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II. Advertising is a Defensible Aspect of Free Enterprise. JONATHAN D. TROBE, M.D, AND JOAN H. LOWENSTEIN, J.D., *W.K. Kellogg Eye Center, Department of Ophthalmology, University of Michigan Medical Center, Ann Arbor, Michigan*

Last spring advertisements by ophthalmologists appeared in newspapers urging readers to have their cataracts removed in the next thirty days. After May 1, said the ads, Medicare would not cover 100% of the surgeon's fee, and the operation would no longer be "free."

Does anyone doubt that this is low-class, unprofessional stuff? It plays upon fears, it misleads, and it probably evokes unnecessary — or at least premature — treatment. Doctors are not hard to find. If patients feel they need their services, can they not seek them without the extra prompting?

On the other hand, the ad is not truly fraudulent, and there is no reason to believe that the patients who submit to its entreaty will receive less skilled care than those who go to doctors who do not so advertise. In fact, many ophthalmologists freely admit that the heavily promoted "cataract mills" turn out better results because the surgeons are more experienced.

A recent survey reveals that 28% of ophthalmic practices now advertise on television.¹ Assuming that at least some of that promotion will be tasteless and misrepresent the facts ever so slightly, does the practice of advertising generally help or harm the patient? We would argue that, on balance, it helps because it makes more information and more choices available — even if some of that information is not quite correct. Advertising is an effective way for a fledgling or innovative practitioner to gain access to patients. It is especially appropriate where highly tangible and standard products and services

are being offered. Cataract surgery and contact lenses fit the bill nicely.

The quest of the "learned professions" to get rid of the scourge of advertising is not unique to doctors. Pharmacists, dentists, chiropractors, optometrists and lawyers have all tried to curtail it. The courts, particularly the United States Supreme Court, have squelched all such attempts as violations of the First Amendment. In fact, the Supreme Court was hardly neutral on the pro's and con's of professional advertising, saying that it serves "to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."³

In 1980, a Federal Trade Commission study showed that eyeglasses sold and eye examinations performed by optometrists were significantly less expensive in cities where they were permitted to advertise.⁴ The quality of the eye examinations was judged equal among advertising and nonadvertising optometrists. Whether prices of goods and services dispensed by ophthalmologists will also fall because of advertising is hard to predict. In any event, a defense of advertising need not rest on this point, but on the fact that it opens doors to patients and providers.

Does the practice of advertising cheapen the image of the professional? In a 1976 case, pharmacists sought to ban advertising of prices for prescription drugs, arguing that advertising would "reduce the image of the pharmacist as a skilled and specialized

craftsman . . . to that of a mere shopkeeper."⁷ In its ruling against the pharmacists, the United States Supreme Court acknowledged the desirability of maintaining a high standard of professionalism, but considered the free flow of information even more important. The Court condemned the pharmacists' "paternalistic" approach.

When lawyers claimed advertising would "undermine the attorney's sense of dignity and self-worth," the United States Supreme Court found "the postulated connection between advertising and the erosion of true professionalism to be severely strained."² On the contrary, the Court suggested that "the failure of lawyers to advertise creates public disillusionment with the profession" and that "cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients."⁵

In other words, the Court was implying that the legal profession was being hypocritical. It approved the "good-old-boy" network but not a direct "sell-job" to the public. In the same way, a distinction is now being made in ophthalmology between "ethical marketing" and "unethical marketing." Ethical marketing seems to mean that you should "sanitize" your promotional package by emphasizing education and service. Is the recent proliferation of hospital-based "wellness centers" really based on an urge to improve health or on a desire to attract patients?

Does advertising promote bad medical practice? While it may be true that the less "ethical" and competent practitioners are the ones who produce the tawdriest promos, there is no evidence that the practice of advertising actually leads to inferior medical care. Perhaps some physicians are promising more than they can produce, but at least their patrons will have a claim against which they can measure an outcome. They may have to learn that the extravagant claim or the miracle result is usually a form of medical hucksterism. On the other hand, advertising may force practitioners to deliver on fabulous promises or lose their clientele.

Fraudulent advertising helps no one — neither patients nor the profession. Yet, the Supreme Court decided that the flow of commercial information is valuable enough to justify "imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."⁸ We agree that most of the rascals guilty of misleading advertising will escape without penalty, since the Federal Trade Commission has, if anything, taken a more vehement procompetitive position than the Supreme Court on this matter.

