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1. NEWSPAPERS WITH CIRCULATION OVER 25,000—SECTION 6251 G. C. DOES NOT REQUIRE CHARGES FOR LEGAL ADVERTISEMENTS TO BE BASED ON RATES APPLICABLE TO ADVERTISERS WHO CONTRACT TO USE MINIMUM AMOUNT OF PERIODICAL SPACE.

2. SECTION 6251 G. C.—RATES—NEWSPAPERS HAVING CIRCULATION LESS THAN 25,000—NO APPLICATION WHERE CIRCULATION MORE THAN 25,000.

3. PRESCRIBED RATES—ADVERTISEMENTS OTHER THAN LEGAL—TRANSIENT RATES.

SYLLABUS:

1. Section 6251, General Code, does not require newspapers with a circulation of over 25,000 to base their charges for legal advertisements on the rates applicable to advertisers who contract to use a minimum amount of periodical space.

2. That portion of Section 6251, General Code, which specifies a rate of one dollar for each square of the first insertion and fifty cents per square for each additional insertion refers to the rate to be charged for legal advertising by newspapers having a circulation of less than 25,000 and has no application to newspapers having a circulation of more than 25,000.

3. Where a newspaper prescribes rates for advertisements other than legal advertisements, and classifies such rates as transient, with no prescribed number of insertions, or on a twelve months basis, with a prescribed number of periodical insertions, the newspaper may charge a rate for legal advertising not inconsistent with the transient rate for other advertisements.

Columbus, Ohio, September 26, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"A certain newspaper, which has a bona-fide circulation of over twenty-five thousand, has published advertisements, notices and proclamations required to be published by county officials under the above named section, (Section 6251, General Code) and has made charges against the county at the rate of ten cents

per line for the first insertion and five cents per line for each additional insertion of advertisements set in six point nonpariel type.

"When notices required by other sections of law are set in display form, the rate charged is one dollar and enghteen cents ($1.18) per inch of column space used.

"This newspaper has submitted the following display advertising rates, effective August 1, 1946:

" '12 *Months' Contract*	
" 'Daily, 88 inches or more	71¢
'Daily, 20 inches or more	74¢
'3 insertions per week	78¢
'2 insertions per week	80¢
'1 insertion per week	84¢
'TRANSIENT, per inch	$1.18
'Political (cash with order) per inch	1.18

" 'The publisher guarantees that no advertising contract or agreement shall be entered into and no advertisement copy shall be accepted at a lower rate than the cost per inch specified herein where the space and frequency of publication are the same.

" 'It is further understood that religious, charity or civil advertising may at the discretion of the Publisher be accepted at the lowest rate on the printed rate card without meeting any of the above contract requirements.

" 'Local contracts are not transferable and are for the sole use of the individual advertiser. General advertising or "national" copy placed by manufacturers is not acceptable at local rates.'

"It will be noted that the published rates for twelve months' contracts are graduated upon the basis of both amount of space used and frequency of insertions. Rates charged for shorter contract periods and certain specified classes of advertisements are varied.

"In Section 6251, General Code, the language 'rates charged on annual contracts by them for like amount of space to other advertisers who advertise in its general display advertising columns;' is used.

"Your opinion is respectfully requested upon the following questions:

"1. Does this language mean the rate charged on annual contracts when a definite amount of space is to be used during the contract period? If your answer is in the affirmative, would public subdivisions pay this same rate per unit of measure, even

though they did not use an equivalent amount of space during a given year?

"2. In the absence of an established annual contract rate by a newspaper having a circulation of twenty-five thousand or more, for irregular or intermittent advertisers, would public sub-divisions be required to pay the rates specified by Section 6251, General Code, for newspapers having a circulation of less than twenty-five thousand?

"3. Since advertisements, notices, etc. required to be published by county officials vary in space required, kinds and classes of advertisements and number of insertions, and it is not possible for such officials to ascertain in advance the amount of space that will be required during the year, which one of the foregoing schedules, and the specific per inch rate would be applicable for charges to public sub-divisions by the newspaper mentioned above?"

As you suggest, your request for my opinion requires a construction of Section 6251, General Code, which reads as follows:

"Publishers of newspapers may charge and receive for the publication of advertisements, notices and proclamations required to be published by a public officer of the state, county, city, village, township, school, benevolent or other public institution, or by a trustee, assignee, executor, or administrator, the following sums, except where the rate is otherwise fixed by law, to wit: For the first insertion, one dollar for each square, and for each additional insertion authorized by law or the person ordering the insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular or rule work fifty percent may be charged in addition to the foregoing rates. Providing, however, newspapers having a circulation of over twenty-five thousand shall charge and receive for such advertisements, notices and proclamations, rates charged *on annual contracts by them for like amount of space* to other advertisers who advertise in its general display advertising columns; and the publisher shall make and file with his bill before its payment, an affidavit, that the newspaper has a bona fide circulation of more than twenty-five thousand at the time the advertisement, notice or proclamation was published, and that the price charged in the bill for same did not exceed the rates herein provided for such advertisement, notice or proclamation." (Emphasis added.)

