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Washington Lawyers Under the Purview of the State Consumer Protection Act—The "Entrepreneurial Aspects" Solution—Short v. Demopolis, 103 Wn. 2d 52, 691 P.2d 163 (1984)

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WASHINGTON LAWYERS UNDER THE PURVIEW OF THE STATE CONSUMER PROTECTION ACT—THE "ENTREPRENEURIAL ASPECTS" SOLUTION—*Short v. Demopolis*, 103 Wn. 2d 52, 691 P.2d 163 (1984).

In *Short v. Demopolis*[1] the Washington Supreme Court held that certain "entrepreneurial aspects" of the practice of law constitute "trade or commerce" for purposes of RCW 19.86, Washington's consumer protection and antitrust law.[2] This holding brings members of the legal community under antitrust and consumer protection scrutiny as embodied in the Consumer Protection Act (CPA). The *Demopolis* decision, however, only applies to the "entrepreneurial aspects" of the practice of law. Although many courts and commentators have struggled with the question of whether professionals should be given preferential treatment,[3] the Washington court is the first to specifically exclude legal malpractice from consumer protection or antitrust legislation.[4] Under this rule, a lawyer who practices law

1. Short v. Demopolis, 103 Wn. 2d 52, 691 P.2d 163 (1984).

2. WASH. REV. CODE § 19.86 (1983) is commonly referred to as the Consumer Protection Act (CPA).

3. *See, e.g.*, Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570, 602 (1975) (professional exemption from antitrust legislation may be justified due to the unique nature of the legal profession, activities that appear violative of antitrust law ought to be analyzed under a rule of reason analysis); Kauper, *Antitrust and the Professions: An Overview*, 52 ANTITRUST L.J. 163, 176 (1983) (it is possible that the Supreme Court will treat professionals differently as it has suggested in dictum, but most certainly the Court will emphasize the role of competition); Sims, Maricopa: *Are the Professions Different?*, 52 ANTITRUST L.J. 177, 186 (1983) (at present there is no such thing as a learned profession exemption and the Supreme Court has signaled its intent to take a hard-headed approach to antitrust violations by the professions); Comment, *Applicability of The Texas Deceptive Trade Practices Act to Attorneys*, 30 BAYLOR L. REV. 65, 72 (1978) (the state deceptive practices act would change the standard of care presently owed by attorneys) [hereinafter cited as Comment, *Texas Deceptive Trade Practices*]; Comment, *The Washington Consumer Protection Act vs. the Learned Professional*, 10 GONZ. L. REV. 435, 437–38, 454 (1975) ((1) attorneys are engaged in trade or commerce, (2) there are no specific CPA exemptions for attorneys, and (3) certain conduct by attorneys may constitute unfair and deceptive practices; conduct violative of the Code of Professional Responsibility or the State Bar Act would be both illegal and against public policy and therefore a per se violation of the CPA) [hereinafter cited as Comment, *The Washington Consumer Protection Act*]; Comment, *Antitrust and the Professions: Where Do We Go From Here?*, 29 VILL. L. REV. 115 (1984) (survey of antitrust case history noting that the trend is to bring professional activities under the scope of antitrust legislation); [hereinafter cited as Comment, *Antitrust and the Professions*]; Comment, *The Applicability of the Sherman Act to Legal Practice and Other 'Non-Commercial' Activities*, 82 YALE L.J. 313, 325 (1972) (the potential for economic evil rather than the type of activity is the determinative factor in finding Sherman Act violations) [hereinafter cited as Comment, *The Applicability of the Sherman Act*]; *see infra* notes 25, 33, 40 for cases considering the learned professions exemption.

4. One other state court has determined that the CPA does not apply to the actual practice of law. Frahm v. Urkovich, 113 Ill. App. 3d 580, 447 N.E.2d 1007 (1983). The *Frahm* court appears to have excluded all consumer protection claims in the actual practice of law from the statute's scrutiny. *Demopolis* may have only excluded malpractice. Other states that have considered the question have held either that (1) the CPA applied to lawyers or (2) the particular practice in question did not constitute

negligently or otherwise commits malpractice[5] is not subject to liability under the CPA if the malpractice involves the actual practice of law.[6]

This Note analyzes the court's decision in light of prior state cases and federal precedent and concludes that the court correctly applied the CPA to lawyers' "entrepreneurial activities." However, to the extent it rules that the performance of legal services is not trade or commerce, the holding is too narrow. The court should have concluded that all aspects of the practice of law are trade or commerce as defined by the CPA, but that certain acts, such as professional negligence, may not be classified as "unfair or deceptive."[7] The court could have both clarified a troublesome area of consumer

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a forbidden element of the CPA. *See* Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 190 Conn. 510, 461 A.2d 938, 943 (1983) (attorney deception in advertising and fee setting was within the definition of trade or commerce as defined in the Connecticut Uniform Trade Practices Act, although regulation of other aspects of law was a question left open); Ivey, Barnum & O'Mara v. Indian Harbor Properties, 190 Conn. 528, 461 A.2d 1369, 1375 (1983) (lawyers not liable under the Connecticut statute because the action lacked a nexus with the public interest); Reed v. Allison & Perrone, 376 So. 2d 1067, 1068 (La. App. 1979) (advertising was clearly trade or commerce subject to regulation by the state bar and the Louisiana Unfair Trade Practices and Consumer Protection Law); Mathews v. Berryman, 196 Mont. 49, 637 P.2d 822, 824–25 (1981) (Montana lawyer's actions held not to constitute fraud, duress, or undue influence; thus the CPA did not apply); Barnard v. Mecom, 650 S.W.2d 123 (Tex. Ct. App. 1983) (liability under the Texas statute for a lawyer's failure to return money from a trust fund held for the client); Lucas v. Nesbitt, 653 S.W.2d 833 (Tex. Ct. App. 1983) (the Texas statute applies to lawyers but there was no evidence to support the finding that the lawyer's acts were unconscionable); DeBakey v. Staggs, 605 S.W.2d 631, 632–33 (Tex. Ct. App. 1980) (lawyer's failure to timely obtain name change for client's daughter held to fall with the Texas Deceptive Trade Practice Act), *aff'd per curiam*, 612 S.W.2d 924 (Tex. 1981).

5. Legal malpractice encompasses liability for negligence, breach of a fiduciary obligation or the representation of adverse or conflicting interests. Common law fraud is not ordinarily included within its definition. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 3–4 (2d ed. 1981).

6. Aspects of legal practice considered the actual practice of law that would be exempt from the act were: (1) plaintiffs' neglect to properly gather essential facts and evaluate the partnership dissolution such that the settlement was untimely, (2) plaintiffs' failure to pursue claims against Demopolis' opponents causing him to lose valuable rights, (3) plaintiffs' failure to file a judgment in a timely manner, and (4) plaintiffs' procurement of a defective judgment because it did not hold one of Demopolis' opponents liable. Short v. Demopolis, 103 Wn. 2d 52, 61, 691 P.2d 163, 168 (1984). Examples of entrepreneurial aspects that would fall under the CPA that were considered by the court were how the price of legal services is determined, billed, and collected and the way a firm obtains, retains, and dismisses clients. *Demopolis*, 103 Wn. 2d at 61, 691 P.2d at 168.

The "practice of law" does not lend itself to a precise definition and it is only recently that the Washington courts have attempted to define its parameters. A recent decision defined the practice of law as including not only the performing of services in the courts of justice, but also the rendering of legal advice, counsel, and the preparation of legal instruments. The selection and completion of preprinted form legal documents has also been found to be the practice of law. Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn. 2d 48, 54–55, 586 P.2d 870, 875 (1978).

The Model Code of Professional Responsibility defines the practice of law as relating to the rendering of services for others that calls for the professional judgment of a lawyer. "The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1981).

7. The Washington CPA forbids "unfair or deceptive acts . . . in the conduct of any trade or

protection law and avoided establishing a special exemption for the legal profession by using this analysis.

I. BACKGROUND

A. *Washington's Antitrust and Consumer Protection Statute*

Washington's CPA is an antitrust and consumer protection statute that implements the Washington Constitution's article XII, section 22 prohibition of monopolies and trusts.[8] The CPA is modeled after the federal antitrust laws and incorporates many of their provisions.[9] The legislatively declared purpose of the CPA is to complement federal antitrust law "in order to protect the public and foster fair and honest competition."[10] Accordingly, the legislature instructed the Washington courts to be guided by decisions of the federal courts and the FTC which construe the various federal antitrust statutes.[11]

Short v. Demopolis involved an alleged violation of the CPA, section 19.86.020 of the Washington Code, which forbids "unfair or deceptive acts or practices in the conduct of any trade or commerce."[12] This section differs from traditional antitrust legislation because it is essentially directed to consumer protection, rather than the prevention of monopolies.[13] To

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commerce." WASH. REV. CODE § 19.86.020 (1983).

