North Dakota Law Review

Volume 55 | Number 4 Article 2

1979

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ADVERTISING, MARKET POWER AND THE PUBLIC INTEREST: THE LAWYERS' CASE

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High on the list of controversial economic topics stands advertising, especially the kind of advertising undertaken by professionals such as dentists, doctors and lawyers. The critics of advertising claim it damages, more often than not, the interest of the consumers, abuses their confidence, and generates abnormal unjustified profits and sometimes vulgarizes common, social taste. For several decades in the past history of the American Association of Lawyers, the guild has categorically rejected advertising by its members on the central criterion of professional ethics. The American Bar Association has banned such activities since 1908. For years, one could find only a handful of defenders of advertisers, and even these spoke humbly and possibly without conviction. It was rather risky to one's reputation of honesty and intelligence to champion the cause of advertising among intellectual circles or in the academic ivory tower. This rather one-sided view of the subject matter constitutes by itself a phenomenon deserving some serious investigation, but it lies presently outside the scope of this paper.

Recently, a fresh and somewhat revolutionary approach has been actively sought by a new generation of young lawyers who are willing to challenge the traditional and well-established view on advertising so endeared by the elder confreres of their legal fraternity. A case in point is *Bates v. State Bar of Arizona*[1] which finally reached the door of the United States Supreme Court on January 18, 1977. The issue was whether lawyers ought to be

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1. 433 U.S. 350 (1977). *See High Court Justices Hear Debate on Lawyers' Ads,* Los Angeles Times, January 19, 1977, at 5, col. 1.

permitted to advertise for their professional services like any other business. Messrs. Bates and O'Sheen operated a legal clinic in Phoenix, Arizona, and in February 1966, they used the local newspaper for listing their fees for a given number of standardized legal services such as uncontested divorces, adoptions, personal bankruptcies, etc. The Arizona State Bar brought disciplinary proceedings against these lawyers, and the Arizona State Supreme Court upheld the Bar's action, thus rejecting the defendants' claim that such a ban on their advertising constituted a violation of the Sherman Anti-Trust Act and also the First Amendment guarantee of free speech. On June 27, 1977, in an unprecedented case, the United States Supreme Court decided, five to four, in favor of Messrs. Bates and O'Sheen. Apparently, the majority of the Court did not subscribe to the theory that advertising by lawyers necessarily "cheapened" the legal profession. The decision of the Court generated considerable consternation among the "old guard" of the legal fraternity. These puritans of the ABA agonize over the risk that a mass of advertising will ensue and get out of hand, culminating in a distasteful environment where "cut-throat" competition among lawyers will prevail. This would not fit well with the self-image of the profession. The "middle-of-the-road" members of the Bar would not criticize advertising *per se,* but continue to object to it basically on the ground that such activities will not create any innovation which could be construed as greatly beneficial to consumers. On the contrary, these members believe that advertising activities will only deceive the public in the long run. On the other side of the spectrum, a third group emerges: they are the "activist lawyers" of the new generation wishing still more freedom. They would reject only those advertisings that are downright false, fraudulent, misleading or deceptive and would like to be given almost a free rein to advertise.

What seems most lacking in the debate on advertising by professionals is an attempt to understand the functions of advertising itself, its uses and its impact on consumers and society at large. Indeed, some aspects of advertising by the legal profession pose problems of considerable intellectual challenge whose study will aid protagonists on all sides of the debate on this subject. In this essay, two basic issues will be examined: (1) the economic aspect of advertising by lawyers as it relates to the market, the American consumers and the legal industry; (2) the ethical aspect of advertising, focusing on the observance of the code of professional ethics, the interest of the users of legal services and the society's welfare at large. Thus, the present paper includes four parts. The

first presents an analysis of the nature and functions of advertising; the second discusses advertising by lawyers, the interest of the general public and the lawyers' code of ethics; the third presents some empirical evidence on the impact of advertising by professionals. Finally, the fourth part is devoted to the presentation of a brief summary and evaluation of the findings discussed in the preceding sections.

I. NATURE AND FUNCTIONS OF ADVERTISING BY PROFESSIONALS

It appears to the author to be inherent in the nature of the advertising business that advertising people should be troubled more than most participants in the economic process of our society about the justification for their activities. For in the evaluation of the role of advertising, our society's two conflicting standards of professional success and integrity meet in a head-on collision; no one is more conscious of this than the lawyer involved in advertising himself. What is then the proper nature and basic function of advertising? The arguments have revolved around three major questions: (a) information vs. persuasion and control; (b) efficiency vs. waste and unemployment; (c) competition vs. concentration or monopoly.

Those in favor of advertising argue that it educates and informs the buyer, the public at large, about the firm, the service, the price. Thereby, advertising tends to make the market for legal services, for instance, more perfect than it would otherwise be. Well managed and properly used advertising by lawyers could provide the information which assists consumers of legal services in making rational choices. In a dynamic and complex society as ours, there is an acute need for the consumer to be closely acquainted with new firms, new services, and various improvements in the existing legal services. Advertising then serves as a medium which disperses such useful and needed information to the public. The role of advertising is essentially to provide information to the consumers. That the latter respond to advertising can be explained by a simple model in which advertising is basically informative. Quality variations among legal services of different lawyers would exist even in the absence of advertising; the problem facing the consumer is to find and choose the types of services offering the most quality per dollar of expenditure according to

one's own preference and needs. The public will respond to legal advertising only if it enables them to select higher quality service per dollar expenditure at lower costs as compared to any random sampling or the use of alternative information sources in purchasing legal services. Therefore, the central question here is not whether advertising by professionals such as the lawyer provides useful and needed information to the consumers. Instead, we have to ask ourselves what are the probabilities that legal advertising will lead to: (a) false and misleading information and (b) persuasive rather than proper and adequate information for the public consumption.

Critics of advertising point out that, in general, the basic objective of advertising is to persuade, not to inform. Competition will pressure lawyers to resort to advertising based upon misleading and extravagant claims which confuse and frequently insult the intelligence of the average consumer, not enlighten him. Little of real value in the rendering of rational choices can be garnered from advertising which crowds our television screens and adds bulk to our magazines. Indeed, advertising may well persuade consumers in some cases to pay high prices for much acclaimed, but inferior, services, foregoing better but unadvertised legal services selling at lower prices. One of the commonly expressed reasons for prohibiting advertising by the legal profession is based on fear of deception and fraud on the part of "quack" lawyers. It is alleged that advertising messages could frequently be deceptive and even fraudulent in some occasions. The question which arises is: Does it really pay for a lawyer to engage in deceptive advertising? The answer is provided by an elegant theoretical analysis of the economic value of advertising by Phillip Nelson.[2] He suggests that all goods and services can be classified as either "search" goods (and services) or "experience" goods (and services).

