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# ADVERTISING BY LAWYERS: SOME PROS AND CONS

MORLEY WALKER\*

In August 1978 the American Bar Association<sup>1</sup> approved amendments to the Code of Professional Responsibility that added television to the media in which lawyer advertising is permissible.<sup>2</sup> Even though this was a minor codicil to the will of the ABA published in the 1977 amendments to the Code permitting newspaper, magazine and radio ads,<sup>3</sup> the heat was intense. Still, it may be some time before we see our favorite model urging us to submit to the comforts of a Chapter 11 bankruptcy. James Russell Lowell said it best:

New occasions teach new duties;  
Time makes ancient good uncouth;  
They must upward still, and onward,  
Who would keep abreast of Truth.<sup>4</sup>

No matter of dinner table discussion has so enthralled the legal

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1. Hereinafter referred to as the ABA.

2. On August 9, 1978, the ABA House of Delegates approved the following amendments to Canon 2 of the Code of Professional Responsibility. (Additions are in italics):

EC 2-8

Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, *television or* radio, should be formulated to convey only information that is necessary to make an appropriate selection. . . .

DR 2-101(B)

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over *television or* radio broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner. . . .

DR 2-101(D)

If the advertisement is communicated to the public over *television or* radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

3. ABA CANONS OF PROFESSIONAL ETHICS NO. 2 (Amendments to Canon 2 of the CODE OF PROFESSIONAL RESPONSIBILITY adopted by the ABA House of Delegates, August 10, 1977).

4. J. LOWELL, THE PRESENT CRISIS, Stanza 18 (1844).

profession—and the long-suffering laity—than the appropriate delivery of legal services to the public. The question of lawyer advertising is the tip of that remarkable iceberg. The cutting edge will not be the question of the propriety of advertising. The real issue is whether advertising and other forms of publicity and solicitation will aid in the delivery of services that the public has the right to seek and the profession, as exclusive licensee, has the responsibility to offer. The question has constitutional, economic and professional implications. This article will attempt to deal with each of these in turn and to offer some observations.

### THE CONSTITUTIONAL DIRECTION

The constitutional issue falls into three areas: (1) free speech; (2) the right to counsel; and (3) unreasonable restriction upon commerce.

#### *Free Speech*

Are the right to advertise and the right to be informed through advertising and other forms of publicity constitutionally protected free speech? Are there, as some consumer groups argue, *no* appropriate restrictions? In a series of cases, beginning with *Valentine v. Chrestensen*<sup>5</sup> the ground work was laid that “commercial speech” is not entitled to first amendment protection.<sup>6</sup> The doctrine is limited. For example, in the famous case, *New York Times Co. v. Sullivan*,<sup>7</sup> a city official instituted a civil libel action against four clergymen and the *New York Times*, based upon a *Times* advertisement criticizing police action against civil rights activists.<sup>8</sup> The United States Supreme Court held that even though the *Times* had been paid for the advertisement, the publication was entitled to the same measure of constitutional protection as ordinary speech.<sup>9</sup> In contrast, where an advertisement violated some valid limitation on economic activity—*e.g.*, an ordinance forbidding newspapers to carry help-wanted advertisements in sex-designated columns—first amendment protection could not be justified.<sup>10</sup>

5. 316 U.S. 52 (1942).

6. The first amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

7. 376 U.S. 254 (1964).

8. The advertisement also solicited contributions for such causes as the legal defense of Martin Luther King, Jr. 376 U.S. at 257.

9. *Id.* at 266.

10. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

## Advertising as Free Speech

With the growth of consumer interest, advertising, though admittedly commercial speech, has been awarded increasing protection. In *Bigelow v. Virginia*<sup>11</sup> a Virginia statute prohibited the advertising of abortion services, then illegal in Virginia. A newspaper editor was convicted under the statute for publishing an advertisement regarding the availability of legal abortions in New York.<sup>12</sup> The Supreme Court found that such an absolute ban on commercial advertising was contrary to the first amendment.<sup>13</sup> Here, the Court reasoned, the advertisement “‘contained factual material of clear public interest.’”<sup>14</sup> It did not merely “propose a commercial transaction.”<sup>15</sup>

Notwithstanding the *Bigelow* decision, the public has a legitimate stake in the regulation of advertising, as exemplified by the activities of the Federal Trade Commission and the Federal Communications Commission. Hence, reasonable regulation grounded in the public interest and affecting time, place, and manner of advertisements will be upheld. Broad prohibitions will usually be overturned by applying the familiar balancing test between public interest and individual liberty. Thus, if the bar were to permit advertising generally, legislatively credentialed bar associations could still control the advertising done by lawyers.

