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Chester N. Mitchell

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THE IMPACT, REGULATION AND EFFICACY OF LAWYER ADVERTISING

By CHESTER N. MITCHELL*

I. INTRODUCTION

The legal profession has traditionally distinguished the market for legal services from other service markets. Avoidance of commercial advertisements as a source of information about the market for lawyers has been an integral part of that market's distinctiveness. Until recently every provincial law society restricted the content, frequency, scale and form of their members' advertisements. Canon 5(3) of the Canons of Legal Ethics of the Canadian Bar Association advises that: "The publication of ordinary simple business cards is not *per se* improper, but solicitation of business by circulars or advertisements . . . is unprofessional. . . ." This Canon follows almost verbatim the American Bar Association's formal ban on advertising formulated in 1908 to which the ABA's Canon of Ethics added: "The most worthy and effective advertisement possible . . . is the establishment of a well merited reputation for professional capacity and fidelity to trust." This ban was justified on the grounds that advertising was unnecessary.¹ While building a good reputation may have been the most effective form of promotion, it need not follow that all less effective methods should subsequently be prohibited. Similarly, while most lawyers in 1908 probably could rely on personal contacts alone, one cannot presume that these methods were even then "most worthy and effective" for every lawyer. A willingness to refrain from commercial advertising has its roots in the English class structure; a structure that operated in the fashion of a cartel. At one time practically all aspiring barristers at the Inns of Court were the sons of wealthy families; and this, at a time when the upper classes denigrated "trade". Commercial competition was considered crass.²

Lawyers, I shall presume, share features with other service-oriented professionals such as accountants, financial advisors, or ophthalmologists. Questions pertinent to legal advertising will to some extent relate to advertising issues in similar fields. Does advertising impede or assist market entry? Does advertising raise or lower prices? And if lower prices result will that increase demand for certain legal services? How effective in general has self-regulation been? Chief Justice Burger suggested in *Bates & O'Steen v. State Bar of Arizona*³ that the enforcement burdens of policing lawyer advertising stand-

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* Mr. Mitchell is a member of the graduating class of 1980 at the University of Western Ontario Law School.

¹ Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* (Chicago: ABA Press, 1980) at 1.

² *Id.* at 85.

³ *Bates and O'Steen v. State Bar of Arizona*, 97 S. Ct. 2691, 433 U.S. 350 (1977).

ards would be enormous.⁴ Does the record from other fields support that contention? Does the legal profession exhibit conditions conducive to fraudulent promotion? What type of advertising, if any, will most effectively sell legal services? And will effective advertising conflict with ethical considerations? The object of this paper is to answer these questions in light of the relevant research into advertising and to analyze the legal status of restrictions on lawyer advertising in terms of recent developments in anti-trust law in both Canada and the United States.

II. ADVERTISING AS ONE SOURCE OF INFORMATION

Before investigating the arguments for and against advertising, it is helpful to know the relative importance of commercial messages as compared to other sources of market information.

Advertising is visible, commercial and organized. For these reasons a tendency may exist to overestimate the impact of commercial promotions. Advertising agencies themselves have an incentive to exaggerate their ability to manipulate consumer responses.⁵ The editor of the *Journal of Advertising Research* admits, however, that "[r]esponses to advertising, despite our hopes, are usually weakly motivated."⁶ Winter concludes that the "alleged manipulative effects of advertising are simply not established in the literature."⁷ Fair maintains that an unwarranted belief in and a fear of the persuasive powers of both propaganda and advertising has developed since the 1940s.⁸ Psychologist J.A.C. Brown agrees that advertising has been overrated. Brown concludes that advertising is a "form of propaganda", and that the advertiser or propagandist is "comparatively helpless" in influencing established trends.⁹

The prime alternative to commercial advertising appears to be person-to-person, word-of-mouth communication. It has been said that word-

⁴ *Id.* at 2711 (S. Ct.), 387 (U.S.); also (1977), 63 A.B.A.J. 1093 at 1097. Contrast Chief Justice Burger's fear that lawyer advertising will create "problems of unmanageable proportions" with Bork's appraisal: "I think the damage ascribable to advertising is slight, and I suspect that in attempting to repair it, we are likely to do more harm in the aggregate than good." See, Bork, "Commentary," in Tuerck, ed., *Issues in Advertising — The Economics of Persuasion* (Washington: American Institute for Public Policy Research, 1978) at 49.

⁵ In selling his profession, ad man Paul Stevens, for example, makes the grandiose claim that "advertising can sell you anything." Stevens, *I Can Sell You Anything* (New York: Wyden, 1972) at 2. Stevens overlooks the economic fact that disposable income is limited and that as Brink and Kelley found, the consumer "is by no means easy to manipulate by the 'hidden persuaders,' . . ." Brink and Kelley, *The Management of Promotion* (New Jersey: Prentice Hall, 1963) at 354.

⁶ Ramond, *Advertising Research: The State of the Art* (New York: Association of National Advertisers, 1976) at 9.

⁷ Winter, "Advertising and Legal Theory," in Tuerck, *supra* note 4, at 16.

⁸ Fair, *The New Nonsense; the End of the National Consensus* (New York: Simon and Schuster, 1974) at 236-40.

⁹ Brown, *Techniques of Persuasion* (Harmondsworth: Penguin, 1963) at 189.

of-mouth advertising is the consumer's most important information source.¹⁰ It is apparently least vital in situations where buyers have little at stake and are not uncertain, thus the market for low price, low risk consumables such as soft drinks, cosmetics, beer, soap and confections represents the area least dependent on word-of-mouth advertising. As expected, these commodities are among the most heavily advertised products.¹¹ Nelson reports that the ratio of advertising expenditures to sales revenues for some of these products are: beer—6.8%, over-the-counter drugs—10% and perfume—14%.¹² By way of contrast, industries spending an average of 2% of revenues on promotion feature higher cost products such as motor vehicles, tires and appliances. Businesses with the lowest relative advertising budgets include primary industries and commercial enterprises where product costs are high and where both buyers and sellers are well informed.¹³

Legal services should be a low advertising business on two grounds. First, word-of-mouth contacts are most important where a high degree of uncertainty exists and much is at stake. The market for lawyers meets both of these criteria. Most people have only slight knowledge about lawyers. An American survey reported that 28% of Americans had used a lawyer only once while 33% had never employed a lawyer at all.¹⁴ Furthermore, when a lawyer's services are needed the stakes are normally high. As a result, 47% of the respondents in a Canadian Gallup Poll indicated that recommendations of family and friends were the primary means of selecting a lawyer. Another 14.6% of the anglophone respondents said they would most likely select a lawyer they met socially.¹⁵ The other important source of information guiding lawyer selection was the recommendation of business associates—again, a reliance shown upon word-of-mouth. As a consistent converse, a majority in that Gallup survey indicated that Yellow Pages advertisements were the source of information they would be least likely to rely upon.¹⁶

These findings, however, do not rule out commercial advertising as a potentially effective adjunct to personal recommendations. This is so for three reasons. First, the present reliance on personal contacts may be due in part to the absence of effective commercial promotions. Second, Yellow Page messages convey very limited amounts of data concerning legal services. Third, if advertising were permitted it might be most useful to persons who lack experience with lawyers and whose peers lack experience with lawyers.

