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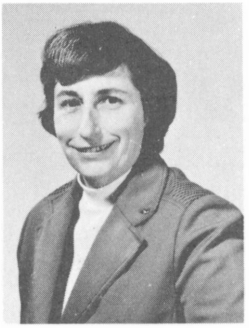

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Society has changed in recent decades and from all indications will continue to change in the future. The civil rights movement and the Watergate episode have been responsible for some of these changes. No longer does the general public stand in awe of professionals such as lawyers, doctors, and accountants. Today's governmental agencies, consumers groups, and even individual members of the professional organizations have taken a look at professional codes of ethics (especially the ethical ban on advertising) and they do not like what they see. The critical view has caused investigations and legal attacks on old, established codes of ethics which traditionally have been justified as being in the public interest. Challengers now point to the First and Fourteenth Amendments and the Sherman Antitrust Act and demand that the codes operate to meet the edicts of freedom of speech, freedom of press, equal rights, and nonrestraint of trade.

June 16, 1975, has become a historic date for professional groups. The Supreme Court in *Goldfarb v. Virginia State Bar* (421 US., 95 S. Ct. 2004) reached a decision which seems to portend change for the professions. Although the case involves the fixing of fees by local bar associations, the more fundamental legal issue appears to be whether the professions are subject to the same laws and regulations as other forms of private enterprise. The U.S. Supreme Court Ruling has opened the door for federal antitrust action against the professions. Just two years later, June 27, 1977, the Supreme Court in *Bates v. State Bar of Arizona* ruled that lawyers have a First Amendment right to advertise prices for routine legal services in newspapers. (45 U.S. L.N. 4895, 97 S. Ct. 2691).

The *Goldfarb* decision struck the first blow at the American Bar Association (ABA). As the year 1975 drew to a close, the American Medical Association (AMA) and two constituent organizations also felt the effects of this historic decision. The Federal Trade Commission (FTC) charged that the AMA's principles of medical ethics deprive consumers of the benefits of competition.

Some of the professional groups prefer to fight to maintain established codes while others propose code modifications. Among the professional groups who in the past few years have felt the force of attack are engineers, pharmacists, opthalmologists, optometrists, opticians, anestheseologists, veterinarians, the AMA, the ABA, and the AICPA. According to an article in *Medical World* January 26, 1976, the National Society of Professional Engineers has spent $450,000 to date in legal fees in attempts to overturn adverse rulings on its ban on competitive bidding. In addition, individual members of a profession might be subject to assessments if a damage claimant is successful since the Clayton Antitrust Act provides injured plaintiffs the chance to recover three-fold damages for violations of the Sherman Act.

The purpose of this article is to present an overview of the problems and actions of the legal and medical professions as they feel the repercussion from the tides of change. And, then, an examination of the accounting profession's position in maintaining the traditionally inflexible code of ethics as it pertains to advertising and soliciting of clients is in order. After all, it is quite evident that the legal and medical professions are in the midst of forces requiring changes to time-honored codes of ethics: the accountants, too, will feel this pressure!

The Legal Profession

Since June, 1975, the ABA has faced lawsuits in federal courts in Virginia, Wisconsin, and New York. Even the California Bar Association faces similar charges although its advertising policy is more liberal than the ABA's. Several individual attorneys have joined the march to court to protest ethical restrictions on advertising. The ABA has lost little time in countering these attacks. In February 1976, and August 1977 amendments liberalizing the Code of Professional Responsibility were adopted.

The Past and The Present

Canons of Professional Ethics were adopted in 1908 by the ABA. The solicitation of business was specifically

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prohibited. Some modifications have been made over the years to allow a few dignified forms of publicity such as announcing a new law office or new partner (due care was necessary to avoid discussing degrees or specialties). Disciplinary rules under Canon 2 regarding advertising are listed under DR 2-101, Publicity in General, and DR 2-102, Professional Notices, Letterheads, Offices, and Law Lists. In effect, the original rules operated to ban advertising and to allow lawyers to list name, address, and telephone number in telephone directories only. The ABA rules are not legally binding but in many states they have been given the force of statutory law through actions of the state associations with the approval of the state supreme courts.

On the issue of more liberal advertising practices, lawyers are divided into two groups. One group views the advent of liberalized advertising as a very real doomsday for the legal profession. This group feels that the dignity and professional status of the members are at stake and would prefer that the ABA association take on the government in a fight to maintain the 38 year ban on advertising.