## Advertising as Solicitation

In *Belli v. State Bar of California*<sup>16</sup> the Supreme Court of California examined the distribution of brochures advertising Belli's lectures. The California State Bar contended that these brochures were used to obtain clients for Belli's law practice rather than audiences for the seminars.<sup>17</sup> The court found that if a lawyer's activity is constitutionally protected, the lawyer can ethically advertise and promote the protected activity, provided the advertising is not principally directed to generating business for the lawyer's practice.<sup>18</sup> This holding is apparently applicable only with respect to advertising for constitutionally protected activities and is not applicable to a lawyer's endorsement of purely commercial products. Thus, an advertisement which cited Belli as “the

11. 421 U.S. 809 (1975).

12. *Id.* at 812.

13. *Id.* at 825.

14. *Id.* at 822.

15. *Id.*

16. 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527 (1974).

17. *Id.* at 827-30, 519 P.2d at 577-80, 112 Cal. Rptr. at 529-32.

18. *Id.* at 833, 519 P.2d at 581, 112 Cal. Rptr. at 533.

famous trial lawyer who first employed 'modern demonstrative evidence' in the courtroom" and as being "onto unabridged Scotch" was not worthy of constitutional protection.<sup>19</sup> If the activity is not protected, the advertising can be grounds for discipline if the lawyer exhibits "wilfulness, either a desire to solicit business or a substantial certainty that the ad would generate business. . . ."<sup>20</sup>

In the political arena, it would seem that if a lawyer is involved in protected activity, the lawyer's conduct is protected. Under such circumstances, it cannot be grounds for disciplinary action unless the motive to promote practice is the principal one. In contrast, advertising, though not principally aimed toward expanding the lawyer's practice, can be construed as misconduct if it includes language designed to expand the practice.

### Limitations on Advertising by Professions

The right to limit advertising flows naturally from the power of the state to regulate individual professional conduct in the public interest. The United States Supreme Court, in *Semler v. Oregon State Board of Dental Examiners*,<sup>21</sup> examined an Oregon statute prohibiting dentists from advertising their professional superiority and prices, from using large displays, glaring light signs, advertising solicitors and publicity agents, and from advertising "free dental work," "guaranteed work," and "painless operations."<sup>22</sup> The Court found this to be a reasonable exercise of the state's power. Speaking for the Court, Justice Hughes stated that "[t]he community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."<sup>23</sup>

The idea that advertising is appropriate for the commercial world but not for the professional world often has been applied to lawyers. In *Barton v. State Bar of California*<sup>24</sup> an attorney published an advertisement in a daily newspaper, in violation of the State Bar rule against soliciting.<sup>25</sup>

The profession of law, said the California Supreme Court, should not be seen as a business, and the public should not get the idea that

19. *Id.* at 839-40, 519 P.2d at 585-87, 112 Cal. Rptr. at 537-39.

20. *Id.* at 840, 519 P.2d at 587, 112 Cal. Rptr. at 539.

21. 294 U.S. 608 (1935).

22. 1933 Or. Laws, p. 210, § 2 (current version at OR. REV. STAT. § 679.140 (1977)).

23. 294 U.S. at 612.

24. 209 Cal. 677, 289 P. 818 (1930).

25. *Id.* at 678, 289 P. at 818.

members of the profession think it is. It can be readily understood, the court opined, how unfavorably the public would react toward the profession if a large page advertisement appeared extolling the learning ability and capacity of the attorney to "get results."<sup>26</sup>

The advertising of prices for professional services has been a particular target of state regulation, to be balanced against the public need to know. Cases concerning the dispensing of eyeglasses provide a useful insight. In 1963, a New Mexico statute prohibiting advertising the sale of eyeglasses was upheld against the owners of a newspaper.<sup>27</sup> The New Mexico paper carried the advertisement of a Texas optometrist. In upholding the statute, the United States Supreme Court recognized the state interest in professional regulation in an area subject to interstate commerce.<sup>28</sup> In another case, a possibly less myopic three-judge federal court enjoined enforcement of a California statutory ban on advertising the price of eyeglasses and optometrical services. In so holding the court acknowledged the consumer plaintiffs' first amendment rights to receive such information.<sup>29</sup>