For search goods, the qualities of the product are determined by inspection before purchase. Clothes, furniture and fruits provide examples of this type of product. For experience goods, the product qualities are determined only by experience after purchase. These are the goods that buyers must actually use before they can tell whether these products live up to their expectations. Cars, television sets, power tools and legal services fall into this second category. The distinction between "search" and "experience" qualities is fundamental to an understanding of the informative role

2. Nelson, *The Economic Value of Advertising,* in ADVERTISING AND SOCIETY, 79 (Y. Brozen, ed., 1974).

of advertising. "Search" goods advertising contains direct information about product qualities that enable consumers to rank alternative brands of a given product, while "experience" goods advertising contains no such direct information. Advertising content of "experience" goods is just indirect information — namely, the fact that the brand is advertised. It merely tells the consumers which brands of legal services, for instance, are likely to provide more utility per dollar spent. Consequently, an important implication could be drawn from this analysis: "experience" goods will be likely to be advertised more heavily than "search" goods. Since legal advertising is an "experience" type, it may easily be subject to abuses in the sense that the users may send improper advertising messages. This fear of misleading advertising is grossly exaggerated because of the relative consumer power in the service market. It is true that the consumers' power over advertising is much less for "experience" goods than for "search" goods because false advertising of "experience" goods cannot be detected prior to purchase. The major control consumers can exert in relation to legal advertising is via the repeat-purchase decision. It is often very difficult, if not impossible, for a lawyer to fool enough people to generate enough one-time-only purchases to make an advertising campaign pay for itself. Legal advertising campaigns involve costly dollar expenditures. Therefore, in order to be profitable, advertising must generate enough additional sales of legal services over a prolonged period of time. Shoddy, fraudulent, one-time service would not fit the long-term goal of any ambitious, decent practicing lawyer in this case. It pays to advertise a "winner." Only a "winner" — a lawyer that lives up to the customers' expectations enough to generate "repeat purchases" — can sell well enough his or her legal services to make advertising pay for itself. Indeed, the main message communicated to the public by repeated advertising of the established legal firms is that the advertised services are "winners."[3] It is rather unfair to condemn a lawyer on the basis of the sheer size of the budget devoted for advertising his or her legal services. As a matter of fact, within the general context of marketing, one could expect that heavily-advertised brands of any kind of product or service, usually are better buys. This belief derives from the following observations:

1. More efficient firms (or lawyers) with lower costs will find that it pays to expand sales by advertising, as well as offering lower prices, higher quality, or both. Such behavior by efficient firms (or

3. Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON., 311 (1970).

lawyers) can produce a positive association between advertising and the quality per dollar spent on the given brand (or legal service).

2. Advertising is an increasing function of the market size, generally. Thus, consumers' utility evaluation of brands (or a given service from specific lawyers or firms) differ. The brands (or legal firms) that possess qualities which appeal to the most people will have a larger market for their advertising than brands with qualities which appeal to fewer people. Popular brands, therefore, have the greatest incentive to advertise — and, in turn, the average consumer has an incentive to purchase heavily advertised brands (or legal services).

Producers of high quality brands (or legal services) have greater incentives to advertise because, for these brands (or services), advertising will produce a greater increase in repeat purchases relative to original, initial purchases than for low-quality brands (or services). This occurs, in part, because the public is more likely to remember brands or services with names made familiar by advertising. Also, it happens because of these brands (or services) the consumer remembers, he or she is more likely to again purchase those with high quality.

Having determined that deceptive advertising will not economically benefit a lawyer, the second question can be addressed: Does advertising by lawyers merely persuade customers rather than inform them, thereby creating wants that result in a distortion of "natural" preference patterns? Those who oppose advertising in general contend that the "ideal model" of a market does not exist. In the idealized model of an efficiently acting competitive market mechanism, consumers are supposed to be well informed. They recognize low quality and avoid it; they never buy drugs that turn out to be ineffective or poisonous. Most important, the desires of the consumers are supposed to represent genuine "wants" and "needs." But in actual life, as Harvard professor John Kenneth Galbraith never tires of pointing out, firms spend much money on advertising to "shape"— and some insist — to "distort" consumer demands. From childhood on, the public is conditioned via advertising to desire what business firms want to sell. The natural sequence, "consumer demand — corporate price and production" is often inverted artificially to become "corporate advertising — consumer demand — high price and profit." Some observers suggest that the power of advertising is so great that it deprives consumers of their discretion in the market place, and

makes it possible for suppliers of services, such as lawyers, to "manage" demand. One of the more articulate of these observers, John Kenneth Galbraith, notes that the sellers of services or goods "engage in the management of those who buy goods"[4] and services through the utilization of a vast network of communications, and a great array of selling organizations. The Galbraithian argument contends that advertising shapes the demand of the public for a given product or service. Wants created by advertising should be accorded low priority by society. "If the individual's wants are urgent, they must be original with himself."[5] But this ignores the fact that virtually all our wants are learned, including those desires for high quality public services that are acquired from too much reading of Galbraith's books. One could not, for instance, unjustly criticize a lawyer who has become financially successful via increased workload with wills and estate planning preparations. Many of the newly-recruited middle aged and modest income customers learn about the prudence and the need of wills or estate planning through his advertising activities. Does advertising by the lawyer alter the customers' preference in this case? First, what is meant by "change in preferences?" One might argue that a customer's preferences to a particular brand of known services or goods is something sacred, that advertising which induces him into purchases of a new and different brand must thereby alter his preferences. While this view ought to be suggested by a quick reading of textbooks on economic theory, it is definitely too narrow. Taste changes of this sort raise few substantial normative issues. People are continually learning and thus, in the narrow textbook sense, changing their preferences. Consequently, it does not help much to judge whether any particular change in behavior stems from a substantial change in preferences or whether any particular change in preferences is a good thing.[6] Without a precise definition of preference changes, it is obviously difficult to examine rigorously the ability of advertising to alter preferences of the buyers. Informally, however, we could reasonably argue that advertising cannot cause important taste changes if it cannot cause major shifts in the pattern of consumer spending. If we accept this test, then the evidence that

4. The view that advertising can broadly influence consumer tastes and demand, both within and across industries, is most clearly associated with the work of John K. Galbraith. *See* J. GALBRAITH, THE NEW INDUSTRIAL STATE 200 (1967); J. GALBRAITH, ECONOMICS, PEACE AND LAUGHTER 64, 73, 75-79 (1971).

