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Attitudinal and Legal Factors in Professional Advertising

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ATTITUDINAL AND LEGAL FACTORS IN PROFESSIONAL ADVERTISING*

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I. INTRODUCTION

This Article is concerned with advertising by professionals, a phenomenon which has taken on greater importance and become more controversial as its impact has grown over the past decade. Part II of the Article discusses the legal precedents which permitted the development of professional advertising in general. In Part III the body of literature concerning professional and consumer attitudes towards promotional behavior is reviewed. Part IV presents and evaluates the initial results of a survey of plastic surgeons. The promotional attitudes of plastic surgeons are an especially interesting subject of study, as advertising by this medical sub-specialty presents in a very clear way some of the problematic issues inherent in the area.

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II. History of the Regulatory Legal Doctrine

Restrictions on competitive behavior by the professions first developed to protect consumers against their own ignorance and against potential professional incompetence as well as misrepresentation. The fear of misleading and fraudulent inducements was a primary justification for the prohibition of advertising.[1]

In 1935, the United States Supreme Court ruled that Oregon had the authority to regulate dental advertising pursuant to its interest in promoting public health.[2] The Court deemed that the benefits of competition were outweighed by the potential for fraud; the validity of the representations contained in the advertisments were of no concern.[3]

A fundamental motivation for the Court's decision was its desire to protect professional morale by preserving professional prestige. A prevalent view, fostered by professional societies, was that any deception of the public through fraudulent advertising would erode professional image, generate widespread distrust, and inhibit the growth of any profession guilty of such practices.

Until 1975, the anticompetitive activities of professional societies were deemed exempt from the Sherman Antitrust Act under the "state action doctrine."[4] A professional society which derived its authority from the state legislation governing the profession was defined as a state-sponsored program.[5] In *Goldfarb v. Virginia State Bar*,[6] the United States Supreme Court overturned this policy and relaxed anticompetitive restrictions on the professions. It held that bar associations' minimum fee schedules and competitive sanctions violated the Sherman Act.[7] Fundamental were the conclusions that price fixing affected interstate commerce and that the practice of law constituted commerce. Where an anticompetitive activity is not legally mandated, the fact that it is *prompted* by the state is insufficient to bring it within the state action exemption. The activity must be *compelled* by the state. The delegation to bar associations of the state power to regulate attorneys did not, therefore, include the power to fix prices.[8]

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[1] *See, e.g.*, Graves v. Minnesota, 272 U.S. 425 (1926); Douglas v. Noble, 261 U.S. 165 (1923); Dent v. West Virginia, 129 U.S. 114 (1889).

[2] Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935) (invoking the police power inherently reserved to the states by the Constitution, amend. IX).

[3] *Id.* at 612.

[4] 15 U.S.C. § 1 (1982) (original version at Ch. 647, § 1, 26 Stat. 209 (1890)); Parker v. Brown, 317 U.S. 341, 352 (1943) (the state "as a sovereign, imposed the restraint [on farm production] as an act of government which the Sherman Act did not undertake to prohibit.").

[5] 317 U.S. 341.

[6] 421 U.S. 773 (1975).

[7] *Id.* at 793. The Sherman Act is constitutionally based on the commerce clause. In fact, the plaintiff in *Goldfarb* was an attorney unable to represent himself in a residential purchase transaction because he was not a member of the Virginia bar.

[8] *Id.* at 788-92.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[9] the Court invalidated a Virginia law prohibiting as "unprofessional conduct" the advertisement of prescription drug prices by pharmacists.[10] The Supreme Court had previously ruled, in the keystone case of *Bigelow v. Virginia*[11] that, notwithstanding the presence of a profit motive and its classification as commercial speech, advertising was protected by the first amendment. Speech with economic aims, while carefully scrutinized, cannot defeat first amendment coverage. Restriction of price advertising interrupted the free flow of information to the public in derogation of its right to know.[12] *Virginia State Board of Pharmacy* represented a new, less paternalistic approach to the regulation of professional conduct. However, regulation of commercial speech was still permissible; states could legislate the time, place and manner of advertisements and restrict false and misleading representations.[13]

The landmark case of *Bates v. State Bar of Arizona*[14] differs from *Goldfarb* in holding that the Arizona ban on lawyers' advertising fell within the state action exemption.[15] The *Bates* Court, citing *Virginia State Board of Pharmacy*, held that a paid advertisement was entitled to some first amendment protection.

