

PERSPECTIVES

On the Professions

A periodical of the Center
for the Study of Ethics in
the Professions (CSEP),
Illinois Institute of Technology

HUB Mezzanine, Room 204, 3241 S. Federal Street, Chicago, IL 60616-3793
Tel: 312.567.3017, Fax: 312.567.3016, email: csep@iit.edu

Vol. 19, No. 2

Spring 2000

"Advertising and Professional Ethics"

Michael Davis, Editor, CSEP,
Illinois Institute of Technology

Before 1975, professions in most Western countries, including the United States, were clear about their relationship to advertising. Professionals were to advertise only in the most limited and dignified way. No professional could properly advertise price, make a claim for special abilities, or appear in a radio or television ad.

Professional codes generally contained detailed provisions concerning advertising. For example, the most important of the engineering codes then said in part:

Engineers may advertise professional services only as a means of identification and limited to the following: Professional cards and listings in recognized and dignified publications, provided they are consistent in size and are in a section of the publication regularly devoted to such cards and listings. The information displayed must be restricted to firm name, address, telephone number, appropriate symbol, names of principal participants, and fields of practice in which the firm is qualified.

Professionals did, of course, market their services even then, but they did not call what they did "marketing." They became active in organizations where they were likely to meet clients, gave informational talks about what they did, did some work that did not pay well in order to put their work before the public, handed out their dignified business cards freely, and otherwise tried to "meet people." But they did not distribute glossy brochures, bid for jobs, or otherwise openly compete with one another for employment. They generally tried to carry on their occupation "like gentlemen." Those who did not conduct themselves like gentlemen were subject to professional discipline. Even professional societies willing to leave much malpractice to litigation would send out teams to measure the size of signs over practitioner offices, citing anyone whose sign was too large. Those cited too often might have their license to practice suspended or revoked.

The New Order

All that began to change in 1975 when the U.S. Supreme Court ruled, in *Goldfarb v. Virginia State Bar*, that a professional society setting minimum prices for services was a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act. In 1978, the Court added, in *Bates v. State Bar of Arizona*, that, for the

same reason, a state bar association could not prohibit lawyers from advertising in a newspaper the price of services at their legal clinic. 1978 was also the year the Supreme Court ruled that the National Society of Professional Engineers could not prohibit competitive bidding.

By 1980, professions in the United States had entered the age of advertising (and marketing). Virtually all professional advertising not false or likely to mislead was, however undignified, permitted. Professions in other countries were not quick to follow America's professions into that new age, but they do seem to be following. In 1994, for example, Australia amended its Legal Profession Act to allow solicitors to advertise much as American lawyers do.

What then has been the result of our two decades' experiment with professional advertising? Are we better off now that the professions can advertise and market their services like other businesses? Worse off? This issue of *Perspectives* should help to answer such questions.

Some Facts

We begin with the facts. Boris Becker tells us that surveys show that more Americans today favor professional advertising than did in the 1970s or 1980s. More

professionals do too. But, even within a single profession, the attitude of professionals can vary quite a bit. Differences in attitude do not, however, seem to explain which professionals advertise and which do not. Economics seems to explain that: those who need advertising ing, to survive, advertise; those that do not, do not.

Becker distinguishes between "price advertising" and "non-price advertising." Price advertising seem to reduce prices. Whether the public benefits from the lower prices is harder to say. Lower prices seem to lead to lower quality (as measured, for example, in time spent with client or patient). Non-price advertising does not reduce prices. Indeed, those who engage in nonprice advertising generally charge more than those who do not advertise.

Whatever its benefits, professional advertising does not seem to have ushered in an age of cheap doctors, cheap lawyers, or even cheap accountants. If the professions used to be conspiracies in restraint of trade, they do not, on the evidence, seem to have been very effective conspiracies.

Hired Gun, Will Travel

It is in this context that Jonathan Van Patten, a lawyer-academic, undertakes a two-part critique of lawyer advertising. Physicians, accountants, and even hospital administrators will have no trouble transferring Van Patten's conclusions about his profession to theirs.

The first part of Van Patten's critique is negative. "Commercialism" is not, he argues, what is wrong with lawyer advertising. For Van Patten, a

lawyer in private practice is, and always has been, engaged in commerce. The second part of his critique considers what, in what is admittedly a business, could still be wrong with (some) lawyer advertising.

Much of the quality of work that lawyers do is, he argues, invisible, making it hard for consumers to assess. The claim that law is a profession is, in effect, the lawyer's promise to put aside opportunities to benefit herself in ways disadvantageous to clients, yet undetectable by them. What is wrong with most lawyer advertising is that it focuses on standardized services (such as a simple will), the least important part of the practice of law (and, I might add, the part most likely to be replaced by cheap software). What advertising should stress is the lawyer's character, but who would want to hire a lawyer who called himself "honest John?" Because claims of good character would be hard to establish, advertising one's character is also probably unethical.

Character

Michael Brody, a practicing lawyer, undertakes to defend the very advertising Van Patten finds most objectionable. Suppose a lawyer appears in a television ad, law books behind her, and says in a tough voice, "Been injured? Why not sue the bastards? For a free assessment of your case, call" She sounds tough, not likely to be polite in negotiation or to settle on the first offer. So long as she is that kind of lawyer, such an ad conveys information useful to potential clients, not only information about how to reach the lawyer but about what kind of lawyer she is. Only dignified lawyers should have dignified ads.

Though Brody disagrees with Van Patten on "over the top" advertising, he does agree with him that character should play a fundamental role in the choice of a lawyer. Brody even points to a threat to that fundamental role in the least controversial form of marketing.