But are doctors losing face with the public because of false advertising? That is unlikely, as false advertising only succeeds if people do not realize that it is false. Ophthalmology has gotten a black eye from revelations of corrupt practices such as kickbacks and overbilling, not from fraudulent advertising. Similarly, we believe patients are harmed not so much by false advertising as by incompetent medical practice. Substandard ophthalmic practice must be regulated by policing the training programs, maintaining a high standard of certification, and by removing the financial incentives to perform unnecessary procedures.

We suspect that ophthalmologists — and all professionals — who object to advertising do so because they are uncomfortable with the image of being merchants, and are disinclined to resort to the untidy methods that merchants must use to promote their wares. Although contact lenses and lens extractions are more sophisticated than shoes and socks, all are highly valued and visible goods and their purveyors have a financial interest in their sale.

Medical advertising often projects an image that fails to square with the traditional view of the doctor as an altruistic care-giver. But that view is out-of-date. Physicians attend seminars teaching them how to maximize "patient flow." They hire accountants and billing consultants to advise them on how to achieve the highest reimbursements from insurers. They set up branch offices or provide limousine service so that no patient is left untreated. The profession has made no concerted attempt to control these practices, perhaps because they are less visible to the public than is advertising. All are part of the entrepreneurial side of fee-for-service medical practice. To reject advertising, one must be prepared to reject the whole free enterprise system.

For advertising in medicine to work in the patient's interest, the patient must know how to use it. It has been argued that it is impossible for patients to protect themselves from being duped by medical advertising for two reasons: first, medicine is too complicated, and second, the patient is unable to be rational when he or she is sick. We see this as a fundamental challenge, but one best met by providing more rather than less information. As the Supreme Court stated in the pharmacy case, "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather to close them."⁶

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III. Editorial. THOMAS L. SLAMOVITS, M.D., *Albert Einstein College of Medicine, Montefiore Medical Center, Bronx, New York*

Dr. Trobe and Dr. Margo agree that patient care is not likely to be detrimentally affected by advertisement in ophthalmology. Yet, the idea of medical advertisement *per se* seems bothersome to both these authors.

The medical profession has a long tradition of opposing advertising.⁵ The World Medical Association and the medical associations of England, Belgium, and Canada view professional advertising as unethical.³ The AMA espoused the same view until in 1977 it was told by the U.S. Supreme Court that its Code of Ethics could no longer prohibit advertising. That ruling resulted from a lawsuit brought by the FTC against the AMA in which the FTC successfully argued that medicine is a *trade*. In spite of the legal definition in the United States, medicine justifiably views itself not just as a trade but also as a *profession*.^{3,4} Medicine is a trade because it involves the exchange of a skill for payment. Medicine is a profession because beyond its self-interest, it provides a trust or trustworthiness to patients by virtue of its concerns with the public good.³

Ophthalmic advertisement is much more compatible with the trade aspects than with the professional aspects of medicine. "All advertising has the capacity to mislead, and it rarely informs in an impartial and complete manner."⁶ Advertising "free surgery" or "laser cataract surgery" can mislead and deceive prospective patients.¹ Beyond its effect on patients, advertisement by ophthalmologists is potentially undesirable because it is perceived as *unprofessional*. Thus, medical advertisement beyond being potentially harmful to patients can be detrimental to the profession. Unfortunately and justifiably, the medical profession generally and ophthalmology specifically have come under attack for being unethical and unprofessional. Government's attempts to regulate medicine as a trade to a great degree arise because of physician-entrepreneurs, doctors whose practices are perceived as much more driven by mercantile than by professional

considerations. Will that perception change by discontinuing advertising? The question is moot since professional advertising is a reality backed by law. So how can the physician's image improve if advertisements continue? The answer rests with the profession.

Enforcement of ethical standards must come from within the profession. The medical profession has a long and honorable tradition of setting for itself standards of professional ethics. The American Academy of Ophthalmology has its own Code of Ethics, which should be enforceable by virtue of the Academy's stature. Members who may have violated the Academy's Code of Ethics have upon notification promptly altered their practices.² Ophthalmologists should not overlook unethical behavior on the part of their colleagues. Since advertising is a reality, it at least should be advertising that as much as possible minimizes misinformation, deception, misleading claims and unprofessional conduct. Self-policing, combined with prompt notification of potential violations of The Academy's Code of Ethics is very likely to limit the undesirable aspects of ophthalmic advertising. If so, advertising will have less potential to harm patients and doctors.

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