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PROFESSIONAL RESPONSIBILITY

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Part I

Law as a Regulated Profession

Chapter 1

Introduction

1. Professions and Professionalism

Work, Jurisdiction, and Competition

Andrew Abbott (1988)

Each profession is bound to a set of tasks by ties of jurisdiction, the strengths and weaknesses of these ties being established in the processes of actual professional work. Since none of these links is absolute or permanent, the professions make up an interacting system, an ecology. Professions compete within this system, and a profession's success reflects as much the situations of its competitors and the system structure as it does the professions own efforts. From time to time, tasks are created, abolished, or reshaped by external forces, with consequent jostling and readjustment within the system of professions.

Jurisdiction is a more-or-less exclusive claim. One profession's jurisdiction preempts another's. Because jurisdiction is exclusive, every move in one profession's jurisdictions affects those of others.

The tasks of professions are human problems amenable to expert service. They may be problems for individuals, like sickness and salvation, or for groups, like fundraising and auditing. They may be disturbing problems to be cured, like vandalism or neurosis, or they may be creative problems to be solved, like a building design or a legislative program. The degree of resort to experts varies from problem to problem, from society to society, and from time to time.

[J]urisdictional claims have three parts: claims to classify a problem, to reason about it, and to take action on it: in more formal terms, to diagnose, to infer, and to treat. Theoretically, these are the three acts of professional practice. Professionals often run them together. They may begin with treatment rather than diagnosis;

they may, indeed, diagnose by treating, as doctors often do. The three are modalities of action more than acts per se. But the sequence of diagnosis, inference, and treatment embodies the essential cultural logic of professional practice. It is within this logic that tasks receive the subjective qualities that are the cognitive structure of a jurisdictional claim.

Diagnosis, treatment, and inference are aspects of professional practice. In most professions, that work is tied directly to a system of knowledge that formalizes the skills on which this work proceeds.

A profession's formal knowledge system is ordered by abstractions alone. Like any knowledge it is organized into a classification system and an inferential system. The classification, however, is quite unlike the diagnostic and treatment classifications. It is not organized from common to esoteric or from treatable to recalcitrant. Rather it is organized along logically consistent, rationally conceptualized dimensions. In law there are rights, duties, procedures, and so on. While these resemble the dimensions of the diagnostic classification, they are in fact more formal and rationalized.

The ability of a profession to sustain its jurisdiction lies partly in the power and prestige of its academic knowledge. This prestige reflects the public's mistaken belief that abstract professional knowledge is continuous with practical professional knowledge, and hence that prestigious abstract knowledge implies effective professional work. In fact, the true use of academic professional knowledge is less practical than symbolic. Academic knowledge legitimizes professional work by clarifying its foundations and tracing them to major cultural values. In most modern professions, these have been the values of rationality, logic, and science. Academic professionals demonstrate the rigor, the clarity, and the scientifically logical character of professional work, thereby legitimating that work in the context of larger values.

Diagnosis, treatment, inference, and academic work provide the cultural machinery of jurisdiction. They construct tasks into known "professional problems" that are potential objects of action and further research. But to perform skilled acts and justify them cognitively is not yet to hold jurisdiction. In claiming jurisdiction, a profession asks society to recognize its cognitive structure through exclusive rights; jurisdiction has not only a culture, but also a social structure. These claimed rights may include absolute monopoly of practice and of public payments, rights of self-discipline and of unconstrained employment, control of professional training, of recruitment, and of licensing, to mention only a few. Which of them are actually claimed depends in part on the audience. Claims made in the political and legal systems generally involve much more than do those in public media. The claims also depend on the professions own desires; not all professions aim for domination of practice in all their jurisdictions. Finally, they depend on the social organization of the professions themselves. This indeed was the focus of the

professionalization literature. To understand the actual claims, then, it is less important to analyze their particular content than their location, their general form, and the social structure of the claiming professions themselves.

Jurisdictional claims can be made in several possible arenas. One is the legal system, which can confer formal control of work. Another is the related arena of public opinion, where professions build images that pressure the legal system. An equally important, but less studied, arena is the workplace. Claims made in the workplace blur and distort the official lines of legally and publicly established jurisdictions; an important problem for any profession is the reconciliation of its public and its workplace position.

Authority often confers obligation. But jurisdictional claims entail only secondarily an obligation to in fact accomplish the work claimed. Lawyers have a right to perform legal work as they wish, but only a hazy obligation to guarantee that all the needs of justice are served. Such general social obligations are more formal among continental professions than among Anglo-American ones. The relative power of continental governments has allowed them to place and enforce such obligations on the professions; in America these obligations are merely paraded in the preambles to codes of professional ethics. The different relation between authority and obligation is one of the profound differences between continental and Anglo-American professions.

Contests for legal jurisdiction occur in three places. The first of these is the legislature, which in America grants statutory rights to certain professional groups. The second is the courts, where such rights are enforced and the actual boundaries of loose legislative mandates specified. The third is the administrative or planning structure, which has always dominated the legal structuring of professions in France, and which increasingly does so in England and America. In England and America, legislatures have traditionally dominated in the legal establishment of professional rights, the American legislatures having been considerably more profligate in the number of rights so established.

The other, and equally important, arena is the workplace itself. In the workplace, jurisdiction is a simple claim to control certain kinds of work. There is usually little debate about what the tasks are or how to construct them. There is normally a well-understood and overwhelming flow of work—alleged criminals waiting to be processed, buildings to be designed, welfare clients to be handled. The basic question is who can control and supervise the work and who is qualified to do which parts of it. My example implicitly (and correctly) assumes that the typical professional worksite is an organization, although in some cases, professionals work in solo or small group practices in open markets.

Professionals in open markets and in organizations control jurisdictional relations in different ways. In open markets, jurisdictional boundaries between competing professions are established by referral networks and similar structures. Oc-

casionally, advertisements are used, either by official groups or by individuals, to establish for the public and for the referral sources the exact contribution of this or that profession. "Let the financial planning professionals at XYZ Bank help you find the money you need." More often, professionals simply establish rules for the kinds of things they do and the kinds of things they don't do, and refer the latter out. Small-town attorneys and accountants, for example, generally operate this way. They are enmeshed in a referral network maintained by club life, personal acquaintance, and a constant flow of business. Since such networks draw so directly on personal relations in fairly tight social systems, interprofessional relations in small towns have a fixed, enduring quality. In large cities, by contrast, several excellent studies have shown that interprofessional relations in open markets range from chaos to open warfare.

Within an organization the situation is quite different. The standard interprofessional division of labor is replaced by the intraorganizational one. More often than not, this locates professionals where they must assume many extraprofessional tasks and cede many professional ones. To be sure, the organizational division of labor may be formalized in job descriptions that recognize professional boundaries, but these have a rather vague relation to reality. In most professional work settings, actual divisions of labor are established, through negotiation and custom, that embody situation-specific rules of professional jurisdiction. These actual divisions of labor exist over relatively short time periods—perhaps a few months to a couple of years. They are extremely vulnerable to organizational perturbations. Professional staff are often replaced by paraprofessional or untrained staff without corresponding change of function. The division of labor must then be renegotiated, with the common result that boundaries of actual professional jurisdiction change to accommodate organizational imperatives.

It is in the workplaces, then, that the actual complexity of professional life insists on having its effect. If a professional is incompetent, organizational function demands that his or her work be done by someone else who is probably not officially qualified to do it. Or if there is too much professional work, nonprofessionals do it. Boundaries between professional jurisdictions therefore tend to disappear in worksites, particularly in overworked worksites. There results a form of knowledge transfer that can be called workplace assimilation. Subordinate professionals, nonprofessionals, and members of related, equal professions learn on the job a craft version of given professions' knowledge systems. While they lack the theoretical training that justifies membership in that profession, they generally acquire much of the diagnostic, therapeutic, and inferential systems discussed in the preceding chapter. This assimilation is facilitated by the fact that professionals are not in reality a homogeneous group. In the jurisdictional system of the workplace, it is the real output of an individual, not his credentialed or noncredentialed status, that matters. Since some professionals are much more talented than others,

the best of the subordinates often excel the worst of the superordinates; certain individuals in closely related professions end up knowing far more about a profession's actual work than do a fair number of its own practitioners.

The reality of jurisdictional relations in the workplace is therefore a fuzzy reality indeed. To be sure, in the elite workplaces—the university teaching hospitals, the Wall Street law firms, the leading architectural houses—the blurring is minimized. Since each group is represented by its best members, vertical and horizontal assimilation can be minimized. But in most professional worksites, the mix of workers is so broad that assimilation is considerable. It reaches its maximum in publicly funded worksites specializing in pariah clients—mental hospitals, jails, criminal courts—where few elite professionals venture, and where attendants, guards, and clerks effectively conduct such professional work as is done.

Dominant professions also form setting-based associations within themselves—for example, the American Academy of Matrimonial Lawyers, the American Society of Hospital Attorneys—while undermining interprofessional societies that are based on particular settings of work, such as the American Orthopsychiatric Association. Yet another strategy for maintaining the publicly clear picture of jurisdictional relations is media manipulation.

Since the advent of associational professionalism in the nineteenth century, the claim to full jurisdiction is nearly always made by a formally organized group. Certainly this has been true since the advent of the formally organized profession in the later nineteenth century.

Claims of full jurisdiction are maintained by a variety of means. Once successful, they are backed by legal rules prohibiting either work with the claimed task or the collection of fees for such work. Within organizations, they are backed by organizational rules. Professions particularly sensitive about professional invasion may maintain vigilante groups to guard the borders—the "unauthorized practice of law" committees of Americas bar associations being the best examples. The lawyers, of course, also directly control the means of enforcement, which may explain why they get away with such groups. Other professions have to depend on the law to back up their claims of full jurisdiction.

A professions social organization has three major aspects—groups, controls, and worksites. Professional groups have diverse forms and functions. Local groups usually emerge early in professional history and later amalgamate into larger ones. Some groups are lobbying groups, some informational ones, still others aim at practitioner control. Some are organized around mere professional membership, while others embody a wide variety of special interests within that membership. The mature profession typically has hundreds of professional associations, many or most of which are open only to members of some large, dominant association.

Under the heading of professional controls can be placed the schools that train practitioners, the examinations that test them, the licenses that identify them, and the ethics codes they are presumed to obey. There are in addition a wide variety of informal controls, usually specific to various professional worksites. Empirical studies of professions show that attempts at licensure seem to come early and ethics codes late in professional development. Examinations and formal schooling tend to come in the middle of professional development. Once begun, however, all develop continually. The typical profession has one ethics code, but usually dozens or hundreds of schools. Although recent years in America have seen consolidated licensure structure across state lines, licensure and examination have characteristically been state based in America, and the politics of license maintenance consequently continuous and complex. It is important to note that licensure alone, of these controls, has direct implications for others beyond the profession involved. Licensure normally carries certain preemptive rights over outsiders, particularly in the United States and France. That a profession has an ethics code does not keep another closely related profession from having one. With licenses, the reverse is generally true; where one profession has a licensed right to do certain work, others are excluded.

Professions operate in a bewildering variety of worksites. Some professions have consolidated, exclusive worksites whose divisions of labor they dominate. The hospital is the most familiar, but large law, accounting, and architectural firms are also examples.

A profession normally has some worksites that are not involved in practice, but only in the purely professional work of maintaining and furthering professional knowledge. These include not only the academic settings discussed before, but also journals, research institutes, and other such organizations. In the United States, such cultural organizations are nearly all affiliated with universities, with a few journals and research institutes being tied to the larger professional associations (e.g., the American Bar Foundation), to industry, or to government agencies.

The strength with which individual professionals are tied to this organized structure varies considerably. Some are central members tying elite worksites to elite schools and dominating major professional associations. Others are totally peripheral, passing their entire careers without contacting any of the central institutions of professional life beyond a few journals. This internal stratification of professions is often confounded with specialization. Often professional tasks are so complex as to require considerable specialization, and individual professionals develop enduring identification with specialty work. These specializations generally fall in a status order of their own, although there is within each an internal hierarchy.

The extent of structuring affects a profession's ability to deal with attack. Thus it is common in professions to create rigid entry standards, coupling extensive education with several levels of examination prior to formal entry into the pro-

fession. This is part of a structure of control that seems utterly advantageous to the profession. It protects recruitment, controls professional numbers (and consequently professional rewards), and guarantees a minimum standard of professional ability. This strategy seems perfectly monopolistic in effect. Yet it is clear that several professions have nearly lost jurisdictions because sudden expansions in demand found them committed to standards that would not permit rapid expansion. The only defense in such conditions is rapid and effective creation of subordinate groups to handle the business, the strategy that led solicitors to develop the managing clerks' role in conveyancing. But this has not been a terribly effective strategy. The British lawyers have in fact lost jurisdiction over many of the important aspects of dispute settlement in Britain precisely because they are too few to service demand and their divisions of labor have not been sufficient.

The social structure of professions is thus neither fixed nor uniformly beneficial. [T]he mature profession is constantly subdividing under the various pressures of market demands, specialization, and interprofessional competition. Some competitive conditions favor the less, some the more organized.

The central organizing reality of professional life is control of tasks. The tasks themselves are defined in the professions' cultural work. Control over them is established, as we have seen, by competitive claims in public media, in legal discourse, and in workplace negotiation.

The Discourse of Professionalism

Kathi Weeks (2011)

The discourse of professionalism today enjoys a wide application, serving as a disciplinary mechanism to manage the affects and attitudes of a service-based workforce that is less amenable to direct supervision.

The category of professional work was once defined narrowly. Confined to those jobs that were subject to a measure of self-regulation, required specialized knowledge, and involved a relatively high degree of discretion and judgment, the label was traditionally reserved for the fields of law, medicine, and the clergy. To be a professional was to have a career—a calling—as opposed to a "mere" job: "To the professional person his work becomes his life. Hence the act of embarking upon a professional career is similar in some respects to entering a religious order". The professional's relationship to his or her calling entailed an erosion of the temporal boundaries between work and life, and a different calibration of the qualities of emotional investment between the times and spaces of work and life outside it. Professional socialization has always served as a disciplinary mechanism, one

that can induce the effort and commitment, entitlement and identification, and—perhaps above all—the self-monitoring considered necessary to a profession's reproduction as such.

Whereas the term once suggested a certain mastery of a field of knowledge linked to a specific skill and expertise, increasingly the mastery that a professional is expected to achieve is over […] "the personality." [T]oday's professional is supposed to gain control over his or her thoughts, imagination, relationships, and affects. Certainly one purpose of this is to promote the kind of self-discipline and subjective investment long associated with being a professional.

Today the term "professional" refers more to a prescribed attitude toward any work than the status of some work. To act like a professional—to be professional in one's work—calls for subjective investment in and identification with work, but also a kind of affective distancing from it. A professional invests his or her person in the job but does not "take it personally" when dealing with difficult co-workers, clients, patients, students, passengers, or customers. As an ideal of worker subjectivity, this requires not just the performance of a role, but a deeper commitment of the self, an immersion in and identification not just with work, but with work discipline. The popular injunction to "be professional;" to cultivate a professional attitude, style, and persona, serves as one way that the autonomy, especially of immaterial workers, can be managerially constituted up and down the […] labor hierarchy.

2. Emergence of the Modern Legal Profession

Lawyers and Their Competitors

Andrew Abbott (1988)

Professions' histories are littered with splinter groups and faltering competitors. These are usually ignored in official mythologies, although occasionally recalled as precursors, charlatans, or worse. By studying interprofessional conflict, we can set the successful professions in their real context and correct our theories of their development.

Potential Jurisdictional Conflicts of the Legal Profession

Two organizational forms emerged in the late nineteenth and early twentieth centuries that generated enormous demand for legal services—the large commercial enterprise and the administrative bureaucracy. The growth of business practice involved some problems never before encountered—large-scale reorganizations, massive bond issues, tax planning, and, in America, antitrust. There were also vastly increased quantities of traditional business work. Governmental work grew similarly. It often involved practice before new tribunals, tribunals with their own staffs, their own forms of procedure, and their own sense of prerogative. Like business work, government-related work was extremely diverse, ranging from personal matters associated with the welfare state's involvement in housing and education to the corporate business generated by the state's regulatory intrusions into the economy. By contrast with business and government work, matters of land and property did not multiply but merely expanded additively with the population.

Potential legal jurisdictions in this period thus grew rapidly. In business and government there appeared qualitatively new areas of work. Even traditional business work expanded very rapidly. In land and property the expansion was slower, but still proportionate to population.

Did the legal profession grow in relation to this changing body of work? Garrison's detailed survey of the Wisconsin bar in the early 1930s estimated the growth in legal work since 1880. He concluded that legal work had vastly outstripped the growth of lawyers; work per lawyer was more plentiful than ever before. Even in

urban Milwaukee the increase of lawyers did not keep pace with most of these indicators. Others, however, believed in overcrowding at the bar. In New York City, Isidor Lazarus noted, there were in 1930 264 lawyers per hundred thousand population, about five times the number in England. Indeed, the number of lawyers in the United States increased by over 30 percent from 1920 to 1930 alone. Yet Lazarus too saw large reservoirs of untapped demand in the "lower middle, and the more or less employed or active lower, sections of the community," as well as in "the legal needs of the economically submerged army of the practically unemployed." But he recognized that this demand would be effective only if "the facilities were created for bringing together the supply and demand and adjusting them on an efficient, reasonable, and profitable volume basis."

Two developments allowed the American profession to avoid this situation. The first was the large firm, whose extensively divided labor accomplished more work with given resources; the Cravath firm, for example, had twenty-five lawyers by 1906 and fifty by 1923. The second was the replacement of clerkship with law school. In 1870, one-quarter of new lawyers had gone to law schools. By 1910, the figure was two-thirds. This shift decoupled the profession's rate of growth from its current size in two ways. First, not only could law schools take extra students more easily than could individual practitioners, but also, since schools were both profitable and prestigious, there was an enormous incentive to found them. There resulted an immense potential for recruitment. Second, the typical law-school career in this period was two years, not five, providing a much shorter response to demand changes.

This rapid expansion was, however, accompanied by a stratification of the American bar, indicated in part by the separation of the night law school graduates from the full-time law school graduates. This stratification has important implications for the interpretation of competition between lawyers and others. Roughly speaking, the night school graduates, along with some day school graduates, dealt with the land and property jurisdiction—individual matters expanding at the rate of population growth. The graduates of the elite full-time schools and their newly huge law firms controlled the qualitatively expanding area of big business practice as well as extensive parts of the new government practice. Work in the traditional business jurisdiction, expanding in amount but not kind, was split between the two groups. Since the majority of the United States lawyer expansion came in night schools and nonelite day schools (whose graduates entered the relatively slowly expanding area of land and property), the American legal profession was moving towards the paradoxical situation of having a lower tier oversupplied with lawyers and an upper one under-supplied.

The demographic and institutional flexibility of the American lawyers, so disturbing to the elite WASP lawyers of the East Coast, in fact enabled the [profession] to handle the demand expansion with relative ease. But as we shall see, this simple picture is by no means the whole story.

Complaints about Unqualified Practice and Other Invasions

GENERAL MATTERS

In the United States, organized concern with unauthorized practice began with the Committee on Unlawful Practice of Law of the New York County Lawyers Association in 1914, and spread from there to such other urban jurisdictions as Chicago, Nashville, Kansas City, and Memphis. In the late 1920s, unauthorized practice became a serious concern of the American Bar Association, which directed a national attack on it throughout the 1930s. Americans generally handled unauthorized practice and external competition by councils and agreements if possible. Direct legal action was a last resort. [T]he urban origins of the first unauthorized practice committees are significant. Since city lawyers were by this time quite stratified, the first conflicts appeared either in the qualitatively new jurisdictions of the upper-tier or in the oversupply of lower-tier lawyers, who were pushing out for new work.

American unauthorized-practice committees characteristically started with large caseloads, then settled down to a lower but fairly steady level of work. "The number of inquiries does not vary much from year to year," said the Pennsylvania Bar Association committee in 1950, speaking of "the routine problems of the relationship between lawyers, bankers, realtors, accountants, justices of the peace, aldermen, and notaries public." This surprisingly constant pattern of activity implies that enforcement became something of a formality.

Despite the apparent stability of routine enforcement, lawyers' *sense* of the degree of unauthorized practice had definite cycles. Partly this reflected phases natural to any social movement. Interest in the problem would suddenly wax, with violent speeches, excited talk, and often some new kind of organization or interprofessional agreement. But then the newly created enforcement organization would go on to a fairly routine existence, indeed often complaining of lawyers' inattention. Agreements like the code of ethics negotiated between the Pennsylvania lawyers and the Pennsylvania Bankers Association in 1922 could endure a decade of benign neglect before grassroots complaints generated renewed Bar Association action.

AREAS OF CONFLICT

The areas about which lawyers complained included all of the chief legal jurisdictions—business affairs like bankruptcy and companies; property matters such as conveyancing, wills, and trusteeship; advocacy before courts and administrative tribunals; and finally, general advice on business, legal, and personal affairs.

[T]he invasion of lawyers' jurisdiction was not peripheral, at least in terms of areas. On the contrary, the rates of complaints seem to follow the rates of work. For example, figures from Pennsylvania on distribution of lawyers' actual work

show that property matters were the most important work for 62 percent of the Pennsylvania profession outside of Philadelphia and Pittsburgh. The correspondence with the complaints of unauthorized practice in property matters (58 percent) is extremely close. Similarly, the greater level of business complaints in the American cities reflects the equally greater importance of business work there. Of course lawyers are more likely to act on a complaint the more central the area invaded. But still, it is noteworthy that jurisdictional enforcement is not just a matter of professional borders. That this invasion occurred with peripheral *clients*, however, is easily verified from discussions of the complaints. Both in America and Britain the cases often involved small shopkeepers who refused to pay lawyers' rates for enforcing debts, as well as private individuals who sought inexpensive wills and deeds. The conflicts thus involved not change of cultural jurisdiction but largely change of clientele settlements.

The national differences, however, reflect important aspects of jurisdictional claims. Advocacy, the classic heart of lawyers' jurisdiction, was of equal concern to both, as was business, perhaps because of the rapid expansion that had called forth competitors in both countries. (It is notable that business conflicts were urban in the United States and rural in England.) Advice was a different matter. Although the British believed advice to be an important legal function, they never really attempted a dominant settlement in the area. American lawyers did, presumably because their greater numbers made them believe they could reasonably uphold the claim. Finally, land and property conflicts sharply differentiated urban from upstate lawyers in the United States, but not urban from provincial solicitors in England. This indicates a second division among United States lawyers—that between rural and urban attorneys. The two status-tiers discussed before were both largely urban. The extensive competition rural lawyers faced in their basic property jurisdiction suggests possible under-lawyering in the countryside, a fact often noted by rural lawyers in debate.

American urban lawyers pushed out into advice giving, an area the solicitors [in England] rapidly gave up. This expansion occurred both in the upper and lower tiers of the urban profession. These lawyers had little trouble in land and property, although their country cousins—the few who remained—faced a massive invasion of this heartland jurisdiction. In England, land and property clearly became the obsession of both urban and provincial solicitors. The reversal of patterns in business practice seems, at this point, to be quite anomalous.

This picture complements and expands the predictions made earlier. In the United States, a relatively understaffed urban upper tier of lawyers pushed into corporate and government work and found substantial competition there. The overstaffed urban lower tier perhaps pushed out into general advice and other areas, looking for work. The rural group was desperately understaffed and was losing its central monopolies.

The overall pattern thus emerging is one of activity within constraint. Professional groups take certain jurisdictional actions partly for internal reasons involving their own structure and knowledge base, partly for external reasons like status and power, and partly because these actions are constrained by the competitive environment.

AUDIENCES FOR JURISDICTIONAL CLAIMS

Efforts to curb unqualified practice are efforts to make the workplace relations of jurisdiction conform to the legal and public ones. As I argued before, if the lawyers have workplace jurisdiction but not public or legal jurisdiction, then they are expanding into the area. If, by contrast, they have legal and perhaps public jurisdiction, but not workplace jurisdiction, then they are facing an invasion.

The only sources where lawyers are fighting to get legal jurisdiction established are city sources. Both New York committees had active legislation and court subcommittees dedicated to solidifying legal control of jurisdictions lawyers had acquired in the workplace. [U]rban jurisdictions were the only sites of lawyer expansion. The rural lawyers were fighting invasions.

Additional evidence comes from the differing extents of legal and public jurisdiction. On the one hand, what was law for the city was law for the countryside; in the legal arena, lawyers' jurisdiction was theoretically uniform from one place to another. Yet throughout the [rural] data rings the message that the public simply doesn't know lawyers' prerogatives: "There undoubtedly does exist throughout the State in many places, throughout the laymen, a certain reluctance to go to a law office." "… the detestation of the law and lawyers evinced by the public, the general unthinking public …"

Such complaints seldom appear in city sources. That the public jurisdiction was less extensive than the legal one in the countryside reemphasizes the interpretation here given—that provincial lawyers were too few for the business and were facing serious invasion. This is further strengthened by the fact, which we know from the actual complaints, that large amounts of legally routine law work—conveyancing and other property matters—were being done by nonlawyers. The workplace jurisdiction was even less extensive than the public one.

In the city, as we have already seen, the arena pattern of jurisdiction shows evidence of expansion. An elegant example of this comes not from the expansion into advice giving and similar areas by the too-numerous lower-status lawyers. Rather it bespeaks an earlier expansion, at the expense of a group called conveyancers. We know that the expansion was old because the uncertainty about jurisdiction was merely at the legal level; the workplace and public jurisdictions, at least in the cities, were secure. The area immediately concerned was the drawing of wills. The legal status of this work was confusing even for lawyers themselves. Thus while

most lawyers in both countries assumed that the drawing of wills was a legally established jurisdiction, it was in fact not so. In England, the Stamp Act of 1870 allowed an unqualified person to draw a will, power of attorney, or transfer of stock (provided the transfer contained no trusts or limitations) and to be paid for these activities. In America, when the Pennsylvania Bar Association's brand-new unauthorized practice committee reported in 1932, its chairman, a Philadelphia suburban lawyer, asserted that "the Committee feels that the writing of wills is the practice of law." W. G. Littleton of Philadelphia rose to his feet and thundered:

> Is it not a fact that the writing of wills is not only not the practice of the law but in the English system lawyers themselves were not permitted to draw wills until the year 1760, when the exclusive privileges of the English association which formerly had that right were thrown open to members of the Bar, and when I come to speak, my mind running back personally as far back as 1885, when I was thrown in with that class of men who were known as conveyancers, who prepared deeds, mortgages, and other legal instruments, and wrote wills, it would be perfectly astonishing to the lawyer of that day to say that members of the conveyancers' association, whose names you probably know, some of whom I recollect, were violating any law.

This passage is notable not only for its total disagreement about the legally established jurisdiction, but also for its reference to an invisible group of non-lawyer legal professionals, who had in workplace fact been ousted from this jurisdiction within the half century of Mr. Littleton's memory. The new social-history method—studying conflict to find the lost people of history—has produced a lost profession.

The Philadelphia conveyancers had been, in fact, a small, elite group of practitioners, some of whom were lawyers and some of whom were not. They normally both drafted and stored title papers, wills, and other documents. At first employed as hired specialists to abstract titles, they eventually became independent consultants. A family lawyer would consult a conveyancer concerning property to be purchased, and the conveyancer would then abstract the title and take counsel from a consulting real-estate lawyer on the title's encumbrances. As specialists in property documents, the conveyancers naturally handled wills, mortgages, trusts, and related property matters. Apparently they had strong professional structure; as Littleton mentions, they had an association. Other sources report that their examinations were felt by many to be considerably more difficult than those of the lawyers.

Nonetheless, the conveyancers were destroyed, very rapidly, by a convergence of forces. The lawyers were rapidly increasing in numbers and looking for work. This threatened the conveyancers' control of wills, trusts, and similar documents. In their heartland title work, a crucial court case both gave them "professional" stature and destroyed them. In *Watson v. Muirhead* (57 PA 161, 1868), the court held conveyancers not liable for bad titles if they had taken reasonable precautions. But this left purchasers without recourse in cases of bad title, a situation the growing business community would not accept. A coalition of exasperated

businessmen, lawyers, and conveyancers created in 1876 the Land Title Insurance Company (the first such corporation), to provide a mechanism for pooling the risks of property transfer. In a similar move, lawyers and bankers founded the Fidelity Trust Company to take up work with trusts and other financial matters. As a result of these changes, the conveyancers rapidly disappeared.

The example of the conveyancers shows again how the relative extents of jurisdictional claims can tell us much about the direction of jurisdictional change. For lawyers of the 1930s, the writing of wills was an old expansion jurisdiction, one in which they sought to convert a successful workplace invasion into publicly and legally recognized domination. That the rural public persisted in having wills drawn by banks, trust companies, prothonotaries, and aldermen indicates that this expansion had never had the success in rural areas that it enjoyed in the city.

COMPETITORS

The lawyers had other antagonists besides the vanquished conveyancers. These antagonists, as I have argued throughout, provide the structure that bends the two professions in different directions. They fall into seven groups. The first are the other free professions—the accountants, the bankers, and others. The second are the other professions affiliated with the law. In America this meant notaries, foreign (out-of-state or out-of-country) lawyers, and disbarred individuals working for other lawyers. A third group, the land professions, comprises the simple category of real estate agents in the United States. A fourth group is local officials—justices of the peace, magistrates, police, and other municipal authorities, as well as their various clerks. Fifth, a group of negligible importance in the United States, but of great importance in England, is national officials. Conversely, the sixth group was more important in the United States—corporations. These include title and trust companies, insurance companies, collection agencies, legal aid societies, trade associations, and various other groups. The seventh category of offenders is a miscellaneous group of outsiders—chiefly insurance agents in the United States.

Competition from other free professions is more common in the provincial than the metropolitan data in both countries, but the general level seems somewhat higher in England. Competition from other legal professionals, by exact contrast, is more common in metropolitan than provincial data, and distinctly more common in the United States. Competition from the land professionals is, as one might expect, largely a provincial concern, and perhaps a little more common in England. Competition from local authorities is purely a rural phenomenon in the United States, although about equally common for both groups in England. A sharp contrast between the two countries arises over competition from officials of national administrative bodies: in the United States, this was negligible, while in Britain it made up nearly a quarter of the Law Society's complaints, and was a substantial problem for the more provincially oriented *Law Notes.* The figures for competition from organizations—companies of various shapes and sizes—exactly

reverse this situation. Companies supply the majority of urban complaints in the United States, and one-fifth of the rural ones. They supply about one-tenth of the English complaints. It is not unfair to summarize these patterns by saying that the English lawyers faced an invasion by officials and other free professionals, and the Americans an invasion by companies and other legal professionals.

[T]he amount of American jurisdiction in property was expanding with the population, and the business jurisdiction much more rapidly. Yet in both jurisdictions, American lawyers faced competition not from individuals but from specialized corporations—trust companies, title companies, collection agencies. This competition was directed not against the expanding law firms in the qualitatively new jurisdictions of big business and government, but against individual lawyers and small partnerships working in more slowly expanding areas. This conflict arose out of external invasion of areas under full lawyer jurisdiction, and proceeded by price cutting; it exemplifies the third form of conflict discussed above.

IMPORTANT CONTESTS

To gain a clearer picture of the actual settlements of the major jurisdictional disputes, we may analyze problem areas and competitors in detail. This means replacing general classifications (free professions, national officials, land and property) with actual groups and bodies of work (accountants, the Board of Trade, trusts).

In America, there is a distinct difference between the urban and rural complaints. The rural complaints concern bread and butter property work—wills first and foremost, followed distantly by conveyancing, general property work, the winding up of estates, and trusts. In the city, the specific problems are general debt work, bankruptcy, and advocacy on retainer, followed distantly by legal, tax, and published advice, the writing of threatening letters, wills, and trusts. It is noticeable that the two lists overlap only in wills, trusts, and general property work, and that much of this competition is attributable to one type of competitor—the trust company and the bankers who ran it. The collection agency, by contrast, seems a completely urban phenomenon, as do the title company and other corporations. Local officials are important chiefly in the countryside, while other legal groups have their chief impact in the city, although notaries do cause some problems in the country.

The urban bar's lower tier, over-supplied by the night law schools, is fighting to expand into (or perhaps to retain) a collection business that is apparently conceded in the country, where the declining lawyer populations are fighting to defend more central jurisdictions against invasion. The urban groups' most important competitors are corporations offering efficient services. Having achieved great economies of scale in searching titles, the title companies next sought to construe their right to draft legal instruments directly affecting insurability as a right to draft deeds. The lawyers managed to turn back this attempt to seize a coequal jurisdiction in land affairs—one that would have been fatal to them—but did have

to settle for the removal of much title work that had once belonged to them. The same thing happened in collections. The lawyers defeated the collection agencies' bid to seize coequal legal jurisdiction—by denying them the rights to have lawyers on retainer, to write certain kinds of threatening letters, and so on. But the collection agencies in fact performed that centralization of demand which Lazarus had foreseen as necessary and absorbed a considerable amount of demand for legal services in the process. The story was repeated with trust companies. The trust companies' bids to write wills and draft trusts were denied, retaining crucial aspects of property jurisdiction under lawyers' legal control. But the lawyers still lost most administrative work connected with trusts and probate.

In each of these competitions with companies, the lawyers preserved what I have called an advisory jurisdiction. Their competitors' administrative efficiency provided far more effective services in the collection, trust, and title areas than could lawyers. In defense against them, the best the lawyers could manage was to retain legal and public control over the purely legal residual of these areas. The companies took over the administrative work in the workplace and, as time passed, were conceded the public right to it in bar association arguments and the legal right to it in court cases. These jurisdictions proved poachable because the subjective jurisdictions over them were weak; only a small fraction of the traditional work in them actually involved lawyers' special skills. Most of it was administration for which lawyers were neither specially trained nor specially able. Yet all of it had been considered part of trusts, collections, or title work as the case might be. The courts tried for some time to defend the lawyers' view by holding *workplace* jurisdictional standards to apply to lawyers (practice of law includes anything that lawyers have customarily done) while holding *legal* standards to apply to their opponents (practice of title companies includes only what statutes say it does). Ultimately, however, the courts retreated and the poachers relented, satisfied with the lucrative administrative work they could so effectively handle. The result split each of the three old legal jurisdictions in half, giving their administrative portions to the corporations and their legal ones to the lawyers. The meaning of trust, title, and collections as areas of work thus radically changed.

The notaries and foreign lawyers offer two interesting footnotes to unauthorized urban practice.The New York bar attributed the notarial problem to the city's large foreign population. The bar associations attacked "ignorant foreigners coming from countries where the 'notary' is a quasi-lawyer" for supposing that notaries were capable of performing legal actions. Eventually, perhaps because America entered the First World War as France's ally, the committee's remarks became a little less nativistic. The (later) foreign lawyer problem was similar; foreigners arriving in the 1930s often saw fit to advise fellow countrymen concerning the laws of their own land, something the bar association originally tried to attack, but later permitted. But the chief problem with foreign lawyers was their procuring offshore divorces for clients, something which drove the bar committees quite mad. Under the heading of foreign lawyers came also those large law firms from other

In recent years, the organized bar has raised similar [concerns about unqualified practice by non-lawyer 'notarios'](https://bit.ly/3mipsT8), particularly in immigration matters.

American cities that opened New York offices. These provide the lone example in these data of a conflict, within the qualitatively new big-business jurisdiction, between members of the upper tier of the profession. Although these invaders were nationally reputable firms, the New Yorkers insisted that they announce on their letterheads their incapability of New York practice. The competition for the new commercial work was so intense as to cause fighting within the profession.

The American rural scene was quite different. There lawyers were scarce and even lawyers were frank about the necessity of non-lawyers doing some legal work. In 1921, half of Pennsylvania's counties had less than forty lawyers apiece, and a quarter had less than twenty. Justices of the peace, aldermen, notaries, prothonotaries, and various other officials and laymen had perforce to do a variety of lawyers' work. Complaints about this practice surfaced most in the smaller cities like Wilkes-Barre, Allentown, and Williamsport, where the clearly defined legal systems of the cities met the locally negotiated divisions of labor characteristic of the true countryside. The rural conflicts concerned basic heartland legal work in land and property and betray all the usual signs of invasion of an underserved jurisdiction. It is striking, by comparison with the urban data, that Pennsylvania shows no sign whatever of the problems associated with collections—complaints about letters, about representation on retainer, about debt work. This too signifies a retreat to heartland work.

Surprisingly, many problems related to the new government business—tax appeals and advocacy before minor and government tribunals—seem to be equally split between urban and rural American lawyers. The presumption that governmental work provided an expansion area mainly for upper-tier urban lawyers may thus be incorrect. The tax advice findings do support it, for that problem is a largely urban matter. But still, the government work may have offered more general opportunities than it seemed at the outset. Perhaps it was the attempt to enter this new jurisdiction that left the rural lawyers so open to invasion in their land and property work.

People v. Alfani

125 A. 671 (NY 1919)

Crane, J.

The defendant was convicted by the Special Sessions of the city of New York, borough of Brooklyn, of violating section 270 of the Penal Law. He was not an attorney and counselor-at-law, but had for a long period of time drawn legal papers and instruments for hire and held himself out to the public as being in that busi-

ness. His conviction was reversed by the Appellate Division on the ground that such acts did not constitute practicing law and, therefore, were in nowise contrary to the statute.

The question is fairly presented whether the things done by Alfani are open to the public generally or require a license from the state before a person can perform them for compensation and as an occupation.

Henry Alfani had lived at 475 Park avenue, Brooklyn, New York, since 1888. In the basement he had an office in which he carried on a real estate and insurance business. Distinct from such work he also drew legal papers, contracts for real estate, deeds, mortgages, bills of sale and wills. A large sign placed over his dining-room or basement window bore the words in big letters "Notary Public—Redaction of all legal papers." The defendant said "redaction" meant the drawing of legal papers. He was sixty years of age and evidently an Italian, as he testified in part through the Italian interpreter.

On December 27, 1917, two investigators of the state industrial commission called on Alfani at his office and asked him to look after a matter for them. Gallo, one of the men, said his name was George Lecas and that he lived at 23 Cook street, Brooklyn, where he had a soda water stand which together with a stock of cigars, cigarettes, candies and malted milk he had sold to the other man whom he introduced as Geannelis. The terms of the sale were these: the purchaser agreed to assume the seller's contract to pay five dollars twice a month to the American Siphon Company from which the fountain had been obtained, $65 being still due thereon; the stock was to be $26 cash and the good will $145 to be paid for by Geannelis—$50 that night, $50 January 15th and $45 January 31st. The last payment was to be extended ten days if the purchaser was unable to meet it on time. The defendant advised that a bill of sale be drawn and that the purchaser give back a chattel mortgage. He explained about the necessity of filing the mortgage in the county clerk's office and the foreclosure by a city marshal in case of non-payment. The papers were drawn and executed for which the defendant charged and received four dollars. Before leaving Gallo said: "In case I have any trouble of any kind and I need any legal advice can I come back to you?" to which Alfani replied, "Yes."

By section 270 of the Penal Law it is a misdemeanor for any natural person "to make it a business to practice as an attorney-at-law * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state." To practice or to represent as being entitled to practice law in any manner is prohibited to those not lawyers.

The Appellate Division was of the opinion that this section related only to practice connected with court or legal proceedings. The restriction is broader than this for effect must be given to the words "or in any other manner." The words "as

aforesaid" have reference to practice in the courts mentioned, and the following "or in any other manner" refer to the practice as an attorney-at-law out of court and not in legal proceedings. Practicing as an attorney-at-law in or out of court or holding oneself out as entitled to so practice is the offense. Not only is this the natural reading of the section but the lower court in a previous decision held that practicing law was not confined to court work.

In *Matter of Duncan* it is said: "It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney-at-law is one who engages in any of these branches of the practice of law."

In *Eley v. Miller* the court stated: "As the term is generally understood, the practice of law is the doing or performing services in a court of justice in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court."

To make it a business to practice as an attorney-at-law not being a lawyer is the crime. Therefore, to prepare as a business legal instruments and contracts by which legal rights are secured and to hold oneself out as entitled to draw and prepare such as a business is a violation of the law.

It does not lead us to a conclusion to investigate the powers of notaries public under the Roman law or of scriveners and notaries under the English system past or present. The legislators who enacted section 270 knew what practicing law was in this state as many of them were of the profession and they were dealing with that as carried on here at the present day. It is common knowledge for which the above authorities were hardly necessary, that a large, if not the greater, part of the work of the bar to-day is out of court or office work. Counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills, are activities which have long been classed as law practice. The legislature is presumed to have used the words as persons generally would understand them, and not being technical or scientific terms "to practice as an attorney-at-law" means to do the work, as a business, which is commonly and usually done by lawyers here in this country.

The reason why preparatory study, educational qualifications, experience, examination and license by the courts are required, is not to protect the bar as stated in the opinion below but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery, dentistry and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest and knowledge reveals how it may be avoided.

Why have we in this state such strict requirements for admission to the Bar? A regents' certificate or college degree followed by three years in a law school or an equivalent study in a law office marks the course to a bar examination which must finally be passed to entitle the applicant to practice as an attorney. Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man. And all of this with but one purpose in view and that to protect the public from ignorance, inexperience and unscrupulousness.

Is it only in court or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum for very little can go wrong in a court where the proceedings are public and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has had frequent occasion to guide the young practitioner or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo. Did the legislature mean to leave this field to any person out of which to make a living? Reason says no. Practicing law as an attorney likewise covers the drawing of legal instruments as a business.

That such work is properly that of an attorney seems to be recognized by other provisions of law. Section 88 of the Judiciary Law, relating to the disbarment of attorneys, makes it the duty of the Appellate Division in each final order of suspension to forbid the giving to another of an opinion as to the law or its application or of any advice in relation thereto.

Section 835 of the Code of Civil Procedure provides in substance that an attorney shall not be allowed to disclose a communication made by his client to him or his advice given thereon, in the course of his professional employment. Such communications have referred to a deed; an affidavit; a chattel mortgage and a bill of sale.

Also the summary power of courts over attorneys may be exercised in matters unrelated to court proceedings.

Even the instances cited below of scriveners and notaries public in foreign lands drawing legal papers sustain this contention, as the laws require such to be trained and experienced men.

The duties of notaries public here are defined by section 105 of the Executive Law. Only in the name is there a correspondence to the continental official.

All rules must have their limitations, according to circumstances and as the evils disappear or lessen. Thus a man may plead his own case in court, or draft his own will or legal papers. Probably he may ask a friend or neighbor to assist him.

We recognize that by section 270 and also 271 a person, not a lawyer, may appear for another in a court not of record outside cities of the first and second class. The results cannot be serious. The cases are generally of minor importance to the parties; such occasions are seldom frequent enough to make it a business, and the procedure is so informal as to constitute the judge really an arbiter in the dispute.

We must, therefore, in harmony with these views, reverse the judgment of the Appellate Division and affirm that of the Special Sessions.

McLAUGHLIN, J. (dissenting).

The defendant was convicted of violating section 270 of the Penal Law. [On appeal], the judgment of conviction was reversed and he was discharged. The People, by permission, appeal to this court.

So much of the section of the Penal Law under which the conviction was obtained as is material to the question presented on appeal, reads as follows: "Practicing or appearing as attorney without being admitted and registered. It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as attorney and counsellor-at-law for another in a court of record in this state or in any court in the city of New York, or to make it a business to practice as an attorney-at-law or as an attorney and counsellor-at-law for another in any of said courts * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state * * *."

The defendant, at the time stated in the information, was a notary public, living at 475 Park avenue, Brooklyn, in the basement of which he had a small office for the transaction of business. Over the entrance of the office was the following sign:

Agency of the Great Eastern Casualty Co. of New York	**Redaction of all Legal Papers**
Notary Public	**Loan Insurance Broker**
Real Estate Operator	**Established 1888.**

On the 27th of December, 1917, one Gallo, special investigator of the state industrial commission, in company with one Geannelis, entered defendant's office and he asked them what they wanted. Gallo stated that he was selling his store, which consisted of a soda water stand, together with a stock of cigars, cigarettes, etc., to Geannelis, for a certain consideration, which was named, part of which was to be

paid down and the balance in installments. Gallo also stated there was a certain amount due to the American Siphon Company on the purchase price of the soda water fountain, which Geannelis was to assume and pay. The defendant advised that Gallo give a bill of sale to Geannelis and that he give a chattel mortgage for the amount remaining unpaid. He also explained it would be necessary to file the mortgage in the county clerk's office, so that the same could be foreclosed by the city marshal in case of non-payment. His suggestions as to the bill of sale and mortgage were followed and he thereupon prepared the same, for which he was paid four dollars.

It is contended that this transaction, together with the sign, amounted to a violation of the provisions of the statute quoted. I have been unable to reach this conclusion. The statute, unless something is read into it which does not there appear, is to prohibit a natural person practicing or appearing as an attorney-at-law in the courts mentioned, or to hold himself out to the public as being entitled to practice in such courts. The defendant did neither. Clearly, the drafting of the bill of sale and chattel mortgage was not practicing or appearing as an attorney-at-law in any court. Nor did the words on the sign, "Redaction of all legal papers" indicate that he was holding himself out as entitled to practice in such courts. The words "in any other manner," upon which stress is laid, relate to what precedes them in the sentence, viz., the courts referred to. The phrase, although general in its nature, is limited and qualified by the prior specific designations. The rule of ejusdem generis applies. Where the enumeration of specific things is followed by some more general word or phrase, such general word or phrase is held to refer to the things of the same kind.

At the time defendant was convicted it was not illegal, and is not now, for natural persons to draft papers usually intrusted to lawyers. Judicial notice may be taken of the fact that in the rural districts of the state leases, deeds, bills of sale, chattel mortgages, wills and other instruments creating legal obligations are frequently prepared by laymen, notaries public and justices of the peace. Indeed, a natural person could, at the time defendant was convicted, appear for another in a Magistrate's Court, or before a justice of the peace, except in cities of the first and second class, and receive pay therefor. This practice is recognized by section 271, which prohibits a person from receiving compensation for appearing as attorney in a court before any magistrate in any city of the first or second class, unless admitted to practice as an attorney and counsellor in the courts of record of the state. That the legislature did not intend to prohibit such practice is apparent from the fact that at its last session it amended section 271, so that it now includes cities of the third, as well as those of the first and second class.

To give to the words "in any other manner" the legal effect suggested would prohibit a natural person anywhere in the state from drawing a legal paper of any description, or appearing in any court. This, the legislature has not yet indicated its intent to do.

One of the well-settled rules of statutory construction is that statutory offenses cannot be established by implication and that acts in and of themselves innocent and lawful cannot be held to be criminal, unless there is a clear and unequivocal expression of the legislative intent to make them such.

I am of the opinion that the defendant was not guilty of violating section 270 of the Penal Law; that the Appellate Division was right in reversing the conviction and discharging him; and its judgment should, therefore, be affirmed.

3. Regulation of Lawyers

Model Rules of Professional Conduct

Preamble and Scope

Preamble: A Lawyer's Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles

include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral

proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 1.0: Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Chapter 2

Professional Gatekeeping

1. Bar Admission

Model Rules of Professional Conduct

Rule 8.1: Bar Admission & Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

1.1 Character & Fitness

Appeal of Lane

544 N.W.2d 367 (1996)

Per Curiam

Gary M. Lane, challenges the decision of the bar commission of the Nebraska State Bar Association to deny his application for readmission to the Nebraska bar through membership in the association.

Facts

At various times Lane was admitted to the bars of Colorado, Iowa, Nebraska, Texas, Virginia, and Washington, D.C. He permitted the Nebraska membership obtained in 1978 to lapse, and in 1994 when he again applied for admission to the Nebraska bar, he no longer held membership in the Iowa bar.

Noting that Lane had failed to list in his application any employment from October 1990 through October 1994, the association's admissions clerk, Jim L. Henshaw, wrote for an explanation. Lane responded by letter that he was unemployed during that period of time. However, in a later letter to the association's executive director, James Sajevic, Lane admitted that he had been employed in temporary jobs during the questioned period of time.

The commission then received information indicating that Lane had exhibited threatening, confrontational, obnoxious, and paranoid behavior. Henshaw wrote Lane requesting his appearance before the commission. Lane appeared, and the commission thereafter advised him that it would continue its background investigation, but that pending the results thereof, he would be permitted to sit for the February 1995 bar examination if he desired to do so. Lane took the examination and was notified that he had passed and that the commission was continuing its investigation.

After the investigation was concluded, the commission advised Lane's attorney by letter that it had concluded Lane lacked the current character and fitness required for admission to the Nebraska bar. The reasons for the denial of admission were stated to be:

1. Evidence of hostile, threatening, and disruptive interactions with individuals since … Lane has resided in Nebraska.

2. Lack of candor in completing his application for admission to the bar, including an incomplete disclosure of past employment and an incomplete disclosure of previous bar admissions.

Lane then wrote the commission requesting a hearing. Lane's attorney later requested that the commission furnish him with a bill of particulars regarding the reasons for the denial of admission. The commission wrote Lane's attorney that the reasons supporting its decision were:

1. Lack of candor in completing the application for admission to the Bar.

A. The application was received on October 31, 1994. Question 2 inquired as to whether he had ever applied for admission to the Bar of any state or applied to take the Bar examination of any state. If so, he was to state the date of the application, the jurisdiction to which he applied, the outcome of the application, and the dates of admission in each jurisdiction. On January 27, 1995, he appeared at a hearing before the Commission and disclosed for the first time that he had been previously admitted in Nebraska and Iowa.

B. In his Application received on October 31, 1994, he was asked to respond to questions … 7 and 8 relating to past employment. The response was to include temporary or part-time employment for the past 10 years. He did not list any employment since October of 1990. A specific inquiry was made of this matter by letter of November 22, 1994, from Jim L. Henshaw. He responded by letter of November 23, 1994, that he had been unemployed from October of 1990 to the date of his letter. It was not until a letter dated April 11, 1995, to Mr. Sajevic that he admitted to such temporary employment. No details were given. Our investigation has found that he had been employed for temporary employment in March and April, 1993, for Manpower and Apple One Employment.

C. In his Application received October 31, 1994, Question 11 asked if any civil actions or judgments had ever been filed against him. He indicated that such actions or judgments were in existence. He did not attach NSBC Form 3 to the Application. It was not until the hearing of January 27, 1995, that this matter was explained.

2. Evidence of Hostile, threatening, and disruptive interaction with individuals since he resided in Nebraska which reflect upon his character and fitness to practice.