There has also been a fair dosage of cases on the advertising of prescription drug prices. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>30</sup> a Virginia statute declared it "unprofessional"<sup>31</sup> for a licensed pharmacist to publish or advertise the price of prescription drugs. Violation of the statute subjected the pharmacist to loss of license. Acknowledging that regulation of pharmacies was within the power of the state, the United States Supreme Court held that this did not include the right to interfere with the consumers' right to know the price of drugs.<sup>32</sup> Consumers who because of age, disability, illness or poverty could only afford the lowest price of drugs needed this information which was not otherwise available.

Such advertising serves as a tool to educate rather than deceive. In *Terry v. California State Board of Pharmacy*<sup>33</sup> a consumer challenged a California statute that prevented pharmacists from advertising prescription drug prices. The District Court for the Northern District of California held that while the state "has legitimate interests in controlling artificial demand for prescription drugs, preventing misleading ad-

26. *Id.* at 683, 289 P. at 820.

27. *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 (1963).

28. *Id.* at 428-29.

29. *Terminal-Hudson Elecs., Inc. v. Department of Consumer Affairs*, 407 F. Supp. 1075 (C.D. Cal. 1976).

30. 425 U.S. 748 (1976).

31. *Id.* at 752.

32. *Id.* at 763-64.

33. 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd*, 426 U.S. 913 (1976).

vertising, maintaining professional standards, and preventing forgery of prescriptions," the statute "only minimally [advanced] the interests asserted, and in any event [did] not do so by the means least restrictive of the plaintiffs' burdened First Amendment freedoms."<sup>34</sup> Here, said the court, there was no touting of the product to create a commercial transaction that would not otherwise occur, since prescription drugs can be purchased only when prescribed.<sup>35</sup>

### Lawyer Advertising and the "Right to Know"

In *Consumers Union v. American Bar Association*,<sup>36</sup> Consumers Union sought to establish "the right to know" about legal services. This right, the complaint alleged, was inhibited by the ABA rule which allowed a lawyer to list certain minimal information only in a list certified by the ABA.<sup>37</sup> Consumers Union sought to publish a directory of lawyers in Arlington County, Virginia, using a questionnaire to elicit information concerning each lawyer's office, education, legal activities, affiliations, area of concentration, fees and billing procedures, and client relations. They asked the ABA whether the proposed directory would be approved. The ABA indicated that certification required the payment of a \$750 fee, which could not be waived, even though Consumers Union was a non-profit organization and the directory was to be sold at cost. An Arlington County lawyer was informed by the State Bar Legal Ethics Committee that responding to the questionnaire and being listed in the directory would indeed violate the disciplinary rule.<sup>38</sup>

Consumers Union claimed that the rule violated their constitutional rights to gather, publish, and receive important factual information necessary to enable them to obtain the most effective and satisfactory legal representation. Agreeing with Consumers Union, a three-judge panel of the District Court for the Eastern District of Virginia found that the rule was "overly broad" and unconstitutionally restrictive of the plaintiffs' rights "to receive and gather consumer information."<sup>39</sup> As stated in *Griswold v. Connecticut*,<sup>40</sup> "the right of freedom of speech and press includes not only the right to utter or to print,

34. 395 F. Supp. at 106.

35. *Id.* at 102.

36. 427 F. Supp. 506 (E.D. Va. 1976). (The ABA was, however, dismissed from the suit, leaving the Supreme Court of Virginia and the Virginia State Bar as defendants. *Id.* at 509, 523.)

37. *Id.* at 510.

38. 427 F. Supp. at 511.

39. *Id.* at 523.