Section 6251, General Code, is specific and clear in prescribing a different standard by which newspaper rates are fixed for newspapers with a circulation of over 25,000 and those with a circulation of under 25,000.

The first sentence of Section 6251, General Code, is a general provision as to maximum rates to be charged by newspapers. The language "provided, however" is language of exception and by its use the legislature clearly intended to except newspapers with a circulation of over 25,000 from said preceding general language. Therefore, the language which specifies a rate of one dollar for each square of the first insertion and fifty cents per square for each additional insertion refers to the rate to be charged for legal advertising by newspapers having a circulation of less than 25,000 and has no application to newspapers having a circulation of more than 25,000.

The language of said statute which requires construction to answer your request, is the language "on annual contracts by them for like amount of space." There are three possible constructions which one may reasonably place on this language:

1. That the county is authorized to enter into a contract with a newspaper based on a definite amount of space to be used over a specified period and shall be charged therefor rates identical to rates of other advertisers who advertise in the general display advertising columns by contract and guarantee the use of a definite amount of space.

2. That the newspaper receiving legal advertising tendered by a county not based on any annual contract guaranteeing any definite amount of space must ascertain how much space has in fact been used over an annual period and establish an average for a day or week and fix a rate based thereon similar to the rate charged to private advertisers who enter into annual contracts guaranteeing such amount of space.

3. That the county is entitled to receive rates for total annual legal advertising not in excess of rates for like amount of space used by other advertisers pursuant to annual contracts guaranteeing publication but not guaranteeing any definite amount of space.

As you suggest in your request, a county or other political subdivision cannot anticipate in advance the amount of legal advertising which it will be required to publish during any annual period. It would, therefore, be unlawful for a county to enter into an annual contract which required payment for a specific number of insertions or a specific amount of space. In State, ex rel. Baraboo v. Page, 201 Wis. 262, it was held that a city council could not contract in advance to pay $100.00 in a lump sum for

legal advertising to be published during the ensuing year. The Court said that the city council could have no advanced knowledge as to the extent of the publication that would be required during the forthcoming year and, therefore, such a contract is invalid as it applies to a political subdivision. Since I cannot ascribe to the General Assembly an intent to enact legislation directing the doing of an act incapable of being performed, I must, therefore, reject such construction.

The second possible construction is not, in my opinion, an acceptable one, because it would require a newspaper to establish its rates retroactively. A newspaper has a right to know in advance what rate it can expect to receive for any legal advertisements. If a newspaper were by statute required to accept legal advertisement under such a construction, the law would be unconstitutional. See, Commonwealth v. Boston Transcript Co., 249 Mass., 477. However, in Ohio by statute a newspaper is specifically authorized to refuse to accept legal advertisements. See Section 4676, General Code.

Since a newspaper may refuse to accept legal advertising, since such refusal must necessarily precede any publication and since the determination of the rate to be charged for such publication is a vital factor in the decision as to whether to accept such legal advertising, I am of the opinion that the General Assembly did not intend such a construction.

The third possible construction is, in my opinion, the most acceptable and the one the legislature must have intended. A county, comparatively speaking under your set of facts, must be said to be in the nature of a transient advertiser because it cannot anticipate in advance how much space it will use. Placing this third construction on the language "annual contract by them for like amount of space" would mean that the county could enter into a contract whereby it would agree with a newspaper to present its legal advertising for one year at a specified rate per insertion without any guarantee of a certain amount of space to be used. In this manner the county could validly negotiate for a more favorable rate. The newspaper would know by such a contract, in advance, that it would have the county's legal advertising business for the next year.

If a newspaper affords to other advertisers rates less than their basic transient rates where such other advertisers make an annual contract to place advertising with said newspaper, but such contract does not guaran-

tee a certain amount of space to be used, this language of Section 6251, General Code, with which we are here concerned, would limit the county in its payment to the newspaper to an amount not to exceed that charged to such other advertisers based on said annual contract for the same amount of space.

Where the language of a statute is susceptible of several possible constructions, it should not be assumed that the legislature intended to violate any constitutional limitations. Columbus Metropolitan Housing Authority v. Thatcher, 140 Ohio St., 38, and the constitutional construction should be adopted in order to sustain the validity thereof. Federal Public Housing Authority v. Guckenberger, 143 Ohio St., 251. See also Youngstown Metropolitan Housing Authority v. Evatt, 143 Ohio St., 268. Nor should it be assumed that the legislature intended to order the doing of an act incapable of performance. I, therefore, conclude that the third construction was the one intended by the General Assembly.

It does not appear that the newspaper referred to in your request offers any annual contract, to any advertiser, which is not based on the use of a prescribed amount of space. In your situation, therefore, the newspaper may charge a rate for legal advertising not inconsistent with the transient rate offered to other advertisers.