5. J. GALBRAITH, THE AFFLUENT SOCIETY 153, 158 (1958).

6. Gintis, *A Radical Analysis of Welfare Economics and Individual Development,* 86 Q. J. ECON. 572 (1972).

advertising is a powerful shaper of tastes must be considered unconvincing. This notion is confirmed by Borden's findings: (a) consumers' wants for products are likely determined by the character of consumers and their existing environment; (b) advertising does not change people's characteristics; it does change the environment only as it has contributed indirectly over a long period in helping a mobile society and a dynamic economy.[7] Furthermore, since advertising is only a small part of the consumers' environment, it would appear unlikely that it could be considered a major influence on tastes and preferences.[8]

Finally, the necessity of advertising has to be evaluated in the context of our modern high-consumption, mass-production and mass-distribution society, what J. K. Galbraith has termed the "affluent society," and what W. W. Rostow has elevated to the "final stage of economic development."[9] Increasing wealth means an increasing capacity to choose between alternatives and an increasing need to make choices. The making of choices, however, requires information about the alternatives between which choice is necessary; and information is an expensive commodity to acquire.

Providing information on which choices between alternative ways of spending money are based is assigned in our society to the seller of goods or services, rather than to the buyer, by a natural economic process of division of labor. The main element of a justification of advertising by lawyers is that in a dynamic and progressive society, the consumer needs to learn how to spend his increasing income and can afford to pay for information. There is a common impression that legal advertising conceals more than it reveals. This is not so if it is practiced ethically. A large number of people are well aware that any advertising whitewash to cover up a lawyer's failings is just as thin and impermanent as the physical stuff. People know from experience that the truth has a way of appearing at the most embarrassing times. Undeniably, there are some "sharp operators" among the members of the legal field just as there are in any other. But most lawyers see the advertising role as contributing to a more open and honest relationship between them and the public at large. One should not expect advertising to make a lawyer appear any more virtuous or competent than he actually is. It is a matter of first doing right, and then telling about it. An advertising policy which sticks to this order of priority can

7. N. BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 843-44 (1964).
8. R. SCHMALENSEE, THE ECONOMICS OF ADVERTISING § 4-5 (1972). *see* W. COMANOR and T. WILSON, ADVERTISING AND MARKET POWER (1974).
9. W. ROSTOW, THE STAGES OF ECONOMIC GROWTH (1971).

hardly fail. In such a case, advertising could not conjure up, in the minds of people, an image of trickery which ethical practitioners of law strongly resent.

A second major issue of debate on the desirability of advertising by lawyers revolves around efficiency versus waste. In a sense, one could declare that advertising by professionals greatly improves the welfare of the public at large. It familiarizes the consumers with a variety of complex legal services and thereby broadens the market for these kinds of professional services; this not only encourages further capital investment and employment, but also large-scale operations resulting in low-cost mass production. This point can be demonstrated by the following theoretical analysis of the possible effects of advertising upon a law firm's output and average cost.

In the short-run, advertising raises a firm's average total cost curve by the advertising cost per unit: SAC1 up to SAC2. Thus, for the given level at Q1, if the advertising cost per unit of service is measured by $\overline{AB}$, total advertising expenditures are equal to the area of the rectangle C1C2AB. The cost of providing each unit of service increases from $\overline{B1Q1}$ to $\overline{AQ1}$ (see Figure 1).

In the long-run, however, the result would be different. Advertising may shift a firm's demand curve to the right and raise its long-run average costs (*e. g.*, from LRAC1 to LRAC2, Figure 2), thereby, influencing its economies of scale. For example, suppose that without advertising, the firm would have produced the output at Q1 for a unit cost of $\overline{BQ1}$ dollars. Then, as a result of advertising, several possibilities may take place:

POSSIBLE EFFECTS OF ADVERTISING UPON A LAW FIRM 'S OUTPUT AND AVERAGE COST IN THE SHORT RUN AND LONG RUN.

Figure 1. Short Run Effect of Advertising:Increase in Cost of Production.

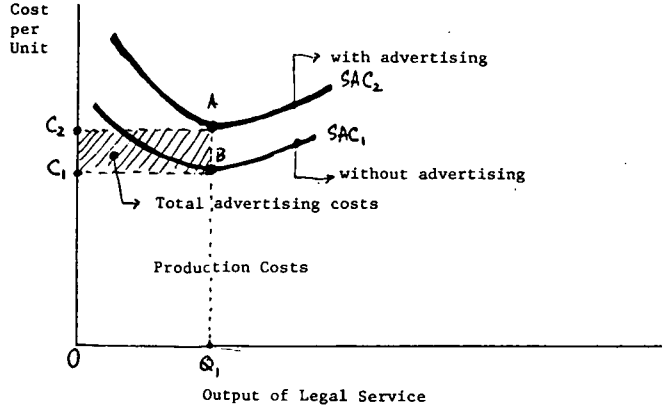
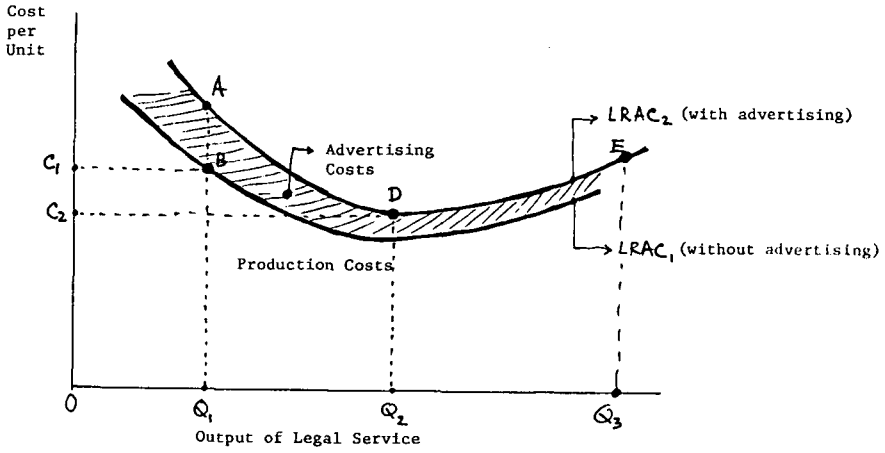


Figure 2. Long Run Effect of Advertising: Economies of Scale.



CASE I. Advertising may give the firm economies of scale, enabling it to produce the larger output at Q2 for the lower unit cost DQ2, even though point D is on a high long-run average cost curve, LRAC2, than point B.

CASE II. Advertising may have a canceling effect, leaving output unchanged at Q1 and simply increasing unit costs from BQ1 to AQ1.

CASE III. Advertising may adversely generate diseconomies of scale, causing the firm to produce the output at Q3 for unit costs of EQ3.

An examination of events in the past few years may tell us which one of these theoretical cases will apply truthfully to the world of reality. At the outset, we can dismiss Case III as unlikely to occur since monopolistic competition results in firms of less than optimum size. Here, monopolistically competitive firms create what economists have often called the "wastes of monopolistic competition" — the existence of "sick" industries characterized by chronic excess capacity resulting from too many sellers of "differentiated" products dividing up the markets, operating inefficiently at output levels below their minimum average costs, and charging higher prices. Examples abound in the retail trades — clothing shops, restaurants, grocery stores. Economic theory and empirical evidence would not list lawyers under this classification.

