Volume 34, Number 2
February 1980

WASHINGTON STATE BAR NEWS

LAWYER ADVERTISING

The Bottom Line - Jack Quinan

LAWYERS PROFESSIONAL LIABILITY RATES
Effective February 1, 1980

RATES PER ATTORNEY AT VARIOUS LIMITS
FULLY DEVELOPED RATES
FOUR OR MORE YEARS IN PRACTICE
(At $1,000 Total Annual Deductible)

INCLUDING FULL PRIOR ACTS

I.	$100,000 Per Claim	$300,000 Annual Aggregate	$360.00
II.	$500,000	$1,500,000	$504.00
III.	$1,000,000	$2,000,000	$576.00
IV.	$5,000,000	$5,000,000	$936.00

DEDUCT: 10% if you had occurence coverage until February 1, 1977
i.e. Affiliated Fire & Marine

50% if just starting practice

DEDUCT: For Staff Size 4 to 6 attorneys 6%
7 to 15 attorneys 12%

NO CHARGE: Law clerks, Paralegals, Investigators, etc.

PUNITIVE DAMAGE COVERAGE: (Optional) ADD 20%

CLAIM HISTORY: Please inquire

RATES ABOVE INCLUDE:

FULL PRIOR ACTS TO POLICY LIMITS

S. E. C. COVERAGE For Up To 10% Of Practice
Including Blue Sky

DEFENSE COSTS PAID IN ADDITION TO POLICY LIMITS
(except SEC)

FALSE ARREST, LIBEL, SLANDER, ETC.

OPTIONS: LIMITS TO - $20,000,000
DEDUCTIBLES - $1,000, $2,500, $5,000, $10,000 & $50,000

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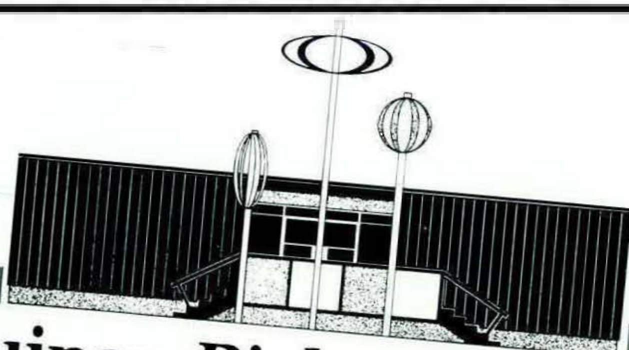

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Volume 34, Number 2
February 1980

WASHINGTON STATE BAR NEWS

FEATURES

IN THE NEWS

DEPARTMENTS

Our Cover

This months issue features Wesley J. Liebeler's legal and economic analysis of advertising, page 14.

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Jay V. White, *Editor*

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Hemovich Offers "Common Sense" View on Lawyer Ads

Editor:

Having read President Hemovich's editorial on "Lawyer Advertising" [*Bar News* 33:12:11], I feel the very infrequent urge to publicly voice my response. I am both surprised and delighted with the opinions so candidly voiced by President Hemovich.

As a non-advertising lawyer, I presume that my feelings are somewhat biased. Nonetheless, I personally and professionally believe that if advertising is to be permitted, it should be in the mode suggested by President Hemovich, to "let it all hang up [out]."

I think the rationale that has been employed by regulatory agencies and even by the United States Supreme Court in justifying and lessening of restrictions upon professional advertising, is fallacious and misleading. President Hemovich's editorial therefore came as the first breath of what I consider to be air of a common sense and honest nature.

I believe that if a proper study were conducted in the next few years of the effects of the liberalization of advertising restrictions on the legal profession and upon the public that supposedly is to be benefited thereby, the results would be contrary to all the predictions voiced by the advocates of such liberalization. I believe that such a study would further show that the only "benefit" that has been derived from such liberalization has been the economic benefits realized by the advertising parties.

I am personally acquainted with the reasons employed by one group of lawyers who are presently advertising; namely, to shorten the normal build-up time for the establishment of their practice in order that the time-honored phenomena of client referrals can thereafter sustain their income and practice. It is my personal belief that the major if not sole benefactors of the current advertising campaigns will be those lawyers who have recently passed the Bar and are attempting to establish their own practices without the difficulties and the delays encountered under the older system.

As a tool of solicitation (which is I think its only purpose for being) the advertising that is now permitted will be a success. As a method of opening the legal system and the profession to the so-called ignored middle and lower strata of our society, I believe the program will be a total and abject failure.

My compliments and respect to President Hemovich for his willingness to address and counter this voguish and ill-conceived trend in our profession.

GARY W. EAST

Seattle

Board Member Rebuts Hemovich Ad Message

Editor:

President Hemovich suggested in his December editorial that the two lawyers I introduced at our November Board meeting were advertising solely to make a "pay day". Jorgen Schleer and Rod Cameron made highly articulate justifications for lawyer advertising that I thought went beyond a mere "bucks" mentality.

Both lawyers believe, as I do, that lawyer advertising will enhance, not denigrate, the profession. They've read — and acted upon — ABA studies which prove that most citizens are deterred from seeking legal services because they cannot identify the right lawyer for their problems and because they believe lawyer fees are too high. By advertising Schleer and Cameron are simply saying to the underrepresented 70% of Americans that lawyers are available and affordable. In other words, they're overcoming the threshold of fear which separates a large segment of the middle class from our profession.

The Hemovich message, as I read it, is that lawyers, who advertise in the marketplace, particularly those who "mislead and distort", compromise the dignity of the profession. The few lawyers who violate their oaths "to uphold the integrity and the honor of the profession and the legal system" by misleading ads will do so despite the *Bates* decision. Our bar association already has the discipline mechanism to deal with them. What I really fear from the President's message is that it will deter many competent lawyers from advertising their availability to the public.

Most lawyers fear that advertising will lower quality. I suppose these same lawyers are really thinking that they themselves could lower their prices only by decreasing quality. In the context of the traditional "cottage industry" delivery systems they may be right. However, if these same lawyers increase their volume through advertising *and* change their delivery methods actual costs can decrease. Simple economic theory tells us that when prices drop because costs fall, quality needn't be affected. In fact, one study of a California clinic showed quality of legal services in routine matters to be higher than those of traditional law firms providing the same services. [McChesney & Muris, "The Effect of Advertising on the Quality of Legal Services" 65 A.B.A.L.J. 1503 (1979).]

Advertising may not be for everyone. The organized bar would do better, however, to hold seminars on how to effectively advertise and improve our legal delivery systems, not lament the passing of an era. After all, aren't we also sworn to "facilitate the process of intelligent selection of lawyers and to assist in making legal services available"? (EC 2-1).

LOWELL K. HALVERSON
Member, Board of Governors
Seventh Congressional District

Seattle

Hemovich's Assumptions Are "Embarrassing"

Editor:

I'm writing this in response to Michael Hemovich's editorial, "Lawyer Advertising" in the December issue. It embarrasses me that our Bar Association President would use some of the assumptions he did. For example: "Advertising and solicitations are not now or never have been intended in any way to benefit the public". The purpose of advertising is, of course, to sell a product. However, it *does* so by informing as to why or how the product or service will be of benefit. As all of us know, the legal profession is just below used car salesmen in the public's eye. A major reason is the public's inability to understand what the lawyer does or charges. Advertising can help educate as to what we do. Further the only conclusion I can come to from the President's statement is he feels the public is incompetent to weigh and evaluate the advertising they see or hear. I for one give the public more credit than that. Maybe Mr. Hemovich's paternalistic attitude and that of others like him has something to do with the public's low opinion of our profession.

Mr. Hemovich asks, "Do we really assist the disadvantaged by advertising [prices]." To the best of my knowledge no one has promoted advertising by lawyers on this premise. The poor have access to numerous free legal services. Certainly, some advertising will be in poor taste or misleading; however, advertising will benefit the competent attorney and hurt the incompetent. As we know professional services are sold by referral and recommendation. The fastest way to push someone out of business or improve their business is for the public to use or refuse his services. The competent will find they don't need to advertise. The incompetent will be starved out of business all the faster or forced to improve his skills. And after all, isn't that really what we want?

ROBERT L. HALE

Seattle

Hemovich Is Right

Editor:

I wish to commend our illustrious president for the comments made by him relating to lawyer advertising.

I turned to the Seattle phone directory yellow pages and found attorneys listed between "athletic organizations" and "auctioneers." When one turns the page and sees the glaring ads of fellow lawyers, it makes one wonder if this is the answer that our profession has come to in order to survive.

I have, over the years, read articles in the *Bar News* telling us how our profession has been encroached upon by mortgage companies, escrow companies, title companies, etc., and now I see that the encroachment of these businesses is to be answered by lawyers taking on each other. I suppose with the idea in mind that he who can run the biggest ad will have the most success. If the ads appearing in the Seattle telephone directory yellow pages are "in good taste and maintaining high standards", then I find it hard to believe.

It is about time, that we, as professional people, restore a little of the dignity to our profession that it so highly deserves. I hope that the president's article is the beginning in this direction, and call upon the lawyers in this state to take another look at the question he has raised, "Do we, as a profession, really want to advertise?"

ALBERT L. LEVINSKI

Seattle

Editor:

I agree with [President Hemovich] 100%. Amen.

ALFRED J. BIANCHI

Seattle

Stoebuck Is Right

Editor:

It was fascinating to see, in the December, 1979, issue of the *Bar News,* the editorial of President Michael J. Hemovich, giving his opinions on lawyer advertising, and then to read the article of William B. Stoebuck, discussing one phase of the same subject. [*Bar News* 33:12:11, 25] The two brought back a flood of memories.

In the 45 years after I was first admitted to the bar and before the promulgation of the decision of the Supreme Court of the United States in the case of *Bates v. State Bar of Arizona,* 443 US 350 (1977), I read with mixed amusement and disgust the pettifogging manifestos of the Ethics Committee, and of other Bar Association pundits, on the subject of advertising — and alleged advertising — by lawyers. A definite trend ran through all those quibbles and fulminations. Methods of public exposure used by big-shot lawyers and large firms (such as serving on prominent boards and committees, membership in posh clubs, and other ostentations) were never criticized; methods of public exposure used by young lawyers and others less favored (such as prominent or lighted signs, law books visible from the street, paying personal bills with "attorney at law" checks, multiple directory listings, and running escrow companies), were violently condemned.

One example of the unfortunate results of this fanatic drive to save ordinary members of the bar from their lustful desires to make a living was to drive almost all real estate closings into the hands of non-lawyers, when lawyers could handle them better. Another was to cause many people to die without wills, because of not knowing where to get them done reasonably. Of course, the big firms wouldn't care about that; they aren't really interested in small-time business, such as could be handled by legal clinics.

I recognize that there will be abuses of the newly developed privilege of lawyer advertising; but I am sure that they will be less harmful, in toto, than were the inequities under the old regime.

If President Hemovich and his cohorts would forget the cynical old "ethics" on lawyer advertising, and get into the spirit of the new dispensation, they might be more successful in getting co-operation from the rank and file of the bar.

In conclusion, and for a starter, I'm with Mr. Stoebuck all the way.

WALLACE BARTHOLOMEW
Olympia

Stoebuck Is Wrong

Editor:

Please accept my heartiest congratulations to President Hemovich for his editorial in the President's Corner entitled, "Lawyer Advertising".

Speaking for myself, he has presented his case fairly and well. Clearly, if the Bar, in fact, fails to heed his warning, the Bar is in for a continued period of deterioration.

I couldn't resist thinking of the President's comments when I read another article in the same issue of the *Bar News* by Professor Stoebuck entitled, "Unauthorized Practice: A Better Answer?" The application to Professor Stoebuck's suggestion of advertising to compete with the unauthorized practitioner is obvious. Almost as inevitable is a comparison of the professional attitude of President Hemovich with the business attitude of Professor Stoebuck.

It occurs to me that the only justification for the Bar Association as such to attempt to prevent unauthorized practice is the protection of the public. If the Bar is to be completely mercenary, then I suspect the lawyer would make more money as a result of the errors made by the untrained practitioner than they would gain by doing the routine job, which, as Professor Stoebuck indicates, can many times be done efficiently by the unauthorized practitioner, if there are no problems which he does not have the training to recognize. It occurs to me that the Bar Association does have some responsibility, not only for the competence of lawyers, but also for the protection of the public against the incompetence of non-lawyers who do their legal work.

J. D. SEARLE
Chehalis

King County "Confirm Motion" Rule Is "Unjust"

Editor:

I just had the unfortunate experience of having my case dropped from the civil motion calendar for failure to confirm before 12:00 noon on the day before the motion is to be heard. This was in King County. I am a relatively new attorney and this was my first motion in Superior Court. There is no CR or Local Rule to be found which would inform an attorney that such confirmation must be made. I also have a very difficult client who was convinced that his motion must be heard by a certain judge and the day for the scheduled motion was the last day, November 30, 1979, that this judge would be on the motion calendar. I can understand that I might miss this rule if I don't read the CR or the Local Rules, but how I can be expected to know about a judges procedural rule that is not published anywhere is simply beyond comprehension. We have enough rules without having unprinted rules to contend with. In addition, the rule is strictly enforced.

I learned of it the day before my motion when casually discussing my motion with another attorney who said off hand, "you know there is some rule about confirming the motion by 12:00 noon on the day before the trial." I learned this over lunch at about 12:30 p.m. I called the court promptly at 1:00 p.m., but was told it was too late. I spent about one hour, including a trip to the court house to try to do something about it, but to no avail. I was finally informed to read CR 40(a) (2e), which is titled as follows:

"Rule 40 Assignment of Cases
(a) Notice of trial
(2) of law
(2e) same guidelines
The Court shall distribute guidelines and procedures consistent with these rules, to be followed on the motion and show cause calendars."

I fail to see how this rule notifies one of anything. I also don't see how I am expected to know that this rule, which is under the rule for assignment of cases and notice of trial and issues, would regulate how the motion calendar works.