In *Bates*, the Supreme Court commented on the historical justifications for professional regulation. The articulated fear of state sanctioned professional societies was deemed outdated and unjustified. Instead, the Court acknowledged the "indispensable role [that competition plays] in the allocation of resources in a free enterprise system"[16] and in consumer education, concluding that the state has a greater interest in the general principle of free speech than in making marketplace choices for individuals. Again citing *Virginia State Board of Pharmacy*, the Court determined that the free flow of information itself protected the public interest and, indeed, the integrity of the profession.[17] The divided *Bates* Court[18] refused to allow the potential for abuse to justify restriction of a constitutional right:

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[9] 425 U.S. 748 (1976).

[10] *Id.* at 766.

[11] 421 U.S. 809 (1975). *Bigelow* involved a newspaper publisher who accepted an advertisement for a New York abortion clinic, violating a Virginia statute barring the sale or circulation of publications encouraging abortion. The Supreme Court viewed the advertisement as protected under the free speech clause because it advanced the public interest by informing women of the availability of licensed abortion facilities. *Id.* at 822.

[12] *Id.*

[13] 425 U.S. at 771.

[14] 433 U.S. 350 (1977).

[15] *Id.* at 363.

[16] *Id.* at 364. *See, e.g.*, FTC v. Proctor & Gamble Co., 386 U.S. 586, 603 (1967) (Harlan, J., concurring). The Court has noted that "such speech serves individual and societal interests in assuring informed and reliable decisionmaking." 425 U.S. at 766.

[17] 433 U.S. at 363-79.

[18] In his dissent, Chief Justice Burger termed the ruling a "Draconian solution," and asserted that it would "only breed more problems than it could conceivably resolve." *Id.* at 388.

> [I]nformation is not in itself harmful . . . people will perceive their own best interests if only they are well enough informed . . . . The best means to that end is to open the channels of communication rather than to close them. The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice that the First Amendment makes for us.[19]

Although *Bates* was an affirmation of the constitutionally protected nature of speech and the policy of enterprise competition, it was a narrow ruling. The Court noted that its decision was specifically limited to attorneys, since different constitutional considerations might attach to other professions.[20] However, *Bates'* value as a predictor of the Court's interpretation of subsequent cases involving other professions was not lost on legal scholars.[21] The Court emphasized that its holding did not address advertisement quality claims or the problem of personal solicitation and its appearance of undue influence.[22] Further, *Bates* left open the question of how "reasonable" advertising was to be defined.

In 1980, attention was turned to health care professionals. In *AMA v. FTC*,[23] medical societies and their members were found to have "conspired, combined and agreed to . . . enforce ethical standards which ban physician solicitation of business [and] severely restrict physician advertising, [thereby] . . . frustrat[ing] competition in the provision of physicians' services throughout the United States and caus[ing] substantial injury to the public."[24] The Second Circuit found the potential for deceptive advertising an insufficient justification for anticompetitive professional strictures. The AMA reacted with "dismay and anger;"[25] the Association stated that "responsible efforts by physicians to comply with rapidly evolving legal standards and social values" were ignored and thus discouraged by the ruling.[26] The AMA also viewed the ruling as an attempt to usurp its power over the practice of medicine in the United States.[27]

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[19] 433 U.S. at 365. *See also*, Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 97 (1977) (upholding a citizen's right to information where ordinance prohibited the posting of real estate "For Sale" signs).

[20] 433 U.S. at 365.

[21] *See, e.g.*, Meyer & Smith, *Attorney Advertising: Bates and a Beginning*, 20 ARIZ. L. REV. 427 (1978); Welch, *Bates, Ohralik, Primus - The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. REV. 585 (1978).

[22] The facts of the case did not suggest that the advertisements "contained claims, extravagant or otherwise. . . ." 433 U.S. at 366. The Court refrained from attempting to resolve problems of "in-person solicitation of clients—at the hospital room or the accident site." *Id.*

[23] 638 F.2d 443 (2d Cir. 1980).

[24] *Id.* at 451.

[25] Ward, *Professional Medical Advertising*, J. KAN. MED. SOC'Y, July, 1979, 436, 444.