A. At the hearing on January 27, 1995, he discussed his attempts to volunteer at the Creighton Legal Clinic. Catherine Mahern, the Director of the Clinic, has indicated that she and Connie Kearney had a meeting with him to discuss his role in the Clinic. At this meeting in September or October of 1994, it was reported that he was hostile and threatening. The next day, Catherine Mahern asked him to leave the Clinic and not return. He was again threatening, hostile and rude.

B. On or about January 19, 1995, he was in attendance at a BAR-BRI Review at Creighton University. Apparently, he could not locate his keys and began accusing other attendees of taking his keys. Kay Strong was one of the individuals accused. He also accused Corby Gary and threatened to fight him. He also indicated to Mr. Gary that he would find out where he lived. As a result, he was asked to not participate in the BAR-BRI Review. An arrangement was made whereby he could review the tapes of the sessions by himself. Thomp Pattermann and Laura Pattermann were also witnesses to other disruptive behavior at the review sessions before he was asked to leave. Robert J. Launbenthal, an active member of the Nebraska and Iowa Bars, observed him making inappropriate and demeaning statements to a security guard at Creighton Law School during the early days of the BAR-BRI Review.

> C. Shortly after his dismissal from the BAR-BRI Review, he spoke by telephone with Kay Coffey and Cindy Lilleoien of NCLE by telephone [sic]. He was rude and threatening to both of the NCLE employees. There apparently had been a controversy regarding whether audiotapes or videotapes would be supplied.

A hearing was then held by the commission, which Lane attended with his attorney. Through his attorney, Lane was permitted to cross-examine witnesses testifying before the commission and to present his own witnesses and evidence, and he himself testified. The commission found there was no evidence to support the assertion that Lane had been rude or threatening toward employees of the NCLE and that he had substantially complied with question 11 on the application by listing a civil judgment against him on his bankruptcy schedules that had been provided to the commission. The commission also found that although Lane failed to reveal his prior admissions to the Nebraska and Iowa bars, as the application form requested, the omission was not the result of an intent to deceive, but that it did indicate a casual attitude about compliance with instructions and the need to fully inform the commission. The commission further found, however, that Lane had acted in a threatening and intimidating manner while at the Creighton University legal clinic and at the BAR-BRI review course. The commission also found that Lane had intended to conceal the history of his temporary employment in Colorado, denoting a lack of candor in the application process.

Reasons for Appeal

[Lane raised seven grounds for reversing the commission's decision, including that the evidence did not support denial of his application for admisssion.]

Evidence

The second reason rests on Lane's premise that the evidence is deficient in two respects. First, according to Lane, it does not support the conclusion that he was hostile, threatening, and disruptive, and even if the evidence does so, the conduct is not such as warrants denial of admission to the bar. Second, again according to Lane, the evidence that he failed to disclose his previous temporary employment does not support the conclusion that he lacked candor, and if the evidence does so, the conduct does not warrant denial of admission to the bar.

Hostile, Threatening, and Disruptive Conduct

At the June 9, 1995, hearing, various witnesses testified to events which occurred during September 1994 and January through February 1995. Two of the events are worthy of discussion.

The first concerns Lane's involvement at the Creighton University legal clinic. Catherine Mahern, an associate professor of law at Creighton, as well as the director of the clinic, and Connie Kearney, an adjunct professor at the clinic, testified that Lane had come to the clinic in the spring or early summer of 1994 and offered to volunteer after school started again. On his first day, September 19, 1994, Lane accompanied Kearney and two law students to a juvenile court hearing. Lane asked to sit with the students at counsels' table, but Kearney told him that he should remain behind the bar. Lane responded that he was a licensed attorney, that he was in good standing, and that he wanted to sit with the students. Kearney again told him that she wanted him to remain behind the bar, to which Lane responded, "I'll remember this." Kearney testified that she took this statement as a threat.

Mahern met with Kearney and Lane to discuss Lane's role in the clinic and to clear up any misunderstandings that might have occurred at the hearing. During the meeting, Lane stated that Kearney was the type of woman who does not know how to deal with men and is intimidated by them. He also admitted what he had said to Kearney at the hearing and that he did not take it back. He told Mahern that while he could work with students, he would not work with women students. Finally, Lane stated that "those people in Colorado" had gotten to Mahern, that what they had told her was not true, that the record had been expunged, and that they could not prove anything.

The next day, Mahern called Lane into her office and asked him to leave the clinic. Lane became very irritated and said that Kearney and a student were on the phones in the back room talking to each other about him in whispered voices or in code. When Mahern stated that he must have been mistaken, he said in a loud voice, "[D]on't you accuse me of auditory hallucinations, I've been accused of that before and it's not true." On his way out, Lane passed by Kearney's desk and asked that she keep him out of her phone conversations from now on.

Lane testified that he did not intend to threaten Kearney at the juvenile court hearing; he had made the statement to her because he felt she was being deliberately discourteous to him as a lawyer from a neighboring jurisdiction. He also stated that he did not tell Mahern that he would not work with the female students, but, rather, that he would let them approach him if they wanted help and that he would just work with the male students "who apparently didn't find [Lane] very intimidating."

The second event occurred during the BAR-BRI review course at Creighton University law school. During one of the review sessions, Lane left approximately 10 minutes early. After the review session ended, Lane returned and demanded to know who had stolen his keys. Lane used strong and profane language in accusing the students in attendance of stealing his keys. After the students had left the

room, Lane said to one of the students, Corby Gary, "[W]e can take this outside and settle this." Lane went on to say to Gary, "I'll find out where you live." Gary testified that the latter statement caused him concern for himself and his wife.

Other events which were mentioned by witnesses at the hearing included intimidating and rude conduct directed at a security guard and a custodian at Creighton and abrasive behavior during the BARBRI review sessions.

In addition, there are other events alluded to in the evidence which cause some concern, especially his interactions with women. His employment history at AppleOne Colorado, Inc., indicates that he had "outbursts in lobby while filling out application," that he was very rude to female employees, and that he walked off one job, allegedly telling a supervisor to have all of his employees see a psychiatrist. Lane testified that he did not quit that shift early, but, rather, was asked to leave because he was "having another one of these disagreements with another one of these women who didn't apparently like me or my demeanor." Lane acknowledged that his being accused of behaving in an intimidating manner toward women is "part of a recurring problem that I've experienced," and that more women tend to find him intimidating than men.

Lane was also discourteous in his answers to various questions put to him by commission members at the hearing:

> Q. Well, it was a stormy night that night, is that correct?
>
> A. No, it was not. We're going to talk about the weather now[?]
>
> . . . .
>
> Q. Aren't you glad you didn't go outside with him?
>
> A. I think that's kind of a silly question.
>
> . . . .
>
> Q. What's the title of the one that was published?
>
> . . . .
>
> A.... I don't see what relevance this has....
>
> . . . .
>
> Q. Were [the keys] lost?
>
> . . . .
>
> A. I don't understand why this is so important.

Moreover, his correspondence with the commission during the investigation process evidences a sarcastic and cavalier attitude toward it and its responsibilities. One letter to Harold L. Rock, the chairperson of the commission, contains the following:

> I am sure you are cognizant of the ethical obligation attorneys have to be courteous to one another. Mr. Henshaw clearly disregards this obligation. If Mr. Henshaw does not have an undisclosed agenda perhaps he should be questioned concerning his unnecessary sarcasm. Perhaps my unemployment is not so difficult to understand after all, if this is the attitude of persons in positions of authority.

Another letter to the commission chairperson reads:

> I do not think slanderous innuendoes constitute sufficient grounds to deny me a license to practice law in the State of Nebraska. I recognize that you may have a qualified privilege during this process.... I note your sarcastic use of the phrase "working with dispatch" in your letter. If the Commission had worked with dispatch on my application, the investigation would have been completed by now....
>
> ... Apparently, my failure to fail has again found your side "delaying the game". I use the words "your side" because this process has taken on the characteristics of a football match, not an administrative inquiry. Are you hoping that only if you delay long enough, something negative will happen to disqualify me for admission?
>
> ... My economic burden of your continued refusal to find me fit to practice in the face of overwhelming favorable evidence pales in comparison to the shabbiness of your effort to impune [sic] my professional integrity.

Also of concern is his belief in various conspiracies being aligned against him. In his interview in January 1995, Lane asserted that because as an attorney he had taken on powerful interests in Texas and because Colorado is dominated by Texas investors, Texas businessmen, and Texas finance, there was an effort on the part of various people in Colorado to politically harass him. Lane stated that the reason a judge in Colorado Springs filed an ethics complaint against him was out of political animosity because "she's a conservative judge in a conservative county."

He also attributed the three other ethics complaints filed against him in Colorado to political harassment. According to Lane, clerks, judges, and attorneys were upset that he came to Colorado Springs to set up a law practice because his reputation in Texas had preceded him.

Lane also implies that the commission was politically motivated in its investigation of his character and fitness. This assertion had been made earlier in a letter from Lane to the commission, in which he objected to the "inquisitorial approach to [his] Bar admission that [he] believe[s] to be motivated by personal or political animosity." Furthermore, Lane is under the impression that all of the people who were in the BAR-BRI course were against him, allegedly because of racial animosity they felt toward him (Lane testified that he is part Hispanic, part Italian, and part "Anglo Irish"), and because they may have heard of his reputation.

While any one of the events described above, viewed in isolation, could perhaps be attributed to the pressures of taking the bar examination or perhaps a misunderstanding, taken together these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system.

Accordingly, our de novo review of the record leads us to independently conclude that Lane has exhibited a pattern of acting in a hostile, threatening, and disruptive manner.

Having so determined, we turn our attention to Lane's claim that even so, the behavior does not constitute sufficient relevant conduct to deny admission under the provisions of rule 3.

Rule 3 provides, in part, as follows:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.

Apparently, Lane is arguing that abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent conduct does not reflect on his "honesty, trustworthiness, diligence, or reliability." He is wrong.

Appendix A to rule 3 explains that "an attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." A record of conduct which shows a history of abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is not the type of record which justifies the trust of others with respect to the professional duties owed them. Our Code of Professional Responsibility speaks directly to this issue. Canon 7, EC 7-10, provides that a lawyer is obligated to treat with consideration all persons involved in the legal process, and Canon 7, EC 7-37, provides that although ill feelings may exist between clients in an adversary proceeding,

> such ill feeling should not influence a lawyer in his or her conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

The requisite restraint in dealing with others is obligatory conduct for attorneys because "[t]he efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel…. Such tactics seriously lower the public respect for … the Bar." It necessarily follows that "an attorney who exhibits a lack of civility, good manners and common courtesy … tarnishes the … image of … the bar…."

In addition, appendix A declares, in part, that "[t]he public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys." When members of the public engage attorneys, they expect that those attorneys will conduct themselves in a professional and businesslike manner. Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irrespon-

sible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence. What cannot be permitted in attorneys cannot be tolerated in those applying for admission as attorneys.

Moreover, the qualities listed in the rule are merely illustrative; "[t]he fact is that in reviewing an application for admission to the bar, the decision as to an applicant's good moral character must be made on an ad hoc basis." We therefore join other courts in holding that abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar.

Even if we assume, arguendo, that Lane believes he is the victim of a conspiracy which encompasses various interests in Texas, various people in Colorado, and the commission itself, the sincerity of his belief in this supposed wide-ranging conspiracy against him cannot overcome the requirements for the practice of law. Belief unrelated to reason is a hallmark of fanaticism, zealotry, or paranoia rather than reasoned advocacy. The practice of law requires the ability to discriminate between fact and faith, evidence and imagination, reality and hallucination. While an applicant for admission to the bar is entitled to argue vigorously that the commission erred in its findings and recommendation, and this court would take seriously any substantiation of the existence of bias or misconduct on the part of the commission, a much stronger showing is needed than demonstrated by this record to warrant a conclusion that the commission had acted out of some type of political or personal animus.

Verbal abuse, unfounded accusations, and the like have no place in legal proceedings. While occasional lapses in decorum can be overlooked, Lane's transgressions exceed occasional incivility, anger, or loss of control. On this record, they form a pattern and a way of life which appear to be Lane's normal reaction to opposition and disappointment.

We agree with and adopt the observations in *Matter of Ronwin,* 139 Ariz. at 583-84:

> Care with words and respect for courts and one's adversaries is a necessity, not because lawyers and judges are without fault, but because trial by combat long ago proved unsatisfactory.
>
> . . . .
>
> The profession's insistence that counsel show restraint, self-discipline and a sense of reality in dealing with courts, other counsel, witnesses and adversaries is more than insistence on good manners. It is based on the knowledge that civilized, rational behavior is essential if the judicial system is to perform its function. Absent this, any judicial proceeding is likely to degenerate into verbal free-for-all and some, no doubt, into physical combat.... [H]abitual unreasonable reaction to adverse rulings ... is conduct of a type not to be permitted of a lawyer when acting as a lawyer. What cannot be permitted in lawyers, cannot be tolerated in those applying for admission as lawyers.

Our de novo review leads us to independently conclude, contrary to Lane's contention, that his egregious pattern of abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent conduct is sufficient relevant conduct to deny him admission to the bar.

Lack of Candor

Question 7 of the application read: "List every job you have held for the ten year period immediately prior to the date of this application or since the age of 18, beginning with your present employment, if any. Please include self-employment, clerkships, internships, temporary or part-time employment and military service." Lane explained that he had failed to list the Colorado temporary employment because he held simple common labor jobs, and he may have either misread the question or forgotten about the jobs. We agree with the commission's determination that such an explanation is not credible. The correspondence between Lane and Henshaw set out earlier establishes not only that Lane failed to list the employment, but that he originally denied having had any employment during the period in question.

In addition, not only did Lane fail to list his former membership in the Iowa bar, but he failed to reveal that he had previously been a member of the bar of this state, the very state whose bar he was again seeking to join. That piece of information was certainly one of the more important and relevant items he could have provided the commission. His explanation that he simply forgot to list it, or that he had run out of space, or that he did not think it was relevant or material, we find to be incredible, despite the somewhat contrary finding of the commission.

Contrary to the commission's implication, we have never held that in order to be found to have lacked candor in filling out an application, an applicant must have had an intent to deceive. On the contrary, in *In re Application of Majorek,* we observed that "false, misleading, or evasive answers to bar application questions may be grounds for a finding of lack of requisite character and fitness." While an intent to deceive will reflect on whether such answers are false, misleading, or evasive, and would properly be considered by the commission, an applicant who recklessly fills out an application, as the consequence of which the application contains false answers, is just as culpable of lacking candor in the application process as is the applicant who intends to deceive the commission.

Accordingly, our de novo review of the record leads us to independently find that Lane lacked candor in filling out the application at issue. Moreover, contrary to Lane's contention, we independently find such conduct reflects on Lane's honesty, trustworthiness, diligence, and reliability, and thus provides an additional reason to deny him admission to the bar of this state.

[* * *]

Conclusion

For the foregoing reasons, we affirm the commission's decision to deny Lane's application to be readmitted to the bar of this state through membership in the Nebraska State Bar Association.

AFFIRMED.

WRIGHT, Justice, dissenting.

The various incidents described by the majority suggest that Lane is at times obnoxious, has a temper, and can be difficult to work with and that these qualities appear to be amplified around women. With this, I cannot quibble. Until today, however, being obnoxious, having a quick temper, and being hard to get along with were not grounds for the extreme sanction of denial of admission to the Nebraska bar. The majority reaches far beyond the current rules governing admission to the Nebraska bar; therefore, I respectfully dissent.

The majority cites two grounds for excluding Lane: (1) Lane's disruptive, threatening, and hostile behavior and (2) Lane's lack of candor.

After reviewing the factual basis for its first allegation against Lane, the majority concludes that "these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system." While I do not approve of such characteristics, there are no bar admission rules for excluding an applicant on such grounds.

The majority states that it has found authority to exclude turbulent or intemperate people such as Lane in Neb.Ct.R. for Adm. of Attys. 3 (rev.1992). The pertinent portion of rule 3 provides:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.

Lane's behavior does not meet this definition. Rule 3 provides authority for the bar to deny admission for behavior which manifests "a significant deficiency in the honesty, trustworthiness, diligence, or reliability" of an applicant. Obnoxious and rude behavior *by definition* simply do not reflect on one's character for honesty, trustworthiness, diligence, or reliability—let alone demonstrate a "significant deficiency" in these traits, as required by rule 3.

Dishonesty and incivility are two vastly different behavioral traits. Rule 3 reaches the former, but simply does not reach the latter. Nothing in the record suggests that Lane has manifested dishonesty toward clients, adversaries, courts, or others with respect to the professional duties owed to them. Rule 3 is not a catchall exclusionary rule reaching all sorts of personality defects in applicants.

The majority explains that we must preclude Lane from membership in the bar in order to protect the public. However, Lane has practiced law in a number of states since being admitted to practice in 1977. Whatever interpersonal problems Lane may have, they apparently have not led to injury to his clients.

Lane is accused of lacking candor based on two omissions on his bar application. First, Lane failed to report approximately 60 to 100 hours of temporary employment during a 5-week period in 1993. At the commission hearing, Lane could not recall exactly why he left the temporary employment off his application. He thought that he may have either misread the question or forgotten about the jobs. Lane speculated that given that the jobs were short-lived, trivial positions, he may have thought that it was not important to mention them or that he may have been embarrassed to do so. The majority does not find this explanation credible.

Second, Lane failed to report that he was formerly a member of the Iowa and Nebraska bars. Lane noted that there were only three lines available on the application for listing past or current bar memberships. Lane speculated that once he filled in those three lines—with information about his other bar memberships—he intended to attach an extra sheet listing these memberships, but forgot to do so prior to sending in his application.

Whatever the case, an allegation of lack of candor is only probative of one's character for honesty if there is evidence of some intent to deceive, or at least purposeful evasiveness. The record does not show any such intent or even any motive for Lane to deceive the commission. The record shows no disciplinary sanctions against Lane in the omitted states, nor any evidence of malpractice. Lane apparently just filled out his application carelessly.

Nevertheless, the majority concludes that an applicant who "recklessly" fills out an application—and as a result the application contains false answers—is just as culpable of lacking candor in the application process as an applicant who intends to deceive the commission. Consequently, the majority finds that Lane lacked candor in filling out the application and that such conduct reflects on his honesty, trustworthiness, diligence, and reliability. The majority cites this as an additional reason to deny him admission to the bar.

However, the determination of whether someone is dishonest is a judgment about that person's state of mind and about his or her intentions. If the goal of the "lack of candor" standard is to ensure that potential attorneys are not dishonest, then a rule which holds that lack of candor can be established without showing any culpable state of mind is a rule that does not advance its own purpose.

Moreover, such a rule completely ignores the "use of information" instructions that we have issued to the commission. Appendix A to the rules for admission of attorneys states: "In making this determination [of whether the present character and fitness of an applicant qualify the applicant for admission], the following factors should be considered in assigning weight and significance to prior conduct:… 10. The materiality of any omissions or misrepresentations." The majority's approach to application omissions ignores factor No. 10. Likewise, we have held that an omission can be material to a consideration of honesty if the omission also demonstrates an intent to deceive, give false answers, or be evasive. Lane's omissions do not establish that he intended to deceive the commission or that he is dishonest.

Under the current rules for admission to the Nebraska bar, I do not believe that Lane can be denied admission.

In re Converse

602 N.W.2d 500 (Neb. 1999)

Per Curiam

Paul Raymond Converse appeals a decision of the Nebraska State Bar Commission (Commission) denying his request to take the July 1998 Nebraska bar examination. Converse claims that the decision of the Commission should be reversed because the Commission rested its denial of Converse's application, at least in part, upon conduct protected by the First Amendment to the U.S. Constitution and, in the alternative, that Converse's conduct did not constitute sufficient cause under Nebraska law for denying his application on the ground of deficient moral character. For the reasons that follow, we affirm the decision of the Commission.

Factual Background

In 1998, Converse applied for permission to sit for the Nebraska bar examination. On June 29, 1998, Converse was notified by letter that the Commission had denied permission for him to take the July 1998 Nebraska bar examination because it had determined that Converse lacked the requisite moral character for admission upon examination to the Nebraska State Bar Association. On July 7, the Commission received notice that Converse was appealing the Commission's initial determination. Converse's appeal was heard on September 15, after which the Commission reaffirmed its initial determination and notified Converse on December 18 that he would not be allowed to sit for the Nebraska bar examination at that time.

The evidence at the Commission hearing revealed that as part of the application process, Converse was required to request that the dean of his law school submit a form certifying completion of Converse's law school studies. That form contained a question asking, "Is there anything concerning this applicant about which the Bar Examiners should further inquire regarding the applicant's moral character of fitness to practice law?" The question was answered, "Yes," and the dean also noted, "Additional information will be provided upon request." The Commission followed up on this notation by conducting an investigation which ultimately revealed certain facts regarding Converse.

After the completion of his first semester at the University of South Dakota (USD) Law School, Converse sent a letter to then assistant dean Diane May regarding certain issues—not relevant to this appeal—that he had had with the law school during fall classes, closing that letter with the phrase, "Hope you get a full body tan in Costa Rica." Subsequent to that note, Converse had several more encounters with May, beginning with his writing letters to May about receiving grades lower than what he believed he had earned in an appellate advocacy class.

After he received a grade he believed to be unjustified by his performance in the appellate advocacy course, Converse wrote letters to May and to the USD law school dean, Barry Vickrey, requesting assistance with an appeal of that grade. In addition to writing letters to Vickrey and May, Converse also sent a letter to the South Dakota Supreme Court regarding the appellate advocacy course professor's characterization of his arguments, with indications that carbon copies of the letter were sent to two well-known federal court of appeals judges. The letter was written to suggest the professor believed her stance on certain issues was more enlightened than that of the judges. Converse sent numerous correspondence to various people regarding the grade appeal against the specific professor. Despite all such correspondence, Converse testified at the hearing that no formal appeal of the grievance was ever filed. Converse's grade was never adjusted.

The evidence showed that following the grade "appeal," Converse prepared a memorandum and submitted it to his classmates, urging them to recall an "incident" in which yet another professor lashed out at him in class, and to be cognizant of the image that incident casts "on [that professor's] core professionalism" prior to completing class evaluations. Converse also wrote a letter to a newspaper in South Dakota, the Sioux Falls Argus Leader, regarding a proposed fee increase at the USD law school. Converse immediately began investigating the salaries of USD law professors and posted a list of selected professors' salaries on the student bulletin board, as well as writing a letter that accused Vickrey of trying to pull a "fast one."

Converse's next altercation at the USD law school involved a photograph of a nude female's backside that he displayed in his study carrel in the USD law library. The picture was removed by a law librarian. In response to the removal of this photograph, Converse contacted the American Civil Liberties Union (ACLU) and re-

ceived a letter indicating that his photograph might be a protected expression under the First Amendment. Once again, Converse went to the student newspaper to alert the student body of the actions of the law school authorities, accusing them of unconstitutional censorship.

Converse redisplayed the photograph once it was returned by the law librarians. Vickrey received several complaints about the photograph from other students, classifying Converse's behavior as "unprofessional and inappropriate." Upon Converse's redisplay of the photograph, Vickrey sent him a memorandum explaining that the picture would not be removed only because Vickrey did not want to involve the school in controversy during final examinations. Converse testified that he redisplayed the photograph in order to force the alleged constitutional issue.

The evidence also revealed that Converse filed an ethics complaint with the North Dakota Bar Association regarding certain correspondence between Vickrey and a retired justice of the North Dakota Supreme Court. The complaint was dismissed. Converse went to the USD student newspaper, claiming that a letter from a retired North Dakota justice to the ACLU, in response to questions from Vickrey, was a violation of professional ethics (apparently Model Rules of Professional Conduct Rule 4.2 (1999), which precludes a lawyer from discussing matters with opposing parties the lawyer knows to be represented by counsel). In addition to going to the press, Converse also contacted the president of USD, referring to Vickrey as an "incompetent" and requesting that Vickrey be fired. In addition to this incident, Converse reported his suspicions about USD's student health insurance policy to the student newspaper under the title of "Law Student Suspects Health Insurance Fraud," as well as in a separate article alleging that USD had suppressed an investigation of its insurance carrier.

The Commission also heard testimony regarding Converse's attempt to obtain an internship with the U.S. Attorney's office in South Dakota. Converse arranged for the internship on his own, only to have his request subsequently rejected by the law school. Upon receiving his denial, Converse sent a complaint to all of USD's law school faculty members. Vickrey testified that Converse's internship was rejected because he failed to comply with the law school's procedures regarding internships. Converse then contacted the chairperson of the law school committee of the South Dakota State Bar Association with his complaint, expressly referring to Vickrey as being "arrogant." There is no indication of a response from the chairperson in the record.

The issue next considered by the Commission was that of various litigation threatened by Converse. Converse indicated that he would "likely" be filing a lawsuit against Vickrey for violations of his First Amendment rights. Converse was also involved in a dispute with other law students, in which he threatened to file a lawsuit and warned the students that all lawsuits in which they were involved would need to be reported to proper authorities when they applied to take a bar examination. Further, Converse posted signs on the bulletin board at the law school

denouncing a professor, in response to the way in which Converse's parking appeal was handled, and then went to the student newspaper to criticize the process and those involved in that appeal.

One of the final issues addressed by the Commission in its hearing was that of a T-shirt Converse produced and marketed on which a nude caricature of Vickrey is shown sitting astride what appears to be a large hot dog. The cartoon on the shirt also contains the phrase "Astride the Peter Principle," which Converse claims connotes the principle that Vickrey had been promoted past his level of competence; however, Converse admits that the T-shirt could be construed to have certain sexual overtones. Converse admitted that the creation of this T-shirt would not be acceptable behavior for a lawyer.

In response to not being allowed to post signs and fliers at the law school, Converse sent a memo to all law students in which he noted to his fellow students that his "Deanie on a Weanie" T-shirts were in stock. In that same memo, Converse included a note to his schoolmates:

> So far 4 causes of action have arisen, courtesy Tricky Vickrey. [He then listed what he believed the causes of action to be.] When you pass the SD Bar, if you want to earn some atty [sic] fees, get hold of me and we can go for one of these. I've kept evidence, of course.

Vickrey asked Converse not to wear his T-shirt to his graduation ceremony, and Converse decided that "it would be a better choice in [his] life not to go to that commencement." Converse acknowledges that Vickrey's request was made in a civil manner.

The evidence also revealed that prior to law school, Converse, in his capacity as a landlord, sued a tenant for nonpayment of rent and referred to the tenant as a "fucking welfare bitch." At the hearing, in response to questioning from the Commission, Converse testified at great length as to how he tends to personally attack individuals when he finds himself embroiled in a controversy.

After the Commission notified Converse that he would not be allowed to sit for the Nebraska bar examination, Converse appealed the adverse determination to this court.

Assignments of Error

Converse claims that the Commission erred in basing its decision, in part, upon conduct and speech arguably protected by the First Amendment; not making Converse aware of all of the "charges" against him in the proceedings in violation of the 14th Amendment; and determining that Converse's conduct gave rise to sufficient cause under Nebraska law for the Commission to deny his application to sit for the Nebraska bar examination.

[* * *]

Analysis

Converse first assigns as error that the Commission's determination should not stand because it is based in large part upon speech that is protected by the First Amendment. Thus, the threshold question we must answer is whether conduct arguably protected by the First Amendment can be considered by the Commission during an investigation into an applicant's moral character and fitness to practice law. We answer this question in the affirmative.

There are four U.S. Supreme Court cases that provide particular guidance with respect to this issue. In *Konigsberg v. State Bar,* 366 U.S. 36 (1961), the bar applicant argued that when the California bar commission forced him to either answer questions about his affiliation with the Communist Party or to face the repercussions of not being certified as possessing the required moral character to sit for the bar, the commission violated his First Amendment rights. The Supreme Court disagreed, pointing out that "regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment [forbids] … when they have been found justified by subordinating valid governmental interests." In the context of a character inquiry, "it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically … exclude all reference to prior speech or association on such issues as character, purpose, credibility, or intent." The Court balanced the effect of allowing such questions against the need for the state to do a complete inquiry into the character of an applicant and concluded that questions about membership would not chill association to the extent of harm caused by striking down the screening process. The Court held that requiring the applicant to answer the questions was not an infringement of the applicant's First Amendments rights.

In 1971, the Court was once again confronted with the issue and decided a trilogy of cases concerning the bar admissions procedures of various states. It was the final case in this trilogy, *Law Students Research Council v. Wadmond*, that clarified the law as to the appropriate depth of a state bar commission's inquiry on an applicant's moral character. The Court declined to uphold a First Amendment attack against the admission procedure of the New York bar association. The Court upheld the statute, which required that the admitting authority be " 'satisfied that [the applicant] possesses the character and general fitness requisite for an attorney and counsellor-at-law.' " The Court declared that a state is constitutionally entitled to make such an inquiry of an applicant for admission to the bar and placed its imprimatur upon a state's conducting a preliminary inquiry into the moral character of those seeking admission.

Converse conceded at oral argument that the Commission's decision cannot be based solely on an applicant's exercise of First Amendment freedoms but that it is proper for the Commission to go behind the exercise of those freedoms and consider an applicant's moral character. That is exactly what was done by the

Commission in the instant case. An investigation of Converse's moral character is not a proceeding in which the applicant is being prosecuted for conduct arguably protected by the First Amendment, but, rather, "an investigation of the conduct of [an applicant] for the purpose of determining whether he shall be [admitted]." Converse's reliance upon cases where a judgment was invalidated at least in part because it was based on conduct protected by the First Amendment is therefore misplaced.

Were we to adopt the position asserted by Converse in this case, the Commission would be limited to conducting only cursory investigations of an applicant's moral character and past conduct. Justice Potter Stewart, writing for the majority in *Law Students Research Council v. Wadmond*, noted that the implications of such an attack on a bar screening process are that no screening process would be constitutionally permissible beyond academic examination and an extremely minimal check for serious, concrete character deficiencies. "The principle means of policing the Bar would then be the deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits, and criminal prosecutions." Assuming but not deciding that Converse's conduct may have been protected by the First Amendment to the U.S. Constitution, *Law Students Research Council v. Wadmond* makes clear that a bar commission is allowed to consider speech and conduct in making determinations of an applicant's character, and that is precisely what has occurred in the instant case. As aptly stated by the South Dakota Supreme Court in *In re Egan,* 24 S.D. 301 (1909):

> [T]here can be such an abuse of the freedom of speech and liberty of the press as to show that a party is not possessed "of good moral character," as required for admission to the bar of this state … and therefore to require that such person be excluded from the bar of this state; and to our mind the evidence submitted here shows such an instance…. "Nor can the respondent be justified on the ground of guaranteed liberty of speech. When a man enters upon a campaign of villification, he takes his fate into his own hands, and must expect to be held to answer for the abuse of the privilege extended to him by the Constitution…."

We conclude that the Commission properly considered Converse's conduct as it reflects upon his moral character, even if such conduct might have been protected by the First Amendment. Converse's first assignment of error is therefore without merit.

Converse next contends that the Commission violated his due process rights by not making him aware of all of the "charges" against him in these proceedings. This argument is basically that when the Commission determined that he lacked the requisite moral character and gave some examples as to why they reached such a determination, they should have provided an all-inclusive list delineating every reason on which their decision was based. We conclude that such a procedure is not required.

By alleging that he has not been made fully aware of the "charges" against him, Converse has confused this inquiry into his moral character with a trial. Such is not the case. An inquiry regarding an application to the bar is not a lawsuit with the formalities of a trial, but, rather, is an investigation of the conduct of an applicant for membership to the bar for the purpose of determining whether he shall be admitted. No charges have been filed against Converse, and he has been advised of the reasons for which his application was denied. Converse's assignment of error that he has been denied due process of law is therefore without merit.

Converse's third assignment of error alleges that the Commission erred by determining there was sufficient cause to deny his application to sit for the Nebraska bar exam. Much of his argument centers around his conduct being protected by the First Amendment, as discussed previously. However, the question presented is not the scope of Converse's rights under the First Amendment, but whether Converse's propensity to unreasonably react against anyone whom he believes opposes him reveals his lack of professional responsibility, which renders him unfit to practice law.

There is no question that "a state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar…." The Court has also stated that it must be "kept clearly in mind … that an applicant for admission to the bar bears the burden of proof of 'good moral character'—a requirement whose validity is not, nor could well be, drawn in question here." "If at the conclusion of the proceedings the evidence of good character and that of bad character are found in even balance, the State may refuse admission…." Nebraska does, in fact, require a bar applicant to show that the applicant is of good moral character. Therefore, the burden is upon Converse to adequately prove his fitness to practice law in Nebraska, and the evidence will be viewed in this light.

The legal reality is that this court, and only this court, is vested with the power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. With that in mind, we commence our analysis with the standards for moral character required for admission to the Nebraska bar as set out in our rules governing the admission of attorneys. Neb. Ct. R. for Adm. of Attys. 3 governs this situation, which provides in pertinent part:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission. In addition to the admission requirements otherwise established by these Rules, the essential eligibility requirements for admission to the practice of law in Nebraska are:
>
> (a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;

> ….
>
> (c) The ability to conduct oneself with respect for and in accordance with the law and the Code of Professional Responsibility;
>
> ….
>
> (j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Under rule 3, Converse must prove that his past conduct is in conformity with the standards set forth by this court, and the record in this case compels the conclusion that he has failed to do so.

We considered an appeal of a similarly situated bar applicant in *In re Appeal of Lane,* 249 Neb. 499 (1996). *In re Appeal of Lane* involved an individual seeking readmission to the Nebraska bar whose past included confrontations with law school faculty, the use of strong and profane language with fellow students at his bar review course, the use of intimidating and rude conduct directed at a security guard at the place where he was taking his bar review course, and some controversial interactions with females. We held that, taken together, "these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system," and we upheld the denial of his application.

We explained in *In re Appeal of Lane* that the "requisite restraint in dealing with others is *obligatory conduct for attorneys* because '[t]he efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel…. Such tactics seriously lower the public respect for… the Bar.' " Furthermore, " 'an attorney who exhibits a lack of civility, good manners and common courtesy … tarnishes the … image of … the bar….' " We held in *In re Appeal of Lane* that "abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar." Expanding on this holding, we stated:

> "Care with words and respect for courts and one's adversaries is a necessity, not because lawyers and judges are without fault, but because trial by combat long ago proved unsatisfactory.
>
> ….
>
> "The profession's insistence that counsel show restraint, self-discipline and a sense of reality in dealing with courts, other counsel, witnesses and adversaries is more than insistence on good manners. It is based on the knowledge that civilized, rational behavior is essential if the judicial system is to perform its function. Absent this, any judicial proceeding is likely to degenerate into a verbal free-for-all…. [H]abitual unreasonable reaction to adverse rulings… is conduct of a type not to be permitted of a lawyer when acting as a lawyer. *What cannot be permitted in lawyers, cannot be tolerated in those applying for admission as lawyers."*

In Nebraska, *In re Appeal of Lane* is clearly the rule and not an exception thereto.

The evidence in this case shows that Converse's numerous disputes and personal attacks indicate a "pattern and a way of life which appear to be [Converse's] normal reaction to opposition and disappointment." The totality of the evidence clearly establishes that Converse possesses an inclination to personally attack those with whom he has disputes. Such inclinations "are not acceptable in one who would be a counselor and advocate in the legal system."

In addition to Converse's tendency to personally attack those individuals with whom he has disputes, his pattern of behavior indicates an additional tendency to do so in arenas other than those specifically established within the legal system. This tendency is best exemplified by observing Converse's conduct in situations where there were avenues through which Converse could have and should have handled his disputes, but instead chose to mount personal attacks on those with whom he had disputes through letters and barrages in the media.

One such incident occurred when Converse received the below average grade in the appellate advocacy course, and he wrote letters to various individuals regarding his arguments. Converse testified that he wrote letters to members of the South Dakota Supreme Court, Judge Richard Posner, Judge Alex Kozinski, and others, but filed no formal appeal. Moreover, upon return of the nude photograph, Converse testified that he redisplayed the photograph to force the issue with the university, but chose not to pursue any action regarding the alleged violation of his rights. There was also the incident regarding Converse's internship with the U.S. Attorney's office, where Converse went outside established procedures, arranged for the internship on his own, and then complained to all faculty and to members of the South Dakota bar when his request was denied for not complying with established procedures. Finally, there was Converse's production and marketing of the T-shirt containing a nude depiction of Vickrey on a hot dog as a result of the ongoing tension between Vickrey and himself. Converse is 48 years old, and his actions cannot be excused as isolated instances of youthful indiscretions.

Taken together with the other incidents previously discussed, the evidence clearly shows that Converse is prone to turbulence, intemperance, and irresponsibility; characteristics which are not acceptable in one seeking admission to the Nebraska bar. In light of Converse's admission that such conduct would be inappropriate were he already an attorney, we reiterate that we will not tolerate conduct by those applying for admission to the bar that would not be tolerated were that person already an attorney. Furthermore, Converse has consistently exhibited a tendency to cause disruption and then go to some arena outside the field of law to settle the dispute, often to an arena not specifically designed for dispute resolution. As explained by Justice Stewart in *Law Students Research Council v. Wadmond*,

> a State is constitutionally entitled to make … an inquiry [into the moral character and past conduct] of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government. The very Constitution that the appellants invoke stands as a living embodiment of that ideal.

The record before us reflects that the Commission conducted such an inquiry and, at the conclusion thereof, correctly determined that Converse possessed a moral character inconsistent with one "dedicated to the peaceful and reasoned settlement of disputes," but, rather, more consistent with someone who wishes to go outside the field of law and settle disputes by mounting personal attacks and portraying himself as the victim and his opponent as the aggressor. Such disruptive, hostile, intemperate, threatening, and turbulent conduct certainly reflects negatively upon those character traits the applicant must prove prior to being admitted to the Nebraska bar, such as honesty, integrity, reliability, and trustworthiness.

The result might have been different if Converse had exhibited only a "single incident of rudeness or lack of professional courtesy," but such is simply not the case. The record clearly establishes that he seeks to resolve disputes not in a peaceful manner, but by personally attacking those who oppose him in any way and then resorting to arenas outside the field of law to publicly humiliate and intimidate those opponents. Such a pattern of behavior is incompatible with what we have required to be obligatory conduct for attorneys, as well as for applicants to the bar.

Converse has exhibited a clear lack of self-restraint and lack of judgment, and our de novo review of the record leads us to independently conclude that Converse has exhibited such a pattern of acting in a hostile and disruptive manner as to render him unfit for the practice of law in Nebraska. We conclude that the Commission's determination to deny Converse's application was correct, and Converse's third assignment of error is therefore without merit.

Conclusion

The Commission correctly determined that Converse possessed insufficient moral character and was unfit to practice law in the State of Nebraska. This determination was based on an inquiry into Converse's moral character that was both proper and constitutionally permissible. Finding no error in the Commission's determination or the process used to reach that determination, we affirm the Commission's denial of application.

In re Roots

762 A. 2d 1161 (RI 2000)

Per Curiam

This case comes before us on an application by the petitioner Roger I. Roots (petitioner or Roots) seeking admission to the bar of the State of Rhode Island. Roots, who was born in October, 1967, is a 1999 graduate of the Roger Williams University School of Law. Following his law-school graduation, he took and passed the Rhode Island bar examination. In accordance with its usual procedures, this Court's Committee on Character and Fitness (committee) examined Roots's record and interviewed him after he had passed the bar examination. Because the committee had serious concerns relating to his character and fitness to become a member of the bar of this state, it conducted a number of hearings to determine whether it would recommend Roots's admission to the bar. As a result of these hearings, the committee in November 1999 voted on his application. The vote of the committee was five in favor of his admission and two opposed.

After this vote, members of the committee circulated memoranda setting forth the views of the majority of the committee and also the views of the minority. The committee conducted a further investigation to determine whether additional information existed that should be taken into account. Upon determining that no additional information, other than that already obtained by the committee, was available, the committee called a meeting for April 12, 2000. Before the date of that meeting, the membership of the committee had changed. One member had resigned and the Attorney General's designee had been replaced. The person who replaced the member who had resigned recused herself from participation in the vote on April 12. The Attorney General's new designee, however, did participate in the vote. The committee then voted, resulting in a recommendation by four members to admit the petitioner and a recommendation by two members to reject his application. Three members of the majority wrote a memorandum in support of their recommendation. One member of the majority presented a separate concurring memorandum that expressed serious doubts about the petitioner's candor and honesty, but nevertheless recommended his admission. The minority members submitted two separate memoranda. The chairman of the committee, who had voted against the admission of petitioner, wrote one memorandum; the Attorney General's designee wrote a separate memorandum.

To avoid an unduly long recitation of the pertinent facts concerning Roots's application, the various reports that the majority and minority members prepared are attached to this opinion and made a part hereof. The report of the majority is appended and marked as exhibit A. The concurring report recommending admission is appended and marked as exhibit B. The minority report that Chairman Steven M. McInnis wrote is appended and marked as exhibit C. The dissenting opinion of the Attorney General's designee is appended and marked as exhibit D. All these reports contain very similar accounts of the factual elements underlying

the reports of the members of the committee. Nevertheless, we shall attempt to set forth in this opinion the important facts and circumstances that we believe justify our conclusion.

Through its hearings and by examining the material submitted in support of and in opposition to the application, the committee sought to resolve three major areas of concern about the petitioner: (1) his criminal record; (2) his candor and veracity; and (3) his ability to take and abide by the attorney's oath. Some of the evidence was documentary in nature. In addition, extensive testimony was taken from the petitioner himself. The three areas of concern shall be dealt with separately in this opinion.

[W]e are of the opinion that Roots's application should be denied without prejudice to Roots reapplying at some later date after he has proven that he has truly rehabilitated himself.

I

Petitioner's Criminal Record

In 1985, when he was eighteen years old, Roots was charged with and convicted of shoplifting in the State of Florida. He had relocated there after leaving his home in Montana during his freshman year in high school. In his bar application, Roots admitted that, following his arrest for this crime, he "failed to appear at [his] scheduled hearing on the matter." He conceded that he was aware that he needed to attend the hearing but claims that his immaturity at the time caused him to disregard the court's order. Within two months, however, the Orlando police rearrested him on the same charge. He was then detained until he could be presented to a judge. And even though the court still treated him with leniency, Roots shirked his responsibility to abide by the terms of his probation when he failed to perform the community-service condition of his sentence. (He admitted in his application to the bar that he just "left Orlando without performing the community service.")

Within a year, however, he was arrested again in Florida and convicted of yet another crime, the felony of resisting arrest with violence. Generally, this crime involves disobeying, with the use of force (as opposed to mere flight), a police officer's lawful attempt to arrest an alleged criminal. As reflected in the police report and in Roots's law school application, the alleged facts of the crime reveal that Roots's truck had collided with another vehicle. A police officer arrived at the accident scene and an argument ensued between Roots and the officer. When the officer learned that Roots had failed to pay two fines for separate moving violations and was driving on a suspended license, he attempted to take Roots into custody but Roots physically resisted the arrest. Although a federal sentencing judge would later characterize this incident as minor because, in attempting to subdue Roots, the police officer struck the only actual blow, a Florida sentencing judge,

who presumably was more familiar with the relevant facts and circumstances, ultimately sentenced Roots to fifty-one weeks in prison following his *nolo contendere* plea after he again violated his initial three-year-probation sentence.

The petitioner then left Florida and moved to Wyoming, where he attended the Northwest Community College in Powell, Wyoming. While there, he exhibited in class a homemade air gun that he had constructed. (This may have been part of a speech presentation.) Because the authorities knew that petitioner had a prior record, they searched his dormitory room. There, they found additional weapons, including an automatic pistol, an automatic rifle with approximately 500 rounds of ammunition, and an assault rifle described as an AK-47. The petitioner was charged in federal court with being a felon in possession of firearms and with the possession of an unregistered firearm in violation of various federal statutes. Pursuant to a plea agreement, petitioner pled guilty to the registration count (relating to the air gun). The other counts were dismissed. A federal judge sentenced petitioner to twenty months in federal prison on January 10, 1992. This sentence terminated on April 4, 1993. As previously mentioned, the federal judge indicated that the petitioner's felony conviction for resisting arrest with violence in Florida was not as serious an offense as might appear on the surface since the only injury was to the officer's hand when he struck the petitioner in the face. Nevertheless, it was established that in purchasing the various weapons, the petitioner had filled out a number of forms in which he had misrepresented his status as a person convicted of a felony in Florida.

The applicant's criminal record also includes the following:

(1) On at least eight occasions from the spring of 1986 to as recently as the winter of 1997, Roots was caught speeding and ordered to pay fines. These moving-traffic violations occurred in Utah, Washington, and Montana.

(2) Roots apparently ignored his previous driver's license suspensions and flouted these dispositions because he later was charged in Georgia not once but twice in 1989 for driving on a suspended license. On the first occasion he not only drove on a suspended license, but also was issued citations for driving without a license, without insurance, and without proper registration. On the second such occasion, he was again driving on an expired registration plate and a suspended license. Roots's bar application explains his conduct thus:

"I was without sufficient money for insurance or registration. I made it to work for several days but was pulled over by another officer only a couple days later. Again, I was arrested for driving without a license, registration, or insurance. * * * To this day I do not know what became of the cases in Georgia."

On the present record, we do not know whether Roots has satisfied whatever lawfully imposed fines he was obliged to pay in Georgia. Apparently, he has not inquired about what present responsibilities — or possible warrants for his arrest based on his failure to resolve these matters — he still may have outstanding in

Georgia.[1] Nothing in the record shows that Roots has resolved these matters. Moreover, even if Roots formerly lacked sufficient funds to pay for his automobile insurance or registration, he should have arranged to use public transportation or pursued other alternatives (for example, carpooling with friends or co-employees), rather than driving continuously on a suspended or revoked license as he did when he was caught doing so on three separate occasions.

[1] (n. 4 in Opinion.) Roots also has not accounted for his 1986 Utah speeding and reckless driving violations. His bar application lists the disposition or fine for these speeding and reckless driving violations as "u/k," which we assume means "unknown." Although Roots has not forgotten about these violations, he has neglected to determine for over fourteen years whether any sanctions remain outstanding against him in Utah for these transgressions.

Every prospective attorney in this state must complete an application that asks for a listing of all the candidate's "violations of * * * traffic law[s] or ordinance[s] other than parking offenses." This part of the application is not superfluous nor a mere incursion into the applicant's privacy, and it should not be so considered. Rather, it bears a logical and appropriate relationship to the ability of a prospective attorney in this state to maintain respect for and to uphold the law. And although repeated violations of various traffic laws, in isolation, may not preclude a candidate from admission to the bar, they certainly are relevant to the moral fitness and good-character determination that must be made when evaluating the qualifications of prospective attorneys.

(3) In Florida, Roots was convicted of providing a false statement to the authorities. To be sure, Roots has admitted that he provided a false name, but it should go without saying that this crime also reflects upon a candidate's ability to serve the public as an attorney, as well as upon the applicant's candor and truthfulness.

In their totality, these various citations, misdemeanors, and felonies that Roots has accumulated over the years present sufficient evidence to warrant, at minimum, a significant delay in acting favorably upon his application for admission to the Rhode Island bar, especially in light of the fact that Roots has admittedly ignored and violated the terms of his two previous probationary periods. Indeed, Roots's first probation required him to perform community services — yet he chose to ignore that mandate from the Florida court. Instead, it was only after he scuffled with an arresting police officer — itself a display of disobedience to the officer's attempt to effect a lawful arrest — and again disobeyed the terms of his probation, that Roots was ultimately forced to serve time in prison.

We recognize that Roots has not been convicted of violating any criminal laws since his conviction on the federal weapons charge and since his release from prison in 1993 after serving his federal jail sentence of twenty months. We also acknowledge and commend Roots's award-winning writings, his law-school class rank, his position on the student newspaper, and his service on the Roger Williams University Law Review. On the other hand, while these more recent accomplishments are indeed praiseworthy, they are largely irrelevant in establishing his moral fitness and good character to practice as a member of our bar. Indeed, no one has sought to disqualify Roots based on his academic incompetency or lack of intelligence. On the contrary, his record in this regard is conceded to be outstanding. But even some notorious criminals can point

with pride to their relative intelligence. Thus, mere intelligence and academic achievement do not necessarily equate to moral fitness and good character, both of which are preconditions to becoming a member of our bar.

Notwithstanding these more recent positive factors, it is our belief that we have not yet had enough opportunity to conclude that Roots has totally rehabilitated himself, especially because his conduct during the years leading up to and including the filing of his bar application raises further questions about the depth, scope, and extent of his alleged rehabilitation. Indeed, his probationary status on the federal-weapons conviction expired only a mere four years ago, after which he then enrolled in law school and continued to engage in activities that cast doubt on his candor, truthfulness, and ability to take the attorney's oath in good faith.

II

The Petitioner's Lack of Candor and Truthfulness

It has been established that the petitioner was not truthful in applying for the purchase of firearms. It also has been established that petitioner was not truthful in answering a question on the bar application about the use of aliases, although he did admit to having used three aliases: Carl Davis, Rodger Roop, and Roger Bell. He indicated on his application that these aliases were used for the purpose of attending school, writing, and telephone fundraising. In his testimony before the committee, however, he admitted that the use of the alias Carl Davis was to help him evade the law after he was indicted for the weapons charge in Montana. When he assisted in a senatorial campaign, he also used another alias, Roger Bell, in order to hide his true identity when salary payments were made to him. The minority report that Chairman McInnis submitted concluded that Roots's lack of candor in this respect would not be consistent with allowing petitioner to practice law.

We have recently affirmed that "[t]he attorney-client relationship is 'one of mutual trust, confidence, and good will,' in which the attorney 'is bound to * * * the most scrupulous good faith.' " A central purpose of requiring character review as part of the attorney-admission process is to protect those members of the public who might become clients of the practicing lawyer from those attorneys who are so morally or ethically challenged that they are unable to demonstrate the type of good character and moral fitness requisite to serving in a fiduciary capacity. As Mr. Justice Frankfurter once observed, lawyers stand

> 'as a shield' * * * in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'

The fiduciary position of trust that a lawyer assumes vis-à-vis his or her clients demands that individuals whom this Court admits to the bar should be worthy of the confidence that members of the public repose in them. An equal and complementary concern is to safeguard the administration of justice from those who might subvert it through misrepresentations, falsehoods, or incomplete disclosures when full disclosure is necessary.

As we have noted previously, Roots was not truthful in applying to buy firearms. Indeed, he repeatedly checked a box indicating that he was *not* a convicted felon when he applied for his gun purchases, despite previously having been convicted of a felony. Thereafter, Roots was convicted for violently resisting arrest, and ultimately spent close to a year in prison for that offense after violating his initial three-year-probation sentence. He was also well aware of his convictions at the time he applied to buy his various assault weapons, yet he failed to disclose them.

