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# WHY LAWYERS SHOULD BE ALLOWED TO ADVERTISE: A MARKET ANALYSIS OF LEGAL SERVICES

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*Last August, the American Bar Association adopted the Model Rules of Professional Conduct, which significantly altered the ABA's position on lawyer advertising. It is still unclear how the states will respond to the ABA's new position, and the debate about the propriety of lawyer advertising continues. In the authors' view, both sides of the debate have overlooked an important point: For purposes of analyzing the advertising problem, legal services are of two types, and the effect of advertising on the legal services market will vary with the type of service involved. "Individualized" services involve legal matters that pose a significant risk of loss for clients and require close personal attention from an attorney. For lawyers who provide this type of service, the authors argue, advertising is of little use since their clients are likely to rely on personal knowledge and reputation in selecting an attorney. "Standardizable" services, however, involve low risk matters and can be provided by means of routinized production systems. The authors believe that these services can be mass produced at low cost without loss of quality. They argue that advertising is necessary to generate the mass demand and economies of scale required to make mass production profitable. The authors conclude that lawyer advertising will likely result in more affordable legal services of the standardizable type and in improved product information about these services, thus benefiting low and middle income consumers as well as the attorneys who specialize in providing standardizable services.*

## INTRODUCTION

In *Bates v. State Bar of Arizona*,<sup>1</sup> a 1977 decision, the United States Supreme Court overturned the American Bar Association's (ABA) sixty-nine-year-old prohibition of advertising by lawyers.<sup>2</sup> The

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<sup>1</sup> 433 U.S. 350 (1977).

<sup>2</sup> The legal clinic of Bates & O'Steen of Phoenix, Arizona, had placed newspaper advertisements publicizing its offer of legal services at fixed fees and was charged with violating Arizona State Bar standards, 17A Ariz. Rev. Stat. Sup. Ct. Rules, Code of Professional Responsibility, Rule 29(a), DR 2-101(B) (Supp. 1976). The Arizona bar's rules were substantially similar to the ABA's Model Code of Professional Responsibility standards in effect at that time. The ABA Model Code provided, in relevant part, that "a lawyer shall not prepare or use public media in order to attract law clients." Model Code of Professional Responsibility DR 2-101 (1977) (replaced by Model Rules of Professional Conduct on August 2, 1983), reprinted in House of

*Bates* holding invalidated comprehensive bans on lawyer advertising but left unsettled the scope of permissible regulation. While the *Bates* Court found attorneys' price advertising to be protected speech under the first amendment,<sup>3</sup> it also stated that false and misleading advertising could be prohibited.<sup>4</sup> The majority expressly declined to consider the problems of advertising claims relating to the quality of legal services.<sup>5</sup>

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Delegates Adopts Advertising D.R. and Endorses a Package of Grand Jury Reforms, 63 A.B.A. J. 1234, 1236-37 (1977) [hereinafter House of Delegates Adopts]. The Model Code's advertising provisions continued a tradition of ABA bans on advertising begun with the ABA Canons of Professional Ethics Canon 27 (1908), reprinted in 33 A.B.A. Rep. 566, 582 (1908). The Arizona Supreme Court upheld the proscription of Bates & O'Steen's advertisements, see *In re Bates*, 113 Ariz. 394, 555 P.2d 640 (1976), but the United States Supreme Court reversed, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Court held that no adequate state interest was served by a total prohibition on lawyer advertising, *id.* at 363-84; as a result, the ban constituted an unconstitutional infringement on the public's first amendment right to information about legal services, *id.*

Prior to the twentieth century, lawyer advertising was generally considered acceptable. For example, the Alabama State Bar Association's Code of Ethics, upon which the ABA Canons of Ethics were based, see 33 A.B.A. Rep. 566, 569 (1908) (reprinting letter from Committee on Code of Professional Ethics acknowledging debt to Alabama Code of Ethics), expressly permitted print advertising. See Ala. St. B. Ass'n, Code of Ethics Rule 16 (1899) (discussing newspaper advertising), reprinted in H. Drinker, *Legal Ethics* 356 (1953). But cf. ABA Canons of Professional Ethics Canon 27 (1908) (suggesting that solicitation of legal business by advertising is unprofessional), reprinted in 33 A.B.A. Rep. 566, 582 (1908). Even prominent attorneys advertised. For example, David Hoffman, author of several legal treatises and texts, placed newspaper advertisements containing testimonial endorsements from the United States Secretary of State Edward Livingston, the President of the Bank of the United States Nicholas Biddle, and Chief Justice John Marshall. See *Daily Nat'l Intelligencer*, July 11, 1835, at 4, col. 2. Hoffman was considered a leader in the field of professional ethics, having devoted an entire chapter to "professional deportment" in one of his books. See D. Hoffman, *A Course of Legal Study* 720-75 (2d ed. Baltimore 1836) (1st ed. Baltimore 1817). The chapter included a section entitled "Fifty Resolutions in Regard to Professional Deportment," *id.* at 752-75, perhaps the earliest code of ethics for American lawyers and certainly one of the most influential. See H. Drinker, *supra*, at 338-51 (reprinting Hoffman's "Fifty Resolutions" in its entirety). In 1838, future president Abraham Lincoln advertised his law practice. See L. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* 1 (1980). In short, lawyer advertising has not been entirely unacceptable throughout the nation's history. Cf. *Winona Republican*, Dec. 4, 1855, at 3, col. 2. (advertisement by future Chief Justice of the Minnesota Supreme Court), cited in J. Eckland, *Judge Wilson and the Winona & St. Peter Railroad: A Minnesota Drama of the Interaction Between Law and Private Enterprise, 1857-1881*, at 10-11 (1979) (unpublished undergraduate thesis) (available at College of Liberal Arts, University of Minnesota).

<sup>3</sup> 433 U.S. at 367-84.

<sup>4</sup> *Id.* at 383. Since *Bates*, the Court has provided further guidance on the extent to which lawyer advertising is protected under the first amendment. In the recent case of *In re R.M.J.*, 455 U.S. 191 (1982), the Court held unconstitutional a Missouri rule regulating the categories of information that a lawyer could include in an advertisement. The Court stated: "Because the listing published by the appellant has not been shown to be misleading, and because the Advisory Committee suggests no substantial interest promoted by the restriction, we conclude that this portion of rule 4 is an invalid restriction on speech as applied to appellant's advertisements." *Id.* at 205.

<sup>5</sup> *Bates*, 433 U.S. at 366, 383. The Court noted that the question as to the validity of quality-related advertising claims was not before it, but that "[s]uch claims . . . might well be

The organized bar's reaction to *Bates* has been hesitant and inconsistent. Two years after the decision, fifteen states still had not formulated new advertising standards.<sup>6</sup> Although by the middle of 1982 bar associations in all states and in the District of Columbia had adopted rules allowing some promotional activities by lawyers,<sup>7</sup> many of these new rules permit only print advertising of the name, address, and specialization of an attorney,<sup>8</sup> and thus may be incompatible with the potentially broader scope of the *Bates* holding.<sup>9</sup> In response to *Bates*, the ABA revised the Model Code of Professional Responsibility to permit limited advertising of the type specifically at issue in the case: simple publication by print or radio. It concurrently rejected a proposal that would have allowed all advertising that was not "false, fraudulent, and misleading."<sup>10</sup> Subsequently, the ABA Commission

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deceptive or misleading to the public, or even false." *Id.* at 366. The majority also expressly declined to resolve "the problems associated with in-person solicitation of clients . . . by attorneys or their agents." *Id.* The rules governing in-person solicitation have been developed by the Court in later cases. Compare *In re Primus*, 436 U.S. 412 (1978) (permitting in-person offers of free legal assistance when such offers are a form of political expression or association) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding disciplinary action against attorney for in-person solicitation for attorney's own personal gain).

<sup>6</sup> See S. Cox, W. Canby & A. Deserpa, *Legal Service Pricing and Advertising* 17-21 (1979) (presenting table comparing state bar association lawyer advertising rules in 1977) (unpublished paper) (on file at New York University Law Review) [hereinafter *Pricing and Advertising*].

<sup>7</sup> See Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808, 808 (1982).

<sup>8</sup> See Hellman, *The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal, and Policy Questions*, 31 *Okla. L. Rev.* 509, 555 (1978) (noting that, under post-*Bates* Oklahoma rules permitting only newspaper advertisements of fewer than 10 square inches with no graphic illustrations, the very advertisement approved by the Supreme Court in *Bates* would be illegal). Many states have similar regulations. Several state bar associations continue to oppose radio and television advertising by lawyers, and some place added requirements on electronic media advertising. See *Pricing and Advertising*, *supra* note 6, at 17-21. For an extensive analysis of state rules, see L. Andrews, *supra* note 2, at 135-46. A thoughtful and comprehensive discussion of the constitutionality of state advertising regulations can be found in Andrews, *Lawyer Advertising and the First Amendment*, 1981 *Am. B. Found. Research J.* 967 (suggesting unconstitutionality of many state regulations).

<sup>9</sup> The basis of the *Bates* holding was that the flow of "truthful advertising concerning the availability and terms of routine legal services to the public could not be restrained." 433 U.S. at 384. The majority opinion also discussed four kinds of limitations on lawyer advertising that the holding was not meant to foreclose: restraints on false, deceptive, or misleading advertising, *id.* at 383; reasonable restrictions on the time, place, and manner of advertising, *id.* at 384; regulations on advertising concerning transactions that are themselves illegal, *id.*; and the "special problems of advertising on the electronic broadcast media," *id.* It is unclear whether the new state bar association rules disallow information protected by the Court's "free flow of commercial information" approach. See *id.* at 365.

