Constitutional Law - Health Care Professionals Seek to Advertise

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INTRODUCTION

The United States Supreme Court has said that commercial speech does enjoy some, but not all, of the protections of the first amendment. Challenges to state regulation of commercial speech in order to determine the outer limits of the protection and government challenges to self-imposed ethical restrictions on professional advertising have kept the field in a state of constant flux. In Friedman v. Rogers one such challenge was decided in favor of the state’s power to suppress the commercial speech advanced. Recognizing the possibility to deceive or mislead the public if professionals were allowed to practice under trade names, the Supreme Court held that the Constitution permitted a state to impose limited regulations on such commercial speech. Within months of Friedman, the Federal Trade Commission, exercising its power to prevent unfair methods of competition, ordered the American Medical Association to modify their ethical restrictions on physician advertising and patient solicitation. The FTC order affected various other professional organizations, including the American Dental Association, which had agreed to abide by it.

Presently North Carolina, like many other states, regulates many of the advertising activities of professionals. Friedman has


5. TRADE REG. REP. (CCH) ¶ 21,562 (1979).

6. N.C. GEN. STAT. § 90-14 (Supp. 1979) (Board able to suspend or revoke license of any physician or surgeon who engages in any “unprofessional conduct, including, but not limited to, any departure from . . . the ethics of the medical profession.” This would seem to include the ethical restrictions on patient solicitation).
increased the burden of proof on the states in justifying their regulation of commercial speech; and the FTC decision has removed most ethical restrictions on physician advertising, which is very significant to North Carolina, given the extensive prior regulation. With the recent trends in the application of the first amendment to commercial speech, evidenced by Friedman and the FTC’s entry into the field, state regulation and ethical restrictions on professional advertising must be liberalized if they are to survive these challenges.

THE CASES

A. Friedman v. Rogers

In response to some rather alarming abuses and deceptive practices in Texas,7 the Texas Legislature adopted the Texas Optometry Act.8 In section 5.13 of the Act were the professional responsibility rule for the practice of optometry and many of the business regulations.9 It prohibited optometrists from practicing under an assumed, trade or corporate name and from allowing association of their names with optometrical offices at which they were not practicing.10

7. See Texas State Bd. of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex.), appeal dismissed, cert. denied, 389 U.S. 52 (1967) (some of the practices included the use of multiple trade names within the same community to give the appearance of competition, changing names of offices from time to time and retaining the trade names used by optometrists whose businesses had been purchased and who were no longer working at the establishment). Note that Rogers was a party in this action as well as in Friedman.


9. Subsection (c) of section 5.13 prohibited fee splitting and bonus arrangements based in whole or in part on the business or income of the optical company.


No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners;

with N.C. Code of Professional Responsibility, DR 2-102(B):
Plaintiff Rogers advocated the commercial practice of optometry and operated a series of optometrical offices under the name Texas State Optical (TSO). He brought an action for declaratory and injunctive relief from the enforcement of section 5.13 and other provisions of the Act to determine his right to conduct a professional practice under a trade name. A three-judge federal district court was convened, and it rejected the State's argument that the operation of optometrical offices under the name Texas State Optical was misleading to the public. The district court found that "the Texas State Optical name has come to communicate to the consuming public information as to certain standards of price and quantity, and availability of particular routine services." The district court balanced Rogers' constitutional interests in the commercial speech advanced and the State's interests in regulating it and, relying primarily on Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. and Bates v. State Bar of Arizona, held that section 5.13(d) was an unconstitutional restriction on the free flow of commercial information protected by the first amendment. Texas appealed to the Supreme Court from this ruling. The Supreme Court reversed the lower court's ruling and held the Texas regulations to be a valid exercise of the State's police powers to protect the public from the deceptive and mis-

11. "Commercial" practice of optometry is characterized by an emphasis on high volume and high speed in examinations, usually on a walk-in, first-come, first-served basis. It entails the use of multiple offices, extensive use of media advertising and practice under a trade name. In contrast, the "professional" practice of optometry places emphasis on gaining patients on the basis of the optometrist's reputation, examination by appointment and a lack of commercial merchandising techniques. Jurisdictional Statement for Appellant (Rogers) at 5, Friedman v. Rogers, 440 U.S. 1 (1979).