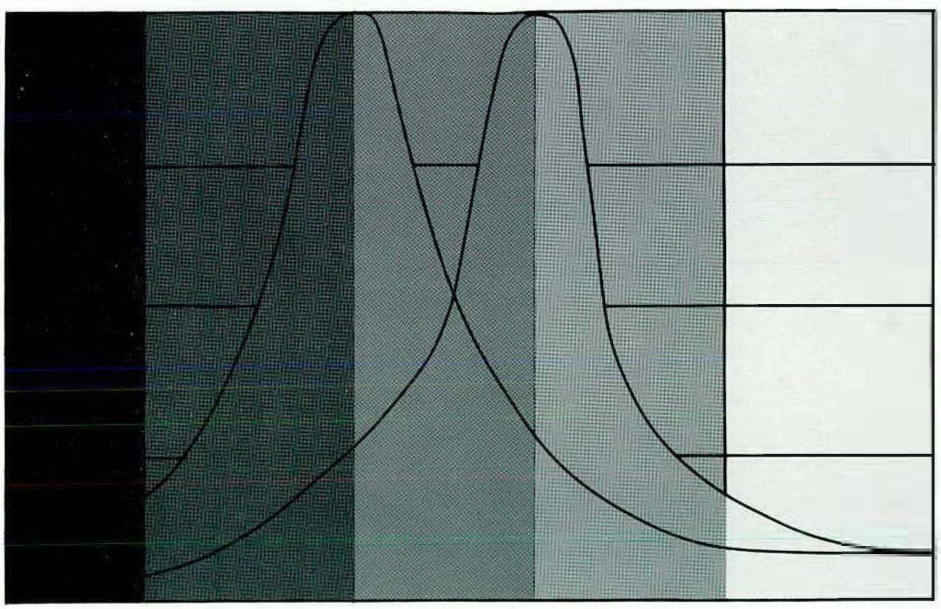
In addition, there is specifically a rule as to summary judgments which states that counsel must notify the motion department by 12:00 noon of the day prior to the hearing. LR 40(a) (2d).

In short, I am frustrated and angry. I have to explain this to my client, and it is not a pleasant experience!

I hope this letter merits publication, as other new attorneys may wish to learn about this unjust rule before they have the same unpleasant experience.

CHERI L. FILION

Seattle



Are We Taking Lawyer Ads Too Seriously?

That's called the "editorial we". After all, you aren't taking lawyer advertising too seriously, are you?

Then, as Emily Dickinson said in a completely different context, there's a pair of us. Don't tell. They'd banish us you know.

President Hemovich brought this subject to our attention in December when he said that he felt like he was "walking the plank", but although "we are soon going to have to bite the bullet", its time to "call a spade a spade" and "tighten up or let it all hang up". *Bar News*, "The President's Corner", 33:12:11. These views on lawyer advertising offered by the bar association president have prompted comment from various quarters. See, e.g., the Letters Department in this issue.

Hemovich argues that to say something is "for the good of the public" is "an age-old cliche" which cannot be used to justify lawyer advertising, but then argues that lawyers should stop advertising for the good of the public. He equates prohibited direct solicitation with advertising because the "object and the purpose is the same, a payday" and similarly complains that the sole purpose of lawyer advertising "is to get business". Presumably lawyers should refrain from doing anything which might result in their getting business or getting paid.

About all I really can conclude from the president's remarks is that he doesn't *like* advertising. Well, I don't like it either, but the question which should be addressed is what can lawyers constitutionally do to carry out what the Supreme Court in *Bates and O'Steen* called "the bar's role to assure that the populace is sufficiently informed to enable it to place advertising in its proper perspective" together with the bar's "special role to play in assuring that advertising by attorneys flows both freely and cleanly."

The official position of the bar association, as articulated most recently at the December meeting of the Board of Governors, is that the Board through its special committee (Steere, Dean, Campbell) will monitor developments in the field and that committee will make recommendations to the Board concerning lawyer advertising as soon as practicable.

Interestingly, the Board—at least for now—decided against sending all members a proposed "Notice of Enforcement of Rules Relating to Attorney Advertising". This notice would have advised attorneys that "effective March 1, 1980, specific enforcement of the 'advertising' rules, as established by the Court, will be sought by the filing of requests for formal hearings with the disciplinary board." The notice also would have stated:

Specific areas which will be under review include:

1. **Use of trade names.**
2. **Use of the word "specialist".**
3. **Use of unauthorized "forums".**
4. **Use of unauthorized categories of information in the print media and specifically in the "yellow pages".**
5. **Use of "jingles", "mottos" and "trademarks" which do not "facilitate the process of informed selection of a lawyer by potential consumers of legal services."**
6. **Use of fee information which is not within the print size requirements, does not contain the required disclaimers or is an "unfair statement or claim". An example of an "unfair statement or claim" is a fee advertised as "lowest in area" when such claim cannot be substantiated by quantifiable statistical data.**

Well, that's enough about a notice that hasn't been sent to us but might be. The Board was wise to take its "wait and see" stance. The fact is nobody really knows what kind of lawyer advertising is protected by the First Amendment: "it's what the Supreme Court says it is", and the article by Wesley Liebeler reprinted in this issue indicates that it's hard to predict what the Court will say next.

Speaking of unpredictability, another matter which surfaced at the December Board meeting was a tape recording of lawyer advertising concocted and broadcast by J.J. Regan, morning disc jockey, and Chuck Bolland ("That's the way the ball bounces"), news director, at KTAC radio in Tacoma. The lyric, presumably entitled, "Don't Get Sued", is sung in a manner vaguely reminiscent of Elvis Presley's version of "Don't Be Cruel", followed by a voice overlay while the tune is repeated in the background. You'll get the idea:

Well, you know what they say:
You're gonna need a lawyer some day.
And if you find you do,
Call 555-8652!
Don't get sued—without a guy like Stu.

Now if your case is weak,
You're gonna need a first-class sneak.
And if he wins the day,
You can bet you're gonna pay and pay!
Don't get sued—without a guy like Stu.

("Hi there! This is J. Stuart McSneaky, graduate of the H.R. Haldeman School of Law and Coaster Repair, and a former almost-member of the American Bar Association, inviting youse all to go for the big one! You only go around once in life, so sue for all the gusto you can! And I'm just the guy to take a percentage of what ya get. We have a special this week on whiplash cases—if you've ever been in a car, chances are you got whiplash, and I can make it pay for you. Call today for a free brochure, call 555-8652, or leave your name and phone number with Denise at the Happy Hands Massage Parlor—I'll get back to you. And remember our motto, "If you've got a case that's leaky, get on the phone and call McSneaky!" And pay your bill, or I'll sue *you*.")

Members of the Board of Governors thought this tape was pretty funny. Hemovich did too, after someone explained to him it was a joke.

JVW

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How's Your PRQ*

Consider these little scenarios:

No. 1—A client calls your law office and asks for you. Your receptionist asks the client to "Please hold", and tries to find you. She can't and busys herself with typing or other calls. And your client holds... and holds... and holds. Having heard nothing for three minutes, or five, or ten, the disgusted client finally hangs up.

No. 2—A client calls your law office and asks for you. Your receptionist says, "I'll see if he's in the office." After you have told her you don't want to speak to this particular client, your receptionist tells him or her, "He's out of the office right now." The client asks when you will return, and the receptionist, caught off guard, says, "Uh, he didn't say." Suspicious client hangs up.

No. 3—A client calls your law office and asks for you. Your receptionist asks, without yet revealing if you are in the office and available, your client's full name, the specific nature of his or her call (and perhaps what he or she had for breakfast?). She then asks the client to hold while she relays all this information to you. The client waits, likely resentful at having been forced to reveal some information considered strictly private, or at least sensitive, to someone not involved with the problem.

The above examples involve misuse of the telephone, your law firm's most immediate connection to the outside world. Proper and respectful use of the phone by the members of your firm, from the receptionist or bookkeeper to the most senior partner in the firm, not only reflects good manners; it just makes good sense by increasing the professionalism of both your law practice and office management techniques.

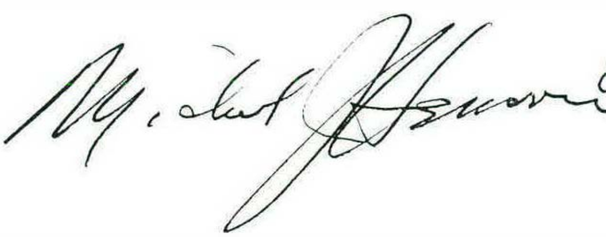
Correct use of the phone is part of a larger area of concern. It is called PUBLIC RELATIONS. (Well, you say, here we go again with a little sermon on PR... But read on.)

We often wonder why the legal profession takes it on the chin so often from the public and the media. We read the PR current literature and huddle with our partners and defend ourselves during the eternal cocktail talk when Dick the Butcher is quoted out of context. We tell ourselves that we are professionals and that we really are good, compassionate, service-minded individuals. We even try to demonstrate this by speaking before groups and in classrooms. We do pro bono work. We organize lawyer referral services, Tel-Law programs, and shopping center legal information booths. We provide an effective fee arbitration service, publish pamphlets on legal topics, and operate a number of PR programs on both the state and local levels. We have 34 local bar associations and one nationally respected state bar association which are constantly working to increase our professionalism and improve our public standing.

With all these activities aimed at making people like us, why, why dear colleague, isn't it happening faster?

Without burying ourselves in philosophy about the historical development of the profession or current societal shifts, we can point out a reason closer to home. Good public relations is not based on how effective we are in telling the world about ourselves. It depends on how we conduct ourselves in what we have been trained to do: practicing law. And good public relations *begins* with good client relations. If we treat our clients with respect... If we communicate adequately about what we're doing and how we charge... If we are doing our dead-level best to give the best representation of which we are capable... If we do all of those things, we know we are laying a foundation of good public relations as individuals and for the profession. I can assure you that the public—your clients and others—will notice that, too. And that, friends, is how to improve the image of the legal profession.

If the above may be considered an admonition, I include myself in the audience. And I further suggest that now is the time to take inventory of our Public Relations Quotient.* There is a handy place to start: Inside our office door. With each one of us.



The Essence of Chaos: The Supreme Court, Advertising and The First Amendment

By **WESLEY J. LIEBELER**

In 1977, Ronald Coase concluded that it was "not easy to describe the present position of legal opinion on advertising and free speech."[1] In his view, "only a poet can capture the essence of chaos."[2] The main body of Coase's article treated the Supreme Court opinions in this field through *Bigelow v. Virginia.*[3] *Virginia Pharmacy*[4] apparently appeared as his article was on its way to press, for Coase discussed it only briefly in an addendum, concluding:

> Now that it has been decided that commercial speech is covered by the First Amendment, consideration of the limits of its application, the inevitable 'balancing,' can proceed in a sensible manner, a process in which the studies by economists of the effects of advertising may be expected to play a useful role.[5]

The expectation that the balancing process needed to define the limits of the First Amendment's application to commercial speech might proceed in a sensible manner seems in short retrospect to have been sanguine indeed. The "commercial-speech" cases which the Supreme Court has decided since *Virginia Pharmacy* are such as to suggest that the services of a poet would be more useful as an aid to their understanding than those of an economist. Since I pretend, modestly, only to the latter office, I will not attempt to explain why the Court did

The question whether there is a First Amendment exception for "commercial speech" is squarely before us.

what it has done. Instead, I venture a statement of what the Court might have done in certain of those cases had it approached the problems exemplified in them in a manner that might appear "sensible" to an economist. I will then apply the principles so developed to a "closeup" of the FTC's advertising regulation, most particularly to its advertising substantiation program. I will have briefer comments on some of its other enforcement activities.

I. The Legacy of *Virginia Pharmacy* in the Regulation of the Bar: From *Bates* To *Primus* and *Ohralik*

Three of the Supreme Court's commercial-speech cases since *Virginia Pharmacy* have involved state regulation of the legal profession. We can understand these cases more readily after a brief outline of the law which appeared to have been established in *Virginia Pharmacy* itself, which struck down as violative of the First Amendment a Virginia statute which prohibited retail pharmacists from advertising the prices of prescription drugs. The Court said:

> the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political.

Wesley J. Liebeler is a professor of law at UCLA. *This paper was delivered at a March, 1979, conference sponsored by the National Legal Center for the Public Interest, whose subject was The 1st Amendment and The Corporation.*

It was published in two parts in New Directions, *May-June, 1979, and July-August, 1979.*

1. Coase, *Advertising and Free Speech,* 6 J. LEGAL STUDIES 1 (1977).
2. *Id.* at 32.
3. 421 U.S. 809 (1975).
4. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
5. Coase, *supra* note 1, at 33-34.

He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.... Speech likewise is protected even though it is carried in a form that is "sold" for profit [such as motion pictures or religious literature]...and even though it may involve a solicitation to purchase or otherwise pay or contribute money....

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection.[6]

Indeed, on this question of regulating speech on the basis of its content, the Court might have referred to another proposition that has, to say the least, been taken as settled or beyond serious dispute:

Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.... To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of the forbidden censorship is content control....[7]

The Court specifically reserved to the state the right to regulate the time, place and manner of advertising, noting that it had often approved restrictions of that kind:

provided that they are justified *without reference to the content of the regulated speech*, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.[8]

It also left open the question of any limits on false, deceptive or misleading commercial speech, noting that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."[9] It did not believe that the construction that it gave the First Amendment in striking down the Virginia statute before it would "prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."[10]

The Chief Justice concurred, emphasizing that this case involved prepackaged drugs and not services of the type provided by doctors and lawyers as to which, in his view, "professional judgment is a large component."[11] He raised the possibility that even advertising the price of certain professional services might be inherently misleading, because of the great variation of what the professional must do in individual cases. Justice Stewart's concurrence emphasized that *Virginia Pharmacy* did not preclude governmental regulation of false or deceptive advertising.

If this language is applied generally to future cases the Court would do well to abandon the pretense that commercial speech is covered by the First Amendment.