In many parts of the law, the lawyer seeks to build a long-term relationship with the client. The lawyer will "entertain" a client, hoping for business by helping the client know the lawyer as someone to be trusted. The lawyer-client relationship may come to resemble ordinary friendship, but (ordinarily) the relationship is not ordinary friendship; it is "business friendship", a relation for use unlikely to survive the use. Lawyers should be careful not to give the impression that the relationship with a client is something it is not.

Advertising to Professionals

The three pieces discussed so far are about advertising by professionals. The last piece is about advertising to professionals. Many professional journals accept advertising likely to be of special interest to their readers because those readers are members of the profession. What ethical issues does such advertising raise?

David Orentlicher's answer explicitly concerns only (technical) medical journals. Many of these journals, such as the Journal of the American Medical Association, have strict rules about what advertising they will accept. In general, they will not accept ads for ordinary consumer goods or services. The ads must be for medications, medical equipment, or the like.

The journals defend this policy on three grounds: first, such ads make the journal more useful (the ads provide needed information); second, non-medical ads are aesthetically objectionable ("tacky"); and third, the professional journal could not survive without advertising or even on general advertising (their niche is medical advertising).

Orentlicher argues that these grounds, even taken together, are inadequate. So, for example, while medical advertising is, as such, more informative than no medical advertising, its net contribution to reader information may still be negative. Insofar as those reading the journal worry that the ads may affect editorial judgment, preventing the publication of studies critical of a drug advertised or encouraging publication of otherwise dubious studies favorable to the drug, the journal has created an apparent conflict of interest reducing the value of the technical studies it publishes. Since publishing the technical studies is the primary reason for the journal, that is a high cost to pay for whatever information the ads provide.

Something Completely Different

The editorial policy of Perspectives rules out footnotes. Ordinarily, contributors do not object. But two contributors to this issue did. They asked, with considerable passion, to include a few acknowledgements. We gave in. The acknowledgements are here, at the end of the Introduction, to preserve Perspectives' format.

Boris Becker wanted to thank David J. Becker, a doctoral candidate in Economics, University of California, Berkeley, for commenting on an

earlier draft.

David Orentlicher wanted to indicate that his piece is based on a much longer article he wrote with Michael Hehir: "Advertising Policies of Medical Journals", 27 Journal of Law, Medicine, & Ethics 113-121 (1999).

Readers will have noticed that Perspectives has joined a number of other journals whose actual date of publication trails the official date by many months. We have noticed that too. We hope that, now that the Center for the Study of Ethics is resettled in a comfortable suite after half a year divided into four parts, and its new staff is no longer new to the tricks of computer-assisted publication, we shall be able to catch up.

-MD

"Professional Advertising: Who, How and Why"

Boris W. Becker College of
Business, Oregon State
University

Since "legalization" of advertising for professional services in the 1970s, research on such advertising has grown along with the advertising itself. The research has focused on three issues: First, what are the attitudes of professionals, and their customers, towards advertising? Second, how much do professionals advertise, and why? Finally, how has advertising of professional services affected their price and quality? Let's consider these issues in order.

Attitudes Towards Professional Advertising

Two threads appear in a substantial body of empirical research on attitudes towards professional advertising. First, with remarkable regularity across all the professions studied, customers are more positive towards advertising than are the professionals. Second, during the late 1970s and throughout the 1980s, attitudes of both customers and professionals became more positive towards advertising. That trend may have ended, however. In one recent study, for example, the term most commonly used to describe attorney advertising was "irritating." About the same number of consumers that described attorney advertising as "informative" described it as "misleading."

The attitude of professionals towards advertising seems to be correlated with three factors. First, the strongest correlation - a very negative one - is with number of years in practice. Younger practitioners are more positive towards advertising, perhaps because they entered the profession after the formal ban was lifted and advertising became "normal." Second, "specialists" tend to be more negative towards advertising than are "general practitioners", probably because specialists feel less need to advertise. Third, and unsurprisingly, those who advertised were more favorable to advertising than those who did not - perhaps because they liked the effects of their own advertising, or because they could not admit, even to themselves, that they had done something objectionable.

Professionals and Advertising Usage

How much do professionals

advertise now? A reasonable estimate is that at least sixty percent of professionals now use some form of advertising. The most popular form is the Yellow Pages (something beyond a mere one-line listing). Other print media are next most popular, with electronic media least popular.

Why do professionals use advertising at all? In a study of dentists, a colleague (Dennis Kaldenberg) and I investigated the impact of a variable that many, including some scholars, think the primary explanation of why professionals advertise - practitioner values. That explanation seems plausible on its face. After all, younger practitioners are more positive about advertising, and we know that, in general, different age-cohorts have different values. Our research, however, failed to find any connection between personal values and the use of advertising or attitude toward its use.

What does seem to matter is simple economics. In the study of dentists referred to above, we presented a concluding summary that may be illuminating. We found that the practitioners we studied could be divided into four groups.

First, there were practitioners who spent little on advertising and still had many new patients. Who were they? We suspect they were either specialists (whose patients came by referral), or established general practitioners (who had strong enough word-of-mouth endorsement from patients not to need other advertising).

Second, there were practitioners who both advertised a good deal and had many new patients. Who were they? They may have been

dentists whose practices had high turnover (for example, because they were located in a neighborhood with high in- and out - migration), or specialists, but those who appeal directly to potential customers (such as cosmetic dentists). Either kind of dentist is likely to be both younger than the average dentist and have a practice in need of advertising to grow.

Third, there were practitioners spending significant sums on advertising, but not attracting many new patients. These were likely to have had the newest practices and to be convinced that advertising works, although it may not have done much for them yet.

Finally, there were practitioners with few new patients and little or no advertising. These were probably older dentists, winding down their practice, or those who do not believe in the effectiveness of advertising or are satisfied with their current level of "busyness."

While we cannot simply extrapolate our findings on dentists to all professionals, we believe that the data are highly suggestive.