The second ground for legal services being a low advertising industry is the relative importance of commercial transactions. Pashigan reports that in

¹⁰ Arndt, *Word of Mouth Advertising: A Review of the Literature* (New York: Advertising Research Foundation, 1967) at 70.

¹¹ Nelson, *Advertising as Information* (1974), 82 J. Pol. Econ. 729 at 739.

¹² *Id.*

¹³ *Id.*

¹⁴ *Supra* note 1, at 81.

¹⁵ Canadian Gallup Poll, "Omnibus Study," conducted by the Canadian Bar Association, March and April, 1978.

¹⁶ *Id.* at Table I.

the U.S., business firms generate the same dollar volume of business for the legal profession as individuals do.¹⁷ Thus at least half of the market for lawyers should follow the low advertising model. A poll conducted for the American Bar Association Journal supports this hypothesis: funds spent on advertising decrease as the number of lawyers in a firm increase and as lawyer income increases. Funds spent also depend on the nature of the practice.¹⁸ Shimp and Dyer found that "attorneys who intend to advertise are younger, practise by themselves or with a small firm and concentrate on the legal affairs of individuals rather than businesses or institutions."¹⁹

The proportion of respondents in the ABA poll saying they would "absolutely not advertise" dropped from 62% in 1978 to 49% in 1979. Overall, by 1979 only 7% of American lawyers had advertised. However, that figure understates future lawyer advertising. Not all state bar associations had completed their advertising regulations by the time of the study and old habits are not instantly changed. As a guide to the future, it may be noted that 14% of lawyers surveyed earning less than \$25,000 advertised whereas only 3% in the over \$50,000 bracket did. While a growth trend is evident, it appears that advertising-sales ratios will remain low because of the greater effectiveness of and need for word-of-mouth advertising and because of the large portion of legal service focused on business and institutional affairs. In the first year after Manitoba permitted lawyer advertising, fewer than half a dozen firms or lawyers availed themselves of their new opportunities. Only two firms, both in the real estate and mortgage field, mentioned prices in their ads.²⁰

III. ADVERTISING ISSUES

A. *Economic Effects*

Advertising has been criticized for raising prices and reducing competition. Are these allegations warranted? And if so, are they applicable to the market for lawyers?

Backman found no relationship between advertising-sales ratios and changes in price since 1945. High advertising ratios did not correlate with exceptional price increases.²¹ Telser's study, cited by Backman, indicated that advertising did not correlate with market concentration or stability of market share. Instead, this study suggests that freer entry and more competition exists among firms that produce heavily advertised goods.²² The counter-argument is that advertising encourages monopolization by establishing and

¹⁷ Pashigan, *The Market for Lawyers: The Determinants of the Demand and Supply of Lawyers* (1977), 20 J. Law & Econ. 53 at 67.

¹⁸ *Advertising Still Laying an Egg*, (1979) 65 A.B.A.J. 1014.

¹⁹ Andrews, *supra* note 1, at 83.

²⁰ Trebilcock and Hudec, *Lawyer Advertising and the Supply of Information in the Market for Legal Services* (1982), 20 U.W.O. L. Rev. [publication forthcoming].

²¹ Backman, *Advertising and Competition* (New York: New York University Press, 1967) at 36-38.

²² *Id.* at 61-66.

then insulating brand names from competition.²³ Researchers in the field report that heavy advertising can increase profits and impede entry by new firms; however, these effects are achievable only in the market for non-differentiated consumable goods or services.²⁴ Even where brand loyalty does impede new entrants, brand name development can serve a positive role as a means of saving on search costs²⁵ or for economizing on decision effort.²⁶ In any case, one must distinguish between the promotion of low cost, undifferentiated products, where advertising may bar entry, and the promotion of higher cost, distinguishable goods and services.

As stated above, the most heavily advertised products are those which exhibit the least quality differentiation.²⁷ Ehrenberg argues that in these markets there is "little scope for persuasive advertising."²⁸ Instead of directly persuading, advertising in these areas is intended primarily to maintain market share. It does this by reinforcing feelings of satisfaction for brands already being used; a process known as fixation.²⁹ The ability of producers to charge what appear to be monopolistic prices thus may depend more on psychology than on economics. Product originators may have a decided advantage over later entrants into the market on the basis of fixation alone. This advantage should be most pronounced with undifferentiated personal use products that are closely associated with personal satisfactions and pleasures. Consumers willing to pay higher prices for brand name products may be buying a placebo effect.³⁰ Conversely, where quality differences exist and where prices are higher, advertising becomes important as an inexpensive source of information.

Advertising as information reduces prices because it reduces the risk of innovation.³¹ The major source of competition, economists argue, is innova-

²³ This position was argued by the Federal Trade Commission in the case of *Realemon*; see *In Re Borden, Inc.* (7-30-78) ATRR (891).

²⁴ Comanor and Wilson, *Advertising and Market Power* (Cambridge: Harvard University Press, 1974) at 131-32.

²⁵ *Id.* at 116.

²⁶ *Id.* at 24. Higher prices for branded goods may also be taken as a measure of quality. Similarly, heavy advertising may be regarded as an implied warranty of quality. This may explain, in part, why generic prescription drugs often cost 80% less than their brand name counterparts. See Brecher, *Licit and Illicit Drugs* (Boston: Little, Brown, 1972) at 488-89; Canon, *Advertising: The Economic Implications* (London: Intertext Books, 1974) at 86.

²⁸ *Supra* note 11. *Supra* note 6, at 22.

²⁹ Fixation commences when people return to a previous source of satisfaction. Garan explains that as a satisfaction source is first enjoyed, "[t]he background for its evaluation increases, the object becomes more valuable and is sought still more for enjoyment." Garan, *Against Ourselves: Discords from Improvements Under the Organic Limitedness of Man* (New York: Philosophica-Library, 1979) at 50. Clearly this process is far more likely to occur with the use of inherently pleasant, personal use products than with the purchase of necessities, tools, capital goods or vital services.