In *Bates* two young lawyers in Arizona opened a "legal clinic" and advertised their fees for certain "routine matters, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name, for which costs could be kept down by extensive use of paralegals, automatic typewriting equipment, and standardized forms and office procedures."[12] These ads were a clear violation of the disciplinary rules of the Supreme Court of Arizona, as that body duly found in affirming disciplinary action against Bates and his partner, in spite of their claims that the rule violated both the First Amendment and Section 1 of the Sherman Act.[13]

While the Supreme Court agreed that the restriction on advertising was that type of state action which was exempt from the Sherman Act, it reversed (5-4) the Arizona Supreme Court on the grounds that the advertisements in question were protected by the First Amendment. The majority believed that *Virginia Phar-*

6. 425 U.S. 760-61.
7. Police Department of the City of Chicago v. Mosley, 408 U.S. 92(1972), at 95-96.
8. 425 U.S. 771.
9. *Ibid.*
10. *Id.* at 772.
11. *Id.* at 774.
12. Bates v. State Bar of Arizona, 433 U.S. 350(1976), at 354.
13. In re Bates, 113 Ariz 396, 555 P.2d 640(1976).

macy dictated that result. The Chief Justice, and Justices Powell and Stewart adopted the view expressed by the Chief Justice in *Virginia Pharmacy* that legal services were so different from pre-packaged prescription drugs and varied so greatly from case to case that any advertisement of their prices would be inherently misleading. The dissenters could have based their position either on the proposition that First Amendment protection does not extend to "misleading" commercial speech or on the proposition that, while such speech is protected, the state interest in regulating lawyers was sufficient to outweigh that protection as regards the particular type of speech involved in this case. They did not say, however, nor did they suggest how misleading commercial speech might be distinguished from other kinds of such speech or outline any standards by which state regulatory interests might be balanced against the First Amendment interests which might be involved in any attempt to regulate such "misleading" commercial speech.

After finding that the First Amendment protected price advertising by lawyers, the majority rejected a number of propositions which Arizona offered to justify its restriction of such speech. While it did not use the words "strict scrutiny" or any recognizable substitutes for them, it did conclude after a searching examination that none "of the proffered justifications rises to the level of an acceptable reason for the suppression of all advertising by lawyers."[14] It refused to apply the overbreadth doctrine to commercial speech, however, but concluded that the specific advertisement before it could not constitutionally be suppressed. It specifically noted that false, deceptive or misleading speech was subject to regulation, justifying that conclusion on the propositions that a commercial speaker will be able to determine the truth of his statements at little cost and that the economic gain hopefully to be derived from such speech would provide an incentive to speak that would overcome any chilling effects that might be associated with such regulation. It also noted that the case did not involve:

> the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or 'runners.'[15]

Six months later the Court was faced with precisely that problem, in two cases that arose under circumstances that seemed almost calculated to force the Court to deal with the differences, if any, between "commercial" and "political" speech. *In re Primus* involved a written solicitation by a female lawyer who was associated with the "Carolina Community Law Firm" and who was an officer and cooperating lawyer of the Columbia, South Carolina, branch of the ACLU. The Court noted that she received no compensation for her work on behalf of the ACLU but was paid a retainer as a legal consultant for the South Carolina Council on Human Relations (Council), which, however, was a nonprofit organization. On behalf of the Council, Ms. Primus spoke to a gathering of women who had been sterilized under a program of Aiken County, S.C., which required such sterilization as a condition of continued receipt of medical assistance under the "Medicaid" program. At this gathering she advised those present, including one Williams, of their legal rights and suggested the possibility of a lawsuit. The ACLU later informed Primus that it was willing to provide representation for the sterilized women and Primus, in turn, wrote to Mrs. Williams, advising her that the ACLU "would like to file a lawsuit on your behalf for money against the doctor who performed the operation." The letter advised that Primus would be coming to Aiken "in the near future and would like to explain what is involved so you can understand what is going on."[16]

Disciplinary proceedings followed, resulting in a private reprimand, which was *sua sponte* increased to a public reprimand by the South Carolina Supreme Court when it approved the report of the disciplinary panel. The

14. 433 U.S. 379.
15. *Id.* at 366.

16. In re Primus, 98 S. Ct. 1893(1978), at 1897.

Supreme Court reversed, holding that Primus' solicitation was protected by the First Amendment and that South Carolina's regulatory interest could not withstand the "exacting scrutiny applicable to limitations on core First Amendment rights."[17]

The companion case, *Ohralik v. Ohio State Bar Association,*[18] was an appeal from disciplinary action by the Ohio Supreme Court. Mr. Ohralik, eleven days after the event, learned of an automobile accident in which a young woman with whom he was casually acquainted was injured. He called her parents, who told him she was still in the hospital and acceded to his suggestion that he visit her there, but only after he stopped by their house to talk with them first. They apprised him of the circumstances of the accident and he allayed their fears that they might be sued by a passenger who was in the car at the time of the accident. Ohralik then proceeded to the hospital and discussed the matter with the daughter, asking her to sign an agreement under which he would represent her in connection with the accident. She declined, asking Ohralik to have her parents come to see her. He returned to the house, examined the insurance policy, and advised the parents that it provided for payment both to the daughter and her passenger under an uninsured motorist clause. The daughter called and assented to his representation; two days later he returned to the hospital and the daughter signed a contract which provided that the attorney would receive one-third of her recovery. In the meantime, Ohralik obtained the name and address of the passenger, went to her home without being invited, told her about the uninsured motorist provisions of the insurance policy and obtained her apparently reluctant agreement that he represent her also.[19]

There is nothing to prevent the Court from deciding these cases in a wholly arbitrary manner.

The passenger's mother attempted to repudiate her daughter's oral agreement the next day, but Ohralik insisted that the daughter had entered into a binding agreement. The driver also eventually discharged Ohralik and, although another lawyer represented her in concluding a settlement with the insurance company, she paid Ohralik one-third of her recovery to settle his lawsuit against her for breach of contract. Both girls lodged complaints with the county bar association, which complaints eventuated in the lawyer's indefinite suspension from practice by the

17. *Id.* at 1905.
18. 98 S. Ct. 1912 (1978).
19. *Id.* at 1916.

Ohio Supreme Court. The Supreme Court affirmed, because:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.[20]

Unfortunately, the Court then proceeded to decide the case as though the level of appropriate judicial scrutiny was *de minimus*. Recognizing that in-person solicitation might exert pressure and often demand an immediate response without providing an opportunity for comparison or reflection, i.e., involved a potential for overreaching, the Court effectively gave Ohio *carte blanche* to adopt "prophylactic measures whose objective is the prevention of harm before it occurs."[21] The possibility that the problem of overreaching might be dealt with in ways that would not directly prevent a lawyer from communicating with putative clients in ways similar to those of Ohralik was not considered. In a breathtaking reverse twist on the overbreadth doctrine, the Court went on to hold that Ohio need not show that Ohralik's conduct actually involved overreaching or any other undesirable effect at which the regulation might have been aimed:

> The court below did not hold that these or other facts [of Ohralik's conduct] were proof of actual harm to . . . [the putative clients] but rested on the conclusion that appellant had engaged in the general misconduct proscribed by the disciplinary rules. Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate the need for prophylactic

20. *Id.* at 1919.
21. *Id.* at 1923.

Washington's Lawyer Advertising Rule

The following is the text of (CPR) DR 2-101, the basic lawyer advertising rule approved by the state Supreme Court, effective January 1, 1979. Related rules which should be referred to by persons interested in the subject of lawyer advertising include DR 2-102 ("Professional Notices, Letterheads and Offices"); DR 2-103 ("Recommendation of Professional Employment"); DR 2-104 ("Suggestion of Need of Legal Services"); and DR 2-105 ("Specialization"). —Ed.

DR 2-101 Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to (CPR) DR 2-103, the following information in print media distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with (CPR) DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices or a statement that practice is limited to one or more fields of law;

(3) To the extent authorized under (CPR) DR 2-105, a statement that the lawyer specializes in a particular field of law practice. Absent such authorization, a lawyer may not hold himself or herself out as a specialist or as specializing in any field of law;

(4) Date and place of birth;

(5) Date and place of admission to the bar of state and federal courts;

(6) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(7) Public or quasi-public offices;

(8) Military service;

(9) Legal authorships;

(10) Legal teaching position;

(11) Memberships, offices, and committee assignments, in bar associations;

(12) Membership and offices in legal fraternities and legal societies;

(13) Technical and professional licenses;

(14) Memberships in scientific, technical and professional associations and societies;

(15) Foreign language ability;

Continued on page 41.

regulation in furtherance of the State's interest in protecting the lay public.[22]

If this language, or even the approach which the Court took in this case, is applied generally to future cases, the Court would do well to abandon the pretense that commercial speech is covered by the First Amendment. If a state can justify a regulation by arguing that the proscribed speech could adversely affect consumers in some cases, never mind that it may not have done so in the case at hand, it is meaningless to talk about First Amendment protection of commercial speech. The scrutiny which the Court applied in *Ohralik* was essentially nonexistent; the result would have been the same if it had applied the "rational basis" standard usually applied to general commercial regulation by the states. To apply that level of scrutiny is simply not to accord First Amendment protection to commercial speech. That this may be what a majority of the Court has in mind is strongly confirmed by the *Texas Optometrists* case,[23] to which I will turn shortly.

While Mr. Justice Marshall concurred in the *Ohralik* judgment, his approach, from the point of view of an economist, was much superior to that of the majority. He was sensitive to the fact that rules against solicitation, like those against advertising, "substantially impede the flow of important information to consumers from those most likely to provide it — the practicing members of the Bar."[24] Indeed, he noted that useful information was provided by Ohralik's conduct in the case at hand: He correctly advised both of his quondam clients that even though they had been injured by an uninsured motorist they could still recover for their injuries under the insurance policy covering the driver of their car. He was disturbed by:

> the Court's suggestion in *Ohralik* that in-person solicitation of business, though entitled to some degree of constitutional protection as "commercial speech," is entitled to less protection under the First Amendment than is "the kind of advertising approved in *Bates*."

In his view:

> The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial, and they are entitled to as much protection as the interests we found to be protected in *Bates*.[25]

Since he refused to accept the view that one form of commercial speech is of less value than another under the First Amendment, he concluded that if in-person solicitation was to be subjected to greater restriction than advertising like that in *Bates* it could be justified:

> only to the degree that dangers which the State has a right to prevent *are actually presented by conduct attendant to such speech,* thus increasing the relative "strength of the State's countervailing interest in prohibition. . . ."[26]

He also pointed out that the legitimate interests that Ohio had in preventing overreaching by lawyers in the context of in-person solicitation might be requited "by more specific and less restrictive rules than a total ban on pecuniary solicitation."[27]

Mr. Justice Marshall was able to concur in the *Ohralik* judgment in the face of his view that the constitutionality of in-person solicitation should be measured by the same standards as those applied in *Bates* by emphasizing the grosser aspects of Ohralik's conduct. He noted particularly the fact that Ohralik had made secret tape recordings of his conversations with the girls, pursued the passenger in an attempt to obtain her as a client even though her interests were in potential conflict with those of the driver who was already his client and the fact that both girls were in pain, may have been on medication and had no more than a high school education. This was laid against the fact that Ohralik himself was an experienced lawyer, in practice for more than 25 years.[28] His concurrence in the result is somewhat troubling, even confining our attention to the application of the proscription to Ohralik himself, and seems impossible to justify if the overbreadth doctrine or anything remotely resembling it were applied to commercial speech. At the least it would seem that Marshall's view would require Ohio to show that Ohralik actually engaged in proscribable conduct — presumably overreaching in this case — and that it may have required an additional showing that such conduct could not have been adequately governed by a more closely drawn regulation. It seems clear that it could have, and in fact Marshall noted himself that the Antitrust Division had suggested that the disciplinary rules be changed "so as to *permit* all solicitation and advertising except the kinds that are false, misleading, undignified or champertous."[29] He also observed that the District of Columbia Bar had recently considered proposals to eliminate its ban on solicitation and instead prohibit false and misleading statements and the solicitation of clients who have given adequate notice that they do not want to hear from the lawyer.[30] Another possibility would be to follow the lead of the FTC and provide for a "cooling-off" period following the solicitation, during which time the client could obtain additional guidance and have time for reflec-

22. *Id.* at 1925.
23. Friedman v. Rogers, slip opinion, February 21, 1979.
24. 98 S. Ct. 1927.
25. *Id.* at 1928.
26. *Id.* at 1930 (emphasis added).
27. *Id.* at 1929.
28. *Id.* at 1926.
29. *Id.* at 1929.
30. *Id.* at 1929-30.

tion on the matter. A client could have the right to repudiate any contract for representation up to the time the cooling-off period ended; if the lawyer actually performed useful services during that period he or she could be compensated for their reasonable value. None of these alternatives would have as great an adverse effect on the flow of commercial information as the rule which Ohio actually adopted and all seem reasonably well calculated to deal with the problem of overreaching.

In effect, the Texas restriction on speech was subjected to no scrutiny at all.

We are, of course, less interested in the personal fates of Ms. Primus and Mr. Ohralik than in trying to articulate a coherent approach to the problems raised by these two cases as well as other "commercial speech" cases, and on that issue Mr. Justice Marshall clearly has the better of the argument. Taking *Bates, Primus* and *Ohralik* together, the Court seems to be saying that we are to have one type of First Amendment protection for "political speech," the "exacting scrutiny applicable to limitations on core First Amendment rights."[31] We are to have a different degree of protection for "commercial speech" of the type involved in Bates, "a limited measure of protection, commensurate with its [commercial speech] subordinate position in the scale of First Amendment values," which allows "modes of regulation that might be impermissible in the realm of noncommercial expression."[32] And we are apparently to have an even lesser degree of protection for the kind of commercial speech involved in *Ohralik:*

> The entitlement of in-person solicitation of clients to the protection of the First Amendments differs from that of the kind of advertising approved in *Bates,* as does the strength of the State's countervailing interest in prohibition.[33]

The *ad hoc* quality of this approach need not be labored. If we have a different level of First Amendment protection for "political speech" than we do for "commercial speech" and, in addition, different levels of such protection for different types of "commercial speech," there is nothing to prevent the Court from deciding these cases in a wholly arbitrary manner, as has, indeed, been pretty much the case so far. There is nothing to prevent this in any event, unless the Court tells us how to distinguish so-called political speech from commercial speech

31. *See* note 17, *supra.*

32. 98 S. Ct. 1918.