Critics of advertising view that the effect of advertising as it appears in the real world is likely to be explained by the theoretical Case II above. To them, advertising simply leads to wasteful use of

resources, contributing nothing but a "zero social product" to our economy.[10] Criticism that advertising involves economic waste assumes the following forms:

1. Particularly criticized are emotional appeals, persuasion, and "tug-of-war" advertising where it is claimed that the main impact of advertising is to shift sales among legal firms rather than to increase the total volume sales of professional services supplied by the whole legal industry. Advertising of this sort merely encourages differentiation of the services or goods, and activities among competing lawyers tend to generate a "canceling effect" without creating any additional benefit to the lawyers as a group, or to the consumers at large. Advertising in this sense departs from its basic function of informing the public and seeks to persuade or to deceive the public.[11] Undoubtedly, there is a shifting of demand for legal services among firms due to several factors including advertising. But this is what we should expect in a competitive, dynamic economy. In the shaping, expanding economy of the past quarter of a century and especially in the wake of rising awareness of human rights and quality of life of the recent years, we could hardly expect that total demand for the professional legal counsel has remained unchanged. Also, one may add that even if market shares of legal firms were exactly the same as they were before the introduction of advertising by lawyers, there still would be a major benefit to consumers despite the alleged "shuffling of existing total demand" for legal services, in the sense that consumers would use the particular services of some given lawyers with qualities and characteristics satisfying their current and proper needs or tastes. Thus, the extent of "waste" involved — if there really is any — appears to depend upon whether our economy is operating at its full-employment capacity. The point to be emphasized is that resources devoted to advertising can be considered as "wasteful" only if they could be utilized more efficiently elsewhere.

2. Sometimes, it is stated that advertising succeeds in generating an expansion of the demand for legal services. This results in a shift of demand from other services (*e.g.*, insurance, investment counseling, education, medicine, etc.). The producers of these latter services will be forced to advertise in an attempt to recapture their original market share. Such "counter-advertising" adds more costs and prices to our services and goods. But here again, all increases in demand for any particular product or service

10. Kaldor, *The Economic Aspects of Advertising*, 18 REV. ECON. STUD. 1, 6 (1950).
11. R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 102 (1964).

such as legal counsel, do not necessarily represent a diversion from other services or products. Thus, an expanded demand for more legal services by the American public is often accompanied by some corresponding increase in income and in purchasing power flowing from their increased production.

3. Another variation is the claim that advertising by lawyers is wasteful because it creates undesirable wants at the expense of things for which there are greater social needs. If there is any need for lawyers, it is already there. More advertising simply depletes the nation's existing total resources; less money will be available to improve public schools, juvenile delinquency programs, etc.[12] As Stuart Chase claimed in the late 1920's, "advertising creates no new dollars."[13] Relating to the same theme is the concern over the relatively high cost of advertising as a percentage of the firm's total volume of sales. For instance, the British Reith's Report arbitrarily selects 5 per cent as the dividing line between "high" and "reasonable" levels of advertising expenditures.[14] Such cut-off points are meaningless since the proper relative advertising expenditures are a function of the service's characteristics. For instance, it is no accident that advertising costs are relatively high for low-priced goods which are available from many retail outlets and which are subject to frequent repeat-purchases (*e.g.*, cosmetics, drugs, cigarettes, etc.).

Recent experiences throughout the United States contribute very little to the validity of the criticism of advertising as being wasteful, at least within the area of advertising activities undertaken by lawyers. Instead, empirical observations of the new legal trends in these past three years somewhat justify the explanation of advertising effects illustrated by the theoretical analysis in the preceding sections. According to this economic analysis (Case I above), unit cost will nevertheless decline from Q1B to Q2D, despite the fact that advertising outlays shift the average cost curve upward (LRAC1 to LRAC2). Greater productive efficiency resulting from economies of scale (output level OQ1 up to OQ2) more than offsets the increase in unit costs due to the introduction of advertising. Advertising could act as a stimulant to a product or a service development. Successful advertising is frequently based upon the unique and advantageous

12. Federal Reserve of Philadelphia, *Advertising and Charlie Brown,* BUS. REV., June 1962 at 10.
13. S. CHASE, THE TRAGEDY OF WASTE 112 (1978).
14. Commission of Enquiry into Advertising, The Labour Party, REPORT OF A COMMISSION OF ENQUIRY INTO ADVERTISING 42 (1966).

features of a lawyer's services. Hence, any lawyer is obligated to improve his service to provide a reasonable "sales point," such as OQ2 in Figure 2, for competing profitably in the advertising sphere. A case in point is the newly established "storefront legal clinics" which have mushroomed throughout the country in the past two years. Current operators of these legal clinics maintain that advertising is vital to them because they must inform and attract a large number of clients to function efficiently. One of the largest of these clinics, Cawley, Schmidt & Sharrow, establishes its headquarters in Baltimore and spreads its 16 branch offices throughout Maryland, Massachusetts, New York, Virginia and the District of Columbia.[15]

Concomitant to the criticism of advertising as being wasteful is the problem of inefficiency — higher cost of production and higher price of service. A majority of economists are very dubious of the argument that advertising permits firms to expand, to achieve lower unit costs of production, and to offer their services at lower prices to the public. This suspicion carries added weight in light of the great cost of advertising in general. Ultimately, consumers must pay for the cost of all advertising in the prices they pay for their services. It follows that advertisers must charge higher prices, or that prices would be lower without advertising. Such a belief overlooks the lower unit marketing cost that could result from large-scale production. To the extent that advertising builds a mass market, it can safely be assumed that advertising facilitates mass production with its accompanying lower unit costs. But then, even though a firm might conceivably achieve lower unit cost, is there any reason to suppose consumers will invariably receive benefits through proportionate price reductions? The answer depends upon the kind of market structure the lawyers are facing. If advertising were capable of promoting monopoly or oligopoly — a case of market control by a restricted number of lawyers (or firms) which will be discussed shortly — then cost reductions in the supplying process of legal services may contribute only to the enhancement of profit but not to a reduction in the price of service. However, as long as advertising activities by lawyers do provide the American consumers with information more cheaply than alternative sources of information, including random sampling of services provided by different legal firms, consumers would certainly respond to advertising, and lower prices per unit of a given quality will likely occur.

15. *Behind the Spread of Storefront Law,* U.S. NEWS & WORLD REP. 55 (Feb. 13, 1976).

In fact, research has shown that costs of advertising in many cases are not shifted to consumers at all.[16] Advertising costs are rarely passed on to consumers because advertising directs consumers to "brands" with lower prices per unit of quality and increases elasticities of demand for services, leading these brands to charge still lower prices per unit quality.