<sup>10</sup> See House of Delegates Adopts, *supra* note 2, at 1235-37; see also Brosnahan & Andrews, *Regulation of Lawyer Advertising: In the Public Interest?*, 46 *Brooklyn L. Rev.* 423, 434 (1980). In 1978, the ABA House of Delegates amended its 1977 resolution specifically to allow television advertising by attorneys. See *TV Advertising Wins ABA Approval by Wide Margin*, 64 A.B.A. J.

on the Evaluation of Professional Standards,<sup>11</sup> which was charged with revising the Model Code of Professional Responsibility, recommended the less restrictive rule to the ABA, which adopted it on August 2, 1983.<sup>12</sup> It is as yet unclear to what extent state bar associations will follow the ABA's lead on the advertising issue.<sup>13</sup>

The discussion of the appropriate regulation of advertising echoes the debate about whether advertising should be allowed at all. This Article argues that participants in the debate on lawyer advertising have failed to appreciate that legal services are a market commodity. The Article applies basic market and economic theory to the production and consumption of legal services and demonstrates that lawyer advertising offers important advantages to consumers of legal services. Part I reviews the current debate about lawyer advertising and identifies two incorrect assumptions in the debate that reflect a failure to view legal services as a market commodity. Part II examines three different ways consumers acquire information about legal services and makes some preliminary generalizations about the role of advertising in providing information to legal consumers. In Part III, the Article examines advertising's effect on the legal services market, suggesting that this effect depends on its interaction with other market forces. Part IV elaborates on the observations made in Part III and argues that advertising will have a beneficial effect on the market for standardizable legal services, while having little effect on the market for individualized legal services. The Article concludes by offering possible explanations for the current opposition to lawyer advertising.

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1341 (1978). The 1977 resolution had permitted only radio advertising. See Model Code of Professional Responsibility DR 2-101 (1977), reprinted in *House of Delegates Adopts*, *supra* note 2, at 1235-36.

<sup>11</sup> This commission is sometimes referred to as the "Kutak Commission," in reference to its late chairman, Robert J. Kutak.

<sup>12</sup> The Model Rules of Professional Conduct provide that a lawyer may advertise in the public media provided that he does not make a false or misleading communication and that the lawyer keep a full copy or record of the advertisement for two years after its last dissemination along with a record of when and where it was used. See Model Rules of Professional Conduct Rules 7.1, 7.2 (1983), reprinted in 52 U.S.L.W. 1, 24 (Aug. 16, 1983).

<sup>13</sup> As this Article went to press, New Jersey was the only state that had drafted proposals for new lawyer advertising rules in response to the Model Rules of Professional Conduct's provisions on advertising. The New Jersey Supreme Court Committee on Attorney Advertising recommended the adoption of advertising rules that substantially resemble the ABA Model Rules of Professional Conduct Rule 7.2. See Report of the Supreme Court Committee on Attorney Advertising, N.J.L.J., May 5, 1983, at 19-21 (supp.). The New Jersey Supreme Court has yet to act on these proposals.

## I

## LEGAL SERVICES AS A MARKET COMMODITY

The current debate<sup>14</sup> on lawyer advertising fails to recognize that legal services are a market commodity. Opponents of lawyer advertising charge that it is inherently misleading and that even literally truthful advertising will enable unscrupulous and incompetent lawyers to recruit clients. Without advertising, they argue, prospective clients must rely on lawyers' reputations, a source that opponents feel is a more reliable index of professional ability. Hence, the argument runs, the prohibition on advertising confines consumer information to the only channel—reputation—that assures consumers will retain lawyers who are competent. Even truthful advertising, they believe, will lead clients to accept advertising claims without closely evaluating them.

Opponents also contend that advertising will raise prices for legal services. A lawyer who advertises, they argue, must spend more on overhead for his practice and therefore must charge more to his clients. Similarly, increases in the cost of practicing law will raise barriers to entry into practice, thereby decreasing competition and further increasing the price of legal services. Opponents also believe that advertising will undermine respect for the legal profession. They associate it with unprofessional behavior and assert that it will degrade lawyers in their own minds and in the eyes of the public.

Supporters of advertising<sup>15</sup> argue that advertising will lower prices with few ill effects. Advertising, supporters contend, will in-

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<sup>14</sup> Disagreement within the legal profession about the desirability of lawyer advertising has continued well after the *Bates* decision. See Advertising Still Laying an Egg, 65 A.B.A. J. 1014, 1017 (1979) (presenting survey results showing substantial disagreement within the legal profession about the effects of lawyer advertising). Examples of the arguments against permitting broader use of lawyer advertising can be found in *Bates*, 433 U.S. at 366-79; Jeffers, Institute on Advertising Within the Legal Profession—Con, 29 Okla. L. Rev. 620 (1976); Kindregan, Where Are We Going with Lawyer Advertising?, 62 Mass. L.Q. 41 (1977); Stamper, Remarks at Panel on Advertising, 49 Okla. B. Ass'n J. 459 (1978); Troutman, It Pays to Advertise?, 51 Fla. B.J. 487 (1977); Note, Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available, 81 Yale L.J. 1181, 1183-85 (1972).

Examples of arguments in favor of broader use of lawyer advertising can be found in *Bates*, 433 U.S. at 366-79; L. Andrews, *supra* note 2, at 77-84; Atkins, Advertising is Coming, 51 Fla. B.J. 191 (1977); DeMent, Legal Services Dilemma: View from the Market, Trial, Aug. 1976, at 26, 30; Francis & Johnson, The Emperor's Old Clothes: Piercing the Bar's Ethical Veil, 13 Willamette L.J. 221 (1977); Margolis, Human Rights Commentator, 52 Conn. B.J. 61, 72-74 (1978); Morrison, Institute on Advertising Within the Legal Profession—Pro, 29 Okla. L. Rev. 609 (1976); Note, *supra*, at 1187-91.

<sup>15</sup> See note 14 *supra*.

duce lawyers to compete in offering lower prices for legal services. They further assert that advertising will provide consumers with accurate additional information beyond that obtainable through reputation. Hence, advertising will permit consumers to make more informed decisions about when to use a lawyer and about which lawyer to use. As for public esteem of the legal profession, supporters of advertising contend that it will remain undiminished and may in fact be enhanced by advertising. Finally, supporters argue that the price competition fostered by the dissemination of information through advertising will lower the cost of some legal services and will thereby help satisfy some currently unmet needs for such legal services among middle income persons.

Both proponents and opponents of advertising have failed to recognize fully that legal services are a market commodity. The commentators have thus rarely evaluated lawyer advertising in relation to other market phenomena. This failure to view legal services as a market commodity has engendered two mistaken assumptions in the lawyer advertising debate: that advertising will have a similar effect on all legal services, and that production and consumption in the legal services market are static. This Part will evaluate each mistaken assumption in turn.

Most commentators have assumed that all legal services are similar and thus have failed to recognize that advertising's impact, whether favorable or unfavorable, will not be the same for all legal services.<sup>16</sup> The debate on lawyer advertising presupposes that, if legal services could be categorized, complexity would be the only relevant

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<sup>16</sup> Some authors, however, have noted that differences among firms' clients would cause advertising to affect legal practices in varying ways. See, e.g., Note, *supra* note 14, at 1201-08 (dividing firms between those that serve corporations and wealthy individuals, and those that serve persons of moderate means). Others have predicted that advertising will have different impacts on the profession because of the different types of legal services that firms provide. See, e.g., Pricing and Advertising, *supra* note 6, at 83-85 (dividing firms between those that provide "routine" services and those that provide "complex" services). Commentators have not, however, distinguished in detail between specially tailored legal services and those that may be systematized, nor have they recognized that private law firms may be divided into three, rather than two, types. For a description of the three major types of law firms—those that provide individualized services, those that provide standardizable services, and those that provide mixed services—see text accompanying notes 53-83 *infra*. Commentators have neither examined the mixed practices nor recognized that the three types of private practice are best identified on the basis of both services and clients rather than by either factor alone. See *id.* This Article will limit itself to a discussion of private practices. In general, the Article's analysis will not consider the impact of services provided by government, legal aid, and public interest lawyers. The Article will,

determinant. Participants in this debate start from the premise that even a petty controversy can be complex,<sup>17</sup> and implicitly conclude that individualized legal services are always preferable.

We believe that this analysis overlooks important considerations and think that legal services can be regarded as of two types: those that can be satisfactorily standardized, and those that require individualized treatment. We call these two categories "standardizable"<sup>18</sup> services and "individualized"<sup>19</sup> services, respectively. Conceivably, many individualized services could be delivered in standardized ways, while many routine services could be provided in an individualized manner.<sup>20</sup> Whether a legal service is individualized or standardizable depends primarily on the degree of risk that the particular legal problem poses for the client. In this context, risk is a function of (1) the gravity of the consequences to life, liberty, or property that might ensue if the legal service does not favorably resolve the matter in question, and (2) the probability that one or more of these consequences will actually occur.<sup>21</sup> Individualized legal services are most responsive to situations that involve a relatively high risk for the client and that therefore require direct and sophisticated involvement by an attorney.<sup>22</sup> Conversely, standardizable services are most responsive to

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however, discuss the impact that the government, legal aid, and public interest bars can have on the lawyer advertising debate. See notes 101-05 and accompanying text *infra*.

<sup>17</sup> See sources cited in note 14 *supra*.

<sup>18</sup> The standardizable category includes both those legal services actually delivered through a standardized system and those that could be so delivered. For an explanation of standardizable services, see text accompanying notes 20-23 *infra*. For purposes of this Article, the term "standardized" refers to those services that are in fact provided through use of a standardized system.

<sup>19</sup> While the term "individualizable" would yield semantic and analytic symmetry, we have refrained from using it because of its awkwardness, and because contemporary legal services are in fact overwhelmingly provided by individualized delivery.

<sup>20</sup> Furthermore, any particular legal service is rarely provided through either completely standardized or individualized techniques. For instance, all attorneys at least use intra-office forms based on their past work. Similarly, many components of even a unique, complex, high-risk legal service, such as document discovery and retrieval in an antitrust suit, can be routinized. Some lawyers prefer an individualized approach, while others seek as much standardization as possible. See text accompanying notes 54-64 *infra*.

<sup>21</sup> While legal services should not be categorized solely on the basis of the complexity of the legal problem, see text accompanying notes 23-24 *infra*, complexity can be an important factor in calculating risk; complexity generally increases the probability that routinization will lead to adverse consequences.