8. O'Connell, *Washington Consumer Protection Act—Enforcement Provisions and Policies*, 36 WASH. L. REV. 279 (1961).

9. Dewell & Gittinger, *The Washington Antitrust Laws*, 36 WASH. L. REV. 239, 242 (1961).

The three federal acts are the Sherman Antitrust Act, the Clayton Antitrust Act and the Federal Trade Commission Act (FTCA). Section .020 of the CPA is based upon § 5(a)(1) of the FTCA, 15 U.S.C. § 45 (a)(1); § .030 of the CPA is based upon § 1 of the Sherman Act, 15 U.S.C. § 1; § .040 of the CPA is based upon § 2 of the Sherman Act, 15 U.S.C. § 2; § .050 of the CPA is based upon § 3 of the Clayton Act, 15 U.S.C. § 14; § .060 of the CPA is based upon § 7 of the Clayton Act, 15 U.S.C. § 18; § .070 of the CPA is based upon § 6 of the Clayton Act, 15 U.S.C. § 17.

10. WASH. REV. CODE § 19.86.920 (1983).

11. *Id.* WASH. REV. CODE § 19.86.920 does not require courts to follow federal precedent, but to be guided by such precedent. Ultimately the interpretation given to the CPA is left to the state court. State v. Reader's Digest Ass'n, 81 Wn. 2d 259, 275, 501 P.2d 290, 301 (1972).

A number of state consumer protection statutes contain similar provisions. For a study comparing state consumer protection statutes, see Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1971).

12. WASH. REV. CODE § 19.86.020 (1983). This language is essentially identical to that used in the FTCA. 15 U.S.C. § 45 (a)(1). Unlike the FTCA, however, the CPA allows for lawsuits by private individuals. In addition, under both the FTCA and the Sherman Antitrust Act, the act or practice need not be in the conduct of trade or commerce. 15 U.S.C. §§ 1, 45 (a)(1). The CPA requires that the act be "in" trade or commerce. WASH. REV. CODE § 19.86.020 (1983). Therefore, the determination of what constitutes trade or commerce is crucial to a CPA action.

13. The FTCA, although not statutorily classified as an antitrust statute, is generally considered as such. 16J J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION 119-9 (1985). The FTC is divided into various bureaus charged with different duties. The Bureau of Consumer Protection is primarily responsible for investigating unfair and deceptive acts. *Id.* at 124-11.

prove an unfair or deceptive trade practice under the CPA, the injured party must show that (1) the act or practice occurred in the conduct of trade or commerce,[14] (2) the conduct was not exempt from the CPA,[15] (3) the conduct was unfair or deceptive,[16] and (4) the conduct affected the public interest.[17]

B. Washington Case Law

Washington cases prior to *Demopolis* had not explicitly decided whether lawyers or other professionals are subject to the CPA. In a case predating the CPA's enactment, however, the Washington Supreme Court concluded that a medical society was liable for "restraint of trade" against a contract medical association.[18] That case at least implicitly decided that

14. III WASHINGTON COMMERCIAL LAW DESKBOOK 27-6 [hereinafter cited as WASHINGTON DESKBOOK].

Significantly, the Washington CPA contains its own definition of trade or commerce. *See infra* notes 95–96 and accompanying text.

15. WASHINGTON DESKBOOK, *supra* note 14, at 27-6. *See generally* Comment, *The Scope of the Regulated Industries Exemption Under the Washington Consumer Protection Act*, 10 GONZ. L. REV. 415 (1975). WASH. REV. CODE § 19.86.170 (1983) provides that actions or transactions specifically permitted by regulatory boards established under title 18 of the Washington Code shall not be construed to violate WASH. REV. CODE § 19.86. Because title 18 provides for the establishment of the state bar, activities specifically mandated by the supreme court that concern legal regulation would be exempt from the CPA.

16. Short v. Demopolis, 103 Wn. 2d 53, 70, 691 P.2d 163, 172 (1984) (Pearson, J., concurring). The CPA does not define the terms unfair and deceptive. The Washington Supreme Court has held that the meaning of "unfair or deceptive acts or practices" is to be arrived at by a "gradual process of judicial inclusion and exclusion." State v. Reader's Digest Ass'n, 81 Wn. 2d 259, 274, 501 P.2d 290, 301 (1972) (quoting from Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 648 (1931)).

17. WASHINGTON DESKBOOK, *supra* note 14, at 27-6. The public interest requirement is determined by reference to the so-called *Anhold* test. *See* Anhold v. Daniels, 94 Wn. 2d 40, 46, 614 P.2d 184, 188 (1980). The elements of the *Anhold* test are: (1) whether the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting, (2) whether the plaintiff suffered damage brought about by such action or failure to act, and (3) whether the defendant's deceptive acts or practices have the potential for repetition. *Id.*

The public interest test may also be satisfied by a legislative or judicial declaration that the activity is within the public interest. This method, known as a per se violation, was judicially developed in State v. Reader's Digest Ass'n, 81 Wn. 2d 259, 276, 501 P.2d 240, 301–02 (1972).

18. Group Health Coop. v. King County Medical Soc'y, 39 Wn. 2d 586, 237 P.2d 737 (1951). The case involved the efforts of the King County Medical Society to undermine the reputation and increase the expenses of Group Health. The court held that there was a combination, the purpose of which was to limit production and fix prices so as to restrain competition and create a monopoly. *Id.* at 645, 237 P.2d at 769.

The court also determined that at common law, the term "restraint of trade" was deemed to cover the practice of medicine. *Id.* at 638, 237 P.2d at 765.

The Washington constitutional provision was adopted prior to the enactment of the Sherman Act, but both arise from the same common law principle discouraging monopolies and restraints of trade. *Id.* at 635, 237 P.2d at 763.

physicians could be held accountable for Sherman Antitrust Act-type violations.[19]

Since the statute's enactment in 1961, the only case attempting to specifically apply the CPA to lawyers was *Lightfoot v. MacDonald*.[20] In *Lightfoot,* the Washington Supreme Court rejected a CPA cause of action for alleged lawyer malpractice on the grounds that the plaintiff was unable to show damage sufficiently impacting the public.[21] The court did not expressly reach the question of whether the lawyer was engaged in trade or commerce within the meaning of the Act.[22] Subsequent case law also failed to answer the question.[23]

C. The Professional Exemption

The foundation for the argument that lawyers' services do not constitute trade or commerce is the "learned professions'" exemption from antitrust law.[24] Dictum alluding to such an exemption first surfaced in *The Schooner Nymph* Case,[25] decided in 1834. In that case Justice Story wrote: "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."[26] The classic rationale for

19. *See* Bauer, *supra* note 3, at 583–84.

20. 86 Wn. 2d 331, 544 P.2d 88 (1976). One other Washington court has considered the Act's application to attorneys and held that attorneys acting as de facto corporate officers may be subject to liability under the CPA. *See* Gould v. Mutual Life Ins., 37 Wn. App. 756, 683 P.2d 207 (1984). In addition, the Washington Supreme Court has held that the unauthorized practice of law may lead to a CPA violation. *See infra* note 23.

21. *Lightfoot,* 86 Wn. 2d at 338–39, 544 P.2d at 92–93.

22. "Whether the lawyer who was sued in that action [*Lightfoot*] was engaged in 'trade or commerce' was a question which we left unanswered." Anhold v. Daniels, 94 Wn. 2d 40, 47–48, 614 P.2d 184, 189 (1980) (Rosellini, J., concurring).

23. Although other cases have not addressed the question of the CPA's relationship to a lawyer's practice, one case did apply the statute to an escrow agent involved in the unauthorized practice of law. *See* Bowers v. Transamerica Title Ins., 100 Wn. 2d 581, 675 P.2d 193 (1983). In *Bowers,* the court held that the unauthorized practice of law was unfair and deceptive and was within the ambit of trade or commerce. *Id.* at 591, 675 P.2d at 200–01. In Petitioner's Reply Brief to the supreme court, Demopolis urged that if the rendition of legal services by nonlawyers was trade or commerce, then the same rule should also apply to lawyers. The supreme court did not address that argument in its opinion. Reply Brief for Petitioner at 15, Short v. Demopolis, 103 Wn. 2d 52, 691 P.2d 163 (1984).

24. Among the occupations that have been considered "professional" are medicine, law, accounting, veterinary medicine, dentistry, real estate, the priesthood and engineering. Bauer, *supra* note 3, at 570 n.6. Although this Note only considers the exemption as applied to lawyers, it will refer to cases dealing with other professions.

25. 18 F. Cas. 506 (C.C.D. Me. 1834) (No. 10,388).