³⁰ Winter rightly faults attacks on brand name promotion by consumerists who ignore the fact that people enjoy feeling more beautiful or more healthy than they are. In one sense, advertisements are designed to meet the demand for illusion. See Winter, *supra* note 7, at 19. On advertised brands see also Nelson, *supra* note 11, at 732.

³¹ Advertising can have considerable impact when information alone is required. Brown cites several examples of marketing successes in Britain and credits each of them to the "informative aspect of advertising". *Supra* note 9, at 175.

tion: new products, new techniques, new methods of management. In turn, competition reduces prices. Understandably, it is vital that potential customers be made aware of price and quality advantages. By reducing the time and cost of attracting customers, advertising limits the risks of innovating. On this basis, Trebilcock and Hudec suggest that the major cost of the present advertising ban may be the retarding effect that a lack of advertising has had on innovation and technological change in the legal profession. The evidence indicates that this argument has some merit. The general thrust of innovation in the production of legal services appears to involve inventive management, the use of paralegals, word processing equipment, pre-printed forms, computers and new methods of handling customer relations. As in other fields, many of these changes are capital intensive. Their successful implementation depends in part on attracting a large number of clients. Advertising then is important here for two reasons: to inform people of new price and service advantages and to build the high volume of business required to make the capital outlay feasible.

This supposition conforms with reports concerning optometrists.³² In states prohibiting the advertising of eye glasses and related services, eye glass prices were 25% to 100% higher than in states without such restrictions. The larger firms offered lower prices. Furthermore, these firms employed fewer optometrists per unit of sales. Legal clinics similarly lower prices in part by supplanting high cost lawyers with lower cost paralegals.

A study in California found that optometrists who did not advertise charged an average of forty dollars an examination while those who did advertise charged an average of twenty-seven dollars.³³ And a study of restraints on the advertising of prescription drugs produced estimates that the higher prices caused by these restraints totalled \$400 million in the U.S. for 1975.³⁴ American lawyers themselves report that fee competition since 1977 has forced them to lower their prices in some areas.³⁵

If advertising encourages the development of larger, commercialized firms will it not lead to monopolistic concentration? The largest four firms in Ontario now control only 5% of the total monetary value of legal business. Legal services, especially those for the household, are mostly local in nature. Local advertising is less expensive than the type of national advertising needed to create country-wide brand names. Furthermore, by their nature, service industries do not lend themselves to the degree of concentration present in the markets for sugar, steel, aluminum and the like. Large volume legal clinics expanded in number from eight to seven hundred between 1974 and 1980 in the U.S. but at the same time there are 400,000 attorneys in

³² Benham, *The Effect of Advertising on the Price of Eyeglasses* (1972), 15 J. Law & Econ. 340 at 340-45; Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control* (1975), 18 J. Law & Econ. 421.

³³ Andrews, *supra* note 1, at 79-80.

³⁴ Cady, *Drugs on the Market* (Lexington: Heath, 1975). See also Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (Washington: American Enterprise Institute, 1976).

³⁵ Andrews, *supra* note 1, at 80.

America. Therefore, while advertising may encourage some firm expansion in order to exploit economics of scale, the resultant concentration will not lead to monopolistic or even oligopolistic markets. Nation-wide marketing organizations such as those featured in the market for real estate services may be possible, although not desirable, but even these organizations do little to effect the autonomy of the local broker.

Finally, it may be noted that advertising can create goodwill for an advertiser. Like any capital asset, goodwill can strengthen a firm's competitive position and thus can act as a barrier to market entry. However, superior products, competent managers and any other factors generating satisfied customers act as barriers to new entrants. Barring those who cannot meet certain standards of service is a function that competition should serve.

B. *Advertising's Effect on the Quality of Legal Services*

Critics suggest that advertising will undermine the legal profession's sense of dignity and encourage a decline in the quality of service. Admittedly, some advertising is undignified and arguments have been made that mass marketing techniques promote short term considerations.³⁶ However, the market for lawyers is in most ways the antithesis of the market for low cost, mass produced consumption items or personal care products where undignified advertising may be the norm. Perhaps the most misleading advertisements have traditionally been those concerned with allegedly medicinal concoctions. The reason for this may be the *post hoc* fallacy. Since most disease is cured spontaneously it does not matter if the treatment supplied is totally irrelevant, positive results usually follow.³⁷ One may safely argue that legal problems do not have the same tendency to alleviate themselves with time.

Suitable analogies for lawyer advertising are found not in the sale of cosmetics and drugs but in the promotion of tax, banking, brokerage and accounting services. Since 1918, American banking services have been advertised. The dignity and the reputation of bankers does not appear to have suffered. Indeed, since surveys indicate that lawyers presently enjoy low public esteem, advertising may be able to improve their public relations.³⁸ Lack of familiarity with lawyers seems to breed contempt. For both lawyers and accountants, studies suggest that a majority of people do not know or understand what these professionals do.³⁹ Persons who have employed a lawyer rate lawyers higher than those who have not employed one.⁴⁰ Trebilcock finds that people with previous experience with lawyers "have a higher regard for lawyers as general problem solvers and as a resource to help pre-

³⁶ Brown gives the example of planned obsolescence, *supra* note 9, at 178. But the advertising emphasis on style, temporary relief, fashion, immediate gratification and other short term interests may be dictated by the type of product and the type of industry which benefits most from mass promotion. See Comanor and Wilson, *supra* note 24.

³⁷ Young, *American Self-Dosage Medicine*, (1974) at 4.

³⁸ See, e.g., studies conducted in Maryland and Kansas in 1979, cited in Andrews, *supra* note 1, at 77.

³⁹ Andrews, *supra* note 1, at 19.

⁴⁰ *Supra* note 38.

vent future problems.”⁴¹ Advertising can thus assist by informing the public of what lawyers do and when one is required. Advertising may also increase the volume of legal business, particularly among first time users. Greater public contact with lawyers will predictably increase public regard for the profession.

Can the volume of legal services delivered be increased by advertising? Campaigns by H&R Block and other tax services appear to have encouraged a large number of middle class, first time users to try tax preparers; and people obtain eye glasses with “greater frequency in the states with less professional control.”⁴² The amount of “new business” that is actually generated by advertisements is unclear, however there are reasons to expect that advertising will spark greater demand for lawyers.⁴³ Trebilcock and Hudek identify individuals and small businesses in urban settings as the main group facing significant information problems in assessing their legal needs. Mass media advertising should be most effective in the more densely populated markets and with respect to routine, frequently required services. Arguably, the legal needs involved will be those most susceptible to low cost, high volume production methods. Legal consumers most in need of standardized services are also those most likely to respond to commercial messages.