Furthermore, Roots admitted to the committee that he was less than forthcoming on his bar application about the reason for his use of the "Carl Davis" alias. Significantly, Roots submitted this untruthful application for admittance to the bar *in 1999.* When pressed about this discrepancy, Roots was unable to reconcile these contradictory statements.

Moreover, as mentioned above, Roots already had been convicted criminally of providing a false statement to the authorities. Such a record of dishonesty, combined with Roots's other criminal misconduct and recent fabrication on his bar application, appears to us to justify at least a several-year delay before Roots's application even should be considered again for his possible admission to the bar. And Roots's use of an alias to mask his "unsavory" connections to white supremacy groups while working for the Committee to Reelect Conrad Burns, and his use of false indorsements on his paychecks, are simply further reasons for this Court to deny Roots's application at this time.

In sum, then, we agree with the minority report that this applicant's lack of candor is inconsistent with admitting him to practice law at this time.

III

Ability to Abide by the Attorney's Oath

Pursuant to Article II, Rule 8 of the Supreme Court Rules, "[e]very person who is admitted as attorney and counselor at law shall take in open court the following engagement:"

" 'You solemnly swear that in the exercise of the office of attorney and counselor you will do no falsehood, nor consent to any being done; you will not wittingly or willingly promote, sue or cause to be sued any false or unlawful suit; or give aid, or consent to the same; you will delay no man's cause for lucre or malice; you will in all respects demean yourself as an attorney and counselor of this court and

of all other courts before which you may practice uprightly and according to law, with fidelity as well to the court as to your client; and that you will support the constitution and laws of this state and the constitution and laws of the United States. So help you God.' "

Beginning in 1993 petitioner has published a number of articles — including articles as recent as 1998 — that express explicit racial and ethnic bias as well as contempt and disdain for the federal government. His 1993 article is entitled "100 Truths and One Lie" and purports to establish that members of the black race are inferior to members of the white race. Excerpts from this work are set forth in the minority report. Moreover, as recently as 1998, Roots has written that he disavows the "de facto" regime of the United States government, its laws, and, apparently, its Constitution. Similarly, he has written in support of the bogus liens that the Freemen in Montana have attempted to place on federal officials who, in his opinion, have violated certain dictates that the Freemen espouse. It is noteworthy that Roots expressed these views in writing even while he was attending law school in 1998. Roots, however, now attempts to retreat from that stance. He would now have us believe that, consistent with the oath all prospective attorneys must take, he now can swear that he will support the constitution and the laws of this state as well as those of the federal government. This oath, as well as similar oaths that prospective attorneys across the United States must take, does not violate any individual constitutional right that Roots may have to express his contrary views.

At the same time, the United States Supreme Court has stated that "citizens have a right under our constitutional system to criticize government officials and agencies. * * * Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character,' than if it should be attempted directly." Thus, we have no intention or desire to censor or to punish Roots for his past or present political views or for exercising his rights of free speech. Nevertheless, when as here, a candidate for admission to the bar of a state has published writings that communicate his or her explicit refusal to accept our federal government as the legitimate government of this country, such a candidate raises legitimate questions about whether he or she in good faith can take and abide by the attorney's oath to support the laws and the constitution of the United States while in the exercise of the office of attorney and counselor. For example, if a candidate for admission to the bar were to express the view that, in his or her opinion, the laws and constitution of the United States were illegitimate and, for that reason, unsupportable, but that in the exercise of his or her office as an attorney or counselor, he or she still could and, therefore, would swear to support that constitution and those laws, then the committee and this Court would be entitled, we believe, to view that candidate's professed oath-taking ability with some degree of skepticism — especially if the candidate were a convicted felon with a history indicating a recurring lack of truthfulness and candor. While it is possible to draw and maintain a sharp line

between a lawyer's personal beliefs and his or her professional conduct, a predictive assessment of a prospective lawyer's ability to take and abide by the attorney's oath is a fair subject for character review when considering an applicant for admission to the bar. Here, Roots bore the burden at all times to demonstrate his moral fitness and character to practice as a lawyer in this state. But his recent 1997-1998 publications and comments disavowing the legitimacy of our federal government — especially when considered in light of his criminal record and history of other misconduct indicating a lack of forthrightness and candor — give us pause in accepting his avowal to us that he can now in good faith take and abide by the requisite attorney's oath.

Nevertheless, in reaching this conclusion, we agree with the majority of the committee that the First Amendment inhibits both the committee and this Court from denying membership in the bar to the petitioner because of his political beliefs and unorthodox political and social ideas. All of these cases related to applicants who either were or had been at one time members of the Communist Party or refused to answer questions relating to their membership in an organization (presumably the Communist Party) that advocated the violent overthrow of the government of the United States. We also recognize, as did the majority members of the committee, that neither a criminal record nor the political views of an applicant constitute an automatic bar to his or her admission. Yet both may be *relevant* in assessing (1) the applicant's candor, honesty, sincerity, and good faith in professing a willingness to take and abide by the requisite attorney's oath, and (2) the ability of the applicant, in the exercise of his or her office as an attorney and counselor, to support the constitution and laws of the United States.

The petitioner has stated to the committee and to this Court that he will not only take the attorney's oath if admitted to the bar, but that he will abide by it. He stated unequivocally under oath to this Court that he would not discriminate against any person for racial or ethnic reasons. He further stated that he would abide by the lawyer's oath in all respects without any mental reservation or purpose of evasion. And he has stated to the committee that he no longer entertains his extremist views on the illegitimacy of the government of the United States.

We are of the opinion, however, that the prior record of the petitioner — including his criminal past and the other conduct referenced above demonstrating his lack of candor and truthfulness — casts such doubt upon the sincerity of Roots's professed willingness to abide by the terms of the oath that he must take as a member of the bar of this state that his application should be denied at this time.

Conclusion

For the above reasons, we conclude that Roots's application to the bar should be denied. The record in this case reveals far too many recent and past criminal acts, instances of untruthfulness, and a lingering inability of this candidate to take the

requisite attorney's oath in good faith. Thus, we cannot endorse Roots's admission to the bar of this state at this time. Nevertheless, our denial of his application shall not preclude the possibility of Roots reapplying for and obtaining approval of his admission to the bar at some later time, but no sooner than two years from the date of this opinion. Moreover, if Roots reapplies for admission to the bar of this state within three years from the date of this opinion, he shall not be required to retake the bar examination. However, in addition to satisfying the committee's usual criteria, he shall be required to demonstrate to the satisfaction of the committee and, ultimately to this Court, that, during the period between the date of this opinion and his reapplication:

1. He has secured and maintained gainful employment;
2. He has kept the peace and been of good behavior;
3. His writings and other conduct are consistent with his ability to take the attorney's oath in good faith;
4. His previous motor vehicle and driving violations and any resulting sanctions in the states of Georgia and Utah have been satisfied and are no longer outstanding;
5. He has performed *pro bono publico* services of a substantial and continuing nature;
6. His post-1993 conduct and achievements outweigh the misconduct and other detrimental factors detailed in this opinion and, thus, are better indications of his moral character and fitness to practice law than his previous misconduct.

Accordingly, we hereby deny Roots's application without prejudice to his reapplication at some later time (no sooner than two years) when a more accurate and adequate assessment of Roots's professed rehabilitation can be undertaken.

EXHIBIT A

REPORT OF THE COMMITTEE ON CHARACTER AND FITNESS REGARDING ROGER ROOTS

Roger Roots is recent graduate of Roger Williams Law School and a applicant for admission to the Rhode Island Bar. Mr. Roots has a problematic history which has necessitated an investigation and a hearing into his moral character and fitness as required by Article II, Rule 3. On the one hand, Mr. Roots has an exemplary record in college and in law school. On the other hand, for a period of some five years ending in 1990, he exhibited gross disrespect for the law, which disrespect was exacerbated by a stream of extremist writings, some of which have continued into the near past. In large measure, resolution of Mr. Roots' candidacy boils down to a question of whether one should emphasize the pre-1991 Mr. Roots or the man who post-dates that period. The issue is compounded by the First Amendment

implications of considering content of his numerous political writings, some of which have attacked our system of laws and others of which have been on occasion blatantly racist.

On balance, a majority of the Committee on Character and Fitness (the Committee) believe Mr. Roots should be given the benefit of the doubt, and that the decision here should be made on the basis of his actions, not his political opinions.

1985-1990

Roger Roots grew up in rural Montana. He left home in 1985, the spring of his freshman year in high school. For the next several years, he criss-crossed the country, supporting himself as an itinerant worker while at the same time obtaining his G.E.D. He ran afoul of the law in Florida in 1985, first with a shoplifting charge, and then, having ignored the terms of his probation, with a series of probation violations which culminated in a resisting arrest charge, a felony under Florida law. For this final offense, he was first held, and later violated on his probation for failure to report. He ended up serving a total of some 51 weeks in prison.

On his return to the West, Mr. Roots attended Northwest Community College in Powell, Wyoming. There he was arrested and charged by the federal government with being a felon in possession of firearms in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) and with the possession of an unregistered firearm in violation of 26 U.S.C. §§ 5845(e), 5861(d), and 5871. He pled guilty to the registration count. On January 10, 1992, he received a the sentence mandated by the Federal Sentencing Guidelines: 20 months in federal prison terminating on April 4, 1993.

The count of conviction, the registration count, involved a homemade weapon which apparently was constructed as part of a class project. The dismissed counts, however, involved the possession of substantially more serious armament: an AK-47 rifle, a 12 gauge shotgun, a .38 caliber revolver and a .22 caliber semi-automatic rifle. In obtaining several of these weapons, Mr. Roots was required to fill out forms on which he misrepresented his status as a Florida felon.

At several points during this period Mr. Roots briefly used an alias. There is no indication that his purpose was to facilitate further violations of the law.

The Committee views this conduct as serious and potentially disabling to his candidacy. The Committee recognizes, however, that all of this conduct occurred during a five year period which ended approximately a decade ago. At the time Mr. Roots was a very young (and apparently very angry) young man. The Florida charges, particularly the felonious resisting arrest, may well have overstated the seriousness of the actual conduct, as indeed the federal judge who sentenced Roots on the weapons charge explicitly found. As for the weapons charges themselves, they apparently resulted from some kind of far-right survivalist gesture

designed to assert a citizen's right to possess weapons, including essentially military weapons, before such possession was banned by the Government. The Committee has received no evidence of a more traditional criminal purpose.

Rhode Island has never made conviction of a felony an absolute bar to the practice of law. Several persons have been admitted to practice here even after conviction of violent felonies. The Committee views the continuing nature of Mr. Roots' offenses to be serious. In particular, the Committee is concerned about the misrepresentations on the gun applications. On the other hand, the Committee has no evidence that Mr. Roots has done anything illegal for a full decade. Given this lapse of time and the intervening events, the Committee does not believe that his criminal conduct by itself renders Mr. Roots ineligible.

Extremist Positions

Mr. Roots has a substantial history of advocating far-right survivalist-type views. He has made statements which directly disparage the rule of law, using such inflammatory phrases as "the Zionist occupation government" and the like. At times, his writings have included explicitly racist statements. Mr. Roots has testified that many of his more extreme statements grew out of angry ignorance, before he had ever been to college; and that college and law school have moderated his views, although they remain at the far right end of the political spectrum.

The committee believes that any weighting of an applicant's political beliefs is fraught with constitutional peril. The Supreme Court has observed that " 'mere unorthodoxy [in the field of political and social ideas] does not as a matter of fair and logical inference negate 'good moral character' ". Further, under the First Amendment, "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law." In particular, the State cannot "penalize [a bar] petitioner solely because he personally… 'espouses illegal aims' ".

The Committee acknowledges there may be circumstances where the First Amendment will not prevent this Court from assessing communications or conduct which bear on the fitness to practice law. Similarly, Rule 8.4(d) of the Rules of Professional Conduct requires that an attorney not engage in conduct prejudicial to the administration of justice which includes but is not limited to "harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, nationality, or sex." Presumably disciplinary action could be taken for conduct violating this Rule. But any foray into this area based upon speech alone is problematic. As the Supreme Court has noted, the requirement of "good moral character" is "unusually ambiguous" and being "easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."

Roger Roots has been involved in extremist political activity. He has flirted with aggressive anti-system views and has made explicit racist statements, although the latter appear to date back to his period of imprisonment in 1992. Certain of his statements are sufficiently extreme to cause one to doubt the soundness of his judgment. However, to do so in this context is to penalize him for the content of his views, precisely what the First Amendment prohibits. Consequently, and in the absence of recent *Conduct* demonstrating unfitness, the Committee believes that Mr. Roots' extremist writings do not rise to the level that should require this Court to press the constitutional envelope by excluding him from the practice of law.

The Bar loses as well as gains when the fringes of diverse opinion are excluded from its membership. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." The Committee believes that neither the Bar nor the Court is so fragile that it cannot survive an attorney whose politics may be outlandish or even egregiously offensive. As an attorney, Mr. Roots will have an ethical obligation to abide by Rule 8.4. He has stated in sworn testimony that he will be able to do so. He has also testified that he can and will support the laws and Constitution of Rhode Island and the United States, all of which proscribe discrimination on the basis of race. The Committee is not able to forecast his inability to live up to this obligation.

1994-2000

Mr. Roots was released from federal prison on April 4, 1993. Since that time, his achievements have been impressive. He graduated at the very top of his class in college. In law school he was a member of the Law Review, the executive editor of the student newspaper, and the student president of the school's chapter of the Federalist Society for Law and Public Policy studies. He has won several national writing competitions and has graduated near the top of his law school class.

Two deans of Roger Williams Law School testified on his behalf, Deans Cogan and Harrington. Both stated that Mr. Roots has been an active and valuable member of the law school community. Both stated that he has been a very motivated student, always prepared and always ready to help his fellows. They made these statements knowing of his criminal record, which he had disclosed on his law school application forms. They were not conversant, however, with his past extremist political writings. Both stated their belief that, if given the opportunity, Mr. Roots would prove to be a credit to the Bar.

Candor Before the Committee

Mr. Roots fully disclosed both his criminal record and his past use of aliases on the Bar questionnaire. He did not disclose his political writings, but he was not asked to do so. In the course of the hearing, questions arose concerning Mr. Roots' candor in answering certain questions on his law school application, particularly

those relating too past employment — a failure to list his position as correspondent to a far-right newspaper as a job and the reasons for his termination from a senatorial campaign. The Committee concludes that Mr. Roots was not being deliberately evasive on these points.

Mr. Roots promptly furnished the Committee with any and all materials requested. His file is now voluminous with the materials which he supplied. Appearing before the committee, he was not a carefully prepared witness. Many of his answers seemed confused, as he groped for explanations of decade-old aberrant behavior. He did not, however, appear consciously untruthful. The Committee can find no substantial evidence which would support the conclusion of lack of candor.

Conclusion

For these reasons, the Committee concludes that Mr. Roots meets the minimum requirements for the admission to the practice of law and recommends to this Court that it admit him to the Bar of the State of Rhode Island.

EXHIBIT B

CONCURRING REPORT TO THE SUPREME COURT ON THE APPLICATION OF ROGER ROOTS

I write this separate report to the Court because, while I agree with the Majority that neither Mr. Roots' personal beliefs nor his past criminal convictions should disqualify him from being a member of the bar, I cannot fully agree with their assessment of his credibility and candor before this Committee.

I, like the majority, question whether an applicant's political or personal opinions should disqualify him from membership in the bar, so long as they do not manifest themselves in illegal, unethical or otherwise improper conduct. Furthermore, I join with the majority in the belief that Mr. Roots' past criminal conduct should not, by itself, disqualify him from the practice of law, given the nature of his crimes and the time that has passed since they were committed. During my tenure, the Committee has been especially concerned with crimes involving theft or dishonesty. An attorney is often placed in position of trust where the only real protection his client or the public has from an abuse of that trust is the attorney's own integrity and sense of honesty. Although the method Mr. Roots used to commit his last crime, lying on gun applications, and the method he used to avoid prosecution, use of aliases, certainly involved dishonest conduct, the underlying crimes did not.

In reviewing Mr. Roots' criminal record in preparation for his testimony, I did not perceive his crimes as demonstrating a dishonest heart so much as a disregard for any law which was inconvenient for him or conflicted with his political beliefs or personal desire. This attitude appeared to manifest itself when he argued with

the police officer in Florida, decided to leave Florida rather than comply with the requirements of his probation, and lied on several gun applications so he could purchase the weapons that he wanted.

In the documents he submitted and his testimony, I hoped to see some indication that he realized that the law was more than just something to be ignored or gotten around when inconvenient or in conflict with his personal beliefs or desires. I was also hoping for candor from Mr. Roots and, as a Committee member, I believe, I was entitled to receive it. Despite his protestations of candor and production of voluminous records, I, like the minority, do not believe that Mr. Roots was fully open and frank with us. The documents he submitted as part of his application as several points provided only half truths, e.g. his characterization in his bar application of the reasons for his use of aliases, his omissions from his law school application of his attendance at the very school at which he was arrested and later convicted of having possession of firearm (whether seized from a school dormitory or his apartment, as stated in the bar and law school application, is not clear), and his mischaracterization of the reasons for his being terminated from the senator's campaign.

In reviewing the recommendations before the hearing, I questioned whether Mrs. Justice Goldberg was truly aware of Mr. Roots' political beliefs listing Adolph Hitler, among others, as evidence of the superiority of the white race, and likening the physical characteristics of African Americans to apes, R. Roots, "100 Truths and One Lie" (1993?), and supporting the Freemen's right to operate their own judiciary, complete with the issuance of liens on the property of public officials, Roger Roots, "Five Freemen Convicted One Acquitted in Federal Show Trial," *The Jubilee Newspaper,* Vol.10 No. 4, April 13, 1998, "How Strong Is the Case Against the Freemen?" *The Jubilee Newspaper,* Vol. 9, No. 3 (1997 or 1998). I also wondered if Mr. Wiernusz had truly read much that Mr. Roots had written. In fact, Mr. Roots admitted that Ms. Justice Goldberg was not aware of his political/social beliefs, which he said he had held in the past. Neither was Mr. Wiernusz aware of any of his Freemen or racial writings, but only his law school articles.

I do not know if these people would have recommended Mr. Roots if they were as fully aware of his writings and personal beliefs as they thought they were, but it does concern me that Mr. Roots offered recommendations of two people who were misinformed about issues of which they represented they were aware. I do not know whether Mr. Roots knew the content of the recommendations of Mrs. Justice Goldberg and Mr. Weirnusz before they were submitted, but if he did, I believe his actions were misleading to the committee and disservice to his employer and friend.

I questioned Mr. Roots as to whether he believed that there should be an extra judicial system and whether the Freemen had the right to file liens that they issued themselves. His answer was that he did not. I find it difficult to reconcile his answer at the hearing with his published writings as recently as 1997 and 1998.[2]

When Mr. Roots asked if there was further information he could provide, I explained that may concern was with his candor and credibility. His response was to immediately deny testimony which he had clearly given just a few minutes before, causing his attorney to stipulate that he had testified to that effect.

I cannot go so far as the dissent in characterizing some of these statements as flat out lies but I certainly was left with the impression that documents submitted in support of his application and his testimony contained a number of half-truths and evasive answers. It appeared that he was trying to soften the hard facts of his criminal record and avoid inquiry into his political/social writings, by evasive, incomplete or misleading statements. Nevertheless, Mr. Roots certainly did disclose his criminal record in detail and, although he did not disclose his political or social beliefs, he was not asked to do sol Moreover, anyone of the instances I described above would not cause me to vote against his application. I recognize that on paper Mr. Roots has made a significant effort to rehabilitate himself and that successful rehabilitation is a goal of the criminal justice system. Mr. Roots pleaded passionately before the Committee that he be given an opportunity to work as a attorney on behalf of prisoners in need of representation. If Mr. Roots had been as frank as the majority felt he was, he would have made my decision much easier.

Weighing all of these factors, I join with the majority in recommending his admission to the bar, however, I do so with significant doubt as to the wisdom of my decision, and therefore I, like the minority, would urge the court to view Mr. Roots' entire record and interview him carefully to determine whether it believes he has the character and fitness to be a member of the bar.

Respectfully submitted,

Brendt W. Anderson

EXHIBIT C

MINORITY REPORT APPLICATION OF ROGER ROOTS

To: Supreme Court of Rhode Island

Re: Bar Application of Roger Roots

This letter is written as dissenting report to the majority vote of the Committee regarding Mr. Roger Roots. Unlike the majority, I believe that the Court should deny admission to the Bar to Mr. Roots. The basis for this belief is threefold:

[2] (n.2 in Exhibit B.) See e.g., Roger Roots, "Five Freemen Convicted One Acquitted in Federal Show Trial," *The Jubilee Newspaper,* Vol.10 No. 4, April 13, 1998, where it is stated by the author, "The bank fraud and false claim charges stemmed from documents issued from the common-law court of the Freemen Justices over an extended period. Such charges had occupied more than half of the two week trial. The Jury, however, even though selected and indoctrinated according to the de facto legal system-rejected this entire aspect of the case." and Roger Roots, "How Strong Is the Case Against the Freemen?" *The Jubilee Newspaper,* Vol. 9, No. 3 1997 or 1998, where Mr. Roots wrote, "For once, a judge was asked to rule on the validity or invalidity of the Freemen financial instruments, all of which are backed by judgments and liens. Ultimately, the notes are redeemable upon liens lawfully placed on the oaths or property of public officials who have violated the law. Thus the chain of recovery is lawful. It is where the buck stop that is so unsettling to de facto regime that now occupies America. It is no wonder that the regime is now waging an around-the-clock war against the common-law movement?"

I. Criminal Record. Mr. Roots has been convicted of various misdemeanors and two felonies. The last conviction resulted in his incarceration in a Federal penitentiary for a term ending in 1993, the year he returned to college and only three years before entering law school. His probation period ended in 1996.

II. Untruthfulness. Mr. Roots has affirmatively lied on his law school application and his application for admission to the Bar, and I believe has carefully avoided disclosing aspects of his past which may rise to the level of tacit untruthfulness. He also by his own admission, lied on the gun permit applications by affirming that he had not been convicted of a felony.

III. Mr. Roots' on the legal system, as evidenced by his publications. I believe that the Committee's charge to inquire into a candidate's moral character and fitness to practice law encompasses a reasonable review of the candidates attitudes and opinions on social issues, to the extent that such views may reflect on his or her ability to take in good conscience and uphold the oath required of all attorneys or on his or her ability to practice law in accordance with the equitable principles enunciated in our rules of professional responsibility. Mr. Roots' writings evidence to me a severe deficiency in this regard.

The record transmitted to the Court contains the full written documentation bearing on the above matters. However, I would like to summarize the contents of some of those documents that relate to my concerns.

Criminal Record. The file discloses many arrests and convictions while Mr. Roots led a basically itinerant life in Florida and other southern states. These occurred when Mr. Roots was young, in some cases in his teens. As the majority of the Committee has noted in its deliberations, taken individually these matters may seem remote in time and relatively minor in severity. However, the last conviction was for a felony, resisting arrest, and in his testimony Mr. Roots conceded that he knew or should have known that the conviction was a felony which would remain on his record if he did not complete his probation. Mr. Roots then fled the jurisdiction and returned to Montana, his home state, and therefore did not complete his probation in Florida. Despite that fact, Mr. Roots obtained numerous weapons the possession of which is prohibited, by federal law, to convicted felons. Mr. Roots testified that he obtained these weapons at various times from various dealers, and that he was required to sign a form at each dealership attesting to the fact that he was not a convicted felon. Each time Mr. Roots falsely replied "No" on the form, and concedes now that he probably knew at the time that the statement was false, and certainly knows it now. It is also worth noting that these weapons were not ordinary handguns; they consisted of an automatic pistol, an automatic rifle with at least 500 rounds, and an assault rifle commonly known as an AK47.

When Mr. Roots exhibited in a college class a homemade air gun that he constructed, the authorities, apparently knowing that he was a convicted felon, raided his dorm room and found the air gun and also the additional weapons. Ultimately, Mr. Roots pleaded guilty to a single charge concerning the air gun, and the remain-

ing charges were dropped. He conceded in his testimony that the other weapons were present and were seized, and that possession of them violated the law as well as the weapon for which he pleaded guilty. Mr. Roots then served time in federal prison, was released in 1993. His probation ended in 1996, while he was in law school.

I believe that the series of convictions is a serious matter. There was no good reason for Mr. Roots to possess such a number of high-powered weapons; in fact, in his testimony before the Committee he could not come up with a coherent reason for purchasing the weapons. Doing so knowingly as a convicted felon is inexcusable, in my view, and should be a bar to his becoming an attorney.

Truthfulness. Mr. Roots was untruthful in at least three areas.

The first concerns an item on his law school application regarding previous employment. The question asks for ceasing employment. Mr. Roots listed a job with the Committee to Reelect Conrad Burns (a Senator from Montana) and he stated that the reason for leaving was conflict with his school schedule. In fact, he was terminated from the job because of his unsavory associations with white supremacist activists. He not only admits this now, but also published several letters to the editor to the local newspaper at the time which bemoaned his firing for that reason. These letters to the editor were also untrue in some respects. He states in them that the reason for his firing was that the Young Republicans at his college, a group that he founded, had a Ku Klux Klan activist as a member, whom Mr. Roots says in his letter to the editor that he barely knew the man. That is untrue; he in fact befriended the man at college, and requested that he helped found the Young Republicans on campus and become its vice president. All of these matters took place after he was released from prison, and within his probationary period.

The second area of untruthfulness concerns an answer given by Mr. Roots in response to a question on the Bar application about any aliases used by the applicant. Mr. Roots listed three aliases, Carl Davis, Rodgers Roop and Roger Bell, and stated on the application that they were used for purposes involving attending school, writing and telephone fundraising. However, in his testimony before the Committee, he revealed after questioning that the real reasons were quite different. The alias Carl Davis was used while Mr. Roots was evading the law after he was indicted for the weapons charge in Montana. Another alias, Roger Bell, was used by the Conrad Burns campaign to hide his true identity in making salary payments to him. Apparently, Mr. Roots falsely endorsed these paychecks and deposited them into his bank account. It is unclear if he ever paid income taxes on these amounts.

The third area, already mentioned above, is that Mr. Roots falsely stated on his gun applications that he was not a convicted felon.

I believe that Mr. Roots has shown a pattern of untruthfulness that is not consistent with practicing law.

Ability to Take Oath in Good conscience. Of all the areas of concern, this is to me the gravest. Mr. Roots has shown by publications and articles he has written to be a committed racist, and has shown utter disdain for the fairness of the legal system and our system of government. These views were advanced not in the far distant past, but as recently as 1998, when he was well through law school. His views in this regard are summarized in two publications. The first is a pamphlet that Mr. Roots apparently composed largely while he was in prison, and which was released no earlier than 1993, since the bibliography in the work lists references published in 1993. The title of the work is "100 Truths and One Lie" and is a manifesto proving the inferiority of blacks as compared with whites. Here are some samples from this enlightening work:

> Fact # 6: Blacks are 6 times as likely to have I.Q.'s of 50 to 70 which put them in the slow learner (retarded) category, while Whites are ten times more likely to score 130 or over.
>
> Fact # 17: among human races numerous studies have been made of the comparative weight of White and Negro brains with results that fell within the range of about an 8-12 percent lower weight for the Negro brain…
>
> Fact # 19: The thickness of the supragranular layer (the outside layer) of the Negro brain is about 15 percent thinner, and its convolutions are fewer and more simple, on average, than that of the White brain.
>
> Fact # 20: The frontal lobes of the Negro brain, responsible for abstract conceptional (sic) reasoning, are smaller relative to body weight, less fissured, and less complex than those of the white brain.
>
> Fact # 24: The Negro skull, in addition to having a smaller brain volume and thicker cranial bones than that of the White, is prognathous; i.e. the lower face projects forward, rather in the manner of an animal's muzzle. In consequence, the Negro jaw is substantially longer, relative to its width, than the White jaw. A feature of the Negro lower jaw is its retention of a vestige of the "simian shelf", a bony region immediately behind the incisors. This simian shelf is a distinguishing characteristic of apes, and it is absent in Whites.
>
> Fact # 46: Scientific research on what constitutes human beauty, in which 300 judges of various backgrounds were shown portrait photographs and asked to rate the beauty of the individual's face, has revealed that Nordic Whites are universally recognized as the most attractive humans, even by Blacks…"

The other publications are those Mr. Roots has written as a reporter for *The Jubilee.* This is an extreme right-wing publication, and Mr. Roots' articles have focused on racial matters and the trials involving the Montana Freemen. The Freemen believe that, as "organic white Americans" (as Mr. Roots calls them), they are not subject to the laws of the United States. They conduct their own trials and appeals in their own "common law" courts, and issue "liens" against the assets of public officials whom their "courts" believe trample on their rights. These include sheriffs, police officers, lawyers and judges. Mr. Roots apparently believes that these liens are legally valid. He states as follows:

In commenting on the liens and notes (January 1997): "Ultimately, the notes are redeemable upon liens lawfully placed on the oaths or property of public officials who have violated the law. Thus the chain of recovery is lawful. It is where the buck stops that is so unsettling to the defacto regime that now occupies America. It is no wonder that the regime is now waging an around-the-clock war against the common law movement?(sic)"

Mr. Roots also apparently believes that the legal system is out to get the Freemen. Here are some samples of his statements

In commenting on the trial of the Montana Freemen (January 1997): "With the prosecution of the Montana Freemen characters, the Zionist occupation government is again targeting what it perceives as the most serious threat to its power: law without lawyers and courts without legislative or executive sanction…" In that same article he refers to public defenders appointed by the Court as "public pretenders" and laments that "[e]ven during the 1996 stand-off at Justus, Montana, U.S. Attorney Matterucci was expressing hope that the men would all surrender and accept government-licensed lawyers. (Isn't it odd that U.S. prosecutors desire their opponents to be represented by bar attorneys?) Later, only those who accepted bar-lawyers were granted bail."

Again, these are not statements made many years ago; the above-referenced articles have been penned while he was attending Roger Williams Law School. I believe that these positions show disrespect and disregard for the legal system and for the many men and women who devote themselves to the practice of law and are inconsistent with the oath that all attorneys are required to take.

Mr. Roots now states that he is not a racist, and would have no problem serving persons of all races and backgrounds as an attorney. However, the Committee, I believe, has every right to examine all the facts and circumstances in order to evaluate the applicant's assertions. Given the facts of this case, I don't accept Mr. Roots' current assertions. I don't think he can in good conscience take the oath of an attorney to treat all members of the public and the legal system, such as judges, clients, and other attorneys with respect. His insulting, disdainful writings about judges, "bar association lawyers", "public pretenders" the "Zionist government" and the like can't be erased by merely stating that all has changed. These writings were not from many years ago, in a misspent youth. They continued right up to at least 1998, and, based on Mr. Roots testimony, even up to today. They were not disclosed or mentioned anywhere; I located them personally on the Internet. I believe that these matters, when taken together with the criminal charges and the untruthfulness, should prevent Mr. Roots from becoming a member of the bar. I know that the majority of the Committee finds individual reasons for overlooking each of these matters taken individually, but I would urge the Court to look at the record in its entirety, and consider whether Mr. Roots is the kind of person that should be representing the Court and the Bar as an attorney. I do not believe that he is.

Respectfully submitted,

Steven M. McInnis

Chairman

April 19, 2000

In re Hinson-Lyles

864 So.2d 108 (La. 2003)

Per Curiam

This matter arises from a petition by Kelle Hinson-Lyles seeking admission to the Bar of the State of Louisiana. For the reasons that follow, we deny the petition.

Underlying Facts and Procedural History

In her application to sit for the July 2002 Louisiana bar examination, petitioner disclosed that she was convicted of a felony sexual offense in 1999. By letter dated June 12, 2002, the Committee on Bar Admissions ("Committee") notified petitioner that in light of her conviction, she would not be certified for admission to the practice of law. A majority of this court subsequently granted petitioner permission to sit for the bar, subject to the condition that upon her successful completion of the exam, she apply to the court for the appointment of a commissioner to take character and fitness evidence. Petitioner successfully passed the essay portion of the July 2002 bar exam. We thereafter appointed a commissioner to take evidence and report to this court whether petitioner possesses the appropriate character and fitness to be admitted to the bar and allowed to practice law in the State of Louisiana. We also authorized the Office of Disciplinary Counsel to conduct an investigation into petitioner's qualifications to be admitted to the bar.

Proceedings before the Commissioner

The commissioner conducted a character and fitness hearing on February 18, 2003. The commissioner received documentary evidence and heard testimony given by petitioner and her witnesses. This record reveals that in May 1996, petitioner received an undergraduate degree in business and office education. With the assistance of her father, who was then the Superintendent of the Vernon Parish School Board, petitioner obtained a teaching position at DeRidder High School in Beauregard Parish. In May 1998, as petitioner was completing her

second year of teaching at DeRidder High, she began a sexual relationship with M.C., a fourteen-year old student in her ninth-grade English class. Petitioner was twenty-three years of age at this time.

Over a period of approximately six weeks, petitioner spoke with M.C. on the telephone or saw him in person nearly every day. Because M.C. was too young to have a driver's license, petitioner arranged to pick him up in an alley behind his home and to take him back to her house, where they engaged in sexual intercourse. In addition, petitioner and M.C. drank alcohol supplied by petitioner, and on one occasion, petitioner allowed M.C. to smoke marijuana that he had brought to her home.

On the evening of July 11, 1998, petitioner picked up M.C. and brought him back to her house, where they engaged in sexual intercourse. However, unbeknownst to petitioner or M.C., the Beauregard Parish Sheriff's Office had received a report from M.C.'s father that his son was "having a sexual affair with one of his school teachers." The officers agreed to investigate the complaint. Upon arriving at petitioner's home, the officers knocked on the door and announced themselves. Petitioner turned off the lights in the house and told M.C. to hide. Meanwhile, petitioner dressed and eventually opened the door, telling the officers she had not heard the knocking because she had been washing her hair. The officers asked whether M.C. was in the house; petitioner lied, said that he was not, and denied he had been inside her home. The officers then requested and obtained petitioner's permission to search the home. M.C. was found hiding in a bedroom closet, underneath a pile of clothes.

Petitioner was arrested and charged with five counts of carnal knowledge of a juvenile and three counts of contributing to the delinquency of a juvenile. On February 25, 1999, pursuant to a plea agreement, the State filed an amended bill of information charging petitioner with two counts of felony carnal knowledge of a juvenile and one count of indecent behavior with a juvenile, also a felony. Petitioner pleaded guilty to the charges in the amended bill of information and was placed on supervised probation for a period of three years with special conditions.

Following her conviction, petitioner was terminated from her position at DeRidder High and she was required to forfeit her teaching certificate to the Louisiana State Department of Education. Petitioner's probation concluded on February 25, 2002, and she has subsequently received an automatic first offender pardon.

At the character and fitness hearing, petitioner admitted she knew her relationship with M.C. was wrong. At the conclusion of the hearing, the commissioner issued detailed findings of fact and conclusions of law and recommended that petitioner be conditionally admitted to the practice of law in Louisiana, subject to a probationary period of two years.

The Committee timely objected to the commissioner's recommendation, and oral argument was conducted before this court.

Discussion

This court has the exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the Bar of this state. Among other requirements for admission to the Bar, applicants must demonstrate by competent evidence that they have "good moral character and the fitness necessary to practice law in the State of Louisiana."

The primary purpose of character and fitness screening is to assure the protection of the public and to safeguard the administration of justice. The term "good moral character" includes, but is not limited to, the qualities of honesty, fairness, candor, trustworthiness, observances of fiduciary responsibility and of the laws of the State of Louisiana and of the United States of America, and a respect for the rights of other persons. One of the specific factors to be considered in making a determination of good moral character and fitness is whether the applicant has been convicted of a felony.

This court has never taken the view that a prior felony conviction will automatically bar an applicant from admission to the practice of law, and we decline to adopt that approach at this time. Rather, we prefer to consider the facts of each case based on the totality of the circumstances which brings the applicant before us. In other words, a felony conviction is simply one of many factors to be considered in determining whether an applicant presently possesses good moral character and fitness.

After reviewing the record developed in this matter, we find that serious character and fitness concerns are present which necessitate the denial of petitioner's application for admission to the practice of law. Setting aside for a moment the gravity of any felony sexual offense, particularly those involving a juvenile victim, we are extraordinarily troubled by the factual circumstances underlying the crimes of which petitioner was convicted. Petitioner occupied a position of trust as a teacher, yet she knowingly and intentionally breached that trust to gratify her own needs. Knowing full well that her conduct was immoral, inappropriate, and illegal, petitioner nevertheless carried on a sexual affair with her fourteen-year old student for nearly two months. Far from discouraging M.C.'s involvement in the relationship, petitioner in fact fostered and encouraged it. She candidly admitted during the character and fitness hearing that the affair would have continued indefinitely but for the fact that M.C.'s father called the police. On more than one occasion, petitioner supplied alcohol for consumption by a minor child, and she countenanced and permitted his use of marijuana while in her home. Finally, when confronted by law enforcement officials, petitioner lied, denied any involvement with M.C., and hid him in a closet in an effort to avoid detection by the police and his parents. Taken as a whole, we find this conduct is not an isolated instance of poor judgment on petitioner's part, but is rather evidence that she fun-

damentally lacks the character and fitness to be admitted to the practice of law. Accordingly, we must reject the commissioner's recommendation that petitioner be granted the privilege of practicing law in Louisiana.

Decree

After hearing oral argument, reviewing the evidence, and considering the law, we conclude petitioner has failed to meet her burden of proving that she has "good moral character" to be admitted to the Louisiana State Bar. Accordingly, it is ordered that Kelle Hinson-Lyles' petition for admission be and is denied.

WEIMER, J., concurring.

I find the past criminal conduct of the petitioner reprehensible. However, I believe the per curiam fails to adequately document those facts that led the commissioner to recommend that petitioner be admitted to the bar. At some time in the future, after the lapse of a more substantial period of time from the termination of petitioner's probation and following an evaluation of petitioner's intervening conduct, this court might be called upon to consider whether petitioner has been sufficiently rehabilitated. Therefore, for the sake of completeness, the majority opinion should include the following factual findings of the commissioner which were included in a thorough, thirteen-page report to this court:

- Except for defensive postures mandated by defense counsel, petitioner never denied responsibility for the inappropriate relationship with her fourteen-year old student.

- Until the events leading up to petitioner's guilty plea, she had led an exemplary life with no moral or legal problems whatsoever.

- Petitioner was a model probationer, cooperative, understood she had done wrong, was very remorseful, did more than necessary, wanted to make changes for the good, and owned up completely to her responsibility. Both of her probation officers and counselor confirm all issues were met, she is not a re-offender threat, and all support her application.

- Psychiatric and psychological evaluations by very competent experts in those fields concluded that at the time of the incident petitioner knew right from wrong, but in an immature way. She was a budding adolescent emotionally. She was very naive and inexperienced sexually. (This was her first sexual encounter.) Dr. Harper, psychologist, found no evidence of mental predisposition to re-offend. Dr. Ware, psychiatrist, found a very low risk to re-offend (there being no absolutes).

- All witnesses and exhibits pertinent thereto have a consensus—petitioner presents one of the best examples of how one can change, her maturity is now impressive, she actually has greater resilience than usual in facing ethical demands, she will not re-offend, and they support her application.

- Her only opportunity thus far in the field of law gained her an unqualified recommendation from her employer, a member of the judiciary.

> • She is now married, expecting a child, and by all accounts available, is functioning as a normal young married professional.

The commissioner made particular note that at the time of the incident, petitioner was "alone, had no prior experience, [was] immature and at a vulnerable position in her life." He also concluded that petitioner has done all that can be done to achieve the rehabilitation necessary for admission to the practice of law.

In conclusion, the commissioner stated:

> This is a case of past conduct. Based simply on the cold record, the obvious seriousness of the charge, and the self evident interest of society, one would be likely to view with great suspicion an offender's application to practice law some five years after commission. Therein lies the problem. What to do when, within a five year span, by clear and convincing evidence, an applicant satisfies the requirements of admission.
>
> …
>
> I have not found, or been cited a decision by this Court addressing our particular situation. The Commissioner's report in the matter _In re: Michael Lawrence Bernoudy, Jr., pending before this Court, was submitted. Though involved, carnal knowledge was only one of the complaints. Further, the recommendation was greatly influenced by a finding of lack of candor and cooperation on the part of Mr. Bernoudy, Jr., elements not found in the instant matter.
>
> This is a 1998 incident…. It would be ironic, to say the least, for society to admit to law school, with full disclosure, then permanently prevent enjoyment notwithstanding passing all scholastic requisites. Further, I don't feel the level of misconduct herein rises to the level of examples cited. Also, almost five years have elapsed. If she had been in practice and disbarred as a result, she could now apply for reinstatement.

In light of "the totality of circumstances involved," the commissioner recommended that petitioner be conditionally admitted to the practice of law in Louisiana, subject to a probationary period of two years. The commissioner further recommended that during the period of probation, petitioner be required to provide an affidavit to the Supreme Court Committee on Bar Admissions on a quarterly basis, stating that she has not committed or been accused of any misconduct; otherwise, her probationary period may be extended for an additional two years, or her conditional right to practice may be terminated or she may be subject to other discipline pursuant to the Rules for Lawyer Disciplinary Enforcement.

In summary, while I agree that petitioner should not be admitted to the practice of law at this time, I believe that it is important to chronicle all the facts, both favorable and unfavorable, reflected in the record. Therefore, I respectfully concur in the majority opinion of this court.

KNOLL, J., concurring.

I agree with the majority that petitioner fundamentally lacks the character and fitness to be admitted to the practice of law. I write separately to express my concern that this case demonstrates the need for an admission rule in tandem with permanent disbarment. In my view, it is a mockery of our rules to allow someone to apply for admission when the undisputed conduct at issue is a recommended ground for permanent disbarment.

Drafting conduct rules governing the legal profession is a very difficult and grave responsibility that we exercise with great caution. However, it is clear in my mind that when conduct is so egregious that it constitutes grounds for permanent disbarment, then the person involved should likewise be permanently prohibited from applying for admission.

The petitioner before us should never be admitted to the practice of law because her admitted and egregious conduct constitutes grounds for permanent disbarment.

KIMBALL, Justice, dissenting.

In my view, this case presents a tragic example of this court's inability to formulate definitive rules to cover these difficult character and fitness issues. In this particular case, this applicant was allowed to attend law school, notwithstanding the fact that she was on active felony probation and had surrendered her teaching certificate, thereby effectively disqualifying her from her original profession. After successfully completing her studies, this court allowed the applicant to sit for the bar examination, which she passed.

This court's rules relating to admission to the bar of the State of Louisiana exist to protect the public and to safeguard the administration of justice. The required assessment of moral character and fitness looks to an applicant's record of past conduct. Admission may be denied on the basis of an applicant's record of past conduct when such record manifests "a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant." When an applicant is found to have engaged in conduct which at that time would have constituted grounds for an unfavorable recommendation, then that applicant bears the burden of proof to affirmatively show character rehabilitation and that such inclination or instability is unlikely to recur in the future.

In the instant case, the record clearly reveals that the applicant overwhelmingly proved that her character has been rehabilitated and that such inclination or instability is unlikely to recur in the future. For example, the supervisor of applicant's first five months of probation described the applicant as a model probationer and recommended her for admission to the bar. Additionally, the attorney who previously represented applicant in connection with the criminal charges that are

the subject of this investigation testified that applicant took responsibility for her actions from the outset and, because the attorney had "the utmost confidence in her," wrote a strong letter of recommendation to Southern University Law Center and, later, the National Conference of Bar Examiners. He also assisted the applicant in obtaining a position as a law clerk in the Ninth Judicial District Court. A Shreveport psychiatrist who evaluated the applicant opined there is a very low risk that the applicant will commit a sexual offense in the future. The director of the clinical education department at Southern University Law Center who supervised the applicant's class work testified that the applicant was very dedicated, extremely committed, and worked all the time to make "sure that it's right." The judge for whom applicant worked as a law clerk reported that her work has been excellent, that she is very conscientious, and that she gets along well with others in the court. The judge highly recommended the applicant for admission to the bar "regardless of her past situation or the circumstances." After hearing all the evidence in this case, the commissioner found the applicant understood her past behavior was wrong, was remorseful, and wanted to make positive changes in her life. The commissioner found that psychiatric and psychological evaluations showed applicant knew right from wrong, but in an immature way such that she was emotionally a budding adolescent when the behavior at issue occurred. Finally, the commissioner found that the applicant is now married, expecting a child, and by all accounts is functioning as a normal young married professional.

Although this appears to be an unusual case with extraordinary facts, it is clear to me that the applicant has produced an impressive amount of evidence proving that she has good moral character and the fitness necessary to practice law in the State of Louisiana. The medical evidence consistently reveals that there is a very low risk the applicant will re-offend. In concluding that this case presents serious character and fitness concerns that necessitate the denial of the petitioner's application for admission to the practice of law, the majority disingenuously focuses solely on the applicant's past deplorable conduct and fails to consider or even mention the overwhelming evidence that the applicant has turned her life around. The retired judge appointed as a commissioner by this court to hear evidence in this case found as a matter of fact that the applicant has done all that can be done to achieve the rehabilitation necessary for admission to the practice of law. In reaching its decision to deny the applicant admission, the majority simply ignores the factual findings made by the appointed commissioner.

The case before us illustrates the need for clear rules detailing what conduct will likely prevent an applicant from being admitted to the bar of our state. In my view, potential law students should be given notice of the types of conduct that will probably preclude them from practicing law before they undertake the challenge of law school and, in many cases, incur substantial debt to acquire a legal education. This court should work with Louisiana's law schools to ensure potential students are given clear information so they can make informed choices.

Under the facts of this particular case, I believe the applicant should be conditionally admitted to the practice of law, subject to a probationary period of two years. As the commissioner found, the applicant has done everything she can to show the necessary rehabilitation. Because the applicant has complied with every requirement presently contained in our rules, it is simply unjust to deny her admission at this juncture.

TRAYLOR, J., dissenting.

In July of last year, Kelle Hinson-Lyles applied to sit for the Louisiana Bar Examination. Her application was opposed by the Committee on Bar Admissions based upon her three 1999 felony convictions. This Court, in its collective wisdom, allowed the petitioner to take the bar examination, upon the condition that she apply to the court for the appointment of a commissioner to take character and fitness evidence. I opposed allowing the petitioner to take the examination and voted, along with Justices Kimball and Knoll, to deny her application.

Ms. Hinson-Lyles took and passed the bar examination and subsequently requested the appointment of a commissioner to take character and fitness evidence. The commissioner held a hearing, took evidence, and found that petitioner possessed the requisite character and fitness to be conditionally admitted to the bar based upon her rehabilitation. This Court now determines that the petitioner should not be admitted to the bar, even though the only new evidence we have before us supports her conditional admission, as recommended by the commissioner that this Court appointed for that purpose.

I do not take the position that Ms. Hinson-Lyles possesses the character and fitness required to be admitted to the bar and, in fact, adhere to my previous determination that she should not have been allowed to sit for the bar examination. I do, however, believe that when this Court allows a person to take the bar examination upon condition, and then that person passes the examination and meets the conditions set before them, it is disingenuous for the Court to then decide that more conditions must be met, especially without stating what those conditions are.

In this case what can the petitioner do that she has not done? Wait and apply later? When or what is the "magic moment" which will show that rehabilitation has occurred? If Ms. Hinson-Lyles applies five years from now, will that be long enough? Ten years? Will she ever be able to show successful rehabilitation? If not, why was she allowed to take the bar examination at all?

Matter of Anonymous

875 N.Y.S.2d 925 (N.Y. App. Div. 2009)

Per Curiam

Applicant passed the February 2008 New York State bar exam and the State Board of Law Examiners certified him for admission to this Court. The Committee on Character and Fitness has completed its investigation of his application for admission, including an interview of applicant.

Applicant has disclosed various student loans with balances now totaling about $430,000. He has stated that the loans are currently delinquent but professes good faith intentions to pay them. He has attributed his nonpayment to the downturn in the economy and bad faith negotiations on the part of some of the loan servicers. Our review of the application indicates that the disbursement dates of the loans cover a 20-year period, from as early as 1985. Applicant has not made any substantial payments on the loans. He has not been flexible in his discussions with the loan servicers. Under all the circumstances herein, we conclude that applicant has not presently established the character and general fitness requisite for an attorney and counselor-at-law.

In re Glass

316 P.3d 1199 (Cal. 2014)

Stephen Randall Glass made himself infamous as a dishonest journalist by fabricating material for more than 40 articles for The New Republic magazine and other publications. He also carefully fabricated supporting materials to delude The New Republic's fact checkers. The articles appeared between June 1996 and May 1998, and included falsehoods that reflected negatively on individuals, political groups, and ethnic minorities. During the same period, starting in September 1997, he was also an evening law student at Georgetown University's law school. Glass made every effort to avoid detection once suspicions were aroused, lobbied strenuously to keep his job at The New Republic, and, in the aftermath of his exposure, did not fully cooperate with the publications to identify his fabrications.

Glass applied to become a member of the New York bar in 2002, but withdrew his application after he was informally notified in 2004 that his moral character application would be rejected. In the New York bar application materials, he exaggerated his cooperation with the journals that had published his work and failed to supply a complete list of the fabricated articles that had injured others.

Glass passed the California Bar examination in 2006 and filed an application for determination of moral character in 2007. It was not until the California State Bar moral character proceedings that Glass reviewed all of his articles, as well as the editorials The New Republic and other journals published to identify his fabrications, and ultimately identified fabrications that he previously had denied or failed to disclose. In the California proceedings, Glass was not forthright in acknowledging the defects in his New York bar application.

At the 2010 State Bar Court hearing resulting in the decision under review, Glass presented many character witnesses and introduced evidence regarding his lengthy course of psychotherapy, along with his own testimony and other evidence. Many of his efforts from the time of his exposure in 1998 until the 2010 hearing, however, seem to have been directed primarily at advancing his own well-being rather than returning something to the community. His evidence did not establish that he engaged in truly exemplary conduct over an extended period. We conclude that on this record he has not sustained his heavy burden of demonstrating rehabilitation and fitness for the practice of law.

I. FACTS

A. Committee of Bar Examiners's evidence

Stephen Glass was born in September 1972, in a suburb of Chicago, Illinois. After early success as a journalist in college and a developing interest in the law, in 1994 Glass was admitted to New York University School of Law but deferred his intended legal training to accept a position in Washington, D.C., with Policy Review magazine.