40. 381 U.S. 479 (1965).

but the right to distribute, the right to receive, the right to read."<sup>41</sup>

If none of the preceding cases rattled the foundations of the noble profession, *Bates v. Arizona*<sup>42</sup> was a major tremor. John Bates and Van O'Steen opened a "legal clinic" in Phoenix, Arizona, providing routine legal services at modest fees to persons of moderate income. After two years of less than moderate income, they began advertising their services in the *Arizona Republic*, listing prices for uncontested divorce, adoption, nonbusiness bankruptcy and change of name.<sup>43</sup> This violated the Arizona Supreme Court's Disciplinary Rule against lawyer advertising.<sup>44</sup> The United States Supreme Court followed the beacon shone by its previous cases and added a few candlepower:

- (1) commercial speech is entitled to first amendment protection, if not false or misleading;<sup>45</sup>
- (2) advertising legal services is not inherently misleading<sup>46</sup> (nor was the Bates ad itself misleading);<sup>47</sup> and
- (3) consumers are entitled to this information.<sup>48</sup>

Despite *Consumers* and *Bates*, the constitutional free speech protections seemingly would not automatically invalidate reasonable restrictions on legal advertising. However, such restrictions must be based on some public interest and run the gauntlet of constitutional specificity. Providing reasonable alternatives, each having a less chilling effect on free speech, would be helpful.

### *Right to Counsel*

At present, the United States Supreme Court recognizes no express right to legal representation in civil cases. Both federal and state courts regularly appoint counsel to represent indigent criminal litigants. Although no right to legal services in other than criminal prosecutions<sup>49</sup> flows from constitutional sources, certain organizations have raised this

41. *Id.* at 482.

42. 433 U.S. 350 (1977).

43. *Id.* at 354.

44. ARIZ. SUP. CT. R. 29(a), D.R. 2-101(B).

45. 433 U.S. at 363. See also *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

46. 433 U.S. at 372.

47. *Id.* at 381-82.

48. *Id.* at 364, 374.

49. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

issue in their efforts to provide legal services for their members. For many years, organizations offering services of an attorney to their members have been met with the prohibition against the unauthorized practice of law. An automobile club,<sup>50</sup> a banking association,<sup>51</sup> a trade association,<sup>52</sup> or an association of taxpayers could not provide legal services for members.<sup>53</sup>

In 1963, the tide turned with *NAACP v. Button*.<sup>54</sup> The NAACP retained attorneys to represent members of minority groups in their grievances concerning racial discrimination, obtained plaintiffs for desegregation actions by holding meetings, and passed out consent forms.<sup>55</sup> The United States Supreme Court overruled Virginia's attempt to forbid the activity as an improper solicitation of legal business.<sup>56</sup> The following year the Court considered *Brotherhood of Railroad Trainmen v. Virginia State Bar*.<sup>57</sup> Here, the Virginia Bar sought to enjoin the union from advising members to obtain legal assistance before settling compensation claims and recommending specific lawyers to handle these claims.<sup>58</sup> The Court held that the workers themselves were not engaged in the practice of law, nor were they or their lawyers soliciting legal business.<sup>59</sup> Similarly, in *United Mine Workers v. Illinois State Bar Association*,<sup>60</sup> an attempt to prevent the union from hiring attorneys on a salaried basis to assist members in asserting their legal rights was held to violate freedom of speech, assembly and petition.<sup>61</sup> Finally, in *United Transportation Union v. State Bar*,<sup>62</sup> the State Bar of Michigan sought to enjoin the union from engaging in group legal activity, where the union recommended to its members that Chicago compensation attorneys be employed at a fixed maximum fee.<sup>63</sup> The Supreme Court found that an injunction would prevent union members from meeting the cost of legal representation and securing meaningful access to the courts. The giving or furnishing of legal advice, said the Court, was itself protected by the first amend-

50. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 8 (1925).

51. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 98 (1933).

52. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 162 (1936).

53. *People ex rel. Courtney v. Association of Real Estate Taxpayers*, 354 Ill. 102, 187 N.E. 2d 823 (1933).

54. 371 U.S. 415 (1963).

55. *Id.* at 420-22.

56. *Id.* at 444.

57. 377 U.S. 1 (1964).

58. *Id.* at 2.

59. *Id.* at 6-7.

60. 389 U.S. 217 (1967).

61. *Id.* at 221-22.

62. 401 U.S. 576 (1971).