26. *Id.* at 507. Dicta concerning a learned professions exemption has surfaced in numerous federal cases. *See, e.g.,* United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952) (ethical considerations between patient and physician are quite different than the usual considerations prevail-

distinguishing the professions from business was that business persons are motivated by profits while professionals strive to provide services to the community.[27] The objective of the professional was thought to be inconsistent with the requirement of competition found in antitrust law.[28]

The federal courts have encountered three different factual settings in which the issue of the professional exemption arises: (1) when acts of professionals directly interfere with the commercial activities of non-professionals, (2) when acts of professionals directly interfere with the activities of other members of the profession, and (3) a combination of both.[29] It is well established that there is no professional exemption in the first situation. The courts have held that the antitrust laws strike broadly enough to reach "every person" engaged in restraints of trade, regardless of occupation.[30] For example, in *American Medical Ass'n v. United States,* the Supreme Court found that it did not need to reach the question whether physicians were involved in trade or commerce when the purpose and effect of their conspiracy were to restrain the business of providing health care.[31] The mere fact that the professionals were interfering with an ongoing business brought the activity within the Sherman Act.[32]

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ing in ordinary commercial matters, and forms of competition usual in the business world may be demoralizing to the ethical standards of a profession); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 436 (1932) (quoting *Schooner Nymph* for the proposition that the term "trade" does not encompass the learned professions and liberal arts); Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 653 (1931) (medical practitioners follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them); Federal Baseball Club v. National League, 259 U.S. 200, 209 (1922) (personal effort not related to production is not a subject of commerce, and lawyers traveling to other states do not engage in commerce as a result of their travel); Riggall v. Washington County Medical Soc'y, 249 F.2d 266, 269 (8th Cir. 1957) *cert. denied,* 355 U.S. 954 (1958) (quoting United States v. Oregon Medical Soc'y, 95 F. Supp. 103, 118 (D.C. Or. 1950)), *aff'd,* 343 U.S. 326 (1952) (the practice of medicine as conducted in Oregon is not trade or commerce within the meaning of § 1 of the Sherman Antitrust Act).

In other cases, liability has been found on antitrust grounds, but the Court has refused to rule on the status of the professional exemption. *E.g.,* United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491–92 (1950) (Court did not rule on the application of the term "trade" to the professions, but concluded that it would contract the scope of the concept of "trade" to exempt real estate brokers from the Act); American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943) (Court acknowledged that there had been much discussion about whether a physician's practice constituted trade under § 3 of the Sherman Act, but the question was moot since the effect of the physicians acts was to restrain the business of the plaintiff).

27. Goldfarb v. Virginia State Bar, 421 U.S. 773, 786–87 (1975).

28. *Id.*

29. Annot. 39 A.L.R. FED. 774, 779 (1978).

30. *Id.* at 780.

31. American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943); *See* Annot. 39 A.L.R. FED. at 780 (1978).

32. *American Medical Ass'n,* 317 U.S. at 518. *See supra* note 12 for an explanation of the differences between the CPA and the Sherman Act.

The Washington equivalent to the Sherman Act is WASH. REV. CODE § 19.86.030 (1983): "Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce

The second and third types of cases have proved more difficult, and it is here that the courts have struggled with the classification of professional activity as trade or commerce. The particular difficulty has been the courts' recognition that while some aspects of a professional's activities are properly classified as business, others cannot be considered as such.[33] Some courts dealt with the problem by designating certain aspects of a practice or the motive of a professional as commercial and therefore subject to antitrust legislation.[34] Under this line of authority, action resulting from noncommercial motives generally was not considered to be within the scope of antitrust law.[35]

The problem of classifying professional activities was seemingly laid to rest in *Goldfarb v. Virginia State Bar,* decided by the United States Supreme Court in 1975.[36] *Goldfarb* involved the publication of minimum fee schedules by a county bar association.[37] The Court reasoned that in enacting the antitrust legislation, Congress drafted broadly and did not intend to exclude professionals.[38] Furthermore, the Court noted that the

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is hereby declared unlawful." Thus, even if the practice of law were not considered trade or commerce, an attorney's conspiracy to restrain trade would violate § 19.86.030.

33. Annot. 39 A.L.R. FED. at 780 (1978).

34. Cases that have developed the commercial/noncommercial theme are: Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 654 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 965 (1970) (in applying the Sherman Act to an educational accrediting association, the court stated that the proscriptions of the Sherman Act are "tailored for the business world, not for the noncommercial aspects of the liberal arts and the learned professions"); Northern Cal. Pharmaceutical Ass'n v. United States, 306 F.2d 379, 385 (9th Cir. 1962) (Sherman Act violations by druggists involved an entrepreneurial rather than a professional activity), *cert. denied,* 371 U.S. 862 (1962); Selman v. Harvard Medical School, 494 F. Supp. 603, 621 (S.D.N.Y. 1980) (the court did not apply the Sherman Act to a student who had been repeatedly denied access to medical school, arguing that academic admissions criteria may have an incidental effect on the commercial aspects of the medical profession, but were nevertheless noncommercial in nature), *aff'd mem.,* 636 F.2d 1204 (2d Cir. 1980); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975) (the court did not apply the Sherman Act to a student hockey player who was denied access to the school team due to previous participation for money; the court stated that the act was "tailored for the business world," and not as a mechanism for the resolution of controversies in the liberal arts or learned professions); United States v. Oregon State Bar, 385 F. Supp. 507, 517 (D. Or. 1974)(citing *Northern Cal. Pharmaceutical,* and *Marjorie Webster Jr. College,* the court suggested that the adoption of a commercial/noncommercial dividing line was perhaps just an application of the "rule of reason").

35. *But cf.* Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 655 n.21 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 965 (1970), where the court applied the commercial/noncommercial test but admitted that there may be situations where a traditionally noncommercial activity would be conducted with a commercial motive, thus rendering it commercial. *See infra* note 90 and accompanying text.

36. 421 U.S. 773 (1975).

37. The fee schedule was published by the Fairfax County Bar Association, but enforced by the Virginia State Bar Association. *Goldfarb,* 421 U.S. at 776.

38. *Id.* at 787. "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 [Sherman Act] includes professions."

sale of a lawyer's services was commerce and thus within the scope of antitrust legislation.[39]

The *Goldfarb* decision seemed to destroy the rationale for the professional exemption and to bring legal services squarely within the trade or commerce designation. In a footnote, however, the Court cautioned against a blanket application of antitrust law to professionals.[40] Thus, while the Court rejected the professional exemption in *Goldfarb,* it left open the possibility that in some future situation special consideration might be granted to the professional.

Since *Goldfarb,* however, the federal courts have failed to countenance any blanket exemption for the "learned professions."[41] The Supreme Court has consistently applied the same standards of antitrust law to professionals that it applies to those engaged in traditional commerce.[42] Moreover, the cautionary footnote in *Goldfarb* has been so restricted by subsequent cases

39. *Id.* at 787–88.

40. 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. We intimate no view on any other situation than the one with which we are confronted today.

Id. at 788–89 n.17.

41. *See* Short v. Demopolis, 103 Wn. 2d 52, 58–59, 691 P.2d 163, 166–67 (1984); *see also* 16E J. VON KALINOWSKI, *supra* note 13, at 49-20. A case considering a professional association's antitrust liability after *Goldfarb* is Bates v. State Bar, 433 U.S. 350, 371–72 (1977) ("[T]he belief that lawyers are somehow 'above' trade has become an anachronism . . ."). In *Bates* the Supreme Court ruled that the state of Arizona could regulate attorney advertising, exempting it from antitrust law under the "state action" doctrine, but also ruled that the first amendment requires that attorneys be given the opportunity to advertise. *Id.* at 379–82; *see also* Ballard v. Blue Shield, 543 F.2d 1075, 1079 (4th Cir. 1976) (the Sherman Act contains neither an express nor an implied exclusion of professional commercial activity, nor does the Act exempt professionals), *cert. denied,* 430 U.S. 922 (1977). *See also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (physicians who were parties to price fixing agreement were not exempted from the Sherman Act); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (engineer's ethical canon against competitive bidding was contrary to the Sherman Act); American Medical Ass'n v. Federal Trade Comm'n, 638 F.2d 443, 448 (2d Cir. 1980) (the business aspects of medical practice fall within the scope of the FTCA even if they are secondary to the charitable and social aspects of the physicians' work), *aff'd per curiam,* 455 U.S. 676 (1982); Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1149 (5th Cir. 1977) (per curiam) (NCAA subject to the Sherman Act); Mardirosian v. American Inst. of Architects, 474 F. Supp. 628 (D.D.C. 1979) (architects subject to antitrust laws).