The other group welcomes the change in public attitude because it calls for a re-evaluation of a traditional "questionable" practice. In particular, a large number of young lawyers and "legal sevice clinics" consider advertising and soliciting extremely important for their survival. Well-established lawyers probably will not advertise. In fact, Richard C. Shadyac of Annandale. Virginia, (an established lawyer) does not expect to advertise, yet he is one of a growing number of lawyers who have filed suit to challenge the advertising ban (*National Observer,* December 27, 1975). The *Bates* decision provided this group with their answer: lawyers have a First Amendment right to advertise.

Richard Sanders, a lawyer, purchased $700 worth of advertising space in the *Seattle Intelligencer* for advertising. In the past this action could have resulted in censure, suspension, or disbarment since lawyers were forbidden to advertise their trade by bar-associate canon and tradition. While the Washington State Bar Association considered disciplinary action, Sanders received over two dozen letters from lawyers who approved of his action. His issue was individual freedom of speech guaranteed in the Bill of Rights although he admitted that he needed more business. (*National Observer,* March 6, 1976). The *Bates* decision (June, 1977) acknowledged the issue of freedom of speech. Because of this decision, lawyers may now advertise (subject to some restrictions).

In California, the bar's Board of Governors approved a pilot program of controlled lawyer advertising consisting of telephone directory and newspaper publicity. Also, for consumer use it authorized publication of a directory sponsored by the bar with more than the usual information on individual lawyers. This controlled program in certain restricted fields has been in operation for more than a year. In Illinois, however, the state bar association voted in January, 1976, to oppose lifting the ethical ban on advertising. Thus, the division within the national association is extreme. Arguments from each side are worthy of consideration.

Goldfarb Decision and Consumers Actions

Absolute self regulation seems doomed! *Goldfarb v. Virginia State Bar* involved an attack against minimum fees for real estate examination set by the local bar and enforced by the state bar association. A young couple who wished to purchase a home sued because they could not obtain a lawyer's services in a title search for less than the minimum fee. The U. S. Supreme Court created problems for professional groups as it considered several factors in arriving at its decision that the fee schedule was "an unreasonable restraint of trade." According to the court:

- Enforcement of a minimum fee schedule is price fixing.
- Effects upon interstate commerce bring it within the antitrust laws.
- Status of a "learned profession" is no justification for exemption from antitrust.
- Exemption on grounds of "state action" (*Parker v. Brown* doctrine) does not apply to fee schedules and enforcement.

Goldfarb's long shadow suggests future challenges to ethical standards set by the professions; the ban on advertising and soliciting is foremost in the areas receiving attention. Indeed, *Bates* ended the traditional absolute ban on advertising.

1976 Amendments to the Canons — Advertising

At the first sign of unrest by the FTC and Consumers Union, a Committee on Ethics and Professional Responsibility began work on a discusson draft of amendments to the Code with careful consideration of recent court decisions on the subject. The Committee held two public meetings — one for nonlawyer organizations and the other for comments from the bar and bench. It then held a general conference to inform members of the bar about the issues that would be raised by advertising and the effects of advertising on both the public and lawyers. A film of the conference was made available to state and local bar associations.

In general the draft would have expanded the material authorized to be published in a reputable law list, legal directory, or a directory published by a "bona fide consumers' organization" and would have permitted a lawyer to state a limitation or concentration of practice on professional cards or announcements, office signs, letterheads, and the yellow pages of the phone directory. The suggested amendments would not have affected existing prohibition of solicitations of clients on a one-to-one basis.

The House of Delegates held its mid-year meeting in Philadelphia on February 17. The Ethics Committee's proposal was rejected for a more narrow set of amendments to the Code regarding advertising. The ABA's policy then permitted lawyers to publish information on legal specialties, references, academic background and degrees, foreign language abilities, office hours, acceptance of credit cards, and initial consultation fees in "reputable" law lists certified by the ABA and in directory

yellow pages.

In August, 1977, the House of Delegates decided that dignified publication and radio advertising could also include certain fee information, a range for certain services, hourly rate, and charges for "specific legal services" the description of which would not be misunderstood or be deceptive. One-to-one solicitation and TV commercials are not permitted. However, if a state bar association chooses not to adopt the ABA's more relaxed ethical canon, it can do so. The state associations along with the state supreme courts remain in control over what lawyers will be allowed to do.