33. *Ibid.*

and how to tell one kind of commercial speech from another. It has not done this, of course, and seems quite unlikely to do so, if for no other reason than that the task is essentially impossible.

While the entire Court seems to believe that it is necessary to distinguish political from commercial speech, Justice Marshall at least does not appear to be willing to try to distinguish between different kinds of commercial speech in terms of the degree of First Amendment protection to be afforded thereto. Any difference in the treatment of different "types" of commercial speech is made to depend on the extent and nature of the harm thought to be likely if such speech (or conduct associated with it) is not regulated by the state and on the availability of alternative means of dealing with such harm that will impose lesser restrictions on the speech itself.

II. Friedman v. Rogers—The Texas Optometrist's Case

Six months after *Primus* and *Ohralik* the Court faced a First Amendment challenge to the constitutionality of a Texas statute that prohibited the practice of optometry under a trade name.[34] The statute had been held unconstitutional by a three-judge District Court, primarily on the authority of *Bates* and *Virginia Pharmacy*.[35] The Supreme Court reversed, stating that:

> A trade name, however, is a significantly different form of commercial speech from that considered in *Virginia Pharmacy* and *Bates*. In those cases, the State had proscribed advertising by pharmacists and lawyers that contained statements about the products and services offered and their prices. These statements were selfcontained and self-explanatory. Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.[36]

The majority then listed some of "the *possibilities* for deception"[37] that are, undeniably, present in connection with the use and advertising of trade names and concluded that it was "clear that the State's interest in protecting the public from the deceptive and misleading use of optometrical trade names is substantial and well demonstrated."[38] The possibility that this protection could have been afforded by means short of banning all use of trade names in the practice of optometry was not considered. In effect, the Texas restriction on speech was subjected to no scrutiny at all. Justices Blackmun and Marshall dissented, agreeing with the District Court that the case should have been decided under the authority of *Bates* and *Virginia Pharmacy*.

Forsaking the role of economist for the moment and assuming that of the semanticist, we might note that the distinction which the Court offers to avoid *Bates* and *Virginia Pharmacy* is hardly equal to the task. Of course a trade name has no "intrinsic meaning"; neither does any other form of speech. All speech acquires meaning over a period of time by associations formed in the mind between the speech and something to which it refers. And all speech, including price advertisements for prescription drugs and legal services, can be manipulated by the user so as to raise "a significant possibility" that it will mislead the addressee. The pharmacist can advertise a false price, switch brands of drugs, slight quality control and cheat the consumer in at least as many ways as can the optometrist. Indeed, it may be more difficult for the consumer to tell when he is being cheated by the pharmacist (or the lawyer) than when he is being cheated by the

34. Friedman v. Rogers, slip opinion, February 21, 1979.
35. 438 F. Supp. 428(ED Tex, 1977).
36. Friedman v. Rogers, *supra* note 34, at 10-11.
37. *Id.* at 11-12.
38. *Id.* at 13-14.

optometrist. If First Amendment protection is to be extended or denied (or the level of its protection varied) as a function of the "possibility that... [it] will be used to mislead the public," it is equally if not more plausible to argue that greater protection should be afforded to trade name advertising by optometrists than to price advertising by pharmacists or lawyers, rather than reach the opposite conclusion, as the Court did.

But that is merely a quibble. The important thing is that the Court attempted to distinguish between lawyer and pharmacist price advertising and the use of trade names by optometrists on the basis that there was a greater possibility that the latter might be used to mislead the public *and* that the consequence of that (arguable) difference was that the state statute regulating the latter was not subject to any constitutional scrutiny whatever. The implications of this for the future of First Amendment protection of commercial speech, particularly as regards the activities of the FTC, are quite broad. If all use of trade names (at least in connection with activities involving the potential of consumer deception similar to those involved in optometry) can be completely banned without generating a level of constitutional scrutiny greater than that which was applied in *Friedman v. Rogers*, then FTC and other regulation of allegedly misleading speech will be largely if not totally unaffected by protection that was thought to be afforded to commercial speech by *Bates* and *Virginia Pharmacy*. While those cases specifically stated that false, deceptive or misleading commercial speech could be regulated they certainly did not say that it could be regulated in any way the State saw fit, i.e., without regard for First Amendment interests, or that commercial speech could be regulated simply because it *might* be false, misleading and deceptive *sometimes*.

But that is what *Texas Optometry* seems to say. If the Court really means what it says in that case, there is little need to discuss the impact that the commercial speech cases might have on the FTC, for they will not have any effect at all. If *Texas Optometry* is to be the rule, the FTC will be free to continue its advertising regulation as it sees fit. On the basis of its past performance in this field, however, there is little reason to believe that the Court is likely to act consistently from one case to the next. The reason for this, perhaps, is the absence of any coherent theoretical structure to which it may turn for guidance in deciding particular cases. I turn now to that issue.

III. An Economic Perspective

Let me begin my attempt to structure a theory to guide decision in commercial speech cases with the problem of deceptive or misleading advertising, the problem the court thought that it had in *Texas Optometry*. It would seem that cases of deceptive or misleading advertising involve the same general problem that is involved in "pollution" cases, a common example being that of a factory that emits smoke which interferes with adjoining land uses. An economic problem arises in such cases because property rights have not been or cannot be precisely specified or enforced in such a way as to internalize the harms and benefits associated with the relationship between the makers and recipients of smoke. It is impossible to avoid harm to one party without imposing costs on the other. Because of the reciprocal nature of this relationship, Coase has argued that the "problem is to avoid the more serious harm."[39]

There is an analogy between the smoke pollution example and cases involving misleading or deceptive advertisements. In the case of the factory, the right to emit smoke without compensating recipients is a "good" as regards those consumers who purchase the output of the factory (widgets). The factory's right to emit smoke without compensation is, of course, a "bad" as far as adjoining landowners are concerned. If the makers of the smoke and its recipients could transact in a market in which property rights to emit smoke (which would of necessity also create property rights to clean air) could be specified and enforced at "reasonable" cost, a socially optimal solution to the resource allocation problem could be expected to result. Where such markets do not exist—as they do not in the interesting cases—any institutional arrangement that is designed to "improve"

39. Coase, *The Problem of Social Cost*, 3 J. L. ECON. 1 (1960).

things, will succeed to the extent that it is able to mimic the market, i.e., replicate that state of affairs that would have come into existence had the costs of conducting market transactions been sufficiently low to have permitted them to have occurred. Only in such way will the output of smoke, clean air, widgets and other good things associated with clean air be set so as to maximize the welfare of all parties concerned.

In the case of the misleading or deceptive advertisement, I assume that the advertisement is not deceptive or misleading to all recipients. Among those recipients who are not misled or deceived, some will receive useful information from the advertisement; it is in fact possible to conceive of situations in which some recipients will receive useful information from the ad even if they are misled or deceived and that they will be better off having received the ad than not. Those persons who are better off having received the ad are analagous to widget consumers in the smoke example. Recipients of the advertisement who have been deceived and thereby made worse off are analagous to the recipients of smoke from the factory. The wealth producing transaction that has occurred between the advertiser and the recipients who benefit from receiving the ad has imposed an external cost on those who have been deceived and injured. But it makes no more sense to ban a deceptive advertisement in all cases where its recipients might be both injured and benefited than it would to ban all smoke from factories just because some persons—those afflicted with severe respiratory ailments, for example—might be injured by receiving that smoke. The problem in both cases is to minimize the social costs of the event; by attempting in one case to achieve optimal levels of smoke (clean air) and widgets and in the other to achieve optimal levels of deception and useful information.

Just as in the case of smoke emissions, if advertisers and their recipients could transact in markets with precisely defined property rights that could be enforced at "low" cost, a socially optimal solution to the resource allocation problem could be expected. Recipients who receive useful information could compensate those who were deceived or those who would be deceived could pay the advertiser not to issue such advertisements or, much the same thing from the standpoint of efficient resource allocation, pay those who would have received useful information from the "deceptive" advertisement not to receive it.

In a world characterized by less than fully specified property rights and high transaction costs, such deals are, of course, mostly fanciful.[40] Yet this zero-transaction-cost model may be useful in thinking about the problems

40. To the extent that these transactions can be made through the form of competing offers to consumers, however, they can and do take place even when transaction costs of bringing all parties together as a group would be prohibitively high. See the discussion of Texas Optometry in Section IV below.

of regulating misleading and deceptive advertising and perhaps other First Amendment commercial speech problems as well. For many cases involving those issues involve the more-or-less permanent allocation of scarce resources, because they involve the specification of property rights in a context where they are quite unlikely to be reallocated in market transactions because of prohibitively high transactions costs. In such cases, absent some compelling reason not to decide cases "efficiently," the specifier of property rights could improve community welfare by specifying the property rights to those parties who would have obtained them if it had been possible to execute market transactions. Welfare could also be increased if property rights could be specified in such a way as to permit market transactions in the purchase and sale of information to occur in cases where they could not occur before because the costs of conducting such transactions exceeded the gain available from exchange. We might also suppose that in some cases our imaginary deals between affected parties in a zero-transaction-cost world might result in the modification of some advertisements rather than in their total suppression. If so, our regulatory substitute for the market should attempt to produce a similar result.

Rather than discuss this idea further in general terms, let me develop its implications by using it to examine the "efficiency" of the Supreme Court's recent commercial speech cases and then to analyze some of the activities of the FTC.

IV. Efficiency and the Supreme Court's Commercial Speech Cases

A. *Texas Optometry:* While there is little indication that any significant number of consumers of optometrical care had ever been materially deceived through the use of trade names in the practice of optometry in Texas, let us grant for purposes of discussion that some might have been or could be. Given that assumption, who are the parties interested in the use or non-use of optometric trade names in Texas, what are their interests and what kind of arrangements would they be likely to construct in a zero-transaction-cost world?

The interested parties are the actual and potential consumers of optometric services, the "professional" optometrists and the commercial optometrists. The "professional" optometrists are, of course, opposed to practice under trade names and would attempt to arrange transactions that would remove commercial optometry (and the use of trade names) from the market. One way to do this would be to pay consumers not to patronize commercial optometrists, thereby forcing that mode of practice from the field. But this can be done even in a world with high transaction costs, by simply reducing prices or increasing "professionalism" to the point where consumers forsake the commercial operators. The "pro-

fessional" operators were unable to do this in the actual Texas market and there is little reason to believe that they would have any better luck in our hypothetical zero-transaction-cost world. Too many consumers prefer lower cost, presumably less "professional," optometric care for the commercial operators to be driven from the market.

Once we grant that the commercial establishments would remain in the field, the question becomes whether or not those opposed to the use of trade names could effect arrangements that would ban their use. Presumably the principal opposition to trade names comes from "professional" optometrists. They can, of course, offer

Too many consumers prefer lower cost, presumably less "professional" optometric care.

payments to interested parties in order to bring about the demise of trade names. The most obvious interested parties, as in the case of whether commercial optometry is to exist at all, are the consumers, in this case those consumers who find trade names valuable. "Professional" optometrists could offer these consumers an incentive to forgo the use of trade names and, as before, this could be done readily in a world characterized by real transaction costs. Once again, the fact that the "professional" optometrists were unable to induce consumers to forgo the use of (reliance on) trade names in Texas strongly suggests that they could not do so in a world that was free of transaction costs.

Now that we are to have both commercial optometry and trade names in our hypothetical world, we might ask what kind of arrangements might emerge to deal with the "possibilities for deception" by trade name which the majority believed justified the statute. These were that a trade name could remain unchanged despite changes in the staff of optometrists "upon whose skill and care the public depends when it patronizes the practice"; that a subpar optometrist could change trade names to shed his past reputation; and that the use of different trade names at different shops owned by the same optometrists could give a false impression of competition. The majority also referred to a case where one Rogers had 82 shops under the trade name "Texas State Optical" or "TSO" and whose advertising was calculated to give the impression (at least to those consumers who believe that Colonel Sanders is in every Kentucky Fried Chicken establishment or Dr. Scholl is in every box of his foot pads) that he or one of his brothers was present at each particular office.

In a zero-transaction-cost world, those consumers who were likely to be injured by such practices—the recipients of external costs associated with the "sale" of information by commercial optometrists to those consumers who obtained useful information from use of the trade name—would presumably offer to pay the putative deceivers not to deceive them. If the above list of possible deceptions is all we have to worry about, the arrangements that would emerge are not hard to discern. Contracts under which optometric offices would list the resident optometrists and those having an ownership or controlling interest in the operation, along with the trade name would seem to solve most of the problems that concerned the majority. Since this could be done without having any appreciable affect on the amount of information which trade name use produced for other consumers, it seems probable that those persons who might be deceived in the manner suggested above could induce optometric offices to respond to their wishes. Since the injury likely to flow from these "abuses" seems quite modest, however, it is also possible that the cost of providing this additional information would exceed the amount of injury that would exist in its absence. In such case, of course, it would not be efficient to supply the information at all.

Assuming that the costs of avoiding the injury were less than the amount of injury, it is hard to see why Texas could not have drawn a statute to deal with the problem without entirely banning the use of trade names, unless, of course, it was not really concerned about the abuse of trade names to mislead the consumers of optometric services, which seems most probably to have been the case. It is hardly necessary for sensible persons to go through the elaborate discussion in which I have just indulged to conclude that the Texas statute was designed more to protect the "professional" optometrists from competition from their commercial brothers that it was to protect consumers from trade name abuse. I venture that it would be hard to find a reputable economist that would not conclude that the social costs of the Texas prohibition of speech exceeded its benefits by a substantial margin. It was basically a device to transfer income to "professional" optometrists from consumers and from those optometrists that had been engaged in a commercial practice. This being the case, it is hard to see how it could be said that Texas had a substantial public interest in the statute that was sufficient to override the First Amendment interests that *Virginia Pharmacy* told us were involved in commercial speech.