42. Bierig, *Whatever Happened to Professional Self-Regulation?,* 69 A.B.A. J. 616, 618 (1983) (despite dicta to the contrary, the Supreme Court has applied the same standard to professional self-regulation as it has applied in other contexts); Kauper, *supra* note 3, at 168 (the Supreme Court has been unrelenting in the professional cases that have come before it since *Goldfarb;* substantively, the Court has ruled consistently against the professions involved). For an analysis suggesting that professionals will no longer be accorded any preferential treatment under the antitrust laws, see Comment, *Antitrust and the Professions, supra* note 3.

that there appears to be little support left for special treatment of the professions.[43]

II. THE *SHORT v. DEMOPOLIS* DECISION

A. *Facts of the Case*

In March of 1980, defendant Demopolis hired the law firm of Short and Cressman to represent him in two pending lawsuits.[44]Both suits were settled in Demopolis' favor, but disputes arose concerning the rendering of legal services and the payment of attorney fees. Eventually, plaintiff Short and Cressman sued Demopolis for breach of an express contract to pay for legal services. Demopolis counterclaimed, alleging, inter alia, unfair and deceptive practice in violation of the Washington CPA.[45]

The trial judge dismissed Demopolis' CPA counterclaim for failure to state a cause of action. On appeal, the supreme court considered two major issues: (1) whether the practice of law constituted trade or commerce within the meaning of the CPA or Washington case law, and (2) whether applying the CPA to the legal profession would unconstitutionally infringe upon the judiciary's exclusive power to regulate the practice of law.[46]

B. *The Holding of the Court*

The court held that lawyers may be subject to liability under the CPA as to the "entrepreneurial aspects" of the practice of law, but that the CPA does not apply to those claims that allege pure negligence or legal malpractice.[47] In reaching this decision, the opinion of the court differed from a

43. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978) ("The cautionary footnote in *Goldfarb* . . . cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions."). *See* 16E J. VON KALINOWSKI, *supra* note 13, at 49-23 through 49-24.

44. The first suit involved a dissolution of a real estate partnership. Although the complaint alleged damages in excess of $200,000, the case was settled for $7500. Attorney fees totalled $19,958.53. The second suit involved a real estate forfeiture. Demopolis prevailed, receiving possession of the premises, rental delinquencies, and damages. *Demopolis,* 103 Wn. 2d at 53, 691 P.2d at 164.

45. Demopolis alleged ten causes of action: (1) unfair and deceptive practices in violation of the CPA, (2) breach of contract, (3) violation of the Model Code of Professional Responsibility (CPR) DR 2-106 (excessive fees), (4) violation of CPR DR 6-101 (incompetence), (5) negligence and malpractice, (6) fiduciary duty violations, (7) misrepresentation, (8) violation of CPR DR 2-110 (threat to withdraw) causing mental distress, (9) reformation of contract, and (10) attorney fees assessment. *Demopolis,* 103 Wn. 2d at 54, 691 P.2d at 165.

46. *Id.* at 55, 691 P.2d at 165. A third issue considered by the court was whether the availability of other remedies to Demopolis should invalidate a CPA claim. The court held that the CPA was designed to give an additional remedy to those already available. *Id.* at 65, 691 P.2d at 170. The issue is not discussed in this Note.

47. *Id.* at 65–66, 691 P.2d at 170. See *supra* note 6 for the court's examples of entrepreneurial and noncommercial behavior.

concurring opinion joined by four justices as to the definition of the scope of CPA liability.[48] The four concurring justices developed a strict analysis and argued that all noncommercial aspects of law are exempt from the CPA's application.[49] The court, on the other hand, held that questions of malpractice are exempt from the CPA, but suggested that other acts in the practice of law may lead to CPA liability.[50] This distinction implies that the CPA could be applied to other unfair or deceptive acts in the practice of law that do not constitute pure malpractice. Justice Dore, for example, wrote a separate concurring opinion to emphasize that coverage of the CPA should not be limited to commercial aspects of law in cases where deceptive advertising leads to a negligence claim.[51]

The supreme court also addressed the issue of whether the application of the CPA to lawyers would violate the separation of powers doctrine.[52] The majority concluded that as applied to the entrepreneurial aspects of the practice of law, the CPA did not impinge upon the court's constitutional power.[53] A vigorous dissent, however, argued that the CPA would violate the separation of powers doctrine.[54]

III. ANALYSIS

A. *Separation of Powers*

The majority held that the CPA's application to the legal profession would not unconstitutionally infringe upon the judiciary's exclusive power to regulate the practice of law.[55] The dissent argued that applying the CPA to the practice of law would permit a "vague dual existence" of regulation by the legislature and the court, thus infringing upon the court's power.[56]

48. Justices Dimmick and Cunningham (pro tem) joined Justice Dolliver in writing the opinion of the court. Justices Williams, Brachtenback, and Hamilton (pro tem) joined Justice Pearson in a concurring opinion. Justice Dore separately concurred and Justice Rosellini dissented.

49. In reference to the majority's inconclusive statements, Justice Pearson wrote: "[I]t leaves one with the impression that the CPA should be applied to all aspects of legal practice, rather than just to the business aspect." *Id.* at 70, 691 P.2d at 172 (Pearson, J., concurring).

50. The opinion of the court stated that the *Demopolis* ruling did not determine whether the CPA applies to every aspect of the practice of law. *Id.* at 66, 691 P.2d at 170–71.

51. *Id.* at 67–68, 691 P.2d at 173 (Dore, J., concurring).

52. For a historical discussion of the separation of powers doctrine in Washington, see *In re* Salary of Juvenile Director, 87 Wn. 2d 232, 238–49, 552 P.2d 163, 167–72 (1976).

53. Short v. Demopolis, 103 Wn. 2d 52, 65, 691 P.2d 163, 171 (1984).

54. *Id.* at 72, 691 P.2d at 174 (Rosellini, J., dissenting).

55. *Id.* at 62, 691 P.2d at 170.

56. *Id.* at 72, 691 P.2d at 174 (Rosellini, J., dissenting). The "vague dual existence" language comes from State *ex rel.* Schwab v. Washington State Bar Ass'n, 80 Wn. 2d 266, 269, 493 P.2d 1237, 1238–39 (1972) (the state bar act is merely advisory and does not impinge upon the court's exclusive authority to suspend a person from practice or take disciplinary action against a lawyer).

The dissent also argued that Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 190 Conn. 510,

The court's jurisdiction over the legal profession is derived from the Washington State Constitution article IV, section 1.[57] Early cases defined the court's inherent powers as the authority to admit, discipline, and disbar attorneys.[58] The court, however, did not claim exclusive authority and conceded that the legislature could regulate and restrict the court's power.[59] More recently the court has redefined its power over admission and disbarment as exclusive and incapable of infringement by the legislature or executive.[60]

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461 A.2d 938 (1983), a decision relied upon by the majority, was logically insupportable. *Demopolis*, 103 Wn. 2d at 77–78, 691 P.2d at 176–77. The *Heslin* court concluded that the Code of Professional Responsibility emphasizes ethical and regulatory functions, while the CPA addresses the pragmatic concerns of the public. Since the Acts have different functions, they are able to exist side by side without violating the separation of powers doctrine.

As the dissent noted, the Code of Professional Responsibility is also pragmatic in its approach and the *Heslin* distinction is therefore inaccurate. *Demopolis*, 103 Wn. 2d at 78, 691 P.2d at 177 (Rosellini, J., dissenting). This Note takes the position, however, that since the Code attempts to regulate attorneys within the profession and the CPA seeks to protect the public, the two codes may coexist despite the overlap.

57. WASH. CONST. art. IV., § 1: "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."

58. *In re* Bruen, 102 Wash. 472, 476, 172 P. 1152, 1153 (1918). Other inherent powers listed by the *Bruen* court were: (1) the power to protect itself, (2) the power to administer justice whether any previous form of remedy had been granted or not, (3) the power to promulgate rules for its practice, and (4) the power to provide process where none exists. *See also In re* Lambuth, 18 Wash. 478, 480, 51 P. 1071, 1072 (1898) (per curiam) (power to strike from the rolls is inherent in court itself because it has the authority to admit attorneys to practice).

59. The legislature may regulate and restrict the courts' inherent powers, but it may not take them away. *Bruen*, 102 Wash. at 477, 172 P. at 1153; *Lambuth*, 18 Wash. at 480, 51 P. at 1072.

One Washington case held that the supreme court had no authority to disbar an attorney. *In re* Waugh, 32 Wash. 50, 72 P. 710 (1903). The case was expressly overuled by *Bruen*. *Bruen*, 102 Wash. at 480, 172 P. at 1155. Another case held that while the court has the power to disbar, the legislature may similarly define criteria for disbarment. State *ex rel.* Mackintosh v. Rossman, 53 Wash. 1, 101 P. 357 (1909).