In September 1995 Glass accepted a position at The New Republic magazine. In early June 1996 he began fabricating material for publication. The fabrications continued and became bolder and more comprehensive until he was exposed and fired in May 1998.

Glass's fabrications began when an article entitled *The Hall Monitor* was published containing a fabricated quotation from an unnamed source disparaging United States Representative Pete Hoekstra for behaving in Congress like an elementary school "super hall monitor." He started by fabricating quotations or sources, and ended by publishing wholesale fictions. He testified that "all but a handful" of the 42 articles he published in The New Republic contained fabrications or were entirely fabricated. He also routinely prepared elaborate reporter's notes and supporting materials to give the false impression to the magazine's fact checkers that he had done all the background work for each article and that his informants had spoken words he falsely attributed to them.

Glass testified at the State Bar Court hearing that he "wrote nasty, mean-spirited, horrible" things about people: "My articles hurt, and they were cruel." He testified that the fabrications gave him "A-plus" stories that afforded him status in staff meetings and also gave particular enjoyment to his colleagues. He said: "Overwhelmingly, what everyone remembers about my pieces are the fake things."

A notable 1996 article was entitled *Taxis and the Meaning of Work.* It was Glass's first cover article and one he viewed as "key" to his successful period of writing for The New Republic. Its theme was that Americans, and in particular, African-Americans, were no longer willing to work hard or to take on employment they consider menial. The article falsely recounted as factual supposed encounters between Glass and three entirely fabricated characters, one a limousine driver, one a taxicab driver, and one a criminal. The limousine driver was depicted as an African-American man who had driven a cab at one time, but now drove a limousine instead because he was "sick of those curry people" and found that limousines attracted beautiful women, or, in the purported words of the driver, gave him "the woo quotient." The author went on to say that he had been permitted to ride along for journalistic purposes with a taxi driver of Middle Eastern descent. The article recounted that the driver stopped for a young African-American passenger—"the type of fare Imran would normally refuse" but felt he had to accept because of nearby police observation. The article describes the pounding music audible from the young fare's headphones, and claims that as they neared his destination, the young African-American man threatened the driver with a knife, hurled coarse abuse at him, and took his wallet. According to the article: " 'These things happen,' Imran said coldly on the drive back downtown. 'I give them whatever they want. I just want my life.' "

Spring Breakdown, published in March 1997, was another example of Glass's fabrications. The theme of the article was that young, conservative Republicans had given up on electoral politics and had turned to drugs and sex. Glass invented a fictional group of male college students attending the Conservative Political Action Conference. To convey the young men's view that conservatives had lost their direction, he attributed to one of them the comment that conservatives were " 'like a guy who has to pee lost in the desert, searching for a tree.' " Glass described the young men using marijuana for an hour, then embarking on a search for a young woman to humiliate. The plan was "to choose the ugliest and loneliest they can find," a person the young men described as "a real heifer, the fatter the better, bad acne," for a few of them to lure to their hotel room and persuade to undress. At that point, the remaining men would emerge from under the bed, shout " 'we're beaching. Whale spotted!' " and photograph the woman. After turning to a discussion of asserted losses in popularity experienced by the conservative movement, the article went on to recount the execution of the plot described above. It asserted that a woman in fact emerged from the young men's room unclothed and in tears, while the perpetrators congratulated each other. The article went on: "This repellent scene was only a little beyond the norm of the conference. A wash

of despair and alcohol and brutishness hung over the whole thing." More examples of drug use ensued, along with examples of shameless sexual behavior. All of this was fabricated.

In another article, entitled *Deliverance,* published in November 1996, Glass recounted receiving unsatisfactory service from a named computer company, and claimed that his complaints to a telephone customer service representative were met with an anti-Semitic slur. In truth, no such slur ever was uttered. Glass also wrote a letter to the president of the company, repeating the accusation, and sent a copy to the Anti-Defamation League.

Glass also engaged in fabrications in freelance articles published by other magazines. An example was *Prophets and Losses,* an article published in Harper's Magazine in February 1998, at which time Glass was also a law student. In that article, Glass represented that he had worked for a telephone psychic service for a time, and recounted fabricated conversations with management, represented as mercenary and either stupid or cynical, and also fabricated conversations with callers, who were depicted as ignorant and desperate. In one case a caller, a fabricated character to whom Glass had attributed an African-American dialect, could not be persuaded to use his money to feed and clothe his seven children by five different mothers instead of buying VCRs and calling telephone psychics for advice on lottery numbers. The article was almost entirely a fabrication. Glass explained at the hearing that his intent was to expose "how the telephone psychic industry preys on minorities.... It uses minority celebrities to advertise and shows that are watched predominantly by minorities to lure them into paying insane amounts of money. [¶] I was angry about that, and I wanted to attack that, and I used terrible, horrible stereotypes to create, essentially, straw men to knock down."

In another example, Glass wrote an article entitled *The Vernon Question* for George magazine. The lengthy article, published in April 1998, concerned Vernon Jordan, an advisor to then President Clinton during the then emerging Monica Lewinsky scandal. In two paragraphs, Glass used nonexistent sources to describe Jordan's supposed reputation as a "boor" and attributed various fictitious statements to "political operatives," "socialites," "political hostesses" and officials. These persons assertedly stated that Jordan was well known for sexually explicit comments, unwanted sexual advances, and crude stares, and added that he was known in their circles as "Vern the Worm" or "Pussyman," and that young women needed protection against him. Another paragraph attributed to a fictional "watchdog" group contained certain claims about Jordan's asserted conflicts of interest and questionable corporate ethics along with statements attributed to fictional "senior officials" at companies on whose boards Jordan sat, saying that Jordan is "totally unaware of the issues" but "we get what we want, access, and he gets what he wants, cash." These were all fabrications.

Charles Lane, who was the editor of The New Republic at the time of Glass's exposure, testified for the Committee of Bar Examiners (hereafter sometimes Committee) that he had received an early complaint about Glass concerning an article entitled *Boys on the Bus,* depicting the actor Alec Baldwin and his brother as silly celebrities whose efforts during a bus tour to campaign on the issue of campaign finance reform were based on ignorance. A representative of Baldwin's disputed the assertion in the article that the actor had been giving out autographs during the bus tour, but Glass repudiated the accusation in print in The New Republic. It was not until Glass prepared his application to the California State Bar that he acknowledged that this article contained fabricated evidence to the effect that interest in the bus tour came from movie fans seeking autographs and referred to a fabricated person who opined that Baldwin lacked real understanding of campaign finance reform.

Although at the time, the *Boys on the Bus* incident seemingly was resolved in Glass's favor, Lane's suspicions were aroused in May 1998 when a journalist employed by Forbes Digital Tool telephoned to warn him that factual assertions in Glass's recent article for The New Republic magazine, *Hack Heaven,* did not seem to be true. The article had described a teenager hacking a California software company and extorting money to stop the intrusion. The article described a convention in Bethesda, Maryland, where some of the events occurred, and when Lane challenged Glass, the latter journeyed with Lane to Bethesda, purporting to identify the building where the convention had been held. A person working in the building denied such a convention had occurred, and Lane became persuaded that Glass was lying. Lane pressed Glass about the factual basis for the article, and although Glass was evasive, he insisted the article was accurate. Glass spent the night at home fabricating what he would assert were his reporter's notes from interviews, fake business cards, a voicemail box, a Web site, and newsletters. He also induced his brother to impersonate a source.

Upon their return to the office from Bethesda, Glass lobbied the executive editor and others to intervene on his behalf with Lane, urging that he was being treated unfairly. Lane, now suspecting that other fabrications may have occurred, wanted to fire him, but in response to the lobbying, suspended him. The next day, a Saturday, Lane was surprised to discover Glass at the office. Thinking Glass had been told not to return, Lane suspected he had altered his computer files. He confronted Glass with evidence that Glass had used his brother as a false source in the *Hack Heaven* piece. Ultimately, during this exchange Glass admitted the article was fabricated, and Lane fired him. Lane found on Glass's desk a letter Glass had written to his landlord, falsely stating he had been transferred by The New Republic to New York and needed his security deposit refunded. Lane also found the letter Glass had written to the chief executive of Gateway computers, again stating the falsehood that a customer service employee had used an anti-Semitic slur against Glass.

Lane reviewed all of Glass's articles over the course of the following three or four weeks. He received a letter from Glass apologizing and saying he had instructed his lawyers to cooperate with The New Republic. Lane compiled a summary of the material in Glass's articles that he found suspicious and submitted the summary to Glass's counsel, who it was agreed would stipulate to those findings of Lane's that Glass believed to be correct. At the time, Lane concluded that 27 of the 42 articles Glass had written for the magazine contained fabrications, and Lane wrote two editorial articles informing the magazine's readership to this effect.

Lane was very surprised to learn for the first time in the California State Bar proceeding that there were four articles Glass identified in his California Bar application as fabrications that he, Lane, had not even suspected were flawed. Lane was also surprised that four of the articles he had identified to Glass's counsel as suspicious, but which Glass had declined to stipulate contained fabrications, were now admitted in the California State Bar application to involve fabrications—including the disturbing *Taxis and the Meaning of Work,* along with *Deliverance,* with its false claim of anti-Semitism, and *Boys on the Bus,* which had involved the magazine in a dispute over authenticity even before Glass's exposure.

Lane testified that he thought Glass had perpetrated an elaborate hoax on readers and was engaged in a con game, not journalism. He testified that Glass's case had been highlighted at the Newseum, a Washington, D.C., museum of journalism, as one of the worst examples of misconduct in journalistic history. Lane noted that The New Republic was put to the expense of hiring a private investigator to analyze Glass's articles and incurred legal fees in the tens of thousands of dollars. He testified that Glass had not offered him reimbursement for the magazine's expenses, nor did he offer to refund any portion of the salary he had been paid. Lane added that the fabrications hurt the magazine's reputation, relationships between employees, and of course hurt those maligned in the articles. Lane was not mollified by a letter of apology he received from Glass in August 2003, around the time Glass's novel, The Fabulist, was published. Lane considered the letter fawning. Lane considered Glass "flagrantly incapable of producing honest journalism," and concluded that his record of systematic deception and lack of thorough confession made him unemployable as a journalist.

Richard Bradley, who was Washington affairs editor for George magazine and Glass's editor for his freelance articles for that magazine, testified on behalf of the Committee. Bradley stated that when he learned of the scandal involving Glass at The New Republic, he investigated the background for the three freelance articles Glass had published, as well as a fourth article that Glass had submitted and that was being edited. On investigation, the article on Vernon Jordan "blew apart like a dandelion in a strong wind." Assertions in the other articles were difficult to substantiate. When, within a week of learning there were problems with Glass's work, Bradley contacted Glass for help in identifying problems in the articles, Glass responded that he was psychologically incapable of doing so and that he was suici-

dal, and hung up. The magazine published an editorial indicating that significant portions of the Vernon Jordan article appeared to be false, and that the fabrications were woven into reliable reporting so that it was difficult to distinguish them. Glass never contacted Bradley to tell him what was true or false in his articles in George magazine, nor was Bradley contacted by Glass's lawyer. (Glass did send a letter of apology to the magazine's editor-in-chief.) Bradley believed that Glass had discredited journalism, contributing to the misconception that journalists are "craven and dishonest." Bradley commented that Glass's articles "caricatured and mocked their subjects … and I felt that the perceptions promoted by [Glass's] fabrications, in these examples [of] African-American people and conservatives, could not be corrected as easily as a factual mistake could be." Because he would not be credible, Bradley would not hire Glass as a journalist.

Joseph Landau, who later became a law professor at Fordham University Law School, was a fact checker at The New Republic while Glass worked there. He testified that Glass had a superior reputation for accuracy among fact checkers because his notes were so thorough and he was apparently so forthcoming, but he tended to push the fact-checking process to the last minute so that it was rushed and could not be done face-to-face. At times Glass could not verify certain facts but would promise Landau to telephone the source. Glass would soon return with confirmation and updated material, a process that reaffirmed the witness's sense that the fact checking was working. Landau had trusted him. Landau received a letter of apology from Glass in the summer of 2004, some six years after Glass had been exposed, and found it to be general and vague.

Louis Miller, a lawyer and chairperson of the board of D.A.R.E. (Drug Abuse Resistance Education), testified that Glass published falsehoods in articles in The New Republic in March 1997 and Rolling Stone in March 1998 that impaired the organization's reputation, because the articles claimed D.A.R.E. was ineffective. According to Miller, the articles contained fabricated "evidence" that the organization had engaged in a widespread campaign of heavyhanded and even violent criminal tactics to counter academic and journalistic criticism of the program. D.A.R.E. sued Glass for libel and settled after Glass agreed the challenged information was fabricated, issued a retraction, and paid the organization's legal expenses of between $25,000 and $50,000. D.A.R.E. did not receive a letter of apology from Glass before it filed suit. D.A.R.E. sued Rolling Stone for defamation but lost on the ground that D.A.R.E. had failed to establish actual malice.

Glass graduated from law school in 2000, when he also took and passed the New York bar examination. He applied to become a member of the New York bar in 2002. After an evidentiary hearing before a subcommittee of a committee on character and fitness, and pursuant to apparent custom, in September 2004, a representative of that committee informed Glass informally that his application would be rejected, so he withdrew it. The record does not disclose the reason for the tentative decision.

In his application to the New York bar, Glass described his misconduct and firing. His application and supporting materials included only 20 articles containing fabrications. Glass wrote that he had apologized to the editor of The New Republic, saying, "I also worked with all three magazines [(referring to The New Republic, Harper's, and George magazines)] and other publications where I had written freelance articles to identify which facts were true and which were false in all of my stories, so they could publish clarifications for their readers."

At the hearing, Lane challenged the quoted statement as untrue. Lane believed that Glass had failed to come forward to actively assist The New Republic in identifying his fabrications, and instead had placed the entire burden of identifying his errors on Lane. Lane testified: "Well, he didn't work with us. The effort we went through, over the course of nearly a month, to investigate all those stories would have been unnecessary if he had worked with us, and simply come forward and laid bare everything that was untrue in his stories. Instead, he sought legal counsel and, in effect, clammed up. [¶] … [W]hen I read the statement that he's laid out in this proceeding, I discovered that, even to this day, he has not—or had not—come clean about everything. So I'm a little amazed to see that he was representing to somebody that he worked with The New Republic to separate fact from fiction in his articles. That was definitely not my experience."

B. Applicant's evidence

According to Glass, during his childhood and young adulthood his parents exerted extremely intense and cruel pressure upon him to succeed academically and socially. Glass felt that The New Republic offered an extremely competitive atmosphere and that his journalistic efforts there failed to make a mark sufficient to ensure his retention after his year term had elapsed. It was after a visit to the family home, when his parents berated him for his apparent failure even in what they considered the worthless career of journalism, that he began fabricating material for publication. He also fabricated reporter's notes and supporting materials for his articles. His aim was to impress his parents and colleagues.

Once he was fired from The New Republic, Glass was distraught, suicidal, and unable to focus, almost immediately entering therapy. He nonetheless hired counsel whom he directed to "work with The New Republic." Glass testified that he believed that The New Republic wanted to conduct its own investigation because it did not trust him and testified that "I came to understand that they were going to provide me with a list of [fabricated] articles, and that I was to affirm whether or not the article was fabricated that they showed me or that they listed." He had fabricated more than The New Republic had discovered in its investigation, although he testified that due to his distress he did not realize this when he reviewed the list or later when he glanced at The New Republic's editorials listing his fabrications. Four of his articles containing fabrications were not on the list and he had erroneously denied there were fabrications in four articles that were on the list,

including *Boys on the Bus, Deliverance,* and *Taxis and the Meaning of Work.* He did not read the editorials—incomplete, as it turned out—that Lane published listing his fabricated articles. In fact, he closely read those articles for the first time when the California State Bar asked him to list all of his fabricated articles. Glass testified that he had "no information" indicating that his lawyers had failed to convey information to The New Republic.

Glass did well in law school. Within a few days of his firing, he rescheduled an exam and within a week, managed to earn a B-plus grade on an exam. He explained, however, that this was a poor grade for him.

Members of Georgetown University's law school faculty testified on his behalf at the hearing. Professor Susan Bloch telephoned him when the scandal first broke and asked if he needed someone to talk to. She appointed him as her research assistant, praising him as one of the brightest and best workers she ever had encountered. She found him to be honest and developed complete trust in him. She recommended him for a judicial internship during law school and a clerkship after graduation. Bloch maintained friendly contact with Glass over the years, including after he moved to California, and testified on his behalf when Glass applied for admission to the New York bar. She testified that she believed Glass had learned from his wrongdoing, that the trauma of his exposure would keep him from ever repeating such behavior, and that she had never observed any dishonesty on his part. She did not read his fabricated articles but was generally aware of their content.

Professor Stephen Cohen, also of the Georgetown law school, testified that Glass took full responsibility for his misconduct. They became friends and Glass was a welcome visitor with Cohen's family. Cohen believed Glass would be honest and ethical as an attorney; in sum, he believed Glass to be fully rehabilitated. Cohen deemed it "presumptuous" and "offensive" when counsel for the Committee of Bar Examiners asked him whether the Georgetown law school application should be read to have required Glass to notify the school that the journalistic honors he listed in his application may have been based in part on fabricated journalism.

In 2001, at the end of his clerkship, Glass moved to New York to be with his girlfriend, and underwent psychoanalysis on a four-day-a-week basis. In June 2001 Glass entered into a contract to write a novel based on his experiences at The New Republic, testifying that his psychiatrists advised him that it would be therapeutic to write the book, which he hoped would serve as a warning to young journalists. He was paid an advance of $175,000 and sold subsidiary rights for $15,000. He wrote the novel, The Fabulist, and appeared on the television program *60 Minutes* in May 2003 (just prior to the date of publication) to discuss his experiences. He claimed that it was not his intent to use the appearance to sell his book, but rather to offer a public apology.

During his residence in New York, and mostly between 2001 and 2004, Glass also undertook to handwrite approximately 100 letters of apology to journalists affected by his fabrications, as well as to the persons who were injured by his articles. He also spoke at a journalism forum at George Washington University in 2003, where he was loudly berated by other journalists. He spoke at a journalism class at Columbia and to a civics organization for high school students. In addition, he worked at a senior center on a regular basis for approximately one year in New York.

Concerning the questions that had arisen about the accuracy of his New York bar application, specifically his assertion that he had "worked with" the affected magazines "to identify which facts were true and which were false in all [his] stories, so they could publish clarifications," Glass testified that perhaps he should have written that he " '*offered* to work with all three magazines,' " or in fact, that he " 'offered to work … *through counsel,*' " but added that he did not intend to make any misrepresentation or exaggeration. He testified that he assumed his lawyer had contacted George magazine, as Glass had instructed him to do, and that he did not prepare a list of fabrications for George magazine. He explained that he attached to his New York bar application the editorials The New Republic had published incompletely listing his fabrications, but he did not read them, or at least did not read them carefully at that time. He also attached the notice that George magazine had published about his work—an article that did not refer to two of his three articles for George that contained fabrications. He reviewed these carefully for the first time in preparation for the California State Bar hearing.

When asked at the hearing in the present matter whether it would be accurate to say that he offered to work with The New Republic to identify which facts were true and which were false in all of his stories, he answered, "I believe that was my intention at the time, yes, and I believe I tried to do that." He explained that what he meant by this was that he asked his counsel to offer to go through the articles to identify fabrications, and then a "joint defense agreement was entered into, proposed by The New Republic, and we entered into a joint defense agreement that constructed this system."

Similarly, Glass explained, he did not actually undertake any work with Harper's Magazine to identify what was true and what was false in his articles, but "offered to work with them, or asked counsel to offer." He did not "have a memory of asking" his attorney whether counsel had contacted Harper's. When asked whether, when he prepared his New York bar application, he noticed or was troubled by the absence of any article from Harper's about his fabrications, he testified that he still assumed counsel had offered to exchange information or to enter into an agreement with Harper's. When pressed on his failure to confirm counsel's contact with Harper's, he testified: "I confirmed—well in my head I asked [counsel] to do something and he didn't tell me otherwise, I believed it to have occurred."

Concerning his decision to list only 20 articles containing fabrications in his New York bar application materials, Glass emphasized that he had not been asked for a complete list of articles containing fabrications, but rather in a telephone conversation, an employee of the committee on character and fitness asked for "a list of articles that contained a statement about a real person or real entity, as opposed to a fake person or a fake entity, that reflected something negative upon that real person or real entity." He wrote a letter to that committee memorializing this telephone conversation, saying he had been asked to list instances in which his fabrications "had a harmful impact on real persons. In response, I've gone back through all of my articles to identify those in which potentially harmful false statements were made about actual persons and actual organizations," and also warning that there might be inadvertent omissions. He did not list *Deliverance, Boys on the Bus,* or an article concerning Ted Turner entitled *Gift of the Magnate,* although these contained fabrications. He explained at the California hearing that the customer service agent to whom he attributed the anti-Semitic slur in *Deliverance* was a "made-up character," and so, he insisted, the article did not harm a real person. When pressed, he admitted that the article could have caused harm to the customer service agent the company determined had assisted him, and to the company.

Similarly, he did not include the *Boys on the Bus* article in his New York bar materials because the person to whom he attributed the statement that Alec Baldwin did not know much about campaign finance reform was fake, and he had created some "fake fans." When asked whether the article harmed Alec Baldwin, a real person, he responded that "Alec Baldwin, truth be told, did not know much about campaign finance reform." When pressed, he conceded that there was a potential for injury to Baldwin.

Glass testified that he moved to California in the fall of 2004. He was hired by the Carpenter, Zuckerman and Rowley law firm as a law clerk. The firm has many homeless clients, and in addition to the legal work he does on their cases, he has helped them with their personal problems, even with regard to matters of personal hygiene.

Originally Glass undertook volunteer work in Los Angeles, but because his law firm encouraged him to stop taking time off during the workday, he arranged to work extra hours for deserving clients on matters for which his firm had no expectation of collecting fees.

California Attorney Paul Zuckerman testified that he decided to give Glass a chance as a law clerk. After initially assigning Glass minor projects and exercising close oversight, Zuckerman became convinced that Glass was one of the best employees in the firm, with a fine intellect, a good work ethic, and reliable commitment to honesty. Glass exhibited great compassion, assisting at a personal level with difficult clients and helping to find resources and social services for some of the firm's many homeless clients. Other lawyers who had

worked for or with the firm confirmed Zuckerman's view of Glass as an employee who conducted excellent legal research, was assiduous and hyperscrupulous about honesty, and stopped to think about ethical issues.

Also offered in support of Glass's application were affidavits that had been submitted in support of his New York bar application from the judges for whom Glass had worked during and immediately after completing law school. Both found him highly competent and honest at that time. Additional declarations from attorneys and friends that had been submitted with the New York bar application were offered in support.

Dr. Richard Friedman, a psychiatrist, testified that he had treated Glass since 2005, and believed he had developed good judgment, scrupulous honesty, and the ability to handle difficult situations well. Dr. Friedman reported that he would be astonished if Glass committed misconduct as he had in the past, both because of the growth of character and moral sense the doctor had observed, but also because of a strong instinct to protect himself from the traumatic results of his prior misconduct. He reported that Glass had no sociopathic personality traits.

Dr. Richard Rosenthal, a psychiatrist and psychoanalyst who is known for treating gamblers and those with impulse control disorders, was approached by Glass's attorney in 2005. Rosenthal had an evaluative as well as therapeutic relationship with Glass that began in 2005 and continued with meetings once or twice a month until the time of the hearing.

Dr. Rosenthal identified Glass's underlying psychological issues as a need for approval, a need to impress others, and a need for attention, and pointed also to Glass's fear of inadequacy, rejection, and abandonment. Rosenthal testified that when they met in 2005, Glass needed to overcome enormous shame and learn to forgive himself. Through therapy, Glass learned to be realistic about family issues and to set boundaries. Rosenthal believed that Glass had grown up in a family that exerted tremendous pressure on him to succeed yet always made him feel like a failure. In Rosenthal's opinion, Glass was rehabilitated, meaning that he was extremely conscientious and honest, avoided the appearance of impropriety, had reasonable goals and expectations, had gained empathy and tolerance, and would not allow himself to be overwhelmed by stress. The doctor saw no evidence that Glass was a sociopath.

Glass himself described his therapy, which had commenced very shortly after his exposure and continued to the time of the 2010 hearing, that is, for 12 years. Through therapy he had learned to separate his feelings about his family from the work environment and to "set boundaries within my family." He testified that he believed the most important thing he could do to make amends was to change himself.

Martin Peretz, who owned and managed The New Republic at the time of the fabrications, testified on Glass's behalf and had developed a charitable view of his misconduct by the time of the California State Bar hearing. He blamed himself and, even more, the magazine's editors for encouraging Glass to write zany, shocking articles and for failing to recognize the improbability of some of Glass's stories. He found the harm of the scandal to the magazine to be minimal. He had renewed social contact with Glass in the past few years and believed that Glass had been harshly treated. He would not rule out hiring Glass again as a journalist. He explained that in his experience as a professor "[t]he most brilliant students plagiarize," complaining to the Committee's counsel, "I actually find your pursuing him an act of stalking."

Additional character witnesses included Melanie Thernstrom, a journalist, memoirist, and friend who testified that she had known Glass for more than a decade because she was a close friend of his girlfriend, Julie Hilden. Her initial skepticism about him dissolved soon after she met him and she believed he had become kind, generous, loyal, responsible, empathetic and above all, honest. Thernstrom witnessed Glass during the period he wrote letters of apology and said that each letter required considerable work and caused him anguish. She found him to be very sorry for the deceptions, and believed that he had taken responsibility for his past acts and would never deceive again. She had observed that Glass was intelligent, hardworking, and empathetic with clients who were injured. She thought the Committee was "picking on" irrelevant issues—that is, the exact number of Glass's deceptive articles and whether or when he had disclosed them all. She believed the Committee's position was "sophistic." In her view, it was enough that he had admitted his misconduct and apologized for it, and she believed that there was no current, ongoing damage from his fabricated articles because Glass's work had been entirely discredited.

Lawrence Berger, a friend, testified on Glass's behalf, saying that Glass immediately told him about the scandal when they met. He testified that Glass is especially committed to being a good person now, being remarkably ethical and a devoted friend. According to Berger, Glass's efforts during the period he wrote the letters of apology were never perfunctory.

Julie Hilden, a freelance lawyer and aspiring scriptwriter and Glass's longtime live-in girlfriend, also testified on his behalf. He took good care of her during a prolonged, serious illness, even though she lived in New York and he was completing law school and doing his clerkship in Washington, D.C., at the time. She testified that he immediately demonstrated that he was very serious about being completely honest in every detail, and honesty is still an overriding concern. She observed the great effort he put into writing letters of apology during a prolonged period between 2002 and 2004. She explained that he takes a personal interest in clients, works very hard for them, and accepts their telephone calls at all hours, including nights and weekends.

C. California State Bar proceedings

Glass took and passed the California Bar examination in 2006 and in July 2007 filed an application for determination of moral character as part of his bar application. The Committee of Bar Examiners denied the application, but on Glass's request a moral character hearing was conducted in the State Bar Court in April and May of 2010.

The State Bar Court's hearing judge found that Glass had established good moral character. The Committee sought review. The State Bar Court Review Department (Review Department) independently reviewed the record, and a majority of the three-judge panel agreed with the hearing judge that Glass had established good moral character.

The Review Department majority acknowledged that Glass's misconduct had been "appalling" and "egregious," but believed that Glass had satisfied his "heavy burden of proof" and established his rehabilitation. The majority stated that Glass's burden of proof as a first-time applicant was "substantially less rigorous" than it would have been for an attorney seeking reinstatement after disbarment. Moreover, the majority declared, its "task here is not to dwell on his past misdeeds, but to determine his present moral fitness." It added that because the "policy of the state favors admission of applicants who have achieved reformation," the majority resolved any reasonable doubt concerning Glass's rehabilitation in his favor and "[gave] him the benefit of any conflicting but equally reasonable inferences flowing from the evidence." The majority concluded that "cumulatively, Glass's legal employment history, community service, character witnesses, progress in therapy, remorse and acceptance of responsibility" provided a more accurate picture of his moral character than his misconduct of many years ago.

The majority acknowledged that Glass had not fully identified his fabrications until the California Bar proceedings, but observed that Glass had not asked the bar to excuse that failure. The majority also expressed some concern regarding Glass's New York bar application, observing that he had "mischaracterized the degree to which he cooperated with the magazines to identify the fabricated articles." On the other hand, in the majority's view, Glass's careful review of his prior articles in connection with the California State Bar proceedings indicated that he had fully acknowledged his wrongdoing, an " 'essential step towards rehabilitation.' " In addition, the majority concluded that Glass had left it to his attorneys to work with the magazines because of his emotional turmoil, and "[t]he State Bar did not prove whether Glass's attorney failed to 'work with' some of the publishers and neither did Glass establish that his attorney had completed the task as requested."

The majority commented upon Glass's excellent reputation with law professors and judicial employers, and observed that Glass's rehabilitation seemed to have occurred over a number of years. The majority recounted the course of Glass's therapy and his therapists' testimony on his behalf in support of the view that

he was rehabilitated. The majority further referred to Glass's community service in New York and commented that his work commitments rendered him unable to continue non-work-related community service in Los Angeles, where he had resided since 2004.

The majority placed great emphasis on Glass's character witnesses, saying: "We afford great weight to Glass's character witnesses, who were community leaders, employers, judges, and attorneys, and all of whom spoke with the utmost confidence in Glass's good moral character and rehabilitation."

The majority declined to believe restitution was required of Glass. "We consider his present character in light of his previous moral shortcomings [citation], and we are at a loss to understand how monetary restitution would mitigate the reputational harm that Glass had caused." The majority found more significant evidence that he has made amends both to the journalistic community in his public admissions concerning his fabrications and to his victims in the letters he sent them.

The majority concluded that "even those who have committed serious, indeed egregious, misconduct, are capable of overcoming their past misdeeds" and that persons who had reformed should be rewarded with an opportunity to serve as lawyers.

The Review Department panel's dissenting opinion concluded that Glass had not proven full rehabilitation, pointing to his " 'staggering' " two-year period of "multilayered, complex and harmful course of public dishonesty." The dissenting judge found especially troubling Glass's omissions and misstatements in his application to the New York bar. "[T]o gain admission to practice law in New York, Glass understated the number of articles he had fabricated and exaggerated his efforts to help the magazines identify those articles. At a time when he should have been scrupulously honest, he presented an inaccurate application because it benefitted him—the same behavior as his earlier misconduct." The dissenting opinion concluded: "Given the magnitude of his misconduct and his subsequent misrepresentations on his New York bar application, Glass has not shown proof of reform by a lengthy period of exemplary conduct which 'we could with confidence lay before the world' to justify his admission."

II. DISCUSSION

A. Applicable Law

(1) To be qualified to practice law in this state, a person must be of good moral character. Good moral character includes "qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process." "Persons of good character … do not commit acts or crimes involving moral turpitude—a con-

cept that embraces a wide range of deceitful and depraved behavior." A lawyer's good moral character is essential for the protection of clients and for the proper functioning of the judicial system itself.

(2) When the applicant has presented evidence that is sufficient to establish a prima facie case of his or her good moral character, the burden shifts to the State Bar to rebut that case with evidence of poor moral character. Once the State Bar has presented evidence of moral turpitude, the burden "falls squarely upon the applicant to demonstrate his [or her] rehabilitation."

Of particular significance for the present case is the principle that "the more serious the misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be." "Cases authorizing admission on the basis of rehabilitation commonly involve a substantial period of *exemplary* conduct following the applicant's misdeeds." Moreover, "truly exemplary" conduct ordinarily includes service to the community.

(3) We independently weigh the evidence that was before the State Bar Court, recognizing that the applicant bears the burden of establishing good moral character. We ask whether the applicant is fit to practice law, paying particular attention to acts of moral turpitude and prior misconduct that bears particularly upon fitness to practice law.

In reviewing moral fitness findings made by the State Bar, we accord significant weight to the State Bar Court hearing judge's findings of fact to the extent they are based on witness demeanor and credibility. Although "the moral character determinations of the Committee and the State Bar Court play an integral role in the admissions decision, and both bear substantial weight within their respective spheres," we are not bound by the determinations of the Committee or the State Bar Court. Rather, we "independently examine and weigh the evidence" to decide whether the applicant is qualified for admission.

(4) Contrary to the Review Department majority's view that Glass's burden was significantly lighter than it would be for an attorney seeking readmission because he was a first-time applicant, in many respects the difference between admission and disciplinary proceedings is "more apparent than real." "Because both admission and disciplinary proceedings concern fitness to practice law as evidenced by acts of moral turpitude, this court routinely consults its disciplinary cases in deciding whether applicants for admission possess, at the outset, the requisite moral character." At both admission and disciplinary proceedings, "[t]he common issue is whether the applicant for admission or the attorney sought to be disciplined 'is a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude' ", particularly misconduct that bears upon the applicant's fitness to practice law.

"However, unlike in disciplinary proceedings, where the State Bar must show that an already admitted attorney is unfit to practice law and deserves professional sanction, the burden rests upon the candidate for admission to prove his own moral fitness."

B. Analysis

(5) The Review Department majority believed it was reasonable to draw all inferences in favor of Glass, failing to be constrained by our discussion in *Gossage* as we shall explain. Although an applicant ordinarily receives the benefit of the doubt as to "conflicting, equally reasonable inferences" concerning moral fitness, the State Bar Court majority failed to recognize that this rule does not materially assist applicants who have engaged in serious misconduct. This is because "[w]here serious or criminal misconduct is involved, positive inferences about the applicant's moral character are more difficult to draw, and negative character inferences are stronger and *more reasonable.*" When there have been very serious acts of moral turpitude, we must be convinced that the applicant "is no longer the same person who behaved so poorly in the past," and will find moral fitness "only if he [or she] has since behaved in exemplary fashion over a meaningful period of time."

Applying the *Gossage* standard in this case of egregious malfeasance, we begin our own independent review of the record with a focus on Glass's many acts of dishonesty and professional misconduct, and then ask whether he has established a compelling showing of rehabilitation and truly exemplary conduct over an extended period that would suffice to demonstrate his fitness for the practice of law.

Glass's conduct as a journalist exhibited moral turpitude sustained over an extended period. As the Review Department dissent emphasized, he engaged in "fraud of staggering' proportions" and he "use[d] … his exceptional writing skills to publicly and falsely malign people and organizations for actions they did not do and faults they did not have." As the dissent further commented, for two years he "engaged in a multi-layered, complex and harmful course of public dishonesty." Glass's journalistic dishonesty was not a single lapse of judgment, which we have sometimes excused, but involved significant deceit sustained unremittingly for a period of years. Glass's deceit also was motivated by professional ambition, betrayed a vicious, mean spirit and a complete lack of compassion for others, along with arrogance and prejudice against various ethnic groups. In all these respects, his misconduct bore directly on his character in matters that are critical to the practice of law.

Glass not only spent two years producing damaging articles containing or entirely made up of fabrications, thereby deluding the public, maligning individuals, and disparaging ethnic minorities, he also routinely expended considerable efforts to fabricate background materials to dupe the fact checkers assigned to vet his work. When exposure threatened, he redoubled his efforts to hide his misconduct, going so far as to create a phony Web site and business cards and to recruit his brother to

pose as a source. In addition, to retain his position, he engaged in a spirited campaign among the leadership at The New Republic to characterize Lane's obviously well-founded concerns as unfair and to retain his position.

Glass's conduct during this two-year period violated ethical strictures governing his profession. Believing that "public enlightenment is the forerunner of justice and the foundation of democracy," the Code of Ethics of the Society of Professional Journalists provides that "[t]he duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues[,] … striv[ing] to serve the public with thoroughness and honesty.… [¶] … [¶] … Deliberate distortion is never permissible." Glass's behavior fell so far short of this standard that Lane recounted seeing Glass featured in an exhibit in the Newseum, a Washington, D.C., museum dedicated to journalism, as embodying one of the worst episodes of deceit in journalistic history.

Glass's misconduct was also reprehensible because it took place while he was pursuing a law degree and license to practice law, when the importance of honesty should have gained new meaning and significance for him.

Moreover, Glass's lack of integrity and forthrightness continued beyond the time he was engaged in journalism. Once he was exposed, Glass's response was to protect himself, not to freely and fully admit and catalogue all of his fabrications. He never fully cooperated with his employers to clarify the record, failed to carefully review the editorials they published to describe the fabrications to their readership, made misrepresentations to The New Republic regarding some of his work during the period he purported to be cooperating with that magazine, and indeed some of his fabrications did not come to light until the California State Bar proceedings. He refused to speak to his editor at George magazine when the latter called to ask for help in identifying fabrications in the articles Glass wrote for that magazine.

(6) The record also discloses instances of dishonesty and disingenuousness occurring after Glass's exposure, up to and including the State Bar evidentiary hearing in 2010. In the New York bar proceedings that ended in 2004, as even the State Bar Court majority acknowledged, he made misrepresentations concerning his cooperation with The New Republic and other publications and efforts to aid them identify all of his fabrications. He also submitted an incomplete list of articles that injured others. We have previously said about omissions on bar applications: "Whether it is caused by intentional concealment, reckless disregard for the truth, or an *unreasonable refusal to perceive the need for disclosure,* such an omission is itself strong evidence that the applicant lacks the 'integrity' and/or 'intellectual discernment' required to be an attorney."

Our review of the record indicates hypocrisy and evasiveness in Glass's testimony at the California State Bar hearing, as well. We find it particularly disturbing that at the hearing Glass persisted in claiming that he had made a good faith effort to

work with the magazines that published his works. He went through many verbal twists and turns at the hearing to avoid acknowledging the obvious fact that in his New York bar application he exaggerated his level of assistance to the magazines that had published his fabrications, and that he omitted from his New York bar list of fabrications some that actually could have injured real persons. He also testified that he told his lawyer to work with Harper's Magazine to identify his fabrications, yet evaded questions concerning whether his lawyer had done so, while insisting that he took responsibility for an inferred failure to follow what obviously were significant instructions. He asserted that he had been too distraught to recognize that the list of fabrications The New Republic gave his lawyer was incomplete—or that in his response he had denied that articles including the egregious *Taxis and the Meaning of Work* were in fact fabricated—while acknowledging that within a few days of his firing he made arrangements to reschedule a final examination for the end of the exam period and did well on the exam he took within a week of his exposure. Indeed, despite his many statements concerning taking personal responsibility, and contrary to what he suggested in his New York bar application, it was not until the California Bar proceedings that he shouldered the responsibility of reviewing the editorials his employers published disclosing his fabrications, thus failing to ensure that all his very public lies had been corrected publically and in a timely manner. He has "not acted with the 'high degree of *frankness* and truthfulness' and the 'high standard of integrity' required by this process."

(7) Honesty is absolutely fundamental in the practice of law; without it, "the profession is worse than valueless in the place it holds in the administration of justice." "[M]anifest dishonesty … provide[s] a reasonable basis for the conclusion that the applicant or attorney cannot be relied upon to fulfill the moral obligations incumbent upon members of the legal profession." As the dissent in the Review Department pointed out, "if Glass were to fabricate evidence in legal matters as readily and effectively as he falsified material for magazine articles, the harm to the public and profession would be immeasurable."

We also observe that instead of directing his efforts at serving others in the community, much of Glass's energy since the end of his journalistic career seems to have been directed at advancing his own career and financial and emotional well-being.

(8) [W]e do well to repeat Justice Felix Frankfurter's "eloquent description" of the moral character required of lawyers: "It is a fair characterization of the lawyer's responsibility in our society that he [or she] stands 'as a shield' … in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' "

(9) As for Glass's case for admission, although he points to his youth at the time of his employment as a journalist and an asserted period of rehabilitation of 12 years (measured between the time he was fired and the hearing in the State Bar Court), we have outlined instances of dishonesty and disingenuousness persisting throughout that period, including at the California State Bar evidentiary hearing. In addition, Glass's behavior was under the scrutiny of first the New York bar from 2002 to 2004, and then the California Bar from 2007 to 2010, reducing the probative value of the evidence of his good conduct during those periods. "[G]ood conduct generally is expected from someone who has applied for admission with, and whose character is under scrutiny by, the State Bar."

(10) The Review Department majority relied heavily on the testimony of Glass's character witnesses, but the testimony of character witnesses will not suffice by itself to establish rehabilitation. Moreover, stressing that Glass's reputation as a journalist had been exploded and that so many years had passed, some of the character witnesses did not sufficiently focus on the seriousness of the misconduct, incorrectly viewing it as of little current significance despite its lingering impact on its victims and on public perceptions concerning issues of race and politics. They also did not take into account, as we do, that the misconduct reflected poorly on the particular commitment to honesty that Glass might have been expected to have had as a law student. For these reasons we believe the Review Department majority accorded too much probative value to the testimony of Glass's character witnesses.

(11) Glass emphasized the remorse he expressed through his letters to victims, and characterized his novel and his appearance on *60 Minutes* as efforts to make amends. Remorse does not establish rehabilitation, however, and in any event, the weight of this evidence is diminished because the letters were not written near the time of his misconduct and exposure, when they might have been most meaningful to the victims, but rather seemed timed to coincide with his effort to become a member of the New York bar. The novel served Glass's own purposes, producing notoriety and a fee of $175,000, and the appearance on *60 Minutes* was timed to coincide with the release of the novel. Glass did not offer any restitution to Lane or Bradley. It was not until approximately 2008 that he made an offer to the then friendly Peretz—who roundly disclaimed any interest in restitution—to repay his salary. This offer was made after Glass applied to the California Bar and was another oddly belated and, we believe, disingenuous effort at making his victims whole.

The record of Glass's therapy does not represent "truly exemplary conduct in the sense of returning something to the community." To be sure, through therapy he seems to have gained a deep understanding of the psychological sources of his misconduct, as well as tools to help him avoid succumbing to the same pressures again. His treating psychiatrists are plainly highly competent and well regarded in their field, and they are convinced that he has no remaining psychological flaws

tending to cause him to act dishonestly. Glass believed that he could best make amends by changing himself. But his 12 years of therapy primarily conferred a personal benefit on Glass himself.

(12) Glass points to the pro bono legal work he does for clients of his firm as evidence of sustained efforts on behalf of the community, but we observe that pro bono work is not truly *exemplary* for attorneys, but rather is expected of them.

(13) Glass and the witnesses who supported his application stress his talent in the law and his commitment to the profession, and they argue that he has already paid a high enough price for his misdeeds to warrant admission to the bar. They emphasize his personal redemption, but we must recall that what is at stake is not compassion for Glass, who wishes to advance from being a supervised law clerk to enjoying a license to engage in the practice of law on an independent basis. Given our duty to protect the public and maintain the integrity and high standards of the profession, our focus is on the applicant's moral fitness to practice law. On this record, the applicant failed to carry his heavy burden of establishing his rehabilitation and current fitness.

III. CONCLUSION

For the foregoing reasons, we reject the State Bar Court majority's recommendation and decline to admit Glass to the practice of law.

2. Pro Hac Vice

Model Rules of Professional Conduct 5.5

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

N.C. Gen. Stat. chap. 84

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of and in good standing in that state, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Office of Administrative Hearings of North Carolina, or any administrative agency, may, on motion, be admitted to practice in that forum for the sole purpose of appearing for a client in the proceeding. The motion required under this section shall be signed by the attorney and shall contain or be accompanied by:

(1) The attorney's full name, post-office address, bar membership number, and status as a practicing attorney in another state.

(2) A statement, signed by the client, setting forth the client's address and declaring that the client has retained the attorney to represent the client in the proceeding.

(3) A statement that unless permitted to withdraw sooner by order of the court, the attorney will continue to represent the client in the proceeding until its final determination, and that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State, has agreed to be responsible for filing a registration statement with the North Carolina State Bar, and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State.

(6) A statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission.

(7) A fee in the amount of two hundred twenty-five dollars ($225.00), of which two hundred dollars ($200.00) shall be remitted to the State Treasurer for support of the General Court of Justice and twenty-five dollars ($25.00) shall be transmitted to the North Carolina State Bar to regulate the practice of out-of-state attorneys as provided in this section.

Compliance with the foregoing requirements does not deprive the court of the discretionary power to allow or reject the application.

§ 84-4.2. Summary revocation of permission granted out-of-state attorneys to practice.

Permission granted under G.S. 84-4.1 may be summarily revoked by the General Court of Justice or any agency, including the North Carolina Utilities Commission, on its own motion and in its discretion.

Sheller v. Superior Court

71 Cal.Rptr.3d 1697 (Cal. App. 2008)

Croskey, Acting P.J.

A Texas attorney appearing *pro hac vice* for plaintiffs in a class action sent a communication to prospective class members that contained at least one misrepresentation. The trial court issued an order to show cause why the attorney's *pro hac vice* status should not be revoked. After a hearing, the trial court declined to revoke the attorney's *pro hac vice* status, and instead ordered the attorney to reimburse the defendant for substantial attorney's fees, as a condition of retaining his *pro hac vice* status. The trial court also formally reprimanded the Texas attorney. The attorney appeals. We conclude the trial court lacked authority to impose attorney's fees as a sanction and also lacked authority to issue the formal reprimand. We therefore reverse the trial court's order. However, we also conclude that the trial court has the authority to revoke an attorney's *pro hac vice* status in certain circumstances, and therefore remand for further proceedings.

Factual and Procedural Background

The challenged order arises in the context of a class action against Farmers New World Life Insurance Company and Farmers Group, Inc. (collectively "Farmers"). The action alleges Farmers committed unfair business practices in connection with Farmers's Universal Life and Flexible Premium Universal Life insurance policies. Specifically, the action alleges that the insurance policies were set up so that Farmers would collect premiums from policyholders that were insufficient to keep the policies in force—resulting in either an untimely lapse of the policies or a substantial increase in premiums. The initial complaint was filed on November 5, 2003. The named plaintiff, Pauline Fairbanks, was not only a Farmers insured, but also a Farmers *agent.* At the time the complaint was filed, Fairbanks was represented by Attorney Scott A. Marks, who is a California attorney.

At the same time, Attorney David L. Sheller, who is admitted to practice in Texas, was pursuing a similar class action against Farmers in Texas. On February 2, 2004, Attorney Sheller filed an application to appear *pro hac vice* as lead counsel on behalf of Fairbanks in the instant action. The application was granted.

From as early as November 1, 2004, the trial court suggested that Fairbanks might not be an ideal class representative for the insureds, as she had also been a Farmers agent. In June 2005, Attorney Sheller, but not Attorney Marks, sent a written communication to some 350 Farmers policyholders, seeking additional class representatives. The letter was in the form of a flyer, boldly captioned, "Attention Farmers Insurance Group Policy Holders!!!" The flyer began, "A potential class action lawsuit has been filed against [Farmers] in the State Court of Los Angeles

County. We are concerned Farmers may have given you misleading information about this lawsuit. Our intention is to help policyholders and give them accurate information." The flyer went on to state, "If you have purchased such a policy, we may be able to help you. We are looking for other people who have purchased such Farmers policies. If you have, you may be accepted as a 'class representative.' If accepted, you are paid for your time in an amount set by the judge." (Emphasis in original.)

Upon learning of this flyer, Farmers filed an ex parte motion for a temporary restraining order preventing plaintiffs' counsel from sending further pre-certification communications to potential members of the class, or, in the alternative, to prevent any such communications without prior court approval. Farmers's motion was based not only on the June 2005 flyer, but also on two other communications which allegedly contained factual misrepresentations about the insurance policies at issue: a September 2003 letter and a telephone survey of 500 Farmers policyholders Attorney Sheller had commissioned. Farmers supported its motion with an expert declaration to the effect that both the September 2003 letter and the June 2005 flyer violated the California Rules of Professional Conduct. As to the statement in the June 2005 flyer indicating that Farmers "may have given [policyholders] misleading information about this lawsuit," Farmers submitted a declaration that it had *never* made a general mailing to its policyholders, much less a misleading one.

A hearing on Farmers's ex parte motion was held on July 28, 2005. Attorney Sheller was present. At the hearing, the trial court expressed concern that "there seems to be some hucksterism going on here by plaintiffs." While the trial court believed that the September 23, 2003 letter did not comply with the Rules of Professional Conduct, the court was most concerned by the June 2005 flyer. Specifically, the court found the statement, "If accepted, you are paid for your time in an amount set by the judge" to be both inappropriate and simply untrue. Not only are class representatives not always entitled to recover, they may in fact be liable for court costs if the defendant prevails. Attorney Sheller responded, "As far as the [issue] of whether or not the class rep[resentative] is going to be paid or not, our contract specifically states that if we lose, they can be liable for costs of court. And without divulging any attorney communications, it is my standard practice to tell people that they can lose." The court responded that Attorney Sheller "just admitted a bait and switch to me," in that Attorney Sheller initially represented to prospective class members that they would be "paid for [their] time," but when the class members signed Attorney Sheller's agreement, they were then told that they could be responsible for costs in the event of a loss. The court believed the misrepresentation to be intentional. Attorney Sheller stated that he had no intention to mislead, and added, "I think now it will be changed. It won't happen again." The trial court restrained plaintiffs' counsel from any further pre-certification communications with potential class members without court pre-approval. Finding

the June 2005 flyer particularly violative of the ethical rules, the trial court, on its own motion, set an order to show cause why Attorney Sheller's *pro hac vice* status should not be revoked.

There followed substantial discovery and briefing. Farmers submitted a supplemental declaration from its expert, confirming her opinion that the June 2005 flyer constituted an ethics violation. Farmers also submitted the declaration of a Texas ethics expert, who concluded the flyer violated Texas rules as well.

In response to the order to show cause, plaintiff argued that the 2005 flyer was accurate "with one minor exception." Plaintiff stated her counsel now realized the statement indicating class representatives would be paid for their time was "oversimplified and incorrect." According to plaintiffs response, "[Attorney] Sheller concedes that this was in error and that he is responsible for this mistake, and he wishes to correct it immediately by a further letter to the potential class, upon the court's approval." Plaintiff explained that the "mistake arose because several lay people looked at the notice in an effort to make it simpler and easier to understand for the average person. [Attorney] Sheller was involved with the review and should have looked at it again and given it more thought before it went out the door to 350 people. However, in the usual press of time and because he did not give extra thought to a letter before it was sent out, [Attorney] Sheller made a human mistake." As to the representation in the flyer that Farmers may have given misleading information about the lawsuit, plaintiff stated, "This sentence was placed in the letter because [Attorney] Sheller has twelve (12) years of experience in life insurance sales fraud cases. It has been [Attorney] Sheller's experience that when people learn of an alleged problem with their policy, by whatever means, most of the time they contact their agent or the home office. Many times when they call their agent or the home office, they are given inaccurate or misleading information that there is not really a problem at all. [Attorney] Sheller has experienced this in this case with policy holders who received the notice in question. This happens so frequently in these cases that it is [Attorney] Sheller's opinion that this is a general business practice in the life insurance industry."