Will advertising cause a decline in legal service quality? Quality in law is not easily defined. Lawyers have not compiled or developed comprehensive criteria for qualitative assessments. Turning to other service industries, Benham found no differences between the lower and the higher priced optometrists.⁴⁴ Cady reports that pharmacists in states permitting advertising provided superior services than those in prohibiting states.⁴⁵ The legal clinics operated by heavy advertisers, Jacoby & Meyers, were compared to more traditional firms in the same area. The clinics were found to be more prompt, better at explaining matters and keeping clients informed, and more reasonable in their fees.⁴⁶ It should be noted, however, that this comparison lacked a proper cross-reference group. Nonetheless, the criteria of “quality” cited are also featured in the Canadian Gallup Poll, “Omnibus Study,” conducted for the

⁴¹ Trebilcock and Hudek, *supra* note 2.

⁴² Benham and Benham, *supra* note 32, at 441.

⁴³ American lawyers Ken Hur and Greg Home claim that their ads are attracting people who had never talked to a lawyer before and did not know how to find one. See Andrews, *supra* note 1, at 78. The relevant question, however, is whether these new clients would have failed to seek legal service but for the advertising campaigns.

⁴⁴ Benham, *supra* note 32, at 347-48.

⁴⁵ Cady, *supra* note 34.

⁴⁶ Andrews, *supra* note 1, at 81. Linenberger and Murdock tend to confirm these results. In their comparison of attorney and consumer attitudes regarding advertising they found that consumers felt fees were unreasonably high and current information sources were inadequate. The lawyers surveyed tended to the opposite opinion. Many attorneys suggested that lawyers who advertise are not as good as those who do not advertise but consumers do not make the same presumption. Consumers were confident that they could evaluate legal services and that they would not pick a lawyer merely on the basis of price. See Linenberger and Murdock, *Legal Service Advertising: Wyoming Attorney Attitudes Compared with Wyoming Consumer Attitudes* (1982), 17 Land & Water L. Rev. 209 at 239-40.

Canadian Bar Association, in March and April, 1978. Responding to the question what characteristics they desired in a lawyer, 50% said a person who will explain the details of the case, 40% said a person who will answer my questions and 23% said they wanted a lawyer who was warm and friendly. Only 5.3% said someone who knows the law and nothing more.

Advertising would be unprofitable if poor quality legal work dissuaded customers from returning. Many people, however, are one-time users and even when repeat business occurs, an average of seven years passes between visits to the lawyer. On the other hand, lawyers may not be able to identify those customers who will not be a source of repeat business. Nor do the one-time customers keep their judgments to themselves. According to Arndt, mass media are important at the awareness stage but "word-of-mouth is the most frequently used source at the evaluation stage."⁴⁷ While by no means the sole basis for judging lawyer performance, customers are apparently able to ascertain whether a lawyer is prompt, courteous, willing to explain in some detail and willing to answer questions. It is also possible that these indicia of good management skills will correlate with legal skills as well.

Advertising may also aid in maintaining quality service by permitting brand names to be established. A comparable situation exists when customers choose between one-of-a-kind restaurants and brand name franchises. While quality differences exist in both classes, it is easier to know what to expect with the brand names. Similarly, reputable department stores could, if permitted, develop legal services outlets just as they have done with insurance and travel services. Customers normally expect satisfactory quality from such retailers because products are pre-screened and guaranteed, and because the company depends upon repeat business. Economists agree that brand names are important sources of quality information in markets for expensive, differentiated goods or services. In the case of legal services, "brand names" should increase customer certainty and thereby encourage greater utilization of lawyers. As previously mentioned, advertising may lead to a greater degree of market concentration with the rise of large, consumer "legal supermarkets". Rather than reduce competition, however, it is more plausible to expect that the concentration likely to occur will increase competition in certain legal sectors. Larger, capital intensive firms will be able to deliver common and relatively standardized services to the household sector at new, lower rates which will put pressure on small, traditional firms and sole practitioners. The growth of larger firms, however, which by itself would increase concentration, may be countered by advertising's ability to increase total demand for legal services.

C. *Enforcement of Advertising Standards*

The accuracy and reliability of information is always an issue. There are good reasons though for concluding that misleading lawyer advertising will not be a significant problem. First, as Winter argues, fraud in general constitutes a "tiny fraction of commercial transactions". The FTC prosecutes a few hundred deceptive practices cases a year and almost half of those involve

⁴⁷ Arndt, *supra* note 1, at 71.

textile and fur mislabelling.⁴⁸ Bork suggests that trying to correct the damage attributable to misleading advertising may often cause more harm than good.⁴⁹

Certain forces deter all sellers from making false claims: the knowledge of the customer, the cost of a bad reputation, competition and legal remedies. Lawyers dealing with business clients normally face sophisticated consumers of legal assistance. This is much less true with customers in the household sector. If there are to be problems of deception they will most likely occur there.

Posner has identified the two kinds of sellers most likely to practice fraud:⁵⁰ sellers of innocuous or inherently uncertain goods and sellers who are transient with no stable customer group, no fixed business locale, no specialized resources and no visibility. Lawyers do not fit either criteria. Their service is not "innocuous" and, far from being transient, lawyers are among the more rooted of the community. In addition, lawyers are highly visible and they possess specialized skills. Finally, legal remedies related to false advertising or misrepresentation should be well known to lawyers and thus deter them more than other sellers. Since legal services are usually a major expense it may also be presumed that customers will have financial incentives to act upon perceived wrongs perpetrated by lawyer advertising.

Besides these economic and legal limits on deceptive advertising, varying types of self-regulation are practiced. The U.S. Department of Commerce once suggested that fear of government restraints was one of the least important and least powerful motivations for business self-control in advertising. Dozens of industries and trade groups maintain their own advertising standards.⁵¹ Limits are also applied by media owners. *Good Housekeeping* magazine tests the products advertised in its pages.⁵² Along similar lines, *The New Yorker* is notorious for its advertising policy. The magazine refuses all self-medication ads plus any other promotions found unsuitable, such as those for cut-rate jewellers or second rate hotels. One would guess that "cut-rate" lawyers would also be suspect.⁵³

Wherever advertising bans have been lifted, bar associations and law societies have instituted regulatory rules. These rules, and in many cases the

⁴⁸ Winter, *supra* note 7, at 31.

⁴⁹ Bork, *supra* note 4, at 49.

⁵⁰ Posner, *Regulation of Advertising by the F.T.C.* (Washingtons Institute for Public Policy Research, 1973) at 5-9.

⁵¹ Advertising Advisory Committee to the Secretary of Commerce, *Self-Regulation in Advertising*, (U.S. Department of Commerce, 1964).

⁵² See Brink and Kelley, *supra* note 5, at 365-71.