Marketplace Consequences

The market impact of advertising can be shown in several ways. First, we have direct empirical evidence for attorneys in personal injury cases that advertising and referrals may be substitutes for one another. That is, as advertising grows in importance, referrals decline. It seems reasonable to infer that the same relation holds for advertising in other professions.

Second, a large and respectable

body of research has focused on the relationship between advertising and the price of professional services. A 1976 study comparing ten commonly dispensed prescription drugs, found that prices were significantly higher in states that had restrictions on drug advertising than in those that did not. A similar study, also done in the pre-legalization era, found that the price of eye glasses was significantly higher in those states with advertising restrictions. Since one of the reasons that the Federal Trade Commission gave for allowing professionals to advertise was this price differential in optometric services, there have been several studies of pricing for those services. What these studies found, in general, is that in markets that permitted advertising-non-price advertising had little impact on prices for either eye glasses or eye examinations, while price advertising led to lower prices.

The effect that advertising has on quality of care is more mixed. In markets that allowed for advertising, non-advertisers spent more time on each eye examination than did those who advertised. But research using an index of eye health found no significant relationship between advertising and quality of care.

A famous study of attorneys in Phoenix, Arizona, found something similar. Attorneys who advertised charged significantly less for routine legal services than those who did not. (Of course, the obvious caveat is that it is impossible to separate cause from effect in a "time-slice" study like this; it could be that attorneys seeking to attract more clients both use advertising and offer lower prices, without the use

affecting the price.) Later, the same authors, using similar data from seventeen metropolitan areas, found an inverse relationship between quality of legal care (as measured by time spent with client) and use of advertising.

Price advertising is unusual for physicians, probably because physician services are hard to standardize. What of non-price advertising? Advertising may have either of two economic consequences. First, it may serve primarily as information, forcing prices down by adding to the range of options available (and so, to more competition). Second, non-price advertising may serve primarily as persuasion, differentiating the product (for example, by convincing potential patients that they need a certain treatment), increasing demand for that product and thereby forcing prices up. A particularly important study suggests that the second effect may predominate, at least for physicians. Advertising allows them to charge higher prices, and the patients then get better care, as measured by time spent with them. For physicians, advertising may be used primarily to attract certain patients, the less price-sensitive, who are more fully insured, and who may expect better care.

"Ethics" does not appear to be a significant factor. While the absence of any relationship between values and attitudes towards advertising (or the use of advertising) initially surprised me, I now believe that the key factor in the decision of professionals to advertise is whether they think the advertising can help them accomplish the goals they set for their practice. If the answer is "yes," then they are likely to

advertise.

What We Still Do Not Know

Of the things we still do not know about professional advertising, the most fundamental is whether current relationships (and trends) will continue, for example, will professionals who now advertise to build their practice continue to advertise after their practice reaches the desired size?

Whether the current relationships continue will, of course, depend (in part) on the economic environment. Since that environment seems to be undergoing radical change, we cannot know what it will be and so cannot say how it will affect current relationships. The trend away from solo medical practice has, for example, already made moot the historical reluctance of physicians-among professionals often the most negative towards advertising-to engage in advertising. Their managed-group practices are becoming heavy users of advertising.

We also do not understand current relationships very well. Without long-term studies of the advertising of professionals, we cannot tell cause from effect.

A Concluding Thought

For better or worse, there is, I think, no going back to the days before professionals advertised. Whether the professionals are dentists, attorneys, engineers, or whatever, they will continue to advertise to help achieve their goals. Of course, they will often fail. Much advertising is misdirected, poorly executed, or too little to have any impact. But that is another story, isn't it?

"Lawyer Advertising and Professional Ethics"

Jonathan K. Van Patten,
University of South Dakota
School of Law

"Injured? We can help. Know Your Legal Rights. FREE telephone interview. FREE office visit. FREE brochures about personal injury cases. Our Policy: Reasonable fees - no deposit required. We never represent insurance companies, only injured people - we're on your side." Typical lawyer ad these days? Yes. Does it generate ethical concerns -either large or small? Not in and of itself. A sense of unease? Yes. Why? Let's think about it.

Commercialism

Much criticism of lawyer advertising is misplaced. While ostensibly concerned with ethics, it may actually serve other agendas. Attacks on a lawyer's advertising for personal injury cases, for example, are often attempts to create a predisposition against plaintiffs' claims in the minds of prospective jurors. There may also be an element of self-righteousness involved. The attacks imply that lawyers who advertise are not good enough to attract clients through the more traditional ways, reputation and word-of-mouth. Criticism of lawyer advertising may also reflect class or social differences (if that term can be used to describe differences in attitude between members of the established bar and neophytes).

Perhaps the best way to express a principled reservation about lawyer advertising is to say that commercialism might have a corrosive effect on

professionalism. This way of stating the problem, properly understood, does not rest on the outdated image of a legal profession unsullied by the forces of the market. (The substantial overhead necessary to run a modern law office, including rent for space, staff, equipment, library, furniture, and furnishings should be more than sufficient to dispel that image.) Rather, this way of stating the problem grounds it in the inherent tension between ethics and self-interest. The primary ethical norm relating to clients is that the client's interests are superior to the lawyer's. The lawyer's interests are subordinated, but not lost. The creative resolution of the tension honors the client's interests without losing the lawyer's.

This tension was largely missed by Justice Blackmun in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), a decision which opened the door to lawyer advertising under the First Amendment's protection of "commercial speech." Blackmun viewed lawyer advertising as a way for lawyers to provide information to potential clients: The interests of the client and lawyer are essentially compatible rather than as competing; potential clients need the very information lawyers want to put into their advertising. On the other hand, Justice O'Connor, dissenting in another advertising case, *Shapiro v. Kentucky Bar Assn.*, 486 U.S. 466, 488-89 (1988), viewed restraints on advertising in terms of the struggle against self-interest: "One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of

economic success by adhering to standards of conduct that could not be enforced either by legal fiat or thru the discipline of the market."