60. *See, e.g.*, Hagan & Van Camp, P.S. v. Kassler Escrow, 96 Wn. 2d 443, 453, 635 P.2d 730, 736 (1981) (the power to regulate the practice of law is solely within the province of the judiciary); *In re* Washington State Bar Ass'n, 86 Wn. 2d 624, 632, 548 P.2d 310, 315 (1976) (source of court's power to admit, enroll, disbar, and discipline is exclusively in supreme court); State v. Cook, 84 Wn. 2d 342, 345, 525 P.2d 761, 763 (1974); *In re* Schatz, 80 Wn. 2d 604, 607, 497 P.2d 153, 155 (1972); State *ex rel.* Schwab v. Washington State Bar Ass'n, 80 Wn. 2d 266, 269, 493 P.2d 1237, 1239 (1972) (the supreme court does not share the power of discipline, disbarment, suspension, or reinstatement with either the legislature or the state bar association); *In re* Simmons, 59 Wn. 2d 689, 705–06, 369 P.2d 947, 956 (1962) (exclusively the function of the supreme court to either rescind the attorney's privilege to practice law or suspend it when the attorney's oath has been violated). *See also* Note, *Unauthorized Practice of Law—Limited Practice of Law for Real Estate Closing Officers?*, 57 WASH. L. REV. 781, 785–86 (1982) (courts' inherent power to regulate admission, discipline, and disbarment has developed into an exclusive power to regulate the practice of law).

The court has been especially rigorous in striking down legislation that grants nonlawyers the right to perform legal functions. *See* Hagan & Van Camp, P.S. v. Kassler Escrow, 96 Wn. 2d 443, 635 P.2d 730 (1981); *In re* Washington State Bar Ass'n, 86 Wn. 2d 624, 548 P.2d 310 (1976). It is now undisputed that the supreme court has sole jurisdiction over admission to practice and apparently may deal with the unauthorized practice of law as an incident of its power over admissions. Offenbacker, *Unauthorized Practice of Law In Washington*, 30 WASH. L. REV. 249 (1955).

At first blush the court's expansive language regarding its jurisdiction suggests that only the judiciary may discipline lawyers. Supreme court decisions, however, reveal that the court's jurisdiction is limited to discipline of acts within the practice of law. The court's power does not infringe upon the state's right to regulate lawyers generally. The practical effect of this arrangement is to subject attorneys to two very different types of regulation: (1) the court's regulation of professionals requiring compliance in order to practice law, and (2) state laws regulating conduct.

An example illustrates this dual regulation. A lawyer who commits a felony in the practice of law may face criminal prosecution by the state, a malpractice suit by the injured party, and a disciplinary action by the bar.[61] Statutory and common law govern the first two instances. The lawyer may be fined, put in jail, or forced to pay a damage award. These consequences, however, do not directly negate the lawyer's right to practice law. The third instance, by contrast, involves regulation of lawyers within the profession; the supreme court is the only entity that may suspend or deny the attorney's privilege to practice law.

Cases cited by the dissent support this proposition as well.[62] The CPA acts as a general regulatory statute, and as such, does not threaten the court's regulation of the admission, discipline, and disbarment of lawyers. Since the court's jurisdiction is limited to regulation of the privilege of practicing law, it has no exclusive jurisdiction over laws that do not purport to affect this privilege.

One situation involving the CPA, however, could impinge upon the supreme court's exclusive regulatory domain. If the CPA were to require conduct contrary to that specified in the Code of Professional Responsibility, the court's ability to regulate the practice of law would be eclipsed. The

61. Disciplinary proceedings have been characterized as neither civil nor criminal. Niklaus v. Simmons, 196 F. Supp. 691, 716 (D. Neb. 1961). They are unique and may be characterized as sui generis. ABA STANDARDS FOR LAWYERS DISCIPLINE AND DISABILITY PROCEEDINGS, Standard 1.2 (1983).

62. Dicta in cases cited by the dissent suggest that the court limited its "exclusive" language to admission, discipline, and disbarment within the practice of law. *See* Hagan & Van Camp, P.S. v. Kassler Escrow, 96 Wn. 2d 443, 453, 635 P.2d 730, 736 (1981) (statute authorizing escrow agents and other lay persons to perform certain transactions with regard to real estate is unconstitutional inasmuch as the supreme court has the exclusive power to regulate the law); State *ex rel.* Schwab v. Washington State Bar Ass'n, 80 Wn. 2d 266, 269, 493 P.2d 1237, 1239 (1972) (membership in the state bar association and authorization to continue in the practice of law coexist under the aegis of one authority: the supreme court); Clark v. Washington, 366 F.2d 678 (9th Cir. 1966) (the power to admit, enroll, and disbar attorneys is exclusively held by the supreme court); *In re* Simmons, 59 Wn. 2d 689, 705–06, 369 P.2d 947, 956 (1962) (exclusive function of the court either to rescind the privilege of practicing law or to suspend it); *In re* Ballou, 48 Wn. 2d 539, 295 P.2d 316 (1956) (suspension from practice of law for violating Canon of Professional Ethics); *In re* Bruen, 102 Wn. 472, 481, 172 P. 1152, 1155 (1918) (only the supreme court may issue final orders concerning disbarment of attorneys; Board of Governors must submit findings of facts to court for judgment).

CPA precludes this possibility, however, by establishing that actions specifically permitted by a Title 18 regulatory board shall not constitute a CPA violation.[63] Hence, attorneys cannot be liable under the CPA for conduct specifically permitted by the supreme court. However, acts that are not specifically permitted or are discouraged by the supreme court could lead to a CPA violation.

B. Lawyers and the Consumer Protection Act

The court's ruling that the CPA applied to the "entrepreneurial aspects" of the legal profession properly expanded the CPA's jurisdiction to lawyers. However, the court erroneously exempted acts occurring in the actual practice of law. Both state and federal precedent suggest that all aspects of the legal profession fall within the trade or commerce definition and are therefore subject to the CPA. Thus the court should have recognized the CPA's general applicability to the practice of law. The court, however, should also have declared that certain acts such as professional negligence are not unfair or deceptive. This solution would have avoided a specific exemption for the legal profession while also clarifying a muddled area of consumer protection law.

There are valid reasons for applying the CPA to all aspects of the legal profession. First, by exempting certain acts from the CPA, the court created a dual standard for the statute's application that favors the legal profession.[64] Other businesses are not similarly favored even though the CPA's application may be equally disruptive to the business function.[65]

Second, clients often forego remedies in lawyer-client disputes due to the difficulty and expense of establishing malpractice or fraud claims.[66] The CPA's attorney fees and treble damages provisions would serve as an incentive for other lawyers to litigate these disputes, thereby increasing the availability of remedies to the public. The court recognized the importance of this as to the entrepreneurial aspects of law, but failed to address the need in the area of the performance of a legal service.

63. WASH. REV. CODE § 19.86.170 (1983). *See supra* note 15 and accompanying text.

64. At present, the court's special exemption from the CPA only applies to lawyers. Undoubtedly other businesses and professions will seek a similar exemption, thereby decreasing the effectiveness of the statute.

65. Other groups commonly affected by the CPA are construction companies, title and insurance companies, and real estate agents. *See, e.g.*, Eastlake Constr. v. Hess, 102 Wn. 2d 30, 686 P.2d 465 (1984); Bowers v. Transamerica Title Ins., 100 Wn. 2d 581, 675 P.2d 193 (1983); Salois v. Mutual of Omaha Ins., 90 Wn. 2d 355, 581 P.2d 1349 (1978); Nuttall v. Dowell, 31 Wn. App. 98, 639 P.2d 832 (1982).

66. *See* Comment, *The Washington Consumer Protection Act*, *supra* note 3, at 436. The Washington Supreme Court agreed and cited the Comment. Short v. Demopolis, 103 Wn. 2d 52, 62, 691 P.2d 163, 168 (1984).

Finally, the legislature intended that the CPA be liberally construed so that "its beneficial purposes may be served."[67] It did not exclude the practice of law from the CPA's scope, but provided for the application of the CPA to Title 18 regulated businesses and professions when their actions are not specifically permitted by a governing board.[68] The statute defines trade and commerce as including the sale of assets or services[69] and subsequent cases have extended the application of the statute to include unfair or deceptive acts occurring after the sale.[70] In compliance with the legislative directive and case law, the CPA ought to be applied to all aspects of the legal profession.