⁵³ Self-imposed media restrictions follow a long tradition. *The Times* of London, in 1850, regularly provided refunds if advertised products were in any way misrepresented. In contrast, some journals refused to accept such responsibility. They argued that sufficient protection for buyers was provided by the law. These publications, such as *News of the World*, became well known for the deceptive nature of the advertisements featured on their pages. See Nevett, *Honest and decent: the early days of voluntary control* (1980), 66 Advertising 30 at 31.

law as well, proscribe false and deceptive advertising. Are sales puffs included as being deceptive? Prosser describes "puffing" as an "expression of the seller's opinion only."⁵⁴ According to legal analysis, at common law when the seller praises in general terms, buyers are not entitled to rely literally upon the words used.⁵⁵

While probably not deceptive in any important sense, puffery does demean the consumer.⁵⁶ Furthermore, flattering but essentially empty claims by competitors may tend to cancel one another. On these grounds puffery should be completely avoided in lawyer advertising. This can be accomplished by prohibiting puffery names, like Wonder Bread, "weasel words" and non-comparative comparisons like "You expect more from Standard, and you get it." In other words, legal advertising should be free of opinion. Wisconsin trial lawyer Ken Hur sponsors a demolition derby car which carries the message: "Sideswiped? Call Ken Hur". The message and the medium are unusual but do not involve puffery. By comparison, one Chicago firm ran an ad with the headline: "The attorneys at Thomas H. Stern, P.C., practice aggressive marital law."⁵⁷ The word "aggressive" here is unacceptable. It is vague and opinionated.

Some contend that legal services cannot be standardized. If that argument is correct then advertised fees for "standard" or "routine" work are by their nature misleading. Certain legal work is very personalized or specific. Such work will not be advertised. On the other hand, the provision of any services will of necessity entail some degree of variation. Such variations do not preclude legal societies from establishing standard or minimum fees for legal work.

Deceptive lawyer advertising will be deterred by business self-interest, by legal sanctions and by self-regulation. The Law Society of Manitoba has formulated an excellent model of advertising regulation. A wide scope for advertising is permitted; for instance members may advertise both price and non-price information in any medium but the content of the advertisements is rigidly controlled. Non-price advertising must be incapable of misleading the public. It must also be dignified and free of claims of superiority. Price advertising must accurately describe the services provided, avoid words such as "from", "minimum" or "and up", and state whether disbursements are included. All firm members undertaking the advertised service must adhere to the fees quoted.

⁵⁴ Prosser, *Handbook of the Law of Torts* (4th ed. Minnesota: West 1971) at 722-23. As an example of what puffing entails, the Chicago Tribune bars advertisers from employing superlatives such as "lowest prices" but the Tribune itself is billed as "the world's greatest newspaper". See Preston, *The Great American Blow-Up-Puffery in Advertising and Selling* (Wisconsin: University of Wisconsin Press, 1975) at 4, 20.

⁵⁵ Prosser, *supra* note 54.

⁵⁶ While puffery may not be deceptive (depending upon whether our standard is the reasonable man or the credulous man), it is arguably effective in selling certain types of products. See Preston, *supra* note 54 at 28 and Baker, *The Permissible Lie: the inside truth about advertising* (Cleveland: World Pub., 1968) at 14-25.

⁵⁷ Andrews, *supra* note 1, at 11-12.

D. *Impact of Advertising on the Legal Profession*

Service industry advertising appears to encourage higher volume, lower profit-margin forms of business. Large pharmacies, for example, enjoy a greater market share in states permitting pharmacies to advertise.⁵⁸ As noted previously, established optometrists are likely to benefit if advertising is prohibited.⁵⁹ The dominant theme of the optometrists' Code of Ethics, in Benham's opinion, is thus the elimination of information sources that would most aid large-volume, commercial firms.⁶⁰

Extending the above findings to lawyers, general practitioners in small firms may well lose business to lower cost "commercial" firms. These operations may be in a position to practise what economists call "cream skimming." This occurs when a competitor gains control of the most profitable tasks leaving the tougher, less lucrative undertakings to weaker competitors. The effect is speculative. What is clear is that higher volume operations in the U.S. do lower prices on a certain range of legal services.

The impact of low price firms on the legal profession will depend upon what segment of the profession is being examined. Lawyers engaged in business and institutional work will hardly be affected. Likewise, lawyers in small towns and rural areas where economies of scale are not available will also not be significantly affected by the change. Two groups may benefit. First, those with the entrepreneurial skill to run a successful high volume legal business may have much to gain in terms of greater income. Second, an increasing number of new lawyers should also welcome advertising and the marketing changes it brings about. Inexperienced entrants naturally charge lower fees. If advertising can increase clients' awareness of price disparities, it may help reduce the time required to develop a viable practice. Advertising may also encourage clients to consider other lawyers, at least for some work; a change that will de-emphasize the traditional loyalties which hinder new entrants. Finally, there is the important possibility that advertising will increase the demand for legal services by attracting clients who would otherwise not hire a lawyer. Frierson found that middle-class Americans consistently overestimated lawyer's fees—91% over for a will, 340% over for advice on a two-page installment sales contract, 123% over for a thirty minute consultation. In addition, 75% had no will and 75% had not seen a lawyer on any personal matter within five years.⁶¹ The American Bar Association's study, *The Legal Needs of the Public*⁶² also detailed the public's problems of knowing how to find a lawyer, what a lawyer might cost and even when they required legal assistance. As examples, 60% of American homebuyers did not

⁵⁸ See Cady, *supra* note 34.

⁵⁹ See Benham, *supra* note 32, at 351.

⁶⁰ Whitman also argues that advertising engenders price competition and results in lower professional profits though the relationship between prices and profits is probably more complex than Whitman allows. See Whitman, *Advertising by Professionals* (1978), 16 American Bus. L.J. 39.

⁶¹ Freedman, "Advertising and Solicitation by Lawyers: Legal Ethics, Commercial Speech and Free Speech," in Hyman, ed., *Advertising and Free Speech*, (1976) at 66-79.

⁶² Curran and Spalding, *The Legal Needs of the Public: the Final Report of a National Survey* (Chicago: American Bar Foundation, 1977).

use a lawyer and only 27% of adults have up-to-date wills. There would appear to be a sizeable latent demand for lawyers. If advertising could stimulate that demand, then freer marketing regulations and lower prices should increase the demand for legal services. If the number of lawyers in practice remained constant while demand increased, prices would also increase, perhaps enough to offset the benefits of innovative operations. However, the membership in the profession is increasing. Economists predict that this alone would push prices down, especially in those areas where inexperienced lawyers can most easily enter the market.⁶³

Lawyers most unlikely to benefit from advertising are those who are already established in smaller, general urban practices. Two factors, however, mitigate the danger of price competition for the established practitioner. First, many legal services are not routine. Where the use of computers, forms and paralegals cannot reduce costs the high volume firm may have no advantage. Second, many criteria other than price are considered in choosing or retaining a lawyer. Factors such as competence, special expertise, honesty and reputation may matter more than price; a significant proportion of clients employ the same lawyer again. A majority of clients (63%) indicated in the Gallup Poll that they never discussed fees with their lawyer. Only 11% changed lawyers because of price or dissatisfaction. A study in Oregon (1978) found that the single most important factor in lawyer selection was the extent to which one is able to use the lawyer for all of one's needs.⁶⁴ Apparently, a long term relationship with a general practitioner is still highly valued.