<sup>22</sup> Almost all litigation, complex business transactions, and tax matters fit into this category. See text accompanying note 56 *infra*.



relatively routine situations that involve low risk to the client and that therefore require comparatively little direct attorney participation.<sup>23</sup>

Using complexity as the sole or primary determinant of legal services categorization is thus inappropriate. A complex legal matter does not necessarily require elaborate legal services when there is a low probability that serious adverse consequences will result if routine handling of the matter permits a mistake to be made. While a petty matter can be legally complex, not all legally complex matters involve substantial risk.<sup>24</sup> It would be absurd, for example, to enlist costly legal services for a controversy in small claims court or for the testamentary planning of a tax-exempt estate. Conversely, an inherently simple legal matter, such as borrowing \$150,000,000 to erect a building, is worth individualized legal services where serious, adverse consequences could result from only a minor error. From the consumer's viewpoint, therefore, risk is the more relevant variable in determining the value of legal services and thus in choosing the appropriate type of legal services. The differing nature of legal services reflects the differing nature of consumers' needs for these services.

Because participants in the advertising debate have failed to recognize that legal services are delivered in a market, they have also presupposed that both production and consumption of legal services are static. For instance, opponents of lawyer advertising assume that, because legal services are a necessity, advertising will stimulate demand only by encouraging frivolous, ill-spirited litigation.<sup>25</sup> This view fails to recognize, however, that, as legal services become more affor-

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<sup>23</sup> Most noncomplex, uncontested matters, such as a will for a small estate, an uncontested divorce for a marriage with little common property, or a title transfer for a small asset, fall into this category. See text accompanying notes 54-55 *infra*. Standardized production techniques are ordinarily appropriate where stakes are small.

<sup>24</sup> See note 21 *supra*.

<sup>25</sup> See H. Drinker, *supra* note 2, at 212 ("extensive advertising would doubtless increase litigation," contrary to public policy). Criticism of lawyer advertising often results from a more general criticism of the level and fundamental nature of litigation. See Francis & Johnson, *supra* note 14, at 223; Radin, *Maintenance by Champerty*, 24 *Calif. L. Rev.* 48, 68, 72 (1935) (observing that view of litigation as evil *per se* existed even as long ago as the advent of Christianity). Regardless of community opposition, litigation started to become more commonplace in America in the late eighteenth and early nineteenth centuries. See P. Miller, *Life of the Mind in America: From the Revolution to the Civil War* 186 (1965) ("[D]emocratic Americans were preternaturally ready to sue each other in courts of law, especially in the primitive turmoil of settlement across the Alleghenies."); W. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825*, at 122-32 (1981) (breakdown of religious homogeneity within Plymouth County was one factor contributing to increased use of courts for dispute resolution).

Furthermore, it is somewhat disingenuous to criticize lawyer advertising because it might increase the volume and character of litigation. While there is some suggestion that permitting

dable, middle and low income consumers who currently do not purchase necessary legal services<sup>26</sup> will be able to purchase such services. Moreover, to consumers in general, the choice of using legal services ordinarily is a relative preference. As in other aspects of economic life, consumers assess the costs and benefits of purchasing a legal service in light of the specific problems before them, their resources, and their desires for goods and services of other types. Consumers will purchase legal assistance when they believe that the transaction produces greater benefits than can be obtained by purchasing other goods or services at that price.<sup>27</sup>

Recognition of the interdependence of supply and demand is essential to understanding the effect of advertising on the legal services

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lawyer advertising has increased certain forms of litigation, see N.Y. Times, Apr. 11, 1983, at D1, col. 1 (describing successful use of television advertisements by personal injury lawyers), it is far from clear what form the increase will ultimately take. In addition, these arguably negative effects must be weighed against the benefits stemming from increased lawyer advertising. Finally, hostility towards particular causes of action, such as personal injury suits, is more properly directed at the relevant substantive law. Cf. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664, 668-76 (1979) (arguing that critics of class actions should not confound the impact of procedural rules with the impact of changes in substantive law). Seeking to discourage particular causes of action by restricting advertising serves only to limit such suits to plaintiffs who are aware of available legal services. Cf. B. Christensen, *Lawyers for People of Moderate Means* 142-46 (1970) ("[T]he practical effect of the old belief about the evil nature of all litigation was to limit the use of the litigative mechanism to the strong, the wealthy, and the knowledgeable.").

<sup>26</sup> It is not easy to define when legal services are truly necessary. See B. Christensen, *supra* note 25, at 18-20 (discussing subjective nature of legal need). The argument that low income consumers do not purchase legal services, however, does not depend on any particular definition of legal need; current statistics can be used to support this proposition independently of any particular definition of legal need. A national study published by the American Bar Foundation examined the relationship between the incidence of problems that arguably required legal services and the frequency with which services were actually used. See B. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* 260-61 (1977). The study demonstrated that, over the full range of legal problems, there is significant latent demand for legal services: Lawyers are consulted for only about a third of the problems that could reasonably be called legal problems. *Id.* The study also examined the relationship between the incidence of arguably legal problems, resort to legal services, and discretionary income. See *id.* at 152-57 (presenting tables analyzing impact of income on patterns of lawyer use). In many situations, poor individuals who had experienced arguably legal problems were less likely to seek legal services than similarly situated individuals with higher income. *Id.* This observation is not surprising because poor people often fail to recognize the legal dimensions of the problems confronting them, see B. Christensen, *supra* note 25, at 18-26, or because they simply believe that, given their income, legal services are not worth the cost, see Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 Yale L.J. 122, 132-35 (1980) (describing theory that cost-benefit analysis determines patterns of lawyer use).

<sup>27</sup> See R. Dorfman, *Prices and Markets* 107-16 (3d ed. 1978) (discussing utility maximization); P. Samuelson, *Economics* 436-47 (10th ed. 1976) (general discussion of substitution effect). The concept of substitution is implicit in the theory of price elasticity of demand. See generally R. Dorfman, *supra*, at 21-23 (discussing demand curve); P. Kotler, *Marketing Management*:

market. The demand for legal services is elastic. For example, if the price of legal services decreases, other factors remaining the same, the inclination to purchase them will increase. Similarly, supply is elastic in the legal services market. For instance, if the demand for legal services increases, suppliers will have more incentive to provide additional volume. This interdependence can be illustrated through example. If several law firms begin to advertise, demand for their legal services will increase, encouraging these firms to provide more services. As additional volume is produced, the supplier's cost of providing legal services may decline because fixed costs in the production process can be distributed over more units of service. These firms can achieve economies of scale through specialization, work force composition (e.g., the use of paralegals), or altering clients' expectations about the degree of personalized service to be provided. They can also structure their practices so as to focus on early diagnosis of risk—which can ordinarily be estimated very quickly by ascertaining the stakes involved in the matter<sup>28</sup>—and to process low risk and high risk matters differently. This reduction in average costs in turn makes it possible to cut prices and to stimulate still additional demand. The additional demand will give producers incentive to increase the supply of legal services. Thus, opponents and supporters of advertising have not fully recognized that advertising, by enabling the dynamics of normal market forces to operate on the delivery of legal services, may alter methods of supplying, as well as delivering, legal services.<sup>29</sup>

Failure to recognize that advertising will affect the way legal services are delivered has distorted the profession's analysis of advertising's impact on the practice of law. This Part's brief examination of the demand for and the production of legal services suggests that the process of delivering legal services must be regarded as being subject to market forces. The remainder of this Article will elaborate on the nature of this market by examining in greater detail how legal services

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Analysis, Planning, and Control 156-65, 398-401 (4th ed. 1980) (presenting model of consumer purchase decisions and discussing price elasticity of demand); P. Samuelson, *supra*, at 59-61 (discussing demand curve). In general, consumer access to information about particular goods and services varies both within and between markets, a situation that may make comparison of marginal benefits difficult. For a detailed discussion of the difficulties posed by imperfect product information in general, see H. Beales, R. Craswell & S. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 491 (1981).

<sup>28</sup> See note 23 and text accompanying notes 23-24 *supra*.

<sup>29</sup> Under some circumstances, a radical drop in price, a radical rise in volume, a radical drop in cost, and a radical increase in purchases may occur more or less simultaneously. This is the phenomenon of transformation from manual or hand-tailored production and distribution to mass production and distribution.

are delivered and the role that advertising plays in their delivery. The next Part will begin this elaboration by analyzing the different ways that consumers acquire information about legal services.

## II

### THE ROLE OF ADVERTISING IN THE LEGAL SERVICES MARKET

Individuals seeking to purchase legal services rely on the same sources of information that consumers rely on in other markets: personal knowledge, reputation, and advertising. It is essential to recognize that advertising is rarely, if ever, the only source of information about products and prices.<sup>30</sup> This Part will examine how these sources affect consumer decisions in the legal services market.<sup>31</sup>

The first and probably strongest source of consumer information is personal knowledge about a product.<sup>32</sup> Personal experience enables a consumer to evaluate a good or service on the basis of that experience and to appraise it in light of his own preferences. The shortcom-

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<sup>30</sup> Personalized communication is often more important to consumer buying decisions. See E. Katz & P. Lazarsfeld, *Personal Influence: The Part Played by People in the Flow of Mass Communications* 48-65 (1955) (suggesting that personal communication is more influential than impersonal communication, especially when a product is expensive, risky, or purchased infrequently); P. Kotler, *supra* note 27, at 484 (noting that communication between people has major role in consumer buying decisions). Katz and Lazarsfeld found primary group reference vital to interpersonal communication. They suggested that information is relayed and enforced through informal networks of communication. See E. Katz & P. Lazarsfeld, *supra*, at 48-65. Secondary group references, such as employment and community associations, have also been found important. See Granovetter, *The Strength of Weak Ties*, 78 *Am. J. Soc.* 1360 (1973). One study found that personal communication may be important in the decision of whether to use professional services: "Talk is apparently almost a prerequisite for going to a psychotherapist, for 80 to 90 percent [of those who see psychotherapists] have talked with others [about the problem]." C. Kadushin, *Why People Go to Psychiatrists* 312 (1969). With regard to legal services in particular, see K. Fisher & C. Ivie, *Franchising Justice: The Office of Economic Opportunity Legal Services Program and Traditional Legal Aid* 14-17 (American Bar Foundation Series, *Legal Services for the Poor* 1971) (suggesting that, in spite of free legal services offices' increased use of mass media, reputation information is the most important source of information about free legal services); cf. Hudec & Trebilcock, *Lawyer Advertising and the Supply of Information in the Market for Legal Services*, 20 *U.W. Ont. L. Rev.* 53, 59-66 (1982) (noting that most Canadian consumers lack requisite personal knowledge to shop comparatively and wisely for legal services).