A draft "Corrective Notice and Apology" was attached, which repeated the bulk of the text of the flyer, including the sentence, "If accepted, you are paid for your time in an amount set by the judge." However, the next paragraph, written in bold type, states, "The sentence 'If accepted, you are paid for your time in an amount set by the Judge' is inaccurate. The Court finds that sentence is an ethical violation by Plaintiffs counsel, David L. Sheller. In actuality, you might not be paid at all and could be personally liable for court costs, if the Plaintiff loses." The draft corrective notice did not restate Attorney Sheller's concern that "Farmers may have given you misleading information about this lawsuit," nor did it retract that statement as ethically improper or otherwise inaccurate.

Attorney Sheller submitted the declaration of his own ethics expert opining that there is "nothing materially misleading" about the original flyer. As to the assertion in the flyer that class representatives would be paid for their time, Attorney Sheller's expert noted that Attorney Sheller conceded "that he neglected to specifically state that the judge might not award any amount." The expert concluded this was, "at worst a de minimus omission" as "it cannot be misleading or in any way improper not to have told a client what is obvious to every plaintiff, if you are not the prevailing party, you won't recover a monetary settlement." The expert then made the fairly remarkable assertion that "[Attorney] Sheller also has pointed out that he contractually obligated himself to bear any costs that might be imposed against the class representative, so that there simply was never an issue regarding the class representative's potential exposure to monetary costs." In fact, Attorney Sheller had not pointed this out at all. The only evidence before the court on this issue was Attorney Sheller's representation at the July 28, 2005, hearing, that his "contract specifically states that if we lose, they can be liable for costs of court."

A hearing was held on the order to show cause on December 2, 2005. The trial court noted that its main concern was the representation in the flyer that class representatives would be paid for their time "if accepted," while, in fact, class representatives could receive nothing and, according to Attorney Sheller's retainer agreement, actually be responsible for costs. Attorney Sheller argued that there was no ethical violation in the flyer, because there is no requirement that an attorney advertisement include a statement that if the client loses, there will be no recovery. Farmers argued that the error was not one of mere omission, but an affirmative statement that class representatives *would* be paid for their time.

Later in the hearing, Attorney Marks argued, for the first time, that there had been no "bait and switch" because Attorney Sheller had, in fact, obligated himself to pay all costs in the event of a loss. Attorney Marks gave the court a document, which was unauthenticated and had not been previously disclosed to Farmers. The document was a one-sentence letter, purportedly written in July 2004, from Attorney Sheller to Fairbanks, reading simply, "In the unlikely event, we lose the case and there are costs that are incurred to you, I will pay them completely." When it was pointed out that this letter was in complete opposition to what had been represented at the July 2005 hearing, Attorney Marks responded that Attorney Sheller had been upset at the July 2005 hearing, and that while he had told the court what his *retainer* provided, he should have informed the court that he had promised to indemnify Fairbanks for costs, and would do the same with future class representatives. The court then questioned whether it was ethical for an attorney to agree to indemnify his client for costs that might be imposed against the client; the ethics experts for both parties were in attendance and, predictably, had opposing views on the issue.

The trial court indicated its intention to sanction Attorney Sheller in some manner, and asked the parties for input on any possible lesser sanction to the revocation of Attorney Sheller's *pro hac vice* status. Attorney Sheller's expert had suggested, in her declaration, that "a reprimand would be the maximum penalty to be appropriately imposed in this matter." Attorney Sheller argued that the prohibition on further pre-certification contact with the class without court approval would be sufficient. Farmers, which had incurred over $140,000 in fees on this issue, argued that, if Attorney Sheller's *pro hac vice* status was not revoked, he should at least be ordered to compensate Farmers for its attorney's fees.

The trial court allowed one final round of briefing. Attorney Sheller admitted that the flyer was "not well written" and apologized "for his mistakes" in drafting it. The court then questioned whether it was ethical for an attorney to agree to indemnify his client for costs that might be imposed against the client; the ethics experts for both parties were in attendance and had opposing views on the issue. Attorney Sheller argued that, when he had written that if accepted, class representatives would be "paid for [their] time in an amount set by the judge," he simply meant that an impartial judicial officer would decide "how much justice, if any[,] an injured person will receive." He argued that his flyer caused no harm, and that any complaints about the flyer were "stylistic in nature." Attorney Sheller argued that he is passionate advocate who must be zealous in order to survive as a sole practitioner opposing a firm. He suggested that "[d]iscipline should only be administered when it is demonstrated that the attorney is representing his own interests as opposed to the clients' [interests]." As such, he argued that issuing a new flyer remedying the first flyer would be an appropriate remedy. At no point did Attorney Sheller ever suggest that the trial court lacked the authority to revoke his *pro hac vice* status, issue a reprimand, or sanction him monetarily.

On February 27, 2006, the trial court issued its order discharging the order to show cause. The court stated that the June 2005 flyer "reads like a crass commercial as opposed to a professional advertisement." The court concluded that the flyer "contained at least one statement that was not true," specifically, the representation that class representatives would be paid for their time. The court also found unethical Attorney Sheller's July 28, 2005 misrepresentation in open court that his retainer agreement specifically states that plaintiffs can be liable for costs in the event the case is lost, given that Attorney Sheller had, in actuality, agreed to reimburse Fairbanks for any costs incurred in this action. The court did not accept Attorney Sheller's claim of overzealousness as an excuse, and specifically concluded that, with respect to the June 2005 flyer, Attorney Sheller had been more concerned with attracting additional clients than with representing Fairbanks's interests. While the trial court believed that Attorney Sheller's conduct would justify the revocation of his *pro hac vice* status, the court in its discretion declined to do so. Instead, the court imposed on Attorney Sheller the responsibility

to pay two-thirds of Farmers's attorney's fees, $95,009, as a condition of retaining his *pro hac vice* status. Additionally, the trial court formally reprimanded Attorney Sheller for his conduct. Attorney Sheller filed a timely notice of appeal.

Issues on Appeal

We first address whether Attorney Sheller can raise any challenge to the court's legal authority to order him to pay attorney's fees to Farmers, and formally reprimand him, in light of Attorney Sheller's failure to raise these arguments before the trial court. Exercising our discretion to reach these purely legal issues, we conclude that no authority existed for the trial court's order, and that it therefore must be reversed. We also consider whether a trial court has the inherent authority to revoke an attorney's *pro hac vice* status. We conclude that such authority exists, allowing a trial court to revoke an attorney's *pro hac vice status* in, at the least, any circumstance in which it could disqualify a California attorney from a particular case. We therefore remand for the trial court to determine whether to exercise its discretion to revoke Attorney Sheller's *pro hac vice* status.

Discussion

1. Scope of the Appeal

On appeal, Attorney Sheller challenges the trial court's authority to order him to pay Farmers's attorney's fees, to formally reprimand him, and—although the order was not made—to revoke his *pro hac vice* status. Farmers responds that these contentions are forfeited, as Attorney Sheller never challenged the trial court's authority to make any such orders. The application of the forfeiture rule is not automatic; appellate courts have discretion to excuse such forfeiture. Parties have been permitted to raise new issues on appeal where the issue is purely a question of law on undisputed facts. This is an appropriate case for the exercise of such discretion. We are here concerned with the purely legal issue of the scope of a trial court's authority to sanction a foreign attorney appearing *pro hac vice.* It would be a miscarriage of justice to allow a sanction imposed without legal authority to remain in effect simply because the attorney failed to challenge it.

Farmers also contends that the order formally reprimanding Attorney Sheller is not an appealable order. Indeed, it appears that the order is not. We exercise our discretion, however, to treat the notice of appeal as a petition for writ of mandate, and address the issue.

2. Inherent Power of the Trial Courts

In order to properly discuss the issues raised by this appeal, we must first address the inherent powers of a trial court. All courts possess inherent supervisory or administrative powers to enable them to carry out their duties. Code of Civil Pro-

cedure section 128 reflects these powers, but is not their source. That section provides, in pertinent part, that each court has the power "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto."

Prior to the enactment of the State Bar Act, attorney discipline was administered by the courts under their inherent judicial power. As originally enacted, the State Bar Act did not attempt to curtail or limit the previously existing judicial power to impose discipline. However, in 1951, the State Bar Act was amended to exclude superior courts and appellate courts from exercising such jurisdiction, leaving the Supreme Court as the sole judicial entity with jurisdiction over attorney discipline. Thus, in California, the inherent judicial power of the superior court does *not* extend to attorney disciplinary actions. That power is exclusively held by the Supreme Court and the State Bar, acting as its administrative arm.

Trial courts in California are not, however, powerless to sanction attorneys for improper conduct or to control the proceedings before them to prevent injustice. Thus, trial courts may conduct contempt proceedings, dismiss sham actions, admonish counsel in open court, strike sham pleadings, and report misconduct to the State Bar. In an appropriate case, the trial court may exercise its inherent power to control the conduct of its ministerial officers to disqualify an attorney in an action before it. Issues of disqualification often arise when an attorney has a conflict of interest, such as when the attorney has been exposed to confidential information of a former client who is in an adverse position in current litigation. " 'A motion to disqualify counsel brings the client's right to the attorney of his or her choice into conflict with the need to maintain ethical standards of professional responsibility.' " "Disqualification motions implicate several important interests, among them are the clients' right to counsel of their choice, the attorney's interest in representing a client, the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion. The 'paramount' concern in determining whether counsel should be disqualified is 'the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.' [Citations.] It must be remembered, however, that disqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety." "The purpose of disqualification is not to punish a transgression of professional ethics. [Citation.] Disqualification is only justified where the misconduct will have a 'continuing effect' on judicial proceedings."

The question has arisen as to whether the inherent power of a trial court includes the power to sanction attorneys for bad faith conduct by requiring the payment of attorney's fees. The United States Supreme Court has held that the inherent power of federal district courts encompasses this power. *Chambers v. NASCO, Inc.* 501 U.S. 32 (1991).) In *Chambers,* the United States Supreme Court began with the premise that a federal court has the inherent power "to control admission to its bar

and to discipline attorneys who appear before it." A court's inherent powers must be exercised with restraint and discretion, and "a primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." The Supreme Court reasoned that, since a district court contains the inherent power to dismiss an action within its discretion, the lesser sanction of the imposition of attorney's fees is also within its inherent power.

The California Supreme Court has reached the opposite result. The California Supreme Court concluded that "it would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute." The California Supreme Court acknowledged that a trial court has the power of contempt to sanction disruptive or disrespectful attorneys, and that procedural safeguards have been enacted to govern contempt proceedings. Without such procedural safeguards in place, "serious due process problems would result were trial courts to use their inherent power, in lieu of the contempt power, to punish misconduct by awarding attorney's fees to an opposing party or counsel." (*Id.* at p. 638, 150 Cal.Rptr. 461, 586 P.2d 942.) Concluding that the use of the courts' inherent power to punish misconduct by awarding attorney's fees "may imperil the independence of the bar and thereby undermine the adversary system," the California Supreme Court concluded that the power to impose such sanctions must be created by the Legislature with appropriate safeguards. [That] reasoning […] has been extended to "any sanction occasioned by attorney conduct."

3. Admission Pro Hac Vice

Most, if not all, States allow an out-of-state attorney to appear *pro hac vice.* However, it is not a right granted by the Constitution.

California Rules of Court, rule 9.40 governs the admission of attorneys *pro hac vice* in California. An attorney who is a member in good standing of the bar of another state who has been retained to appear in a particular cause pending before a court of this state may, "in the discretion of such court" be permitted to appear as counsel *pro hac vice.* No person is eligible to appear *pro hac vice* if the person is a California resident, regularly employed in California, or regularly engaged in substantial business in California. Repeated appearances *pro hac vice* constitute cause to deny an application. An attorney seeking to appear *pro hac vice* must file an application indicating the courts to which the applicant has been admitted, and that the applicant is a member in good standing in those courts. An applicant must indicate that he or she "is not currently suspended or disbarred in any court," but there is no requirement for including any history of discipline imposed.

While there does not appear to be a statement of the scope of a court's discretion in ruling on an application to appear *pro hac vice* in a civil case, our Supreme Court has concluded that, when a criminal defendant seeks to be represented by an attorney appearing *pro hac vice,* the court's exercise of discretion should be limited

by the individual's right to defend himself in whatever manner he desires. The defendant's choice of counsel should be interfered with only to avoid significant prejudice to the defendant himself or " 'a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' "

While in some jurisdictions, the State Bar has no power to discipline attorneys appearing *pro hac vice*, an attorney appearing *pro hac vice* in California is "subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance." Additionally, once permitted to appear *pro hac vice,* a foreign attorney in California "is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California."

4. Revocation of Pro Hac Vice Status

No case in California has yet addressed whether a trial court has the authority to revoke an attorney's *pro hac vice* status. Numerous other courts, however, have considered the issue, and determined that trial courts possess that authority. The parties have not cited to, and independent research has not disclosed, an opinion from any jurisdiction concluding that trial courts lacked the authority to revoke an attorney's *pro hac vice* status.

However, the legal basis for the authority to revoke an attorney's *pro hac vice* status has varied. Some jurisdictions expressly include the authority to revoke *pro hac vice* status in their statutes or rules allowing *pro hac vice* appearances. *See* […] N.C. Gen.Stat. § 84-4.2 ("Permission granted (to appear *pro hac vice*) may be summarily revoked by the General Court of Justice or any agency … on its own motion and in its discretion") […]) Federal courts have concluded the authority to revoke an attorney's *pro hac vice* status is included within the inherent power of a federal court "to control admission to its bar and to discipline attorneys who appear before it." Finally, some courts have found the power to revoke an attorney's *pro hac vice* status within a trial court's inherent power to regulate practice before it and protect the integrity of its proceedings.

Moreover, jurisdictions differ on the conduct of the *pro hac vice* attorney that will be sufficient to justify revocation of *pro hac vice* status. In some jurisdictions, the trial court may revoke an out-of-state attorney's *pro hac vice* status for any conduct which "adversely impacts the administration of justice." In some jurisdictions, violation of an established disciplinary standard justifies revocation of *pro hac vice* status. Other jurisdictions require bad faith of the *pro hac vice* attorney before such status can be revoked. Still other jurisdictions grant trial courts a very broad discretion, which permits revocation of *pro hac vice* status for reasons which do not amount to misconduct. In Ohio, the courts have not yet determined the outer limits of the trial courts' authority to revoke *pro hac vice* status, but have concluded that, at the least, conduct which would support disqualification of a local attorney is sufficient to justify revocation of a *pro hac vice* attorney's status. In Washington,

pro hac vice status can be revoked for conduct that constitutes contempt, adversely affects the conduct of the litigation, or violates the code of professional responsibility.

In this admittedly non-uniform state of the law, we now consider whether California trial courts have the authority to revoke an attorney's *pro hac vice* status. We consider the three legal bases that have been found by other jurisdictions to support such authority: (1) express provision in statute or rule; (2) implied in court's authority to control admission to its bar and discipline attorneys who appear before it; and (3) implied in court's inherent power to regulate practice before it and protect the integrity of its proceedings. California has no express provision granting trial courts the right to revoke an attorney's *pro hac vice* status. Unlike federal courts, California trial courts do not possess the power to control admission to the bar and discipline attorneys. But California trial courts do possess the inherent power to regulate practice before them and protect the integrity of their proceedings. In determining whether this power encompasses the authority to revoke an attorney's *pro hac vice* status, we look at the language of the governing court rule. An attorney appearing *pro hac vice* "is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California." (Cal. Rules of Court, rule 9.40(f).) Given that a California trial court's inherent power includes the authority to disqualify a California attorney, and that revocation of an out-of-state attorney's *pro hac vice* status is, in effect, a disqualification of the out-of-state attorney, we conclude that a California trial court's inherent powers include the authority to revoke an attorney's *pro hac vice* status when that attorney has engaged in conduct that would be sufficient to disqualify a California attorney. While it may be that a California trial court has the authority to revoke an attorney's *pro hac vice* status under other circumstances as well, we need not reach the issue of the precise limits of a trial court's authority in this appeal.

5. The Trial Court's Order

In this case, the trial court ordered Attorney Sheller to pay Farmers's attorney's fees. The order had no statutory basis, and the trial court could not have imposed a similar order on a California attorney. Similarly, the trial court formally reprimanded Attorney Sheller. Again, this is not a sanction that the trial court would have had jurisdiction to impose on a California attorney. Farmers suggests that, even though these sanctions could not have been imposed on a California attorney, the sanctions can be upheld in this case as *lesser* sanctions to the permissible sanction of revocation of Attorney Sheller's *pro hac vice* status. The conclusion does not follow. Indeed, it has already been established that although a trial court has the inherent power to disqualify a California attorney, it does not have the power to impose the apparently lesser sanctions of attorney's fees and a formal reprimand. There is simply no reason to conclude that, even though a trial court has the inherent power to revoke an out-of-state attorney's *pro hac vice* status, it some-

how has the power to impose every conceivably lesser sanction on that attorney—especially when the trial court does not possess the jurisdiction to impose those sanctions on a California attorney. An attorney appearing *pro hac vice* submits to the "jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California." The attorney appearing *pro hac vice* does not submit to the disciplinary jurisdiction of the California courts to a *greater* extent than California attorneys. The trial court's order was error.

However, on remand, the court can also consider whether Attorney Sheller's *pro hac vice* status should be revoked. Moreover, the trial court can consider imposition of any other sanction procedurally available and justified by the facts. Specifically, but not exclusively, the court can consider whether Attorney Sheller should be reported to the State Bar for the initiation of disciplinary proceedings.

On appeal, Attorney Sheller argues that, at most, he committed a "marginal infraction," rendering the imposition of any sanctions an abuse of discretion. Here, we disagree. While we conclude that the trial court lacked jurisdiction to impose the sanctions ordered, this should in no way be interpreted as our approval of Attorney Sheller's conduct in this matter. Attorney Sheller mailed an advertising flyer to 350 of Farmers's policyholders, seeking additional class representatives and informing them, "If accepted, you are paid for your time in an amount set by the judge." This statement is completely false; it indicates to the policyholders that they would be paid "for [their] time," in other words, that they would be paid *regardless* of the outcome of the action. We also share the trial court's concern that Attorney Sheller's explanations for his conduct were contradictory and his purported justifications were wholly inadequate. While Attorney Sheller's status as a *pro hac vice* attorney does not permit the trial court to sanction him in a manner that a California attorney could not be sanctioned, we express no opinion as to whether Attorney Sheller's conduct is worthy of the sanction of revocation of his *pro hac vice* status or any other permissible sanction.

Disposition

The order requiring Attorney Sheller to pay Farmers's attorney's fees is reversed. The petition for writ of mandate with respect to the order reprimanding Attorney Sheller is granted, and the trial court is directed to vacate the order.

Page v. Oath, Inc.

C.A. No. S20C-07-030 CAK (Del. Super. Jan. 11, 2021)

Karsnitz, J.

Several weeks ago, I issued a Rule to Show Cause why the approval I had given to L. Lin Wood, Esquire to practice before this Court in this case should not be revoked. Mr. Wood is not licensed to practice law in Delaware. Practicing *pro hac vice* is a privilege and not a right. I respect the desire of litigants to select counsel of their choice. When out of state counsel is selected, however, I am required to ensure the appropriate level of integrity and competence.

During the course of this litigation, a number of high profile cases have been filed around the country challenging the Presidential election. The cases included, *inter alia,* suits in Georgia, Wisconsin and Michigan. Opinions were delivered in all of the States which were critical in various ways of the lawyering by the proponents of the lawsuits. In the Rule to Show Cause, I raised concerns I had after reviewing written decisions from Georgia and Wisconsin. Specifically, in Georgia, a lawsuit filed by Mr. Wood resulted in a determination that the suit was without basis in law or fact. The initial pleadings in the Wisconsin case were riddled with errors. I had concerns as listed in the Rule to Show Cause.

I gave Mr. Wood until January 6, 2021 to file a response. He did so at 10:09 p.m., January 6. The response focused primarily upon the fact that none of the conduct I questioned occurred in my Court. The claim is factually correct. In his response, Mr. Wood writes:

> Absent conduct that prejudicially disrupts the proceedings, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct.

Mr. Wood also tells me it is the province of the Delaware Supreme Court to supervise the practice of law in Delaware and enforce our Rules of Professional Conduct. With that proposition I have no disagreement. In my view it misses the point and ignores the clear language of Rule 90.1. The response also contains the declaration of Charles Slanina, Esquire. I know Mr. Slanina and have the highest respect for him, especially for his work and expertise in the area of legal ethics. His declaration here focused on my lack of a role in lawyer discipline and was not helpful regarding the issue of the appropriateness and advisability of continuing *pro hac vice* permission.

Rule 90.1(e) reads in full:

> Withdrawal of attorneys admitted *pro hac vice* shall be governed by the provisions of Rule 90(b). The Court may revoke a *pro hac vice* admission *sua sponte* or upon the motion of a party, if it determines, after a hearing or other meaningful opportunity to respond, the continued admission *pro hac vice* to be inappropriate or inadvisable.

The standard then I am to apply is if the continued admission would be inappropriate or inadvisable.

I have no intention to litigate here, or make any findings, as to whether or not Mr. Wood violated other States' Rules of Professional Conduct. I agree that is outside my authority. It is the province of the Delaware Office of Disciplinary Counsel, and ultimately the Delaware Supreme Court, or their counterparts in other jurisdictions, to make a factual determination as to whether Mr. Wood violated the Rules of Professional Conduct. Thus, the cases cited by Mr. Wood are inapposite and of no avail. In *Lendus, LLC v. Goode,* and *Crumpler v. Superior Court, ex. rel New Castle County,* the courts allowed the foreign lawyer to withdraw as *pro hac vice* counsel and referred alleged ethical violations to the Office of Disciplinary Counsel. Neither of those is happening here. Similarly, in *Kaplan v. Wyatt,* Chancellor Brown, on very different facts, allowed *pro hac vice* counsel to continue his representation but stressed that this did not constitute approval of his conduct and that ethical violations could be addressed elsewhere.

What I am always required to do is ensure that those practicing before me are of sufficient character, and conduct themselves with sufficient civility and truthfulness. Violations of Rules of Professional Conduct are for other entities to judge based upon an appropriate record following guidelines of due process. My role here is much more limited.

In response to my inquiry regarding the Georgia litigation Mr. Wood tells me he was (only) a party, and the case is on appeal. He also tells me that the affidavit filed in support of the case only contained errors. Neither defense holds merit with me. As an attorney, Mr. Wood has an obligation, whether on his own or for clients, to file only cases which have a good faith basis in fact or law. The Court's finding in Georgia otherwise indicates that the Georgia case was textbook frivolous litigation.

I am also troubled that an error-ridden affidavit of an expert witness would be filed in support of Mr. Wood's case. An attorney as experienced as Mr. Wood knows expert affidavits must be reviewed in detail to ensure accuracy before filing. Failure to do so is either mendacious or incompetent.

The response to the Rule with regard to the Wisconsin complaint calls the failings "proof reading errors". Failure to certify a complaint for injunction or even serve the Defendants are not proof reading errors. The Complaint would not survive a law school civil procedure class.

Prior to the pandemic, I watched daily counsel practice before me in a civil, ethical way to tirelessly advance the interests of their clients. It would dishonor them were I to allow this *pro hac vice* order to stand. The conduct of Mr. Wood, albeit not in my jurisdiction, exhibited a toxic stew of mendacity, prevarication and surprising incompetence. What has been shown in Court decisions of our sister States satisfies me that it would be inappropriate and inadvisable to continue Mr. Wood's permission to practice before this Court. I acknowledge that I preside over a small part of the legal world in a small state. However, we take pride in our bar.

One final matter. A number of events have occurred since the filing of the Rule to Show Cause. I have seen reports of "tweets" attributable to Mr. Wood. At least one tweet called for the arrest and execution of our Vice-President. Another alleged claims against the Chief Justice of the Supreme Court of the United States which are too disgusting and outrageous to repeat. Following on top of these are the events of January 6, 2021 in our Nation's Capitol. No doubt these tweets, and many other things, incited these riots.

I am not here to litigate if Mr. Wood was ultimately the source of the incitement. I make no finding with regard to this conduct, and it does not form any part of the basis for my ruling. I reaffirm my limited role.

I am revoking my order granting Lin Wood, Esquire the privilege of representing the Plaintiff in this case.

IT IS SO ORDERED.

3. Unauthorized Practice of Law

Model Rules of Professional Conduct

Rule 5.5

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

N.C. Gen. Stat. chap. 84

§ 84-2.1. "Practice law" defined.

(a) The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition.

(b) The phrase "practice law" does not encompass:

(1) The drafting or writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S.7A-38.5 or by mediators of employment-related matters for The University of North Carolina or a constituent institution, or for an agency, commission, or board of the State of North Carolina.

(2) The selection or completion of a preprinted form by a real estate broker licensed under Chapter 93A of the General Statutes, when the broker is acting as an agent in a real estate transaction and in accordance with rules adopted by the North Carolina Real Estate Commission, or the selection or completion of a preprinted residential lease agreement by any person or Web site provider. Nothing in this subdivision or in G.S.84-2.2 shall be construed to permit any person or Web site provider who is not licensed to practice law in accordance with this Chapter to prepare for any third person any contract or deed conveying any interest in real property, or to abstract or pass upon title to any real property, which is located in this State.

(3) The completion of or assisting a consumer in the completion of various agreements, contracts, forms, and other documents related to the sale or lease of a motor vehicle as defined in G.S.20-286(10), or of products or services ancillary or related to the sale or lease of a motor vehicle, by a motor vehicle dealer licensed under Article 12 of Chapter 20 of the General Statutes.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged

in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney-at-law. The provisions of this section shall be in addition to and not in lieu of any other provisions of this Chapter. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina.

§ 84-2.2. Exemption and additional requirements for Web site providers.

(a) The practice of law, including the giving of legal advice, as defined by G.S.84-2.1 does not include the operation of a Web site by a provider that offers consumers access to interactive software that generates a legal document based on the consumer's answers to questions presented by the software, provided that all of the following are satisfied:

(1) The consumer is provided a means to see the blank template or the final, completed document before finalizing a purchase of that document.

(2) An attorney licensed to practice law in the State of North Carolina has reviewed each blank template offered to North Carolina consumers, including each and every potential part thereof that may appear in the completed document. The name and address of each reviewing attorney must be kept on file by the provider and provided to the consumer upon written request.

(3) The provider must communicate to the consumer that the forms or templates are not a substitute for the advice or services of an attorney.

(4) The provider discloses its legal name and physical location and address to the consumer.

(5) The provider does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the consumer.

(6) The provider does not require the consumer to agree to jurisdiction or venue in any state other than North Carolina for the resolution of disputes between the provider and the consumer.

(7) The provider must have a consumer satisfaction process. All consumer concerns involving the unauthorized practice of law made to the provider shall be referred to the North Carolina State Bar. The consumer satisfaction process must be conspicuously displayed on the provider's Web site.

(b) A Web site provider subject to this section shall register with the North Carolina State Bar prior to commencing operation in the State and shall renew its registration with the State Bar annually. The State Bar may not refuse registration.
(c) Each Web site provider subject to this section shall pay an initial registration fee in an amount not to exceed one hundred dollars ($100.00) and an annual renewal fee in an amount not to exceed fifty dollars ($50.00).

§ 84-7. District attorneys, upon application, to bring injunction or criminal proceedings.

The district attorney of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of G.S. 84-4 to 84-8, and it shall be the duty of the district attorneys of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of G.S. 84-4 to 84-8.

§ 84-8. Punishment for violations.

(a) Any person, corporation, or association of persons violating any of the provisions of G.S. 84-4 through G.S. 84-6 or G.S. 84-9 shall be guilty of a Class 1 misdemeanor.
(b) No person shall be entitled to collect any fee for services performed in violation of G.S. 84-4 through G.S. 84-6, G.S. 84-9, or G.S. 84-10.1.

§ 84-10.1. Private cause of action for the unauthorized practice of law.

If any person knowingly violates any of the provisions of G.S.84-4 through G.S.84-6 or G.S.84-9, fraudulently holds himself or herself out as a North Carolina certified paralegal by use of the designations set forth in G.S.84-37(a), or knowingly aids and abets another person to commit the unauthorized practice of law, in addition to any other liability imposed pursuant to this Chapter or any other applicable law, any person who is damaged by the unlawful acts set out in this section shall be entitled to maintain a private cause of action to recover damages and reasonable attorneys' fees and other injunctive relief as ordered by court. No order or judgment under this section shall have any effect upon the ability of the North Carolina State Bar to take any action authorized by this Chapter.

Birbrower, Montalbano, Condon & Frank v. Superior Court

70 Cal.Rptr.2d 304 (Cal. 1998)

Chin, J.

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar." We must decide whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125 when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation.

Although we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125. Contrary to the Court of Appeal, however, we do not believe the Legislature intended section 6125 to apply to those services an out-of-state firm renders in its home state. We therefore conclude that, to the extent defendant law firm Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower), practiced law in California without a license, it engaged in the unauthorized practice of law in this state. (§ 6125.) We also conclude that Birbrower's fee agreement with real party in interest ESQ Business Services, Inc. (ESQ), is invalid to the extent it authorizes payment for the substantial legal services Birbrower performed in California. If, however, Birbrower can show it generated fees under its agreement for limited services it performed in New York, and it earned those fees under the otherwise invalid fee agreement, it may, on remand, present to the trial court evidence justifying its recovery of fees for those New York services. Conversely, ESQ will have an opportunity to produce contrary evidence. Accordingly, we affirm the Court of Appeal judgment in part and reverse it in part, remanding for further proceedings consistent with this opinion.

I. BACKGROUND

The facts with respect to the unauthorized practice of law question are essentially undisputed. Birbrower is a professional law corporation incorporated in New York, with its principal place of business in New York. During 1992 and 1993, Birbrower attorneys, defendants Kevin F. Hobbs and Thomas A. Condon (Hobbs and Condon), performed substantial work in California relating to the law firm's representation of ESQ. Neither Hobbs nor Condon has ever been licensed to practice law in California. None of Birbrower's attorneys were licensed to practice law in California during Birbrower's ESQ representation.

ESQ is a California corporation with its principal place of business in Santa Clara County. In July 1992, the parties negotiated and executed the fee agreement in New York, providing that Birbrower would perform legal services for ESQ, including "All matters pertaining to the investigation of and prosecution of all claims and causes of action against TANDEM COMPUTERS INCORPORATED [Tandem]." The "claims and causes of action" against Tandem, a Delaware corporation

with its principal place of business in Santa Clara County, California, related to a software development and marketing contract between Tandem and ESQ dated March 16, 1990 (Tandem Agreement). The Tandem Agreement stated that "The internal laws of the State of California (irrespective of its choice of law principles) shall govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto." Birbrower asserts, and ESQ disputes, that ESQ knew Birbrower was not licensed to practice law in California.

While representing ESQ, Hobbs and Condon traveled to California on several occasions. In August 1992, they met in California with ESQ and its accountants. During these meetings, Hobbs and Condon discussed various matters related to ESQ's dispute with Tandem and strategy for resolving the dispute. They made recommendations and gave advice. During this California trip, Hobbs and Condon also met with Tandem representatives on four or five occasions during a two-day period. At the meetings, Hobbs and Condon spoke on ESQ's behalf. Hobbs demanded that Tandem pay ESQ $15 million. Condon told Tandem he believed that damages would exceed $15 million if the parties litigated the dispute.

Around March or April 1993, Hobbs, Condon, and another Birbrower attorney visited California to interview potential arbitrators and to meet again with ESQ and its accountants. Birbrower had previously filed a demand for arbitration against Tandem with the San Francisco offices of the American Arbitration Association (AAA). In August 1993, Hobbs returned to California to assist ESQ in settling the Tandem matter. While in California, Hobbs met with ESQ and its accountants to discuss a proposed settlement agreement Tandem authored. Hobbs also met with Tandem representatives to discuss possible changes in the proposed agreement. Hobbs gave ESQ legal advice during this trip, including his opinion that ESQ should not settle with Tandem on the terms proposed.

ESQ eventually settled the Tandem dispute, and the matter never went to arbitration. But before the settlement, ESQ and Birbrower modified the contingency fee agreement. The modification changed the fee arrangement from contingency to fixed fee, providing that ESQ would pay Birbrower over $1 million. The original contingency fee arrangement had called for Birbrower to receive "one-third (1/3) of all sums received for the benefit of the Clients … whether obtained through settlement, motion practice, hearing, arbitration, or trial by way of judgment, award, settlement, or otherwise…."

In January 1994, ESQ sued Birbrower for legal malpractice and related claims in Santa Clara County Superior Court. Birbrower removed the matter to federal court and filed a counterclaim, which included a claim for attorney fees for the work it performed in both California and New York. The matter was then remanded to the superior court. There ESQ moved for summary judgment and/or adjudication on the first through fourth causes of action of Birbrower's counterclaim, which asserted ESQ and its representatives breached the fee agreement.

ESQ argued that by practicing law without a license in California and by failing to associate legal counsel while doing so, Birbrower violated section 6125, rendering the fee agreement unenforceable. Based on these undisputed facts, the Santa Clara Superior Court granted ESQ's motion for summary adjudication of the first through fourth causes of action in Birbrower's counterclaim. The court also granted summary adjudication in favor of ESQ's third and fourth causes of action in its second amended complaint, seeking declaratory relief as to the validity of the fee agreement and its modification. The court concluded that: (1) Birbrower was "not admitted to the practice of law in California"; (2) Birbrower "did not associate California counsel"; (3) Birbrower "provided legal services in this state"; and (4) "The law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed."

Although the trial court's order stated that the fee agreements were unenforceable, at the hearing on the summary adjudication motion, the trial court also observed: "It seems to me that those are some of the issues that this Court has to struggle with, and then it becomes a question of if they aren't allowed to collect their attorney's fees here, I don't think that puts the attorneys in a position from being precluded from collecting all of their attorney's fees, only those fees probably that were generated by virtue of work that they performed in California and not that work that was performed in New York."

In granting limited summary adjudication, the trial court left open the following issues for resolution: ESQ's malpractice action against Birbrower, and the remaining causes of action in Birbrower's counterclaim, including Birbrower's fifth cause of action for quantum meruit (seeking the reasonable value of legal services provided).

Birbrower petitioned the Court of Appeal for a writ of mandate directing the trial court to vacate the summary adjudication order. The Court of Appeal denied Birbrower's petition and affirmed the trial court's order, holding that Birbrower violated section 6125. The Court of Appeal also concluded that Birbrower's violation barred the firm from recovering its legal fees under the written fee agreement, including fees generated in New York by the attorneys when they were physically present in New York, because the agreement included payment for California or "local" services for a California client in California. The Court of Appeal agreed with the trial court, however, in deciding that Birbrower could pursue its remaining claims against ESQ, including its equitable claim for recovery of its fees in quantum meruit.

We granted review to determine whether Birbrower's actions and services performed while representing ESQ in California constituted the unauthorized practice of law under section 6125 and, if so, whether a section 6125 violation rendered the fee agreement wholly unenforceable.

II. DISCUSSION

A. The Unauthorized Practice of Law

The California Legislature enacted section 6125 in 1927 as part of the State Bar Act (the Act), a comprehensive scheme regulating the practice of law in the state. Since the Act's passage, the general rule has been that, although persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California. The prohibition against unauthorized law practice is within the state's police power and is designed to ensure that those performing legal services do so competently.

A violation of section 6125 is a misdemeanor. Moreover, "No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar."

Although the Act did not define the term "practice law," case law explained it as " 'the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.' " *Merchants* included in its definition legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation. *Ring* later determined that the Legislature "accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court [in *Merchants*] that it had a sufficiently definite meaning to need no further definition. The definition … must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term 'practice law.' "

In addition to not defining the term "practice law," the Act also did not define the meaning of "in California." In today's legal practice, questions often arise concerning whether the phrase refers to the nature of the legal services, or restricts the Act's application to those out-of-state attorneys who are physically present in the state.

Section 6125 has generated numerous opinions on the meaning of "practice law" but none on the meaning of "in California." In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite.

This interpretation acknowledges the tension that exists between interjurisdictional practice and the need to have a state-regulated bar. As stated in the American Bar Association Model Code of Professional Responsibility, Ethical Consideration EC 3-9, "Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

If we were to carry the dissent's narrow interpretation of the term "practice law" to its logical conclusion, we would effectively limit section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission. Clearly, neither *Merchants* nor *Baron* supports the dissent's fanciful interpretation of the thoughtful guidelines announced in those cases. Indeed, the dissent's definition of "practice law" ignores *Merchants* altogether, and, in so doing, substantially undermines the Legislature's intent to protect the public from those giving unauthorized legal advice and counsel.

Exceptions to section 6125 do exist, but are generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal. They are narrowly drawn and strictly interpreted. For example, an out-of-state attorney not licensed to practice in California may be permitted, *by consent of a trial judge*, to appear in California in a particular pending action.

In addition, with the permission of the California court in which a particular cause is pending, out-of-state counsel may appear before a court as counsel pro hac vice. A court will approve a pro hac vice application only if the out-of-state attorney is

a member in good standing of another state bar and is eligible to practice in any United States court or the highest court in another jurisdiction. The out-of-state attorney must also associate an active member of the California Bar as attorney of record and is subject to the Rules of Professional Conduct of the State Bar.

The Act does not regulate practice before United States courts. Thus, an out-of-state attorney engaged to render services in bankruptcy proceedings was entitled to collect his fee.

Finally, California Rules of Court, rule 988, permits the State Bar to issue registration certificates to foreign legal consultants who may advise on the law of the foreign jurisdiction where they are admitted. These consultants may not, however, appear as attorneys before a California court or judicial officer or otherwise prepare pleadings and instruments in California or give advice on the law of California or any other state or jurisdiction except those where they are admitted.

The Legislature has recognized an exception to section 6125 in international disputes resolved in California under the state's rules for arbitration and conciliation of international commercial disputes. This exception states that in a commercial conciliation in California involving international commercial disputes, "The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California." Likewise, the Act does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law.

B. The Present Case

The undisputed facts here show that neither *Baron*'s definition nor our "sufficient contact" definition of "practice law in California" would excuse Birbrower's extensive practice in this state. Nor would any of the limited statutory exceptions to section 6125 apply to Birbrower's California practice. As the Court of Appeal observed, Birbrower engaged in unauthorized law practice *in California* on more than a limited basis, and no firm attorney engaged in that practice was an active member of the California State Bar. As noted, in 1992 and 1993, Birbrower attorneys traveled to California to discuss with ESQ and others various matters pertaining to the dispute between ESQ and Tandem. Hobbs and Condon discussed strategy for resolving the dispute and advised ESQ on this strategy. Furthermore, during California meetings with Tandem representatives in August 1992, Hobbs demanded Tandem pay $15 million, and Condon told Tandem he believed damages in the matter would exceed that amount if the parties proceeded to litigation. Also in California, Hobbs met with ESQ for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed. Birbrower attorneys also traveled to California to initiate arbitration proceedings

before the matter was settled. As the Court of Appeal concluded, "… the Birbrower firm's in-state activities clearly constituted the [unauthorized] practice of law" *in California*.

Birbrower contends, however, that section 6125 is not meant to apply to *any* out-of-state *attorneys*. Instead, it argues that the statute is intended solely to prevent nonattorneys from practicing law. This contention is without merit because it contravenes the plain language of the statute. Section 6125 clearly states that *no person* shall practice law in California unless that person is a member of the State Bar. The statute does not differentiate between attorneys or nonattorneys, nor does it excuse a person who is a member of another state bar. It is well-settled that, in determining the meaning of a statute, we look to its words and give them their usual and ordinary meaning. "If statutory language is 'clear and unambiguous there is no need for construction, and courts should not indulge in it.' " The plain meaning controls our interpretation of the statute here because Birbrower has not shown "that the natural and customary import of the statute's language is either 'repugnant to the general purview of the act' or for some other compelling reason, should be disregarded…."

Birbrower next argues that we do not further the statute's intent and purpose—to protect California citizens from incompetent attorneys—by enforcing it against out-of-state attorneys. Birbrower argues that because out-of-state attorneys have been licensed to practice in other jurisdictions, they have already demonstrated sufficient competence to protect California clients. But Birbrower's argument overlooks the obvious fact that other states' laws may differ substantially from California law. Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state.

California is not alone in regulating who practices law in its jurisdiction. Many states have substantially similar statutes that serve to protect their citizens from unlicensed attorneys who engage in unauthorized legal practice. Like section 6125, these other state statutes protect local citizens "against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." Whether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of section 6125's language and purpose. Moreover, as the North Dakota Supreme Court pointed out in *Ranta*: "It may be that such an [out-of-state attorney] exception is warranted, but such a plea is more properly made to a legislative committee considering a bill enacting such an exception or to this court in its rule-making function than it is in a judicial decision." Similarly, a decision to except out-of-state attorneys licensed in their own jurisdictions from section 6125 is more appropriately left to the California Legislature.

Assuming that section 6125 does apply to out-of-state attorneys not licensed here, Birbrower alternatively asks us to create an exception to section 6125 for work incidental to private arbitration or other alternative dispute resolution proceedings. Birbrower points to fundamental differences between private arbitration and legal proceedings, including procedural differences relating to discovery, rules of evidence, compulsory process, cross-examination of witnesses, and other areas. As Birbrower observes, in light of these differences, at least one court has decided that an out-of-state attorney could recover fees for services rendered in an arbitration proceeding.

In *Williamson*, a New Jersey law firm was employed by a client's New York law firm to defend a construction contract arbitration in New York. It sought to recover fees solely related to the arbitration proceedings, even though the attorney who did the work was not licensed in New York, nor was the firm authorized to practice in the state. In allowing the New Jersey firm to recover its arbitration fees, the federal district court concluded that an arbitration tribunal is not a court of record, and its fact-finding process is not similar to a court's process. The court relied on a local state bar report concluding that representing a client in an arbitration was not the unauthorized practice of law. But as amicus curiae the State Bar of California observes, "While in *Williamson* the federal district court did allow the New Jersey attorneys to recover their fees, that decision clearly is distinguishable on its facts…. [¶] In the instant case, it is undisputed that none of the time that the New York attorneys spent in California was" spent in arbitration; *Williamson* thus carries limited weight. Birbrower also relies on California's rules for arbitration and conciliation of international commercial disputes for support. As noted, these rules specify that, in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar.

We decline Birbrower's invitation to craft an arbitration exception to section 6125's prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law. Even though the Legislature has spoken with respect to *international* arbitration and conciliation, it has not enacted a similar rule for private arbitration proceedings. Of course, private arbitration and other alternative dispute resolution practices are important aspects of our justice system. Section 6125, however, articulates a strong public policy favoring the practice of law in California by licensed State Bar members. In the face of the Legislature's silence, we will not create an arbitration exception under the facts presented.

In its reply brief to the State Bar's amicus curiae brief, Birbrower raises for the first time the additional argument that the Federal Arbitration Act (FAA) preempted the rules governing the AAA proposed arbitration and section 6125. The FAA regulates arbitration that deals with maritime transactions and contracts involv-

ing the transportation of goods through interstate or foreign commerce. Although we need not address the question under [the] California Rules of Court, and note the parties' settlement agreement rendered the arbitration unnecessary, we reject the argument for its lack of merit. First, the parties incorporated a California choice-of-law provision in the Tandem Agreement, indicating they intended to apply California law in any necessary arbitration, and they have not shown that California law in any way conflicts with the FAA. Moreover, in interpreting the California Arbitration Act stay provisions, the high court observed that the FAA does not contain an express preemptive provision, nor does it "reflect a congressional intent to occupy the entire field of arbitration."

Finally, Birbrower urges us to adopt an exception to section 6125 based on the unique circumstances of this case. Birbrower notes that "Multistate relationships are a common part of today's society and are to be dealt with in commonsense fashion." In many situations, strict adherence to rules prohibiting the unauthorized practice of law by out-of-state attorneys would be " 'grossly impractical and inefficient.' "

Although, as discussed, we recognize the need to acknowledge and, in certain cases, to accommodate the multistate nature of law practice, the facts here show that Birbrower's extensive activities within California amounted to considerably more than any of our state's recognized exceptions to section 6125 would allow. Accordingly, we reject Birbrower's suggestion that we except the firm from section 6125's rule under the circumstances here.

C. Compensation for Legal Services

Because Birbrower violated section 6125 when it engaged in the unlawful practice of law in California, the Court of Appeal found its fee agreement with ESQ unenforceable in its entirety. Without crediting Birbrower for some services performed in New York, for which fees were generated under the fee agreement, the court reasoned that the agreement was void and unenforceable because it included payment for services rendered to a California client in the state by an unlicensed out-of-state lawyer. The court opined that "When New York counsel decided to accept [the] representation, it should have researched California law, including the law governing the practice of law in this state." The Court of Appeal let stand, however, the trial court's decision to allow Birbrower to pursue its fifth cause of action in quantum meruit. We agree with the Court of Appeal to the extent it barred Birbrower from recovering fees generated under the fee agreement for the unauthorized legal services it performed in California. We disagree with the same court to the extent it implicitly barred Birbrower from recovering fees generated under the fee agreement for the limited legal services the firm performed in New York.

It is a general rule that an attorney is barred from recovering compensation for services rendered in another state where the attorney was not admitted to the bar. The general rule, however, has some recognized exceptions.

Initially, Birbrower seeks enforcement of the entire fee agreement, relying first on the federal court exception. This exception does not apply in this case; none of Birbrower's activities related to federal court practice.

A second exception on which Birbrower relies to enforce its entire fee agreement relates to "Services not involving courtroom appearance." California has implicitly rejected this broad exception through its comprehensive definition of what it means to "practice law." Thus, the exception Birbrower seeks for all services performed outside the courtroom in our state is too broad under section 6125.

Some jurisdictions have adopted a third exception to the general rule of nonrecovery for in-state services, if an out-of-state attorney "makes a full disclosure to his client of his lack of local license and does not conceal or misrepresent the true facts." For example, in *Freeling v. Tucker*, the [Idaho] court allowed an Oklahoma attorney to recover for services rendered in an Idaho probate court. Even though an Idaho statute prohibited the unlicensed practice of law, the court excused the Oklahoma attorney's unlicensed representation because he had not falsely represented himself nor deceptively held himself out to the client as qualified to practice in the jurisdiction. In this case, Birbrower alleges that ESQ at all times knew that the firm was not licensed to practice law in California. Even assuming that is true, however, we reject the full disclosure exception for the same reasons we reject the argument that section 6125 is not meant to apply to nonattorneys. Recognizing these exceptions would contravene not only the plain language of section 6125 but the underlying policy of assuring the competence of those practicing law in California.

Therefore, as the Court of Appeal held, none of the exceptions to the general rule prohibiting recovery of fees generated by the unauthorized practice of law apply to Birbrower's activities in California. Because Birbrower practiced substantial law in this state in violation of section 6125, it cannot receive compensation under the fee agreement for any of the services it performed in California. Enforcing the fee agreement in its entirety would include payment for the unauthorized practice of law in California and would allow Birbrower to enforce an illegal contract.

Birbrower asserts that even if we agree with the Court of Appeal and find that none of the above exceptions allowing fees for unauthorized California services apply to the firm, it should be permitted to recover fees for those limited services it performed exclusively *in New York* under the agreement. In short, Birbrower seeks to recover under its contract for those services it performed for ESQ in New York that did not involve the practice of law in California, including fee contract ne-

gotiations and some corporate case research. Birbrower thus alternatively seeks reversal of the Court of Appeal's judgment to the extent it implicitly precluded the firm from seeking fees generated in New York under the fee agreement.

We agree with Birbrower that it may be able to recover fees under the fee agreement for the limited legal services it performed for ESQ in New York to the extent they did not constitute practicing law in California, even though those services were performed for a California client. Because section 6125 applies to the practice of law in California, it does not, in general, regulate law practice in other states. Thus, although the general rule against compensation to out-of-state attorneys precludes Birbrower's recovery under the fee agreement for its actions in California, the severability doctrine may allow it to receive its New York fees generated under the fee agreement, if we conclude the illegal portions of the agreement pertaining to the practice of law in California may be severed from those parts regarding services Birbrower performed in New York.

The law of contract severability is stated in Civil Code section 1599, which defines partially void contracts: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." In *Calvert v. Stoner*, we considered whether a contingent fee contract containing a provision restricting a party's right to compromise a suit without her attorney's consent was void entirely or severable in part. We observed that "It is unnecessary … to determine whether the particular provision is invalid as against public policy. It is sufficient to observe, assuming such invalidity, that in this state … the compensation features of the contract are not thereby deemed affected if in other respects the contract is lawful." *Calvert* concluded that the invalid provision preventing the client from compromising the suit could be severed from the valid provision for attorney fees.

The fee agreement between Birbrower and ESQ became illegal when Birbrower performed legal services in violation of section 6125. It is true that courts will not ordinarily aid in enforcing an agreement that is either illegal or against public policy. Illegal contracts, however, will be enforced under certain circumstances, such as when only a part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. "'"When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the … law … [divides] according to common reason; and having made that void that is against law, lets the rest stand…."'" If the court is unable to distinguish between the lawful and unlawful parts of the agreement, "the illegality taints the entire contract, and the entire transaction is illegal and unenforceable."

In *Keene*, the defendant agreed to pay the plaintiffs $50,000 in exchange for their business involving coin-operated machines. The defendant defaulted on his payments, and the plaintiffs sued. The defendant argued that the sales agreement was

void because part of the sale involved machines that were illegal under a California penal statute. The court affirmed the lower court's determination that the price of the illegal machines could be deducted from the amount due on the original contract. "Since the consideration on the buyer's side was money, the court properly construed the contract by equating the established market price of the illegal machines to a portion of the money consideration." Thus, even though the entire contract was for a fixed sum, the court was able to value the illegal portion of the contract and separate it from the rest of the amount due under the agreement.