[26] *AMA Seeks Rehearing In FTC Case* [hereinafter cited as *AMA Seeks Rehearing*], AMA News, Oct. 1, 1980, at 1.

[27] *Id.*

The *FTC* ruling provided no clear solution to the problem of how far medical societies could go in policing themselves to regulate improper practices. The court urged professional organizations to develop prescriptive self regulation, peer review mechanisms and certification procedures to enhance quality.[28] Although possibly constitutionally suspect as unlawful restraints of trade, self regulatory programs have generated interest among health care practitioners as well as academicians.[29]

Subsequent to *Bates*, the American Bar Association Code of Professional Responsibility was modified. The new Rules of Professional Conduct permit advertisement of an attorney's name, fields of practice, consultation fees, fixed fees for specific services, and credit arrangements.[30] In 1977, two Arkansas attorneys were privately reprimanded by that state bar's committee on Professional Conduct as a result of their advertising; the censure was affirmed in *Eaton v. Supreme Court of Arkansas*.[31] The attorneys had contracted with Val-Pak Advertising for an advertisement in a mail-out packet which contained a variety of discount coupons redeemable at local businesses. The envelope read, "Save! Save! Save! Use these . . . valuable coupons from local businesses."[32] In affirming the reprimand, the Arkansas Supreme Court concluded that the advertising did not assist individuals in need of legal services to make an informed selection of counsel or a justified fee comparison.[33] It held that appellants' reliance on *Bates* was ill-placed; the advertisements indicated a clear solicitation of business.[34]

Litigation with respect to professional advertising behavior has redefined relationships among the professions, regulatory authorities, and the public. Despite the limitations of *Eaton*, the Supreme Court continues to couple strong enunciations of first amendment principles with holdings evincing its belief that competitive freedom in the exchange of information and services will increase ethical behavior, encourage heightened consumer demands, and foster professional development.

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[28] 638 F.2d at 452.

[29] *See* Note, *Federally Imposed Self-Regulation of Medical Practice: A Critique of the Professional Standards Review Organization*, 42 GEO. WASH. L. REV. 822 (1974); Dobson, *PSROs: Their Current Status and Their Impact to Date*, 15 INQUIRY 113 (1978).

[30] *Model Rules of Professional Conduct*, Rule 7.2 comment (1983).

[31] 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981).

[32] *Id.* at 579, 607 S.W.2d at 59. The coupons also offered french fries with the purchase of a hamburger, reduced price health spa membership, auto repairs and gift certificates from fabric and shoe stores.

[33] *Id.* at 580, 607 S.W.2d at 59-60.

[34] *Id.*, 607 S.W.2d at 59. Subsequently, one of the co-petitioners applied for admission to practice before the Supreme Court. In his dissent to the grant of admission, Chief Justice Burger stated that the manner in which the applicant advertised his services brought his professional character into question. "Although ingenious his advertising was in my view, pure solicitation . . . and wholly out of keeping with minimum proposed standards; it is more in keeping with selling merchandise than the profession of law." In re Admission of Benton, 50 U.S.L.W. 3713, 3714 (U.S. March 9, 1982) (Burger, C. J., dissenting). The Chief Justice equated Benton's application with an attempt to "wash away"

III. Review of the Literature: Professional Advertising

The impact of *Bates* and *Goldfarb* on advertising behavior has generated academic marketing research[35] and increased attention to associational self-regulation as well as opinionated pronouncements by the professions themselves.[36] Taken as a whole, this body of literature cogently describes the present reality, limitations and potential of professional advertising.

Most surveys of professional attitudes toward advertising indicate overwhelming disapproval of it on the grounds argued before the Supreme Court in *Bates*. Professionals worry about tarnishing their image and the public's inability to assess the quality of their services. They generally do not recognize any potential benefit in increased competition and consumer access to information. Notwithstanding these attitudes, the quantity of dental and legal advertising has increased in modest increments since regulations were relaxed. However, research to date has not identified whether this is a result of growth in these professions rather than development of the propensity to advertise. One study noted that "[p]hysicians to date have shunned advertising, and accountants seem content to limit their advertising to the Yellow Pages."[37]

In Darling and Hackett's study of four professional groups, the majority of the respondents believed that professional advertising would not increase competition.[38] Similarly, Wright and Allen found that fifty-nine percent of their physician respondents thought advertising would have little or no effect on competition. Eighty-four percent felt that advertising would not decrease medical costs, and seventy-four percent indicated that it would not lower medical fees.[39]