<sup>31</sup> Information, in turn, is only one of three factors controlling market transactions. The three factors—product design, market segmentation, and information dissemination—are discussed in text accompanying notes 52-83 *infra*.

<sup>32</sup> See D. Hawkins, K. Coney & R. Best, *Consumer Behavior: Implications for Marketing Strategy* 412 (1980) (recognizing the importance of personal experience to consumer decisions, but conceding its effect is hard to measure); F. Nicosia, *Advertising, Management, and Society: A Business Point of View* 284 (1974) (suggesting importance of personal experience in consumer decisions).

ing of personal knowledge, however, is its particularity. Even extensive personal experience with a specific product, such as the services of a particular lawyer or firm, will not provide the consumer with all the information he needs to make the best market decision. Making the best market decision requires not only knowledge of an individual product but also an ability to compare it with other available products.

In order to make an informed decision about purchasing legal services, a consumer must be familiar with the legal services provided by a wide range of lawyers or firms. Comparing products through personal knowledge requires a significant investment of time, effort, and money. Relatively few consumers can afford the repeated experience necessary to make an informed choice among legal service providers. A field study published by the American Bar Foundation shows that, at least in the present market for legal services, the average adult uses a lawyer once or twice in his life.<sup>33</sup> Only a very small percentage of adults uses a lawyer as often as five times,<sup>34</sup> but even five uses of legal services would constitute very limited experience compared with, for example, the average person's use of doctors, dentists, or automobile mechanics. Furthermore, even if a consumer has used a particular legal service with relative frequency, he is still unlikely to have had the direct experience necessary to compare it with the services of other firms or with possible substitutes for legal services.<sup>35</sup>

As a partial result of the general insufficiency of personal knowledge, a second source of information—reputation—becomes an important element of consumer decisions to purchase legal services.<sup>36</sup> Reputation provides the potential buyer with a form of personal knowledge as it has been accumulated by others. Reputation informa-

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<sup>33</sup> B. Curran, *supra* note 26, at 185-86, 190 (68% of survey respondents had used a lawyer one or two times).

<sup>34</sup> *Id.* at 190 (seven percent of survey respondents had used a lawyer five times or more).

<sup>35</sup> Examples of some possible substitutes for legal services are arbitration performed by non-lawyers, use of contracts adapted from do-it-yourself manuals, and obtaining tax advice from a nonlawyer.

<sup>36</sup> Reputation information and personal influence can be assumed to affect legal services purchases much as they do purchases of other goods. Cf. E. Katz & P. Lazarsfeld, *supra* note 30, at 219-33 (discussing flow of information and influence for grocery buying, fashion trends, movie-going, and public affairs; though each area had different "opinion leaders," breadth of information flow and importance of reputation were present in all areas). But cf. Pricing and Advertising, *supra* note 6, at 4-9 (information about legal services less widespread than information about most products; the disparity results, in part, from extensive ban on lawyer advertising).

tion is important to consumers for two reasons. First, reputations are seen as trustworthy because they come from such reliable sources as family and friends.<sup>37</sup> Second, the acquisition of reputation information requires relatively small investments of time and energy. Opponents of legal services advertising implicitly assert that reputation is a very reliable medium of information.<sup>38</sup> Nevertheless, the evaluations that create a reputation are not those of the prospective purchaser himself. Hence, the prospective purchaser will find reputation information both less complete and less trustworthy than his personal knowledge.<sup>39</sup> Whenever possible, he will seek to confirm reputation information with personal knowledge or will at least try to verify the reputation's accuracy.<sup>40</sup>

Because some consumers have much greater access than others to reputation information, not all prospective purchasers of legal services are equally well equipped to verify reputation information. For example, one valuable source of reputation information, personal contact with a lawyer or with those who frequently use legal services, is concentrated most heavily among whites and property owners with high incomes and better education.<sup>41</sup> Thus, nonwhites and persons of low and middle socioeconomic status usually have fewer sources of reputation information about legal services.

A third source of product information is advertising. Advertising consists of a message, usually short, that is relayed to a large group at the instance of the producer. Like reputation information, advertising allows consumers to compare goods or services without having re-

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<sup>37</sup> See E. Katz & P. Lazarsfeld, *supra* note 30, at 139-46, 325 (suggesting that individuals are more likely to be influenced by people they consider competent and trustworthy); cf. P. Lazarsfeld, B. Berelson & H. Gaudet, *The People's Choice* 60-64, 155-57 (3d ed. 1968) (arguing that pressure from family and friends has strong influence on decisions about whether to vote and for whom to vote); Wall St. J., Oct. 22, 1981, § 2, at 29, col. 1 (discussing role of "word of mouth" in consumer decisions).

<sup>38</sup> See H. Drinker, *supra* note 2, at 218 ("Clients naturally gravitate to a lawyer who has successfully represented their friends or who has obtained the confidence of the community by effective public service.").

<sup>39</sup> See Hudec & Trebilcock, *supra* note 30, at 64.

<sup>40</sup> Consumer information searches rarely end after hearing a single piece of reputation information. Consumers are likely to engage in a sufficiently lengthy information search so as to be able to compare and evaluate any particular piece of information. See P. Kotler, *supra* note 27, at 156-67 (describing information searches).

<sup>41</sup> Mayhew & Reiss, *The Social Organization of Legal Contacts*, 34 Am. Soc. Rev. 309, 312-15 (1969); see also Carlin & Howard, *Legal Representation and Class Justice*, 12 UCLA L. Rev. 381, 426-27 (1965) (lower class individuals are less likely to know someone who can refer them to lawyers); Hudec & Trebilcock, *supra* note 30, at 64-65 (maintaining that individuals in lower socioeconomic groups are less likely to know a lawyer socially); Project, *supra* note 26, at 144-45, 164 (presenting statistical results of a national survey about patterns of lawyer use).

peated, broad-based personal experience.<sup>42</sup> It enables them to gather, at little personal cost, information about a range of goods or services—information that may be indispensable for substantiated market comparisons and choices.<sup>43</sup> Advertising has a number of characteristics that make its impact relatively ineffectual in comparison with either direct experience or reputation information. The brevity of its message constrains producers from communicating all of the information consumers need or desire. Because the advertising information comes from an impersonal source, consumers often pay little or no attention to it. Similarly, the obviously biased source of the message encourages them to seek corroboration through other available reputation information.<sup>44</sup>

Advertising has advantages and disadvantages for producers as well. Before deciding to advertise, any individual producer must care-

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<sup>42</sup> Many commentators are skeptical of the degree to which consumers trust advertising messages unless the impression created by the message is reinforced by good reputation or satisfactory experience with the product. They suggest that advertising is only one factor affecting consumer preferences. See, e.g., Huth, *The Advertising Industry—An Unlikely Monopolizer*, 19 *Antitrust Bull.* 653, 666-68, 672 (1974); Miller, *Advertising and Competition: Some Neglected Aspects*, 17 *Antitrust Bull.* 467 (1972); see also note 37 *supra*. Others, however, believe that consumers are very susceptible to advertising messages. They fear that the best advertisers would capture unduly large segments of the market. See, e.g., Kaldor, *The Economic Aspects of Advertising*, 18 *Rev. Econ. Stud.* 1 (1950-1951). An introduction to some of the arguments concerning advertising can be found in F. Scherer, *Industrial Market Structure and Economic Performance* 376-84 (2d ed. 1980), and H. Beales, R. Craswell & S. Salop, *supra* note 27, at 491-539. For examples of these arguments in the context of professional services, see C. Baird, *Advertising by Professionals* (Int'l Inst. for Econ. Research Original Paper No. 8, 1977) (suggesting that advertising increases competition); *Pricing and Advertising*, *supra* note 6, at 4-9 (consumer ignorance of legal matters is so great that attorneys may gain greater market control than most other producers or service providers).

The experience of law firms that have advertised suggests that advertising has not yet overcome direct experience as a marketing factor and that it stimulates primarily latent demand for legal services by encouraging only those who have not previously consulted a lawyer to do so. See ABA Commission on Advertising, *Summary of Hearing Testimony* (1979) (clinic proprietors suggest that most of their clients had not previously consulted a lawyer); see also Hudec & Trebilcock, *supra* note 30, at 70 n.45. Significantly, advertising designed to reach previously untapped markets has succeeded for both brokers and tax preparers. See Karp, *Leader of the Herd*, *Barron's*, Dec. 16, 1974, at 10; Karp, *The Bewilderment of Henry Block*, *Dun's*, Sept. 1974, at 53, 57 (the 50% annual growth of H & R Block derived from lower and middle income persons who had not previously sought tax preparation aid); *A Broker Uses TV to Educate Clients*, *Bus. Wk.*, Apr. 11, 1977, at 90.

<sup>43</sup> Some kinds of information that can be reliably communicated through advertising, see note 44 *infra*, can be critical to prospective consumers of legal services. Examples of such kinds of information are (1) the fact that legal services can help remedy a specific problem, and (2) the price of legal services.

<sup>44</sup> See notes 49-50 and accompanying text *infra*. As one economist has observed: "[T]he amount of deceptiveness in advertising can easily be exaggerated if one simply looks at the incentives of advertisers to deceive without considering the incentives of consumers not to be

fully weigh these costs and benefits. Advertising's primary advantage is that it enables the producer to reach and recruit a large number of consumers and thereby to increase revenue; the increased volume may permit the reduction of production costs through economies of scale<sup>45</sup> and thereby generate further increases in profits. Advertising, however, also has drawbacks for the producer. Its chief drawback is its high cost;<sup>46</sup> moreover, efficacy normally requires repetition.<sup>47</sup> Advertising also incurs the costs associated with mass marketing, such as those of preparing for levels of production sufficient to meet the demand generated by advertising promotion. This increased demand may also require some form of standardized production, both to absorb marketing costs and to increase output, and standardized production entails start-up costs such as expenditures for research and development.<sup>48</sup> Thus, restrictions on advertising limit lawyers' exposure to entrepreneurial risk. If lawyers cannot advertise, and legal services are promoted through personal knowledge and reputation information, lawyers will not bear any of the direct costs of providing consumers with information. Furthermore, because without advertis-

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deceived. . . . Deception requires not only a misleading or untrue statement, but someone ready to be misled by the statement." Nelson, *Advertising as Information*, 82 J. Pol. Econ. 729, 749 (1974) [hereinafter Nelson, *Advertising as Information*].