63. *Id.* at 577.

ment.<sup>64</sup>

Is the advertising of group legal services also protected? In *Jacksonville Bar Association v. Wilson*<sup>65</sup> an advertisement by a lawyer referral service of the Jacksonville Bar Association was challenged by an individual practitioner, who was not a member of the association.<sup>66</sup> The Florida Supreme Court held that the association was:

an organization of lawyers, which all in a given area may join, working cooperatively to lower the barrier between the legal profession and the public. Certainly the public must be attracted, and must be apprised of the availability of the service. . . . Counselling, or preventive legal advice before trouble commences, will tend to keep people out of the courts, within the letter and spirit of the Canons of Ethics. And alerting the public to the existence of a service, under bar sponsorship, which will provide such preventive advice at a reasonable fee is not unethical, but must redound to the benefit both of the public and of the bar.<sup>67</sup>

It can be argued that most of these cases turn on issues of free speech protection rather than a specific right to counsel. But the right to legal representation and the right to know about possible services through advertising seem inexorably connected. The right to advertise group legal services stands reasonably established. From the consumer's as well as the practitioner's standpoint there appears to be little reason why the same right does not extend fully to the individual lawyer.

### *Unreasonable Restriction upon Commerce*

Attempts by bar associations to provide minimum fee schedules are now universally under attack, as a violation of antitrust laws. The principal case, *Goldfarb v. Virginia State Bar*,<sup>68</sup> involved such a minimum fee schedule. The plaintiffs, after diligent search, were unable to obtain an attorney willing to perform a title examination for less than the minimum fee (one percent of the value of the property) established by the local bar association.<sup>69</sup> The lender financing the purchase required the plaintiffs to furnish a title examination, which could be performed only by a member of the Virginia Bar.<sup>70</sup>

64. *Id.* at 582.

65. 102 So.2d 292 (Fla. 1958).

66. *Id.*

67. *Id.* at 295.

68. 421 U.S. 773 (1975).

69. *Id.* at 776. (Plaintiffs wrote to 36 Fairfax County attorneys, asking what they would charge for a title search. None of the 19 attorneys who responded indicated that they would charge less than the minimum fee set by the local bar association. *Id.*)

70. VIRGINIA STATE BAR COMM. ON LEGAL ETHICS, OPINIONS, No. 239 (1965).

Speaking through Chief Justice Burger, the United States Supreme Court found that the schedule and its enforcement mechanisms constituted price fixing, in violation of the Sherman Act,<sup>71</sup> since the fee schedule, rather than being merely advisory, operated as a fixed, rigid price floor.<sup>72</sup> The schedule was enforced through the prospect of disciplinary action by the state bar, by reason of the lawyers' desire to conform to announced professional norms, and by implicit assurance that other lawyers would not compete by underbidding.<sup>73</sup> The State Bar Committee on Legal Ethics had previously stated that although a lawyer had an ethical duty to charge a lower fee in a deserving case, if a lawyer "purely for his own advancement intentionally and regularly bill[ed] less than the customary charge of the bar for similar services, . . . [in order to] increase his business with resulting personal gain, it [would become] a form of solicitation contrary to Canon 27. . . ."<sup>74</sup> Some eleven years later, the Committee amplified its stand, stating that "evidence that an attorney habitually charges less than the suggested minimum fee schedule adopted by his local bar association, raises a presumption that such lawyer is guilty of misconduct."<sup>75</sup>

The Fairfax County Bar Association argued that its activity should be exempt from consideration under the Sherman Act because it involved "a learned profession."<sup>76</sup> The County Bar also argued that competition was inconsistent, since providing service to the community, not enhancing profits, was the goal of professional activities.<sup>77</sup> The Court found this argument thinly veiled. Because Virginia lacked an integrated bar, and the fee schedule was not adopted by its supreme court or legislature, it could not claim that the fee-setting process was "state action" and therefore exempt from the Sherman Act under the doctrine of *Parker v. Brown*.<sup>78</sup> To take advantage of the state action exemption, the activities must have been required and not merely prompted by the state.<sup>79</sup> However, the Court did restate that states have a compelling interest in the practice of the profession and may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."<sup>80</sup>

71. 15 U.S.C. §§ 1-7 (1976).

72. 421 U.S. at 781.

73. *Id.* at 776.

74. *Id.* at 777 n.4.

75. *Id.* at 777-78.

76. *Id.* at 786.

77. *Id.*

78. 317 U.S. 341 (1943).

79. 421 U.S. at 790.

80. *Id.* at 792 (quoting *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 336 (1952)).