12. In Texas State Bd. of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex.), appeal dismissed, cert. denied, 389 U.S. 52 (1967), the testimony showed that Dr. Rogers had had no ownership in or control over several of the Texas State Optical shops but merely had sold the name to them to use.


leading use of trade names by professionals.\textsuperscript{17}

B. AMERICAN MEDICAL ASSOCIATION

In a complaint issued in 1975, the Federal Trade Commission charged the American Medical Association and two constituent members located in Connecticut with violating section 5 of the Federal Trade Commission Act through ethical restrictions on advertising and solicitation. Specifically, the FTC complaint charged that the AMA had agreed with others to prevent or hinder its physician members from soliciting business (by advertising or otherwise), engaged in price competition or otherwise engaged in competitive practices.\textsuperscript{18} Noting that the AMA represented fifty-five percent of the physicians in the United States, the FTC administrative law judge found that the challenged practices had placed a "formidable impediment to competition in the delivery of health care services by physicians in this country."\textsuperscript{19} The judge ordered that the AMA "cease and desist from engaging in the challenged practices and revoke and rescind any existing ethical principles or guidelines which restrict physicians' advertising, solicitation or contractual relations."\textsuperscript{20} The full Commission concurred in the administrative law judge's finding that the FTC had jurisdiction over the AMA. It found that the AMA was a company or association organized to carry on business for its own profit or that of its members within the meaning of section 4 of the FTC Act and that their acts and practices were in or affecting commerce as required by section 5 of the Act.\textsuperscript{21} While still requiring the AMA to drop its current ethical restrictions on advertising and patient solicitation by its members, the full Commission modified the administrative law judge's recommended order to permit the AMA to adopt and enforce reasonable ethical guidelines concerning advertising that is false or deceptive.\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{17} Friedman v. Rogers, 440 U.S. at 15-16 (1979).
  \item \textsuperscript{18} [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,491.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{20} \textit{Id}.
  \item \textsuperscript{21} TRADE REG. REP. (CCH) No. 409, Part II, at 3-18 (FTC Oct. 12, 1979).
  \item \textsuperscript{22} \textit{Id} at 58.
\end{itemize}
BACKGROUND

A. CONSTITUTIONAL ATTACKS

A major obstacle that confronted challenges to state restrictions of commercial speech was the United States Supreme Court's adoption of the commercial speech doctrine. The commercial speech doctrine is directly traceable to Valentine v. Chrestensen. At issue was a New York statute that prohibited the distribution of any handbill, circular or other advertising matter whatsoever in or on any street. Defendant had distributed commercial handbills with a message critical of the ordinance on the back. Dismissing the message as an attempt to avoid the ordinance, a unanimous Court sustained the ordinance. The Court said that while the state could not unduly burden the communication of information and dissemination of opinion, "equally clear . . . the Constitution imposes no such restraint on government as respects purely commercial advertising." This exception to the first amendment received further support in Breard v. Alexandria in which the Court upheld a conviction for violation for an ordinance banning door-to-door solicitations of magazine subscriptions. Since the selling "brings into the transaction a commercial feature," the Court reasoned the solicitation lacked first amendment protections.

Members of the Court have criticized this extreme attitude; however, not until Bigelow v. Virginia was this extreme view moderated to any great extent. While in the earlier case of Pittsburgh Press Co. v. Pittsburg Commission on Human Relations the Court had implied that commercial speech which proposes a purely legal commercial activity might be entitled to first amendment protections, the Bigelow decision went much further. In Bigelow

23. 316 U.S. 52 (1942).
24. Id. at 54.
26. Id. at 642-43.
27. Mr. Justice Douglas, who was a member of the Supreme Court when Chrestensen was decided and who joined that opinion, observed: "The ruling was casual, almost offhand. And it has not survived reflection." Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring); Bigelow v. Virginia, 421 U.S. 809, 820 n.6 (1975). "There is some doubt concerning whether the 'commercial speech' distinction announced in Valentine v. Chrestensen . . . retains continuing validity." Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting).
the Court said,

[t]o the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

. . . Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

The question remaining for the Court to answer was the extent of the protection: at what point would the governmental interests be sufficient to outweigh the constitutional protections? This question was of special interest to professionals. The Court's answer in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* and *Bates v. State Bar of Arizona* made clear that commercial speech could be regulated in some instances, but the Court failed to specify guidelines for the lower courts' determinations of deceptive or misleading—and, therefore, unprotected—speech.