One factor that affects consumers' confidence in advertising information—i.e., their susceptibility to being deceived—is the content of the advertising message. Consumers behave differently towards advertising of "search qualities"—qualities that can be determined by inspection prior to purchase—than towards advertising of "experience qualities"—those qualities that cannot be ascertained prior to purchase. Cf. *id.* at 731 (defining "search" and "experience" qualities). Producers have strong disincentives to mislead consumers about search qualities because consumers can easily verify assertions about search qualities prior to purchase. *Id.* Consumers can therefore have confidence in search information that is provided by advertising. *Id.* Market forces do not, however, provide producers with similar disincentives against misleading consumers about experience qualities. Thus, when experience qualities are important to making a purchase decision, consumers will tend to rely on reputation information rather than on advertising information. See Nelson, *Information and Consumer Behavior*, 78 J. Pol. Econ. 311, 321-23 (1970) [hereinafter Nelson, *Information and Consumer Behavior*].

Two other factors tend to reduce consumer reliance on advertising. The more expensive a good is, the more likely the consumer is to rely on reputation rather than on advertising information. Nelson, *Advertising as Information*, *supra*, at 749. Second, consumers tend to rely more on reputation information when buying products that are infrequently purchased. See Nelson, *Information and Consumer Behavior*, *supra*, at 321-23 (suggesting that consumers will rely more on reputation when evaluating seldom-purchased goods).

<sup>45</sup> See text accompanying notes 26-29 *supra*.

<sup>46</sup> See L. Andrews, *supra* note 2, at 14 (discussing advertising expenditures by law firms).

<sup>47</sup> See C. Dirksen, A. Kroeger & F. Nicosia, *Advertising Principles, Problems, and Cases* 87-89 (5th ed. 1977); D. Lucas & S. Britt, *Measuring Advertising Effectiveness* 218 (1963).

<sup>48</sup> Designing methods for processing a high volume of cases requires a large investment of time and money. For example, one legal clinic devoted more than a year's time and several hundred thousand dollars to creating computerized legal forms before opening its first office.



ing demand is relatively stable, lawyers will lack incentives to incur the set-up costs associated with mass production.

Because advertising may fail to alter consumer choice, the producer who advertises is subject to considerable entrepreneurial risk. If he spends a great deal of money and fails to gain the consumers' attention, he has lost much. More importantly, if he spends much, but consumers are dissatisfied with his product, he will lose more than his promotional investment. The producer who advertises runs this risk of extraordinary loss because of the general effect that advertising has on consumer behavior. Advertising tends to cause consumers to seek information about the producer's reputation and about other consumers' direct experience with him.<sup>49</sup> Moreover, advertising often better enables consumers to evaluate reputation information.<sup>50</sup> If reputation and experience information are unfavorable, advertising can have the ironic effect of informing a much larger group of consumers about the poor quality of the producer's goods or services. Thus, while advertising offers the potential of attracting a high volume of business, it also carries with it the possibility of a significant loss of business.<sup>51</sup>

This Part has discussed the relative efficacy of the three different means of informing consumers about legal products and has outlined the effects of lawyer advertising in general terms. It has suggested that effective advertising requires a large investment, must be accompa-

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Interview with Wayne Willis, senior partner and co-founder of Hyatt Legal Services, in New Haven, Connecticut (March 5, 1979); see also Brill, TV Pitchman for Cut-Rate Legal Advice, *Esquire*, May 9, 1978, at 87, 89-90; Hudec & Trebilcock, *supra* note 30, at 82, 89.

<sup>49</sup> Advertising can often cause consumers to feel a need for a product. Once a consumer's perceived need for a product has reached a sufficient level, the consumer will initiate an information search. The nature of this information search varies with product categories and with the consumer's personal characteristics. In general, however, noncommercial information sources such as reputation have a stronger effect on consumer evaluations of products than have commercial information sources. See P. Kotler, *supra* note 27, at 156-57; cf. P. Lazarsfeld, B. Berelson & H. Gaudet, *supra* note 37, at 75-86 (political propaganda arouses citizen interest in politics, causing citizens to acquire information on their own initiative).

<sup>50</sup> Advertising plays a different role in the consumer's decisionmaking process when it is seen after the consumer has already reached a level of perceived need sufficient to have begun an information search. When the consumer is exposed to advertising at this stage, it helps the consumer to remember brand names and thus enhances the consumer's ability to remember, distinguish, and evaluate reputation information. See Nelson, *Advertising as Information*, *supra* note 44, at 734.

<sup>51</sup> Cf. Hudec & Trebilcock, *supra* note 30, at 71 (dishonest advertising will in large part create its own demise); Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. Legal Stud. 527, 530 (1979) (advertising, when combined with a good reputation, creates a positive brand recognition that contributes to a firm's value; misrepresentation, on the other hand, is likely to diminish a firm's value).

nied by the capacity for mass production of quality goods or services, and must avoid negative feedback. Only if consumers judge the product as satisfactory will the producer find advertising worthwhile. From the consumers' perspective, advertising by competitors provides information about many products. It thus affords consumers a basis for comparing many products, even though the basis of that comparison is less reliable than that provided by personal knowledge or reputation. The next Part will focus more specifically on the role of advertising in the legal services market.

### III

#### THE EFFECT OF MARKET FORCES ON THE UTILITY OF LAWYER ADVERTISING

Exchanges between producers and consumers generally depend on three factors: product design, market segmentation, and information dissemination.<sup>52</sup> "Product design" encompasses both the particular nature of a product, as well as its price to the buyer. "Market segmentation" refers to a product's characteristic features and their effects on the preferences of consumers willing to purchase the general type of product. "Information dissemination," discussed in Part II, involves both the methods that producers use to provide consumers with information about their products and the methods that consumers use to obtain information. This Part will consider how advertising, as one form of information dissemination, varies in its utility to lawyers and consumers depending on the other factors affecting the sale of legal services—product design, market segmentation, and other forms of information dissemination.<sup>53</sup>

#### A. *Product Design*

The "product" provided by lawyers consists of a wide variety of services ranging from the preparation of a simple will to the litigation of a complex matter. We believe that legal services can be separated into two categories: standardizable services and individualized services. Standardizable and individualized services differ in two respects.

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<sup>52</sup> Although commentators have not used these particular terms to describe a market, the concepts are implicit in the literature of economics and marketing. See, e.g., C. Dirksen, A. Kroeger & F. Nicosia, *supra* note 47, at 66-96; R. Dorfman, *supra* note 27, at 7, 13-41; P. Kotler, *supra* note 27, at 129-69, 194-206, 395; P. Samuelson, *supra* note 27, at 45-48.

<sup>53</sup> See note 27 *supra*; cf. Pricing and Advertising, *supra* note 6, at 4-9 (applying conventional market theory to the legal services market, but noting several distinctions in that market).

First, the two kinds of services use different production techniques. The second difference, largely a function of the first, is that the fees charged for standardizable services reflect underlying costs different from those reflected in individualized service fees.

Standardizable services include matters such as uncontested divorces, simple wills, and routine collection litigation, each of which is best delivered through a routinized system of production.<sup>54</sup> The use of a routinized system of production requires legal services producers to apply analytical skills to designing routines for processing similar legal problems. Although creating these standardized systems requires extensive up-front research, the production system allows lawyers to handle more clients and to achieve lower per unit costs.<sup>55</sup> When standardized production is used, the client's bill reflects both the underlying costs of processing that particular legal problem and a portion of the capital cost incurred in creating the production system. Standardizable services thus have potentially lower per unit costs because of the economies of scale that can result from relatively higher production volume.

Examples of individualized services, in contrast, include a plan for a vast estate involving many beneficiaries, a large securities issue, a merger of two substantial business corporations, and a trial involving a serious tort or crime. When a firm provides an individualized service, the legal problem is resolved solely through the application of skills to that particular case; individualized service production does not utilize formal, standardized production routines. Fees for individualized legal services principally reflect the costs of the efforts applied to that particular problem.<sup>56</sup>

Every law practice operates through some combination of individualized and standardized production.<sup>57</sup> In general, however, legal practices fall within one of three categories: primarily individualized,

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<sup>54</sup> Standardizable services are best delivered through a routinized system of production because delivery through such systems can lower price without reducing quality. See text accompanying notes 27-29 *supra* and 55-56, 84-94 *infra*. If more extensive use of lawyer advertising is permitted, thus allowing market forces to operate more freely, standardizable services will tend to be provided through standardized production systems.

<sup>55</sup> See Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179, 191-93 (discussing standardization of legal services).

<sup>56</sup> While billing for contingent fee services differs from that accompanying most other individualized services, contingent fee services are properly included in the individualized category because they often involve individualized discovery and proof. However, the procedures for conducting some contingent matters, such as workers' compensation proceedings, can be readily standardized.

<sup>57</sup> The terms "standardized" and "standardizable" are discussed in note 18 *supra*.

primarily standardizable, or mixed.<sup>58</sup> Primarily individualized practices deliver most of their services through individualized production and incur most of their costs and earn their profits on a case-by-case basis. Firms providing primarily standardizable<sup>59</sup> services employ a different production strategy. They assume a high volume of client matters<sup>60</sup> and focus their labor on systematizing their response to similar legal issues. The costs of creating this system can be recovered gradually through billings for cases subsequently resolved through the standardized production system.