Professionals also do not think that greater availability of market information would benefit consumers. The Darling and Hackett sample did not feel advertising would make the public more aware of the professional's qualifications or assist the consumer in choosing professional services more intelligently.[40] An *American Bar Association Journal* random telephone poll of 600 members and law students demonstrated a strengthening perception that legal

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the impact of the state court's reprimand and obtain the Supreme Court's "implied blessing." *Id.*

[35] *See, e.g.*, Bloom, *Self Advertising*, 16 Med. World News, Feb. 10, 1975, at 65 (physician advertising); Traylor & Mathias, *The Impact of TV Advertising Versus Word of Mouth on the Image of Lawyers: A Projective Experiment*, 12 J. Advertising 142 (1983) (attorney advertising).

[36] *See, e.g.*, *AMA Seeks Rehearing*, *supra* note 26; Horwitz, *Plastic Surgeon Bounced From ASPRS*, Medical Tribune, May 25, 1982, at 3.

[37] *Ads Start to Take Hold in the Professions*, Bus. Wk., July 24, 1978, at 122 [hereinafter cited as *Ads Take Hold*].

[38] Darling & Hackett, *The Advertising of Fees and Services: A Study of Contrasts Between, and Similarities Among, Professional Groups*, J. Advertising, Spring 1978 at 23 (survey of physicians, attorneys, dentists and accountants).

[39] Wright & Allen, *Advertising in Medicine: Background, Controversy, Conclusions*, in Proceedings Am. Mktng. Ass'n, 1981, at 241-44.

[40] Darling & Hackett, *supra* note 38, at 32.

advertising does not help consumers choose more wisely; in 1981 seventy-six percent agreed that consumers were not aided as compared with sixty-five percent in 1978.[41] However, forty-nine percent of the sample agreed in 1981 that advertising has brought legal services to individuals who needed them but were previously unaware of their existence.[42] Only twenty-nine percent believed legal costs would be somewhat or significantly lower as a result of advertising.[43]

The professions' "deep concerns . . . regarding the potential negative impact of advertising"[44] have focused on the risks of deception or fraud. A large majority of physicians believe that advertising would promote deceptive trade practices. Professionals also fear the potential effects to themselves as individuals and to the professions.[45] Lawyers responding to one survey concluded that legal advertising would unfavorably affect the nature of their profession; they predicted that price competition would decrease quality as well as routinize service.[46] Members of the professions believe that the images of their respective specialties will be tainted.[47]

A low percentage of respondents to the various studies indicated that they had advertised or planned to advertise.[48] Dentists and physicians showed greater opposition to promotional activities than did accountants or attorneys.[49] However, surveys of students in professional schools demonstrate a greater recognition of the advantages of advertising.[50]

Self-promotional behavior outside the rubric of conventional advertising is clearly important to professionals in marketing their services. Physicians, for example, maintain club memberships, write and teach,[51] make television and radio appearances, co-author health books, endorse commercial products, and "get . . . their names before the public in such great numbers . . . that their more reticent colleagues are wondering if the old controls [of self-regulation] still stand up."[52]

Since the *Bates* decision, articles have examined the development of self-regulation by professional associations. Originators of false and misleading

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[41] *Advertising Attracting Neither Participants Nor Supporters*, 67 A.B.A. J. 1,618, 1,619 (1981) [hereinafter cited as *ABA Survey*].

[42] *Id.*

[43] *Id.*

[44] Darling & Hackett, *supra* note 38, at 33.

[45] *Id.* at 24. *See also*, *ABA Survey*, *supra* note 41, at 1,619 (lawyers believe advertising has misled the public about routine legal costs).

[46] Renforth, Raveed & Porter, *The Professions as Small Business: Advertising Directions in the New Legal Environment*, 18 J. SMALL BUS. MGMT., April, 1980 at 11.

[47] *Ads Take Hold*, *supra* note 37; Darling & Hackett, *supra* note 38, at 23.

[48] *ABA Survey*, *supra* note 41; Renforth, Raveed & Porter, *supra* note 46, at 13.

[49] Darling & Hackett, *supra* note 38, at 32.