A third major issue of debate on advertising by lawyers centers around competition versus concentration and monopoly. To an economist, a perfect competitor is defined as a firm (*e.g.*, a lawyer) that has no control over the price of the services — in the sense that the firm faces an essentially horizontal demand curve along which it can sell as much or as little output as it likes. Imperfect competition involves some control by each firm over its own price, by virtue of the fact that there are not a very large number of rivals who sell exactly the same product (or service) as it does. Main forms of imperfect competition are: (a) oligopoly — few sellers of similar or differentiated products, and (b) monopoly — many sellers of differentiated products. Monopoly power can mean that consumer choice is restricted, and it can be opposed on the ground that it restricts individual freedom, as well as on the ground that it results in an inefficient output level. The general criticisms of monopoly are rooted in the fundamental notion of resource misallocation resulting from the restriction of output and higher prices.

Critics of advertising contend that it facilitates the concentration of monopoly power because large legal firms (or influential lawyers) can usually afford continuous and heavy advertising, whereas new struggling lawyers or small firms cannot. On the one hand, extensive advertising in "open season" creates financial barriers to entry for new lawyers and thereby intensifies the market power which large, wealthy firms already possess. On the other hand, by creating "brand" loyalties, customers become less responsive to price cutting by competitors, thereby enhancing the monopoly power enjoyed by authoritative, prestigious firms which are advertising their services. This nefarious impact burdens the consumers' load further when advertising increases and the promoters of a product or service have few, if any, unique or precise claims to make. Statistical evidence of a recent study of the marketing of ethical drugs in Great Britain illustrates the possibility of this result. Other studies also indicate that the markets in which advertising is most effective, and hence, most intensively employed

16. Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970); Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974).

by influential firms, are not necessarily those in which the value of providing available information to consumers is greatest.[17] There is some question whether advertising outlays, even in a situation where all legal service markets were competitive, would be allocated among various firms in the efficient fashion. Some observers contend that advertising, once it is supported wholeheartedly by members of the legal profession, will embrace the monopoly power already in ferment among large corporations. Their case is stated as follows: (a) the large legal firm has the power of the large purse, which enables it to spend substantial sums of advertising; (b) advertising thus creates a barrier to new firms entering the industry; (c) the result is high economic concentration; (d) because of their protected position and their alleged "service differentiation," these firms can charge monopolistic prices which often are too high. Moreover, they must recover the costs of their advertising by charging higher prices; (e) higher prices result in excessively large profits for these firms.

The above reasoning follows a rather neat and logical sequence, yet one still could express some doubt about its final conclusion.[18] Even though advertising itself constitutes an additional cost, there is certainly no reason to suppose that cost tends to promote monopoly or concentration. What is not so obvious here is the careful distinction between "production costs" and "selling costs." Some forty years ago, the late Professor Edward H. Chamberlain of Harvard University argued, in his famous book,[19] that there are two kinds of costs which manufacturers, producers, suppliers, or sellers in general incur. First, they must contract fabrication costs, the costs of producing what it is they want to sell. Second, they incur additional expenditures that do not produce the service (or product), or change it, or improve it, but merely get it sold. Advertising, of course, is the most obvious example which Chamberlain cited. The fallacy in the distinction between production costs and selling costs is fairly easy to notice. Professor Ludwig von Mises gives the illustration of eating in a restaurant. A man has a choice of two

17. W. Reekie, *Some Problems Associated with the Marketing of Ethical Pharmaceutical Products,* 9 J. INDUS. ECON. 47 (1970).

18. Professor Jules Backman expresses doubt about advertising and monopoly power on the basis of his research. *See* J. BACKMAN, ADVERTISING AND COMPETITION 4-5 (1967). Professor Kaldor confirms this thesis stating that no significant relationship exists between advertising intensity and degree of concentration. *See* N. KALDOR & R. SILVERMAN, A STATISTICAL ANALYSIS OF ADVERTISING EXPENDITURES AND THE REVENUE OF THE PRESS 88-89 (1948).

19. E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 214 (6th ed., 1950). A related approach was developed almost simultaneously by the British economist, Joan Robinson. *See* J. ROBINSON, ECONOMICS OF IMPERFECT COMPETITION (1933).

places, A and B, serving identical meals, identical food. But in one restaurant, A, they have not swept the floor for six weeks. How shall we describe the money spent by the other restaurant, B, in sweeping the floor? "Production costs" or "selling costs"? Does sweeping change the food? Certainly not. Surely then, it could be argued that this is strictly a "selling cost" to restaurant B. It is like advertising. The food remains the same; but because we have a worker cleaning out the floor, more customers come to this restaurant than to the other. But this is nonsense. What you buy is a meal, served in certain surroundings. If the surroundings are more desirable, it is a different meal, a different package, so to speak.

Advertising is, therefore, simply one of the many dimensions of marketing a product or a service. When caught in a competitive dilemma, a lawyer can use price or any other feature — quality, design, appearance, etc. — when trying to outwit his competition. This is another kind of competition, sometimes called "non-price competition," sometimes called "quality competition." Competition in this case takes the form not only of producing the identical service which your competitors are producing, but also, in buying the identical resource which your competitors are buying. For instance, each lawyer tries to make his service a little different from that of any other lawyer's. He avoids the price competition of classical "perfect competition." Instead, he introduces brand-quality competition precisely because it is a profitable form of imperfect competition. So, competition sometimes means offering a better service, or perhaps an "inferior" service which is more in line with what the American consumers are, in fact, desirous of purchasing.

If advertising does reduce competition and enhance monopoly power, then there ought to be high levels of advertising in those industries in which leading firms have a large share of total sales of the market. This appears to be true for some situations such as soaps, cigarettes, breakfast cereals, but it is mostly false in others — drugs and cosmetics, for example. The best way to test the proposition is to examine the data closely for all consumer-product industries. Such an examination shows a negligible positive association between advertising intensity and concentration level. In other words, the exceptions to the hypothesis nearly outweigh the conforming cases. If advertising lessens competition and encourages monopoly, then changes in concentration and advertising intensity ought to move in the same direction.

However, data for the 1947-1957 decade, for instance, show, if anything, the opposite relation -- an inverse association between changes in advertising intensity and changes in degree of concentration.

Thus, advertising, on the contrary, could foster competition by exposing the American consumers to competing services of lawyers and, thus, enabling these lawyers to gain market acceptance for their new services more rapidly than they could without advertising. Once it is a common practice among lawyers, advertising can decrease barriers to entry for new, struggling lawyers, and hence, decrease monopoly power of those firms located in large, strategic metropolitan cities by increasing the elasticities of demand of existing firms. The rationale for this conclusion is:

1. With no advertising, consumers might determine the optimum number of brands of service through the sampling process until they find the *best* brand in their sample, and then continue to purchase this particular brand. Old brands would sell to repeat-purchase-customers and to new consumers who are sampling. New brands (*e.g.*, service of lawyers just coming into the market) would have lower sales in the short-run. Advertising can make entry easier for these "new" lawyers via reduction in concentration.