Individualized and standardizable practices differ in the kinds of demand they require to make a profit. Primarily individualized practices can profit with a small or moderate volume of cases. Indeed, a single large case can sustain a fair-sized firm for whatever time is required to resolve the matter.<sup>61</sup> In contrast, to attract clients, firms with primarily standardizable practices must charge less than those with individualized practices because they provide clients with less personal attention, a characteristic that is generally regarded as a valuable incident of professional services.<sup>62</sup> Consequently, producers

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<sup>58</sup> It is important to emphasize that placement in any one of these categories is a matter of degree. Primarily individualized firms may utilize methods of production and cost recovery that are characteristic of primarily standardizable firms, and vice versa. This phenomenon can be illustrated by examining some of the features of a typical primarily individualized practice, the corporate law firm. Such firms have developed routine procedures for organizing a corporation that are standardized down to the minutes that are taken at the first meeting of incorporators. Furthermore, they also treat some of their costs as capital expenditures and recover them gradually over time. For instance, corporate law firms often discount the hourly billings of junior associates. This initial "loss" is then recouped by the billing rates charged once those associates have accumulated sufficient professional experience.

<sup>59</sup> For purposes of the ensuing discussion, it will be assumed that firms offering standardizable services in fact use standardized production techniques. See note 54 *supra*. Some consumers of standardizable services, however, may still choose to patronize primarily individualized firms that use primarily individualized production. See notes 18 *supra* and 70 *infra*.

<sup>60</sup> Attempting to attract and preparing to accommodate higher demand are not undertaken without risk. See text accompanying notes 45-51 *supra*.

<sup>61</sup> The legal problems normally facing businesses, whether involving litigation or such non-litigation matters as arranging mergers or issuing securities, are usually quite complex. The stakes involved in these problems are high enough to justify the large expenditures that normally accompany individualized legal services. The complexity of business problems normally requires extensive attention by individual attorneys to insure that legal advice is specially tailored to the individual problem. See notes 66-68 and accompanying text *infra*. Furthermore, the clients who have such legal needs once are likely to have them many times. A few of these clients can therefore sustain a firm for years.

<sup>62</sup> If the standardizable firm does not substantially undersell individualized or mixed firms, consumers, being infrequent and often apprehensive purchasers of legal services, will either patronize the individualized or mixed firm, where they will receive more reassuring personal attention, or they will refrain from using a lawyer altogether. Firms that provide standardizable

of standardizable services will profit less from each case. To make their practice worthwhile, then, they must attract a high volume of cases.

Mixed practices, as the term implies, contain elements of both individualized and standardizable practices. They tend to offer a wide range of legal services to a varied clientele and produce their services through both individualized and standardized production systems. The manner in which mixed firms recover their costs also distinguishes them from either primarily individualized or primarily standardizable firms. Mixed firms cannot maximize profits on services delivered through either individualized or standardized production.<sup>63</sup> Because they spend less time processing individualized matters than do individualized firms, they are less efficient in resolving individualized problems. This inefficiency is likely to result in their charging smaller profit margins in the fees they collect for individualized services. Similarly, mixed firms are less efficient in providing services through standardized production than are primarily standardizable firms since mixed firms never achieve the economies of scale achieved by standardizable firms. Since their costs of production are therefore higher, they profit by charging more for each case. They may also offer to sell standardizable services at or below cost in hopes of attracting future individualized business.<sup>64</sup>

### *B. Market Segmentation*

Another aspect of the legal services market is its segmentation.<sup>65</sup> Market segmentation refers to the phenomenon that various categories of purchasers will buy different types of product images. For the seller, it means that specific categories of potential purchasers must be identified and that the product must be patterned to address their specific needs.

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services, then, must advertise price. While in theory advertising that does not mention price might attract latent demand, in practice this is unlikely to be true. Most individuals probably already know of the general availability of legal services for common problems such as wills, divorces, real estate, and personal injuries; they fail to contact lawyers because of perceptions about the high price of legal services.

<sup>63</sup> In theory, nothing would prevent a firm from separately providing standardized and individualized services, thus creating a hybrid that attains the efficiencies of both individualized and standardizable firms. Such a firm would not be a mixed service firm as we have defined it.

<sup>64</sup> Cf. Lochner, *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 *Law & Soc'y Rev.* 431, 443-44 (1975) (young lawyers take on pro bono cases to attract future paying clients, to gain experience, and to make legal contacts).

<sup>65</sup> See text accompanying notes 16-25 *supra* and 73-79 *infra*.

In the model legal services market, the consumer chooses a type of product according to his financial resources and the risks involved.<sup>66</sup> Those with great resources and more at stake favor individualized services; typical individualized service clients are wealthy individuals and corporations whose legal problems usually are both complex and risky.<sup>67</sup> Consumers with substantial interests at stake are willing to pay a higher fee to avoid the perceived risks that attend a more standardized service.<sup>68</sup>

The great majority of the public, however, has moderate resources and has legal problems of moderate risks. These consumers usually face problems such as wills, divorces, and property acquisitions that involve small or moderate risks of loss.<sup>69</sup> The stakes involved are, on the average, less than for consumers seeking individualized services. While most consumers' legal problems are not necessarily simple, from the consumers' viewpoint they are worth only a modest investment in legal services.<sup>70</sup> Currently, consumers with modest problems patronize mixed or standardizable firms; they apparently do not feel, given their resources and preferences, that primarily individualized service is worth the cost.

### *C. Information Dissemination*

Information dissemination constitutes the third aspect of market behavior. As might be expected, each of the three types of practices has, by virtue of its product and market, different strategies for disseminating information about itself. Consequently, each relies on a different mix of the information techniques discussed in Part II—direct experience, reputation, and advertising.<sup>71</sup>

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<sup>66</sup> See text accompanying notes 20-21 *supra*.

<sup>67</sup> While complexity can be an important factor in determining whether individualized services are appropriate, legal problems are better categorized by risk than by complexity. See note 21 and text accompanying notes 18-24 *supra*.

<sup>68</sup> Individualized services are arguably of better quality than services provided through standardized production because individualized services present less risk that the service will not be tailored to respond to the unique facts of a legal problem.

<sup>69</sup> B. Curran, *supra* note 26, at 103-04.

<sup>70</sup> Some standardizable services may nevertheless be provided in an individualized fashion. For example, a large Wall Street firm may handle divorce, probate, estate planning, or traffic ticket problems for a wealthy person. Firms providing primarily standardizable services, however, will have little capacity to provide individualized services and thus must charge relatively lower fees to attract middle income clients.

<sup>71</sup> See text accompanying notes 30-51 *supra*.

Providers of primarily individualized services have little use for advertising of any kind and no use for mass advertising.<sup>72</sup> Because purchasers of individualized legal services have a great deal at stake,<sup>73</sup> they are likely to evaluate carefully information about legal services. Advertising provides little information useful to such consumers. Its brevity renders it relatively ineffective in communicating the complexity, reliability, and uniqueness of an individualized service. Furthermore, advertising originates from an obviously biased source. Simply put, advertising is not cost effective for the seller of individualized services because it cannot communicate information likely to influence potential purchasers of those services.

Other factors contribute to the ineffectiveness of individualized legal services advertising. Many individualized services clients are repeat users of legal services<sup>74</sup> and accordingly have personal knowledge of particular firms' past work. Similarly, clients with sophisticated legal problems, business or personal, usually associate with other persons having similar legal problems.<sup>75</sup> Reputation information about individualized firms, therefore, is often available to the client with a need for individualized services. The availability of alternative reliable information sources makes advertising largely irrelevant to patrons of individualized firms.<sup>76</sup>

Firms offering primarily standardizable services, however, must appeal to a broader-based, less well-connected, and less well-informed clientele to generate the volume of business necessary to profit from their moderate prices.<sup>77</sup> To generate this large client pool, these practices must stimulate the latent demand for legal services. They

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<sup>72</sup> See Note, *supra* note 14, at 1201-04 (concluding that individualized service providers have little use for advertising, but not considering differences in production techniques used to provide individualized and standardizable services).

<sup>73</sup> "Stake," in this context, is the gravity of the consequence to life, liberty, or property that might ensue if a legal service does not favorably resolve the matter in question. See text accompanying notes 20-23 *supra*.

<sup>74</sup> See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95, 103-04, 112-19 (1974).

<sup>75</sup> See note 41 and accompanying text *supra*.

<sup>76</sup> Advertising expenditures would largely be wasted for the individualized firm, as almost any advertising medium will reach beyond the small group of persons requiring individualized legal care. Primarily individualized firms, however, can perhaps benefit from the advice of public relations firms. See Brill, *How to Handle the Press*, *Am. Law.*, Jan. 1981, at 8; Goldstein, *Marketing Lawyers' Services into the 1980's*, 54 *N.Y. St. B.J.* 202, 236-39 (1982).

<sup>77</sup> Primarily standardizable firms must charge moderate prices because they are likely to use standardized production techniques. See note 59 *supra*. Because standardized production provides the consumer with less personal attention, and personal attention is generally regarded as a valuable incident of professional services, market forces will encourage standardizable service firms to charge less for standardizable services than would an individualized firm.

must reach those persons who, because of the relative infrequency of their legal problems, the high cost of legal services, or the mystique surrounding the legal profession, do not consult attorneys for any but the most pressing problems.<sup>78</sup> For the potential client, even the minimal information that advertising provides about a primarily standardizable practice is useful. Standardizable service firms must provide consumers with this threshold of information;<sup>79</sup> personal knowledge and reputation cannot reach such a wide audience efficiently.<sup>80</sup>

Mixed practices,<sup>81</sup> unlike standardizable and individualized service firms, do not rely on any single marketing strategy. The firm providing mixed services can make use of all three forms of information dissemination, depending on the mix of legal services it provides. While a mixed services firm could advertise its standardizable services, it will not find advertising as profitable as will a firm providing primarily standardizable services.<sup>82</sup> Mixed firms cannot achieve economies of scale comparable to those achieved by primarily standardizable firms because mixed firms cannot accommodate mass demand for

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<sup>78</sup> This conclusion can be inferred from statistics showing that poor people who had experienced problems that could reasonably be called legal problems were far less likely to seek legal services than were similarly situated individuals with higher incomes. See B. Curran, *supra* note 26, at 152-57 (presenting tables analyzing the impact of income on patterns of lawyer use); see also note 26 *supra*.