[50] Renforth, Raveed & Porter, *supra* note 46, at 14. *See also*, Meskin, *Advertising of Dental Services: A Consumer and Dentist Attitude Survey*, 45 J. AM. COLL. DENTISTS 247 (1978).

[51] *See* Schwersenz, *Marketing Your Services*, C.P.A. J., Oct. 1976, 11, 131. Baker, *You Can Advertise Now—But Should You?*, 8 BARRISTER 14, 15 (Summer 1981).

[52] Bloom, *supra* note 35, at 65.

advertisements and those having the potential for deception have been publicly censured, placed on probation, or excluded from professional associations.[53] For example, according to the president of the American Society of Plastic and Reconstructive Surgeons, an advertisement is "appropriate" only "if it assists the public about availability of service."[54] In defining standards such as this one, a professional association, although no longer able to fix prices or ban advertising, may clearly retain a considerable amount of leverage.

Studies indicate that consumer attitudes are markedly different from those of professionals. Although it has been found that consumers rate personal referral, experience, and availability as the most salient factors in their choice of a physician,[55] respondents to various questionnaires generally express approval of professional advertising.[56] Consumers value additional information because it helps them to scrutinize the market and to "shop" for a professional. Most agreed that advertising increases professional competition.[57] In one sample, indicative of the positive view of consumer powers, nearly half the respondents stated that advertising would compel physicians to be more responsive to consumer needs.[58] "Roughly one-third felt that better service . . . and better utilization of services . . . would result."[59] Many consumers believe that advertising will result in beneficial price competition.[60] Perhaps suggesting a trend toward greater professional marketing behavior, "[y]ounger consumers (particularly those in the age group 18-25) have more positive attitudes toward advertising and its effects."[61]

In contrast, professional groups themselves clearly believe that unrestricted advertising "would eventually lead to increased regulation by the government . . . a pendulum swing."[62] Researchers note that these fears are largely unjustified; one commentator labels such negativity "provincial."[63] According to other observers, "apprehension of the return of hucksterism, misrepresentation and false promises probably is unfounded."[64] These fears result from professional

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[53] *See, e.g.*, Horwitz, *supra* note 36.

[54] *Id.* at 30.

[55] Traylor & Mathias, *supra* note 35. Vanier & Sciglimpaglia, *Consumer Attitudes Toward Advertising by Professionals: The Case of the Medical Profession*, in CURRENT ISSUES AND RESEARCH IN ADVERTISING 149, 153-54 (1981).

[56] *See* Marks & Ahuja, *Demographics, Situations, Impact People's Views of Ads for Doctors*, Marketing News, Dec. 9, 1983, at 3, col. 1; Smith & Meyer, *Attorney Advertisng: A Consumer Perspective*, 44 J. MKTG. 56, 61 (1980).

[57] Vanier & Sciglimpaglia, *supra* note 55, at 156.

[58] *Id.*

[59] *Id.*

[60] *See* Marks & Ahuja, *supra* note 56, at 3; Meskin, *supra* note 50; Vanier & Sciglimpaglia, *supra* note 55, at 164.

[61] Vanier & Sciglimpaglia, *supra* note 55, at 159.

[62] Darling & Hackett, *supra* note 38, at 33. *See also* Wright & Allen, *supra* note 39, at 32.

[63] Shapiro, *Consumers, Health Care Professionals are Deeply Divided on the Issue of Advertising*, Marketing News, Dec. 9, 1983, at 13.

[64] Wright & Allen, *supra* note 39, at 243.

attitudes developed through years of "etiquette"[65] as well as the tawdry history of unrestrained medical advertising in the United States.[66]

Academic critiques of professional advertising include economic and sociological analyses. In what has become a classic work in the field,[67] Benham compared samples of eyeglass prices from states with and without advertising restrictions, and found that the restrictions may have increased prices between 25 and 100%.[68] However, some critics have refuted Benham, asserting that the absence of advertising in the eyeglass market correlated with decreased quality.[69] Further, the applicability of the results of a product study to individualized professional services has been questioned:

> Those who favor professional advertising suggest that its use would tend to make market structures more competitive by helping new firms or practitioners to enter markets and increasing the overall demand for services. Easier entry and greater demand for professional services would presumably result in more competition among professionals and, hopefully, better performance. Opponents of advertising in the professions suggest that advertising may result in greater barriers to entry by creating product differentiation or economies of scale in advertising.[70]

This somewhat circular discussion illustrates the confusion regarding the economic ramifications of unfixed prices and advertising in the professions. Similarly, no study to date has assessed whether advertising costs will be passed on to consumers as an increase in overhead or whether this effect will be outweighed by a corresponding price decrease generated by increased competition.