B. *Bates* and *Virginia Pharmacy:* The most obvious potential parties to transactions concerning price advertising of prescription drugs are, of course, the consumers of those drugs and the pharmacists themselves, although the interests of the pharmacists may be divided along lines similar to those appearing among the optometrists in *Texas Optometry*. It would seem to be sufficient to establish that the social benefits of truthful price advertising exceed its social costs simply to show that such advertising would occur in the absence of any legal or institutional constraints tending to prevent it. There does not appear to be any real external harm in connection with such advertising to be weighed against the benefits of the information which it produces. With the advent of price advertising of prescription drugs, those consumers who prefer advertising and lower prices will patronize pharmacists who provide that mix of product, price and service. There will presumably be stores that provide no advertising, higher prices and perhaps greater service or finer amenities and the consumers who prefer those things can patronize those stores. If truthful price advertising occurs—and persists—after proscriptions against it are removed, it must be the case that enough consumers are benefiting sufficiently from such advertising to cover the costs of its production. Since there are no apparent external harms associated with such advertising, the kind of cost-benefit required in *Texas Optometry* is not necessary here. If truthful price advertising exists after the statute is struck down, we must conclude that the statute occasioned inefficiency; if no advertising occurs after the statute is nullified, nothing has been lost by the nullification. In either case, it appears that the decision to strike down the Virginia statute against price advertising was efficient.

If no advertising occurs after the statute is nullified, nothing has been lost by the nullification.

The same analysis would seem to apply to the truthful advertising of prices by lawyers.

C. *Primus* and *Ohralik:* In trying to relate the problem in *Ohralik* to an existing body of economic analysis, the analogy to automobile accidents seems relevant. There is considerable literature dealing with the question of what kind of arrangements automobile drivers and pedestrians, for example, would make in a zero-transaction-cost world. Such transactions are limited in the real world, of course, because no driver or pedestrian knows which of the other he will eventually encounter in an accident and because the transaction costs involved in deals between classes of pedestrians and classes of drivers are prohibitively high. In the absence of such deals, it has been argued that tort law should seek to replicate the arrangements that would have come into existence had transaction costs been low enough to permit those deals to have been made. In the context of *Ohralik* the question becomes: in a zero-transaction-cost world, what kind of arrangements would putative accident victims and lawyers or other providers of information make relative to the provision of information.

The first thing that is clear is that they would not provide for the total suppression of information about insurance and general liability problems. That information is extremely valuable to those who have been involved in accidents and they would be willing to pay considerable sums to receive it. Presumably they would try to make arrangements to receive it under circumstances where they would pay approximately a competitive price for it under circumstances where they would not be "overreached" or otherwise taken advantage of by the providers of that information (which is really the same thing as paying a competitive price for it). Since there are circumstances where action should be taken immediately after the accident to protect their interests, presumably those interested in receiving such information would wish to make arrangements to receive the relevant information as soon after the accident as practicable.

On the other side of the coin, we must remember that actors in a market system are unlikely to provide information unless they can expect to recover the costs of producing and communicating it. Because of this, Mr. Justice Powell's remark in *Ohralik* that the Ohio disciplinary rule did "not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice,"[41] is particularly inapt. Neither lawyers nor any one else operating in a market context is likely to provide such information unless he can expect to be paid for doing so; payment is made by accepting employment in connection with the provision of information.

The problem faced by putative receivers of information and its providers in our zero-transaction-cost world, then, is to make some arrangement that will efficiently satisfy the needs described above. Would-be receptors want correct information provided under roughly competitive conditions and the would-be providers rightly expect to be paid at least a roughly competitive rate for their services in providing that information. While there are no doubt many different ways in which these differing, yet accommodatable interests can be reconciled, one of them could be to provide a "cooling off" period following a lawyer's initial contact with an accident victim, at least under circumstances where it appears that overreaching or other undesirable conduct may be involved. While the existence of such a "cooling-off" period may result in some lawyers providing information without compensation (and thus result in less than optimal amounts of information being produced), this may simply be a cost to be endured in order to prevent accident victims from suffering greater costs by being overreached.

It is not necessary to resolve definitively the problem of in-person solicitation here. It is enough to show that it is not in the interests of either lawyers or accident victims to be constrained by a rule that absolutely prohibits in-person solicitation. We reach that conclusion by showing that they would not be likely to adopt such an arrangement in a zero-transaction-cost world. If it is not in the interests of the parties concerned to have such a rule, it is hard to see how it can be argued that Ohio has sufficient interest in that rule to override the First Amendment values involved. The *Ohralik* result was, in other words, inefficient. Absent other considerations that would justify ignoring efficiency, i.e., the best interests of the parties directly affected, we may conclude that *Ohralik* was wrongly decided.

It is difficult to apply this kind of analysis to *Primus* because the actors there were not operating in a market context. There may still be overreaching and conflict-of-interest problems when individual "clients" are used to advance political interests. But there was no need to provide any direct economic incentive in order for the sterilized women to be provided with information about their legal rights. It seems clear that they would have received that information even if Ms. Primus and other lawyers like her had been completely silenced on the issue. The ACLU and various community organizations had taken an interest and they would most likely have provided this information no matter how Primus and others like her had been constrained against solicitation.

This is not to say, however, that the case was wrongly

41. Ohralik v. Ohio State Bar Assn., 98 S. Ct. 1920(1978)

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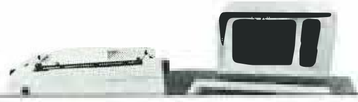

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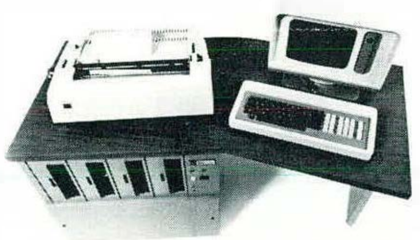

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decided; I do not believe that it was. It does, however, suggest caution in accepting the proposition, becoming widely voiced, that the regulation of speech is likely to have a greater chilling effect in the political than in the commercial field. In *Primus*, for example, even the closest regulation of Ms. Primus and other lawyers would not have "chilled" delivery of information to the sterilized women that their legal rights may have been violated and that free legal services were available regarding the matter. As I have said, the ACLU and similar community organizations would have provided that information if Primus had been prevented from so doing. The same would not appear to be so in cases like *Ohralik*, however, because the most likely sources of information there are operating in a market context. Unless the putative providers of information are able to obtain payments for their efforts, the information most probably will not be forthcoming. There is no effective source motivated by non-pecuniary considerations as there was in *Primus* and as there will often be in connection with "political" speech. This suggests that regulation of commercial speech may often have a greater, not a lesser, chilling effect than would similar regulation of political speech.

The *Ohralik* result was, in other words, inefficient.

V. Federal Trade Commission Regulation of Speech

I will apply the analysis sketched above to the FTC's standard for identifying deceptive or misleading speech, and to its advertising substantiation program.

A. *The Standard for Deception:* An initial problem in any FTC proceeding against an advertisement that is alleged to be false, misleading or deceptive is to establish the claim that the advertisement makes and then to ascertain whether that claim is false, misleading or deceptive. While there are many statements of the standards to be applied to this problem, I take a recent version by the administrative law judge in the *Kroger* case.[42]

> If an advertisement is capable of conveying more than one impression to the consumer and any of them is false, the advertisement may be found to be misleading. From its own review of an advertisement, the Commission may find impressions which the advertisement is likely to convey to the public and determine whether such impressions have a tendency or capacity to deceive the public, even in cases where a number of consumers may testify that they were not actually deceived. In determining the tendency and capacity of an advertisement to mislead, the Commission looks to the impression an advertisement makes on the gullible and unthinking rather than on the trained and sophisticated.

For the flavor of how this language translates into practice, consider some of the cases on which the rule is based. *Charles of the Ritz*[43] involved a cosmetic preparation known as "Charles of the Ritz Rejuvenescence Cream." The advertisements typically referred to "a vital organic ingredient" and "essences and compounds" which the product contained which would bring to the user's skin quickly "the clear radiance . . . the petal-like quality and texture of youth," that it "restores natural moisture necessary for a live, healthy skin," and that it gives to the skin "a bloom which is wonderfully rejuvenating," and is "constantly active in keeping your skin clear, radiant and young looking." The Commission interpreted this language to claim that the product would rejuvenate and restore youth or the appearance of youth to the skin regardless of the condition of the skin or the age of the user. Needless to say, it found that claim to be false.

Similar in solicitude was *Gelb v. FTC*,[44] which involved a claim that Clairol colored hair "permanently."

42. Matter of Kroger, FTC Docket No. 9102, Order Ruling on Complaint Counsel's Motion for Summary Decision, May 18, 1978, at 3.

43. Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

44. 144 F.2d 580 (2d Cir. 1944).

The Commission treated this as a claim that new hair would grow in at the dyed color and not surprisingly found that claim to be false. The Court of Appeals affirmed this piece of nonsense, in spite of the fact that "it seems scarcely possible that any user of the preparation could be so credulous as to suppose that hair not yet grown out would be colored by an application of the preparation to the head." And this ignores the question of how those who might have been so deceived could have been injured, an interesting question in view of the fact that it would have been difficult for them to have purchased a competitive product that would have lived up to the claim as it was interpreted by the FTC.

I cannot resist reporting my favorite interpretation of an ad by the Commission and the remarks upon it by the Seventh Circuit. The Commission found that consumers had a preference for 100% olive oil soap and that the name "PALM AND OLIVE OIL SOAP," under which a particular soap was sold, deceptively indicated that the soap was 100% olive oil. In rejecting this absurdity, the Court said:

> How a person with any intelligence could look at the label or brand name upon a cake of soap or the wrapper thereof, containing the two descriptive words 'palm and olive' oil and be misled into believing that such words mean 100% olive oil, is so incredible as to be unbelievable. We suppose that by the same process of mental reaction, such witness would believe that the words 'goose grease and lard' meant 100% lard and no goose grease, or that if shown a picture of a cow and a horse, would be led to believe that he had seen a picture of two horses.[45]

The application of the cost-benefit principles which I have sketched above to this standard is straightforward and need not be labored. It simply cannot be to the benefit of the community to restrict advertisements of the type discussed above by applying the fool's standard in determining the meaning of the advertisement and whether or not the ad is false, misleading or deceptive. The application of that standard has the same effect as the banning of all smoke from industrial plants. It considers only the possible costs of the activity and leaves possible benefits entirely out of the scales. It seems clear that each of the ads considered above provided useful information to some, perhaps a considerable number of, consumers. Why should those benefits be forgone simply because some small number, most likely zero in connection with the ads discussed above, of consumers *might* have been misled.

Most sensible people would have no difficulty in concluding that there is no public interest in applying a fool's standard to advertising claims simply as a matter of practical public policy. It is simply a waste of resources to

45. Wrisley v. FTC, 113 F.2d 437 (7th Cir. 1940).

There is no public interest in applying a fool's standard to advertising claims . . .

concern ourselves with such matters. If that is so, it is hard to see how it can be argued that the government has an interest in regulating such advertisements that rises to the level of overriding the First Amendment interests that are presumably involved. If the Court sticks to the rule implicit in *Bates* and *Virginia Pharmacy* it is hard to see how any FTC advertising regulation based on its usual standards of advertisement meaning and deception could withstand First Amendment scrutiny.

B. *Advertising Substantiation:* Advertising substantiation had its genesis in *Matter of Pfizer,*[46] where the Commission held that it was unfair to consumers to make an affirmative product claim unless there was "a reasonable basis for making that claim." It is now well established that this "reasonable basis" requirement consists of two distinct elements:

> (1) possession of substantiating material *at the time* the challenged advertising claims were allegedly made, and (2) *actual* reliance on the material as substantiation for the challenged claims. It is not enough that the claim was in fact true or that there was information which could have supported the advertiser's claim.[47]

Under this rule an advertiser clearly can be subjected to sanctions for making true claims, the truth of which can in fact be established by information in existence at the time the claim was made. No matter what power the government has to regulate false, misleading or deceptive advertising after *Bates, Virginia Pharmacy* and *Texas Optometry,* advertising substantiation must be outside that power, at least when applied to advertising claims that are in fact truthful.

If, however, constitutional scrutiny of government restrictions on commercial speech rises at least to the level of requiring the government to show that there is a real, let alone a significant or overriding regulatory interest that could possibly take precedence over First Amendment values, there is reason to believe that advertising substantiation is constitutionally infirm no matter what kind of speech it may be used to regulate. I base this statement on the proposition that the FTC is unable to show that there is any real regulatory interest to justify a compulsory advertising substantiation program. This is so because the Commission has no idea whether the benefits of advertising substantiation exceed its costs *and*

46. 81 FTC 23 (1972).

47. Matter of Kroger, *supra* note 42, at 10.

because there is a much less restrictive way of dealing with the problem to which advertising substantiation is addressed, providing the optimal amount of reliable product information to consumers. The FTC has no idea of the relationship between the costs and benefits of advertising substantiation in large part because it does not know how much reliability in product claims is desired by consumers. The production of too much reliability (accompanied, of course, by appropriate increases in costs and, therefore, prices of the products to which these reliable claims relate) will injure consumers just as much as will the production of too little reliability. Since there is no public interest in producing too much reliability in product claims and since the FTC does not know whether its advertising substantiation rules produce too much reliability or not, it would seem to follow that it is unable to show that there is any public interest even to begin to justify these rules as against the First Amendment interests involved.

The Court has not yet been able to formulate any discernible theory to guide principled decision in this area of the law.