C. *The Noncommercial Exemption*

The *Demopolis* court clearly decided that the CPA applies to the entrepreneurial aspects of law and that malpractice in the performance of a legal service is exempt from the CPA's application.[71] However, the opinion of the court and the concurring opinions differed as to what is exempt from the CPA. The opinion of the court suggests that the actual practice of law is exempt.[72] The court concluded, however, that *Demopolis* does not decide "whether the CPA applies to every aspect of the practice of law in this state as to the performance of legal services."[73]This statement suggests that some acts committed during the performance of a legal service may be trade or commerce and subject to the CPA. A concurring opinion signed by four justices tried to clarify the opinion of the court and advocated a strict

67. WASH. REV. CODE § 19.86.920 (1983).

68. *Id.* at § 19.86.170. For an explanation of the exemption provision of the CPA, see Comment, *supra* note 15. For an explanation of the section's applicability to professionals, see Comment, *The Washington Consumer Protection Act*, *supra* note 3, at 446.

A Texas court has held that attorney's acts of negligence are subject to the state deceptive practices act. The statute had exempted negligence by physicians but not lawyers. *See* DeBakey v. Staggs, 605 S.W.2d 631 (Tex. Ct. App. 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981).

69. WASH. REV. CODE § 19.86.010 (1983).

70. Salois v. Mutual of Omaha Ins., 90 Wn. 2d 355, 581 P.2d 1349 (1978). In *Salois*, the court determined that because the statutory definition of trade or commerce "includes" the sale of assets or services, the legislature must also have meant acts occurring after the transaction was complete. This reversed an earlier decision that held that only acts designed to include a sale are subject to the CPA. *Id.* at 359–60, 581 P.2d at 1352. For the earlier interpretation see Johnston v. Beneficial Mgmt. Corp. of Am., 85 Wn. 2d 637, 538 P.2d 510 (1975).

71. Short v. Demopolis, 103 Wn. 2d 52, 65–66, 691 P.2d 163, 170–71 (1984).

72. Those claims attacking the performance of plaintiff's legal advice and services are exempt from the CPA. *Demopolis*, 103 Wn. 2d at 61, 691 P.2d at 168. The majority does not clearly articulate whether these claims are exempt because they are not within the definition of trade or commerce or because of some other grounds.

73. *Id.* at 66, 691 P.2d at 170–71. The opinion of the court noted that its ruling would not address malpractice or misconduct as advocated in a student comment. *Id.* at 61–62, 691 P.2d at 168. *See* Comment, *The Washington Consumer Protection Act*, *supra* note 3, at 436.

commercial/noncommercial dividing line for the CPA's application to lawyers.[74] Under its analysis, the actual practice of law does not constitute trade or commerce and therefore cannot give rise to a CPA violation.[75]

There are problems with this strict distinction. The difference between a commercial practice involving the obtaining, retaining, or discharge of a client, and a noncommercial practice involving the professional judgment of a lawyer is often difficult to discern. For example, it is fairly clear that a lawyer who deceptively advertises should fall within the scope of the CPA.[76] But it is less clear whether a lawyer who violates a fiduciary obligation, such as the duty of undivided loyalty, has committed a CPA violation.[77] A strict commercial/noncommercial dividing line suggests that this breach of duty would be malpractice in the actual practice of law and exempt from the CPA.[78] Arguably, however, the attorney's assertion of loyalty could have been used either to obtain or retain the client and therefore is an entrepreneurial aspect as defined by the court.[79]

It is also unclear whether actual fraud in the performance of a legal service would lead to a CPA violation. Fraud is not malpractice, and thus it would not be exempted on that basis.[80] But if the commercial/noncommercial dividing line is meaningful, fraud in the actual practice of law would be exempt.

The commercial/noncommercial distinction is based on federal case law. Justice Pearson, in the four-justice concurring opinion, noted that the opinions of *Goldfarb* and other federal cases refusing to apply a professional exemption considered only the business aspects of the allegedly

74. For the four-justice concurring opinion response to this apparent inconsistency, see *supra* note 49.

75. In order for the CPA to apply, the act or practice must occur in trade or commerce. WASH. REV. CODE § 19.86.020 (1983). *See supra* note 12.

76. In another concurring opinion, Justice Dore urged that the CPA be applied to one non-business aspect, that of deceptive advertising. Short v. Demopolis, 103 Wn. 2d 52, 67, 691 P.2d 163, 173 (1984) (Dore, J., concurring). However, the definition of "entrepreneurial" given in the opinion of the court would include advertising. Advertising appears to be a way in which a law firm "obtains" its clients. *Id.* at 61, 691 P.2d at 168. Justice Dore also suggested that if the deceptively advertising lawyer later mishandles the case through negligence, the negligence ought to be subject to the CPA. *Id.* at 68, 691 P.2d at 173 (Dore, J., concurring). A former president of the Washington Bar Association has stated that the *Demopolis* rationale would probably apply to legal advertising. Campbell, *The CPA Decision: A Reminder to Stress Competence*, 39 WASH. STATE BAR NEWS 11 (1985).

77. Fiduciary obligations encompass a duty to represent the client with undivided loyalty, to preserve the client's confidence, and to disclose any material matters bearing upon the representation of the obligations. The breach of a fiduciary obligation is a form of malpractice. R. MALLEN & V. LEVIT, *supra* note 5, at 126. A breach of a fiduciary obligation constitutes constructive fraud. *Id.* at 111.

78. Both the opinion of the court and the four-justice concurring opinion would exempt malpractice in the actual practice of law from the CPA. Short v. Demopolis, 103 Wn. 2d 52, 66, 70, 691 P.2d 163, 170, 171 (1984).

79. *Id.* at 61, 691 P.2d at 168. *See supra* note 6 for a definition of "entrepreneurial aspects."

80. *See supra* note 5.

anticompetitive professions.[81] Although federal courts have considered the business aspects of the professions, they have not advocated an exemption of certain aspects on the basis of a trade or commerce distinction.

The United States Supreme Court in *Goldfarb* ruled that all aspects of law fall within the trade or commerce category, but that some aspects of the profession may be exempt on other grounds.[82] The *Goldfarb* Court stated that the legal service in question, the examination of a land title, was commerce when exchanged for money.[83] Implicitly, this dictum suggests that the exchange of money for any legal service may lead to the application of antitrust laws. *Goldfarb's* caveat conceded that professionals may require different considerations than other businesses. However, this caveat referred to the states' right to proscribe certain behavior counter to antitrust law, and not to whether the practice of law was trade or commerce.[84] All federal cases, with only one exception, have followed the *Goldfarb* line of reasoning.[85]

81. *Demopolis*, 103 Wn. 2d at 69, 691 P.2d at 171 (Pearson, J., concurring).

82. 16E J. VON KALINOWSKI, *supra* note 13, at 49-10. The Court concluded that the practice of law was commerce by virtue of lawyers selling services. The Court acknowledged, however, that the differences between professions and businesses may be relevant in determining whether a restraint imposed by a professional organization violated the Sherman Act. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787–88 (1975). *See* Kissam, Webber, Bigus, and Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 612–18 (1982); Veizaga v. National Bd. for Respiratory Therapy, 1977-1 TRADE CAS. (CCH) ¶61,274 (N.D. Ill. Jan. 27, 1977).

83. *Goldfarb*, 421 U.S. at 787.

84. The issue in *Goldfarb* and subsequent cases was whether antitrust principles or the regulatory agency's anticompetitive rule ought to prevail. In *Goldfarb*, the bar association urged that minimum fee schedules were valid despite their anticompetitive effects. The Court disagreed. But in a cautionary footnote it proposed that the special characteristics of professions may require a rule of reason analysis that would in some cases uphold a profession's rule despite its anticompetitive effects. *Id.* at 788 n.17.

Demopolis, by contrast, did not present the court with a conflict between an ethical rule and antitrust legislation. If Demopolis' allegations were proved correct, his former attorneys violated the Code of Professional Responsibility. Since the CPA and the Code are in agreement that the alleged activities are harmful to the public, the court did not need to determine whether one provision ought to prevail over the other. In cases such as this, where the attorneys' ethical code and the CPA are consistent in their treatment of unfair and deceptive acts, it is unnecessary to restrict the CPA to only entrepreneurial activities. For federal cases that have considered the application of antitrust to professional rules, see, e.g., Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (foundation for medical care established maximum fee schedules for member doctors); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (engineers' canon of ethics prohibiting competitive bidding in engineering contracts); Bates v. State Bar, 433 U.S. 350 (1977) (Code of Professional Responsibility disciplinary rule prohibiting advertising).

85. *See* Kissam, Webber, Bigus & Holzgraefe, *supra* note 82, at 616. The one exception is Selman v. Harvard Medical School, 494 F. Supp. 603 (S.D.N.Y. 1980), *aff'd mem.*, 636 F.2d 1204 (2d Cir. 1980). *Selman* followed *Marjorie Webster* and developed a commercial/noncommercial argument. *See infra* note 90 and accompanying text. This line of reasoning is dubious in light of Supreme Court decisions in *Goldfarb* and *Professional Eng'rs*. Kissam, Webber, Bigus & Holzgraefe, *supra* note 82, at 616.