Demographic data indicate that professional activity is shifting from individual practice to group practice. One article suggests that group practice, a spreading trend among dentists and lawyers, is spurring advertising and that "such groups are among the biggest advertisers."[71] It indeed appears that large-volume professional associations are realizing economies of scale by promoting and providing fairly standardized, routine services at reduced cost.

Bloom and Stiff state that advertising can reduce underutilization of the medical professions by promoting therapeutic and diagnostic services.[72] "[U]nderworked surgeons and other underutilized secondary care professionals

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[65] Bates v. State Bar of Ariz., 433 U.S. 350, 371 (1977).

[66] Traynor, *Accountant Advertising: Perceptions, Attitudes and Behaviors*, 23 J. ADVERTISING RESEARCH 35 (1983-84).

[67] Benham, *The Effects of Advertising on the Price of Eyeglasses*, 15 J. LAW & ECON. 337 (1972).

[68] *Id.* at 344.

[69] Wright & Allen, *supra* note 39, at 241.

[70] Renforth, Raveed & Porter, *supra* note 46, at 15.

[71] *Ads Take Hold*, *supra* note 37, at 122.

[72] Bloom & Stiff, *Advertising in the Health Care Professions*, 4 J. HEALTH, POL'Y, POLITICS & L. 642, 648 (1980).

would use advertising to help them serve unmet needs . . . for second opinions and for specific preventive and diagnostic procedures."[73] Benham cites another economy of scale occasioned by advertising in the consumer's search process, which is made less expensive when information is made more "readily and cheaply available."[74] Such information is particularly valuable to a mobile populace. "[A]s more people relocate, the need to select service providers increases."[75] Smith and Meyer also cite specialization as a factor in the need for information; as the pool of those eligible to provide health care grows to include more specialists, delivery of services becomes divided among many physicians rather than remaining concentrated in the hands of one provider.[76]

Professional advertising is also linked to the development of patient autonomy and the assumption of decision-making authority. It may be

> the beginning of a recognition on the part of patients that they are no longer children completely dependent on the authoritarian personality to maintain their health. Instead, some patients apparently believe that they can and should assume more responsibility for their health care and that they have the right to shop for the best care available.[77]

However, to this, one commentator demurs that "medicine is not an ordinary consumer product. The opportunity to take advantage of . . . desperate, unfortunate patients is beyond description. . . . In respect to medical advertising, it might be argued that most adults are in a sense children."[78] The question of whether and to what extent such paternalism should be manifested is openly debated. While acknowledging the potential for abuse, the Supreme Court has ruled in favor of

> a potent alternative to th[e] "highly paternalistic" approach . . . "that alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[79]

Opening the channels of communication between professionals and consumers impels consumers to assess professional services more seriously. Bloom and Stiff contend that such an increase in consumerism will counter the danger of deceptive advertising.[80] Indeed, they conclude that the competition promoted by

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[73] *Id.* at 647-48.

[74] Benham, *supra* note 67, at 345.

[75] Smith & Meyer, *supra* note 56, at 58.

[76] *Id.*

[77] Kasteler, Kane, Olsen & Thetford, *Issues Underlying the Prevalence of "Doctor-Shopping" Behavior*, 17 J. HEALTH & SOC. BEHAV. 328, 337-38 (1976).

[78] Ward, *supra* note 25, at 438.

[79] Bates v. State Bar of Ariz., 433 U.S. 350, 365 (quoting Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 770 (1976)).

[80] Bloom & Stiff, *supra* note 72, at 651-52.

advertising will generate broad systemic changes. "[B]y some time in the 1990's . . . advertising will be recognized as having contributed to the development of a significantly different health care delivery system in this country—one that takes a much smaller share of our GNP than the one we now have."[81]

IV. The Present Study

A. Purpose

This study was undertaken to analyze the attitudes of a sub-group of physicians toward the advertising of their services. Clearly, since the *Bates* decision, advertising by physicians has become an industry; television advertising by medical professionals increased by forty-eight percent in 1983, rising to forty-one million dollars.[82] However, in spite of this economic development, it appears that only a limited proportion of the medical community actually advertises.