In this case, the parties entered into a contingency fee agreement followed by a fixed fee agreement. ESQ was to pay money to Birbrower in exchange for Birbrower's legal services. The object of their agreement may not have been entirely illegal, assuming ESQ was to pay Birbrower compensation based in part on work Birbrower performed in New York that did not amount to the practice of law in California. The illegality arises, instead, out of the amount to be paid to Birbrower, which, if paid fully, would include payment for services rendered in California in violation of section 6125.

Therefore, we conclude the Court of Appeal erred in determining that the fee agreement between the parties was entirely unenforceable because Birbrower violated section 6125's prohibition against the unauthorized practice of law in California. Birbrower's statutory violation may require exclusion of the portion of the fee attributable to the substantial illegal services, but that violation does not necessarily entirely preclude its recovery under the fee agreement for the limited services it performed outside California.

Thus, the portion of the fee agreement between Birbrower and ESQ that includes payment for services rendered in New York may be enforceable to the extent that the illegal compensation can be severed from the rest of the agreement. On remand, therefore, the trial court must first resolve the dispute surrounding the parties' fee agreement and determine whether their agreement conforms to California law. If the parties and the court resolve the fee dispute and determine that one fee agreement is operable and does not violate any state drafting rules, the court may sever the illegal portion of the consideration (the value of the California services) from the rest of the fee agreement. Whether the trial court finds the contingent fee agreement or the fixed fee agreement to be valid, it will determine whether some amount is due under the valid agreement. The trial court must then determine, on evidence the parties present, how much of this sum is attributable to services Birbrower rendered in New York. The parties may then pursue their remaining claims.

III. Disposition

We conclude that Birbrower violated section 6125 by practicing law in California. To the extent the fee agreement allows payment for those illegal local services, it is void, and Birbrower is not entitled to recover fees under the agreement for those services. The fee agreement is enforceable, however, to the extent it is possible to sever the portions of the consideration attributable to Birbrower's services illegally rendered in California from those attributable to Birbrower's New York services. Accordingly, we affirm the Court of Appeal judgment to the extent it concluded that Birbrower's representation of ESQ in California violated section 6125, and that Birbrower is not entitled to recover fees under the fee agreement for its local services. We reverse the judgment to the extent the court did not allow Birbrower to argue in favor of a severance of the illegal portion of the consideration (for the California fees) from the rest of the fee agreement, and remand for further proceedings consistent with this decision.

KENNARD, J., Dissenting.

In California, it is a misdemeanor to practice law when one is not a member of the State Bar. In this case, New York lawyers who were not members of the California Bar traveled to this state on several occasions, attempting to resolve a contract dispute between their clients and another corporation through negotiation and private arbitration. Their clients included a New York corporation and a sister corporation incorporated in California; the lawyers had in previous years represented the principal owners of these corporations. The majority holds that the New York lawyers' activities in California constituted the unauthorized practice of law. I disagree.

The majority focuses its attention on the question of whether the New York lawyers had engaged in the practice of law *in California*, giving scant consideration to a decisive preliminary inquiry: whether, through their activities here, the New York lawyers had engaged in the practice of law *at all*. In my view, the record does not show that they did. In reaching a contrary conclusion, the majority relies on an overbroad definition of the term "practice of law." I would adhere to this court's decision in *Baron v. City of Los Angeles*, more narrowly defining the practice of law as the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Under this definition, this case presents a triable issue of material fact as to whether the New York lawyers' California activities constituted the practice of law.

I

Defendant Birbrower, Montalbano, Condon & Frank, P.C. (hereafter Birbrower) is a New York law firm. Its lawyers are not licensed to practice law in California.

Kamal Sandhu was the sole shareholder of ESQ Business Services Inc., a New York corporation (hereafter ESQ-NY), of which his brother Iqbal Sandhu was the vice-president. Beginning in 1986, Birbrower lawyers represented the Sandhu family in various business matters. In 1990, Kamal Sandhu asked Birbrower lawyer Kevin Hobbs to review a proposed software development and marketing agreement between ESQ-NY and Tandem Computers Incorporated (hereafter Tandem). The agreement granted Tandem worldwide distribution rights to computer software created by ESQ-NY. The agreement also provided that it would be governed by California law and that, according to Birbrower's undisputed assertion, disputes were to be resolved by arbitration under the rules of the American Arbitration Association. ESQ-NY and Tandem signed the agreement.

Thereafter, a second corporation, also named ESQ Business Services, Inc. (hereafter ESQ-CAL), was incorporated in California, with Iqbal Sandhu as a principal shareholder. In 1991, ESQ-CAL consulted Birbrower lawyers concerning Tandem's performance under the agreement. In 1992, ESQ-NY and ESQ-CAL jointly hired Birbrower to resolve the dispute with Tandem, including the investigation and prosecution of claims against Tandem if necessary. ESQ-NY and ESQ-CAL entered into a contingency fee agreement with Birbrower; this agreement was executed in New York but was later modified to a fixed fee agreement in California.

The efforts of the Birbrower lawyers to resolve the dispute with Tandem included several brief trips to California. On these trips, Birbrower lawyers met with officers of both ESQ-NY and ESQ-CAL and with representatives of Tandem; they also interviewed arbitrators and participated in negotiating the settlement of the dispute with Tandem. On February 12, 1993, Birbrower initiated an arbitration proceeding against Tandem, on behalf of both ESQ-NY and ESQ-CAL, by filing a claim with the American Arbitration Association in San Francisco, California. Before an arbitration hearing was held, the dispute with Tandem was settled.

In January 1994, ESQ-CAL and Iqbal Sandhu, the principal shareholder, sued Birbrower for malpractice. Birbrower cross-complained to recover its fees under the fee agreement. Plaintiffs ESQ-CAL and Iqbal Sandhu thereafter amended their complaint to add ESQ-NY as a plaintiff. Plaintiffs moved for summary adjudication, asserting the fee agreement was unenforceable because the Birbrower lawyers had engaged in the unauthorized practice of law in California. The trial court agreed, and granted plaintiffs' motion. The Court of Appeal upheld the trial court's ruling, as does a majority of this court today.

II

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar." The Legislature, however, has not defined what constitutes the practice of law.

Pursuant to its inherent authority to define and regulate the practice of law, this court in [*Merchant's*] defined the practice of law as follows: " 'As the term is generally understood, the practice of the law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which the legal rights are secured although such matter may or may not be depending in a court.' "

In 1970, in *Baron v. City of Los Angeles*, this court reiterated the *Merchants* court's definition of the term "practice of law." We were quick to point out in *Baron*, however, that "ascertaining whether a particular activity falls within this general definition may be a formidable endeavor." *Baron* emphasized "that it is not the whole spectrum of professional services of lawyers with which the State Bar Act is most concerned, but rather it is the smaller area of activities defined as the 'practice of law.' " It then observed: "In close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law 'if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a *trained legal mind*.' " *Baron* added that "if the application of legal knowledge and technique is *required*, the activity constitutes the practice of law. . . ."

The majority asserts that the definition of practice of law I have stated above misreads this court's opinion in *Baron*. But what the majority characterizes as "the dissent's fanciful interpretation of the [*Baron* court's] thoughtful guidelines" consists of language I have quoted directly from *Baron*.

The majority also charges that the narrowing construction of the term "practice of law" that this court adopted in *Baron* "effectively limit[s] section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission." Fiddlesticks. Because the *Baron* definition encompasses all activities that " 'reasonably demand application of a trained legal mind' ", the majority's assertion would be true only if there were no activities, apart from court appearances, requiring application of a trained legal mind. Many attorneys would no doubt be surprised to learn that, for example, drafting testamentary documents for large estates, preparing merger agreements for multinational corporations, or researching complex legal issues are not activities that require a trained legal mind.

According to the majority, use of the *Baron* definition I have quoted would undermine protection of the public from incompetent legal practitioners. The *Baron* definition provides ample protection from incompetent legal practitioners without infringing upon the public's interest in obtaining advice and representation from other professionals, such as accountants and real estate brokers, whose skills in specialized areas may overlap with those of lawyers. This allows the public the freedom to choose professionals who may be able to provide the public with

needed services at a more affordable cost. As this court has recognized, there are proceedings in which nonattorneys "are competent" to represent others without undermining the protection of the public interest.

The majority, too, purports to apply the definition of the practice of law as articulated in *Baron*. The majority, however, focuses only on *Baron's* quotation of the general definition of the practice of law set forth in *Merchants*. The majority ignores both the ambiguity in the *Merchants* definition and the manner in which *Baron* resolved that ambiguity. The majority apparently views the practice of law as encompassing *any* "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation."

The majority's overbroad definition would affect a host of common commercial activities. On point here are comments that Professor Deborah Rhode made in a 1981 article published in the Stanford Law Review: "For many individuals, most obviously accountants, bankers, real estate brokers, and insurance agents, it would be impossible to give intelligent counsel without reference to legal concerns that such statutes reserve as the exclusive province of attorneys. As one [American Bar Association] official active in unauthorized practice areas recently acknowledged, there is growing recognition that ' "all kinds of other professional people are practicing law almost out of necessity." ' Moreover, since most legislation does not exempt gratuitous activity, much advice commonly imparted by friends, employers, political organizers, and newspaper commentators constitutes unauthorized practice. For example, although the organized bar has not yet evinced any inclination to drag [nationally syndicated advice columnist] Ann Landers through the courts, she is plainly fair game under extant statutes [proscribing the unauthorized practice of law]."

Unlike the majority, I would for the reasons given above adhere to the more narrowly drawn definition of the practice of law that this court articulated in *Baron*: the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Applying that definition here, I conclude that the trial court should not have granted summary adjudication for plaintiffs based on the Birbrower lawyers' California activities. That some or all of those activities related to arbitration does not necessarily establish that they constituted the practice of law, as I shall explain.

III

As I mentioned earlier, Birbrower's clients had a software development and marketing agreement with Tandem. The agreement provided that its validity, interpretation, and enforcement were to be governed by California law. It also contained an arbitration provision. After a dispute arose pertaining to Tandem's performance under the agreement, Birbrower initiated an arbitration on behalf of its

clients by filing a claim with the American Arbitration Association in San Francisco, and held meetings in California to prepare for an arbitration hearing. Because the dispute with Tandem was settled, the arbitration hearing was never held.

[T]his court in *Baron* defined the term "practice of law" in narrower terms than the court had done earlier in *Merchants*. Under the narrower definition articulated in *Baron*, the practice of law is the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind.

Representing another in an arbitration proceeding does not invariably present difficult or doubtful legal questions that require a trained legal mind for their resolution. Under California law, arbitrators are "not ordinarily constrained to decide according to the rule of law…." Thus, arbitrators, " 'unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' " They " 'are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' " For this reason, "the existence of an *error of law* apparent on the face of the [arbitration] award *that causes substantial injustice* does not provide grounds for judicial review."

Moreover, an arbitrator in California can award any remedy "arguably based" on "the contract's general subject matter, framework or intent." This means that "an arbitrator in a commercial contract dispute may award an essentially unlimited range of remedies, whether or not a court could award them if it decided the same dispute, so long as it can be said that the relief draws its 'essence' from the contract and not some other source."

To summarize, under this court's decisions, arbitration proceedings are not governed or constrained by the rule of law; therefore, representation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind.

Commonly used arbitration rules further demonstrate that legal training is not essential to represent another in an arbitration proceeding. Here, for example, Birbrower's clients agreed to resolve any dispute arising under their contract with Tandem using the American Arbitration Association's rules, which allow any party to be "represented by counsel *or other authorized representative*." Rules of other arbitration organizations also allow for representation by nonattorneys. For instance, the Rules of Procedure of the Inter-American Commercial Arbitration Commission, article IV provides: "The parties may be represented or assisted by persons of their choice." By federal law, this rule applies in all arbitrations between a United

States citizen and a citizen of another signatory to the Inter-American Convention on International Commercial Arbitration, unless the arbitrating parties have expressly provided otherwise.

The American Arbitration Association and other major arbitration associations thus recognize that nonattorneys are often better suited than attorneys to represent parties in arbitration. The history of arbitration also reflects this reality, for in its beginnings arbitration was a dispute-resolution mechanism principally used in a few specific trades (such as construction, textiles, ship chartering, and international sales of goods) to resolve disputes among businesses that turned on factual issues uniquely within the expertise of members of the trade. In fact, "rules of a few trade associations forbid representation by counsel in arbitration proceedings, because of their belief that it would complicate what might otherwise be simple proceedings." The majority gives no adequate justification for its decision to deprive parties of their freedom of contract and to make it a crime for anyone but California lawyers to represent others in arbitrations in California.

In addressing an issue similar to that presented here, a federal court held that a firm of New Jersey lawyers not licensed to practice law in New York was entitled to recover payment for legal services rendered in a New York arbitration proceeding. In allowing recovery of fees, the court cited a report by the Association of the Bar of The City of New York: "The report states, 'it should be noted that no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law.' The report concludes '[t]he Committee is of the opinion that representation of a party in an arbitration proceeding by a nonlawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.'" *Williamson, supra*.

The majority's attempt to distinguish *Williamson* from this case is unpersuasive. The majority points out that in *Williamson*, the lawyers of the New Jersey firm actually rendered services at the New York arbitration hearing, whereas here the New York lawyers never actually appeared at an arbitration hearing in California. The majority distinguishes *Williamson* on the ground that in this case no arbitration hearing occurred. Does the majority mean that an actual appearance at an arbitration hearing is not the practice of law, but that preparation for arbitration proceedings is?

In this case, plaintiffs have not identified any specific California activities by the New York lawyers of the Birbrower firm that meet the narrow definition of the term "practice of law" as articulated by this court in *Baron*. Accordingly, I would reverse the judgment of the Court of Appeal and direct it to remand the matter to the trial court with directions to vacate its order granting plaintiff's motion for summary adjudication and to enter a new order denying that motion.

Estate of Condon v. McHenry

76 Cal.Rptr.2d 922 (Cal. App. 1998)

Walker, Associate Justice

Michael R. Condon and his attorneys, Michael Katz and his firm (the "Elrod firm"), appeal an order of the probate court denying Katz attorney fees for services rendered to the estate of Evelyn J. Condon. Michael, Evelyn's son, was appointed co-executor of her will with his sister, Caroline M. McHenry, the respondent to this appeal. Michael lives in Colorado; Caroline lives in California, as did their mother. The Elrod firm, which Evelyn J. Condon had retained to prepare her will and other documents effectuating her estate plan, is in Colorado, where the will was prepared, and where Katz is licensed to practice law. Katz is not a member of the California State Bar.

Michael retained Katz and the Elrod firm to advise him as co-executor in the probate proceedings. Caroline retained counsel in California, James Cody and his firm (the Carr firm), to represent her as co-executor in the same proceedings. The record reflects that Kate did most of his work in Colorado, where Michael resides, communicating by telephone, mail, and fax with Cody and with other of the Condon siblings in California. Michael also retained California counsel, Dominic Campisi and his firm (the "Evans firm"), to file papers and make appearances on his behalf in the probate court in San Mateo County.

In January 1996, fully three acrimonious years after the will was admitted to probate, the parties scheduled a hearing to approve the account, distribute the estate's assets, and award the fees owed the executors and their attorneys. Michael, through Campisi, filed a petition seeking compensation from the estate for Kate's ordinary and extraordinary legal services. Caroline challenged the petition, asserting that some of the work for which Kate sought payment was done for Michael and their brother, Eugene, individually, not for the estate. She also contended that the sums Kate claimed were unreasonable.

The probate judge never reached the issues Caroline raised. Once he determined that Kate was not a member of the California State Bar and had not applied to appear *pro hac vice*, he expressed his view that Kate was not an "attorney" within the meaning of Probate Code section 10810: "As far as this court is concerned he's not a licensed legal practitioner…." The judge adjourned the hearing, telling Campisi, "I will give you [two hours] to come up with some authority [for me] to order payment out of a California estate to a nonmember of the California bar for attorney's fees[.]"

When the hearing resumed, the judge denied Kate's hastily-assembled application for leave to appear *pro hac vice*. After hearing argument, he concluded that, by serving as counsel for the co-executor of a will written for a California decedent,

which devised California property, and was subject to California probate proceedings, Kate, a nonmember of the State Bar, had "practice[d] law in California" in violation of Business and Professions Code section 6125. The court therefore refused to authorize payment of his legal fees. Michael and the Elrod firm timely appealed.

In our June 25, 1997, opinion, we reversed the probate court's order, holding that California Probate Code section 8570 et seq. allowed for such fees and that section 6125 did not proscribe them. Following our denial of a petition for rehearing, the Supreme Court granted review and ordered action on the cause deferred until disposition of *Birbrower, Montalbano, Condon & Frank v. Superior Court* then pending before it. Following its decision, the Supreme Court transferred review to us with directions to vacate our prior decision and to reconsider *Condon* in light of *Birbrower*.

Following our review we conclude that Kate did not violate section 6125. He is therefore entitled under the Probate Code to ordinary statutory fees and to extraordinary fees in whatever amount the court deems reasonable for the services he rendered to Michael in his capacity as co-executor.

The Legal Question

Section 6125 provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar." Section 6126 states that "[any] person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor." Our courts have spun from these prohibitions a policy against awarding attorney fees to unlicensed practitioners of law.

It is well settled in California that "practicing law" means more than just appearing in court. " '… [T]he practice of the law … includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be []pending in a court.' " The parties agree that Katz "practic[ed] law" for Michael in his capacity as co-executor of his mother's will.

We must decide whether an out-of-state law firm, not licensed to practice law in California, violated section 6125 when it performed legal services by either physically or virtually entering California on behalf of a Colorado client who was an executor of a California estate.

Analysis

1. The Probate Code Allows the Payment of Attorney Fees to an Out-of-state Attorney Rendering Services on Behalf of a California Estate.

The Probate Code makes specific allowance for a nonresident, such as Michael, to serve as executor of a will subject to probate in California, and our courts have made clear that "[t]he executor[] has the right to choose independent counsel to perform the necessary legal services on behalf of the estate." Here, Michael's choice was not only his to make, it was also reasonable; the Elrod firm did business where he lived and its principals had originally prepared his mother's estate plan.

Lending further support to our conclusion, the language of the Probate Code is mandatory; it provides "the attorney for the [executor] *shall* receive compensation", making no exception for out-of-state attorneys, and our Supreme Court has held that the attorney's right to ordinary compensation is absolute. Moreover, our courts have approved without question the payment of statutory fees to an out-of-state attorney retained by a California executor. And it is common practice for California probate judges to award fees to out-of-state attorneys rendering legal services in "ancillary" matters. In sum, though out-of-state attorneys have undoubtedly served California estates before this, and their services have surely entailed professional communications with people in California, there is nothing in the Probate Code or prior cases to suggest that they are disqualified from receiving statutory compensation.

2. Section 6125 does Not Proscribe an Award of Attorney Fees to an Out-of-state Attorney for Services Rendered on Behalf of an Out-of-state Client Regardless of Whether the Attorney is Either Physically or Virtually Present Within the State of California.

In *Birbrower*, ESQ Business Services, Inc. (ESQ), a California Corporation with its principal place of business in Santa Clara County, retained the New York law firm of Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower), a professional law corporation incorporated in New York with its principal place of business in New York. Birbrower attorneys performed substantial work while physically present in California relating to the law firm's representation of ESQ. Neither the professional corporation nor any of the individual attorneys rendering services in California were licensed to practice law in California, although they were licensed in New York. ESQ's retention agreement with the Birbrower firm provided for the rendition of legal services to resolve a contractual dispute relating to a software development and marketing contract between Tandem Computers Incorporated (Tandem), a Delaware corporation having its principal place of business in California, and ESQ. The retention agreement specifically provided that: " 'The internal laws of the State of California (irrespective of its choice of law principles) shall

govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parries hereto.' " In a malpractice action brought by ESQ against the Birbrower firm, the attorneys asserted by way of a cross-complaint the right to receive their fees with respect to their legal representation performed in California. ESQ defended asserting that Birbrower was not licensed to practice law in California and thus was barred from collecting any fees.

While representing ESQ, Birbrower attorneys traveled to California several times, met in California with ESQ and its accountants and gave legal advice to ESQ. They negotiated directly in California with Tandem's representatives on numerous occasions in an effort to resolve the contractual dispute and attempted to initiate California arbitration proceedings.

The Supreme Court granted review for the purpose of determining "whether Birbrower's actions and services performed while representing ESQ in California constituted the unauthorized practice of law under section 6125 and, if so, whether a section 6125 violation rendered the fee agreement wholly unenforceable." The issue articulated by the court was "whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125 when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation."

In answering the question posed the court focused on the meaning of "in California" and stated: "In our view, the practice of law 'in California' entails sufficient contact with the *California client* to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the *California client* that included legal duties and obligations."

In fleshing out the definition of the practice of law in California the Supreme Court in *Birbrower* states: "Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a *California client* on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices law 'in California' whenever that person practices California law anywhere, or Virtually' enters the state by telephone, fax, e-mail, or satellite."

Implicit in the court's formulation of the rule is the ingredient that the client is a "California client," one that either resides in or has its principal place of business in California. This conclusion is not only logical, it comports with the reason underlying the proscription of section 6175.

In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders. In resolving the issue of the applicability of section 6125 it is useful to look to the reason underlying the proscription of section 6125. *Birbrower* instructs that the rationale is to protect California citizens from incompetent attorneys stating: "California is not alone in regulating who practices law in its jurisdiction. Many states have substantially similar statutes that serve to *protect their citizens* from unlicensed attorneys who engage in unauthorized legal practice. Like section 6125, these other state statutes protect local citizens 'against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.' Whether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of section 6125's language and *purpose*." *Birbrower*, *supra*.

It is therefore obvious that, given the facts before us, the client's residence or its principal place of business is determinative of the question of whether the practice is proscribed by section 6125. Clearly the state of California has no interest in disciplining an out-of-state attorney practicing law on behalf of a client residing in the lawyer's home state.

3. The Applicability of the Birbrower Guidelines to this Case.

It is apparent that both the facts and the issues in *Birbrower* are distinguishable from those presented in *this case*. Most significantly Michael R. Condon was a resident of the state of Colorado. Thus, the issue was not "whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125, when it performed legal services in California for a *California-based client* …", but whether an out-of-state law firm practicing law on behalf of a resident of the lawyer's home state violated section 6125 when that lawyer either physically or virtually entered the state of California and practiced law on behalf of that client. Adopting the premise, as articulated in *Birbrower*, that the goal of section 6125 is to protect California citizens from incompetent or unscrupulous practitioners of law we must conclude that section 6125 is simply not applicable to our case.

The Elrod firm was retained by Michael to represent him in his capacity as coexecutor of the estate of Evelyn J. Condon. The firm's primary representation involved the implementation of the buy/sell agreement which was part of an estate

plan drafted by the firm in Colorado. Its services involved the negotiation, settlement and drafting of documents resolving the dispute among the heirs of the estate leading to the sale of the estate's principal asset, the family business. The negotiation and discussion with beneficiaries of the estate and their attorneys in California occurred for the most part by phone, fax and mail while the attorneys were physically located in Colorado. It appears that communication between Michael and the Elrod firm took place entirely within Colorado.

Under *Birbrower* one of the factors to be considered by the court in determining the applicability of section 6125 is whether the practitioner is plying "California law." Nevertheless, our Supreme Court instructs that a person does not automatically practice law "in California" whenever that person practices "California law" anywhere. In the matter before this court there is no record reflecting that Katz was practicing "California law." Furthermore, that factor is not relevant to our holding. If indeed the goal of the statute is to protect California citizens from the incompetent and unscrupulous practitioner (licensed or unlicensed), it simply should make no difference whether the out-of-state lawyer is practicing California law or some other breed since the impact of incompetence on the client is precisely the same.

Also, it would be presumptuous of this court to assume that in a multi-state business transaction where parties are located in diverse states and represented by counsel in those states, the lawyers are practicing "California law." Furthermore, it is insular to assume that only California lawyers can be trained in California law. Surely the citizens of states outside of California should not have to retain California lawyers to advise them on California law. Finally, the fact that California law was not implicated in the Elrod firm's representation of Michael R. Condon provides us additional impetus to conclude that the policy of protecting California citizens from untrained and incompetent attorneys has not been breached.

For the reasons stated herein we hold that Katz and the Elrod firm (licensed to practice law in Colorado) did not practice law "in California" within the meaning of section 6125 when its members entered California either physically or virtually to practice law on behalf of Michael (a Colorado citizen).

In light of the foregoing, we conclude that appellants did not violate our Business and Professions Code. Katz and the Elrod firm are, therefore, entitled under the Probate Code to ordinary statutory fees and to extraordinary fees in whatever amount the court deems reasonable for any services he rendered to Michael in his capacity as coexecutor. Appellants are to recover the costs and reasonable attorney fees incurred in prosecuting this appeal.

REVERSED AND REMANDED.

In re Creasey

12 P.3d 214 (Ariz. 2000)

Feldman, Justice

¶ This court disbarred Frederick C. Creasy, Jr. on September 16, 1996, for a number of violations of the Code of Professional Conduct and other Rules of the Supreme Court. The most serious involved failure to properly maintain client funds entrusted to him on two separate occasions, failure to adequately supervise a non-lawyer, and failure to assist in the State Bar's investigation of these matters. In the eleven years prior to his disbarment, Creasy received six informal reprimands from the State Bar.

¶ 2 On April 14, 1999, the State Bar received a report from attorney William Shrank regarding Creasy's possible violations of the disbarment order. The submission included the transcript of the sworn statement of a witness taken in what is described in the record as a private arbitration matter involving a claim for underinsured motorist benefits made by Sterling K. Smith against his insurer, USAA Casualty Insurance Company. Smith's USAA policy required him to submit this disputed claim to arbitration.

¶ 3 Along with his wife, Marilyn Creasy, a certified public adjuster and owner of The Legal Shoppe, Creasy "represented" Smith in this arbitration. Shrank represented USAA. At the time of the accident with the underinsured motorist, Smith evidently had some preexisting injuries caused by industrial accidents and covered under workers' compensation. Creasy sought to establish that the automobile accident, rather than the industrial problems, caused specific injuries. During a sworn statement of Dr. Dennis Crandall, Smith's treating physician, and over Shrank's objections, Creasy extensively and probingly examined Dr. Crandall concerning Smith's injuries.

¶ 4 Based on Creasy's appearance at and actions during the sworn statement, the State Bar filed a petition asking this court for an order directing Creasy to appear and show cause why he should not be held in contempt for violating the 1996 disbarment order by engaging in the practice of law. Creasy appeared in response to our order and the issues were briefed and argued.

¶ 5 Creasy, no longer a member of the bar, contests the jurisdiction of this court to regulate the actions of a non-lawyer. He also denies that he practiced law when he examined Dr. Crandall, arguing that actions that constitute the practice of law before a court are not the practice of law when done in the context of a private arbitration proceeding. Finally, he contends that because he was employed by an insurance adjuster licensed under A.R.S. § 20-281 (1990), the Arizona Department of Insurance has sole jurisdiction to regulate his conduct in this matter. We disagree with all three of his submissions.

DISCUSSION

A. Jurisdiction

¶ 6 We first address Creasy's argument that this court lacks jurisdiction over him because he is a non-lawyer. The argument is without merit. As we have previously said:

> Article III of the Arizona Constitution creates the judicial branch of government, separate and distinct from the other branches.
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> This court has long recognized that under article III of the Constitution "the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court."

¶ 7 The court's authority over the practice of law is also based on the creation of an integrated judicial department and the revisory jurisdiction of this court as provided in the Arizona Constitution. Prior to 1985, the Arizona Legislature prohibited the practice of law by unlicenced persons. Effective January 1, 1985, however, the entire title regulating attorneys was repealed; since then the practice of law has been under the exclusive regulatory jurisdiction of this court, governed by the Supreme Court Rules, in particular Rule 31(a)(3). This constitutional power to regulate the practice of law extends to non-lawyers as well as attorneys admitted to bar membership.

¶ 8 The facts of this case do not require us to determine the extent of our power to regulate "practitioners" who are not and have never been lawyers. In the situation presented here, our rules specifically apply to both active lawyers and those who have been disbarred. Rule 31(a)(3) states:

> *Privilege to practice.* Except as hereinafter provided in subsection 4 of this section (a), no person shall practice law in this state or hold himself out as one who may practice law in this state unless he is an active member of the state bar, and no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended, disbarred, or on disability inactive status.

(Emphasis added.) We see no reason why we would have jurisdiction over lawyers and not over disbarred lawyers like Creasy. Creasy's case actually presents an even stronger situation for jurisdiction than that of a person never admitted to the bar. On admission, Creasy submitted himself to the authority of the State Bar and this court. He is still bound by the restrictions imposed on him by this court's disbarment order, made under Rule 31, which explicitly prohibits a disbarred lawyer from continuing or resuming practice. His expulsion from the bar in no way frees him from these restrictions. It would be strange doctrine that as a result of being disbarred, a lawyer may not only resume practice but be free of the obligations imposed on lawyers who have not been disbarred.

¶ 9 Given our authority over the practice of law and those who have been admitted to the bar, we conclude that we have continuing jurisdiction to prevent Creasy from resuming the practice of law. We turn, then, to the question of whether he was engaged in the practice of law.

B. The practice of law

¶ 10 Creasy argues that his actions during the private arbitration proceeding—unconnected to any pending judicial matter— do not constitute the practice of law. We long ago defined the practice of law as

> those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law. Such acts … include rendering to another *any other advice or services* which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession.

More recently, we applied this definition to hold that a judge who represented a corporation in contract negotiations and who advised the corporation regarding those negotiations had engaged in the practice of law. As these cases make clear, a person need not appear in a judicial proceeding to engage in the unauthorized practice of law. Creasy concedes that he represented Smith when he took Dr. Crandall's sworn statement but argues that the medical claim evaluation issues at stake did not require the "application of a trained legal mind." He also argues that because his examination of Dr. Crandall occurred in the context of a private arbitration, his actions do not constitute the unauthorized practice of law. We are unpersuaded for the following reasons.

¶ 11 In this case we need not decide whether the Arizona Land Title definition should be changed or whether the Baron definition of the practice of law is an appropriate narrowing of Arizona Land Title or Fleischman. Whatever may be the line separating the proper activities of lay people and lawyers in a non-adversary context, even a cursory look at the caption of the proceedings at which Creasy appeared and a sample of Creasy's examination of Dr. Crandall during the sworn statement makes it apparent that Creasy rendered the kind of core service that is and has "been customarily given and performed from day to day [only] in the ordinary practice of members of the legal profession." As noted, our cases make clear that a person need not appear in a judicial proceeding to engage in the practice of law. If negotiation of a contract in Fleischman was the practice of law, then, a fortiori, Creasy's representation of Smith by examining a witness in an adversary setting involving a disputed claim certainly falls within that definition as well, particularly in light of the nature of the examination, which was no less exhaustive or rigorous than one would ordinarily see during a formal deposition in a judicial proceeding.

¶ 12 We are quite aware of the social, technological, and economic changes that have taken place since our decision in Arizona Land Title. In some situations these changes may require us to reexamine our broad definition of the practice of law. This is not the case in which to do so. We do not deal here with the legitimate practice of other professionals, with the preparation or distribution of generic documents and forms for general use, the mere giving of legal advice, or even the preparation of documents for a specific client, the situation in which the "trained legal mind" test evolved.

¶ 13 Our conclusion that Creasy engaged in the practice of law by acting as a public adjuster is supported by the decisions of other jurisdictions. The Illinois Supreme Court held that a suspended lawyer engaged in the unauthorized practice of law when he represented a former client in settlement negotiations against her insurance company even though the insurance company had already admitted liability. Citing *Liberty Mutual Insurance Co. v. Jones*, for the proposition that adjusters employed by insurance companies do not engage in the unauthorized practice of law, Bodkin argued that "his position was the same as that of an adjustor for an insurance company except that he was acting on behalf of a claimant." The Illinois court rejected this argument, distinguishing Liberty Mutual on the grounds that the Missouri Supreme Court had

> distinguished between services rendered by an insurance adjuster on behalf of his company and services rendered by one who negotiates a claim against the company. … The court stated … [that] "appellants' lay claim adjusters work only for their several employers, who hire and retain them with their eyes open. When they deal with claimants it is on an adversary basis, not a representative basis implying a fiduciary relation."

¶ 14 Kansas, like Arizona, has no statute prohibiting the unauthorized practice of law, has reached the same result by approximately the same reasoning. The Martinez court held that an insurance claims "consultant" engaged in the unauthorized practice of law by putting together settlement brochures, negotiating settlements on behalf of injured persons, and advertising that he could save claimants the trouble of hiring a lawyer. The court concluded that the consultant offered a service that required knowledge of legal principles and that his financial interest in settling without litigation conflicted with his clients' interest in receiving a fair settlement, thus distinguishing the consultant's work from that done by insurance company adjusters. The court thus enjoined the consultant from further representation. Although the injunction was issued under the Kansas Consumer Protection Act, the finding of unauthorized practice was based on the court's "inherent power to define and regulate the practice of law."

¶ 15 Of course, unlike Illinois, which had no statute authorizing adjusters to investigate or settle claims "on behalf of either the insurer or the insured," the Arizona Legislature arguably has authorized private adjusters to represent claimants against insurance companies. However, we still find persuasive the Illinois court's rejection of Bodkin's argument that his actions were merely "administrative" be-

cause of his status as an admitted, though suspended, attorney. The court held that Bodkin was engaged in the practice of law, reasoning, "It is obvious that settling a case, under these circumstances, required legal skill. It is mere sham … to contend that the acts during suspension were clerical, administrative, and ministerial only." Creasy clearly employed legal skill during his examination of Dr. Crandall and cannot now claim he was not engaged in practicing law.

¶ 16 The Kansas Supreme Court reached a similar result in a case in which a suspended lawyer continued all his activities except court appearances, finding that his activities were not permissible just because they could have been performed by non-lawyers. The court's rationale was that "some actions which may be taken with impunity by persons who have never been admitted to the practice of law, will be found to be in contempt if undertaken by a suspended or disbarred attorney." Applying this reasoning to our facts, we believe Creasy, who acted as a representative for his client by examining a witness in an adversarial setting, cannot now claim to have merely engaged in insurance adjusting under A.R.S. § 20-281.

C. Legislative authority to license private insurance adjusters

¶ 17 Finally, we turn to Creasy's argument that pursuant to A.R.S. § 20-281, the legislature has authorized the licensing of private insurance adjusters and that he is therefore subject only to the jurisdiction of the Department of Insurance. This argument is also without merit. In defining adjuster and setting out licensing requirements in A.R.S. §§ 20-281 and 20-312, the legislature has undertaken the regulation of insurance adjusters. Section 20-281(A) defines an adjuster as

> any person who, for compensation as an independent contractor or as the employee of such an independent contractor … *investigates and negotiates settlement of claims* arising under insurance contracts, on behalf of either the insurer or the insured.

(Emphasis added.) Creasy acted as an employee of his wife, who is licensed as an adjuster under A.R.S. § 20-312. Creasy's actions during the sworn statement are therefore permissible if we consider only the statute and if they can technically be characterized as only the investigation, negotiation and settlement of claims.

¶ 18 But even if we were so persuaded, the legislature's adoption of A.R.S. § 20-281 cannot authorize Creasy to violate our disbarment order by engaging in activities that constitute the practice of law. Section 20-281 is intended to regulate insurance adjusters. The legislature has not purported to, nor can it, authorize non-lawyers or disbarred lawyers to practice law. Whether it is within the legislature's power to authorize one to engage in activities that constitute the practice of law while engaging in the business of insurance adjusting is a question we reserve for the appropriate case, if and when brought.

CONCLUSION

¶ 19 We hold that Creasy has violated Rule 31(a)(3) and the order of disbarment. We thus find him in contempt and order that he immediately cease and desist from any further activities that constitute the practice of law. In lieu of other penalties that might be imposed, Creasy is ordered to pay the costs incurred by the State Bar, plus reasonable attorneys' fees, the amount to be approved by this court on application by the State Bar.

MARTONE, Justice, concurring.

¶ 20 I join the holding that this court has jurisdiction over disbarred lawyers pursuant to the order of disbarment and Rule 31(a)(3). Creasy is a disbarred lawyer. This case, therefore, affords us no opportunity to address the quite separate question of whether this court has jurisdiction over persons who were never lawyers and whose activities are not part of, or ancillary to, Judicial Department institutions within the meaning of Article VI, § 1 of the Arizona Constitution.

¶ 21 This court has regulatory power over lawyers and disbarred lawyers engaged in the practice of law in this state, for activities both within the Judicial Department and outside of it. This court also has the exclusive authority to determine who shall appear in a representative capacity in Judicial Department institutions and activities ancillary to them. This means that we can prohibit non-lawyers from representing others in Article VI institutions and proceedings conducted pursuant to Article VI authority (e.g., depositions). But what of non-lawyers engaged in the practice of law outside of Judicial Department institutions? I do not join in that part of the majority opinion which contains dicta suggestive of an answer to this troublesome question. The expansive dicta is imprudent because this is not an action against a person who was never a lawyer.

¶ 22 The question of jurisdiction over non-lawyers for activities outside of Article VI institutions or authority is the direct result of the absence of an unauthorized practice of law statute. That absence creates a potential incongruity between the breadth of the definition of the practice of law, on the one hand, and the limited scope of the Judicial Department's enforcing authority under Article VI of the Constitution, on the other. Because this court does not possess the broader police power of the state (the legislature does), the question of non-lawyers engaged in activities within the definition of the practice of law, yet unconnected to Judicial Department institutions, is complex and its answer must await another day. In the meantime, it is enough to say that we have the power to enforce our orders of disbarment.

In re Trester

172 P.3d 31 (Kan. 2007)

Per Curiam

This is an original proceeding in discipline filed by the Disciplinary Administrator against respondent, Irwin S. Trester, an attorney admitted to the practice of law in Kansas in 1968. A hearing panel of the Kansas Board for the Discipline of Attorneys conducted a formal hearing, as required by Kansas Supreme Court Rule 211.

The hearing panel concluded that Trester violated Kansas Rules of Professional Conduct (KRPC) as follows: KRPC 5.5(a) (unauthorized practice of law); KRPC 8.4(b) and (c) (misconduct). Additionally, Trester was held to have violated Kansas Supreme Court Rule 202 (grounds for discipline). The hearing panel unanimously recommended that Trester be indefinitely suspended from the practice of law in the state of Kansas.

Hearing Panel's Findings of Fact

This action arose out of Trester's practice of law in the state of California where he does not have a license. Despite his admission to the Kansas Bar, Trester never practiced law in the state of Kansas and returned to California and took the California Bar examination on four occasions. Trester never passed the California Bar examination but was not dissuaded and, for nearly 40 years, practiced law in California. His office was advertised as "Law Offices of Irwin Trester." Much of his work was limited to the federal practice in the areas of immigration and labor law. Trester testified before the hearing panel that he was merely required to have a license to practice in some state, not necessarily in the same state where his office was located.

Friedman Bag Company (Friedman), a California company, retained Trester to represent it in the areas of labor and employment law. Trester never informed Friedman that he was not licensed to practice law in California. In 2002, Friedman sued both Trester individually and his business, the "Law Offices of Irwin Trester," in California Superior Court, alleging legal malpractice and fraud. The fraud claim was based on the fact that Trester represented Friedman without a license to do so.

In 2005, California prosecutors charged Trester with seven counts of grand theft, one count of possession of an assault weapon, and one count of unauthorized practice of law. The basis for the theft charges was Trester's acceptance of retainers without a license to practice law in the state of California. Trester subsequently entered a plea of no contest to three charges of felony theft and one charge of

misdemeanor unauthorized practice of law. On October 26, 2005, the California court placed Trester on probation for 3 years and ordered him to perform 100 hours of community service, to pay restitution, and to refrain from practicing law in California. Then, in June 2006, the California court granted Trester's motion to reduce the felony convictions to misdemeanors under the California penal code.

Hearing Panel's Conclusions of Law

Based upon the findings of fact, the hearing panel made several conclusions of law. The hearing panel cited Supreme Court Rule 202, which describes the effect of a criminal conviction on a person licensed to practice law in Kansas: "A certificate of a conviction of an attorney for any crime … shall be conclusive evidence of the commission of that crime … in any disciplinary proceeding instituted against said attorney based upon the conviction." Based on this rule, the hearing panel concluded that Trester's three California theft convictions and one conviction of engaging in the unauthorized practice of law were conclusive evidence of his commission of those crimes.

Although the hearing panel did not mention the fact that Trester admitted violating KRPC 5.5(a) in his answer to the formal complaint, the panel did conclude the rule was violated. KRPC 5.5(a) states that a lawyer shall not "practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." Because Trester was convicted of engaging in the unauthorized practice of law in California, the hearing panel found him in violation of that rule.

The hearing panel found that Trester violated KRPC 8.4(b), which states: "It is professional misconduct for a lawyer to … commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Focusing again on Trester's three California theft convictions and one conviction of engaging in the unauthorized practice of law, the hearing panel concluded that theft and the unauthorized practice of law are crimes that reflect directly on his honesty and trustworthiness.

Finally, the hearing panel also found that Trester violated KRPC 8.4(c), which states: "It is professional misconduct for a lawyer to… engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The hearing panel concluded that Trester engaged in dishonest conduct when he held himself out as an attorney in California.

In deciding what discipline to recommend, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (1991). In applying Standard 3, the hearing panel considered the duty violated, the lawyer's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors.

Duty Violated. The Respondent violated his duty to the legal profession to maintain his professional integrity.

Mental State. The Respondent intentionally violated his duty.

Injury. As a result of the Respondent's misconduct, the Respondent caused actual injury to Friedman Bag Company.

Aggravating or Mitigating Factors. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following aggravating factors present:

Dishonest or Selfish Motive. Theft is a crime of dishonesty. Misleading a client into believing that you possess a license to practice law in California is also dishonest. Thus, the Respondent's misconduct was motivated by dishonesty and selfishness.

A Pattern of Misconduct. The Respondent engaged in a pattern of misconduct when, over an extended period of time, he committed the crimes of theft and the unauthorized practice of law. As such, the Hearing Panel concludes that the Respondent engaged in a pattern of misconduct.

Multiple Offenses. The Respondent violated KRPC 5.5, KRPC 8.4(b), and KRPC 8.4(c). Accordingly, the Hearing Panel concludes that the Respondent committed multiple offenses.

Refusal to Acknowledge Wrongful Nature of Conduct. The Respondent refused to acknowledge the extent of the wrongful nature of his conduct.

Substantial Experience in the Practice of Law. The Kansas Supreme Court admitted the Respondent to practice law in 1968. Therefore, the Hearing Panel concludes that the Respondent had substantial experience in the practice of law at the time he engaged in the misconduct.

Illegal Conduct, Including that Involving the Use of Controlled Substances. The Respondent engaged in illegal conduct, and, as a result, was convicted of three counts of theft and one count of engaging in the unauthorized practice of law.

Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following mitigating circumstances present:

Absence of a Prior Disciplinary Record. The Respondent has not previously been disciplined.

The Present and Past Attitude of the Attorney as Shown by the Respondent's Cooperation. The Respondent fully cooperated in the disciplinary process as exhibited by his complete acknowledgment of the misconduct.

Previous Good Character and Reputation in the Community Including any Letters from Clients, Friends, and Lawyers in Support of the Character and General Reputation of the Attorney. The Respondent enjoys the respect of his peers and clients and generally possesses a good character and reputation as evidenced by several letters received by the Hearing Panel.

> *Imposition of Other Penalties or Sanctions*. The Respondent was prosecuted for theft and for engaging in the unauthorized practice of law. As a result, the Respondent was placed on probation, ordered to perform community service work, and ordered to pay restitution. According to the Respondent, he is in compliance with the terms and conditions of his probation.

In addition to the above-cited factors, the hearing panel examined ABA Standard 4.62 regarding suspension after a lawyer knowingly deceives a client and causes injury or potential injury; Standard 5.11 regarding disbarment after a lawyer engages in serious criminal conduct including theft or in any other intentional conduct involving dishonesty, that seriously adversely reflects on the lawyer's fitness to practice; and Standard 7.2 regarding suspension after a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

The Deputy Disciplinary Administrator recommended Trester be indefinitely suspended, and Trester requested published censure.

Trester filed exceptions to the final hearing report. His only exception to the hearing panel's findings of fact concerned the subject matter of the Friedman case. Trester stated he was retained by Friedman to handle "labor relation matters." Trester also took exception to the hearing panel's conclusions of law regarding his violation of KRPC 8.4(c). He further took exception to some of the aggravating factors and the hearing panel's recommendation of discipline.

Analysis

In a disciplinary proceeding, this court considers the evidence, the findings of the hearing panel, and the arguments of the parties and determines whether violations of KRPC exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence.

This court views the findings of fact, conclusions of law, and recommendations made by the hearing panel as advisory only, but we give the final hearing report the same dignity as a special verdict by a jury or the findings of a trial court. Therefore, the hearing panel's report will be adopted where amply sustained by the evidence, but not where it is against the clear weight of the evidence. When the panel's findings relate to matters about which there was conflicting testimony, this court recognizes that the panel, as the trier of fact, had the opportunity to observe the witnesses and evaluate their demeanor. We do not reweigh the evidence or assess the credibility of witnesses. Rather, this court examines any disputed findings of fact and determines whether clear and convincing evidence supports the panel's findings. If so, the findings will stand. Moreover, it is not necessary to restate the entire record to show substantial competent evidence to support the hearing panel's findings.

I. Violation of KRPC 8.4(c)

First, Trester argues that clear and convincing evidence does not support the hearing panel's finding that he violated KRPC 8.4(c). KRPC 8.4(c) provides that "it is professional misconduct for a lawyer to … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Trester urges this court to reject the hearing panel's conclusion that he engaged in dishonest conduct when he held himself out as an attorney in California.

Rather than motivated by dishonesty, fraud, or deceit, Trester contends that his misconduct was motivated by the "mistaken belief" that he could hold himself out as an attorney because he was admitted to practice law in Kansas and had been admitted to practice law before the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Tenth Circuit Court of Appeals. According to Trester, he has a "plausible explanation" justifying this mistaken belief.

Regarding this alleged "plausible explanation," Trester claims that before opening his California office, he solicited input from Los Angeles Attorney Ira Sherman, then head of the ethics division of the California Bar. In his testimony at the hearing, he indicated that the services he provided in California were consistent with the advice given to him by Sherman.

Before the hearing panel, Trester denied ever making any appearances as an attorney before the California Superior Court, Appellate Court, or Supreme Court, instead claiming that he only appeared in those courts as a mediator. Instead of appearing in a legal capacity in California state courts, Trester testified that he made regular appearances in federal immigration courts and before administrative agencies. When asked, however, what percentage of his practice in the last 10 years has related to immigration law, Trester answered: "It's varied from 15 to 20 percent to 50 and sometimes 60 percent."

To add credence to his argument that he, in good faith, held himself out as an attorney, Trester notes in his brief that two previous ethics complaints filed against him were dismissed. First, Trester testified at the hearing that around 1980 an ethics complaint was filed in California based on Trester's holding himself out as an attorney. According to him, the claim was dismissed for lack of jurisdiction. Second, in 1996, a California attorney filed an ethics complaint against Trester, and the matter was referred to the office of the Kansas Disciplinary Administrator. The subject of the complaint involved Trester's negotiation of collective bargaining agreements and informal labor arbitration under the National Labor Relations Act. Because these particular acts did not consist of engaging in the unauthorized practice of law in California, the complaint was dismissed. Neither of these previous incidents appear to be relevant to the case at hand.

Trester contends that he never told anyone he was a member of the California Bar. But, as the petitioner points out, Trester admitted he never told Friedman that he was not licensed to practice law in California, nor did he place his state

of licensure on his business cards or stationery. Trester, instead, advertised that he was an "attorney at law" in the "Law Offices of Irwin Trester," which gave the impression that he was authorized to practice law generally in that state. The petitioner argues that Trester's admission and actions show the intent to deceive. We agree.

Trester contends his situation is comparable to the one in *In re Kershner*. Kershner was convicted of four felony violations of the Kansas Securities Act. Kershner also failed to file his attorney registration fees for the years 1985-90 when he was not practicing law. In addition, Kershner failed to appear before the hearing panel, later claiming he never received notice of the hearing.

The *Kershner* hearing panel recommended disbarment, finding that respondent violated the Model Rules of Professional Conduct (MRPC) 8.4(b), (c), and (g). This court found the fact that Kershner was convicted of four felony violations of the Kansas Securities Act was sufficient to show a violation of MRPC 8.4(b). We concluded: "[U]nder the facts present, Kershner's felony convictions cannot also be 'other conduct that adversely reflects on his fitness to practice law' and a violation of MRPC 8.4(g). There does not appear to be a violation of MRPC 8.4(c)."

Kershner is distinguishable from the present case. Unlike this case, there is no indication Kershner held himself out as a broker or dealer and the criminal offenses did not include theft or the unauthorized practice of law. Additionally, Kershner had no victims to compensate. Here, Trester was ordered to pay restitution in the California theft cases. And the hearing panel found Trester caused actual injury to Friedman.

Trester contends that he wants to provide evidence by way of explaining his conduct, but it appears that he merely attempts to attack the California criminal theft convictions and unauthorized practice of law conviction. This attack is inappropriate on two fronts: (1) Trester admits he violated KRPC 8.4(b) which was based on his California conviction of the crime of unauthorized practice of law, and (2) Supreme Court Rule 202 and Kansas precedent do not permit us to look behind Trester's convictions. Further, "a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state." Supreme Court Rule 202.

Recently, in *In re Pyle*, this court acknowledged the fact that, in fewer than 50 cases, we have found attorneys guilty of violating KRPC 8.4(c) in its current form. We have no qualms, however, saying that holding oneself out as an attorney in a state in which he or she has no license to practice law and giving the impression the attorney is authorized to practice law generally in that state engages in conduct that violates KRPC 8.4(c).

Clear and convincing evidence supports the panel's finding that Trester violated KRPC 8.4(c).

II. Aggravating Factors

Next, Trester argues clear and convincing evidence does not support the hearing panel's findings regarding three of the six aggravating factors in the final hearing report.

At the outset, we note that neither this court nor the hearing panel is required, in an attorney disciplinary proceeding, to cite and discuss every potentially applicable ABA Standard. The ABA Standards serve only as guidelines to assist courts in selecting appropriate and uniform discipline, depending upon the facts and the aggravating and mitigating factors present in each case.

Dishonest or Selfish Motive

First, Trester contends the hearing panel incorrectly found his misconduct was motivated by dishonesty and selfishness. The panel stated: "Theft is a crime of dishonesty. Misleading a client into believing that you possess a license to practice law in California is also dishonest." Again, Trester argues that he held himself out as an attorney based on a good faith belief that he was allowed to do so for the "limited purpose of providing labor and immigration services."