Two years after the *Goldfarb* decision, *Bates v. Arizona*<sup>81</sup> presented the Court with state action. In *Bates*, the Court properly held that a state rule prohibiting the commercial advertising of routine legal services and their costs does not violate the Sherman Act under *Parker*.<sup>82</sup> Yet the Court went on to recognize that a ban on advertising increases "the difficulty of discovering the lowest-cost seller of acceptable ability."<sup>83</sup> It would appear then that rules which have the effect of inhibiting price or service competition through advertising which is not false or misleading will meet serious and continued opposition. A ban on commercial advertising perpetuates the market portion of established lawyers. Advertising, though an added cost, may permit rather than prevent the young attorney from competing in the market.

#### ECONOMIC CONSIDERATIONS: THE NATURE OF ADVERTISING

The codfish lays ten thousand eggs,  
 The homely hen lays one.  
 The codfish never cackles  
 To tell you what she's done.  
 And so we scorn the codfish,  
 While the humble hen we prize,  
 Which only goes to show you  
 That it pays to advertise.<sup>84</sup>

For those concerned with the issue of legal advertising, some thought should be given to the nature of advertising itself. In its best image advertising is said to be like a road map, directing travellers to a destination. In fact, advertising has a two-fold objective: it provides product information and persuades people to use the product.

Advertising provides consumers with relevant facts to make choices, between producers of the same service (between two lawyers) or different services (a visit to the doctor or a visit to a lawyer). Advertising will perfect competition but competition already exists. As a spokesperson in the United States Department of Justice has said, "The consumers of legal services are just as entitled to the benefits of competition as are the consumers of other services."<sup>85</sup>

Additionally, it has been demonstrated that advertising can lower

81. 433 U.S. 350 (1977).

82. *Id.* at 363.

83. *Id.* at 377. See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

84. Anonymous, "It Pays To Advertise," in BARTLETT'S FAMILIAR QUOTATIONS 1101 (14th ed. 1968).

85. Los Angeles Times, Aug. 22, 1974 at 9 (quoting Joseph Sims, Special Ass't, Antitrust Div., U.S. Dep't of Justice).

prices to the consumers. A study of the effect of advertising on the price of eyeglasses revealed that in states where there was no ban on advertising, the eyeglasses cost \$17.98, whereas where there was a complete ban on advertising, the eyeglasses cost \$37.48.<sup>86</sup>

Lawyer referral services, group legal plans and prepaid legal insurance programs are already advertising, in competition with individual practitioners and firms. Their advertisements are primarily of the informational type. If persuasion is involved, it speaks to the appropriateness of seeking legal advice rather than the use of the particular service offered. If it is proper for them, is it less proper for the individual lawyer or firm? The word "solicitation" has acquired a reputation equivalent only to the Victorian notion of sex. As the inimitable Samuel Johnson said, "It is wrong to stir up law suits; but once it is certain that a law suit is to go on, there is nothing wrong in a lawyer's endeavoring that he shall have the benefit, rather than another . . . I would have him inject a little hint now and then to prevent his being overlooked."<sup>87</sup>

We all solicit. The boy or girl at a college dance hopes to meet a likeable friend for mutual benefit. Lawyers are no different. They initially try to graduate from the name schools of law, to be on the law review, to clerk for a learned justice. Once in practice, whether individually or with a firm, they join in community activities that afford them some prominence. The motive as well as the result cannot help but be two-fold. It is hypocritical to say otherwise for most attorneys. Attorneys want to serve but we also want to be available to be retained—if qualified.

Most disconcerting to the notion that lawyers should not solicit business is that business entertainment is a deductible fact of a taxpayer's life—for lawyers as for anyone else. This is amusingly revealed in the amazing voyage of the *Chee Chee V*, a worthy ship whose owner testified:

[C]ertainly there has been more entertainment done on sailboats in recent years. That's what the glamor part is. I submit it may be a sneaky way to practice law. I do think utilizing a little glamor, giving somebody what they think they want—it may be your tie or the curl of your hair—I don't know how one selects a lawyer, but I have been fortunate. I have had a few cases on the books that involve millions of dollars coming directly from [the boating] field. . . . I have used the boat primarily for entertainment and promotion with the idea of

86. Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 342 (1972).