It might seem slightly paradoxical that standards of conduct that cannot be enforced legally or through market forces may nevertheless have force. Ethical norms act as overarching principles that direct and inform the decisionmaking process. They help to shape character but do not create it. An ethical norm is not an end in itself.

Character

In the practice of law, ethics is ultimately a matter of character. Much of what lawyers do is not understood by clients, nor is it amenable to any kind of precise measurement. Accountability is often fluid. Yes, there is some "bottom line" reckoning in terms of winning and losing. But in the overall movement (or non-movement) of a matter to resolution, there is considerable flexibility.

What should a client know before hiring a lawyer? Clients should know the answers to several questions not even hinted at in lawyer advertising: "This is very important to me. Will you treat it as if it were important to you? Do you have the time to give my case the attention it deserves? How will you balance that time commitment with other important cases or matters? How do you decide which files to work on before others? What happens to my case when something else is more important or pressing? Do you work fast or slowly? Are you thorough? Are you vigilant? Do you know when you don't know? Do you prefer to resolve problems through aggression or

cooperation? Do other lawyers refer this type of matter to you? If I have questions or concerns, will you return my phone calls? If nothing has been done, will you tell me the truth? Will you be honest and fair with the bill? Finally, can I trust your answers to these questions?" Wouldn't the client be better off knowing the answers to these questions instead of being told, "I'm on your side?"

Advertising for legal services is inherently flawed because it is based on telling rather than showing. In fact, most attempts to show (through comparisons or client testimonials) would probably run into problems with the disciplinary board. (Comment 1 of Rule 7.1 of the American Bar Association's Model Rules of Professional Conduct says: "The prohibition ...of statements that may create 'unjustified expectations' would ordinarily preclude advertising about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements.") Even the telling is fraught with difficulties. Most lawyers' services resist a simple, objective description in terms of price, experience, and nature. In any event, what is more important than description is the character of the person described.

Role of Rules

The culture of lawyers, like that of society generally, works better when the restraints on self-interest are self-imposed. When internal restraints on a lawyer are absent or eroding because parents, teachers, other lawyers, and other mentors failed to nurture them, or now fail to reaffirm them, external (and less effective) restraints become necessary. Rules then

attempt to define what was formerly a matter of good judgment and common sense.\

Restrictions on advertising serve as one of the external restraints on a lawyer's self-interest. The restrictions are limited in scope, focusing mostly on accuracy. The most important rules, those concerned with dignity, are too hard to write. The restraints supporting dignity must be internal. For some reason, bankers, doctors, and hospitals find it easier to advertise professional services without loss of dignity. Why is loss of dignity more of a problem for lawyers who advertise than for other professionals? The lawyer's ad cited earlier, with its emphasis on FREE this and FREE that, has more in common with advertising for autos and carpets than with the advertising of other professionals.

But we shouldn't overreact to what is a symptom, not the disease itself. Condemning excesses is easy; so is condemning fault in others. But such condemnation will do little when the real problem lies closer to home. Solzhenitsyn, and many others, remind us that the struggle between good and evil is not a struggle between nations, or between religious creeds, or between political parties, or between economic classes. The struggle between good and evil is waged in every heart.

The Internal Struggle

The struggle for professionalism is not simply a matter of ethical lawyers and unethical lawyers. It is a struggle between good and evil that is personal to every lawyer. Some lawyers have clearly given in to the dark side; it will take more than a little

counseling to bring them back. For them, the bar needs measures sterner than a sermon. For the rest who continue to struggle against the dark side, there is no respite. One can be both a genius and a fool on the same case. One can win and malpractice at the same time. One can act honorably and lie within the same negotiation. Therefore, pray, examine, confess, and be vigilant.

We come back to the tension curbing the pursuit of self-interest by placing the clients' interests ahead of the lawyer's. It's not your case, it's their case. Listen. Think. Meditate. How can I get to where they want to go without losing them, or myself (or even the other side), in the process?

In advertising, this would mean the "soft sell," not the "hard sell." Cut out the "FREE" stuff and the other gimmicks. Tell prospective clients who you are, what you do, how you practice, and what you believe in. Then, try living up to those words.

"The Ethics of Legal Marketing"

Michael L. Brody Winston and Strawn, Chicago

One way of describing legal marketing is to characterize it as the strategy by which a lawyer in pursuit of a fee persuades people to pay him to perform services they had not previously thought they needed. So defined, legal marketing seems ethically suspect, particularly if we recall that the most typical legal service, filing a law suit, is perceived as a

positive evil by the person sued. Hence, the very idea of "ethical legal marketing" - like military music - is seemingly a concept at war with itself. Is the ethical marketing of legal services even possible?

The Problem of "Ethical" Marketing in General

By "marketing" I mean both advertising and less direct forms of promotion like taking a client to dinner. Economists hold that such marketing is not "unethical" and that it actually contributes to a community's welfare by diminishing the information costs associated with purchasing decisions. So conceived, marketing serves the beneficial function of helping consumers satisfy their needs.

Issues of marketing ethics arise, however, because purchasing decisions can be influenced by considerations beside the consumer's welfare - by appeal, for example, to the consumer's snobbery ("Buy this car, everybody will think you're rich") or sexual fantasy ("Buy this car and you will attract beautiful women like me"). Though such appeals generally do not help consumers choose rationally, what counts as ethical marketing is still complex because sometimes what consumers want is precisely the comfort, style, or power associated with tong visuals or pretty girls; sometimes consumers even know they are pandering to their own fantasies, but choose to do so nonetheless.