This is particularly so because the Commission has available an alternative remedy, the adoption of which would be likely to improve the operation of the market for reliable product claims and thereby reveal how much of such reliability consumers are actually willing to purchase. This remedy is simply to establish a system of standards which advertisers can use, if they wish, to communicate to potential purchasers the degree to which any particular product claim is "substantiated." Presumably as the level of substantiation rises, the cost of substantiation will rise as will, most usually, the price of the product. If consumers value substantiated product claims they will presumably be willing to pay a higher price for a product as to which any particular claim is highly substantiated. If substantiation is not valued highly, not much of it will be produced and product prices will presumably be lower. It could well be that similar products, each having different levels of substantiation for their respective product claims, all selling at different prices reflecting the differing costs of producing such different levels of substantiation would appear on the market. In this way a market for reliability in product claims could be brought into existence as different firms vied to provide different types of consumers with different types of products, product claims and degrees of reliability in these claims. Consumers would obtain the best available mixes of such qualities that the market could produce and no serious First Amendment problems would be raised. It seems to me that the availability of this less restrictive approach to the "problem" of reliability in product claims raises serious questions as to the constitutionality of the Commission's existing advertising substantiation rules.

VI. Conclusion

An examination of the Supreme Court's recent First Amendment "commercial" speech cases shows that the Court has not yet been able to formulate any discernible theory to guide principled decision in this area of the law. It has decided a series of cases in different ways that cannot plausibly be explained or justified by any of the analytical tools which the Court has so far brought to bear on the problem. The Court has said that different standards of constitutional scrutiny are to be applied to the regulation of "political" speech than to "commercial" speech and, indeed, that different standards are to be applied to different types of "commercial" speech. It has done this without clearly specifying the relevant differences between different levels of constitutional scrutiny to be applied to them. Its sharp retreat in its latest decision, *Texas Optometry*, raises the possibility that its foray into the protection of commercial speech may be short lived and without serious significance. I have suggested that the Court's failure fully to requite the princi-

ples of its earlier cases may be due to the absence of a coherent theory by which those principles may be generally applied.

I have argued that there is no good reason to try to categorize different instances of speech, either as "political" or "commercial" or as between different examples of so-called "commercial" speech. The First Amendment can consistently be applied to all of these different examples of speech by interpreting it to establish a very strong presumption against *any* governmental regulation or restriction of speech. As is presently the case as regards "political" speech that presumption can be overcome if, in balancing First Amendment interests against legitimate community interests in regulating the speech involved, it appears that the regulatory interests clearly outweigh the First Amendment interests by a substantial margin.

While few constitutional scholars seem to view it this way, to the economist this balancing process is observed as a type of cost-benefit analysis. If the social benefits of restricting particular speech clearly outweigh the social costs of so doing, and by a substantial margin, that speech can constitutionally be restricted. I do not see why that formulation is not equal to the task involved in all First Amendment cases, no matter what "type" of speech is involved.

I have also suggested that insight into the costs and benefits of regulating speech can be obtained by inquiring into the kind of arrangements the affected parties would have made for themselves, had they been able to transact with each other in a hypothetical "zero-transaction-cost world." This is, of course, simply a technique to estimate what values the interested parties place on speech and on its restriction, weighted to take account of the intensity of their interests in the matter.

When this technique of estimating social costs and benefits is applied to those recent cases in which the Court has upheld the restriction of "commercial" speech as against First Amendment interests, it appears that the upholding of such restrictions was unwarranted, both because the costs of the restrictions exceeded likely benefits and because less restrictive (costly) means of regulation were available. It also appears that application of a cost-benefit approach to determining the governmental interest in restricting speech would result in significant portions of the Federal Trade Commission's regulation of advertising being held unconstitutional.

I do not predict that this will in fact occur. If the Court continues down the road indicated in *Texas Optometry*, it will almost certainly not come to pass. I do not believe, however, that the decision in that case can be justified. Continuation of the process begun in *Virginia Pharmacy* and *Bates* would be based on sound constitutional doctrine and could produce significant social benefits. □

Continued from page 19.

(16) Names and addresses of bank references;

(17) With their written consent, names of clients regularly represented;

(18) Prepaid or group legal services programs in which the lawyer participates;

(19) Whether credit cards or other credit arrangements are accepted;

(20) Office and telephone answering service hours;

(21) Fee for an initial consultation;

(22) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;

(23) Contingent fee rates subject to (CPR) DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(24) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled, without obligation, to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

(25) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled, without obligation, to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(26) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information;

(C) Any person desiring to expand the information authorized for disclosure in (CPR) DR 2-101(B), or to provide for its dissemination through other forums may apply to the Code of Professional Responsibility Committee of the Washington State Bar Association. Any such application shall be directed to the chairman of the committee at the office of the Washington State Bar Association. Any such application shall be heard expeditiously by the committee. The applicant shall have the right to be heard in person and the committee may hear such other persons as it deems appropriate on the issue of whether the proposal is necessary in light of the existing provisions of the code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The committee shall establish such rules as it deems appropriate to assure orderly, fair and expeditious procedures for hearing and recommending relief. Any recommended relief shall be recommended to the Supreme Court as an amendment to (CPR) DR 2-101(B), and shall be universally applicable to all lawyers.

(D) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(E) Unless otherwise specified in the advertisement if a lawyer publishes any fee information authorized under (CPR) DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under (CPR) DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under (CPR) DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than 1 year.

(F) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

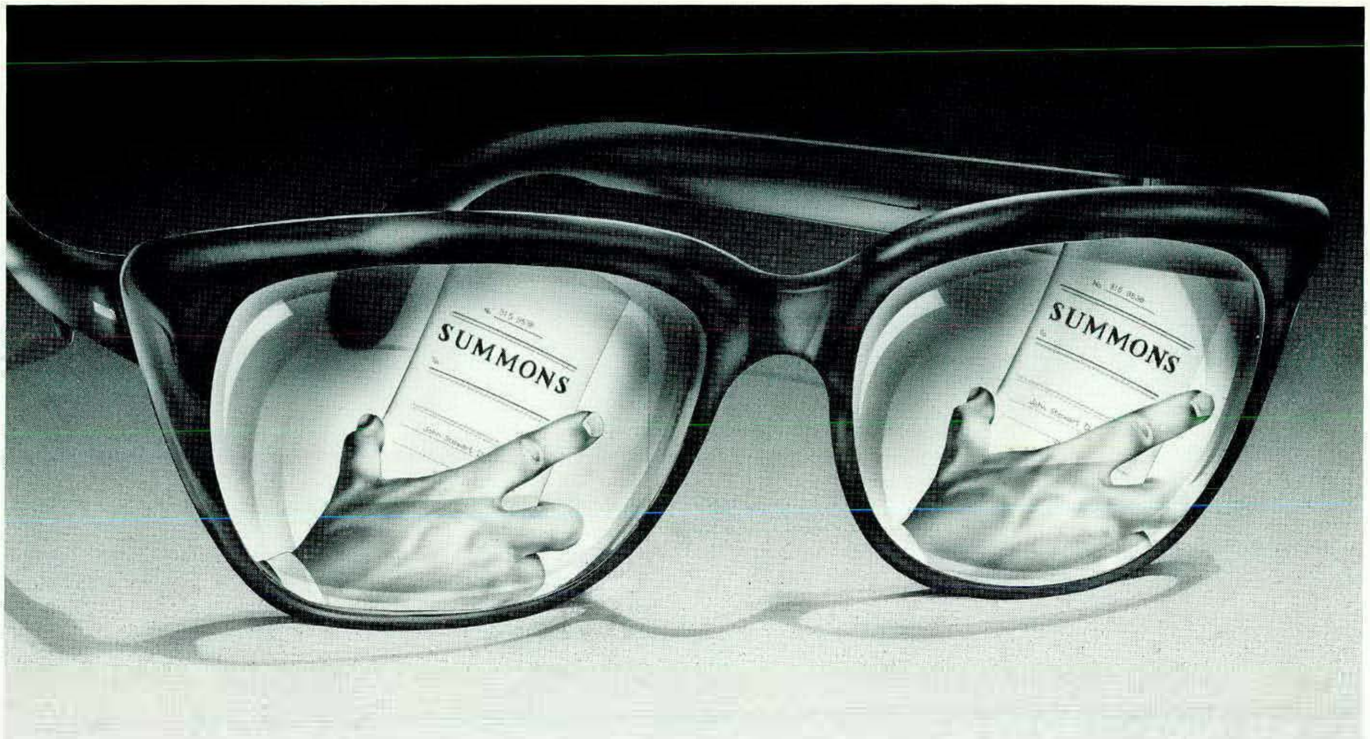
(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(G) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. A paid advertisement must be identified as such unless it is apparent from the context that it is a paid advertisement. If the advertisement is communicated to the public by use of radio or television, a recording of the actual transmission shall be retained in the lawyer's or law firm's records for a period of 3 years. □



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Board May Propose Court Rule To Govern Unauthorized Practice

By **JAY V. WHITE**

OLYMPIA, January 11-12—The Board of Governors has referred to bar association counsel a draft rule to regulate the unauthorized practice of law.

The rule, proposed by the Unauthorized Practice of Law (UPL) Committee chaired by John A. Hoglund of Olympia, would require the approval of the state Supreme Court before becoming effective. The Board will make the final decision as to whether the rule should be proposed to the court.

Hoglund appeared at the Board meeting here to urge approval of the rule, citing the "vacuum of authority" which he said exists because, although the UPL Committee receives periodic complaints about alleged unauthorized practice and investigates them, "there is no formal regulatory rule or authority to act" and so "there really is very little for the Committee to do."

Hoglund stated that, to his knowledge, Virginia is the only state with a supreme court rule dealing with the unauthorized practice of law.

In a memorandum to President Hemovich which was circulated to Board members, the bar association's General Counsel Kurt M. Bulmer explained that a rule promulgated by the Virginia State Bar Association was challenged successfully in *Surety Title v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977). The Virginia rule provided that disciplinary action could be taken against an attorney who did not act in accordance with advisory opinions issued by the Virginia bar concerning unauthorized practice. The Virginia Federal District Court held that the "state action" exemption did not extend to protect a bar association rule from attack under antitrust laws, but on appeal the *Surety Title* opinion was vacated to permit the Virginia Supreme Court an opportunity to promulgate that court's present rule which presumably constitutes "state action".

Bulmer pointed out in his memorandum that in Washington the State Bar Act makes the unauthorized practice of law a misdemeanor, RCW 2.48.180, and that the bar association traditionally has had a committee to review ULP complaints. He stated that the committee's work was noted with approval by the state Supreme Court in *In re McCallum*, 186 Wn. 312, 315, 57 P. 2d 1259 (1936):

> In such cases, unauthorized practice of law, the court has the power of its own motion to institute proceedings of this kind, or cause them to be instituted. The power in the court includes the power to ratify and approve, as we do in this case with appreciation, the services of attorneys acting as a committee of the state bar association and who at the same time are officers of this court, in filing the petition making the charges.

Hoglund told the Board that the thrust of the proposed rule is to provide a mechanism to deter unauthorized practice through civil remedies, including the institution of disciplinary proceedings where attorneys are involved. In addition, the bar association would have the power to refer complaints to prosecuting attorneys, the Attorney General, or other appropriate tribunals or agencies for remedial action. The bar association also would be empowered to issue advisory opinions, subject to Supreme Court review, to define unauthorized practice and to provide additional framework for enforcement of the rule.

Under the rule, the state Supreme Court would assert jurisdiction over "all persons rendering legal services" in this state, whether admitted to practice or not, in order to "ensure accountability to the public and to the Supreme Court" by such persons.

The Board deferred making a formal recommendation as to whether the rule should be implemented pending further study.

OTHER BOARD ACTIONS...

■ NO FREE CLE FOR JUDGES—The Board reaffirmed its position that judges of courts of record should not be granted an exemption from CLE tuition. The Board's action followed review of

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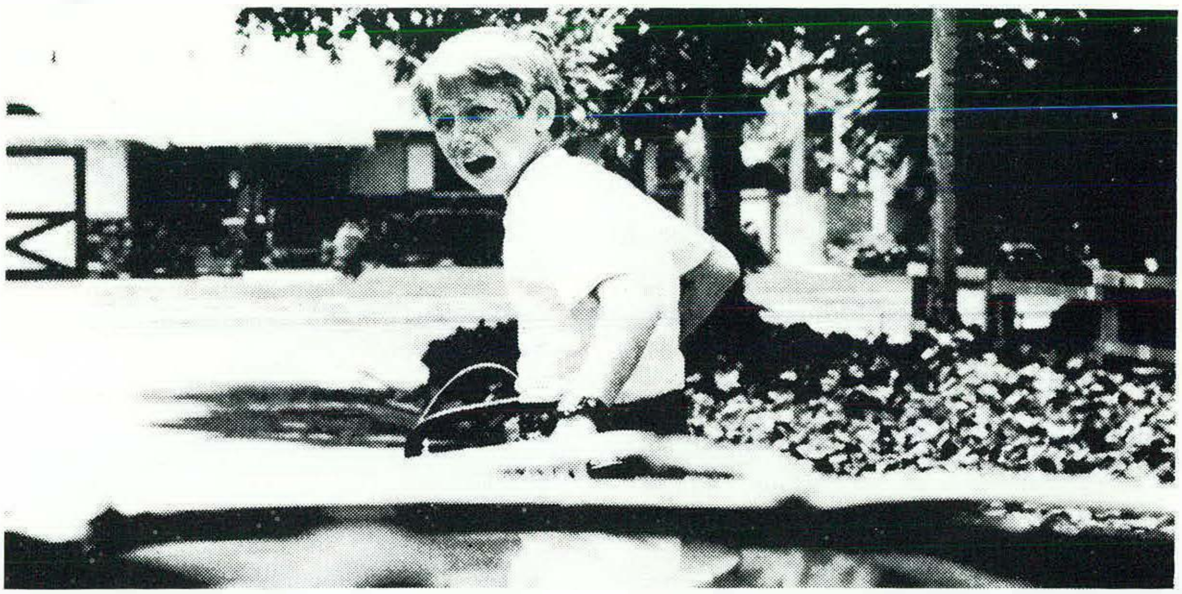

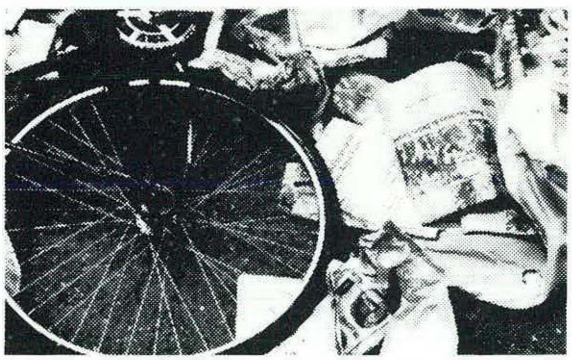

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a request for such an exemption submitted by Keith M. Callow, Presiding Chief Judge of the state Court of Appeals.