<sup>79</sup> Cf. L. Andrews, *supra* note 2, at 13 (noting advantages of legal advertising); Heffernan, A Lawyer Learns of Broadcasting's Advantages, *Broadcasting*, Nov. 13, 1978, at 18 (describing how advertising helped one legal clinic achieve needed volume); Meyers, *Legal Clinics: Their Theory and How They Work*, 52 L.A.B.J. 106 (1976) (arguing that without advertising legal clinics are unlikely to flourish); Muris & McChesney, *supra* note 55, at 183-84, 189-91 (observing that clinics must advertise to achieve volume of work sufficient to prosper).

The growth of legal clinics since advertising by lawyers has been permitted, see notes 2-13 and accompanying text *supra*, suggests that standardizable firms need to advertise. In 1974, there were eight legal clinics in the nation. In early 1977, there were more than 60 such law firms. In early 1979, after many state bar associations had changed their advertising rules to conform with *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), there were more than 150 legal clinics. See Bodine, *Legal Clinics: The Bargain Bar*, *Nat'l L.J.*, Feb. 12, 1979, at 1, col. 1 [hereinafter Bodine, *The Bargain Bar*]. By late 1979, nearly 700 clinics existed. See Bodine, *Proliferation of Legal Clinics Continues; 550 More Were Born in the Last 10 Months*, *Nat'l L.J.*, Dec. 31, 1979, at 5, col. 1.

<sup>80</sup> See text accompanying notes 30-41 *supra*. As noted above, see notes 49-51 and accompanying text *supra*, personal knowledge and reputation are still vital to the success of primarily standardizable firms. The generality of information contained in advertisements, as well as skepticism about advertising claims, will lead potential clients to supplement advertising with information from reputation and personal knowledge. Consequently, clients in need of standardizable services will avoid standardizable firms that have bad reputations or with which they have had bad experiences.

<sup>81</sup> For a description of mixed service firms, see text accompanying notes 63-64 *supra*.

<sup>82</sup> Firms providing primarily standardizable services are likely to use standardized production techniques. See note 59 *supra*; see also notes 18-24 and accompanying text *supra*.



standardizable services. Thus, other things being equal, a mixed services firm cannot match the low prices that standardizable services firms charge.<sup>83</sup> For a mixed firm, investment in advertising is correspondingly less profitable.

Similarly, while reputation and personal knowledge will attract clients for individualized services offered by mixed practices, these forms of information dissemination will often be less effective media for these firms than for firms concentrating on individualized practices; clients of mixed services firms typically are less frequent users of legal services than are clients of individualized practices. At the same time, though, clients of mixed practices usually have less at risk and demand less personalized treatment. As a result, skillful advertising might succeed in recruiting some individualized clients for mixed firms.

#### IV

#### THE CONSEQUENCES OF ADVERTISING FOR THE LEGAL SERVICES MARKET

As we have seen, permitting lawyers to advertise probably will have little effect on the market for individualized legal services:<sup>84</sup> The price and quality of such services are likely to remain largely as they are today.<sup>85</sup> Yet advertising can improve the function of the market

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<sup>83</sup> A comparison of mixed and standardizable firms' fees suggests that mixed practices have been unable to achieve economies of scale. The legal advertisements that have proliferated since *Bates* have generally promoted competition and overall local price reduction. Telephone interview with W. Canby, Professor of Law, Arizona State University (Feb. 12, 1979); see Clark, A Client's-Eye View of Low-Fee Lawyers' Ads, *Money*, Mar. 1978, at 117. Average clinic prices are significantly lower than those of traditional, mixed practice law offices serving persons with average legal problems. Bodine, *The Bargain Bar*, supra note 79, at 27-28. Economic theory, which predicts cost-saving through planned high-volume routine legal practice, thus appears vindicated. See Hirshleifer, *The Firm's Cost Function: A Successful Reconstruction?*, 35 *J. Bus.* 235, 239-40 (1962); Muris & McChesney, supra note 55, at 184.

<sup>84</sup> See text accompanying notes 72-76 supra.

<sup>85</sup> Major firms with business clients appear to have steadily increased their hourly billing rates and starting associates' salaries in the years since *Bates*. See Tisher, Bernabei & Green, *Cleaning Up*, *Student Law.*, Nov. 1977, at 14, 16; see also annual salary surveys in *Student Law.*, Nov. 1982, at 21-24; *Student Law.*, Nov. 1981, at 25, 28-31; *Student Law.*, Nov. 1980, at 35, 38, 41-43; *Student Law.*, Nov. 1979, at 21, 24-28; *Student Law.*, Nov. 1978, at 27, 30-35; *Student Law.*, Nov. 1977, at 19, 21, 44-46; *Student Law.*, Oct. 1976, at 26-28; *Student Law.*, Oct. 1975, at 22, 24. The surveys show that the largest increases, in both absolute dollars and percentage terms, have been at the largest firms, which, not coincidentally, are individualized firms serving primarily business clients. See also *Pricing and Advertising*, supra note 6, at 76-77 (presenting tables comparing the fees charged for four basic legal services: uncontested divorce, simple will, will with trust, and uncontested bankruptcy). Generally, firms that advertise and charge a flat rate have the lowest prices. Firms that do not advertise and that charge by the hour presumably provide more individualized services. They also appear to charge the highest fees.

for standardizable services and will probably lead to lower prices without a decline in the quality of services. Current restrictions on advertising interfere with the optimal function of the market for standardizable legal services. Without advertising, producers cannot generate high volumes or achieve economies of scale, and thus have little incentive to offer standardizable services at lower prices. Indeed, prohibitions on advertising may actually inflate the price of standardizable services. Consumers of such services cannot readily compare prices without advertising<sup>86</sup> so that services actually provided through standardized techniques may appear no different to the infrequent user than do individualized services. Therefore, lawyers who provide standardizable services can use standardized production techniques, charge fees far above cost, and still attract clients.

Historically, the quality of legal services has been uneven and regulated, if at all, by the bar. Lawyers' codes of professional responsibility insure only a minimum standard of quality and are enforced infrequently at best.<sup>87</sup> In the legal services market, as in most other markets, consumer protection is left primarily to market forces.

Market forces control quality when consumers refuse to make repeat purchases from a producer and give that producer a bad reputation by informing other consumers about the low quality of its goods and services. These market safeguards operate fairly effectively for primarily individualized services because many individualized consumers are frequent users and also know one another.<sup>88</sup> Without advertising, however, market forces cannot protect consumers of mixed and standardizable services, who are infrequent users and who know few persons acquainted with a particular firm. In a legal services market without advertising, frequent users are more likely to receive services at the price and quality they desire than are consumers with less access to experience and reputation information.<sup>89</sup> Without advertising, the quality and price of standardizable legal services are controlled principally by producers.

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<sup>86</sup> See *Pricing and Advertising*, *supra* note 6, at 5-6.

<sup>87</sup> See Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 *Am. B. Found. Research J.* 919, 922-23, 1000 (arguing that clients have the primary responsibility for identifying lawyer deviance and that lack of awareness about the disciplinary system minimizes the reporting of questionable lawyer behavior). Furthermore, the bars' "all-but-exclusive focus on deviance control" seeks only to identify the worst offenders rather than to upgrade the overall quality of the profession. *Id.* at 1015.

<sup>88</sup> See text accompanying note 41 *supra*.

<sup>89</sup> See *Pricing and Advertising*, *supra* note 6, at 5-6 (noting that consumers of legal services are often unable to evaluate fully the quality of services and fairness of the price).

As we have seen, lawyer advertising will not affect the price and quality of individualized services.<sup>90</sup> Providers of individualized services are not likely to advertise, and consumers of individualized services are not likely to rely on advertising information. Permitting advertising will thus neither facilitate nor interfere with the operation of the market for individualized legal services. On the other hand, advertising will enable producers of standardizable services to increase business volume, to achieve economies of scale, and to lower prices. Once consumers are able to compare prices of standardizable services, those firms that can mass produce these services will attract more clients.<sup>91</sup> Consequently, some producers of standardizable services will grow larger, and market power in this part of the legal services market will become more centralized.<sup>92</sup>

Advertising will also tend to improve the quality of standardizable legal services by improving information dissemination in the market in two ways. First, advertising will create greater familiarity with names of firms, making it easier for consumers to retain information they hear about a particular firm.<sup>93</sup> Second, advertising will improve access to reputation information by stimulating latent demand. Individuals who could not, or who believed they could not, afford legal services will find that legal services are affordable. These individuals will then purchase legal services, evaluate the services they purchase, and supply reputation information to other consumers. Thus, because of greater name familiarity and improved access to reputation information, consumer evaluations of quality—especially negative evaluations—are likely to become known to potential customers of these firms. With this information, consumers will avoid bad firms and will patronize the better ones.<sup>94</sup> For the consumer of standardizable services, the probable result of permitting lawyers to advertise will be lower priced services of better quality.

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<sup>90</sup> See text accompanying notes 72-76 *supra*.

<sup>91</sup> Factors such as quality, location, office facilities, friendliness, and community standing will continue to be important to consumers. Nevertheless, consumers will presumably look first to lower-priced practices when quality and other attributes of competing standardizable firms are largely indistinguishable.

<sup>92</sup> A study of eyeglass sales, for example, found that states permitting advertising have a greater proportion of large, low-priced retail outlets in major population centers and fewer small, "neighborhood" optometrists' offices. See Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & Econ. 337, 350-51 (1972).

<sup>93</sup> See Nelson, *Advertising as Information*, *supra* note 44, at 734.

<sup>94</sup> This observation highlights deficiencies in the traditional argument against lawyer advertising. Traditionalists maintain that reputation information alone is the best mechanism for steering consumers away from incompetent practitioners. These traditionalists wish to limit severely lawyer advertising so as to enhance the impact of reputation on market behavior.

## V

## EXPLAINING THE OPPOSITION TO LAWYER ADVERTISING

If advertising by attorneys is beneficial for consumers of standardizable services, why has the bar resisted it? The most obvious explanations reflect the structure of economic and political interests within the bar.

Mixed practices profit by charging inflated fees for standardizable services or, alternatively, by using standardizable services as loss leaders to attract individualized service business.<sup>95</sup> Advertising would permit growth of primarily standardizable firms, and these firms would then begin to compete for clients who would otherwise patronize mixed service firms. As a result, mixed service practitioners would like to prevent advertising. Because mixed service practitioners probably constitute a majority of current legal service producers, and because they have correspondingly great power in the organized bar and in the political system at large,<sup>96</sup> these practitioners have presented an influential opposition to lawyer advertising.