2. Advertising will likely lead to the elimination of brands of services with higher price per unit of quality, and to the reduction of the entry of such service brands. By providing information about a wide variety of substitute services, advertising tends to diminish the monopoly power of well-known and well-established legal firms. In fact, intensive advertising is frequently associated with the introduction of new services designed to compete with existing "brands." Competitive advertising is generally used to attract customers the lawyer does not have — either current non-users of legal services or customers of the competitors. Thus, advertising in this fashion is aimed at destroying loyalty to well-established firms. One could not treat such advertising as a decisive force in building monopoly![20]

II. ADVERTISING, CONSUMER'S INTEREST AND THE LAWYER'S CODE OF PROFESSIONAL ETHICS

We have examined so far the propriety of advertising by professionals such as doctors, lawyers, etc., from the economic

20. Brozen, *New FTC Policy from Obsolete Economic Dotrine*, 3 ANTITRUST L. J. 481 (1973).

standpoint alone. For instance, we have discussed the possible economic effects on the consumer, the market and the economy at large. At this stage, we wish to shift the analysis to the ethical aspect of advertising, in particular the relation of advertising activities to the well-being of the public as purchasers of legal services and to the behavioral ethics of the lawyers as dispensers of those services. Our attention will focus primarily on two basic questions:

1. Does advertising by lawyers really hinder consumers in their search for proper, adequate legal services? In other words, is the ban on advertising by professionals necessary for the protection of the consumer's interest?

2. If it is not, then what is a reasonable alternative explanation for the continuation of the ban on advertising?

The immediate reaction to the proposal that doctors and lawyers be permitted to advertise is at least skepticism and often abhorrence by a majority of professionals in these fields. Their common outcry is that without any restrictions of advertising, the consumers would be unprotected against the hazards of advertising, especially by the unscrupulousness of some legal practitioners and "quacks." Advertising, after all, falls within the scope of a profit-seeking enterprise; it could not constitute the purview of professionals such as lawyers. For the latter, to advertise would demean the entire legal profession. Instead of the lawyers serving the needs of the members in our society, such practitioners would be no different than the common, ravenous, materialistic businessman who only looks out for his selfish interest. The proscription of advertising by lawyers is often written into state laws as Professional Codes of Ethics on the ground that it is not only proper, but also legitimate, for the state to protect the safety, the health and the general welfare of the public within its own boundaries. The foundation for the consumer's protection view is anchored on the following three premises:

1. The consumer does not possess enough knowledge to assess the quality of various legal services.

2. Advertising is unprofessional in the sense that it leads customarily to a general deterioration of the quality of legal services.

3. Advertising, by its own nature, deviates the attention from the inanimate, yet true, object — the nature of the services that the lawyers offer to the public. Often when professionals advertise, they tend to promote themselves, rather than spell out the nature and attributes of their specific services. This self-promotion

suggests in a subtle way that other practitioners are not quite as proficient. These suggested comparisons are obviously difficult to measure, and impossible to substantiate. As a result, unethical or unfair claims will occur more frequently when advertising is allowed

Today, in the era of consumerism, it becomes very fashionable to advocate a ban of advertising by lawyers on the grounds that such a proscription is necessary to ensure some degree of protection for the consumer's ignorance. Those poor souls are often at a loss when they are subjected to a barrage of multi-media advertising activities. The gullible customers easily become the victims of the ill-qualified lawyers who will be able to carve out a share of the market under the circumstances. It would naturally increase the incidence of shoddy and fraudulent practices of law in the long-run. The arguments made in *Bates and O'Sheen v. State Bar of Arizona,* which were noted in the introduction of this essay, suggest that lawyers often are in a constant fear of quackery by advertisers. The threat of quackery can be expected to remain only as long as we firmly believe that all lawyers are crooks. Obviously, there are always scoundrels in any group who would use misleading and deceptive advertising to hook the innocent customers. But this constitutes an exception rather than a common rule. Those who stress the incentive of charlatans to deceive, often underestimate the counterbalancing incentive of consumers to avoid being duped. Besides, consumers can resort to several available means to cope with their limited ability to evaluate professional services. One such way is to patronize the firms offering legal services rather than the individual lawyer in solo practice. While customers often cannot tell when they are sold unnecessary, shoddy services, other lawyers can always monitor the actions of their colleagues. The Kaiser Foundation Health Plan in California provides an illustration in the medical field. It is an institutional arrangement which could become widespread if the market for health services were made too explicitly competitive by incentive advertising. Such a setting greatly removes the penchant for providing unnecessary services. Also the reputation of the group is now at stake. It becomes more imperative for the entire association to police the quality of services now being provided. Consumers in this situation are no longer at the mercy of those suppliers of professional services: if they cannot evaluate the services they must purchase, they will seek out institutional arrangements which will protect them.

More often than not, it is the officers of professional

associations who exaggerate the fear of "deceit" that follows advertising by professionals. For instance, recently Dr. James Sammons, AMA's executive vice president, professed in a news conference in St. Paul, Minnesota on March 13, 1978, that the AMA does not oppose price advertising by medical doctors, but that the advertising has a great potential for being misleading.[21] True, advertising may increase the probability that a "quack" can capture the attention of the consumers. However, to say that consumers notice a given practitioner does not mean necessarily that they will patronize him!

By contrast, a ban on advertising by lawyers could also decrease greatly the chance that consumers will notice particularly good practitioners. The legal societies would have us believe that each practitioner of law is either extremely good or extremely bad. Under the current mise-en-scene, for instance, a caller to the county's Bar Association for a referral or for a check on a given lawyer, is likely to be told that any member in good standing with the organization and who has the appropriate specialty credentials is just as good as any other one. Specifically here, no attempt is made to differentiate among members in good standing. By contrast, once competitive advertising activities emerge on the scene, such differences among members of the Bar may be easier for consumers to discover.

When evaluating the effect of advertising by "quack lawyers," we often have the penchant to have the "most naive" consumer in mind. Instead, we should think of how the "average" consumer would respond to advertising. If poor practitioners are allowed to advertise openly, some consumers will probably be bamboozled into purchasing shoddy or unnecessary services that they otherwise would not buy. That is a cost of lifting the ban in a free, open market. However, identifying a cost of an action could not be considered as a sufficient reason to decide against advertising. The final decision must rest on the overall balance of cost and benefit we expect to derive from removing the ban on advertising by lawyers. Experiences point out that advertising has opened the door for many low and middle income people to a variety of legal services that they thought they could never afford.[22] In such a case, advertising should be permitted even though some gullible consumers may be made worse off.