■ CODE OF PROFESSIONAL RESPONSIBILITY—The Board (1) tabled a request for modification or clarification of Formal Opinion No. 170—which states that when a personal injury claimant effects recovery for his injury which includes medical expenses upon which the claimant's own insurance carrier has a subrogation claim, it is ethical for the claimant's attorney to assert a right to deduct pro-rata attorney's fees from the subrogated amount where the subrogation insurance carrier has not retained plaintiff's attorney in connection with the subrogation—pending further comment in light of *Pena v. Thorington*, 23 Wn. App. 277 (1979); (2) voted to withdraw Formal Opinion No. 56 which prohibited an attorney from using the words "Attorney at Law" on personal checks; (3) voted that no change be recommended as to DR 2-108 which prohibits attorneys from entering into employment agreements restricting the right of a lawyer to practice law upon termination of the agreement, except as a condition to payment of retirement benefits.

■ JUDICIAL DISCIPLINE AND REMOVAL—The Board approved language to amend the proposed constitutional amendment to provide for judicial discipline and removal which was endorsed by the Board in December. *Bar News*, 1:34:46. The new language would clarify the proposed change in the constitution by placing procedural rule-making authority in the judicial qualifications commission which would recommend to the state Supreme Court any disciplinary action to be taken against a judge or justice.

■ LEGISLATION—Following a report by William A. Baker, who chairs the Legislative Committee, the Board voted to (1) *defer* consideration of House Bill 986 which would create an independent state agency for administrative law judges pending further study by the Task Force on Administrative Procedures; (2) *defer* taking a position on the proposed Financial Institution Account Deposit Act pending consultation by the Real Property, Probate and Trust Section with affected financial institutions; (3) *support* proposed amendments to the Washington Business Corporation Act relating to (a) indemnification of directors and officers; (b) shareholder presence—conference calls; (c) voting trust agreements; (d) rights and duties of directors; and (e) corporate dissolution; (4) *support* legislation relating to attorneys' fees, expert witness fees and interest on judgments *except* for provisions which would make payment of certain attorneys' fees discretionary with the court and permit the assessment as costs of expert witness fees against a losing party; (5) *support* in principle legislation to increase salaries of district court judges; (6) *endorse* the concept of making district courts ones of record provided that appropriate changes be made in jury selection procedures; (7) *support* legislation to govern the award of attorneys' fees in eminent domain proceedings; and (8) *oppose* an amendment to Ch. 18.100 RCW, relating to professional service corporations, which would prohibit more than 30 individuals from becoming shareholders in such corporations.

■ SUPERIOR COURT—The Board endorsed a proposal to add five judges to the King County Superior Court bench. □

Washington Appellate Practice Handbook

Terry N. Foster
Associate Director of Continuing Legal Education

A major new CLE publication, the Washington Appellate Practice Handbook will be available early this Spring. The Handbook puts together for the first time a complete treatment of the subject of Appellate Advocacy, Procedure and Practice in a readable and usable format. In thirty-two chapters the Handbook covers the nature and function of the appellate process, an extensive analysis of the processing of appellate cases, forms, textual analysis of significant case law, practice tips, and the complete appellate rules and rules for appellate court administration. The book is fully indexed and contains a table of statutes and cases, rules and references.

The Handbook takes the position that appellate advocacy does not end with the study of the rules of appellate procedure but rather effective advocacy demands an understanding of the system, the values at work, and the art of persuasion. One of the unique features of the Handbook is a chapter containing a study of the values which may motivate an appellate court judge in the decision making process. The book also provides an explanation of the differences between the function of the trial court and appellate court. This analysis is offered to promote understanding of the appellate judges' perception of the comparative roles of the trial and appellate courts so that the practitioner may develop appropriate appellate arguments and make informed decisions about which cases to appeal.

Produced under the extraordinarily fine leadership of Seattle attorney Malcolm E. Edwards and Justice Charles Horowitz of the Washington State Supreme Court, the Handbook is an outgrowth of an American Bar Association project which had its origins in the Appellate Judges Conference of the Judicial Administration Division. The goal of the project was to encourage the preparation of appellate practice handbooks in each of the states with the objective of improving the level of appellate advocacy in the state appellate courts. Mr. Edwards and Justice Horowitz were selected as co-chairpersons of the American Bar Association Appellate Handbook Committee for the State of Washington and they in turn selected a committee of writers made up of practicing attorneys and judges. The writers initial efforts were reviewed by the full committee, the material was re-written, and the final draft was approved by the editorial board each of whom contributed many hours of volunteer effort to the project. The editorial board members, Karl B. Tegland, Professor Robert H. Aronson, Appellate Court Commissioners Michael F. Keyes, Mark H. Adams, and Joseph A. Thibodeau worked together with Professor Lewis H. Orland to produce a valuable reference work which will be of lasting value to members of the bench and bar of this state.

The Appellate Practice Handbook will be presented in connection with a series of seminars at three locations in the state during the months of March and April. Several of the writers will present their material and additional insights into the art of appellate advocacy. The announcing brochure for the seminar contains a more detailed description of the contents of the Handbook. Please consult the brochure for the seminar in your area.

Approved Continuing Legal Education Activities

COURSES APPROVED

ALI-ABA

Foreign Investment in US Real Estate
Feb. 21-22, 1980: San Francisco 10.00

Pension, Profit-Sharing & Deferred Compensation Plans
March 19-21, 1980: San Francisco 19.50

Trial Evidence in Federal & State Courts
Feb. 8-9, 1980: Seattle 12.50

GONZAGA UNIVERSITY SCHOOL OF LAW

Federal Taxation Workshop
Feb. 1, 1980: Coeur d'Alene, Idaho 3.00

NATIONAL LAWYERS GUILD

Consumer Law for the General Practitioner
Feb. 1, 1980: Seattle 6.00

NEW YORK LAW JOURNAL

Generation Skipping Transfers in Trust
Feb. 14-15, 1980: Los Angeles 10.00

PRACTISING LAW INSTITUTE

Legal Rights of the Mentally Disabled
Feb. 7-9, 1980: San Francisco 15.00

Tax Problems in Tax-Exempt Financing
Feb. 28-29, 1980: Denver 9.00

Maritime Personal Injury
March 6-8, 1980: Los Angeles 18.25

Toxic Substances Litigation
March 21-22, 1980: San Francisco 12.50

UNIVERSITY OF PUGET SOUND SCHOOL OF LAW

Environmental Law & Land Use Planning
Jan. 27-Feb. 3, 1980: San Diego 16.50

Around the State

BENTON-FRANKLIN REPORT

By STEPHEN T. OSBORNE

Election of officers followed the annual Bar Golf Tournament. Elected president was **Diehl R. Rettig; Eugene G. Schuster** was tabbed as vice-president, and **Nathan Kirk** was elected secretary-treasurer. In past years, **Duane Taber,** perennial organizer of the event, generally reserved the discretion to award the trophy to either the low gross or the low net score. **Roger Olson** made the choice a simple one by posting a low gross and low net score. **Mike Johnston** won the longest drive competition. The officers were installed, and the winners presented their awards that evening at a banquet at the Tri-City Country Club.

It is getting difficult to know the players without a score card. In the new partner category, belated congratulations are extended to **Andy Bohrnsen** who became a partner with the Leavy & Taber firm. **Fran Forgette** became a partner with Raekes, Rettig, Osborne & Forgette.

District Court Judge, **Daryl Jonson,** has left the bench to join the firm of Butler, Cowan & Walker. **Crane Bergdahl** has left the Leavy & Taber firm and will share space with Stan Taylor. **Ed Alden,** formerly with the legal staff of the Washington Public Power Supply System, has joined the firm of Evans & Kerr.

EAST KING REPORT

By BARRY J. HASSON

Since the last King County Report, the annual "Golf and Gulp" Tournament was held by the East King County Association. Forty golfers attended and participated, and about that many stayed around for dinner. Golfing, but not necessarily gulping, were Issaquah District Court Judge **Robert K. Waitt,** and King County Superior Court Judges **Lloyd Bever, Frank Eberharter, Frank Howard, Stephen Reilly,** and **Jack Scholfield.** Dining, but not duffing, were Superior Court Judges **Dick Ishikawa** and **Dave Hunter.** If this reporter missed anyone from the above list, please blame tournament reporter pro tem and East King County Bar Association President, **Doug Cowen,** who is used to taking such blame.

Chairman of the foregoing event was **Dick Holt,** and participants were cheered on by two of the Seattle Seahawks cheerleaders.

As usual, a lot of movement has been taking place in and into the East Side legal community. **Bruce Hand** is now sharing office space with **Harry Wilson** and **Barbara Reardon** in their new Bellevue edifice, which is also occupied by the, as previously announced, premier law firm of **Barry J. Hasson. John W. Martin Jr.** is now in the Surrey Building in the firm which is now known as Hanson, Zwink, and Baker, the principals being **John Hanson, Bill Zwink,** and **John M. Baker II. Eric Jeppesen,** formerly of the East Side Defenders Association, is now an associate with Revelle, Ries, and McDermott. **Gerald Igl** is now an associate of **Pete Gulick,** and **Curt Lichtenberg** and **Bob Sifferman** are associates of **Rick Carrithers.**

Out in Redmond, **Jerry Netzky** is taking over **Jim Young's** practice; **Gordon B. Anderson Jr.** has opened his office at Bear Creek; and **David E. Reed** and **John E. Schafers** have formed a partnership on Redmond Way. Finally, **Bob Villareale** is renting space to **Robert F. Young** in Kirkland.

SEATTLE-KING REPORT

By JAMES L. VARNELL

Recent Associations. **Charles H. Thulin** and **Stevan D. Phillips** have become associates of Jones, Grey & Bayley. **Jerome R. Cronk** has relocated his office to 305 Shoreline Business and Professional Center, 17544 Midvale Avenue North, Seattle. Former secretary and law clerk **Marilyn Jordan** has recently become admitted to the Washington Bar and is now associated with her former mentor, **Paul F. Bonnell.** The firm is known as Bonnell and Jordan with offices at 137 S.W. 153rd Street, Seattle. **John M. Cary** and **William F. Baron** have formed a partnership with offices at 500 Pioneer Building. **W. Bernard Bauman** has opened his office for the practice of law at 529 Pioneer Building. **Mary Ann Ottinger** has joined the firm of Hayne & Moote, P.S., Inc. as a partner and is now located at the firm's new Bellevue office, 12360 N.E. 8th Street. **William E. Fitzharris, Jr.** and **Daniel Cavallerano** have also associated with the firm. Each of the following attorneys has opened his office at Suite 500, Pioneer Building: **Fernando E. Perez Pena, Ralph D. Pittle, David J. Sadick, Melvyn Jay Simburg, Richard J. Troberman,** and **Robert P. Williamson.**

Coming Attractions. Various readers have commented on the absence of drollery in this column recently. Among others **Bruce Pym, David Koopmans,** and **Kameron C. Cayce** will be pleased to know that next month this writer's annual awards of merit and recognition will be published, and that each of them will be serving on the editorial advisory committee.

SNOHOMISH REPORT

By HENRY S. CHAPMAN

Congratulations to **Judge French** who was elected on November 6th to the Superior Court position.

The Bellevue law firm of Nelson and McCarthy have opened a branch office in Everett at 610 Central Building, telephone number 252-5171. **Hugh W. Hawkins, Jr.,** formerly of the Snohomish County Prosecuting Attorney's Office, will be the attorney-in-residence at the Everett office.

We wish a speedy recovery for Judge **Phil Sheridan,** who has had surgery recently and to **Johannes Watness** who suffered a broken hip and is home recuperating from surgery.

Terry Forbes and wife spent this Christmas in Hawaii.

Charles R. Meyer has opened a new law office at 310 Main Street, Sultan, Washington 98294, telephone number 793-1222.

Just a reminder to all of you that our annual Bar Banquet will be held at the Everett Golf and Country Club on February 23, 1980. Hope to see you there!

Best wishes for a prosperous New Year!

Briefly Noted

The Public Land Law Review

The federally owned lands cover one third of the United States and the Federal Government has dominant power over the use made of this land and its resources. In response to the growing importance of these lands, the School of Law at the University of Montana will publish a new law review early in 1980. Called the Public Land Law Review, it is designed to provide a comprehensive discussion of the legal issues relating to the federally owned lands.

The first issue of the Review will contain articles on the status of federally implemented reserved water rights, a review of strip mining regulations, recent changes in the law of livestock grazing, and the Bureau of Land Management wilderness review program. Comments and casenotes by the editorial staff will also be included.

The Review will be about one hundred seventy five pages. It will sell for five dollars. Inquiries are welcome at The Public Land Law Review, University of Montana School of Law, Missoula, Montana, 59812.

New VideoLaw Seminar on Depositions

The Consortium for Professional Education announces the release of the new VideoLaw Seminar, *The Deposition: A Simulation with Commentary.* Designed for the practicing lawyer wishing to evaluate and improve skills in deposition technique, this professionally produced videotaped program was filmed from a live 1978 National Institute sponsored by the ABA Section of Litigation and the Young Lawyers Division. This three and one-half hour program is a "how to" demonstration featuring nationally recognized attorneys as performers.

If you are interested in either rental or pre-purchase viewing, you may make arrangements by calling our toll-free number, (800) 621-8986. When placing an order, please indicate the video format you prefer (¾" video-cassette, ½" reel-to-reel, VHS, or Betamax).