If advertising does cause a net increase in demand for lawyers, an additional concern is raised. If more people hire more lawyers will there not be unwarranted strain on parts of the legal system—specifically the court system? While a larger volume of litigation because of advertising is possible, more litigation is not necessarily a negative result. And if genuine problems do occur they should be solved not by restricting access to lawyers but by changing court procedures or the law itself.

IV. ADVERTISING CONTENT AND MEDIA CHOICE

The Professional Organization Committee's report for the Ontario Government⁶⁵ recommended that the Law Society of Upper Canada should submit to the Attorney General a revised Rules of Professional Conduct permitting lawyers to advertise. These advertisements could provide both price and non-price information but only in print media. The Committee also suggested that in the absence of action by the L.S.U.C. the Ontario Government should move to amend the *Law Society Act*.⁶⁶ As can be seen, the primary difference between Ontario's proposed restrictions on advertising and Manitoba's actual regulations is the provision concerning electronic media.

⁶³ "Job-market trials of young lawyers," *Macleans*, Apr. 6, 1981 at 50.

⁶⁴ Andrews, *supra* note 1, at 83.

⁶⁵ Ministry of the Attorney General of Ontario, *The Report of the Professional Organizations Committee* (Toronto: The Ministry of the Attorney General, 1980).

⁶⁶ R.S.O. 1980, c. 233.

Permissible in Manitoba, lawyer advertising on radio or television would be banned in Ontario. Is this restriction reasonable? Why are television and radio less acceptable than print media? What lessons can be learned in this area from the advertising business?

Of the 7% of American lawyers advertising in 1979, 33% used the Yellow Pages, 31% the newspapers, 7% magazines, 7% leaflets, 2% direct mail and 2% radio. Very few used television.⁶⁷ By comparison, Benham found that some optometrists spent 80% of their advertising budget on local television.⁶⁸ Local television has also been used to good effect by Jacoby & Meyers, Cawley & Schmidt and Group Legal Services. State Bar Associations in Ohio, Oklahoma, Missouri and Connecticut have experimented with television campaigns.⁶⁹ In support of television, it has been argued that the broadcast media are the most effective and persuasive channels of mass communications.⁷⁰ A study by the Illinois State Bar Association in 1977 measured the response to three weeks of advertisements in television, radio and newspapers. Reportedly, 71% of the respondents remembered the television ads while only 39% recalled reading the same ad in newspapers.⁷¹ If television is an effective medium for advertising is Ontario's proposed limit on that medium simply another attempt to limit competition?

The arguments are notably weak. The above Illinois study commits the cardinal sin of advertising research—it measures communication by itself.⁷² According to Ramond, research must tabulate both what an advertisement communicates and what it sells. Advertising research has repeatedly found that successful communication may not sell anything. Similarly, advertisements can sell without apparently having communicated.⁷³

Critics claim that television is inherently more deceptive than other media; that it emphasizes style over substance and manipulates subliminally. Others suggest the manipulative capacities of television have been exaggerated. Zielske found that television commercials were quickly forgotten.⁷⁴ Current campaigns in more than a dozen nations to restrict tobacco and alcohol consumption by banning television commercials for these drugs have met with little success.⁷⁵ To repeat a point made earlier, however, other pro-

⁶⁷ *Supra* note 18. The lawpoll reports that as yet no individual lawyer or firm has utilized or intends to utilize television, however, Wisconsin lawyer Ken Hur proves an exception to this finding. See Andrews, *supra* note 1, at 12.

⁶⁸ Benham, *supra* note 32, at 349.

⁶⁹ Andrews, *supra* note 1, at 19, 23.

⁷⁰ Currie, *Attorney Advertising Over the Broadcast Media* (1979), 32 Van. L. Rev. 755 at 765.

⁷¹ *Id.*

⁷² See Ramond, *supra* note 6, at 3-4.

⁷³ *Id.*

⁷⁴ *Id.* at 53-55.

⁷⁵ See generally, Berger and Wiseman, *Report on Anti-Smoking Legislation* (Non-Medical Use of Drugs Directorate, 1976); Ogborne and Smart, *Will Restrictions on Alcohol Advertising Reduce Alcohol Consumption?* (1980), 75 Br. J. of Addiction 293; and Bourgeois and Barnes, *Does Advertising Increase Alcohol Consumption* (1978), J. of Ad. Research.

professionals have had success with television. E.F. Hutton's business tripled between 1970 and 1977. A six-week television campaign for Cawley & Schmidt allegedly brought in one new client for every ten dollars spent on advertising. At the least, Ontario's prohibition against proposed lawyer advertising on radio and television is probably not necessary.

If all media were available, what type of ad in what context will work best? The institutional advertisements funded by legal societies are directed toward three objectives: image building, promotion and provision of legal services in general. Efforts to build the image of the profession as a whole are a questionable use of resources.⁷⁶ This is understandable in light of what advertisers recommend. Successful campaigns are personal, they focus on one objective and ask the potential customer to do something specific. Ads promoting half-hour consultations with a lawyer for fifteen dollars or ads saying something specific about wills are more powerful than campaigns merely encouraging people to consult their family lawyer. Institutional advertisements can also err by explaining how society benefits from the profession. While flattering to the profession or the industry, these ads do not stimulate demand for legal services as do ads explaining how the individual can specifically benefit. Ads that use fear tactics and that are argumentative are also weak. Institutional ads can be useful, however, in providing information about lawyer referral services or in letting people know where explanatory brochures can be acquired.⁷⁷

Advertising responses in general should be measured, not assumed. A survey of lawyers who advertised in the first attorney advertising section of the *Los Angeles Times* revealed that 42% of the respondents received no calls as a result of their ads and that 81% found no one came in for a free consultation.⁷⁸ However, most of those initial ads were simply published business cards providing little information. Studies in Ohio and Maryland indicate that legal clients favour ads providing a generous amount of information.⁷⁹

People are exposed to thousands of advertisements each day. They are understandably selective about what they notice.⁸⁰ The prime consideration

⁷⁶ Image building or influencing public opinion is a "complex and uncertain" matter as Pierson stresses. Because the assessment of image building campaigns is so uncertain, there exists the danger of badly miscalculating the amount of promotion required. See Pierson, "Sales-Related and Institutional Advertising: The Case of Rate-regulated Public Utilities in Tuerck, ed., *The Political Economy of Advertising* (Washington: American Enterprise Institute, 1978) 207.