87. J. BOSWELL, *LIFE OF JOHNSON*: 1776 at 581 (Mod. Lib. ed.).

creating clients and obtaining legal retainers.<sup>88</sup>

Fortunately, the taxpayer was not allowed to exempt himself from the general rule that entertainment expenditures must relate to specific business and not the seeking of future business by asserting that the Code of Professional Responsibility prevented him from advertising!<sup>89</sup> Nevertheless, the comments speak for themselves. Would not some regulated form of advertising be fair treatment for those who cannot afford or would prefer not to resort to the hypocrisy of the *Chee Chee V?*

#### ADVERTISING AND THE DELIVERY OF LEGAL SERVICES

Novel and noble steps have been taken to improve the delivery of legal services to consumers. We have only to look at the vast array: public defenders, legal aid, group legal service plans, prepaid group legal insurance, lawyer referral plans. The results of a 1973-74 survey demonstrate, however, that there is still much to be done in improving the public image of the profession. The data released by the ABA Special Committee to Survey Legal Needs is amazing. This first comprehensive market research ever done on the incidence of personal legal problems and the use of lawyers indicated:

- (1) To find a lawyer, forty-six percent of the people surveyed said they would have consulted friends, relatives or neighbors, and fifteen percent would have used the telephone book. Forty-five percent met lawyers through organizations to which they belonged.
- (2) More than one third of American adults have never consulted a lawyer and slightly more than a quarter have consulted a lawyer only once. One in five said they had considered consulting a lawyer but had not done so—for many reasons, including lack of information.
- (3) More than one third believed a lawyer would charge between \$21-34 for one-half hour of consultation. In contrast, eighty-five typical lawyer referral services reported fees under \$20, with the average fee being \$10.<sup>90</sup>

The survey perhaps indicates that the public generally may not recognize when they have a “legal problem,” do not have sufficient methods to seek out qualified legal assistance, and are unaware of (and concerned about) the cost of legal services.

Despite these results, arguments against lawyer advertising continue to abound. Some of these arguments and possible responses are:

- (1) *Advertising by lawyers will favor established or financially suc-*

88. *Handelman v. Commissioner*, 509 F.2d 1067, 1073 n.7, 1074 n.9 (2d Cir. 1975).

89. *Id.* at 1074 n.11.

90. *See generally* B. CURRAN and F. SPALDING, *THE LEGAL NEEDS OF THE PUBLIC* (1974).

*cessful attorneys who can afford advertising and raise significant barriers to entry of those who cannot.* It is true that the large established firms will have greater discretionary income to pay for advertising. However, most of these firms deal with established corporate clients where advertising will probably not be the means of retaining present clients or securing additional ones. It is also true that advertising may eliminate those with a marginal practice, but so might any improvement in the delivery of services, such as the use of word processing equipment or paralegals.

(2) *The cost of advertising will be passed on to consumers.* While the cost of legal services may increase because of advertising, it is equally possible that increased knowledge of legal services, particularly about fees, will reduce the cost of some legal services to an extent greater than the advertising expense. Also, lawyers who choose not to advertise would be free to provide a lower fee to clients, just as are lawyers who do not accept credit cards. All the costs of legal practice such as rent, malpractice insurance, participation in unrecompensed legal services, are reflected in an office's fee structure. There is no reason for excepting advertising.

(3) *Advertising of legal fees is inherently misleading.* While deception can occur in fee advertisement, such deception is equally possible in an initial telephone or face-to-face contact with a client and the provider of any service, including legal service. Just as the agreement to observe a minimum fee schedule is a violation of the antitrust laws, so a blanket agreement not to advertise prices may run aground on the shoals of *Goldfarb*. There is no incentive in the long run for an advertiser to mislead in advertising fees, since such conduct may be the subject of complaints and possible discipline. It is better that the client have some indication of a range of fees offered by other lawyers to use as a background to the discussion with a lawyer in that first meeting.

(4) *Advertising of prices cannot assist in the selection of a qualified lawyer.* Since the layman in search of a lawyer has extremely limited data at best, price information would provide one criterion on which prospective clients can compare lawyers in various service specialties. For years schedules of operating costs and office visit fees have been a part of group medical and hospital plans. Group legal services and lawyer referral services are already quoting fees or ranges of fees and advertising such fees in approved communications.