If you have any questions about the program, please do not hesitate to contact our office.

Official Notice on 1% Affidavits

To all persons filing 1% Real Estate Excise Tax affidavits with the King County Department of Records. Effective January 2, 1980 only the new 1% affidavit, which requests information relating to tax correspondence will be accepted.

These new forms may be obtained at the Department of Records, Room 311, King County Administration Building, 500 4th Avenue. For information, call (206) 344-3873.

Callers Receive Informed Referrals

All King County residents can call (206)447-3200 toll-free beginning January 1 for information on where they can find counseling, medical care, classes, and social and legal services.

The new Community Information Line, "open" from 8:30 a.m. to 5:30 p.m. weekdays, also offers callers the chance to discuss sensitive personal problems anonymously with a trained and caring listener.

Community Information Line is sponsored by a partnership between United Way, the City of Seattle, King County and the State of Washington.

The service, which Crisis Clinic, Inc. will manage, will draw on current information on 1,500 social and health service agencies in the county.

Local Federal Rule 16 To Be Studied; Comments Invited

The Federal Bar Association of the Western District of Washington and the Seattle-King County Bar Association, working in conjunction with representatives of the United States District Court, have undertaken a review of the pretrial order requirements of Local Rule 16 of the United States District Court for the Western District of Washington. The committee would welcome any criticisms of the present rule, any explanation of significant problems or benefits encountered in working with the rule, and any comments or suggestions anyone might have on possible ways to improve Local Rule 16 or to eliminate any unnecessary burdens created by the present rule. Please send any comments or suggestions to John Guadnola, P.O. Box 1157, Tacoma, Washington 98401. Your assistance will be greatly appreciated.

Board Elections Due

Lawyers residing in the Second, Fourth and Seventh Congressional Districts please note:

Members of the Board of Governors of the State Bar to represent those districts are due to be elected this year. Expiring in September are the three-year Board terms of David A. Welts, Second District; James M. Danielson, Fourth District and, Lowell K. Halverson, Seventh District.

The State Bar Association By-Laws (Article II) provide that any active member in good standing may be nominated for the office of Governor from the district in which the member resides upon petition signed by at least twenty but not more than thirty active members also residing in the district.

Nominating petitions may be obtained from the Bar Office, 505 Madison Street, Seattle, WA 98104.

The petition must be filed in the Bar Office by 5 p.m., May 31, 1980.

Add one lawyer to the Legislature... Seattle attorney William H. (Skeeter) Ellis, shown here being administered the oath of office by Chief Justice Robert F. Utter, was named in December to fill the 46th District vacancy in the state House of Representatives created by the resignation of Republican Scott Blair. Ellis is a partner in the Seattle firm of Foster, Pepper & Riviera. A member of the Washington State Bar since 1958, he is a graduate of Yale University and the Stanford University School of Law.

Ellis' appointments to House standing committees include the Judiciary, Natural Resources, and Insurance Committees. He is presently a member of the Washington State Statute Law Committee. His previous experience in Olympia includes eight years as a bill drafter for the Legislature.

Inter-Attorney Fee Arbitration Established

Occasionally, two or more attorneys or law firms have a dispute as to fees or costs between themselves.

These fees and costs may arise from such things as being co-counsel on a case or from having provided direct legal advice in an area of expertise. The Board of Governors has established an arbitration process to provide for an expeditious and economical means of resolving such disputes.

If use of the arbitration proceeding is made the parties must agree to binding arbitration. As such the arbitration provisions of RCW 7.04 apply—this permits easy reduction of the arbitration decision to judgment if necessary. Where the dispute involves less than \$2,500 a single arbitrator is used, if it is for more than \$2,500 a three-member panel hears the matter. There is a \$25.00 cost to the petitioner. Normally there will be no further costs but in the situation of an extended hearing or a particularly complex matter compensation may be required for the arbitrator. The proceedings are confidential.

Inter-attorney arbitration proceedings provide a convenient, competent, non-judicial forum for the resolution of money disputes between members of the profession. The low-cost, the confidentiality and the speed of the process all make the program one which attorneys may wish to avail themselves of if they get into a dispute. The necessary petitions and further information may be obtained by contacting the Bar Association Office.

In Memoriam

F. Derond DeWeese, 70, of Bellingham, died October 11. He was admitted to the Bar in 1949.

William Gardiner, 61, of Ferndale, died October 18. He was admitted to the Bar in 1949.

John Goldmark, 62, of Seattle, died October 31. He was admitted to the Bar in 1949.

Nelda Jaeger Kraemer, 92, of Tacoma, died November 15. She was admitted to the Bar in 1910.

James M. Martin, 51, of Bellevue, died December 9. He was admitted to the Bar in 1954.

Clifford O. Moe, 71, of Ephrata, died November 10. He was admitted to the Bar in 1932.

Judge Marshall A. Neill, 65, of Spokane, died October 6. He was admitted to the Bar in 1938.

Judge W. A. Richmond, 88, of Tacoma, died October 27. He was admitted to the Bar in 1927.

ADVERTISING RATES

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Notices

PROFESSIONAL

Curtis N. Epperson and John T. O'Shea take pleasure in announcing the opening of their law offices on Mercer Island, Washington. Available for consultation on all matters related to Marine Resource Law, Fisheries Law, and Admiralty.

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(206) 236-0432 Cable: OCEANLAW

Martin Silver, LL.M. in taxation, NYU, WSBA (section on Taxation), ABA (section on Taxation), announces his availability for consultation, referral and review of documents re: estate, corporate, partnership and general tax planning.

Martin Silver, Esq.
510 Securities Building
Seattle, Washington 98101
Telephone: (206) 624-7272

Richard Ralston announces his availability to lawyers for consultation, referral, etc., in coastal zone property, pollution and fishing problems, Indian law and related matters. LL.M. in Law and Marine Affairs, UW.

Richard S. Ralston, Esq.
Suite 302 Pioneer Building
600 First Avenue
Seattle, Washington 98104
Telephone: (206) 447-9681

John O. Durkan announces his availability to assist lawyers to guide clients through civil or fraud tax audits, to negotiate settlements or to prepare and try federal tax cases before the U.S. District Court or the U.S. Tax Court.

Mr. Durkan served seventeen years with the IRS as corporate auditor, review and trial attorney and as Assistant Appellate Counsel of the Seattle District. Member of Washington and Montana Bars.

John O. Durkan, Esq.
155 N.E. 100th, Suite 403
Seattle, Washington 98125
Telephone (206) 523-5783

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Bogota, Colombia

Douglass A. North, former law clerk on the Washington State Court of Appeals, announces his availability for referral, consultation, or association on appellate arguments and briefs.

Douglass A. North, Esq.
Hennings, Maltman, Weber & Reed
414 Central Building
Seattle, Washington 98104
Telephone: (206) 624-6271

Michael Lantz of the Washington State Bar announces his availability to lawyers for consultations and referrals in Federal Tax cases pertaining to civil or fraud tax audits and to prepare and try tax cases before the U.S. Tax Court or U.S. District Court. He also is available to assist in Business, Corporate, and Estate tax planning

Michael Lantz, Esq.
3727 Seattle First National Bank Bldg.
Seattle, Washington 98154
Telephone (206) 682-7626

CLASSIFIED

For Sale: Matthew Bender, Lasser's *Estate Tax Techniques & Income Tax Techniques;* Rabkin & Johnson *Federal Income Gift Estate Taxation*. Volumes are current. Make offer. Call (206) 624-2521.

For Sale: Complete set of CJS Law Books including latest supplements. Contact Elaine Matt, Cascade Natural Gas Corp., P.O. Box 24464, Seattle 98124, phone (206) 624-3900.

For Sale: Olivetti 1500 Bond Copier \$2,000.00. CPT 4200 with tapes \$1,500.00. Both machines in good condition and on service contracts. R.G. Phillips, Jr. (206) 357-7797.

For Sale: Disposing of law library of my late husband. Sets not current.

Also collectors' editions. For list of books contact: Helen S. Dent, P.O. Box D, Gardiner, WA. 98334 Phone: (206) 797-7321.

Books Like New: ALR2d, 3d; ALR Fed 1-21; Danner Interrogatories; Schweitzer Trial Practice, 8 v.; Averback, Accident Cases, 7 v., 3 gold leather office chairs, teal vinyl sofa, Dictaphone, Antique Desk. (206) 363-2647.

For Sale: Am. Jur. Proof of Facts and Proof of Facts 2d—$800.00, Am. Jur. Pleading and Practice Forms—$500.00, Moore's Federal Practice (31 volumes)—$300.00, Rabkin & Johnson, Federal Income, Gift & Estate Taxation (13 volumes)—$250.00, Cavitch, Business Organizations with tax planning, (16 volumes)—$300.00. For cash, buyer to take care of transportation. Call (509) 837-5302 or 837-3692.

Wanted: Used Am. Jur., U.S. Codes, Moores Federal Practice (blue volumes) and other books for a law library at the Northwest Intertribal Court System. Phone: (206) 466-3163 or write P.O. Box 676, LaConner, Washington 98257.

Wanted: Attorney to share office space, legal secretary, legal assistant, and common expenses. Down town location. Inquire: (206) 624-2775.

Wanted: Young attorney for practice in the general and criminal law areas. Work would involve trial preparation, research and opportunity for trial experience. Salary negotiable. Contact John L. Farra, Market & I, Suite 201, Aberdeen, Washington 98520. Send resume.

Anchorage Trial Attorney interested in association with Seattle firm doing business in Alaska. (907) 276-8002 Ronald T. West.

Wanted: One IBM 271 Dictating Unit. (206) 457-8525.

Wanted: Used Washington Digest in good condition. Price commensurate with condition. (206) 574-4800. Contact Craig Schauermann.

Office Space: Deluxe space on the top floor of the new Fourth and Blanchard Building. Unbeatable view, library, receptionist, and conference room available on a cost-sharing basis if desired. Call J. Carmody at (206) 464-1490.

Prime Office Space Available: In deluxe Pioneer Building Suite for 1 attorney. All services and amenities available. Terms negotiable. Call (206) 623-7007.

Office Space: Attractive office space for 1, 2 or 3 attorneys includes receptionist, complete library, conference room, copy machine. Contact Alan C. Alhadeff, Third and Blanchard Bldg., Seattle, (206) 682-9192.

Established Seattle law firm has prestige space available for an attorney, with a private office for his secretary. New building, excellent view. Also available, two offices for attorneys, will provide secretarial service. Latest in telephone equipment. Receptionist service provided. Use of complete law library and copy machine. Replies confidential. Reply Box 62, WSBA.

Office Space Available for one or two attorneys; reception and phone service; library & copier. Free parking. Some over flow referrals. $500 per month. 328 Fairview Ave. No., Seattle (206) 623-6042.

Office Space: Up to 2,000 square feet of prime view space available for sublease on the top floor of the new Fourth & Blanchard Building. Use of library, receptionist, and conference room on a cost-sharing basis if desired. Some individual offices with amenities also available. Call James Carmody, (206) 464-1490.

POSITIONS

Position Available: Medium sized Southwestern Washington firm seeks attorney with 2-4 years experience in

Business Law. Confidential. Send resumes to Box 58, Washington State Bar Association.

Position Available: Medium sized Seattle firm with commercial practice desires associate with two or more years' experience in creditor's rights and bankruptcy, for continued emphasis in that practice. Send resumes to Box 60, WSBA.

Position Available: Six-lawyer Bellevue firm (business, real estate and litigation) seeking interviews, one or two year's trial experience preferred. Please send resumes to WSBA Box 61.

Positions Available: Entry level tax positions (seasonal, full & part-time) available for J.D. interested in data processing of federal and state income tax returns. Call CCH Computax at (206) 251-5350.

Law Office Management: Supervisor of personnel, purchasing, accounting and daily administration of 20-lawyer firm. Prefer MBA or equivalent. Salary negotiable. Inquiries confidential. Submit resume to Box 63, WSBA.

Attorney Sought by progressive and growing young law firm to work in branch office in Lynnwood. Minimum one-year (preferably trial) experience. Desire person looking for long-term career with firm. (206) 622-1702.

Position Available: Okanogan general practice firm seeks to hire attorney for indigent criminal defense. Salary negotiable. Borgersen & Burchard, Box 629, Okanogan, Washington 98840 (509) 422-1631.

Position Available: Small Seattle Firm seeks associate with two+ years experience; salary commensurate with experience. Contact R. Joseph Wesley (206) 682-9192. Third and Blanchard Bldg. Seattle, 98121.

Tax Attorney: Established law firm in Wenatchee has a need for a tax attorney (LI.M.). Send resume in strict confidence to: Garfield R. Jeffers, Jeffers, Danielson & Foreman, P.S. P.O. Box 1688, Wenatchee, WA. 98801.

Position Available: The Seattle District Court will have a position as traffic magistrate available in 1980, to hear and adjudicate minor traffic offenses. Two days per week. Salary will be paid at the judicial pro-tem rate but King County employee benefits will not apply.

Qualifications for this position require being a member of the Washington State Bar and having had some experience in a judicial capacity, i.e., pro-tem, commissioner, with traffic cases in district or municipal courts.

Please address all resumes to: Richard H. Roth, King County District Court's Administrator, Room E-340, King County Courthouse, Third and James, Seattle, Washington 98104, by: February 29, 1980.

Associate to assist full practitioner in downtown Seattle law office. Salary of $2,300 per month plus medical benefits. Applicant must have MBA degree or equivalent, be a member of the WSBA and a non-smoker. The primary work will be in the area of probate estate planning and business law although there will be work in other areas of the law from time to time. If you believe that you qualify and are interested, please contact: Lauren Harris, (206) 624-5606, for an interview.

Two Positions Available: One requires taxation LLM, academic standing, prior legal practice important; second position requires litigation interest, actual experience preferred. Reply Box 56, WSBA.

Position Available: Associate needed for small eastside law firm with varied practice from mental health law to business law. Reply to Box 57, WSBA.

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