⁷⁷ Andrews, *supra* note 1, at 22-25.

⁷⁸ *Id.* at 16.

⁷⁹ *Id.* at 30. Advertising executive David Ogilvy advises that if one is advertising chewing gum, there is not much to say so keep the copy short. But if the product has many different qualities to recommend it then one should write long copy. In respect to this last type of product, Ogilvy concludes that "the more you tell, the more you sell". Ogilvy used 719 words of copy in an advertisement for Rolls-Royce and 960 words in an ad promoting industrial development in Puerto Rico. Ogilvy, *Confessions of An Advertising Man* (New York: Dell, 1963) ch. 5.

⁸⁰ Firestone, for example, lists eight "self-defence mechanisms" consumers possess that mitigate against the blandishments of commercial advertisers. See Firestone, *The Economic Implications of Advertising* (Toronto: Methuen, 1967) at 181.

for lawyers competing in the attention market would appear to be effective research.⁸¹ One must identify the correct target group, utilize the most effective medium and ensure that the message's content is noticed, remembered and acted upon. It would seem, for instance, that certain radio stations are the best means for reaching persons recently arrested,⁸² that television addresses the largest number of "middle class" and that classified newspaper advertisements are not effective in promoting legal services. Naturally, one must also be prepared to cope with the volume of business a successful campaign generates.

V. LEGAL ADVERTISING AND ANTI-TRUST LAW

According to the empirical evidence, prohibiting advertising increases a profession's profits by permitting members to charge above competitive prices.⁸³ As the Monopolies and Mergers Commission in the U.K. recently reported,⁸⁴ traditional restrictions on lawyer advertising are not in the public interest. The issue to be addressed in this section is whether the public interest can be protected by anti-trust laws. Are restrictions on lawyer advertising in any way illegal in Canada under section 32 of the *Combines Investigation Act*?⁸⁵ The Act was amended in 1976 to include the professions.⁸⁶ In 1978, the Director of Investigation and Research, *Combines Investigation Act*, decided that the Law Society of British Columbia and the Benchers of the Society had committed an offence under section 32 by finding lawyer Donald Jabour guilty of unbecoming conduct because of his advertising activities. The issue whether section 32 could apply to the Law Society went to trial.⁸⁷ At trial Mr. Justice MacKoff of the Supreme Court of British Columbia found that section 32 did apply, and that no conflict existed between the Act and the provincial statute, the *Legal Professions Act*.⁸⁸ According to MacKoff J., the object of the *Legal Professions Act* was to control the quality of the legal profession, whereas the object of the *Combines Investigation Act* was to suppress undue restraints on competition.⁸⁹ Section 48(b) of the *Legal Professions Act* prohibited "conduct unbecoming a member of the Society."

⁸¹ See generally, Mallickson and Nason, *Advertising - How to Write the Kind That Works*, (New York: Scribners, 1977) ch. 2.

⁸² Andrews, *supra* note 1, at 35.

⁸³ Restrictions on advertising by professionals contribute, on average, 10.8% to the earnings of professional practitioners in a sample of Canadian professions. Muzondo and Pazderka, *Professional Licensing and Competition Policy: Effects of Licensing and Competition Policy: Effects of licensing on earnings and rate-of-return differentials* (Ottawa: Consumer and Corporate Affairs, Research Monograph No. 5) at 127.

⁸⁴ England, Royal Commission on Legal Services, *Final Report* (1979) at 371.

⁸⁵ R.S.C. 1970, c. C-23, as am. (1974-1975-1976, c. 76).

⁸⁶ S.C. 1974-1975-1976, c. 76, s. 14(3).

⁸⁷ *Jabour v. Law Soc. of B.C., Law Soc. of B.C. v. A.G. of Can.* (1979), 98 D.L.R. (3d) 442, 45 C.P.R. (2d) 163 (B.C.S.C.).

⁸⁸ R.S.B.C. 1960, c. 214, s. 48(b)(iii) (now the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26).

⁸⁹ *Supra* note 87, at 456 (D.L.R.), 177-78 (C.P.R.). Discussed generally at 452-56 (D.L.R.), 173-78 (C.P.R.).

But advertising, *per se*, was held not to be "unbecoming behaviour".⁹⁰ MacKoff J. left the Benchers authority to find some advertising "unbecoming"; indeed, he stated that the Law Society had a duty to establish and enforce advertising standards.⁹¹ There was, however, "no specific nor implicit authorization in the *Legal Professions Act*" by which the Law Society could impose a "blanket restraint tantamount to a complete prohibition of advertising."⁹² Due to this lack of specific authority, section 32 did apply to the defendants. Whether or not section 32 was contravened was not argued.

On appeal, the British Columbia Court of Appeal decided that the Law Society could prohibit commercial advertising by its members.⁹³ Since the court cited, "without apology", the related American cases of *Bates*,⁹⁴ and *Parker v. Brown*⁹⁵ and relied in part upon these cases for support in the rejection of the anti-trust argument, an analysis of the cases is warranted.

Parker v. Brown established that the *Sherman Anti-Trust Act*⁹⁶ did not apply to state government actions. The object of the Act, it was reasoned, was to prevent damage caused by private sector monopolies. But monopolies created by state governments should be presumed to be in the public interest. The *Parker* doctrine is based on considerations of federalism and judicial restraint. Regardless of their wisdom, state economic regulations are exempt from anti-trust laws.⁹⁷ In *Parker v. Brown*, the State of California created a marketing board to fix agricultural prices. Implementation of controls was determined by referenda among radish growers. In effect, the *Parker* scheme amounted to a state-sanctioned agricultural cartel.

Price fixing was also featured in *Goldfarb v. Virginia State Bar*.⁹⁸ A schedule of fees for title searches established by the Virginia Bar was judged to be in violation of the *Sherman Act*. The Bar in *Goldfarb* acted as a private organization, not a "state agency"; therefore, the "state action exemption" from *Parker* did not apply. The prerequisites of the exemption by the time of *Bates* were threefold:⁹⁹

1. state regulations must authorize the anticompetitive activity;
2. the state regulations must directly order and compel the activity;

⁹⁰ *Id.* at 462 (D.L.R.), 183 (C.P.R.).

⁹¹ *Id.* at 463 (D.L.R.), 184 (C.P.R.).