This court has stated that theft is a crime of dishonesty. Further, Trester misled Friedman by holding himself out as an attorney practicing in California. He advertised his business as the "Law Offices of Irwin Trester" and even named it so on a web page advertisement.

Clear and convincing evidence supports the panel's finding that Trester's conduct was motivated by dishonesty and selfishness.

Refusal to Acknowledge Wrongful Nature of Conduct

Second, Trester contends the hearing panel incorrectly found that he refused to acknowledge the wrongful nature of his conduct. Trester points out that, as a mitigating factor, the panel found he showed a cooperative attitude. The panel stated: "The Respondent fully cooperated in the disciplinary process as exhibited by his complete acknowledgment of the misconduct."

In his brief, Trester admits he was wrong to hold himself out as an attorney when he was not licensed to practice law in California. This admission comports with the petitioner's statement regarding Trester's cooperation. Nevertheless, Trester's refusal to acknowledge the *wrongful nature* of his conduct is replete throughout the record and his brief.

Clear and convincing evidence supports the panel's finding that Trester refused to acknowledge the wrongful nature of his conduct.

Illegal Conduct, Including that Involving the Use of Controlled Substances

Third, Trester contends the hearing panel incorrectly found that he engaged in illegal conduct which included the use of controlled substances. The panel stated: "The Respondent engaged in illegal conduct, and, as a result, was convicted of three counts of theft and one count of engaging in the unauthorized practice of law." Although the use of controlled substances was included in the caption, the panel never made a finding of drug use, nor were drugs ever mentioned in the formal complaint or at the hearing. Moreover, the petitioner acknowledges in its brief that the hearing panel made no finding concerning the use of controlled substances. At oral argument, it was clarified that the heading was simply a statement of the ABA factor: "Illegal conduct, including that involving the use of controlled substances."

Trester is correct that there is no evidence of drug use in this case. Clear and convincing evidence supports the panel's finding only that Trester engaged in illegal conduct which resulted in convictions of three counts of theft and one count of engaging in the unauthorized practice of law.

III. Recommendation of Indefinite Suspension

Trester contends the hearing panel's recommendation of indefinite suspension from the practice of law is too harsh. He argues that public censure would be an appropriate sanction for his misconduct.

We note that when an attorney has been convicted of a felony offense, this court, with very few exceptions, imposes either suspension or disbarment as a sanction. Trester pled guilty to three felony theft charges. In postjudgment proceedings, the felony convictions were reduced to misdemeanors under California Penal Code § 17(b)(3) (West 2006), which grants judges the discretion to reduce the crime classification. The basis for the request was to avoid the automatic termination of Trester's Kansas law license.

Pursuant to ABA Standard 3, the hearing panel considered the factors of the duty violated, Trester's mental state, the potential or actual injury caused by the respondent's misconduct, and the existence of aggravating and mitigating factors. Also, the panel considered these ABA Standards:

> "Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client." Standard 4.62.
>
> "Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt to conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Standard 5.11.

"Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system." Standard 7.2.

The hearing panel recognized that federal agencies and federal courts may regulate practitioners appearing in such venues without reference to state licensing requirements. The panel also recognized that at least one federal circuit court of appeals has held that a lawyer practicing only in federal court may maintain a law office without a state license.

But the panel determined that these cases do not negate the fact that Trester has been convicted of the unauthorized practice of law. As correctly observed by the panel, if there was a defense to that charge, the time to have litigated the issue was during the California prosecution. Under Supreme Court Rule 202, the time for Trester to litigate the issue has passed. Under our rules, we accept that Trester was engaged in the unauthorized practice of law.

Moreover, the fact that Trester can cite authority for his position that he was authorized to practice law in federal courts does not negate the fact that Trester's stationery, law office sign, and other representations to the public and to Friedman were deceptive indications that Trester could practice law in the state of California. The evidence was that Friedman was misled by these representations.

Trester urges this court to consider the facts that he has completed his community service requirements, paid the ordered restitution, and has fully cooperated with the Disciplinary Administrator. He further adds that he has no prior disciplinary record and is remorseful for his misconduct. Trester has changed his business stationery, business cards, and office sign so that they no longer advertise that he is an "attorney at law."

Trester requests published censure. ABA Standard 4.63 states: "Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client."

Given the serious nature of this case—three counts of theft related to Trester's practice of law—and the length of time Trester's deceptive behavior played out, we conclude a period of suspension would be more appropriate. "*All* lawyers, by virtue of their licenses, enjoy the status of officers of the court. That status brings with it the responsibility to refrain from conduct unbecoming such officers, to uphold the rule of law, and to enhance public confidence in that rule and the legal system set up to safeguard it."

We note that, in effect, Trester has been suspended from the practice of law by the terms of his probation in the criminal case. According to the docket sheet submitted as an exhibit at the panel hearing, one of the conditions of probation

imposed at the sentencing hearing on October 26, 2005, is that "the defendant is not to practice law in the State of California whatsoever." Because Trester has not been practicing law, a majority of the court concludes that making the suspension effective as of the date of the criminal sentence is appropriate.

IT IS THEREFORE ORDERED that Irwin Trester be and he is hereby indefinitely suspended from the practice of law in the state of Kansas. This order shall be retroactive to October 26, 2005.

IT IS FURTHER ORDERED that Irwin Trester shall comply with Supreme Court Rule 218 and, if respondent seeks reinstatement, that he shall comply with Supreme Court Rule 219; that he shall demonstrate that he knows, understands, and is willing to comply with the Kansas Supreme Court rules; and that he is competent to engage in the active and continuous practice of law in this state.

IT IS FURTHER ORDERED that this opinion be published in the official Kansas Reports and that respondent pay the costs of these proceedings.

Chapter 3

Attorney Discipline

Model Rules of Professional Conduct

Rule 8.2

Rule 8.3

Rule 8.4

Rule 8.5

Rest. (3d) of the Law Governing Lawyers

§ 5

N.C. Gen. Stat. chap. 84

§ 84-28. Discipline and disbarment.

(a) Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt as provided in G.S. 84-23.

(b) The following acts or omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise:

(1) Conviction of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;

(2) The violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act;

(3) Knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or contempt of the Council or any committee of the North Carolina State Bar.

(c) Misconduct by any attorney shall be grounds for:

(1) Disbarment;

(2) Suspension for a period up to but not exceeding five years, any portion of which may be stayed upon reasonable conditions to which the offending attorney consents;

(3) Censure - A censure is a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or members of the public, but the protection of the public does not require suspension of the attorney's license;

(4) Reprimand - A reprimand is a written form of discipline more serious than an admonition issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure. A reprimand is generally reserved for cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession, or members of the public; or

(5) Admonition - An admonition is a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

Any order disbarring or suspending an attorney may impose reasonable conditions precedent to reinstatement. No attorney who has been disbarred by the Disciplinary Hearing Commission, the Council, or by order of any court of this State may seek reinstatement to the practice of law prior to five years from the effective date of the order of disbarment. Any order of the Disciplinary Hearing Commission or the Grievance Committee imposing an admonition, reprimand, censure, or stayed suspension may

also require the attorney to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court.

(d) Any attorney admitted to practice law in this State, who is convicted of or has tendered and has had accepted, a plea of guilty or no contest to, a criminal offense showing professional unfitness, may be disciplined based upon the conviction, without awaiting the outcome of any appeals of the conviction. An order of discipline based solely upon a conviction of a criminal offense showing professional unfitness shall be vacated immediately upon receipt by the Secretary of the North Carolina State Bar of a certified copy of a judgment or order reversing the conviction. The fact that the attorney's criminal conviction has been overturned on appeal shall not prevent the North Carolina State Bar from conducting a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d1) An attorney who is disciplined as provided in subsection (d) of this section may petition the court in the trial division in the judicial district where the conviction occurred for an order staying the disciplinary action pending the outcome of any appeals of the conviction. The court may grant or deny the stay in its discretion upon such terms as it deems proper. A stay of the disciplinary action by the court shall not prevent the North Carolina State Bar from going forward with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(e) Any attorney admitted to practice law in this State who is disciplined in another jurisdiction shall be subject to the same discipline in this State: Provided, that the discipline imposed in the other jurisdiction does not exceed that provided for in subsection (c) above and that the attorney was not deprived of due process in the other jurisdiction.

(f) Upon application by the North Carolina State Bar, misconduct by an attorney admitted to practice in this State may be restrained or enjoined where the necessity for prompt action exists regardless of whether a disciplinary proceeding in the matter of the conduct is pending. The application shall be filed in the Superior Court of Wake County and shall be governed by the procedure set forth in G.S. 1A-1, Rule 65.

(g) Any member of the North Carolina State Bar may be transferred to disability inactive status for mental incompetence, physical disability, or substance abuse interfering with the attorney's ability to competently engage in the practice of law under the rules and procedures the Council adopts pursuant to G.S. 84-23.

(h) There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any appeal shall be as provided by statute or court rule for appeals in civil cases. A final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas. A final order imposing suspension for less than 18 months or any other discipline except disbarment shall be stayed pending determination of any appeal of right.

(i) The North Carolina State Bar may invoke the process of the General Court of Justice to enforce the powers of the Council or any committee to which the Council delegates its authority.

(j) The North Carolina State Bar may apply to appropriate courts for orders necessary to protect the interests of clients of missing, suspended, disbarred, disabled, or deceased attorneys.

The senior regular resident judge of the superior court of any district wherein a member of the North Carolina State Bar resides or maintains an office shall have the authority and power to enter orders necessary to protect the interests of the clients, including the authority to order the payment of compensation by the member or the estate of a deceased or disabled member to any attorney appointed to administer or conserve the law practice of the member. Compensation awarded to a member serving under this section awarded from the estate of a deceased member shall be considered an administrative expense of the estate for purposes of determining priority of payment.

§ 84-36. Inherent powers of courts unaffected.

Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.

Neal v. Clinton

No. CIV 2000–5677, slip op. (Ark. Cir. Ct. Jan. 19, 2001)

In re Riehlmann

891 So.2d 1239 (La. 2005)

In re Diaz

288 P.3d 486 (Kan. 2012)

In re Gates

Misc. Case No. 18-00301-KRH (Bankr. E.D. Va. 2018)

Matter of Giuliani

No. 2021-00506 (NY App. Div. June 24, 2021)

Chapter 4

Law Firms

Model Rules of Professional Conduct

Rule 5.1

Rule 5.2

Rule 5.3

Rule 5.4

Rule 5.6

Rule 5.7

Lawyer Disciplinary Board v. Veneri

524 S.E.2d 900 (W. Va. 1999)

In re Columbia Valley Healthcare System, L.P.

320 S.W.3d 819 (Tex. 2010)

Hoff v. Mayer, Brown, & Platt

772 N.E.2d 263 (Ill. App. Ct. 2002)

Cardillo v. Bloomfield 206 Corp.

988 A.2d 136 (N.J. Super. 2010)

Chapter 5

Advertising and Solicitation

1. Advertising

Model Rules of Professional Conduct

Rule 7.1

Rule 7.2

Bates v. State Bar of Arizona

433 U.S. 350 (1977)

Florida Bar v. Pape

918 So.2d 240 (2005)

Hayes v. New York Attorney Grievance Committee

672 F.3d 158 (2d Cir. 2012)

Hunter v. Virginia State Bar

744 S.E.2d 611 (Va. 2013)

2. Solicitation

Model Rules of Professional Conduct

Rule 7.3

Rule 7.6

N.C. Gen. Stat. chap. 84

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to perform or render any legal services, whether to be performed in this State or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney-at-law, or group of attorneys-at-law, whether practicing in this State or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney-at-law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys-at-law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for

the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this State or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

The council of the North Carolina State Bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in G.S. 84-37 shall apply. Nothing contained herein shall be construed to supersede the authority of district attorneys to seek injunctive relief or institute criminal proceedings in the same manner as provided for in G.S. 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters.

NAACP v. Button

371 U.S. 415 (1963)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case originated in companion suits by the National Association for the Advancement of Colored People, Inc. (NAACP), and the NAACP Legal Defense and Educational Fund, Inc. (Defense Fund), brought in 1957 in the United States District Court for the Eastern District of Virginia. The suits sought to restrain the enforcement of Chapters 31, 32, 33, 35 and 36 of the Virginia Acts of Assembly, 1956 Extra Session, on the ground that the statutes, as applied to the activities of the plaintiffs, violated the Fourteenth Amendment. A three-judge court convened pursuant to 28 U. S. C. § 2281, after hearing evidence and making fact-findings, struck down Chapters 31, 32 and 35 but abstained from passing upon the validity of Chapters 33 and 36 pending an authoritative interpretation of these statutes by the Virginia courts. The complainants thereupon petitioned in the Circuit Court of the City of Richmond to declare Chapters 33 and 36 inapplicable to their activities, or, if applicable, unconstitutional. The record in the Circuit Court was that made before the three-judge court supplemented by additional evidence. The Circuit Court held the chapters to be both applicable and constitutional. The holding was sustained by the Virginia Supreme Court of Appeals as to Chapter 33, but reversed as to Chapter 36, which was held unconstitutional under both state and federal law. Thereupon the Defense Fund returned to the Federal District Court,

where its case is presently pending, while the NAACP filed the instant petition. We granted certiorari, and ordered reargument this Term. [T]he only issue before us is the constitutionality of Chapter 33 as applied to the activities of the NAACP.

There is no substantial dispute as to the facts; the dispute centers about the constitutionality under the Fourteenth Amendment of Chapter 33, as construed and applied by the Virginia Supreme Court of Appeals to include NAACP's activities within the statute's ban against "the improper solicitation of any legal or professional business."

The NAACP was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. It maintains its headquarters in New York and presently has some 1,000 active unincorporated branches throughout the Nation. The corporation is licensed to do business in Virginia, and has 89 branches there. The Virginia branches are organized into the Virginia State Conference of NAACP Branches (the Conference), an unincorporated association, which in 1957 had some 13,500 members. The activities of the Conference are financed jointly by the national organization and the local branches from contributions and membership dues. NAACP policy, binding upon local branches and conferences, is set by the annual national convention.

The basic aims and purposes of NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes. For more than 10 years, the Virginia Conference has concentrated upon financing litigation aimed at ending racial segregation in the public schools of the Commonwealth.

The Conference ordinarily will finance only cases in which the assisted litigant retains an NAACP staff lawyer to represent him. The Conference maintains a legal staff of 15 attorneys, all of whom are Negroes and members of the NAACP. The staff is elected at the Conference's annual convention. Each legal staff member must agree to abide by the policies of the NAACP, which, insofar as they pertain to professional services, limit the kinds of litigation which the NAACP will assist. Thus the NAACP will not underwrite ordinary damages actions, criminal actions in which the defendant raises no question of possible racial discrimination, or suits in which the plaintiff seeks separate but equal rather than fully desegregated public school facilities. The staff decides whether a litigant, who may or may not be an NAACP member, is entitled to NAACP assistance. The Conference defrays all expenses of litigation in an assisted case, and usually, although not always, pays each lawyer on the case a per diem fee not to exceed $60, plus out-of-pocket expenses. The assisted litigant receives no money from the Conference or the staff lawyers. The staff member may not accept, from the litigant or any other source, any other compensation for his services in an NAACP-assisted case. None of the

staff receives a salary or retainer from the NAACP; the per diem fee is paid only for professional services in a particular case. This per diem payment is smaller than the compensation ordinarily received for equivalent private professional work. The actual conduct of assisted litigation is under the control of the attorney, although the NAACP continues to be concerned that the outcome of the lawsuit should be consistent with NAACP's policies already described. A client is free at any time to withdraw from an action.

The members of the legal staff of the Virginia Conference and other NAACP or Defense Fund lawyers called in by the staff to assist are drawn into litigation in various ways. One is for an aggrieved Negro to apply directly to the Conference or the legal staff for assistance. His application is referred to the Chairman of the legal staff. The Chairman, with the concurrence of the President of the Conference, is authorized to agree to give legal assistance in an appropriate case. In litigation involving public school segregation, the procedure tends to be different. Typically, a local NAACP branch will invite a member of the legal staff to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member will bring printed forms to the meeting authorizing him, and other NAACP or Defense Fund attorneys of his designation, to represent the signers in legal proceedings to achieve desegregation. On occasion, blank forms have been signed by litigants, upon the understanding that a member or members of the legal staff, with or without assistance from other NAACP lawyers, or from the Defense Fund, would handle the case. It is usual, after obtaining authorizations, for the staff lawyer to bring into the case the other staff members in the area where suit is to be brought, and sometimes to bring in lawyers from the national organization or the Defense Fund. In effect, then, the prospective litigant retains not so much a particular attorney as the "firm" of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation.

These meetings are sometimes prompted by letters and bulletins from the Conference urging active steps to fight segregation. The Conference has on occasion distributed to the local branches petitions for desegregation to be signed by parents and filed with local school boards, and advised branch officials to obtain, as petitioners, persons willing to "go all the way" in any possible litigation that may ensue. While the Conference in these ways encourages the bringing of lawsuits, the plaintiffs in particular actions, so far as appears, make their own decisions to become such.

Statutory regulation of unethical and nonprofessional conduct by attorneys has been in force in Virginia since 1849. These provisions outlaw, *inter alia,* solicitation of legal business in the form of "running" or "capping." Prior to 1956, however, no attempt was made to proscribe under such regulations the activities of the NAACP, which had been carried on openly for many years in substantially the manner described. In 1956, however, the legislature amended, by the addition

of Chapter 33, the provisions of the Virginia Code forbidding solicitation of legal business by a "runner" or "capper" to include, in the definition of "runner" or "capper," an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. The Virginia Supreme Court of Appeals held that the chapter's purpose "was to strengthen the existing statutes to further control the evils of solicitation of legal business . . . ." The court held that the activities of NAACP, the Virginia Conference, the Defense Fund, and the lawyers furnished by them, fell within, and could constitutionally be proscribed by, the chapter's expanded definition of improper solicitation of legal business, and also violated Canons 35 and 47 of the American Bar Association's Canons of Professional Ethics, which the court had adopted in 1938. Specifically the court held that, under the expanded definition, such activities on the part of NAACP, the Virginia Conference, and the Defense Fund constituted "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control." Finally, the court restated the decree of the Richmond Circuit Court.

I.

[* * *]

II.

Petitioner challenges the decision of the Supreme Court of Appeals on many grounds. But we reach only one: that Chapter 33 as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth. More specifically, petitioner claims that the chapter infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. We also think petitioner has standing to assert the corresponding rights of its members.

We reverse the judgment of the Virginia Supreme Court of Appeals. We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics.

A.

We meet at the outset the contention that "solicitation" is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right "to engage in association for the advancement of beliefs and ideas." We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. We have said that the Sherman Act does not apply to certain concerted activities of railroads "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws" because "such a construction of the Sherman Act would raise important constitutional questions," specifically, First Amendment questions. And we have refused to countenance compelled disclosure of a person's political associations in language closely applicable to the instant case:

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups . . . ."

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinc-

tive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

B.

Our concern is with the impact of enforcement of Chapter 33 upon First Amendment freedoms. We start, of course, from the decree of the Supreme Court of Appeals. Although the action before it was one basically for declaratory relief, that court not only expounded the purpose and reach of the chapter but held concretely that certain of petitioner's activities had, and certain others had not, violated the chapter. These activities had been explored in detail at the trial and were spread out plainly on the record. We have no doubt that the opinion of the Supreme Court of Appeals in the instant case was intended as a full and authoritative construction of Chapter 33 as applied in a detailed factual context. That construction binds us. For us, the words of Virginia's highest court are the words of the statute. We are not left to speculate at large upon the possible implications of bare statutory language.

But it does not follow that this Court now has only a clear-cut task to decide whether the activities of the petitioner deemed unlawful by the Supreme Court of Appeals are constitutionally privileged. If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

We read the decree of the Virginia Supreme Court of Appeals in the instant case as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. We can-

not accept the reading suggested on behalf of the Attorney General of Virginia on the second oral argument that the supreme Court of Appeals construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted. In the first place, upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation, or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33. In the second place, the decree does not seem to rest on the fact that the attorneys were organized as a staff and paid by petitioner. The decree expressly forbids solicitation on behalf of "any particular attorneys" in addition to attorneys retained or compensated by the NAACP. In the third place, although Chapter 33 purports to prohibit only solicitation by attorneys or their "agents," it defines agent broadly as anyone who "represents" another in his dealings with a third person. Since the statute appears to depart from the common-law concept of the agency relationship and since the Virginia court did not clarify the statutory definition, we cannot say that it will not be applied with the broad sweep which the statutory language imports.

We conclude that under Chapter 33, as authoritatively construed by the Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances. There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any other occasion, to do what the decree purports to allow, namely, acquaint "persons with what they believe to be their legal rights and . . . [advise] them to assert their rights by commencing or further prosecuting a suit . . . ." For if the lawyers, members or sympathizers also appeared in or had any connection with any litigation supported with NAACP funds contributed under the provision of the decree by which the NAACP is not prohibited "from contributing money to persons to assist them in commencing or further prosecuting such suits," they plainly would risk (if lawyers) disbarment proceedings and, lawyers and nonlawyers alike, criminal prosecution for the offense of "solicitation," to which the Virginia court gave so broad and uncertain a meaning. It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading

to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

It is apparent, therefore, that Chapter 33 as construed limits First Amendment freedoms. As this Court said in *Thomas v. Collins*, "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." Thomas was convicted for delivering a speech in connection with an impending union election under National Labor Relations Board auspices, without having first registered as a "labor organizer." He urged workers to exercise their rights under the National Labor Relations Act and join the union he represented. This Court held that the registration requirement as applied to his activities was constitutionally invalid. In the instant case, members of the NAACP urged Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia to exercise their legal rights and to retain members of the Association's legal staff. Like Thomas, the Association and its members were advocating lawful means of vindicating legal rights.

We hold that Chapter 33 as construed violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association. In so holding, we reject two further contentions of respondents. The first is that the Virginia Supreme Court of Appeals has guaranteed free expression by expressly confirming petitioner's right to continue its advocacy of civil-rights litigation. But in light of the whole decree of the court, the guarantee is of purely speculative value. As construed by the Court, Chapter 33, at least potentially, prohibits every cooperative activity that would make advocacy of litigation meaningful. If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

C.

The second contention is that Virginia has a subordinating interest in the regulation of the legal profession, embodied in Chapter 33, which justifies limiting petitioner's First Amendment rights. Specifically, Virginia contends that the NAACP's activities in furtherance of litigation, being "improper solicitation" under the state statute, fall within the traditional purview of state regulation of professional conduct. However, the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment worked by Chapter 33 upon protected freedoms of expression. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional

claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. In *NAACP v. Alabama ex rel. Patterso,*, we said, "In the domain of these indispensable liberties, whether of speech, press, or association the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." Later, in *Bates v. Little Rock*, we said, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Most recently, in *Louisiana ex rel. Gremillion v. NAACP*, we reaffirmed this principle: ". . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."

However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. Even more modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar; regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest. Hostility still exists to stirring up private litigation where it promotes the use of legal machinery to oppress: as, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; to harass large companies through a multiplicity of small claims; or to oppress debtors as by seeking out unsatisfied judgments. For a member of the bar to participate, directly or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public. And beyond this, for a lawyer to attempt to reap gain by urging another to engage in private litigation has also been condemned: that seems to be the import of Canon 28, which the Virginia Supreme Court of Appeals has adopted as one of its Rules.

Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several States have sustained regulations aimed at these activities. We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between

those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights. There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants; compare *NAACP v. Alabama ex rel. Patterson*, where we said:

> [the NAACP] and its members are in every practical sense identical. The Association, which provides in its constitution that 'any person who is in accordance with [its] principles and policies . . .' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.

Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. There has been neither claim nor proof that any assisted Negro litigants have desired but have been prevented from retaining, the services of other counsel. We realize that an NAACP lawyer must derive personal satisfaction from participation in litigation on behalf of Negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice. But this would not seem to be the kind of interest or motive which induces criminal conduct.

We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. Nothing that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application of Chapter 33 to those activities. *A fortiori,* nothing in this record justifies the breadth and vagueness of the Virginia Supreme Court of Appeals' decree.

A final observation is in order. Because our disposition is rested on the First Amendment as absorbed in the Fourteenth, we do not reach the considerations of race or racial discrimination which are the predicate of petitioner's challenge to the statute under the Equal Protection Clause. That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes

plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

Reversed.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words. This Virginia Act is not applied across the board to all groups that use this method of obtaining and managing litigation, but instead reflects a legislative purpose to penalize the N. A. A. C. P. because it promotes desegregation of the races. Our decision in *Brown v. Board of Education,*, holding that maintenance of public schools segregated by race violated the Equal Protection Clause of the Fourteenth Amendment, was announced May 17, 1954. The amendments to Virginia's code, here in issue, were enacted in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee also passed laws following our 1954 decision which brought within their barratry statutes attorneys paid by an organization such as the N.A.A.C.P. and representing litigants without charge.

The bill, here involved, was one of five that Virginia enacted "as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." Those are the words of Judge Soper, writing for the court in *N.A.A.C.P. v. Patty*. He did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our *Brown* decision, starting with the Report of the Gray Commission on November 11, 1955. He mentioned the "interposition resolution" passed by the General Assembly on February 1, 1956, the constitutional amendment made to carry out the recommendation of the Report of the Gray Commission, and the address of the Governor before the General Assembly that enacted the five laws, including the present one. These are too lengthy to repeat here. But they make clear the purpose of the present law—as clear a purpose to evade our prior decisions as was the legislation in *Lane v. Wilson*, another instance of a discriminatory state law. The fact that the contrivance used is subtle and indirect is not material to the question. "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." There we looked to the origins of the state law and the setting in which it operated to find its discriminatory nature. It is proper to do the same here.

Discrimination also appears on the face of this Act. The line drawn in § 54-78 is between an organization which has "no pecuniary right or liability" in a judicial proceeding and one that does. As we said in *N.A.A.C.P. v. Alabama*, the N.A.A.C.P. and its members are "in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective

the expression of their own views." Under the statute those who protect a "pecuniary right or liability" against unconstitutional invasions may indulge in "the solicitation . . . of business for . . . [an] attorney," while those who protect other civil rights may not. This distinction helps make clear the purpose of the legislation, which, as Judge Soper said, was part of the program of "massive resistance" against *Brown v. Board of Education*.

Ohralik v. Ohio State Bar Assn.

436 U.S. 447 (1978)

MR. JUSTICE POWELL delivered the opinion of the Court.

In *Bates v. State Bar of Arizona*, this Court held that truthful advertising of "routine" legal services is protected by the First and Fourteenth Amendments against blanket prohibition by a State. The Court expressly reserved the question of the permissible scope of regulation of "in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or 'runners.'" Today we answer part of the question so reserved, and hold that the State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.

I

Appellant, a member of the Ohio Bar, lives in Montville, Ohio. Until recently he practiced law in Montville and Cleveland. On February 13, 1974, while picking up his mail at the Montville Post Office, appellant learned from the postmaster's brother about an automobile accident that had taken place on February 2 in which Carol McClintock, a young woman with whom appellant was casually acquainted, had been injured. Appellant made a telephone call to Ms. McClintock's parents, who informed him that their daughter was in the hospital. Appellant suggested that he might visit Carol in the hospital. Mrs. McClintock assented to the idea, but requested that appellant first stop by at her home.

During appellant's visit with the McClintocks, they explained that their daughter had been driving the family automobile on a local road when she was hit by an uninsured motorist. Both Carol and her passenger, Wanda Lou Holbert, were injured and hospitalized. In response to the McClintocks' expression of apprehension that they might be sued by Holbert, appellant explained that Ohio's guest statute would preclude such a suit. When appellant suggested to the McClintocks

that they hire a lawyer, Mrs. McClintock retorted that such a decision would be up to Carol, who was 18 years old and would be the beneficiary of a successful claim.

Appellant proceeded to the hospital, where he found Carol lying in traction in her room. After a brief conversation about her condition, appellant told Carol he would represent her and asked her to sign an agreement. Carol said she would have to discuss the matter with her parents. She did not sign the agreement, but asked appellant to have her parents come to see her. Appellant also attempted to see Wanda Lou Holbert, but learned that she had just been released from the hospital. He then departed for another visit with the McClintocks.

On his way appellant detoured to the scene of the accident, where he took a set of photographs. He also picked up a tape recorder, which he concealed under his raincoat before arriving at the McClintocks' residence. Once there, he re-examined their automobile insurance policy, discussed with them the law applicable to passengers, and explained the consequences of the fact that the driver who struck Carol's car was an uninsured motorist. Appellant discovered that the McClintocks' insurance policy would provide benefits of up to $12,500 each for Carol and Wanda Lou under an uninsured-motorist clause. Mrs. McClintock acknowledged that both Carol and Wanda Lou could sue for their injuries, but recounted to appellant that "Wanda swore up and down she would not do it." The McClintocks also told appellant that Carol had phoned to say that appellant could "go ahead" with her representation. Two days later appellant returned to Carol's hospital room to have her sign a contract, which provided that he would receive one-third of her recovery.

In the meantime, appellant obtained Wanda Lou's name and address from the McClintocks after telling them he wanted to ask her some questions about the accident. He then visited Wanda Lou at her home, without having been invited. He again concealed his tape recorder and recorded most of the conversation with Wanda Lou. After a brief, unproductive inquiry about the facts of the accident, appellant told Wanda Lou that he was representing Carol and that he had a "little tip" for Wanda Lou: the McClintocks' insurance policy contained an uninsured-motorist clause which might provide her with a recovery of up to $12,500. The young woman, who was 18 years of age and not a high school graduate at the time, replied to appellant's query about whether she was going to file a claim by stating that she really did not understand what was going on. Appellant offered to represent her, also, for a contingent fee of one-third of any recovery, and Wanda Lou stated "O. K."

Wanda's mother attempted to repudiate her daughter's oral assent the following day, when appellant called on the telephone to speak to Wanda. Mrs. Holbert informed appellant that she and her daughter did not want to sue anyone or to have appellant represent them, and that if they decided to sue they would consult their own lawyer. Appellant insisted that Wanda had entered into a binding agreement.

A month later Wanda confirmed in writing that she wanted neither to sue nor to be represented by appellant. She requested that appellant notify the insurance company that he was not her lawyer, as the company would not release a check to her until he did so. Carol also eventually discharged appellant. Although another lawyer represented her in concluding a settlement with the insurance company, she paid appellant one-third of her recovery in settlement of his lawsuit against her for breach of contract.

Both Carol McClintock and Wanda Lou Holbert filed complaints against appellant with the Grievance Committee of the Geauga County Bar Association. The County Bar Association referred the grievance to appellee, which filed a formal complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. After a hearing, the Board found that appellant had violated Disciplinary Rules (DR) 2-103 (A) and 2-104 (A) of the Ohio Code of Professional Responsibility. The Board rejected appellant's defense that his conduct was protected under the First and Fourteenth Amendments. The Supreme Court of Ohio adopted the findings of the Board, reiterated that appellant's conduct was not constitutionally protected, and increased the sanction of a public reprimand recommended by the Board to indefinite suspension.

The decision in *Bates* was handed down after the conclusion of proceedings in the Ohio Supreme Court. We noted probable jurisdiction in this case to consider the scope of protection of a form of commercial speech, and an aspect of the State's authority to regulate and discipline members of the bar, not considered in *Bates*. We now affirm the judgment of the Supreme Court of Ohio.

II

The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized Bar for many years. Last Term the Court ruled that the justifications for prohibiting truthful, "restrained" advertising concerning "the availability and terms of routine legal services" are insufficient to override society's interest, safeguarded by the First and Fourteenth Amendments, in assuring the free flow of commercial information. The balance struck in *Bates* does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's countervailing interest in prohibition.

A

Appellant contends that his solicitation of the two young women as clients is indistinguishable, for purposes of constitutional analysis, from the advertisement in *Bates*. Like that advertisement, his meetings with the prospective clients apprised them of their legal rights and of the availability of a lawyer to pursue their claims. According to appellant, such conduct is "presumptively an exercise of his free speech rights" which cannot be curtailed in the absence of proof that it actually caused a specific harm that the State has a compelling interest in preventing. Brief for Appellant 39. But in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment.

Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

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

As applied in this case, the Disciplinary Rules are said to have limited the communication of two kinds of information. First, appellant's solicitation imparted to Carol McClintock and Wanda Lou Holbert certain information about his availability and the terms of his proposed legal services. In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices" of legal services; it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating "informed and reliable decisionmaking."

It also is argued that in-person solicitation may provide the solicited individual with information about his or her legal rights and remedies. In this case, appellant gave Wanda Lou a "tip" about the prospect of recovery based on the uninsured-motorist clause in the McClintocks' insurance policy, and he explained that clause and Ohio's guest statute to Carol McClintock's parents. But neither of the Disciplinary Rules here at issue prohibited appellant from communicating information to these young women about their legal rights and the prospects of obtaining a monetary recovery, or from recommending that they obtain counsel. DR 2-104 (A) merely prohibited him from using the information as bait with which to obtain an agreement to represent them for a fee. The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice.

Appellant does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or an exercise of associational freedom, "employ [ing] constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." Nor can he compare his solicitation to the mutual assistance in asserting legal rights that was at issue in [cases involving labor unions assisting their members in pursuing legal claims arising from their employment]. A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.

B

The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."

As is true with respect to advertising, it appears that the ban on solicitation by lawyers originated as a rule of professional etiquette rather than as a strictly ethical rule. "[T]he rules are based in part on deeply ingrained feelings of tradition, honor and service. Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." But the fact that the original motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation does not detract from the force of the other interests the ban continues to serve. While the Court in *Bates* determined that truthful, restrained advertising of the prices of "routine" legal services would not have an adverse effect on the professionalism of lawyers, this was only because it found "the postulated connection between advertising and the erosion of *true professionalism* to be severely strained." The *Bates* Court did not question a State's interest in maintaining high standards among licensed professionals. Indeed, to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of "true professionalism."

The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation. The American Bar Association, as *amicus curiae*, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in DR 2-103 (A) and 2-104 (A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.

We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

III

Appellant's concession that strong state interests justify regulation to prevent the evils he enumerates would end this case but for his insistence that none of those evils was found to be present in his acts of solicitation. He challenges what he characterizes as the "indiscriminate application" of the Rules to him and thus attacks the validity of DR 2-103 (A) and DR 2-104 (A) not facially, but as applied to his acts of solicitation. And because no allegations or findings were made of the specific wrongs appellant concedes would justify disciplinary action, appellant terms his solicitation "pure," meaning "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them," without more. Appellant therefore argues that we must decide whether a State may discipline him for solicitation *per se* without offending the First and Fourteenth Amendments.

We agree that the appropriate focus is on appellant's conduct. And, as appellant urges, we must undertake an independent review of the record to determine whether that conduct was constitutionally protected. But appellant errs in assuming that the constitutional validity of the judgment below depends on proof that his conduct constituted actual overreaching or inflicted some specific injury on Wanda Holbert or Carol McClintock. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

The State's perception of the potential for harm in circumstances such as those presented in this case is well founded. The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice

all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.

The efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in circumstances like those of this case, the State were required in addition to prove actual injury. Unlike the advertising in *Bates*, in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the solicitation that he could not recall specific details at a later date. If appellant's view were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession, in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

On the basis of the undisputed facts of record, we conclude that the Disciplinary Rules constitutionally could be applied to appellant. He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used the information he had obtained from the McClintocks, and the fact of his agreement with Carol, to induce Wanda to say "O. K." in response to his solicitation. He employed a concealed tape recorder, seemingly to insure that he would have evidence of Wanda's oral assent to the representation. He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw when Mrs. Holbert requested him to do so only a day after the initial meeting between appellant and Wanda Lou and continued to represent himself to the insurance company as Wanda Holbert's lawyer.

The court below did not hold that these or other facts were proof of actual harm to Wanda Holbert or Carol McClintock but rested on the conclusion that appellant had engaged in the general misconduct proscribed by the Disciplinary Rules. Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of

the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public. We hold that the application of DR 2-103 (A) and 2-104 (A) to appellant does not offend the Constitution.

Accordingly, the judgment of the Supreme Court of Ohio is

Affirmed.

MR. JUSTICE MARSHALL, concurring in part and concurring in the judgment.

I agree with the majority that the factual circumstances presented by appellant Ohralik's conduct "pose dangers that the State has a right to prevent," and accordingly that he may constitutionally be disciplined by the disciplinary Board and the Ohio Supreme Court. I further agree that appellant Primus' activity in advising a Medicaid patient who had been sterilized that the American Civil Liberties Union (ACLU) would be willing to represent her without fee in a lawsuit against the doctor and the hospital was constitutionally protected and could not form the basis for disciplinary proceedings. I write separately to highlight what I believe these cases do and do not decide, and to express my concern that disciplinary rules not be utilized to obstruct the distribution of legal services to all those in need of them.

I

While both of these cases involve application of rules prohibiting attorneys from soliciting business, they could hardly have arisen in more disparate factual settings. The circumstances in which appellant Ohralik initially approached his two clients provide classic examples of "ambulance chasing," fraught with obvious potential for misrepresentation and overreaching. Ohralik, an experienced lawyer in practice for over 25 years, approached two 18-year-old women shortly after they had been in a traumatic car accident. One was in traction in a hospital room; the other had just been released following nearly two weeks of hospital care. Both were in pain and may have been on medication; neither had more than a high school education. Certainly these facts alone would have cautioned hesitation in pressing one's employment on either of these women; any lawyer of ordinary prudence should have carefully considered whether the person was in an appropriate condition to make a decision about legal counsel.

But appellant not only foisted himself upon these clients; he acted in gross disregard for their privacy by covertly recording, without their consent or knowledge, his conversations with Wanda Lou Holbert and Carol McClintock's family. This conduct, which appellant has never disputed, is itself completely inconsistent with an attorney's fiduciary obligation fairly and fully to disclose to clients his activi-

ties affecting their interests. And appellant's unethical conduct was further compounded by his pursuing Wanda Lou Holbert, when her interests were clearly in potential conflict with those of his prior-retained client, Carol McClintock.

What is objectionable about Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it. Appropriately, the Court's actual holding in *Ohralik* is a limited one: that the solicitation of business, under circumstances—such as those found in this record—presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State. In this much of the Court's opinion in *Ohralik*, I join fully.

II

The facts in *Primus*, by contrast, show a "solicitation" of employment in accordance with the highest standards of the legal profession. Appellant in this case was acting, not for her own pecuniary benefit, but to promote what she perceived to be the legal rights of persons not likely to appreciate or to be able to vindicate their own rights. The obligation of all lawyers, whether or not members of an association committed to a particular point of view, to see that legal aid is available "where the litigant is in need of assistance, or where important issues are involved in the case," has long been established. Indeed, Judge Soper in *Ades* was able to recite numerous instances in which lawyers, including Alexander Hamilton, Luther Martin, and Clarence Darrow, volunteered their services in aid of indigent persons or important public issues. The American Bar Association Code of Professional Responsibility itself recognizes that the "responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer," and further states that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

In light of this long tradition of public interest representation by lawyer volunteers, I share my Brother BLACKMUN'S concern with respect to Part VI of the Court's opinion, and believe that the Court has engaged in unnecessary and unfortunate dicta therein. It would be most undesirable to discourage lawyers—so many of whom find time to work only for those clients who can pay their fees—from continuing to volunteer their services in appropriate cases. Moreover, it cannot be too strongly emphasized that, where "political expression and association" are involved,"a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." For these reasons, I find particularly troubling the Court's dictum that "a State may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation." This proposition is by no means self-evident, has never been the actual

holding of this Court, and is not put in issue by the facts presently before us. Thus, while I agree with much of the Court's opinion in *Primus*, I cannot join in the first paragraph of Part VI.

III

Our holdings today deal only with situations at opposite poles of the problem of attorney solicitation. In their aftermath, courts and professional associations may reasonably be expected to look to these opinions for guidance in redrafting the disciplinary rules that must apply across a spectrum of activities ranging from clearly protected speech to clearly proscribable conduct. A large number of situations falling between the poles represented by the instant facts will doubtless occur. In considering the wisdom and constitutionality of rules directed at such intermediate situations, our fellow members of the Bench and Bar must be guided not only by today's decisions, but also by our decision last Term in *Bates v. State Bar of Arizona*. There, we held that truthful printed advertising by private practitioners regarding the availability and price of certain legal services was protected by the First Amendment. In that context we rejected many of the general justifications for rules applicable to one intermediate situation not directly addressed by the Court today—the commercial, but otherwise "benign" solicitation of clients by an attorney.

The state bar associations in both of these cases took the position that solicitation itself was an evil that could lawfully be proscribed. While the Court's *Primus* opinion does suggest that the only justification for nonsolicitation rules is their prophylactic value in preventing such evils as actual fraud, overreaching, deception, and misrepresentation, I think it should be made crystal clear that the State's legitimate interests in this area are limited to prohibiting such substantive evils.

A

Like rules against advertising, rules against solicitation substantially impede the flow of important information to consumers from those most likely to provide it—the practicing members of the Bar. Many persons with legal problems fail to seek relief through the legal system because they are unaware that they have a legal problem, and, even if they "perceive a need," many "do not obtain counsel . . . because of an inability to locate a competent attorney." Notwithstanding the injurious aspects of Ohralik's conduct, even his case illustrates the potentially useful, information-providing aspects of attorney solicitation: Motivated by the desire for pecuniary gain, but informed with the special training and knowledge of an attorney, Ohralik advised both his clients (apparently correctly) that, although they had been injured by an uninsured motorist, they could nonetheless recover on the McClintocks' insurance policy. The provision of such information about legal

rights and remedies is an important function, even where the rights and remedies are of a private and commercial nature involving no constitutional or political overtones.

In view of the similar functions performed by advertising and solicitation by attorneys, I find somewhat disturbing the Court's suggestion in *Ohralik* that in-person solicitation of business, though entitled to some degree of constitutional protection as "commercial speech," is entitled to less protection under the First Amendment than is "the kind of advertising approved in *Bates*." The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial, and they are entitled to as much protection as the interests we found to be protected in *Bates*.

B

Not only do prohibitions on solicitation interfere with the free flow of information protected by the First Amendment, but by origin and in practice they operate in a discriminatory manner. As we have noted, these constraints developed as rules of "etiquette" and came to rest on the notion that a lawyer's reputation in his community would spread by word of mouth and bring business to the worthy lawyer. The social model on which this conception depends is that of the small, cohesive, and homogeneous community; the anachronistic nature of this model has long been recognized. If ever this conception were more generally true, it is now valid only with respect to those persons who move in the relatively elite social and educational circles in which knowledge about legal problems, legal remedies, and lawyers is widely shared.

The impact of the nonsolicitation rules, moreover, is discriminatory with respect to the suppliers as well as the consumers of legal services. Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society, so the Disciplinary Rules against solicitation fall most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporateoriented firms. Indeed, some scholars have suggested that the rules against solicitation were developed by the professional bar to keep recently immigrated lawyers, who gravitated toward the smaller, personal injury practice, from effective entry into the profession. In light of this history, I am less inclined than the majority appears to be, to weigh favorably in the balance of the State's interests here the longevity of the ban on attorney solicitation.

C

By discussing the origin and impact of the nonsolicitation rules, I do not mean to belittle those obviously substantial interests that the State has in regulating attorneys to protect the public from fraud, deceit, misrepresentation, overreaching, undue influence, and invasions of privacy. But where honest, unpressured "commer-

cial" solicitation is involved—a situation not presented in either of these cases—I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicitation rule and against which the First Amendment ordinarily protects. While the State's interest in regulating in-person solicitation may be somewhat greater than its interest in regulating printed advertisements, these concededly legitimate interests might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation. For example, the Justice Department has suggested that the disciplinary rules be reworded "so as to *permit* all solicitation and advertising except the kinds that are false, misleading, undignified, or champertous."

To the extent that in-person solicitation of business may constitutionally be subjected to more substantial state regulation as to time, place, and manner than printed advertising of legal services, it is not because such solicitation has "traditionally" been banned, nor because one form of commercial speech is of less value than another under the First Amendment. Rather, any additional restrictions can be justified only to the degree that dangers which the State has a right to prevent are actually presented by conduct attendant to such speech, thus increasing the relative "strength of the State's countervailing interest in prohibition," *ante*, at 455. As the majority notes, and I wholeheartedly agree, these dangers are amply present in the *Ohralik* case.

Accordingly, while I concur in the judgments of the Court in both of these cases, I join in the Court's opinions only to the extent and with the exceptions noted above.

In re Primus

4 (3) 6 U.S. 412 {1978}

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand for writing such a letter. The appeal is opposed by the State Attorney General, on behalf of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South

Carolina. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP v. Button*, we noted probable jurisdiction.

I

Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm," and was an officer of and cooperating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU). She received no compensation for her work on behalf of the ACLU, but was paid a retainer as a legal consultant for the South Carolina Council on Human Relations (Council), a nonprofit organization with offices in Columbia.

During the summer of 1973, local and national newspapers reported that pregnant mothers on public assistance in Aiken County, S. C., were being sterilized or threatened with sterilization as a condition of the continued receipt of medical assistance under the Medicaid program. Concerned by this development, Gary Allen, an Aiken businessman and officer of a local organization serving indigents, called the Council requesting that one of its representatives come to Aiken to address some of the women who had been sterilized. At the Council's behest, appellant, who had not known Allen previously, called him and arranged a meeting in his office in July 1973. Among those attending was Mary Etta Williams, who had been sterilized by Dr. Clovis H. Pierce after the birth of her third child. Williams and her grandmother attended the meeting because Allen, an old family friend, had invited them and because Williams wanted "[t]o see what it was all about…." At the meeting, appellant advised those present, including Williams and the other women who had been sterilized by Dr. Pierce, of their legal rights and suggested the possibility of a lawsuit.

Early in August 1973 the ACLU informed appellant that it was willing to provide representation for Aiken mothers who had been sterilized. Appellant testified that after being advised by Allen that Williams wished to institute suit against Dr. Pierce, she decided to inform Williams of the ACLU's offer of free legal representation. Shortly after receiving appellant's letter, dated August 30, 1973—the centerpiece of this litigation—Williams visited Dr. Pierce to discuss the progress of her third child who was ill. At the doctor's office, she encountered his lawyer and at the latter's request signed a release of liability in the doctor's favor. Williams showed appellant's letter to the doctor and his lawyer, and they retained a copy. She then called appellant from the doctor's office and announced her intention not to sue. There was no further communication between appellant and Williams.

On October 9, 1974, the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (Board) filed a formal complaint with the Board, charging that appellant had engaged in "solicitation in vio-

lation of the Canons of Ethics" by sending the August 30, 1973, letter to Williams. Appellant denied any unethical solicitation and asserted, *inter alia*, that her conduct was protected by the First and Fourteenth Amendments and by Canon 2 of the Code of Professional Responsibility of the American Bar Association (ABA). The complaint was heard by a panel of the Board on March 20, 1975. The State's evidence consisted of the letter, the testimony of Williams, and a copy of the summons and complaint in the action instituted against Dr. Pierce and various state officials, Following denial of appellant's motion to dismiss, App. 77-82, she testified in her own behalf and called Allen, a number of ACLU representatives, and several character witnesses.

The panel filed a report recommending that appellant be found guilty of soliciting a client on behalf of the ACLU, in violation of Disciplinary Rules (DR) 2-103 (D) (5) (a) and (c) and 2-104 (A) (5) of the Supreme Court of South Carolina, and that a private reprimand be issued. It noted that "[t]he evidence is inconclusive as to whether [appellant] solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages." The panel determined that appellant violated DR 2-103 (D) (5) "by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization." Appellant also was found to have violated DR 2-104 (A) (5) because she solicited Williams, after providing unsolicited legal advice, to join in a prospective class action for damages and other relief that was to be brought by the ACLU.

After a hearing on January 9, 1976, the full Board approved the panel report and administered a private reprimand. On March 17, 1977, the Supreme Court of South Carolina entered an order which adopted verbatim the findings and conclusions of the panel report and increased the sanction, *sua sponte*, to a public reprimand.

We now reverse.

II

This appeal concerns the tension between contending values of considerable moment to the legal profession and to society. Relying upon *NAACP v. Button* and its progeny, appellant maintains that her activity involved constitutionally protected expression and association. In her view, South Carolina has not shown that the discipline meted out to her advances a subordinating state interest in a manner that avoids unnecessary abridgment of First Amendment freedoms. Appellee counters that appellant's letter to Williams falls outside of the protection of *Button*, and that South Carolina acted lawfully in punishing a member of its Bar for solicitation.

The States enjoy broad power to regulate "the practice of professions within their boundaries," and "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " For example, we decide today in *Ohralik v. Ohio State Bar Assn.* that the States may vindicate legitimate regulatory interests through proscription, in certain circumstances, of in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to lay persons.

Unlike the situation in *Ohralik*, however, appellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain. The question presented in this case is whether, in light of the values protected by the First and Fourteenth Amendments, these differences materially affect the scope of state regulation of the conduct of lawyers.

III

In *NAACP v. Button*, the Supreme Court of Appeals of Virginia had held that the activities of members and staff attorneys of the National Association for the Advancement of Colored People (NAACP) and its affiliate, the Virginia State Conference of NAACP Branches (Conference), constituted "solicitation of legal business" in violation of state law. Although the NAACP representatives and staff attorneys had "a right to peaceably assemble with the members of the branches and other groups to discuss with them and advise them relative to their legal rights in matters concerning racial segregation," the court found no constitutional protection for efforts to "solicit prospective litigants to authorize the filing of suits" by NAACP-compensated attorneys.

This Court reversed: "We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of [state law] and the Canons of Professional Ethics." The solicitation of prospective litigants, many of whom were not members of the NAACP or the Conference, for the purpose of furthering the civil-rights objectives of the organization and its members was held to come within the right " 'to engage in association for the advancement of beliefs and ideas.' "

Since the Virginia statute sought to regulate expressive and associational conduct at the core of the First Amendment's protective ambit, the *Button* Court insisted that "government may regulate in the area only with narrow specificity." The Attorney General of Virginia had argued that the law merely (i) proscribed control of the actual litigation by the NAACP after it was instituted, and (ii) sought to prevent the evils traditionally associated with common-law maintenance, champerty, and barratry. The Court found inadequate the first justification because of an absence of evidence of NAACP interference with the actual conduct of litigation, or neglect or harassment of clients, and because the statute, as construed, was not drawn narrowly to advance the asserted goal. It rejected the analogy to the common-law offenses because of an absence of proof that malicious intent or the prospect of pecuniary gain inspired the NAACP-sponsored litigation. It also found a lack of proof that a serious danger of conflict of interest marked the relationship between the NAACP and its member and nonmember Negro litigants. The Court concluded that "although the [NAACP] has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from [the NAACP's] activities, which can justify the broad prohibitions which it has imposed."