The commercial/noncommercial distinction of the concurring opinion was taken primarily from *Marjorie Webster Junior College, Inc. v. Middle States Association of College and Secondary Schools,* a pre-*Goldfarb* case.[86] The concurring opinion's reliance on this case is misplaced for two reasons. First, since *Marjorie Webster* was decided prior to *Goldfarb,* it does not incorporate the Supreme Court's analysis that all aspects of a profession are trade or commerce.[87] Second, *Marjorie Webster* developed a different commercial/noncommercial distinction than that proposed in *Demopolis.* The case held that an educational association's refusal to accredit a for-profit college was a noncommercial venture and therefore not a violation of the Sherman Antitrust Act.[88] According to the court, the Sherman Act was not tailored for the "noncommercial aspects of the liberal arts and the learned professions."[89] The court noted, however, that if an educational association's acts were commercially motivated, antitrust law could apply.[90] Therefore, the motivation for the activity actually determined whether the Sherman Act would be applicable.

A distinction limited solely to entrepreneurial aspects does not encompass a motivation test. While not the best solution, the *Marjorie Webster* court's analysis at least left future courts with the ability to conclude that some acts of accreditation are noncommercial, while similar acts which are

86. 432 F.2d 650 (D.C. Cir.), *cert. denied,* 400 U.S. 965 (1970). The four-justice concurrence primarily relied upon *Marjorie Webster,* but also cited Frahm v. Urkovich, 113 Ill. App. 3d 580, 447 N.E.2d 1007 (1983), for the commercial/noncommercial principle. Short v. Demopolis, 103 Wn. 2d 52, 69, 691 P.2d 163, 171 (1984) (Pearson, J., concurring). *Frahm* is not discussed because it outlines no broad principles applicable to this case other than its reliance upon *Goldfarb's* footnote 17. In addition, the *Frahm* court was impressed that the actual practice of law could have no direct effect on the consuming public. *Frahm,* 447 N.E.2d at 1010. This argument is inapplicable to *Demopolis,* since the public interest test was not considered by the supreme court. *Demopolis,* 103 Wn. 2d at 71–72, 691 P.2d at 172 (Pearson, J., concurring).

87. Veizaga v. National Bd. for Respiratory Therapy, 1977-1 TRADE CAS. (CCH) ¶61,274 (N.D. Ill. Jan. 27, 1977) (the analysis of *Marjorie Webster* was conducted for the purpose of determining whether the activity was totally exempt from the antitrust laws. *Goldfarb* makes it clear that there is no such total exemption).

88. *Marjorie Webster,* 432 F.2d at 654. A possible explanation for the court's willingness to create a commercial/noncommercial distinction was its reluctance to interfere in the affairs of an educational institution. *Id.* at 654. *Marjorie Webster* has been cited as authority supporting an educational exemption from antitrust law. *See* Weistart, *Antitrust Issues in the Regulation of College Sports,* 5 J. COLL. & UNIV. L. 77, 79–81 (1979).

89. *Marjorie Webster,* 432 F.2d at 654.

90. *Id.* at 655 n.21. "For example, if accreditation were denied any institution purchasing textbooks from a supplier who did not provide special discounts for association members, it would be hard to imagine other than a commercial motive for the action." Thus the *Marjorie Webster* court concluded that accreditation could be subject to antitrust law if the motive of the act was commercial.

The apparent definition of "commercial" in *Marjorie Webster* is that which is done for economic protection or personal gain, while "noncommercial" motives pertain to those acts that benefit society as part of the profession's public service. Annot., 39 A.L.R. FED. 774, 780 (1978).

commercially motivated may subject the actor to antitrust law.[91] A strict commercial/noncommercial formula is incapable of making such a fine distinction.[92]

D. Washington's Definition of Trade or Commerce

Following the legislative directive to be guided by federal decisions,[93] the *Demopolis* court looked to federal precedent to ascertain the meaning of trade or commerce.[94] But Washington courts should look to federal case law for assistance only when sections of the CPA are not defined by the Washington legislature.[95] Where the legislature has defined a term within the statute, it is unnecessary for the court to apply federal definitions. Unlike its federal counterpart, the CPA specifically defines trade and

91. In an amicus curiae brief to *Goldfarb*, the American Bar Association argued against a distinction based upon commercial/noncommercial aspects of the legal profession. Rather, the Bar Association proposed that the *Marjorie Webster* solution concerning commercial purposes might prove a workable test. Brief for American Bar Ass'n as Amicus Curiae at 11, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

However, others have disagreed with the *Marjorie Webster* test, arguing that the essential factor in Sherman Act proceedings is the commercial effect of the action and not the purpose for the action. *See e.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 486, 489 (1950). This test would also negate the commercial aspects reasoning of the *Demopolis* court. *See* Comment, *The Applicability of the Sherman Act*, *supra* note 3, at 324–27; Brief for the United States as Amicus Curiae; Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

92. A federal case demonstrates the weakness of the commercial/noncommercial analysis. In *In re* Wilson Chem. Co., 64 F.T.C. 168 (1964), the FTC issued a cease and desist order against a collection lawyer for deceptively inducing his client's customers to pay overdue bills. *Id.* at 186–90. Since the lawyer's practice was collections, by definition his acts occurred within "the actual practice of law." According to the *Demopolis* entrepreneurial aspect formula, however, this attorney's acts are not entrepreneurial and therefore not subject to the CPA. See *supra* note 6 for the *Demopolis* definition of entrepreneurial.

One commentator has argued that in the case of attorney debt collections, the activity ought to be considered commercial since it is regularly engaged in by non-attorneys in a totally commercial setting. *See* Lewis, *Regulation of Attorney Debt Collectors—The Role of the FTC and The Bar*, 35 HASTINGS L.J. 669, 686 (1984).

Although not noted by the court, the FTC has stated its intention to pursue only the "business practices" as distinguished from the "quality of care" aspects of the profession. S. REP. NO. 451, 97th Cong., 2d Sess. 12 (1982). While this statement clarifies the FTC's prosecutorial and enforcement intentions, it does not answer the question of whether the practice of law is trade or commerce. It more accurately reflects the Commission's concern with not treading upon an area traditionally regulated by the states. *See* H.R. REP. NO. 156, 98th Cong., 1st Sess. 13 (1983) (purports to limit the FTC's ability to invalidate any state law that establishes "training, education, or experience requirements for the licensure of professionals" or "permissible tasks or duties which may be performed by professionals and which are based in fact on specialized training or education").

93. WASH. REV. CODE § 19.86.920 (1983).

94. *Demopolis*, 103 Wn. 2d at 56, 691 P.2d at 165–66.

95. The court should look to federal precedent to define terms not defined by the CPA, such as "unfair or deceptive" acts. *See supra* note 16.

commerce as including the sale of assets or services.[96] The Washington Supreme Court has also expanded this definition to include unfair or deceptive acts occurring during the performance of a contract, but unrelated to deception in the formation of a contract.[97] Moreover, the court has held that another profession, the practice of medicine, is within the antitrust definition of trade.[98]

Further evidence for including the professions within the trade or commerce definition is the legislature's failure to specifically exempt professions from the statute.[99] The exemption provision within the CPA only exempts professional activities if they are specifically permitted by the regulatory board.[100]

Since the legislature provided its own definition of trade and commerce, it was unnecessary for the court to look to federal interpretations.[101] Post-*Goldfarb* federal decisions appear to include all aspects of the professions within the commerce definition; Washington law and precedent clearly point in this direction. The *Demopolis* court's attempt to restrict the definition of trade or commerce probably reflects its recognition that there are problems with the CPA's application to the legal profession. These problems are capable of being addressed by the statute, however, which makes a special exemption for the legal profession unnecessary.

E. Strict Liability and the Legal Profession

The four-justice concurring opinion's primary concern with applying the CPA to the practice of law was that Washington courts do not require proof of intent to deceive when attempting to establish deceptive acts.[102] In order to prove a CPA violation it is sufficient that an act or practice has the

96. WASH. REV. CODE § 19.86.010 (1983). The FTCA does not promulgate its own definition of trade or commerce but instead relies on a general definition of commerce. As defined in the FTCA, commerce applies to commerce among the several states and foreign nations. 15 U.S.C. § 44 (1982). The FTCA has also been amended to encompass unfair or deceptive acts in or affecting commerce. 15 U.S.C. § 45 (1982). The Washington CPA only encompasses unfair or deceptive acts in trade or commerce. *See supra* note 12.

97. *See* Salois v. Mutual of Omaha Ins., 90 Wn. 2d 355, 581 P.2d 1349 (1975).