⁹² *Id.*

⁹³ *Jabour v. Law Soc. of B.C.; Law Soc. of B.C. v. A.G. of Can.* (1981), 115 D.L.R. (3d) 549 at 561, [1981] 2 W.W.R. 159 at 175, 53 C.P.R. (2d) 87 at 100 (B.C.C.A.). Aff'd S.C.C., Aug. 9, 1982, not yet reported. See Strauss, "Restrictions on lawyer's ads upheld by the Supreme Court," *The Globe and Mail* (Toronto), Aug. 10, 1982 at 1, col. 1.

⁹⁴ *Supra* note 3.

⁹⁵ 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943).

⁹⁶ 15 U.S.C. s. 1-6 (1976).

⁹⁷ Page, *Antitrust, Federalism and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum* (1981), 61 Boston U. L.R. 1099 at 1100.

⁹⁸ 421 U.S. 773, 44 L. Ed. 2d 572 (1975).

⁹⁹ Student Project, *Attorney Advertising: Bates Impact on Regulation* (1978), 29 S. Carolina L.R. 457 at 494.

3. the anticompetitive activity must relate to the primary purpose of the state regulations.

These three conditions were met in *Bates*. Bates and O'Steen conceded that their advertisements violated Disciplinary Rule 2-101(B). This rule was adopted by the Supreme Court of Arizona as Rule 29(a). In addition, Rule 29(a) specifically prohibited lawyers from advertising in newspapers, magazines, or telephone directories and on radio and television, and so on. These restrictions also related directly, so it was reasoned, to the regulation of the legal profession by the state. Seaton J.A. for the British Columbia Court of Appeal approved of this part of *Bates*, saying: "I think . . . that that is the proper approach to the relationship between provincial or state regulatory authorities and federal anti-combines legislation."¹⁰⁰ One of the three conditions necessary to preclude anti-trust law was not, however, satisfied in *Jabour*. The provincial statute did not "directly order and compel the anti-competitive activity."¹⁰¹ There was no reference to advertising in the *Legal Professions Act*. The Benchers' rulings which did mention and affect advertising were not rules made pursuant to a statute.¹⁰² If the court is to suspend inquiry into anticompetitive activities out of respect for provincial autonomy then arguably, it should be evident that the activity has been clearly authorized by provincial legislation. Without authorization the activities would be criminal offenses, therefore the authorization should be express, not implied. In *Bates* the authorization was perfectly clear; in *Jabour* it was not.

Two other difficulties confront the Court of Appeal in its finding support in *Bates*. First, because it was open to the *Bates* Court to find the Arizona prohibition unconstitutional on First Amendment, freedom of speech grounds, a close scrutiny of the *Parker* doctrine was not required. The third condition of the state action exemption, for example, appears to leave room for a variety of interpretations. Since *Goldfarb*, the Supreme Court has shown renewed interest in *Parker*.¹⁰³ Most recently in *Midcal Aluminum*,¹⁰⁴ the Court narrowed the *Parker* exception to those anticompetitive policies "actively supervised" by state agencies. While this distinction between supervised and unsupervised authorization may prove to be unworkable, it is clear that on facts similar to *Parker* the Court is now saying the Sherman Act applies.

Second, the United States Justice Department reportedly intends to pursue further anti-trust actions to clarify those circumstances in which the organized bar functions as a private group making agreements subject to anti-trust violations, as in *Goldfarb*, or as a state agency, as in *Bates*. Thus, in the United States, the state action exemption doctrine, which *Jabour* did not satisfy as it stood in 1977, is being narrowed further.

¹⁰⁰ *Supra* note 93, at 572 (D.L.R.), 188 (W.W.R.), 110 (C.P.R.).

¹⁰¹ *Supra* note 87, at 463 (D.L.R.), 184 (C.P.R.).

¹⁰² *Supra* note 87, at 461 (D.L.R.), 182 (C.P.R.).

¹⁰³ *Supra* note 97, at 1101.

¹⁰⁴ *California Retail Liquor Dealers v. Midcal Aluminium, Inc.*, 445 U.S. 97, 100 S.C. 937 (1980).

It should be noted that despite the *Bates* decision, which forced state codes to lift the total ban on advertising, major limitations still face many American lawyers wishing to advertise.¹⁰⁵ In Hellman's opinion some of the proposed responses to *Bates* "seem designed more to thwart advertising by lawyers than to permit it."¹⁰⁶ States limit content by, for example, forbidding hourly rates to be advertised; Georgia attorneys cannot use color, graphics or type larger than one half centimeter and direct mail advertising is prohibited in thirty-eight states.¹⁰⁷

These developments suggest that even if a ban on commercial advertising is found to be subject to and in contravention of s. 32 of the *Combines Investigation Act*, less stringent but still anticompetitive rules could be substituted. Such stop gap measures, however, may be short lived if the American Supreme Court example set in *In Re R.M.J.* is followed.¹⁰⁸ In that case the Court clearly felt free to ask whether the advertising restraint in question was in the public interest.¹⁰⁹ Since most advertising restraints imposed by the organized bar are not in the public interest, a combination of federal pressure, adverse publicity and continuing anti-trust challenges will likely encourage Canadian law societies to reform their advertising codes.*

VII. CONCLUSION

Lawyer advertising will probably be of significance only in the market for personal legal services in large towns and cities. In that market, advertising will encourage innovative methods of supplying legal services. Advertising will assist new entrants and increase competitive pressures. Lower prices for certain types of services will result. Improved access due to client information and lower prices will increase the demand for lawyers in the effected market. Lawyers' services, despite a more liberalized approach to promotion, will remain in the low advertising-to-sales ratio category. Elaborate and rigid regulatory schemes to supervise lawyer advertising are probably not required because a number of factors will limit deceptive lawyer advertising.¹¹⁰ If it is true that potential clients generally want and respond most favorably to factual, informative advertisements devoid of hype and puffery then good ethics will be synonymous with good business. Finally, competently conducted research and experimentation is needed to ascertain what type of advertisement will best suit the needs and objectives of lawyers.

¹⁰⁵ Andrews, "The Selling of a Precedent" (1982), 10 *Student Lawyer* 12 at 14.

¹⁰⁶ Hellman, *The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal and Policy Questions* (1978), 31 Ok. L.R. 509 at 509.

¹⁰⁷ *Supra* note 105, at 47-48.

¹⁰⁸ *In Re R.M.J.*, 50 LW. 4185 at 4189 (S. Ct. 1982).

¹⁰⁹ *Supra* note 105, at 47.

¹¹⁰ See notes 5, 9 and 80, *supra*.

*The efficacy of such challenges now appears tenuous given the Supreme Court of Canada's recent ruling in the *Jabour* case, rendered after the writing of this article. *Supra* note 93.