Consumers groups and the FTC have indicated dissatisfaction with the limited modifications. These reform groups may continue turning to the courts for satisfaction which could result in loss of control over this section of the Code.

The Medical Profession

The AMA, state medical societies, and state regulatory bodies are currently being challenged in administrative law court hearings and legal suits because of physicians. Although the AMA has vowed to fight such attempts to end bans on ads, the AMA's Judicial Council issued a clarifying statement about ethical principles regarding advertising and soliciting of patients. Change may be on the horizon for the medical profession, as for others.

Background

In 1847 a group of physicians met in Philadelphia to form the American Medical Association. One of their purposes was to establish a code of ethics that would help eliminate the many charlatans who were offering cures for nearly every disease. Since part of that code dealt with public advertising, it is evident that the AMA's ethical restraints against advertising are of long standing.

It is interesting to note that the current AMA Principles of Medical Ethics, adopted in 1957, do not mention the word advertising at all. Section 5 does, however, state that the physician "should not solicit patients." This has generally been held to prohibit statements of self-aggrandizement and price competition through the advertising of fees as well as to limit the use of other forms of advertising.

The AMA Medical Ethics do permit the physician to engage in the following forms of advertising: 1) announcement of the opening of a professional office, office hours, description of the practice by medical specialty, and availability for house calls; 2) advertising in a community newspaper a new office location, the joining of a group practice, or separation from one; 3) listing in the yellow pages; 4) listing of availability with the county medical society or hospital for people requesting the name of a doctor; and 5) listing in a reputable physician's directory.

There are, however, further restraints which may apply to the local physician. Thirty-four states have legal restrictions on advertising and most state and county medical societies do not permit any physician advertising. Two local societies which do permit advertising have stringent restrictions on the type and frequency. The Chicago society permits a doctor to run two ads in neighborhood newspaper during the first two months in a new office. The DuPage County (Illinois) society allows a new doctor to have one ad in a single issue of one or more newspapers if the society is notified beforehand. It also limits the size and content of those ads.

Legal Challenge

The recent advent of consumerism and the creation of consumer protection groups has had an impact upon the medical profession. Attempts by such groups, many of them with little success, to develop physician directories have met with resistance by medical societies. Such directories are intended to provide the public with adequate information for selecting medical services. The medical societies' resistance to directory efforts has led to legal action on several fronts.

1) On December 19, 1975, the Federal Trade Commission filed a complaint calling for an administrative law court hearing on charges against the AMA, the Connecticut State Medical Society, and the New Haven County Medical Association. The complaint charges that the AMA's Principles of Medical Ethics, through its restriction of advertising by member physicians, act as a restraint on trade. An administrative law judge could in such a hearing direct the AMA to adopt specific advertising standards.

The trial began September 7, 1977, and could last several months. The AMA contends that current policy does not consider advertising by physicians as unethical.

2) In Virginia, the Comprehensive Health Planning Council of Northern Virginia and the Virginia Citizens Consumer Council have joined in a suit against the State Board of Medicine, an action which grows out of a less than successful attempt in 1974 to prepare a physician directory. The medical board, based on an opinion of the state attorney general, warned physicians that the state medical practice law prohibited a physician from publishing anything other than an address and telephone number. Biographical data, fees, credit arrangements, office hours, and other services available were requested for inclusion in the directory but most physicians refused to supply such information.

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3) On January 23, 1976, a Phoenix heart surgeon filed a $90 million dollar suit against the AMA, the Maricopa County Medical Society, and several local physicians charging that the AMA's Principles of Medical Ethics restrain trade by prohibiting advertising. The doctor contends that he was denied membership in the local society and the AMA because of a 1973 magazine article about him and that local physicians have conspired to prevent him from practicing cardiovascular surgery in Phoenix (*American Medical News,* March 1, 1976).

The Future

Many in the medical profession are concerned that unrestricted advertising could lead to extremes in the form of advertising which would be advantageous neither to the profession nor to the public. On the other hand, some believe that a head-on fight to preserve the outright ban on advertising by doctors is one that the profession cannot win. One lawyer who practices before

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the FTC has been quoted as saying that he believes any blanket ban on advertising is doomed to defeat as a *per se* violation of the antitrust laws. An alternative supported by some is to voluntarily give up such a blanket prohibition in exchange for the right to police physician advertising. Whether such a compromise is even possible has not been determined.