When does marketing shift from appealing to a reasonable aesthetic preference and become exploitation? To ask that question is to frame the fundamental ethical issue faced by consumer

marketers. Ethical issues of legal marketing are no different. The problem is how to differentiate between the marketing activities of lawyers which contribute to the best allocation of legal services, and those which exploit the attorney-client relationship.

Ethical Non-issues

To understand what in legal marketing raises valid ethical issues, it is helpful to consider issues that sound like valid ethical issues but are not.

Consider the vulgar marketing lawyers often excoriate as "unethical." Recently, for example, a California law firm, wanting to tout its litigation expertise, mailed hand-grenade-shaped paperweights to its potential clients. The fake grenades were to show that the firm would use "all the tools" available on behalf of its clients.

What is interesting about this promotion is its reception by the target audience. Apparently, while the paperweights badly scared some recipients, and turned off others who do not desire lawyers who confuse litigation with war, still other recipients liked the paperweights so much they refused to give them back when the firm (embarrassed by some of the apparently unintended perceptions of its paper-weights) sought to retrieve them. The paperweights communicated information - that offended some potential clients but attracted others. Such information is precisely the kind would-be clients ought to have when selecting a lawyer. What is wrong is for "grenade throwing" lawyers to pretend that their style is to exhaust all chances of settlement before beginning a law suit. Either

approach may be the right one for a particular client or a particular situation, but the skills and personality of the lawyer who reflexively pursues one strategy will often be very different from the skills and personality of the lawyer who pursues the other. A client ought to be deciding how to approach a legal problem and select the lawyer most suited to that approach. One person's bad taste may be another's bracing candor. Because vulgar marketing does not interfere with rational decision, it raises no (valid) ethical issue.

Another "non-issue" is media advertising: TV and radio commercials, billboards, matchbook covers, and magazine ads. These communicate little more than the fact that a particular lawyer or firm is in the business of providing a particular legal service. Both lawyers and the public have long viewed media advertising of legal services as shocking. For a long time too, it was deemed unethical by the profession's formal written canons of behavior. From the perspective of the consumer, however, a TV spot advertising a personal-injury lawyer should be no more offensive than one advertising a device to thin thighs in ten days. Even when the lawyer looks into the camera and promises that, like Al Gore, he "will fight for you," there is no ethical issue. Every lawyer is supposed to do that. The televised promise is simply a way of saying, "I do this for a living and I want your business."

A final non-issue is lying. Obviously, a lawyer should not misrepresent his or her experience, successes, training, or expertise. So, for example, the lawyers with suspended licenses

whom the Wall Street Journal of January 25, 2001 described using the internet to solicit legal business as if they were lawyers in good standing, were clearly acting unethically (as well as breaking the law). No one would suggest that lying is an ethical way to market legal services.

Valid Ethical Issues

Where valid ethical issues begin is in roughly the same place they begin in other marketing contexts: where the considerations appealed to tend to undermine the rationality of consumer decisions. So, for example, "ambulance chasing" is unethical because a lawyer is soliciting business at a time when a shocked, outraged, or incapacitated victim, or the family of the victim, cannot be expected to make a rational decision.

Much the same is true of a lawyer who appeals to a client's moral failings, such as greed, to urge a frivolous suit. Such lawyers impose on defendants (and the courts) the cost of a law suit that should never have been brought. It is wrong in the same way that marketing a defective product is wrong: it takes money from a consumer under false pretenses and may impose costs on third parties to the transaction who are injured by the defective product or forced to defend the frivolous claim. In extreme cases, such conduct is redressed by malpractice claims and court-imposed sanctions. The problem is that the line between a frivolous claim and zealous representation is often hard for anyone to draw. Hence, in all but the unusual cases we are all captive to the lawyer's good faith and judgment.

Judgment

Which brings us to what are

probably the hardest ethical issues in legal marketing: how to market the most important attribute of a legal professional, integrity.

The provision of non-routine legal services has two components. One is requisite knowledge or skill. In litigation, for example, the lawyer must understand the substantive law, the court's procedures, and how to present a case. Legal consumers can assess a lawyer's skills by asking about the cases the lawyer has handled, watching the lawyer at a trial, and so on. Hence, the marketing of this first component of legal services should be subject to market discipline and, therefore, ethically unproblematic.

Not so with the second component of what a lawyer sells: judgment. Judgment involves matters about which reasonable people can disagree without anyone being clearly wrong. When is a claim good enough to warrant a law suit? How much is the suit likely to cost? What might the award be?

When a lawyer is marketing to a sophisticated legal consumer in a competitive marketplace, questions of skill tend to even out and the decision to hire the lawyer is primarily a decision to trust the lawyer's ability to make reliable legal judgments. Yet the very process of building trust builds a personal relationship altering the client's ability to judge the lawyer objectively. We trust people whom we know and like and who have proven worthy of trust. Such people are, in effect, our friends. When does a client's judgment about a lawyer switch from a judgment about a lawyer and become a judgment about a friend? When does engendering

such a friendship (one having direct financial advantages for the lawyer) become (unethical) manipulation?

Much of legal marketing is intended to engender trust. The corporate lawyer's well-appointed offices and lofty view communicate the lawyer's status as a professional of distinction. Client entertaining creates opportunities for lawyer and client to get to know and confide in one another.

This should be a good thing. Fundamentally, the lawyer-client relationship is a personal one. It works best when a skilled lawyer understands the client's needs and gives honest advice about what the legal system can do to meet them. That dialogue depends in turn on the client's willingness to be honest with the lawyer (even about unpleasant facts) and the lawyer's willingness to be honest (even about painful advice) with the client, a willingness itself dependent on how much trust the relationship has engendered. Legal marketing that fosters such trust in good faith is ethical in the best sense of the word. Legal marketing that fosters such trust in bad faith is a profound and personal betrayal.