*Virginia Board of Pharmacy* involved a Virginia statute declaring the advertising of prescription drug prices by a licensed pharmacist to be unprofessional conduct. Declaring the statute invalid, the Court held that speech which "does no more than propose a commercial transaction" was not wholly outside the protections of the first amendment. The Court refused, however, to extend full first amendment protection to commercial speech. The Court said that just as restrictions on the time, place or manner of expression were permissible under certain circumstances, restrictions on false, deceptive or misleading commercial speech were equally permissible. Although "much commercial speech is not
provably false, or even wholly false," but rather it is "only deceptive or misleading," the Court foresaw no obstacle to a state effectively regulating such speech.\textsuperscript{35} The Court said that the first amendment does not prohibit the states from insuring that the stream of commercial information "flow[s] cleanly as well as freely."\textsuperscript{36} The greater objectivity and hardiness of commercial speech makes toleration of inaccurate statements for fear of silencing the speaker less necessary.\textsuperscript{37} The state may require that the commercial speech advanced appear in such a form or include additional information as is necessary to prevent it from deceiving the recipient.\textsuperscript{38}

In \textit{Bates} the Court was confronted with a state statute that prohibited advertising by attorneys. The State Bar of Arizona had disciplined the firm of Bates and O'Steen for advertising prices for routine legal services. On appeal from the Arizona Supreme Court to the United States Supreme Court, the State Bar argued that attorney advertising, and by implication advertising by any professional who dispensed services rather than quantifiable goods, was inherently misleading. This argument was particularly attractive to the State Bar as it appeared to have had the backing of the Court in general and the Chief Justice in particular in \textit{Virginia Board of Pharmacy}.\textsuperscript{39} The Court rejected this argument but did state that some forms of advertising could be misleading and, therefore, would be subject to restrictions imposed by the states.\textsuperscript{40} In a later case involving solicitation of business by a professional,\textsuperscript{41} the Court observed:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with

\textsuperscript{35} Id. at 771.
\textsuperscript{36} Id. at 771-72.
\textsuperscript{40} 433 U.S. 350, 383 (1977).
\textsuperscript{41} Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).
respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.\textsuperscript{42}

The court in\textit{Federal Trade Commission v. Simeon Management Corp.}\textsuperscript{43} gave meaning to the concept of what constitutes false or deceptive commercial speech. The court of appeals held that "an advertisement is misleading only if it fails to disclose facts necessary to dissipate false assumptions likely to arise in light of the representations actually made."\textsuperscript{44} The court of appeals also observed that

\begin{quote}
[t]here is disagreement as to whether such false assumptions must be actively promoted by the advertisement, or whether it is sufficient that an advertisement fails to correct an independent existing misapprehension about its product. But there is no deception under either standard unless the public holds a belief contrary to material facts not disclosed.\textsuperscript{46}
\end{quote}

Other courts have held that neither intent to deceive nor actual deception need be shown;\textsuperscript{46} a mere likelihood or propensity to deceive is sufficient.\textsuperscript{47} "Whether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than a conclusion of law."\textsuperscript{48}

\textsuperscript{42. Id. at 456.}
\textsuperscript{43. 532 F.2d 708 (9th Cir. 1976).}
\textsuperscript{44. Id. at 716.}
\textsuperscript{46. Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963); FTC v. Sterling Drug, Inc., 317 F.2d 666, 674 (2d Cir. 1963).}
\textsuperscript{47. See Resort Car Rental Sys. v. FTC, 518 F.2d 962, 964 (9th Cir. 1974); Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967); Bankers Sec. Corp. v. FTC, 297 F.2d 403, 405 (3d Cir. 1961); Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960).}
\textsuperscript{48. Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976); cf. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) ("the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction").}
A restriction on the use of trade names by professionals—a form of commercial speech that Texas felt was inherently misleading and deceptive—confronted the Court in Friedman.