The New York State Board of Regents has ruled that professionals in twenty-nine fields (including physicians, accountants, dentists, architects, and engineers) may advertise services, but not prices, on broadcast media.

In spite of the AMA's public pledge to resist change in its Principles of Medical Ethics, it appears that the legal challenges facing the AMA have already led to some relaxation in its interpretations, particularly in the providing of fee information by physicians. A recent Judicial Council statement of clarification of advertising and solicitation specifically permits the following (item 3 in particular represents a change of attitude):

1) Name, type of practice, location of office, office hours, and other useful information through office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories.
2) Biographical and other relevant data for listing in a reputable directory.
3) At the option of the physician, fee information which may include the charge for a standard office visit or the fee or range of fees for specific types of services provided there is disclosure of the variables and other factors which affect the amount of the fee.

In its statement, the Judicial Council points out that physicians must adhere to state law and state and local medical societies where these provide more stringent restrictions than those allowed by the AMA. Since most of these laws or societies are more restrictive, the local physician continues to be bound by legal or ethical limitations in advertising practices. It is unlikely that this statement of clarification by the AMA will avert continued legal action by the FTC and others. The future remains uncertain but some change in ethical restrictions on advertising is likely.

And What About the Accountants?

CPA's have already felt the consequences of Federal government involvement with restrictive provisions of professional codes of ethics. In 1972 the Department of Justice challenged the Code of Professional Ethics Rule 3.03:

> *A member or associate shall not make a competitive bid for a professional engagement. Competitive bidding for public accounting services is not in the public interest, is a form of solicitation, and is unprofessional.*

This action resulted first in the non-enforcement of this rule and finally in its omission from the 1972 revision of the Code. The current attack on ethical bans on advertising will eventually be extended to include the AICPA and the state societies. There are some conditions, however, which may delay this type of action against the accounting profssion.

1) Doctors and lawyers have greater consumer identification and are more likely to receive the immediate attention of the FTC and of consumer interest groups.
2) CPA's compete with non-CPA's in providing certain types of client services, particularly in the income tax area where consumer identification is greatest. Most of these non-CPA's do advertise their services, thus relieving some of the pressure.
3) The client of a CPA is most frequently a business entity rather than an individual consumer. The business entity is less reliant on advertising sources for the obtaining of accounting services and the reasonable determination of a fee prior to the performance of the services.

While these characteristics may delay public concern about CPA advertising, it is unlikely that they will permanently avert scrutiny and action.

The AICPA ban on advertising, Rule 502, follows:

> *"Solicitation and advertising. A member shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited."*

This ban is very similar to those of the legal profession and of the local medical societies which are currently being challenged. In fact, the position of the accounting profession is much stricter than that assumed by the medical profession through the AMA. Since these are also being challenged, it would appear that any total ban on advertising by members of a professional organization is suspect and a prime candidate for legal challenge. Accountants, therefore, must be aware of developments in other professions. There is every reason to believe that the future will contain further challenges against some time-honored professional credos.

The AICPA committee established to consider changing the ban on advertising appears to be on the brink of a decision to relinquish control of this section of our Code of Ethics. No official announcement has been made; however, knowledgeable members at recent conventions have stated that the committee may change Rule 502 to the extent that all reasonable advertisements would be accepted. One-to-one solicitation would not be allowed.

The AMA has elected to fight the FTC and consumer groups. The ABA has modified its rule on the advertisement ban, but has retained some control. The AICPA sems ready to relinquish almost all control. Is this wise? Change may well be in order, but Justice Blackmun in the Bates case stated that the court was not saying that advertising may not be "regulated in any way." "False, deceptive, or misleading" advertising claims about the quality of legal services — "a matter we do not address today" — are not measurable and verifiable and are "so likely to be misleading as to warrant restriction."

Justice Blackmun wrote that the majority recognized the problem of defining a boundary between deceptive and non-deceptive advertising and they expected the ABA to play a special role in assuming that advertising flows both freely and cleanly for the legal profession.

Accountants have worked diligently to provide the public with financial information that is not misleading. Why then should all control be relinquished? Why not continue some control over advertising to protect the public from being misled.