"Advertising Policies of Medical Journals"

David Orentlicher, Indiana University School of Law, Indianapolis

Open an issue of the New England Journal of Medicine, the Journal of the American Medical

Association, or any other major medical journal, and you will see page after page of advertisements by drug companies. Drug ads are as familiar in medical journals as classified ads are in newspapers.

Advertisements for drugs and other health-related products are not only ubiquitous in medical journals, they are the exclusive source of advertising. You will not find advertisements for automobiles, credit cards, jewelry, or the like in a medical journal.

This is not entirely surprising. Because physicians control the use of prescription drugs, drug companies are especially interested in reaching physicians. Purveyors of consumer goods may also want to attract the attention of physicians, but they can do that while advertising in general-interest magazines like Time, Newsweek, or Business Week. Accordingly, consumer-oriented companies are generally unwilling to pay as high an advertising rate as drug companies. From an economic perspective, it makes perfect sense for drug companies and other health-related businesses to dominate medical advertising.

Yet, if their object is maintaining high standards of medical research, education, and ethics, the journals seem to have it exactly backward. Instead of accepting only health-related advertising, medical journals would do better to accept anything but health-related advertising. When much of a medical journal's revenue comes directly from health-related businesses, the journal's editors and owners have a conflict between their interest in maintaining revenue and their interest in providing the best

information to their readers. Wouldn't the medical profession and the public be better served if medical journals rejected health-related advertising, or at least encouraged non-health-related advertising? Let's consider this question more carefully.

Journal editors

When a journal thrives because of advertising revenue, the editor cannot help but feel gratitude to the businesses that advertise in the journal's pages. Such gratitude can subconsciously influence editorial judgment. Studies that show good results from drug therapy might be accepted more readily than studies that show unimpressive results. To be sure, journals often erect "walls" between their editorial and business offices to prevent any influence, but editors are likely to notice the names of advertisers when they read their own journal.

Even if health-related advertising does not influence editorial judgment, it creates an appearance of impropriety. Some medical journals earn millions of dollars from drug companies. With that amount at stake, why should readers not wonder whether a connection exists between advertising receipts and editorial decisions? And, if readers do wonder, patients may suffer. If physicians discount what they read in a medical journal, they may not incorporate the reported research into their practice as quickly as they should.

Whether or not advertising influences the editorial process or creates an appearance of impropriety, editors compromise the scientific quality of their journals by accepting health-related advertising.

Advertisements are not selected because they tout the most useful drugs for the most serious diseases or because they provide the most reliable information about the drugs. Advertising pages go to those willing to pay the most. It is how much companies can pay for space that decides which will have their ads published in the journal. The companies also decide what the ads say. Thus, although there may be some educational value to advertising, ads leave physicians with a skewed view both of which therapies are available and of the usefulness of the therapies advertised. Much of the benefit of publishing important research studies is undone by publishing drug advertising beside them. It is akin to undoing the nutritional benefit of fresh fruit by serving it with whipped cream.

Professional Societies

Health-related advertising also creates conflicts of interest for medicine's professional societies. Many of the leading medical journals are published by the societies. The American Academy of Pediatrics publishes *Pediatrics*, the American College of Obstetricians and Gynecologists publishes *Obstetrics & Gynecology*, and the Massachusetts Medical Society publishes the *New England Journal of Medicine*. If advertising revenue ensures a profit for such a journal, that profit goes to the parent medical society. Because professional societies disseminate information about health-care products, any benefit they receive from advertising those products will give them ethical problems much like those the journals have.

A professional society may lose

its objectivity when evaluating drugs if drug companies subsidize its budget. Even if the society's positions are not in fact influenced by its receipt of advertising revenue, people must wonder whether it is so influenced. The mere appearance of impropriety can be as damaging to a professional society as to a professional journal. If the American Medical Association (AMA) opposes price controls on prescription drugs, the public will be unsure whether the opposition is truly rooted in legitimate concerns like the potentially harmful effect on industry's research spending or, instead, in the AMA's pecuniary interest.

Countervailing Benefits of Health-Related Advertising

Given the potential harm of health-related advertising in medical journals, the journals should refuse the advertising unless there are sufficient benefits to justify the advertising. Are there sufficient benefits? Journal editors and other commentators have suggested three justifications for health-related advertising in medical journals:

1. **Enhancing the Value of Medical Journals:** Some journal editors justify the policy of accepting only health-related advertising as a way to foster the journal's educational mission. On this view, health-related advertisements are included because they augment the information the journal's articles provide. Non-health-related advertisements, on the other hand, would not contribute to the journal's educational mission.

This argument is not persuasive. The mission of medical journals is to provide the most reliable medical information available. With their skewed information, advertisements compromise that goal.

2. **Aesthetics:** Another suggested justification for the exclusion of non-health advertising lies in aesthetic considerations. Running ads for cars, credit cards, or jewelry in a professional journal may seem in poor taste. Many patients already think that physicians care too much about money. Ads that feature high-ticket items will only reinforce the view that physicians are overly materialistic.

Aesthetic tastes are not trivial, but they are not sufficient reason to embrace a significant conflict of interest. Tackiness is a small price to pay for greater scientific integrity and better health care.

3. **Ensuring that Journals Can Cover their Costs:** Health-related advertising may be necessary for journals to cover the costs of publishing and mailing their issues. If medical journals were to exclude health-related advertising, they would likely

experience an overall decline in revenue. Consumer-oriented advertisers can reach physicians in lay publications and so are generally unwilling to pay as much for advertising in medical journals as health-related businesses are. Journals that have tried to interest non-health-related companies in advertising seem to have found it difficult to do so. If excluding health-related advertisements would reduce the revenue of medical journals, the journals might have to reduce the number of issues or the number of pages per issue. Fewer articles would be published, and medical research and education might suffer.