B. Statutory Attacks

Professional associations often have adopted ethical restrictions which have had distinct anticompetitive effects. Because of these effects, private individuals and the United States have brought several challenges to the legality of these restrictions. Two of these challenges reached the United States Supreme Court: Goldfarb v. Virginia State Bar and National Society of Professional Engineers v. United States, a third, American Medical Association probably will reach it in the near future.

In Goldfarb the Court was confronted with a private antitrust suit challenging a minimum-fee schedule published by the Fairfax County Bar Association and enforced by the Virginia State Bar, through published reports and ethical opinions. Holding that the minimum-fee schedule violated section 1 of the Sherman Act, the Court said that the schedule and its enforcement constituted price-fixing as

a fixed, rigid price floor arose from respondent's activities: every lawyer who responded to petitioners' inquiries adhered to the fee schedule, and no lawyer asked for additional information in order to set an individualized fee. . . . The fee schedule was enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms.

The Court rejected the county bar's plea for a total exclusion from

49. Examples of such restrictions are: prohibitions on attorney advertising (the American Bar Association), prohibitions on competitive bidding by members (the National Society of Professional Engineers), minimum fee schedules (the Virginia Bar Association) and prohibitions on physician advertising (the American Medical Association).

52. TRADE REG. REP. (CCH) No. 409, Part II (FTC Oct. 12, 1979).
53. 421 U.S. 773, 777 (1975). One such ethical opinion stated that "evidence that an attorney habitually charges less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such lawyer is guilty of misconduct." Id. at 777-78.
54. Id. at 780-93.
55. Id. at 781.
antitrust regulation as such finding would allow attorneys "to adopt anticompetitive practices with impunity." Having previously found that Congress had intended to "bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states," the Court found that the activities of lawyers played an important part in that commercial intercourse. The Court noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context.

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Professional Engineers involved a civil antitrust suit brought by the United States against the National Society of Engineers alleging that the Society's canon of ethics prohibiting its members from submitting competitive bids for engineering services violated section 1 of the Sherman Act. The Court noted that while ethical norms may serve to regulate and promote competition and thus fall within the Rule of Reason, the ethical restrictions employed by the Society were "a far cry from such a position." The Court observed that

56. Id. at 787.
57. Id. at 788 (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944)).
58. Id.
59. Id. For cases developing and applying the rule of reason, see Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. 457, 461 (D.D.C. 1975) ("Under the rule of reason the legality of restraints on trade is determined by weighing all the factors of the case such as 'the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy and the purpose or end sought to be attained'); Mitchel v. Reynolds, 1 P. Wins. 181, 24 Eng. Rep. 247 (1711).
60. 421 U.S. 773, 788 n.17 (1975).
62. Id. at 696.
the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition. In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.63

It was this Rule of Reason analysis that the Federal Trade Commission employed to evaluate the ethical restrictions on physician advertising imposed by the American Medical Association.

ANALYSIS

A. FRIEDMAN V. ROGERS

In Friedman the Court appears to have placed a rather substantial burden of proof on the state. To justify suppression of commercial speech, the state must show either that the general public's understanding of the advertisement will be inherently misleading or that the potential for abuse is substantial, well demonstrated and not speculative or hypothetical.64

Trade names are distinguishable from the commercial speech employed in Virginia Board of Pharmacy and Bates. The messages advanced in those cases were self-contained and self-explanatory,65 whereas, as Justice Powell noted, "a trade name conveys no information about the price or 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."66 The Court noted that

63. Id. The Society of Professional Engineers argued that the submission of competitive bids for engineering services not only would deceive those who requested the bids as to the cost of the work but also would cause safety hazards as engineers cut corners in order to be more competitive.