Let us turn now to the second premise: advertising is

21. *AMA Gives Ad Views*, Grand Forks Herald, March 15, 1978, at 8D, col. 4.
22. *Behind The Spread of Storefront Law*, U.S. NEWS & WORLD REP. Feb. 13, 1978 at 55.

unprofessional since it will degenerate the quality of services, create unnecessary costs and raise the price of legal services. Is there any validity in the contrary argument — will price and quality improve under the existing ban? As we have discussed in Section I above, price may or may not be expected to fall even when advertising costs are added to production costs, depending upon whether the realization of the economies of large-scale production does indeed occur or not. The only thing certain is that entry to most professions is presently hampered by license laws. It is very likely that prevailing prices are substantially higher than costs, on the basis of contrived restriction of supply. If advertising and competitive pressure reduces the costs of comparison shopping for legal services, prices are almost certain to fall. Lawyers would not have to cut corners in order to pay for advertising. Thus, advertising expenditure would be paid for out of economic profits even as the force of more open competition decreases the size of economic profits.

The same competitive force would render it dangerous for a practitioner to cut corners, because by doing so, it would lead to a loss of customers. We may conclude safely then that if advertising were allowed, quality of services would not automatically decline. Of course, the quality could not be uniform everywhere, because different consumers have different needs and tastes for price-quality combinations. Some lawyers living under such an advertising climate may experiment in finding the price-quality combinations that best respond to consumer demands. To the extent that advertising contributes to the consumers' awareness of alternative practitioners, each lawyer (or seller) would have to be alert in assuring that the quality of his legal services lived up to the expectations and desires of his clients. Moreover, since the price of services would fall, additional people — some part of low-income and a large section of middle-income groups — would be able and anxious to purchase legal services that were previously out of their reach or their customary planning. Instead of relying on neighbors, friends, relatives, etc., these people could consult frequently the legal practitioners. The average quality of legal advice and counsel purchased would improve, even if the average quality given by lawyers did not change.

Finally, the third premise's contention that open competitive behavior via advertising would result in less professional interaction, and, therefore, hamper progress in knowledge and technique, has no validity at all. Competitive advertising would not

necessarily diminish the incentive of individual lawyers or groups of practitioners to promote their professional reputations. If advertising has any effect in this regard, it would contribute to fuller awareness of technical advances in the field of law among lawyers. The claim that advertising would give rise to invidious comparisons among lawyers ignores the very essence of the response to advertising in the market for professional services. It is hard to imagine that many lawyers would assert a supremacy over any other by name. It is equally hard to believe that many consumers would be fooled by statements of such supremacy. The types of ads that will pay off in the market of professional services are likely those which consumers will not discount too heavily. Expectation of an increase in occurrences of unethical, unfair claims by lawyers following the lift of the ban of advertising is overstated.

From the above discussion, it is not possible to derive any sensible justification for the prohibition of advertising by lawyers on the ground of consumers' protection. On the contrary, as was previously pointed out, in many instances such a ban inhibits competition, the consumers' guardian angel. Then, what could be an alternative explanation for the continuation of the proscription? One persuasive explanation is the view of lawyers as members of a large, loosely organized "cartel." Under the "cartel" view, the ban of advertising by professionals serves primarily to enforce proscriptions against undue competition by members of that cartel. At the outset, we wish to caution the readers that by no means do we consider the American professional societies as "cartels" in the strictest sense of the word. Today, it would be illegal in the United States and a few other countries for cartels to set prices collusively and shamelessly in order to maximize their mutual profits. On the other hand, if a few large firms encounter the same problem, experience suggests that they may arrive at some tacit mode of behavior to avoid fierce competition. Strictly defined, a cartel is an association of firms of the same industry, established to increase the profits of its members by adapting common policies governing production, market allocation, or price. A cartel may be domestic or international in scope. The OPEC oil cartel is popularly referred to as an "international monopoly." The goal of a cartel is to raise each member's long run profits to higher levels than would prevail under competitive conditions. To be successful, therefore, a cartel must have certain characteristics:

1. Dominant market share — a cartel must control the bulk of

an industry's total output. Otherwise, the members will not have sufficient power to influence market prices.

2. Cohesiveness — A member is less likely to cut his price in order to boost sales and profits at the other members' expense.

3. Price-inelastic demand — The quantity demanded of the cartel's product must be relatively unresponsive to changes in price. This means that if the price of the product is increased by some given percentage, say, 10 per cent, quantity sold declines only by a smaller percentage — 4 per cent, for instance. There is nothing shocking about this. If competitors are willing to "chisel" on conventional market rules by joining the cartel for the purpose of improving their individual welfare, we must also admit to the possibility that they will be willing to "chisel" on cartel rules for the purpose of enhancing their individual welfare. Hence, there is a built-in incentive which can cause the demise of the cartel.

Professional associations in our modern economy could not be construed as "cartels" in the strict traditional sense. Yet, a number of these organizations are continually and actively engaged in the acquisition of market and political power. But power is never complete. It is always circumscribed by the imperfect nature of knowledge and the forces of law, custom, and the market. Thus, members of these organizations have developed complex sets of rules to govern the supply of services and prices, and to outskirt the competitive pressures of the free market. Members voluntarily refrain from competitive bidding since it can be considered as "an act discreditable to the profession."[24] So, in a broader sense, these professional organizations behave more or less in the general direction of a regular cartel.

Because of the built-in incentive for cartel members to collude and also to chisel, we can anticipate that cartels, if left alone, do not last long. Normal dissolution of a cartel, however, can be prevented if the collusive agreement has the force of law. Cheating on the agreement will not often occur if such cheating is declared a criminal offense by the state. With legally enforced Professional Codes of Ethics, an unethical lawyer is one who breaks the cartel's agreement not to act competitively. He is unethical to his *colleagues,* but not to his *customers*. It is this interpretation that lends credence to the claim by Messrs. Bates and O'Sheen that legal bans on advertising are conspiracies in restraint of trade. This view is also

23. For further discussion of employer cartel in sports, *see* THE DAILY ECONOMIST 57-76 (H. Johnson and B. Weisbrod, eds., 1973).

24. J. CAREY, THE RISE OF THE ACCOUNTING PROFESSION TO RESPONSIBILITY AND AUTHORITY 465-66 (1970).

what the U.S. Department of Justice had in mind when it announced that it would bring suit against the American Bar Association for violations of the Sherman Antitrust Act.[25] It is also shared by the Federal Trade Commission when it began in the early weeks of January 1978 to question the American Bar Association and some other professionals on the legality of such traditional practices as restricting advertising, limiting licenses, and even dictating educational requirements for members.[26] The FTC investigations could spark confrontations between the agency and state licensing boards, since many of the standards that are being questioned are enforced by state authorities.