(5) *Advertising by lawyers would diminish the stature of the profession.* It is doubtful that advertising can damage the dignity of the legal profession post-Watergate. While there would be abuses, there are already abuses by some lawyers who have been and will continue to be subject to disciplinary action by the Bar. Giving the public a better understanding of legal services will diminish fear and suspicion.

(6) *Advertising will result in stirring up improper suits.* In contrast, greater publicity, by remedying the information gap, would reduce the necessity of going to the law in later situations. The annual legal check-up offered by some bar associations and a few group plans can provide the same preventive service that periodic physical check-ups do in the health field.

In sum, it appears that the great advertising controversy is ruttled in two paths: All advertising should be prohibited, except as expressly authorized; or all advertising should be permitted, subject to laws respecting deceptive advertising—if the laws are violated, then sanctions should be imposed. The first of these paths does not seem to be fulfilling the public's present right to and need for better access to legal services and lawyers' right and duty to provide them. It is argued that the second path would permit irreparable damage that could not be sufficiently mitigated by subsequent legal action.

It has been suggested that the advertising of legal services through the Yellow Pages and law lists is a sufficient step in providing increased information. The problems with this are that law lists are seldom available to the public, and Yellow Pages simply do not permit price advertising at the present time, even to the extent approved by the ABA.

#### WHAT'S THE PRESENT TREND—AND WHY?

A March 1978 poll by the ABA, based on 599 telephone interviews, revealed that only three percent of the nation's lawyers have advertised. Eighty-nine percent said they will not or probably will not advertise. Only a handful in Los Angeles, San Francisco, Cleveland, and Sacramento have taken to advertising on television.<sup>91</sup>

The publicity given the Los Angeles Legal Clinic of Jacoby & Meyers in the November 20, 1972 *Newsweek* article<sup>92</sup> initially led to disciplinary investigation. Almost five years later, in August 1977,

91. *Is Advertising Laying an Egg? Lawyers May Be More Interested in Solicitation*, 64 A.B.A.J. 673 (1978).

92. *NEWSWEEK*, Nov. 20, 1972, at 92.

there were four Jacoby & Meyers clinics, when the firm went on the air with a thirty-second message. Now there are seventeen clinics. The firm believes that advertising is essential to an operation which specializes in providing a handful of legal services to middle income clients—to generate the necessary volume of small cases.

Many lawyers are not happy with their own experimentation, despite the perceived need to inform people that legal services are available at reasonable prices, and that professional services should be advertised as a reasonable alternative to the non-attorney bankruptcy and divorce ads that appear daily in metropolitan newspapers. The cost of advertising did not support the new business generated.

In Chicago, some lawyers have taken space on the benches at bus stops. A Waukegan firm now has a “dignified” sign in electric lights. A few lawyers have regular announcements on a Chicago FM station. In contrast, the Illinois State Bar Association counsels greater use of institutional advertising and lawyer referral services.

Some of the questions still to be answered were noted by the ABA at its August meeting:

- (1) Should a distinction be drawn between direct mail advertising and advertising in other print media?
- (2) Can a distinction be drawn between advertising and solicitation?
- (3) Is the reason that some advertisers have found newspaper advertising comparatively ineffective due in large or small part to where the advertisements are run in the newspaper? Is a limitation on lawyer advertisements to the classified section of the newspaper in the best interest of either the lawyer or the public?
- (4) Are representations of specialties or areas of concentration in advertisements by lawyers actually quality representations?
- (5) What is the long term prognosis for the continued existence and viability of the sole practitioner or small firm when advertising and office economics of scale become more prevalent?
- (6) Is institutional advertisement a workable alternative to the cost and difficulty of individual advertising?

#### SUMMARY

Experimentation both by individuals and organized bar should be encouraged. Advertising by individual attorneys can be misleading, and such advertising does not serve the public interest. But the solution is not to prohibit individual advertisements because they may be competitive. Indeed, individual practice itself is competitive. Competitive advertising can be factual, in good taste, and need not be misleading (*i.e.*, hopefully *not* carefully tailored advertisements—“suits finely

pressed"). It may have the effect of driving the cost of legal services down, to the point where more Americans can be effective consumers, due to greater knowledge and lower prices. And, of course, there may be fewer attorneys in the "business." There are not many Danbury hatters around these days, either.<sup>93</sup>

93. *See* *Loewe v. Lawlor*, 208 U.S. 274 (1908).



# CHICAGO-KENT LAW REVIEW

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