64. Friedman v. Rogers, 440 U.S. 1, 13 (1979).

65. Id. at 12.

66. Id. In note 11 of the opinion, the Court observed: "A trade name that has acquired such associations to the extent of establishing a secondary meaning becomes a valuable property of the business, protected from appropriation by others." Because of this value, the FTC is required to find that the deceptive or misleading use of the trade name cannot be remedied by any means other than proscription before it can prohibit its use under section 5. See FTC v. Royal Milling Co., 288 U.S. 212 (1933). But, the Court noted, a property interest in a means of communication does not enlarge or diminish the First Amendment protection of that communication. Accord-
loosely defined associations of trade names with price or quality present a danger of such information being manipulated to deceive or mislead the consuming public. The Court took particular care to mention the history of deceptive and misleading uses of trade names that had been present in Texas and had led to the promulgation of regulations prohibiting the use of trade names by optometrists. Because a trade name does not identify the person with whom the consumer deals (in this case a licensed professional), any optometrist or professional advertising only under a trade name can avoid the necessity of maintaining a good reputation as to his work. As such the trade name "frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one." Because it fails to affix professional responsibility, the use of trade names by professionals has a long history of disapproval, which the Court continued in *Friedman*.

The Court distinguished *Virginia Board of Pharmacy* and *Bates* from *Friedman* on another basis. In both cases, as in *Linmark Associates, Inc. v. Township of Willingboro*, the state statutes in question were complete prohibitions on the use of informational advertising by the seller of the good or services. Here, however, the Texas Optometry Act permits an optometrist to advertise not only the price of his goods and services but to some extent the quality of his services. Alluding to the dissenters' assertions that the Act virtually had abolished a legal form of practice, the majority noted that "[t]he use of a trade name also facilitates the advertising essential to large scale commercial practices with numerous branch offices, conduct the State rationally may wish to discourage while not prohibiting commercial optometrical

\[\text{ingly, there is no First Amendment rule, comparable to the limitation on section 5, requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication.}\]

\[440\ U.S. \text{ at } \_ \text{ n.11.}\]
\[67. \text{Id. at 12-13.}\]
\[68. \text{Id. at 13-14.}\]
\[69. \text{Id. at 13.}\]
\[70. \text{ABA Comm. on Professional Ethics, Opinions, No. 318 (1967).}\]
\[71. 431 U.S. 85 (1977).\]
\[72. \text{Tex. Rev. Civ. Stat. Ann. art. 4552-5.09(a) (Vernon 1976), which prohibited price advertising by optometrists, was declared to violate the first amendment by the district court in Rogers v. Friedman, 438 F. Supp. 428, 429 (E.D. Tex. 1977), rev'd in part, 440 U.S. 1 (1979). No appeal was taken from this ruling.}\]
practice altogether.” 73 In essence, the Court found that the State merely had required that the advertising optometrist include such additional information in his advertisements so that they would not be deceptive. 74 Thus, the commercial speech advanced would "flow cleanly as well as freely." 75

Justice Blackmun, in his dissent, argued that a trade name was an extremely valuable asset 76 and that the majority had over-estimated the potential for deception and underestimated the harmful impact of section 5.13 on first amendment rights. 77 As the practice of "commercial" optometry was still legal in Texas, "[i]t follows . . . that Texas has abridged the First Amendment rights of . . . Doctor Rogers . . . by absolutely prohibiting, without reasonable justification; the dissemination of truthful information about wholly legal commercial conduct." 78 Blackmun argued that neither of the two reasons proffered by the State and adopted by the majority justified "a statute so sweeping as section 5.13(d)." 79

B. AMERICAN MEDICAL ASSOCIATION

The Federal Trade Commission in American Medical Association took a position on deceptive or false advertising substantially similar to the Court's position in Friedman and Bates. Where the professional advertising is inherently misleading or presents a substantial potential for abuse, it would be a proper subject for "an ethical precept narrowly directed toward [the] false or deceptive advertising or unfair solicitation." 80 Competition, however, may not be equated with deception. 81

Where professional ethical norms present substantial restraints on competition, the test of their legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. As the Court observed

74. Id. at 16.
77. Id. at 20.
78. Id.
79. Id. at 24.
81. Id. at 32 (quoting from National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978)).
in *Professional Engineers*, the unreasonableness of trade restrictions can be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. . . . Thus, the contours of the analysis required under the rule of reason will vary somewhat depending upon the nature of the restraint.82