At least until recently, the power of mixed practice attorneys was enhanced by their tacit alliance with attorneys supplying primarily individualized services, a group that has traditionally dominated the leadership of the bar.<sup>97</sup> Lacking the numerical strength to achieve leadership without cooperation, individualized practitioners achieved power in the bar by maintaining a confraternity within the profession, in part by cultivating the support of mixed practitioners.<sup>98</sup> They

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<sup>95</sup> See text accompanying note 64 *supra*.

<sup>96</sup> The majority of the nation's attorneys practice alone or in small firms, earning far less than their colleagues in large firms. Although most lawyers are officially classed as "urban residents," many of these practice in county seat towns or suburban neighborhoods rather than "downtown." See Q. Johnstone & D. Hopson, Jr., *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* 17-18 (1967); A. Nichols, *The Pricing of Physician and Lawyer Services* 57-59 (1975) (unpublished dissertation). See generally Bureau of the Census, U.S. Dep't of Commerce, 1977 Census of Selected Service Industries: Legal Services, at 5-46 to -47 (presenting table of demographic characteristics of American legal profession) [hereinafter 1977 Census].

The organized bar reflects these divisions. A prominent attorney has noted that, with certain exceptions, "state bar association members tend to be trial lawyers. They tend to be from small firms, they tend to represent nonurban areas, and they're pretty conservative." Welles, *The Growing Split in the ABA Between 'Retail' and Corporate Lawyers*, *Am. Law.*, Aug. 11, 1978, at 33 (preview issue) (quoting the late New York attorney Francis T.P. Plimpton).

<sup>97</sup> See J. Auerbach, *Unequal Justice* 62-65 (1976); cf. Woytash, *Who Speaks for the Legal Profession?*, 64 *A.B.A. J.* 24 (1978) (noting that the bar once had a "grand consensus").

<sup>98</sup> One observer has written:

The bar may never have been a monolith as it appears in retrospect, but it is certainly not one now. Perhaps it was mere acquiescence that gave authority to whatever pronounce-

generally did not challenge mixed practitioners' opposition to advertising.<sup>99</sup>

Bar politics, however, have changed since the Second World War.<sup>100</sup> A third faction, the public interest bar,<sup>101</sup> has developed.<sup>102</sup> Public interest lawyers favor advertising, which they believe will provide middle income individuals with greater access to legal services.<sup>103</sup> Perhaps as importantly, the practice of law has become more specialized; fewer law firms offer a variety of services ranging from matters such as uncontested divorces and personal bankruptcies to antitrust litigation.<sup>104</sup> Mixed practice lawyers are therefore a less numerous and less powerful faction in the bar. In the advertising debate,

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ments the leadership made about what was good for lawyers or was good for the public. But whatever it was, the process has changed.

Woytash, *supra* note 97, at 24.

<sup>99</sup> One commentator has noted that "[e]ven the more ardent professionalists [i.e., individualized practitioners] who have dominated the ABA's top leadership, have been no match for the protectionists [i.e., mixed practitioners] who not only outnumber them but fight much harder because they have a lot of business to lose" if liberalized advertising rules and other reforms, such as no-fault insurance and expanded prepaid insurance plans, were to be enacted. Welles, *supra* note 96, at 33. "Despite [its] economic insulation [from the effects of progressive reform], the corporate bar has not been a very loud voice for progressive views . . ." *Id.*

<sup>100</sup> See Slovak, *Influence and Issues in the Legal Community: The Role of the Legal Elite*, 1981 *Am. B. Found. Research J.* 141, 158-63 (observing that, while legal elite has leadership positions in Chicago bar, it frequently cannot control the bar's resolution of issues); Woytash, *supra* note 97, at 24 (suggesting that contemporary legal elite shares little with average lawyer and that this gap is gaining in importance and impact).

<sup>101</sup> For purposes of this Article, the term "public interest bar" is used in the broadest sense and includes government and legal aid lawyers.

<sup>102</sup> See Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 *Am. B. Found. Research J.* 83, 85-87 (in 1961, only one percent of graduating law students began careers in public interest law, compared with 12% in 1971-1972). The rise of the public interest bar is also reflected in the number of well-known organizations, such as the Natural Resources Defense Council, Common Cause, and Public Citizen, that began in the 1970's. See J. Handler, E. Hollingsworth & H. Erlanger, *Lawyers and the Pursuit of Legal Rights* 69, 70-75 (1978) (observing that public interest firms expanded in the 1970's, adding to the existing base of public-oriented legal groups such as the ACLU, the NAACP Legal Defense Fund, and government supported legal aid services). Furthermore, during the 1960's, law students identified increasingly with government and the public interest bar rather than with corporate law firms. See J. Auerbach, *supra* note 97, at 278-79.

<sup>103</sup> See, e.g., Freedman, *Advertising and Soliciting*, in *Verdicts on Lawyers* 94 (R. Nader & M. Green eds. 1976); Morrison, *supra* note 14.

<sup>104</sup> Statistics compiled by the Bureau of the Census indicate that sole practitioners tend to be less specialized than partnerships. See 1977 Census, *supra* note 96, at 5-46 to -47 (24.6% of sole practitioners are specialists; 44.2% of partnerships are specialized). Furthermore, sole practitioners have become a relatively smaller percentage of the legal profession in recent years. See Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States*, at 416 (1975). Another study, which focused on the Chicago bar, concluded that lawyers' fields of practice depend on their clients' needs. See Laumann & Heinz, *The Organization of Lawyers' Work: Size, Intensity, and Co-Practice of the Fields of Law*, 1979 *Am. B. Found. Research J.*

many elements of the individualized practice bar have joined forces with the public interest bar.<sup>105</sup> Thus, changes in bar politics make the passage of rules permitting broader use of lawyer advertising far more likely than in the past.

If the advertising problem were only one of economic competition within the bar, however, it might not have generated such heated controversy. One must look deeper, even if only to speculate. Perhaps the underlying anxiety about advertising stems from its tendency to portray legal services as a "business" rather than a "profession." Of course, the practice of law manifestly is both a profession and a business,<sup>106</sup> and a highly competitive business at that. Why the passion to deny its character as a business? The answer derives from the notion, basic to our legal ideals, that justice cannot be sold.<sup>107</sup> This notion is central to the ideology of the bar. A group for which that notion is so important inevitably would find it difficult to recognize that access to justice is in any sense a question of buying and selling. Nevertheless, lawyers differ in skill, knowledge, and the time they can devote to a case, and individuals with more resources are usually able to purchase both a superior lawyer and more of his time. Therefore, justice—actual outcomes in the legal system—is related to the quality of lawyering that a client can afford; justice at the margin can often be bought.

The legal profession is understandably reticent to acknowledge this tension between ideal and reality. One means of avoiding the

217, 233-37. The study noted that this phenomenon has the potential of creating increased conflicts within the bar that parallel conflicts among lawyers' clients. See *id.* at 238-45.

<sup>105</sup> According to one government attorney, the public interest bar views the ABA "less as a trade association than as a professional society devoted to enhancing the profession's contribution to society." Welles, *supra* note 96, at 33 (quoting Joe Sims, Deputy Assistant Attorney General in the Dep't of Justice, Antitrust Div.).

One partner in an individualized firm has suggested that opinions about proposed reforms reflect personal interest:

"I'm very troubled by the high cost of legal services . . . I think legal advertising is a great thing—provided it's done with dignity. I think fee competition is fine, prepaid legal services are great if they work, and no-fault is overdue. I'm for reform in residential real estate, probate, all that stuff . . . [.] That's because our firm is not really economically dependent on serving the individual."

*Id.* at 33 (quoting Washington, D.C., attorney Richard Phillips).

<sup>106</sup> Cf. Nelson, *Practice and Privilege: Social Change and the Social Structure of Large Law Firms*, 1981 *Am. B. Found. Research J.* 97 (discussing the effect of market forces on the structure and growth of large law firms).

<sup>107</sup> According to Dean Roscoe Pound, the lawyer should act "not as a hired seeker for what he is told to find by his superiors, but as a free seeker for the truth for its own sake, impelled by the spirit of public service inculcated by his profession." R. Pound, *The Lawyer From Antiquity to Modern Times* 362 (1953). Black's *Law Dictionary* 776 (5th ed. 1976) defines "justice" as the "constant and perpetual disposition of legal matters or disputes to render every man his due."

unpleasant implications of this tension is to minimize overt participation by lawyers in activities, such as advertising, that suggest that effective legal assistance is bought and sold.<sup>108</sup> Opposition to legal advertising, in other words, is a consequence of the inconsistency between providing legal services through the free market and realizing equal justice before the law.<sup>109</sup>

Analysis of the legal services market, however, suggests that advertising will not increase the degree to which justice is actually bought and sold. The services best suited to advertising are standardizable and involve simple, low risk, often uncontested situations. The explicit sale of these services will not affect the sale of other, more sophisticated services on which the result of a high risk legal contest most likely depends. Thus, increased use of lawyer advertising can help lead to significant improvements in the function of the market for legal services without threatening the ideal that justice cannot be sold.<sup>110</sup> To fulfill its professional duties to the public and the legal system, the bar should permit broader use of advertising by lawyers.

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<sup>108</sup> As described by the 1908 Canons of Professional Ethics, "[t]he most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct." ABA Canons of Professional Ethics Canon 27 (1908), reprinted in 33 A.B.A. Rep. 566, 582 (1908).

<sup>109</sup> Dean Pound, in a widely quoted passage, noted that "[t]here is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood." R. Pound, *supra* note 107, at 5. Some attorneys, however, had begun to criticize the Pound view of altruistic lawyers even prior to Pound's book. See, e.g., Llewellyn, *The Bar Specializes—With What Results?*, 167 *Annals* 177, 177 (1933) (stating that large corporate law firms' "main work is in essence the doing of business").

<sup>110</sup> This Article has not sought to address the problem of unequal access to sophisticated legal services in situations where the quality of legal services can be outcome-determinative. That problem is, of course, another story.

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