There is, then, at least one important benefit of health-related advertising, helping the journals survive. Is it, along with the others, enough to justify the harm such advertising does?

Balancing the Harms and Benefits

It is difficult to know whether the benefits for medical education and research of health-related advertising can justify the harms such advertising does. On one hand, a loss of journal pages could compromise the ability of researchers to publish important information. On the other hand, there are currently a very large number of medical journals. With fewer journals, the average quality of published studies should rise. Although there is some uncertainty about the role of

health-related ads in medical journals, we can say with confidence that some journals would not suffer if they dropped health-related advertising. For example, the New England Journal of Medicine covers all its costs through subscription fees and charges for classified ads. Revenue from its health-related ads subsidizes programs of the Massachusetts Medical Society. Because such a journal does not need health-related advertising to carry out its mission, it should not accept such advertising.

Even for those journals that need health-related advertising to meet their expenses, changes in advertising policy probably should occur. Journals often have a formal policy against running non-healthrelated ads. The airlines, fashion designers, and hotel chains that want to advertise in these medical journals cannot, regardless of their willingness to pay journal advertising rates. At the least, these journals should accept non-health-related advertising. A mix of health-related and other advertising would diminish the harm from health-related advertising.

In sum, because of the conflict of interest that advertising by drug companies and other health-related businesses creates, medical journals should, when practical, eliminate such advertising altogether. When elimination is impractical, the journals should at least open their pages to consumer-oriented advertising.

"Announcements"

CONFERENCES: TheSixth International Conference on Social Values will be held at Oxford University, England, July 3-6, 2001. Topics will include: university leadership and governance; the entrepreneurial university; economics of educational expansion; the commercialization of research; the changing rationality of the university; educating students for super complexity; university education and the development of work related capability; enhancing graduate employability; the changing social and economic role of the university; students or customers; accountability of universities to both corporate and public funders; preserving the liberal ideal; the vocationalization of the university curriculum. Contact: Dr. Samuel M. Natale, School of Business, Adelphi University, Garden City, New York 11530.

The IEEE Society on Social Implications of Technology and the IEEE Computer Society will cosponsor an International Symposium on Technology and Society 2001: Ethical and Social Issues Criteria in Academic Accreditation, July 6-7, 2001, University of Connecticut, Stamford. Among topics to be discussed are: requirements and philosophy of ABETCSAB Criteria 2000; models and components of an effective ethics and social issues curriculum; the role of multidisciplinary pedagogy; infusion of ethics and social issues throughout the engineering, scientific, and technical curricula; the teaching of problem solving in ethical and societal contexts; and resources

for course work and professional growth. Contact: Brian M. O'Connell, Department of Computer Science, Central Connecticut State University, 1615 Stanley Street, New Britain, CT USA 06050. Email: oonne11b@ccsu.edu.

The 4th International Congress on Dental Law and Ethics, Responsibility and liability in oral health care, will be held in Amsterdam, the Netherlands, October 25-27, 2001. Topics will include: liability and risk management; delegation to others; patient file; dossier electronic forms; dentist-patient relationship (legal); dentist-patient relationship (ethical); managed care; protocols; and consequences of liability under different legal systems. Contact: VVAA conference services, P.O. Box 8153, 3503 RD UTRECHT, The Netherlands. Ph. 31-30-2474-450. Fax:31-30-2474 647. Email: congres@vvaa.nl

CALL FOR PAPERS: HYLE-Infernational Journal for Philosophy of Chemistry is currently preparing a special issue on Ethics of Chemistry, "ethics" in a sense broad enough to include the twointerrelated perspectives of professional ethics. Contributions may deal with one or several of the following topics (or any other that is relevant): Do the professional codes of conduct of chemical societies withstand a philosophical analysis, particularly concerning consistency? Are there inherent reasons, to be analyzed by philosophical or socio-historical means, for the negative public image of chemistry as science (before and after the increased awareness of environmental ideas)? Does chemistry in general,

unlike other sciences, raise particular hopes, fears, or other emotions, to be analyzed by psychological or phenomenological means? What role should the ethics of chemistry play in the formulation of public policy? What can we learn about the ethics of science in general and chemistry in particular from historical cases of the involvement of scientists in public affairs, such as the Manhattan project? Manuscripts should follow the general Guidelines for Contributions (available on the inside cover of HYLE and on the HYLE web site). Deadline: May 31, 2001. Contact: Dr. Joachim Schummer, Institute of Philosophy, University of Karlsruhe, D-76128 Karlsruhe, GERMANY. Email: Joachim.Schummer@geist-soz.uni-karlsruhe.de.

New England College is pleased to announce the launch of a new scholarly journal, the International Journal of Politics and Ethics. The journal is published on behalf of the Frank Maria Center for International Politics and Ethics at New England College. Interested contributors are encouraged to visit the journal's website for additional information at: <http://www.nec.edu/academics/cipe/ijpe.htm> or contact Tom Lansford, Reviews Editor, IJPE, New England College at tlansford@nec.edu

Ethics, Washington and Lee University, will hold a colloquium and conference, Global Journalism: The Quest for Universal Ethical Standards, November 2-3, 2001 Deadline for submission of papers is September 1, 2001. Papers must be no longer than 5000 words, double-spaced, and include an

abstract. The author's name (or authors' names) should appear on a removable title page and no where else in the submission. Selection will be by blind review. All selected papers will be considered for publication in the Journal of Mass Media Ethics. Contact: Brian Richardson, Associate Professor of Journalism, Reid Hall, Washington and Lee University, Lexington, VA 24450. Email: richardsonb@wlu.edu

The Third Annual Conference of the Society for Ethics Across the Curriculum, will be held at the University of Florida, Gainesville, January 30-February 3, 2002. The conference will focus on the philosophical and pedagogical issues raised by the use of cases and codes when teaching ethics across the curriculum. Papers are welcomed regarding any question about teaching ethics across the curriculum, but especially questions regarding the selection and evaluation of cases and codes, teaching methods to best utilize them, confidentiality, legal liability, copyrights, and the general question of whether the cases and codes are effective vehicles for teaching ethics across the curriculum. Deadline for papers or abstracts: September 1, 2001. Contact Dr. Stephen Scales, Philosophy Department, Towson University, 8000 York Road, Towson, MD 21252. Ph. 410-704-2752. Fx. 410-704-4298. Email: scales@towson.edu.