The AMA, in its *Principles of Medical Ethics*, banned all solicitation which it defined as "any attempt to obtain patients or patronage by persuasion or influence."83 Such a sweeping ban by the AMA clearly proscribes almost all forms of advertising—including price advertising—whether deceptive or not. "Given the integral function of advertising and other forms of solicitation to . . . competition in . . . society, [the] AMA's broad proscription of advertising and solicitation has [had], by its very essence, significant adverse effects on competition among the AMA's members."84

Having found that the ethical restriction had a distinct adverse effect on competition, the Commission then compared the "alleged procompetitive virtues of the challenged restraints against [the] anticompetitive evils."85 Balancing the AMA's proffered reasons for the restrictions (to prevent false or deceptive advertising and unfair solicitation) against the need for competition, the Federal Trade Commission concluded:

that [the] AMA's justification for the challenged restraints bears no reasonable relationship to legitimate, procompetitive concerns and that such justification is entitled to little weight in the overall balance of competitive effects. [The] AMA's wholesale restrictions on advertising and solicitation impede communication of . . . information resulting in significant fee disparity and economic harm to consumers. Whether viewed alone, or in conjunction with other evidence or purpose and effect, [the] AMA's restraints on advertising and solicitation impede competition.86

**CONCLUSION**

Society, the object of commercial speech, has an interest in such information: using it to make informed judgments with re-

82. *Id.* at 26.
83. *Id.* at 27.
84. *Id.* at 28.
85. *Id.* at 31.
86. *Id.* at 33-34.
pect to commercial transactions. The advertiser has an interest in disseminating the information to consumers in order to persuade them to purchase his product. Truthful and complete advertising serves to implement these goals; however, when the commercial speech advanced reasonably may cause the consumer to be misled, "it loses its informative value and first amendment interests attenuate. Moreover, misleading advertising directly implicates the government's interest in preventing sales induced by means of misrepresentation." Thus, the leeway for misleading, deceptive or false expression that has been allowed in other contexts has had little force in the commercial arena.

The potential for abuse in advertising by professionals, especially in the medical and legal fields, is clear where the advertisements claim superior legal abilities or set forth "alluring promises or relief." The court will hold advertisements which present such claims to be sufficiently misleading to justify state suppression, and the state should have no difficulty in showing that they fit into at least one of the two categories set forth in Friedman and American Medical Association.

The restrained professional advertisement, which, although potentially misleading, is not inherently misleading will present the states with their biggest headaches. So long as the restrained professional advertising is confined to advertisements that are truthful and capable of verification, the state will have to prove that the potential for abuse is substantial and not hypothetical.


88. Misleading Advertising, supra note 45. In the note, the author proposes a three-part test for the court to apply in its determination of whether or not a particular advertisement is misleading. In order to be found to be misleading, he argues: (1) the advertisement must be one that a reasonable person could interpret as making a false assertion, (2) the definition of misleading advertising should be limited to assertions of facts that could be material in eliciting an economic response and (3) the misrepresentations must be material in inducing an economic response.


90. Talsky v. Department of Registration and Educ., 68 Ill. 2d 579, 370 N.E.2d 173, 180 (1977), cert. denied, 439 U.S. 820 (1978). Talsky involved advertisement by a chiropractor which included pictures of "patients" in the before and after mode. The advertisements in question contained very little substantive information and the court found them to be highly misleading.

Proving substantial potential for abuse is not easy as *Metpath, Inc. v. Myers*\(^{92}\) and *Bolton v. Kansas State Board of Healing Arts*\(^{93}\) clearly show. *Metpath* involved a California statute that prohibited medical laboratories from advertising their clinical laboratory procedures to the lay public.\(^{94}\) The district court rejected the State’s claim that such advertising was inherently misleading.\(^{95}\) Among other factors considered by the court was the fact that a physician had to recommend the tests before they could be performed. The court also felt that the advertisement itself was fairly clear and understandable.\(^{96}\) Although *Metpath* was decided prior to *Friedman* and *American Medical Association*, the burden placed on the state was still substantial: “if the rationales offered to justify the suppression of speech cannot withstand close scrutiny, the statute must fall.”\(^{97}\)