However, this does not mean that the language of the statute does not prescribe a limitation on a newspaper in so far as its rates for legal advertising are concerned. The Supreme Court of Ohio has stated that the rates for legal advertising as set forth by Section 6251, General Code, are maximum rates and do not have the effect of precluding contracts for legal advertising at a lower rate. McCormick v. The City of Niles, 81 Ohio St., 246. Also, it has been held that Section 6251, General Code, is a limitation on both parties to a legal advertising contract. City of Cleveland v. The Legal News Publishing Co., 110 Ohio St., 360. The court said there that not only is Section 6251 a limitation on the amount which shall be paid but it is also a limitation on the amount to be received.

In coming to a conclusion, and following the above analysis of the language of the statute and the cases heretofore cited, we must say that the language of the statute with which we are here concerned, specifies a maximum rate which can be charged for legal advertising and that such rate cannot be prescribed by a contract which guarantees in advance the

use of a certain amount of space, but that the newspaper may charge rates not inconsistent with the highest rates which they charge to other advertisers who have contracts with the newspaper not based on an agreement in advance to use a certain amount of space.

There is yet another reason why this construction is, in my opinion, a valid one. The business of newspaper publishing is in the nature of a private enterprise and cannot be said to be a business impressed with a public use. This is gained from an analysis of a recent court decision from the Supreme Court of Iowa. It was held in Shuck v. Carroll Daily Herald, 215 Iowa, 1276, that the newspaper is not clothed with a public interest. The court said:

> "The Uhlman case has been before two respectable courts since it was given forth. The United States District Court in Michigan and the Supreme Court of Louisana. Both refused to allow it.
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> "In Friedenberg v. Irwin Pub. Co., 170 La. 3, 127 So. 345, the court said:
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> " 'The weight of authority is that the publishing of a newspaper is a strictly private enterprise, and the publishers thereof are free to contract and deal or refuse to contract and deal with whom they please. (Citing cases). And at any rate, it is for the legislature, and not the courts, to declare that a business has become impressed with a public use. * * *
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> " 'There is, however, one case holding the contrary doctrine, to wit, Uhlman v. Sherman, 22 Ohio N. P. (N. S.) 225. But we prefer to follow the weight of authority.'
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> "In In re Wohl (D. C.) 50 F. (2d) 254, 256, the court said:
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> " 'Coming to the specific application of the doctrine invoked, the only case specifically holding a newspaper to be clothed with a public interest is the decision of a nisi prius court of Ohio in the case of Uhlman v. Sherman (22 Ohio N. P. (N. S.) 225), supra. It is interesting to note that there the nisi prius judge frankly admitted that learned and diligent counsel on both sides were unable to find a parallel case, and that he himself had been unable to find one. * * * I find * * * that there is no such trend as the trustees urge. A newspaper is not at the common law a business clothed with a public interest.' "

See also Journal of Commerce Pub. Co. v. Tribune Co., 286 F. 111.

The state legislature has indicated in Section 4676, General Code, that

a newspaper is endowed with a private interest in that it has given the newspaper the right to refuse a legal advertisement. Section 4676, General Code, provides:

> "Where in this title a notice is directed to be published in a newspaper and no such newspaper is printed at the place mentioned, as defined in section sixty-two hundred and fifty-five of the General Code, or if the publisher of such newspaper refuses, on tender of the legal charge for printing such notice, to insert it in his newspaper, a publication thereof in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for."

See also Section 10,221 General Code. This is consistent with the thinking that newspaper publishing is of private concern. See Mack v. Costello, 32 S. D. 551.

For other cases holding that the business of newspaper publishing is a private business, see: Commonwealth v. Boston Transcript Co., supra; Philadelphia Record Co. v. Curtis-Martin Newspapers, Inc., et al., 305 Pa., 372; and County of Lake v. The Lake County Publishing and Printing Co., 280 Ill., 243.

It has been fundamental in our society that the business of newspaper publishing is in the nature of a private enterprise for the reason that the freedom of the press is and must necessarily remain one of the bulwarks of liberty in our society. To fetter the press is to fetter ourselves. For that reason, Section 6251, General Code, should be given a broad and liberal construction in favor of the newspaper which is, in my opinion, further indication that the construction to which I have heretofore arrived is the logical and the most favorable one.

Accordingly, it is my opinion and you are so advised that Section 6251, General Code, does not require newspapers with a circulation of over twenty-five thousand to base their charges for legal advertisements on the rates applicable to advertisers who contract to use a minimum amount of periodical space. That portion of Section 6251, General Code, which specifies a rate of one dollar for each square of the first insertion and fifty cents per square for each additional insertion refers to the rate to be charged for legal advertising by newspapers having a circulation of less than twenty-five thousand and has no application to newspapers having a circulation of more than twenty-five thousand.

Where a newspaper prescribed rates for advertisements other than legal advertisements and classifies such rates as transient, with no prescribed number of insertions, or on a twelve months basis, with a prescribed number of periodical insertions, the newspaper may charge a rate for legal advertising not inconsistent with the transient rate for other advertisements.

Respectfully,

C. WILLIAM O'NEILL
Attorney General