

MARKETING AND THE LEARNED PROFESSIONS

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Recently there has been a focus of attention on the subject of advertising and pricing in the learned professions. Exploratory studies have been completed in a number of the professions with the goal of assessing each group's interest in and support of expanding their profession's freedom to use all of the marketing instruments. Generally the more established individuals in the professions resist changes in regulatory rules giving them more "marketing" freedom.

This manuscript reviews the history of the restricted use of the marketing instruments of advertising, personal sales, and price in two major professions. Many of the restrictions are common to most of the learned professions even though the dates of implementation and challenge may be different. Conclusions relate to the recent changes taking place and an outlook for the future.

The accounting, law, medicine and other practicing units of the learned professions are governed by codes of ethics put in effect by professional associations and by regulatory authorities. The codes prohibited such practices as competitive advertising and solicitation and client encroachment. Those associated with the learned professions felt that competitive advertising and solicitation were incompatible with the dignity and ethics of the professions and that such ethical constraints were immune from the antitrust laws and other legal restrictions.

The past few years have seen significant changes in these outlooks and practices. Attacks have come under the antitrust laws from the Justice Department, private litigants, Federal Trade Commission, and consumer advocates. These groups are attacking these ethical restrictions on constitutional grounds as violations of free speech and free press. Also, members and organizations in the professions have themselves increasingly been voicing support of price competition and advertising.

The Sherman Antitrust Act prohibits agreements or combinations in restraint of trade or commerce. Agreements to fix or stabilize prices or concerning the dissemination of price information have been held to be illegal under the act. Nevertheless, professional associations traditionally include in their codes of ethics restrictions on price competition and advertising.

The Justice Department opened its attack on these restrictions in the accounting profession in its action against the American Institute of Certified Public Accountants, resulting in 1972 in a consent judgment nullifying former Rule 3.03 of the Code of Professional Ethics prohibiting competitive bidding. It further resulted in an acknowledgment by the institute that submission of price quotations is not an unethical practice under any policy of the institute.

The attack was extended to the legal field in a 1975 case (Goldfarb v. Virginia State Bar) where the Supreme Court held that the publication and enforcement by local and state bar associations of minimum fee schedules violated the Sherman Act. The Court stated that there was no absolute learned profession exemption from the Sherman Act.

On June 27, 1977, the most important Supreme Court decision to date in this area was decided. This is the case of Bates versus the State Board of Arizona. Two Arizona attorneys, Van O'Steen and John Bates, in violation of ethics rules of the Arizona Supreme Court, placed advertisements in the February 22, 1976 issue of the Arizona Republic (a Phoenix newspaper). The advertisement contained information on fees to be charged for particular legal services, such as for uncontested divorces, name changes and adoptions. The U.S. Justice Department filed a brief in the Supreme Court setting forth its position that the anti-solicitation rule was immune from attack under the Sherman Act because it constituted official state action. However, the Justice Department urged strongly that the blanket rule against professional solicitation and advertising was unconstitutional. The Justice Department stated that it was a matter of public interest that consumer decisions about services be intelligent and well informed. They added that "there is not now sufficient information available to the public concerning such services ... One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices and even their existence. Such a ban ... is fundamentally incompatible with a system of free expression."

Associations that have been under attack or investigation the past few years are the American Medical Association, the American Dental Association, the American Society of Anesthesiologists, the American Institute of Architects, the American Pharmaceutical Association, the Professional Association of Engineers, the American Bar Association, the American Optometric Association, and the American Veterinary Medical Association.

In each of the above mentioned organizations, advertising, solicitation, and price setting policies have been extremely controversial subjects. There are similarities in many of the marketing related ethical codes of the professions listed. The legal cases against the various codes of ethics have, however, been initiated by many independent sources. This paper specifically concerns the marketing activities of two learned professions, accounting and law. These two professions have been at the forefront of the legal attacks. Many of the observations are, however, also applicable to the other learned professions. Some of the other professions have astutely observed the trends in the accounting and legal codes of ethics and have preempted legal maneuvers by changing their codes in recognition of new legal interpretations.