In *Bolton*, a case decided subsequent to *Friedman* but prior to *American Medical Association*, the district court was confronted with a challenge to a Kansas statute which permitted the State Board of Healing Arts to revoke, suspend or limit a license of a physician or other member of the healing arts who used advertisements for the purpose of solicitation of professional patronage.\(^{98}\) In addition, the license could be revoked, suspended or limited for

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\(^{92}\) 462 F. Supp. 1104 (N.D. Cal. 1978).
\(^{94}\) CAL. BUS. & PROF. CODE § 1320(h) (West 1979).
\(^{95}\) 462 F. Supp. 1104, 1109 (N.D. Cal. 1978).
\(^{96}\) Id. at 1109-10. The Court actually looked at three advertisements in *Metpath*. The first ad described the results of recent medical research which supposedly demonstrated a correlation between certain cholesterol levels and the frequency of heart disease. It claimed that Eskimos almost never die of heart disease because of their diet, which, along with regular exercise, produces higher levels of a certain type of cholesterol known as High Density Lipoproteins (HDL). The ad claimed that Metpath could perform a laboratory procedure capable of determining the level of HDL present in the patient’s blood. The ad ended by saying “*w*e’re Metpath. We help your physician find out more about you. And even though all laboratory tests must be ordered through your physician, we thought you should know something about us.” The second ad described a new clinical laboratory test, introduced by Metpath, which measured the amount of glucose stored by the red blood cells. Metpath’s ad claimed that this new test was more accurate and less expensive than other similar procedures and would allow physicians to prescribe with greater precision the daily insulin requirements of diabetic patients. The third ad was very general in nature and extolled the efficiency of Metpath, Inc. *Id.* at 1111-13.

\(^{97}\) Id. at 1108.

unethical conduct which, according to Kansas Administrative Regulation 100-18-1, included virtually any form of advertising.\(^9\) The court found "no distinction between lawyers and health care professionals in the area of advertising";\(^10\) and in light of various Supreme Court decisions, including *Bates* and *Friedman*, such restrictions must be invalidated to the extent "that the provision bars truthful advertising through the media" as violative of the first amendment.\(^1\)

This very problem has begun to arise in North Carolina as members of the health care professions begin to advertise.\(^10\) As North Carolina, like Kansas, is attempting to place blanket prohibitions on advertisements by health care professionals for the solicitation of professional patronage,\(^10\) the various health care boards probably will attempt to enforce such bans, giving rise to yet another challenge to a restriction on commercial speech. So


\(^1\) *Id.* at 736.

\(^10\) In the wake of *American Medical Association* and *Friedman*, several dentists and chiropractors have begun advertising on television and in newspapers.

\(^10\) A good example of this is N.C. GEN. STAT. § 90-41(a) (1975) which provides:

The North Carolina State Board of Dental Examiners shall have the power and authority to . . . (3) revoke or suspend a license to practice dentistry and (4) invoke such other disciplinary measures, censure, or probative terms against a licensee . . . in any instance or instances in which the Board is satisfied that such . . . licensee: (18) has, directly or indirectly, advertised in any manner for professional patronage or business; provided, however, it shall not be considered advertising for a dentist . . . to place his name, office address, telephone number, and office hours in an approved register or other publication, or to place his name followed by the word, "dentist", on the door or window of his office, or to place his name before the public in any other manner expressly approved by the Board.

As N.C. GEN. STAT. § 90-14 (Supp. 1979), which regulates the activities of physicians, is tied directly to the ethics of the medical profession which the FTC ordered the AMA to drop, whether or not a physican could be punished for advertising under this statute as it is now written is uncertain. Although the AMA has given notice of appeal, their winning either a reversal or a major modification of the FTC order is unlikely as the FTC order is merely a logical extension of *Bates* and *Friedman*. 

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long as the advertisement is truthful, capable of verification\textsuperscript{104} and presented in such a manner and form so that the general public is capable of understanding them,\textsuperscript{105} the challenges will be successful and the restrictions will fall by the wayside as the State finds it is unable to carry the burden placed on it by the Supreme Court in \textit{Friedman}.

\textit{Lex Allen Watson II}


\textsuperscript{105} Friedman v. Rogers, 440 U.S. 1, 16 (1979).