The advertising behavior of plastic surgeons has been of note to observers.[83] Cosmetic surgery addresses the individual's insecurities and personal feelings concerning beauty and aging; therefore, the problems of deception and overreaching by advertisers present themselves very sharply. Despite the wariness of professional societies, plastic surgeons have begun to advertise. The advertising itself runs the gamut from professional announcements of qualifications in the Yellow Pages to explicit representations, including "before" and "after" photographs and patient testimonials.

It is not surprising that plastic surgeons have addressed the public directly. Although cosmetic surgery is a lucrative field, doctors in other specialties, notably otolaryngology, opthalmology, and dermatology, compete with plastic surgeons for patients.[84] Perhaps for this reason, plastic surgeons have historically *not* relied solely on other physicians for patient referrals; in this, they may be differentiated from other tertiary medical specialities.

Since plastic surgeons have been in the forefront of physician advertising, a study of their attitudes could enable researchers to project the growth of medical self-promotion and the direction which it might take in the future.

B. Methodology

In addition to the basic research questions, demographic data were collected, including years in practice, practice setting, income, and referral sources.

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[81] *Id.* at 655.

[82] Wall St. J., Mar. 15, 1984, at 1, col. 5.

[83] In a recent article, the former director of research and development of the American Society of Plastic and Reconstructive Surgeons stated that "[t]here is a definite desire in the membership to embark on their own marketing programs." He noted that some within the ranks of the society have now urged that it advertise to promote the profession; however, others regard this as "sacrificing [our]selves on the altar of commercialism." Bussey, *Ads for Plastic Surgery Stir Medical Feud,* Wall St. J., Mar. 13, 1984, at 33, col. 3.

[84] *Id.*

Respondents were also queried as to their goals with respect to practice enhancement. Finally, the instrument surveyed present advertising behavior, including the contents and medium of the advertisement and length of advertising usage. Within this framework, one "Likert-type" statement concerning the likelihood of future advertising by non-users was employed.

This study is limited by the impact of changing conditions upon the issues regarding professional advertising and by the inherent nature of attitudinal surveys. In addition, the respondent sample was based on membership of the American Society of Plastic and Reconstructive Surgeons (ASPRS), for which board certification is a prerequisite; therefore, physicians in practice less than three years and those presently in residency training are not included in the sample.

The data in the present analysis were collected during the fall of 1983 as part of a broader-scale research design on physician advertising and peer-review organizations. The sample was drawn on a sequential random basis from a professionally prepared mailing list based on the ASPRS national membership roster. Five hundred questionnaires were mailed to plastic surgeons with a cover letter on the stationery of the New York University Graduate School of Business Administration explaining the purposes of the research project. Recipients were also provided with a postcard to be mailed to the investigator to enable them to obtain a copy of the survey results while preserving the anonymity of their responses. A stamped, self-addressed envelope was included with each questionnaire to encourage compliance. A total of 221 plastic surgeons, 44.2% of those surveyed, responded. There was only one mailing per respondent. The relatively high response rate can perhaps be attributed to the great interest that plastic surgeons have in advertising and the level of their emotional response to the inquiries it generates.

The questionnaire included twenty-one "Likert-type" statements; respondents were asked to state their opinion of each statement along a five-point scale, ranging from "strongly agree" (=1) to "strongly disagree" (=5). The data were evaluated using the analysis-of-variance statistical test to assess the degree of significant difference in the mean average responses between physicians, based on a cross-tabulation of advertising physicians as compared to the total group of respondents.

C. Preliminary Analysis of the Data

The initial computer analysis of cross-tabulations juxtaposed the attitudes of advertising plastic surgeons with the total number of survey respondents. The general direction of majority sentiment revealed by a comparison of their responses could have been predicted. However, the results were surprising in the relative standards of accord; neutrality as well as dispersion varies between the groups.

Advertising physicians disagree more than the total group with the statement that "physicians who advertise will no longer receive patient referrals from colleagues who refuse to advertise." Forty-three percent of the advertising group as opposed to sixteen percent of the total group disagreed or strongly disagreed. Of those who advertise, those advertising more than one year were more divided in their opinions than those advertising less than one year. This suggests that the length or intensity of advertising behavior may be a critical factor in colleagues' perceptions of the advertising physician.