98. *See supra* notes 18–19 and accompanying text.

99. *Cf.* WASH. REV. CODE § 19.86.170 (1983), which specifically exempts transactions regulated by the insurance commissioner, the Washington Utilities and Transportation Commission, or the Federal Power Commission. *See also* DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Ct. App. 1980) (court noted that the negligence of physicians was specifically exempted from the CPA, while that of lawyers was not), *aff'd*, 612 S.W.2d 924 (Tex. 1981).

100. WASH. REV. CODE § 19.86.170 (1983). *See supra* note 15.

101. Reply Brief for Petitioner at 8, Short v. Demopolis, 103 Wn. 2d 52, 691 P.2d 163 (1984).

102. *Demopolis*, 103 Wn. 2d at 70, 691 P.2d at 172.

capacity to deceive.[103] Therefore good faith is irrelevant to a CPA violation.[104] Since the CPA focuses on deception of the client rather than the attorney's breach of due care, once deception has been established, liability results. To apply strict liability to the profession of law would radically alter the present standard of care and make it difficult for a lawyer to effectively perform the role of legal counselor.[105]

While this concern is valid, it does not warrant a special exemption for attorneys. The court could have instead relied on safeguards within the statute to protect the normal operations of the legal profession. Section 19.86.920 of the Washington Code requires that the CPA not be construed "to prohibit acts or practices which are reasonable in relation to the development and preservation of business."[106] The attorney's role as advocate and advisor is essential to the legal profession. Since strict liability would unduly disrupt this aspect of the profession, it should not be applied to this practice of law. If the court had applied the reasonable practices provision rather than a blanket exemption for the performance of law, it could have avoided the CPA's strict liability aspect and still retained the possibility of applying the statute to egregious acts committed by attorneys in the actual practice of law. Essentially, the court would then have transformed a no-fault CPA action into one requiring the existence of fault on the part of the lawyer.

F. Unfair or Deceptive Acts

The four-justice concurring opinion also illustrates a confusing aspect of the CPA. The capacity-to-deceive test was designed to deter deceptive

103. Fisher v. World-Wide Trophy Outfitters, 15 Wn. App. 742, 748, 551 P.2d 1398, 1403 (1976).

104. *Id.*

105. The elements of legal malpractice in the state of Washington are: existence of attorney-client relationship, existence of a duty on the part of a lawyer, failure to perform the duty, and negligence that must have been the proximate cause of damage to the client. Sherry v. Diercks, 29 Wn. App. 433, 437, 628 P.2d 1336, 1338 (1981).

The standard of care expected of an attorney is that degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law. Walker v. Bangs, 92 Wn. 2d 854, 601 P.2d 1279 (1979). An attorney who professes to be a specialist in a field of law will be held to the standard of performance of those who similarly hold themselves out as specialists in that area. *Id.* at 860, 601 P.2d at 1283. The standards for the practice of law are the same throughout the state and do not differ in various communities. Cook, Flanagan & Berst v. Clausing, 73 Wn. 2d 393, 395, 438 P.2d 865, 866 (1968). *See* Lewis, *supra* note 92, at 704–05 (urges incorporation of the "false, deceptive, or misleading" standard of the FTCA into the Code of Professional Responsibility as applied to attorney debt collectors). *See generally* Comment, *Texas Deceptive Trade Practices*, *supra* note 3.

106. WASH. REV. CODE § 19.86.920 (1983). This provision has caused the court to narrowly interpret the term "unfair methods of competition" as embodied in § 19.86.020. *See* State v. Black, 100 Wn. 2d 793, 803, 676 P.2d 963, 969 (1984).

conduct before injury occurs.[107] Thus, under federal law it is typically applied to the inducement stage of a business relationship.[108] The test for unfair acts, which generally applies to the performance part of a transaction, is different. Under federal law, an unfair act occurs when it: (1) causes substantial injury to consumers, (2) violates established public policy, and (3) is unethical or unscrupulous.[109] While neither test encompasses a bad faith requirement, the FTC does consider the defendant's bad faith when awarding damages.[110] Since the CPA does allow for damages this consideration could be applied to Washington cases.

It is not clear whether Washington courts distinguish between acts in the inducement and the performance stage of a transaction.[111] In addition, Washington courts have not explicitly decided whether an unfair act under the Washington CPA requires a finding of bad faith.[112]

Before ruling that a lawyer has violated the CPA during the performance stage of a transaction with a client, Washington courts should require a finding that the lawyer has acted in bad faith. Without such a requirement, the typical malpractice or breach of contract claim would be engulfed by the CPA. A bad faith test comports with the lawyers' Code of Professional

107. *See* 16J J. VON KALINOWSKI, *supra* note 13, at 122-3.

108. Treatises discussing "deceptive" acts generally refer to advertising and other representations used to induce a sale. *See, e.g., id.* at 122-1 to 122-29.

109. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 n.5 (1972). In 1980, the FTC elaborated on the *Sperry* declaration and stated that, to justify a finding of unfairness, the injury must satisfy three tests: (1) the injury must be substantial; (2) the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces; and (3) the injury must be one which consumers could not reasonably have avoided. H.R.REP. NO. 156, 98th Cong. 1st Sess. 35–40 (1983). The FTC has since merged the third requirement of *Sperry* into the other two. *Id.* at 40.

110. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 307 (2d ed. 1984). A suggested definition of bad faith is conduct that constitutes an "evasion of the spirit of the bargain, lack of diligence and slacking off, [and] willfull rendering of imperfect performance." WASHINGTON DESKBOOK, *supra* note 14, at 27–28, quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 comment d (1971). Negligence should not fall within this definition unless the acts or omissions could be termed "reckless" negligence.

111. Some courts have required proof of bad faith before a breach of contract will be found unfair or deceptive. *See* Nuttall v. Dowell, 31 Wn. App. 98, 112, 639 P.2d 832, 840 (1982) (CPA should not apply to an isolated, after-the-fact breach of private contract where the breach of contract was not done in bad faith or does not constitute a violation of the law). Since *Nuttall* involved a possible violation of the Broker's Act, it is not clear whether the court cited the bad faith element of *Salois* due to the per se nature of the claim, or as an independent requirement of all after-the-fact breaches. *See also* Pilch v. Hendrix, 22 Wn. App. 531, 533, 591 P.2d 824, 826 (1979) (defendant's breach of contract does not give rise to a CPA claim in the absence of bad faith and the public interest requirement as defined in *Salois*).

Most decisions incorporating a "bad faith" requirement, however, have involved a per se situation where the alleged violation was of a statutorily designated duty of good faith. *See, e.g.*, Salois v. Mutual of Omaha Ins., 90 Wn. 2d 355, 581 P.2d 1349 (1978).

For an analysis suggesting that the Washington courts are restricting the CPA to violations occurring only in the inducement stage, see Comment, *The Consumer Protection Act Private Right of Action: A Reevaluation*, 19 GONZ. L. REV. 673 (1985).

112. WASHINGTON DESKBOOK, *supra* note 14, at 27-27.

Responsibility which generally requires a knowing violation of the Disciplinary Rules.[113] Moreover, such a requirement is consistent with the policy of not interfering with the reasonable practice of law, and it places limits on the instances in which treble damages can be awarded.[114] Finally, the court could clarify a murky area of CPA interpretation by enunciating a single standard that would be applicable to professionals and other businesses alike.

IV. CONCLUSION

The *Demopolis* decision is a major step forward for the consuming public, but it falls short of delivering the full benefits of the CPA. The court appears to exclude the actual performance of a legal service from the definition of trade or commerce. This is contrary to federal precedent and the plain meaning of the Washington CPA. The court's ruling shelters certain conduct from the statute's purview, despite the motivation for and harmful effect of the conduct.

The court should have recognized that, like other services, the legal profession is within the definition of trade or commerce as set forth by the Washington CPA. The court could then have excluded those elements incompatible with the practice of law on the basis of the reasonable practices provision. The court could also have explicitly defined unfair and deceptive practices in the performance phase of a service as requiring bad faith before a CPA violation would be found. This interpretation would have clarified an unclear area of the law and developed a general rule capable of application to all businesses and professions.

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113. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1981) (shall not knowingly reveal confidences or secrets); DR 7-101(A) (shall not intentionally fail to represent clients through available means). The recently adopted Washington Rules of Professional Conduct also refer to "knowing" violations. *See, e.g.*, RULES OF PROFESSIONAL CONDUCT 8.4(a) (1985) (knowingly assist or induce another to violate the Rules).

The existence of good faith is not a relevant factor in a negligence or malpractice action. However, bad faith may be indicative of fraud. R. MALLEN & V. LEVIT, *supra* note 5, at 342.

114. WASHINGTON DESKBOOK, *supra* note 14, at 27-28.