The Journal of Information Ethics is planning a special issue on the ethics of book reviewing. Brief notes or longer essays on any aspect of this unusual topic are welcome. Possibilities include conflict of interest, lack of commitment, revenge, literary

fight, intellectual disagreement, and plagiarism. Deadline: November 1, 2001. Contact: Robert Hauptman, Editor, JIE, LR&TS, St. Cloud State University, St. Cloud, MN 56301. Ph. 320-255

PUBLICATIONS: Thanks to the Ethics Resource Center at the American Medical Association, Chicago, a new, expanded version of Virtual Mentor came on line in November, 2000, with seven new content areas. Sharpen your knowledge of-and ponder ethically hard choices in medicine, law, policy, and humanities. Go to www.virtualmentor.org.

MISCELLANEOUS: The Southwestern Law Enforcement Institute will hold an Ethics Train the Trainer course, May 14-18, 2001, at the Old Town Holiday Inn, San Diego, California. Among the topics included will be: models for ethical decision-making; identifying dilemmas and "stakeholders"; the Six Pillars of Character and the principles of ethical policing; what does the condition of society mean to policing; higher standards-different standards; strategies for creating a healthy ethical environment; and understanding the present through the classics. Contact: Registrar, Southwestern Law Enforcement Institute, P.O. Box 830707, Richardson, Texas 750830707. Ph. 972-664-3468. Fx. 972-699-7172. Email: slei@swlegal.org.

Thanks to a grant from the National Science Foundation, a five-day workshop on Teaching Computer Ethics will be held at Colorado School of Mines (CSM), Golden, May 30-June 3, 2001. Twenty participants (faculty chosen from around the country)

and seven leaders will work together to study applied ethics, the human values in computing and telecommunications, and the skills necessary to teach ethics to technically oriented students. Leaders of the workshop include: Deborah Johnson, Georgia Tech, author of the well-known textbook Computer Ethics; Tracy Camp, CSM, an expert on women in computer education; Chuck Huff, St. Olaf College, a scholar of the psychology of computer ethics; Barbara Moskal, CSM, an expert in educational evaluation; and Keith Miller, University of Illinois-Springfield, one of the authors of the ACM/IEEE Software Engineering Code of Ethics. Contact: Keith Miller at miller.keith@uis.edu.

CHAIRS: The Engineering College, Cornell University, invites application for the newly created Sue G. and Harry F. Bovay Chair in the History and the Ethics of Professional Engineering. The Bovay Chair is one of several initiatives across the University to address ethics in the research and practice of science and engineering. Others include the Program for Ethics and Public Life, which is actively engaged in education about ethical issues in the new biology, and Ethical, Legal, and Social Issues Initiative of the Cornell Genomics Initiative. At least one degree in engineering or the applied sciences preferred. Applicants should send a cover letter or CV, a statement of interest and goals, and names and contact information of at least three references to: Bovay Chair Committee, c/o Associate Dean Richard J. Cleary, 222 Carpenter Hall, Cornell University, Ithaca, NY 14853. Ph. 607-255-8240.

Illinois Institute of Technology's Center for the Study of Ethics in the Professions will host an NSF funded Ethics Across the Curriculum workshop June 18-26, 2001. The workshop will focus on integrating ethics into technical courses, documenting success for ABET accreditation, and helping colleagues do the same. Contact Michael Davis by email (davism@iit.edu) or call the Center at (312) 567-3017.

You are invited to participate in a Wilton Park conference on Global Corporate Citizenship May 2-4, 2001 in Montreux, Switzerland. Wilton Park is a Commonwealth Office. It's an independent nonprofit making executive agency of the Foreign and Commonwealth office. It seeks, through higher level residential conferences to promote international dialogue on issues of importance amongst officials, businesspeople, diplomats, journalists and academics. The conferences are valued for their policy focus and networking opportunities. Proceedings are in English and are intended to be interactive and informal. Interested parties should email: frances.martin@wlltonpark.org.uk or call Fran Martin at (+44) 1903-817777 or fax (+44) 1903-815244.

The University of Illinois at Chicago is hosting a conference, "Ethics Oversight at the Frontiers of Biomedical Research" June 1-2, 2001. This conference will identify key problems that face Institutional Review Boards, especially questions of genetic research that will continue to test these committees in the foreseeable future. Contact the UIC Office of Conferences and Institutes: Phone (312) 996-5225;

Fax (312) 996-5227 or e-mail: uicci@uic.edu. Funded in part by the National Institutes of Health.

The Center for the Study of Ethics in the Professions (CSEP) was established in 1976 for the purpose of promoting education and scholarship relating to ethical and policy issues of the professions. *Perspectives on the Professions* is one of the means the Center has of achieving that purpose.

EDITOR: Michael Davis

MANAGING EDITORS: Ethel Lewis

EDITORIAL BOARD: David Beam, Robert F. Ladenson, Martin Malin, Ullica Segerstrale, Warren Schmaus

CSEP DIRECTOR: Vivian Weil

Opinions expressed in *Perspectives on the Professions* are those of the authors, and not necessarily those of the Center for the Study of Ethics in the Professions or the Illinois Institute of Technology.