The advertising group agrees much more strongly than the group as a whole that advertising makes it easier for the neophyte to develop a practice. Ninety-one percent versus a group norm of sixty-three percent agreed or strongly agreed with this statement. The advertising group also agreed more than the total group that "advertising attracts new patients to an old practice." Ninety-one percent versus a norm of fifty-five percent agreed or agreed strongly. No advertising physicians disagreed; this group demonstrated far less neutrality than the normal percentage of all respondents.

Surprisingly, thirteen percent of the total advertising group agreed or strongly agreed that "physicians, as professionals, should not engage in advertising." All of these responses came from physicians who had advertised for more than one year. They generally believe that the fact that their colleagues are advertising forces them to advertise. Unfortunately, the data does not enable analysis of whether this is merely a perception of the competitive environment, as opposed to reality. Further analysis of the available statistics might explore the demographic implications of this statement.

Another surprising finding is that fifty-two percent of the advertising group agrees or strongly agrees that "professional advertising will lead to gimmickery." Particularly strong agreement is seen in the group advertising for more than one year, although the basis for its judgment is not known. The number of neutral responses to this question was also larger than that for the general respondent group. Seventy-four percent of those who advertise, versus a norm of eighteen percent, disagreed with the statement that professional "advertising should be restricted to listings in telephone directories." Physicians seeking to increase their patient rosters see fewer problems with the appropriateness of sketches, before/after pictures, or patient testimonials in advertisements.

The advertising group disagreed more than the total group with the statement that "it is very difficult to commercially communicate competence and quality of services in the medical profession." Nevertheless, the majority agreed; of the advertising group, seventy percent agreed or strongly agreed, and of the total group, eighty-two percent agreed.

As with all respondents, the responses of advertising physicians yielded a spread with respect to the impact of advertising on price competition. Ten per-

cent more than the total group's percentage rate strongly agreed or agreed. Responses were also related to the respondents' income levels.[85]

The advertising group is more in agreement than the total group that "physician advertising will increase the quality of care in medicine." However, seventy percent disagreed or strongly disagreed with this statement as opposed to ninety-one percent of the total respondents.

As might be expected, in response to the statement that "advertising preys on the insecurities of the public," the advertising group disagreed more strongly than the total respondent group. Seventy-five percent of the total group agreed or strongly agreed with this proposition; however, thirty-two percent of those advertising nonetheless agreed and eighteen percent were neutral on this statement. The advertising group disagreed more than the total group that advertising will increase patient litigation against physicians. Seventeen percent of those physicians advertising agreed or strongly agreed.

Responding to the statement that "advertising has an adverse effect on the public's image of medicine," sixty percent of the total advertising group as opposed to only nine percent of the total group disagreed or strongly disagreed. However, twenty-seven percent of the advertising group agreed or strongly agreed; fourteen percent were neutral. Further analysis would be required to juxtapose economic and value judgments; undoubtedly, the responses indicate the conflict between these preferences.

The plastic surgeons who advertise reported much more disagreement with the statement that advertising will generate increased governmental regulation of medicine. Fifty-two percent of advertisers versus the norm of fifteen percent disagreed with the statement. The advertising group also demonstrated less neutrality in its responses.

V. Conclusion

The data reflect the concerns of plastic surgeons about the potential negative impact of advertising. Although they indicate awareness of the negative connotations of self-promotion, they also strongly acknowledge that advertising

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[85] Responses to the statement that "physician advertising will increase price competition" varied according to respondents' income levels, as demonstrated by the following data:

Annual Income	*Percentage Agreeing or Strongly Agreeing*
Less than $20,000	50
$20,000-35,999	29
$36,000-50,999	53
$51,000-75,999	31
$76,000-100,999	45
$101,000-150,999	33
$151,000-200,999	37
$201,000-300,999	28
Over $300,000	39

must be regarded as an important informational tool. Younger physicians have a more positive additude towards the role of advertising. Further analysis of the raw data is necessary to evaluate attitudinal factors affecting the propensity to advertise.

In addition, evaluation of physicians' attitudes toward peer review, associational self regulation, and governmental restrictions on the profession is essential to a complete understanding of all the issues involved in advertising. Such a discussion is well beyond the ambit of the present study. However, it is hoped that this initial effort will stimulate additional scholarly research and positive attention to these issues.