Professional Codes of Ethics generally permit the lawyers to list their names, addresses and telephone numbers in the Yellow Pages of the telephone directories, and that is all. No lawyer is supposed to, in any way, differentiate himself from his colleagues in such listings. Sometimes they are not even allowed to list their specialties. The consuming public is asked to secure information about specialties from the professional association themselves; this is consistent with the cartel interpretation of the Code of Ethics. Here, the American Bar Association constitutes somewhat the administrative arm of the cartel. It would want naturally to control the kinds of information given out about individual members. It portions out referrals according to a quota much like OPEC sets production limits of crude oil on member states. One should note another similarity with cartels: professional associations themselves advertise the desirability and usefulness of the legal services their members supply. This fact is also consistent with the cartel view. Such advertisements attempt to increase the market demand for services so that the Bar Association will have more business to portion out to members.

III. EMPIRICAL EVIDENCE OF ADVERTISING

The economic implications of advertising have been probed through a number of recent empirical studies. Unfortunately, such studies are subject to serious problems with respect to both the acquisition and analysis of relevant data; hence, conclusions are necessarily tentative. Nevertheless, empirical research suggests that perhaps the microeconomic effects of advertising are not as adverse as many critics have traditionally assumed.

25. Guzzardi, *A Search For Sanity in Antitrust,* FORTUNE, Jan. 30, 1978 at 72.
26. *See, An FTC Challenge to the Legal Profession,* BUSINESS WEEK, Jan. 9, 1978 at 23.

In particular, a substantial portion of total advertising is of an informative type, and therefore, is a basic means by which consumers are informed of prices and terms of sales. Furthermore, advertising does not seem to be a mechanism by which competition is necessarily reduced. On the contrary, it is frequently a means to enhance the fair working of a competitive free market.

If, as we have discussed in section II above, the cartel interpretation of the ban on advertising by professionals is correct, the removal of these restrictions should result in lower prices for professional services. While the implications for the quality of these services are much less clear, there is little reason to expect that such a quality would decline. Some empirical studies of the effects of professional advertising can be mentioned here. One is done by Professor Lee Benham of the University of Chicago (now at Washington University in St. Louis) measuring the effects of advertising by optometrists on the price of eyeglasses and eye examinations.[27] A separate study by Dr. James W. Begrin, Department of Community Medicine and Hospital Administration, University of North Carolina, compares the work of commercial optometrists employed by profit-making firms with that of professional, non-advertising practitioners.[28] A third study by Professor John F. Cady of the University of Arizona, in 1976, examines the effects of advertising on the prices of prescription drugs and the quality of pharmaceutical services.[29] Since not all states ban advertising by optometrists and pharmacists, it is possible to get some impression of the effects of advertising on quality and price by (a) looking at price and quality in those states where advertising is banned; and (b) comparing them to price and quality in those states where advertising is permitted. The results of these studies can be summarized here:

1. There are important differences in prices between states that prohibit only price advertising and those that permit price advertising.

2. Prices are slightly higher in states where the ban on price advertising alone is in force than in states with no advertising restrictions.

3. Prices are considerably higher in states where a ban on all advertising exists than in states with no advertising or with a ban only on price advertising.

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27. Benham, *Advertising, Competition, and the Price of Eyeglasses,* J. L. ECON. 337 (1972).
28. *The Battle Over Advertising Eyeglasses,* CHANGING TIMES, July 1978 at 42.
29. J. CADY, RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS, Study No. 44 (1976).

4. The difference in prices between states with a loose ban on advertising and states with a restrictive ban on advertising is 25 per cent.

5. Quality of services being offered to consumers does differ significantly between states with restricted advertising and states with no restriction; in many types of services, they are about equivalent in quality.

These empirical studies provide results which are consistent with the cartel view of the proscription of advertising by professionals. They are inconsistent with the notion that such restrictions would benefit the consuming public. Of course, the studies cited here involve physical products (eyeglasses, prescription drugs) as well as professional services (eye examination) and studies which concentrate only on services of physicians or lawyers may yield different results. Yet, these studies should give pause to those who would dismiss out of hand the idea of advertising by lawyers. If a certain legal association continues adamantly to oppose the movement towards legalization of advertising by their members, it would seem they are fighting, not because the public interest is best served by advertising restrictions, but because they still regard themselves as the administrative arms of a "cartel."

IV. CONCLUSION AND CAVEAT

What has preceded in these pages cannot be accepted as a complete analysis of the advertising impact on consumers and our economy at large. It is simply an investigation of two major issues of the effect of advertising: (a) the economic welfare of the purchasers of legal services; (b) the possible conflicts between long-standing professional Codes of Ethics and the promotion of fair competition. Nor is the article "the" analysis of advertising by lawyers; it is only "an" analysis, more can be done by others in the immediate future.

It is always elegant to conclude an essay on applied economics with a discussion of the effects of various policy options. Unfortunately, such elegance must be foregone here.

While the author is not advocating a "free-for-all" kind of advertising by lawyers, this examination of advertising's impact on market competition reveals a weakness in the argument for banning advertising; such a ban should be lifted. In a dynamic and complex society such as ours, there is an acute need for consumers

to be closely acquainted with lawyers and their variety of services over the course of time. Advertising is still the best available medium that lawyers can utilize to dispense such needed information. Any advertising should be tailored in terms of the consumers' total information requirements; therefore, in the regulation of advertising by State Bar Associations, the consumers' total information requirements must be considered. Marketers and critics alike tend often to overestimate the power of advertising to directly and immediately affect the consumers. Surely some "consumer learning" occurs. But our knowledge of the nature of this learning — both the process and the content of learning — is far from being explicit. There are many pieces of useful information that lawyers could advertise without infringing upon their honesty and decency. Since lawyer services are not necessarily standardized, it would be difficult to draw up precise lists of prices concerning a variety of services. However, lawyers might advertise what they charge per hour of their time in performing different types of work. Information about specialties, normal hours of daily operation, and availability and terms of credit would probably be given.

Even if consumers may occasionally encounter some lawyers who would not mind using "offensive" tactics in their advertising (offensive to whom and by what criteria? — this is another value judgment to debate), this essay has shown that there are enough likely benefits of advertising to justify at least a trial run of openly competitive advertising by the legal practitioners. Advertising, despite its costs, contributes to an expanding market for new and better legal services. Many of these new services that have been mentioned in this essay would not have been brought to market unless lawyers were free to develop mass markets through widespread advertising. Finally, advertising does not take place in a vacuum. The abandonment of advertising could not represent a net saving to consumers or to lawyers. Instead, such a development would require lawyers to seek alternative marketing techniques, some of which would be less efficient or downright detrimental to the large mass of people with relatively modest economic means.