Subsequent decisions have interpreted *Button* as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." The Court has held that the First and Fourteenth Amendments prevent state proscription of a range of solicitation activities by labor unions seeking to provide low-cost, effective legal representation to their members. And "lawyers accepting employment under [such plans] have a like protection which the State cannot abridge." Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers, this Court has required that "broad rules framed to protect the public and to preserve respect for the administration of justice" must not work a significant impairment of "the value of associational freedoms."

IV

We turn now to the question whether appellant's conduct implicates interests of free expression and association sufficient to justify the level of protection recognized in *Button* and subsequent cases. The Supreme Court of South Carolina found appellant to have engaged in unethical conduct because she " 'solicit[ed] a client for a non-profit organization, which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization.' " It rejected appellant's First Amendment defenses by distinguishing *Button* from the case before it. Whereas the NAACP in that case was primarily a

" 'political' " organization that used " 'litigation as an adjunct to the overriding political aims of the organization,' " the ACLU " 'has as one of its primary purposes the rendition of legal services.' " The court also intimated that the ACLU's policy of requesting an award of counsel fees indicated that the organization might " 'benefit financially in the event of successful prosecution of the suit for money damages.' "

Although the disciplinary panel did not permit full factual development of the aims and practices of the ACLU, the record does not support the state court's effort to draw a meaningful distinction between the ACLU and the NAACP. From all that appears, the ACLU and its local chapters, much like the NAACP and its local affiliates in *Button*, "[engage] in extensive educational and lobbying activities" and "also [devote] much of [their] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [their] declared purposes." The court below acknowledged that " 'the ACLU has only entered cases in which substantial civil liberties questions are involved ….' " It has engaged in the defense of unpopular causes and unpopular defendants and has represented individuals in litigation that has defined the scope of constitutional protection in areas such as political dissent, juvenile rights, prisoners' rights, military law, amnesty, and privacy. For the ACLU, as for the NAACP, "litigation is not a technique of resolving private differences"; it is "a form of political expression" and "political association."

We find equally unpersuasive any suggestion that the level of constitutional scrutiny in this case should be lowered because of a possible benefit to the ACLU. The discipline administered to appellant was premised solely on the possibility of financial benefit to the organization, rather than any possibility of pecuniary gain to herself, her associates, or the lawyers representing the plaintiffs in the *Walker v. Pierce* litigation. It is conceded that appellant received no compensation for any of the activities in question. It is also undisputed that neither the ACLU nor any lawyer associated with it would have shared in any monetary recovery by the plaintiffs in *Walker v._Pierce*. If Williams had elected to bring suit, and had been represented by staff lawyers for the ACLU, the situation would have been similar to that in *Button*, where the lawyers for the NAACP were "organized as a staff and paid by" that organization.

Contrary to appellee's suggestion, the ACLU's policy of requesting an award of counsel fees does not take this case outside of the protection of *Button*. Although the Court in *Button* did not consider whether the NAACP seeks counsel fees, such requests are often made both by that organization and by the NAACP Legal Defense Fund, Inc. In any event, in a case of this kind there are differences between counsel fees awarded by a court and traditional fee-paying arrangements which militate against a presumption that ACLU sponsorship of litigation is motivated by considerations of pecuniary gain rather than by its widely recognized goal of vindicating civil liberties. Counsel fees are awarded in the discretion of the court; awards are not drawn from the plaintiff's recovery, and are usually premised on a

successful outcome; and the amounts awarded often may not correspond to fees generally obtainable in private litigation. Moreover, under prevailing law during the events in question, an award of counsel fees in federal litigation was available only in limited circumstances. And even if there had been an award during the period in question, it would have gone to the central fund of the ACLU. Although such benefit to the organization may increase with the maintenance of successful litigation, the same situation obtains with voluntary contributions and foundation support, which also may rise with ACLU victories in important areas of the law. That possibility, standing alone, offers no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees.

Appellant's letter of August 30, 1973, to Mrs. Williams thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. As *Button* indicates, and as appellant offered to prove at the disciplinary hearing, the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," including "advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys … for assistance".

V

South Carolina's action in punishing appellant for soliciting a prospective litigant by mail, on behalf of the ACLU, must withstand the "exacting scrutiny applicable to limitations on core First Amendment rights …." South Carolina must demonstrate "a subordinating interest which is compelling," and that the means employed in furtherance of that interest are "closely drawn to avoid unnecessary abridgment of associational freedoms."

Appellee contends that the disciplinary action taken in this case is part of a regulatory program aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients, and to be present on the record before us. We do not dispute the importance of these interests. This Court's decision in *Button* makes clear, however, that "broad prophylactic rules in the area of free expression are suspect," and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Because of the danger of censorship through selec-

tive enforcement of broad prohibitions, and "because First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity."

A

The Disciplinary Rules in question sweep broadly. Under DR 2-103 (D) (5), a lawyer employed by the ACLU or a similar organization may never give unsolicited advice to a lay person that he retain the organization's free services, and it would seem that one who merely assists or maintains a cooperative relationship with the organization also must suppress the giving of such advice if he or anyone associated with the organization will be involved in the ultimate litigation. Notwithstanding appellee's concession in this Court, it is far from clear that a lawyer may communicate the organization's offer of legal assistance at an informational gathering such as the July 1973 meeting in Aiken without breaching the literal terms of the Rule. Moreover, the Disciplinary Rules in question permit punishment for mere solicitation unaccompanied by proof of any of the substantive evils that appellee maintains were present in this case. In sum, the Rules in their present form have a distinct potential for dampening the kind of "cooperative activity that would make advocacy of litigation meaningful," as well as for permitting discretionary enforcement against unpopular causes.

B

Even if we ignore the breadth of the Disciplinary Rules and the absence of findings in the decision below that support the justifications advanced by appellee in this Court, we think it clear from the record—which appellee does not suggest is inadequately developed—that findings compatible with the First Amendment could not have been made in this case. "Considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment [against appellant]. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied."

Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs. The approach we adopt today in *Ohralik, post*, p. 447, that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.

The record does not support appellee's contention that undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case. Appellant's letter of August 30, 1973, followed up the earlier meeting—one concededly protected by the First and Fourteenth Amendments— by notifying Williams that the ACLU would be interested in supporting possible litigation. The letter imparted additional information material to making an informed decision about whether to authorize litigation, and permitted Williams an opportunity, which she exercised, for arriving at a deliberate decision. The letter was not facially misleading; indeed, it offered "to explain what is involved so you can understand what is going on." The transmittal of this letter—as contrasted with in-person solicitation—involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct. The manner of solicitation in this case certainly was no more likely to cause harmful consequences than the activity considered in *Button*.

Nor does the record permit a finding of a serious likelihood of conflict of interest or injurious lay interference with the attorney-client relationship. Admittedly, there is some potential for such conflict or interference whenever a lay organization supports any litigation. That potential was present in *Button*, in the NAACP's solicitation of nonmembers and its disavowal of any relief short of full integration. But the Court found that potential insufficient in the absence of proof of a "serious danger" of conflict of interest, or of organizational interference with the actual conduct of the litigation. As in *Button*, "[n]othing that this record shows as to the nature and purpose of [ACLU] activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application," of the Disciplinary Rules to appellant's activity. A "very distant possibility of harm," cannot justify proscription of the activity of appellant revealed by this record.

The State's interests in preventing the "stirring up" of frivolous or vexatious litigation and minimizing commercialization of the legal profession offer no further justification for the discipline administered in this case. The *Button* Court declined to accept the proffered analogy to the common-law offenses of maintenance, champerty, and barratry, where the record would not support a finding that the litigant was solicited for a malicious purpose or "for private gain, serving no public interest". The same result follows from the facts of this case. And considerations of undue commercialization of the legal profession are of marginal force where, as here, a nonprofit organization offers its services free of charge to individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to tap alternative sources of such aid.

At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction". In the context of political expression and association, however, a State must regulate with significantly greater precision.

VI

The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar. The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence. As we decide today in *Ohralik*, a State also may forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils. And a State may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation. Accordingly, nothing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU.

We conclude that South Carolina's application of DR 2-103 (D) (5) (a) and (c) and 2-104 (A) (5) to appellant's solicitation by letter on behalf of the ACLU violates the First and Fourteenth Amendments. The judgment of the Supreme Court of South Carolina is

Reversed.

Zauderer v. Office of Disciplinary Counsel

471 U.S. 626 (1985)

JUSTICE WHITE delivered the opinion of the Court.

[W]e have on a number of occasions addressed the constitutionality of restraints on advertising and solicitation by attorneys. This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a State may discipline an attorney for soliciting business by running news-

paper advertisements containing nondeceptive illustrations and legal advice, and whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.

I

Appellant is an attorney practicing in Columbus, Ohio. Late in 1981, he sought to augment his practice by advertising in local newspapers. His first effort was a modest one: he ran a small advertisement in the Columbus Citizen Journal advising its readers that his law firm would represent defendants in drunken driving cases and that his clients' "[f]ull legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING." The advertisement appeared in the Journal for two days; on the second day, Charles Kettlewell, an attorney employed by the Office of Disciplinary Counsel of the Supreme Court of Ohio (appellee) telephoned appellant and informed him that the advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis, a practice prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility. Appellant immediately withdrew the advertisement and in a letter to Kettlewell apologized for running it, also stating in the letter that he would decline to accept employment by persons responding to the ad.

Appellant's second effort was more ambitious. In the spring of 1982, appellant placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device. The advertisement featured a line drawing of the Dalkon Shield accompanied by the question, "DID YOU USE THIS IUD?" The advertisement then related the following information:

> "The Dalkon Shield Interuterine *[sic]* Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

The ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for "free information."

The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement. The ad, however, also aroused the interest of the Office of Disciplinary Counsel. On

July 29, 1982, the Office filed a complaint against appellant charging him with a number of disciplinary violations arising out of both the drunken driving and Dalkon Shield advertisements.

The complaint, as subsequently amended, alleged that the drunken driving ad violated Ohio Disciplinary Rule 2-101(A) in that it was "false, fraudulent, misleading, and deceptive to the public") because it offered representation on a contingent-fee basis in a criminal case—an offer that could not be carried out under Disciplinary Rule 2-106(C). With respect to the Dalkon Shield advertisement, the complaint alleged that in running the ad and accepting employment by women responding to it, appellant had violated the following Disciplinary Rules: DR 2-101(B), which prohibits the use of illustrations in advertisements run by attorneys, requires that ads by attorneys be "dignified," and limits the information that may be included in such ads to a list of 20 items; DR 2-103(A), which prohibits an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer"; and DR 2-104(A), which provides (with certain exceptions not applicable here) that "a lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

The complaint also alleged that the advertisement violated DR 2-101(B)(15), which provides that any advertisement that mentions contingent-fee rates must "disclos[e] whether percentages are computed before or after deduction of court costs and expenses," and that the ad's failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement "deceptive" in violation of DR 2-101(A). The complaint did not allege that the Dalkon Shield advertisement was false or deceptive in any respect other than its omission of information relating to the contingent-fee arrangement; indeed, the Office of Disciplinary Counsel stipulated that the information and advice regarding Dalkon Shield litigation was not false, fraudulent, misleading, or deceptive and that the drawing was an accurate representation of the Dalkon Shield.

The charges against appellant were heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Appellant's primary defense to the charges against him was that Ohio's rules restricting the content of advertising by attorneys were unconstitutional. In support of his contention that the State had not provided justification for its rules sufficient to withstand the First Amendment scrutiny called for by those decisions, appellant proffered the testimony of expert witnesses that unfettered advertising by attorneys was economically beneficial and that appellant's advertising in particular was socially valuable in that it served to inform members of the public of their legal rights and of the potential health hazards associated with the Dalkon Shield. Appellant

also put on the stand two of the women who had responded to his advertisements, both of whom testified that they would not have learned of their legal claims had it not been for appellant's advertisement.

The panel found that appellant's use of advertising had violated a number of Disciplinary Rules. The panel accepted the contention that the drunken driving advertisement was deceptive, but its reasoning differed from that of the Office of Disciplinary Counsel: the panel concluded that because the advertisement failed to mention the common practice of plea bargaining in drunken driving cases, it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) *and* be liable for attorney's fees (because they had not been convicted of drunken driving). The panel also found that the use of an illustration in appellant's Dalkon Shield advertisement violated DR 2-101(B), that the ad's failure to disclose the client's potential liability for costs even if her suit were unsuccessful violated both DR 2-101(A) and DR 2-101 (B)(15), that the advertisement constituted self-recommendation in violation of DR 2-103(A), and that appellant's acceptance of offers of employment resulting from the advertisement violated DR 2-104(A).

The panel rejected appellant's arguments that Ohio's regulations regarding the content of attorney advertising were unconstitutional as applied to him. The panel noted that neither *Bates* nor *In re R. M. J*. had forbidden all regulation of attorney advertising and that both of those cases had involved advertising regulations substantially more restrictive than Ohio's. The panel also relied heavily on *Ohralik v. Ohio State Bar Assn.*, in which this Court upheld Ohio's imposition of discipline on an attorney who had engaged in in-person solicitation. The panel apparently concluded that the interests served by the application of Ohio's rules to advertising that contained legal advice and solicited clients to pursue a particular legal claim were as substantial as the interests at stake in *Ohralik*. Accordingly, the panel rejected appellant's constitutional defenses and recommended that he be publicly reprimanded for his violations. The Board of Commissioners adopted the panel's findings in full, but recommended the sanction of indefinite suspension from the practice of law rather than the more lenient punishment proposed by the panel.

The Supreme Court of Ohio, in turn, adopted the Board's findings that appellant's advertisements had violated the Disciplinary Rules specified by the hearing panel. 10 Ohio St. 3d 44, 461 N. E. 2d 883 (1984). The court also agreed with the Board that the application of Ohio's rules to appellant's advertisements did not offend the First Amendment. The court pointed out that *Bates* and *In re R. M. J*. permitted regulations designed to prevent the use of deceptive advertising and that *R. M. J*. had recognized that even non-deceptive advertising might be restricted if the restriction was narrowly designed to achieve a substantial state interest. The court held that disclosure requirements applicable to advertisements mentioning contingent-fee arrangements served the permissible goal of ensuring that poten-

tial clients were not misled regarding the terms of the arrangements. In addition, the court held, it was "allowable" to prevent attorneys form claiming expertise in particular fields of law in the absence of standards by which such claims might be assessed, and it was "reasonable" to preclude the use of illustrations in advertisements and to prevent attorneys from offering legal advice in their advertisements, although the court did not specifically identify the interests served by these restrictions. Having determined that appellant's advertisements violated Ohio's Disciplinary Rules and that the First Amendment did not forbid the application of those rules to appellant, the court concluded that appellant's conduct warranted a public reprimand.

Contending that Ohio's Disciplinary Rules violate the First Amendment insofar as they authorize the State to discipline him for the content of his Dalkon Shield advertisement, appellant filed this appeal. Appellant also claims that the manner in which he was disciplined for running his drunken driving advertisement violated his right to due process. We noted probable jurisdiction, 469 U. S. 813 (1984), and now affirm in part and reverse in part.

II

There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case—advertising pure and simple—falls within those bounds. Our commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," and appellant's advertisements undeniably propose a commercial transaction. Whatever else the category of commercial speech may encompass, it must include appellant's advertisements.

Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible. To resolve this appeal, we must apply the teachings of these cases to three separate forms of regulation Ohio has imposed on advertising by its attor-

neys: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees.

III

We turn first to the Ohio Supreme Court's finding that appellant's Dalkon Shield advertisement (and his acceptance of employment resulting from it) ran afoul of the rules against self-recommendation and accepting employment resulting from unsolicited legal advice. Because all advertising is at least implicitly a plea for its audience's custom, a broad reading of the rules applied by the Ohio court (and particularly the rule against self-recommendation) might suggest that they forbid all advertising by attorneys—a result obviously not in keeping with our decisions in *Bates* and *In re R. M. J*. But the Ohio court did not purport to give its rules such a broad reading: it held only that the rules forbade soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem.

The interest served by the application of the Ohio self-recommendation and solicitation rules to appellant's advertisement is not apparent from a reading of the opinions of the Ohio Supreme Court and its Board of Commissioners. The advertisement's information and advice concerning the Dalkon Shield were, as the Office of Disciplinary Counsel stipulated, neither false nor deceptive: in fact, they were entirely accurate. The advertisement did not promise readers that lawsuits alleging injuries caused by the Dalkon Shield would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation. Rather, the advertisement reported the indisputable fact that the Dalkon Shield has spawned an impressive number of lawsuits and advised readers that appellant was currently handling such lawsuits and was willing to represent other women asserting similar claims. In addition, the advertisement advised women that they should not assume that their claims were time-barred—advice that seems completely unobjectionable in light of the trend in many States toward a "discovery rule" for determining when a cause of action for latent injury or disease accrues. The State's power to prohibit advertising that is "inherently misleading," thus cannot justify Ohio's decision to discipline appellant for running advertising geared to persons with a specific legal problem.

Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. The extensive citations in the opinion of the Board of Commissioners to our opinion in *Ohralik* suggest that the Board believed that the application of the rules to appellant's advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue

in *Ohralik*. We cannot agree. Our decision in *Ohralik* was largely grounded on the substantial differences between face-to-face solicitation and the advertising we had held permissible in *Bates*. In-person solicitation by a lawyer, we concluded, was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. In addition, we noted that in-person solicitation presents unique regulatory difficulties because it is "not visible or otherwise open to public scrutiny." *Id.*, at 466. These unique features of in-person solicitation by lawyers, we held, justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain, but we were careful to point out that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services."

It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement—and print advertising generally—poses much less risk of over-reaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.

Nor does the traditional justification for restraints on solicitation—the fear that lawyers will "stir up litigation"—justify the restriction imposed in this case. In evaluating this proffered justification, it is important to think about what it might mean to say that the State has an interest in preventing lawyers from stirring up litigation. It is possible to describe litigation itself as an evil that the State is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. "As a litigant," Judge Learned Hand once observed, "I should dread a lawsuit beyond almost anything else short of sickness and death."

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we

cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.

The State does not, however, argue that the encouragement of litigation is inherently evil, nor does it assert an interest in discouraging the particular form of litigation that appellant's advertising solicited. Rather, the State's position is that although appellant's advertising may itself have been harmless—may even have had the salutary effect of informing some persons of rights of which they would otherwise have been unaware—the State's prohibition on the use of legal advice and information in advertising by attorneys is a prophylactic rule that is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation against innocent defendants. Advertising by attorneys, the State claims, presents regulatory difficulties that are different in kind from those presented by other forms of advertising. Whereas statements about most consumer products are subject to verification, the indeterminacy of statements about law makes it impractical if not impossible to weed out accurate statements from those that are false or misleading. A prophylactic rule is therefore essential if the State is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.

The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes. Indeed, in *In re R. M. J.* we went so far as to state that "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." The State's argument, then, must be that this dictum is incorrect—that there are some circumstances in which a prophylactic rule is the least restrictive possible means of achieving a substantial governmental interest.

We need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area, for we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest. The State's contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.

The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services. This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under § 5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in . . . commerce," 15 U. S. C. § 45(a)(1), reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics. In short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us.

Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising—indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising. Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising. An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

IV

The application of DR 2-101(B)'s restriction on illustrations in advertising by lawyers to appellant's advertisement fails for much the same reasons as does the application of the self-recommendation and solicitation rules. The use of illustra-

tions or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. Because the illustration for which appellant was disciplined is an accurate representation of the Dalkon Shield and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the State to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest through the least restrictive available means.

The text of DR 2-101(B) strongly suggests that the purpose of the restriction on the use of illustrations is to ensure that attorneys advertise "in a dignified manner." There is, of course, no suggestion that the illustration actually used by appellant was undignified; thus, it is difficult to see how the application of the rule to appellant in this case directly advances the State's interest in preserving the dignity of attorneys. More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

In its arguments before this Court, the State has asserted that the restriction on illustrations serves a somewhat different purpose, akin to that supposedly served by the prohibition on the offering of legal advice in advertising. The use of illustrations in advertising by attorneys, the State suggests, creates unacceptable risks that the public will be misled, manipulated, or confused. Abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions. Because illustrations may produce their effects by operating on a subconscious level, the State argues, it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Thus, once again, the State's argument is that its purposes can only be served through a prophylactic rule.

We are not convinced. The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket

ban. Moreover, none of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements. Indeed, because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.

Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burden-some that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations. The experience of the FTC is, again, instructive. Although that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one: in many instances, the agency has succeeded in identifying and suppressing visually deceptive advertising. Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration.

V

Appellant contends that assessing the validity of the Ohio Supreme Court's decision to discipline him for his failure to include in the Dalkon Shield advertisement the information that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful entails precisely the same inquiry as determining the validity of the restrictions on advertising content discussed above. In other words, he suggests that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception; moreover, he contends that the State must establish that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so. Not surprisingly, appellant claims that the State has failed to muster substantial evidentiary support for any of the findings required to support the restriction.

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the

client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. Indeed, in *West Virginia State Bd. of Ed. v. Barnette*, the Court went so far as to state that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."

But the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

The State's application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard. Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs"—terms that, in ordinary

usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

VI

Finally, we address appellant's argument that he was denied procedural due process by the manner in which discipline was imposed on him in connection with his drunken driving advertisement. Appellant's contention is that the theory relied on by the Ohio Supreme Court and its Board of Commissioners as to how the advertisement was deceptive was different from the theory asserted by the Office of Disciplinary Counsel in its complaint. We cannot agree that this discrepancy violated the constitutional guarantee of due process.

Under the law of Ohio, bar discipline is the responsibility of the Ohio Supreme Court. Ohio Const., Art. IV, § 2(B)(1)(g). The Board of Commissioners on Grievances and Discipline formally serves only as a body that recommends discipline to the Supreme Court; it has no authority to impose discipline itself. See Govt. Bar Rule V(2), (16)-(20). That the Board of Commissioners chose to make its recommendation of discipline on the basis of reasoning different from that of the Office of Disciplinary Counsel is of little moment: what is important is that the Board's recommendations put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio. Appellant does not contend that he was afforded no opportunity to respond to the Board's recommendation; indeed, the Ohio rules appear to provide ample opportunity for response to Board recommendations, and it appears that appellant availed himself of that opportunity. The notice and opportunity to respond afforded appellant were sufficient to satisfy the demands of due process.

VII

The Supreme Court of Ohio issued a public reprimand incorporating by reference its opinion finding that appellant had violated Disciplinary Rules 2-101(A), 2-101(B), 2-101 (B)(15), 2-103(A), and 2-104(A). That judgment is affirmed to the extent that it is based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement. But insofar as the reprimand was based on appellant's use of an illustration in his advertisement in violation of DR 2-101(B) and his offer of legal advice in his advertisement in violation of DR 2-103(A) and 2-104(A), the judgment is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part, concurring in the judgment in part, and dissenting in part.

I fully agree with the Court that a State may not discipline attorneys who solicit business by publishing newspaper advertisements that contain "truthful and nondeceptive information and advice regarding the legal rights of potential clients" and "accurate and nondeceptive illustration[s]." I therefore join Part I-IV of the Court's opinion, and I join the Court's judgment set forth in Part VII to the extent it reverses the Supreme Court of Ohio's public reprimand of the appellant Philip Q. Zauderer for his violations of Disciplinary Rules 2-101(B), 2-103(A), and 2-104(A).

With some qualifications, I also agree with the conclusion in Part V of the Court's opinion that a State may impose commercial-advertising disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers." *Ante*, at 651. I do not agree, however, that the State of Ohio's vaguely expressed disclosure requirements fully satisfy this standard, and in any event I believe that Ohio's punishment of Zauderer for his alleged infractions of those requirements violated important due process and First Amendment guarantees. In addition, I believe the manner in which Ohio has punished Zauderer for publishing the "drunk driving" advertisement violated fundamental principles of procedural due process. I therefore concur in part and dissent in part from Part V of the Court's opinion, dissent from Part VI, and dissent from the judgment set forth in Part VII insofar as it affirms the Supreme Court of Ohio's public reprimand "based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement."

I

A

The Court concludes that the First Amendment's protection of commercial speech is satisfied so long as a disclosure requirement is "reasonably related" to preventing consumer deception, and it suggests that this standard "might" be violated if a disclosure requirement were "unjustified" or "unduly burdensome." *Ante*, at 651. I agree with the Court's somewhat amorphous "reasonable relationship" inquiry only on the understanding that it comports with the standards more precisely set forth in our previous commercial-speech cases. Under those standards, regulation of commercial speech—whether through an affirmative disclosure requirement or through outright suppression—is "reasonable" only to the extent that a State

can demonstrate a legitimate and substantial interest to be achieved by the regulation. Moreover, the regulation must directly advance the state interest and "may extend only as far as the interest it serves." Where the State imposes regulations to guard against "the potential for deception and confusion" in commercial speech, those regulations "may be no broader than reasonably necessary to prevent the deception."

Because of the First Amendment values at stake, courts must exercise careful scrutiny in applying these standards. Thus a State may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. Where a regulation is addressed to allegedly deceptive advertising, the State must instead demonstrate that the advertising either "is inherently likely to deceive" or must muster record evidence showing that "a particular form or method of advertising has in fact been deceptive," and it must similarly demonstrate that the regulations directly and proportionately remedy the deception. Where States have failed to make such showings, we have repeatedly struck down the challenged regulations.

As the Court acknowledges, it is "somewhat difficult" to apply these standards to Ohio's disclosure requirements "in light of the Ohio court's failure to specify precisely what disclosures were required." *Ante*, at 653, n. 15. It is also somewhat difficult to determine precisely what disclosure requirements the Court approves today. The Supreme Court of Ohio appears to have imposed three overlapping requirements, each of which must be analyzed under the First Amendment standards set forth above. First, the court concluded that "a lawyer advertisement which refers to contingent fees" should indicate whether "additional costs . . . might be assessed the client." The report of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court explained that such a requirement is necessary to guard against "the impression that if there were no recovery, the client would owe nothing." App. to Juris. Statement 14a. I agree with the Court's conclusion that, given the general public's unfamiliarity with the distinction between fees and costs, a State may require an advertising attorney to include a costs disclaimer so as to avoid the potential for misunderstanding, *ante*, at 653—provided the required disclaimer is "no broader than reasonably necessary to prevent the deception".

Second, the report and opinion provide that an attorney advertising his availability on a contingent-fee basis must "specifically expres[s]" his rates. The Court's analysis of this requirement—which the Court characterizes as a "suggest[ion],"—is limited to the passing observation that the requirement does not "see[m] intrinsically burdensome". The question of burden, however, is irrelevant unless the State can first demonstrate that the rate-publication requirement directly and proportionately furthers a "substantial interest." Yet an attorney's failure to specify a particular percentage rate when advertising that he accepts cases on a contingent-fee basis can in no way be said to be "inherently likely to deceive," and the voluminous

record in this case fails to reveal a single instance suggesting that such a failure has in actual experience proved deceptive. Nor has Ohio at any point identified any other "substantial interest" that would be served by such a requirement. Although a State might well be able to demonstrate that rate publication is necessary to prevent deception or to serve some other substantial interest, it must do so pursuant to the carefully structured commercial-speech standards in order to ensure the full evaluation of competing considerations and to guard against impermissible discrimination among different categories of commercial speech. Ohio has made no such demonstration here.

Third, the Supreme Court of Ohio agreed with the Board of Commissioners that Zauderer had acted unethically "by failing *fully* to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of publishing the advertisement." The record indicates that Zauderer enters into a comprehensive contract with personal injury clients, one that spells out over several pages the various terms and qualifications of the contingent-fee relationship. If Ohio seriously means to require Zauderer "fully to disclose the[se] terms," this requirement would obviously be so "unduly burdensome" as to violate the First Amendment. *Ante*, at 651. Such a requirement, compelling the publication of detailed fee information that would fill far more space than the advertisement itself, would chill the publication of protected commercial speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception. Given the Court's explicit endorsement of Ohio's other disclosure provisions, I can only read the Court's telling silence respecting this apparent requirement as an implicit acknowledgment that it could not possibly pass constitutional muster.

B

Ohio's glaring failure "to specify precisely what disclosures were required," is relevant in another important respect. Even if a State may impose particular disclosure requirements, an advertiser may not be punished for failing to include such disclosures "unless his failure is in violation of valid state statutory or decisional law requiring the [advertiser] to label or take other precautions to prevent confusion of customers." Whether or not Ohio *may* properly impose the disclosure requirements discussed above, it failed to provide Zauderer with sufficient notice that he was expected to include such disclosures in his Dalkon Shield advertisement. The State's punishment of Zauderer therefore violated basic due process and First Amendment guarantees.

Neither the published rules, state authorities, nor governing precedents put Zauderer on notice of what he was required to include in the advertisement. As the Court acknowledges, Ohio's Disciplinary Rules do not "on [their] face require any disclosures except when an advertisement mentions contingent-fee *rates*—which appellant's advertisement did not do." In light of the ambiguity of the rules, Zauderer contracted the governing authorities *before* publishing the advertisement

and unsuccessfully sought to determine whether it would be ethically objectionable. He met with representatives of the Office of Disciplinary Counsel, reviewed the advertisement with them, and asked whether the Office had any objections or recommendations concerning the form or content of the advertisement. The Office refused to advise Zauderer whether "he should or should not publish the advertisement," informing him that it "does not have authority to issue advisory opinions nor to approve or disapprove legal service advertisements." And even after full disciplinary proceedings, Ohio still has failed, as the Court acknowledges, "to specify precisely what disclosures were required," and therefore to specify precisely how Zauderer violated the law and what reasonable precautions he can take to avoid future disciplinary actions.

A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." This requirement "applies with particular force in review of laws dealing with speech,"

These guarantees apply fully to attorney disciplinary proceedings. Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." But where "[t]he appraisal of [an attorney's] conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question," and where the State has not otherwise proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct.

I do not believe that Zauderer's Dalkon Shield advertisement can be said to be so obviously misleading as to justify punishment in the absence of a reasonably clear contemporaneous rule requiring the inclusion of certain disclaimers. The advertisement's statement that "if there is no recovery, no legal fees are owed by our clients" was accurate on its face, and "[t]here is nothing in the record to indicate that the inclusion of this information was misleading" in actual practice because of the failure to include a costs disclaimer. Moreover, although the statement might well be viewed by many attorneys as carrying the potential for deception, the Office of Disciplinary Counsel itself *stipulated* that "[t]he Dalkon Shield advertisement published by [Zauderer] does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Several other States have approved the publication of Dalkon Shield advertisements containing the *identical* no-legal-fees statement, without even a suggestion that the statement might be deceptive. And the Office of Disciplinary Counsel's refusal to respond to Za-

uderer's prepublication inquiries concerning the propriety of the advertisement wholly undermines one of the basic justifications for allowing punishment for violations of imprecise commercial regulations—that a businessperson can clarify the meaning of an arguably vague regulation by consulting with government administrators. Although I agree that a State may upon a proper showing require a costs disclaimer as a prophylactic measure to guard against potential deception, and may thereafter discipline attorneys who fail to include such disclaimers, Ohio had imposed no such requirement at the time Zauderer published the advertisement, as the Court acknowledges. The State instead has punished Zauderer for violating requirements that did not exist prior to this disciplinary proceeding.

The Court appears to concede these serious problems, noting that "it may well be that for Ohio actually to *disbar* an attorney on the basis of its disclosure requirements as they have been worked out to this point would raise significant due process concerns." The Court "see[s] no infirmity" in this case, however, because the Supreme Court of Ohio publicly reprimanded Zauderer rather than disbarring him. This distinction is thoroughly unconvincing. When an attorney's constitutional rights have been violated, we have not hesitated in the past to reverse disciplinary sanctions that were even less severe than a public reprimand. Moreover, a public reprimand in Ohio exacts a potentially severe deprivation of liberty and property interests that are fully protected by the Due Process Clause. The reprimand brands Zauderer as an unethical attorney who has violated his solemn oath of office and committed a "willful breach" of the Code of Professional Responsibility, and it has been published in statewide professional journals and the official reports of the Ohio Supreme Court. This Court's casual indifference to the gravity of this injury inflicted on an attorney's good name demeans the entire legal profession. In addition, under Ohio law "a person who has been . . . publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred. . . ." In light of Ohio's vague rules, the governing authorities' refusal to provide clarification and guidance to Zauderer, and the Ohio Supreme Court's "failure to specify precisely what disclosures [are] required," Zauderer will hereafter publish advertisements mentioning contingent fees only at his peril. No matter what disclaimers he includes, Ohio may decide after the fact that further information should have been included and might, under the force of its rules, attempt to suspend him indefinitely from his livelihood. Such a potential trap for an unwary attorney acting in good faith not only works a significant due process deprivation, but also imposes an intolerable chill upon the exercise of First Amendment rights.

II

The Office of Disciplinary Counsel charged that Zauderer's drunken driving advertisement was deceptive because it proposed a contingent fee in a criminal case—an unlawful arrangement under Ohio law. Zauderer defended on the ground that the offer of a refund did not constitute a proposed contingent fee. This was the sole issue concerning the drunken driving advertisement that the Office complained of, and the evidence and arguments presented to the Board of Commissioners were limited to this question. The Board, however, did not even mention the contingent-fee issue in its certified report. Instead, it found the advertisement "misleading and deceptive" on the basis of a completely new theory—that as a matter of "general knowledge" as discerned from certain "Municipal Court reports," drunken driving charges are "in many cases . . . reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court," so that in such circumstances "the legal fee would not be refundable." Although Zauderer argued before the Supreme Court of Ohio that this theory had never been advanced by the Office of Disciplinary Counsel, that he had never had any opportunity to object to the propriety of judicial notice or to present opposing evidence, and that there was no evidence connecting him to the alleged practice, the court adopted the Board's findings without even acknowledging his objections.

Zauderer of course might not ultimately be able to disprove the Board's theory. The question before the Court, however, is not one of prediction but one of process. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." Under the Due Process Clause, "reasonable notice" must include disclosure of "the *specific* issues [the party] must meet," and appraisal of "the factual material on which the agency relies for decision so that he may rebut it". These guarantees apply fully to attorney disciplinary proceedings because, obviously, "lawyers also enjoy first-class citizenship." Where there is an "absence of fair notice as to the reach of the grievance procedure and the *precise* nature of the charges," so that the attorney is not given a meaningful opportunity to present evidence in his defense, the proceedings violate due process.

The Court acknowledges these guarantees, but argues that the Board's change of theories after the close of evidence was "of little moment" because Zauderer had an opportunity to object to the Board's certified report before the Supreme Court of Ohio. This reasoning is untenable. Although the Supreme Court of Ohio made the ultimate determination concerning discipline, it held no *de novo* hearing and afforded Zauderer no opportunity to present evidence opposing the Board's surprise exercise of judicial notice. Under Ohio procedure, the court's role was instead limited to a record review of the Board's certified findings to determine whether they were "against the weight of the evidence" or made in violation of legal and procedural guarantees. All that Zauderer could do was to argue that the

Board's report was grounded on a theory that he had never been notified of and that he never had an opportunity to challenge with evidence of his own, and to request that proper procedures be followed.

The court completely ignored these objections. To hold that this sort of procedure constituted a meaningful "chance to be heard in a trial of the issues," is to make a mockery of the due process of law that is guaranteed every citizen accused of wrongdoing.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I, II, V, and VI of the Court's opinion, and its judgment except insofar as it reverses the reprimand based on appellant Zauderer's use of unsolicited legal advice in violation of DR 2-103(A) and 2-104(A). I agree that appellant was properly reprimanded for his drunken driving advertisement and for his omission of contingent fee information from his Dalkon Shield advertisement. I also concur in the Court's judgment in Part IV. At least in the context of print media, the task of monitoring illustrations in attorney advertisements is not so unmanageable as to justify Ohio's blanket ban. I dissent from Part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule.

Merchants in this country commonly offer free samples of their wares. Customers who are pleased by the sample are likely to return to purchase more. This effective marketing technique may be of little concern when applied to many products, but it is troubling when the product being dispensed is professional advice. Almost every State restricts an attorney's ability to accept employment resulting from unsolicited legal advice. At least two persuasive reasons can be advanced for the restrictions. First, there is an enhanced possibility for confusion and deception in marketing professional services. Unlike standardized products, professional services are by their nature complex and diverse. Faced with this complexity, a lay person may often lack the knowledge or experience to gauge the quality of the sample before signing up for a larger purchase. Second, and more significantly, the attorney's personal interest in obtaining business may color the advice offered in soliciting a client. As a result, a potential customer's decision to employ the attorney may be based on advice that is neither complete nor disinterested.

These risks are of particular concern when an attorney offers unsolicited advice to a potential client in a personal encounter. In that context, the legal advice accompanying an attorney's pitch for business is not merely apt to be complex and colored by the attorney's personal interest. The advice is also offered outside of public view, and in a setting in which the prospective client's judgment may be more easily intimidated or overpowered. For these reasons, most States expressly

bar lawyers from accepting employment resulting from *in person* unsolicited advice. Some States, like the American Bar Association in its Model Rules of Professional Conduct, extend the prohibition to employment resulting from unsolicited advice in telephone calls, letters, or communications directed to a specific recipient. Ohio and 14 other States go a step further. They do not limit their rules to certain methods of communication, but instead provide that, with limited exceptions, a "lawyer who has given unsolicited legal advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

The issue posed and decided in Part III of the Court's opinion is whether such a rule can be applied to punish the use of legal advice in a printed advertisement soliciting business. The majority's conclusion is a narrow one: "An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive . . . advice regarding the legal rights of potential clients." The Court relies on its commercial speech analysis in *Central Hudson Gas & Electric Corp.* and *In re R. M. J.*. As the Court notes, *Central Hudson Gas & Electric* establishes that a State can prohibit truthful and nondeceptive commercial speech only if the restriction directly advances a substantial government interest. *In re R. M. J.* went further, stating that a State cannot place an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive.

Given these holdings, the Court rejects Ohio's ban on the legal advice contained in Zauderer's Dalkon Shield advertisement: "do not assume it is too late to take legal action against the . . . manufacturer." Surveying Ohio law, the majority concludes that this advice "seems completely unobjectionable". Since the statement is not misleading, the Court turns to the asserted state interests in restricting it, and finds them all wanting. The Court perceives much less risk of overreaching or undue influence here than in *Ohralik* simply because the solicitation does not occur in person. The State's interest in discouraging lawyers from stirring up litigation is denigrated because lawsuits are not evil, and States cannot properly interfere with access to our system of justice. Finally, the Court finds that there exist less restrictive means to prevent attorneys from using misleading legal advice to attract clients: just as the Federal Trade Commission has been able to identify unfair or deceptive practices in the marketing of mouthwash and eggs, the States can identify unfair or deceptive legal advice without banning that advice entirely. *Ante*, at 645-646. The majority concludes that "[t]he qualitative distinction the State has attempted to draw eludes us."

In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit. In its prior decisions, the Court was better able to perceive both the importance of state regulation of professional conduct, and the distinction between pro-

fessional services and standardized consumer products. The States understandably require more of attorneys than of others engaged in commerce. Lawyers are *professionals*, and as such they have greater obligations. As Justice Frankfurter once observed, "[f]rom a profession charged with [constitutional] responsibilities there must be exacted . . . qualities of truth-speaking, of a high sense of honor, of granite discretion." The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain. While some assert that we have left the era of professionalism in the practice of law, substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large.

The Court's commercial speech decisions have repeatedly acknowledged that the differences between professional services and other advertised products may justify distinctive state regulation. Most significantly, in *Ohralik*, the Court found that the strong state interest in maintaining standards among members of licensed professions and in preventing fraud, overreaching, or undue influence by attorneys justified a prophylactic rule barring in person solicitation. Although the antisolicitation rule in *Ohralik* would in some circumstances preclude an attorney from honestly and fairly informing a potential client of his or her legal rights, the Court nevertheless deferred to the State's determination that risks of undue influence or overreaching justified a blanket ban. At a minimum, these cases demonstrate that States are entitled under some circumstances to encompass truthful, nondeceptive speech within a ban of a type of advertising that threatens substantial state interests.

In my view, a State could reasonably determine that the use of unsolicited legal advice "as bait with which to obtain agreement to represent [a client] for a fee," poses a sufficient threat to substantial state interests to justify a blanket prohibition. As the Court recognized in *Ohralik*, the State has a significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of laypeople who have not sought their advice. While it is true that a printed advertisement presents a lesser risk of overreaching than a personal encounter, the former is only one step removed from the latter. When legal advice is employed within an advertisement, the layperson may well conclude there is no means to judge its validity or applicability short of consulting the lawyer who placed the advertisement. This is particularly true where, as in appellant's Dalkon Shield advertisement, the legal advice is phrased in uncertain terms. A potential client who read the advertisement would probably be unable to determine whether "it is too late to take legal action against the . . . manufacturer" without directly consulting the appellant. And at the time of that consultation, the same risks of undue influence, fraud, and overreaching that were noted in *Ohralik* are present.

The State also has a substantial interest in requiring that lawyers consistently exercise independent professional judgment on behalf of their clients. Given the exigencies of the marketplace, a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office, rather than that advice which it is most in the interest of potential clients to hear. In a recent case in New York, for example, an attorney wrote unsolicited letters to victims of a massive disaster advising them that, in his professional opinion, the liability of the potential defendants is clear. Of course, under the Court's opinion claims like this might be reached by branding the advice misleading or by promulgating a state rule requiring extensive disclosure of all relevant liability rules whenever such a claim is advanced. But even if such a claim were completely accurate—even if liability were in fact clear and the attorney actually thought it to be so—I believe the State could reasonably decide that a professional should not accept employment resulting from such unsolicited advice. Ohio and other States afford attorneys ample opportunities to inform members of the public of their legal rights. Given the availability of alternative means to inform the public of legal rights, Ohio's rule against legal advice in advertisements is an appropriate means to assure the exercise of independent professional judgment by attorneys. A State might rightfully take pride that its citizens have access to its civil courts, *ante*, at 643, while at the same time opposing the use of self-interested legal advice to solicit clients.

In the face of these substantial and legitimate state concerns, I cannot agree with the majority that Ohio DR 2-104(A) is unnecessary to the achievement of those interests. The Ohio rule may sweep in some advertisements containing helpful legal advice within its general prohibition. Nevertheless, I am not prepared to second-guess Ohio's longstanding and careful balancing of legitimate state interests merely because appellant here can invent a less restrictive rule. As the Iowa Supreme Court recently observed, "[t]he professional disciplinary system would be in chaos if violations could be defended on the ground the lawyer involved could think of a better rule." Because I would defer to the judgment of the States that have chosen to preclude use of unsolicited legal advice to entice clients, I respectfully dissent from Part III of the Court's opinion.

Shapero v. Kentucky State Bar Assn.

486 U.S. 466 (1988)

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court as to Parts I and II and an opinion as to Part III in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY join.

This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

I

In 1985, petitioner, a member of Kentucky's integrated Bar Association, applied to the Kentucky Attorneys Advertising Commission for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The proposed letter read as follows:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them. You may call my office anytime from 8:30 a. m. to 5:00 p. m. for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

The Commission did not find the letter false or misleading. Nevertheless, it declined to approve petitioner's proposal on the ground that a then-existing Kentucky Supreme Court Rule prohibited the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." The Commission registered its view that Rule 3.135(5)(b)(i)'s ban on targeted, direct-mail advertising violated the First Amendment—specifically the principles enunciated in *Zauderer*—and recommended that the Kentucky Supreme Court amend its Rules. Pursuing the Commission's suggestion, petitioner petitioned the Committee on Legal Ethics of the Kentucky Bar Association for an advisory opinion as to the Rule's validity. Like the Commission, the Ethics Committee, in an opinion formally adopted by the Board of Governors of the Bar Association, did not find the proposed letter false or misleading, but nonetheless upheld Rule 3.135(5)(b) (i) on the ground that it was consistent with Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct.

On review of the Ethics Committee's advisory opinion, the Kentucky Supreme Court felt "compelled by the decision in Zauderer to order Rule 3.135(5)(b)(i) deleted," and replaced it with the ABA's Rule 7.3.

The court did not specify either the precise infirmity in Rule 3.135(5)(b)(i) or how Rule 7.3 cured it. Rule 7.3, like its predecessor, prohibits targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. We granted certiorari to resolve whether such a blanket prohibition is consistent with the First Amendment and now reverse.

II

Lawyer advertising is in the category of constitutionally protected commercial speech. The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Since state regulation of commercial speech "may extend only as far as the interest it serves," state rules that are designed to prevent the "potential for deception and confusion may be no broader than reasonably necessary to prevent the" perceived evil.

Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public. Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on." The drafters of Rule 7.3 apparently appreciated as much, for the Rule exempts from the ban "letters addressed or advertising circulars distributed generally to persons who are so situated that they might in general find such services useful."

The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need the legal services" offered in his letter, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who actually "need legal services of the kind provided and advertised by the lawyer." But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

The court below did not rely on any such theory. Rather, it concluded that the State's blanket ban on all targeted, direct-mail solicitation was permissible because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." The court observed:

> Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.

In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." Second, "unique difficulties" would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement can effectively avoid further bombardment of his sensibilities simply by averting his eyes." A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "convey information about legal services by means that are more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice.

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer solicitation—solicitation that is "not visible or otherwise open to public scrutiny" and for which it is "difficult or impossible to obtain reliable proof of what actually took place"—do not apply to written solicitations. The court below offered no basis for its "belief that submission of a blank form letter to the Advertising Commission does not provide a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." Its concerns were presumably those expressed by the ABA House of Delegates in its comment to Rule 7.3:

> State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading.

The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements. As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all readers. If the targeted letter specifies facts that relate to particular recipients, the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated; it could require the lawyer to explain briefly how he or she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial

information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. In that regard, respondent identifies two features of the letter before us that, in its view, coalesce to convert the proposed letter into "high pressure solicitation, overbearing solicitation," which is not protected. First, respondent asserts that the letter's liberal use of underscored, uppercase letters "fairly shouts at the recipient that he should employ Shapero." Second, respondent objects that the letter contains assertions that "state no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing."

The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and non-deceptive letter, no matter how big its type and how much it speculates can never "shout at the recipient" or "grasp him by the lapels," as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. "The States may not place an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive," unless the State "asserts a substantial interest" that such a restriction would directly advance. Nor may a State impose a more particularized restriction without a similar showing. Aside from the interests that we have already rejected, respondent offers none.

To be sure, a letter may be misleading if it unduly emphasizes trivial or "relatively uninformative facts," or offers overblown assurances of client satisfaction. Respondent does not argue before us that petitioner's letter was misleading in those respects. Nor does respondent contend that the letter is false or misleading in any other respect. Of course, respondent is free to raise, and the Kentucky courts are free to consider, any such argument on remand.

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

I

Zauderer held that the First Amendment was violated by a state rule that forbade attorneys to solicit or accept employment through advertisements containing information or advice regarding a specific legal problem. I dissented from this holding because I believed that our precedents permitted, and good judgment required, that we give greater deference to the State's legitimate efforts to regulate advertising by their attorneys. Emphasizing the important differences between professional services and standardized consumer products, I concluded that unsolicited legal advice was not analogous to the free samples that are often used to promote sales in other contexts. First, the quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods. Second, and more important, an attorney has an obligation to provide clients with complete and disinterested advice. The advice contained in unsolicited "free samples" is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining.

[* * *]

III

The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations.

Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to

advertise are founded in elementary economic principles. Restrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers (in this case attorneys) to maintain a price/quality ratio in some of their services that is higher than would otherwise prevail. Although one could probably not test this hypothesis empirically, it is inherently plausible. Nor is it implausible to imagine that one effect of restrictions on lawyer advertising, and perhaps sometimes an intended effect, is to enable attorneys to charge their clients more for some services (of a given quality) than they would be able to charge absent the restrictions.

Assuming, arguendo, that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favor of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available, and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results

from overly zealous representation of the client's interests; abuse of the discovery process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a subclass of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary

foundations. In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

DaimlerChrysler Corp. v. Kirkhart

561 S.E.2d 276 (N.C. App. 2002)

Campbell, J.

This appeal arises from the trial court's grant of a preliminary injunction which restricts the manner in which Defendants, a licensed attorney and his law practice, may use information obtained from DaimlerChrysler through discovery in a separate action in which Defendants represented Peter and Frances Pleskach ("the Pleskaches") in a lawsuit against DaimlerChrysler ("the Pleskach case"). Specifically, the trial court's preliminary injunction restrains Defendants from using information obtained through discovery in the Pleskach case to solicit clients and generate further litigation against DaimlerChrysler. Defendants bring forward numerous assignments of error challenging the trial court's findings and conclusions, and also challenging the constitutionality of the preliminary injunction. Upon careful consideration of the briefs, oral argument, transcript, and record, we dissolve the preliminary injunction entered against Defendants.

I. Background

Defendant H.C. Kirkhart ("Kirkhart") is licensed to practice law in North Carolina and does business as The Law Offices of H.C. Kirkhart. On or about 19 April 1999, Kirkhart, as attorney for the Pleskaches, filed a complaint against DaimlerChrysler ("Plaintiff") asserting that Plaintiff had violated the New Motor Vehicles Warranties Act ("Lemon Law Statute"), by failing to make certain disclosures to the Pleskaches required by [the Lemon Law statute], namely: that the Dodge Caravan ("Caravan") the Pleskaches had purchased from Plaintiff had previously been repurchased by Plaintiff from its original owners as a result of the Caravan's defective condition.[1] Based on this alleged violation of the Lemon Law Statute, the Pleskaches asserted claims for fraud and unfair and deceptive trade practices. On or about 28 April 1999, DaimlerChrysler filed its answer denying the material allegations of the Pleskach complaint.

Subsequent to filing the complaint in the Pleskach case, Kirkhart served DaimlerChrysler with a set of interrogatories and a request for production of documents, seeking, inter alia, the vehicle identification numbers of all vehicles that DaimlerChrysler had repurchased since 1994, the names and addresses of the original

[1] (n.1 in Opinion) Kirkhart had previously represented the original owners of the Caravan, Leslie and Tiffany Clark, in an action against DaimlerChrysler which resulted in DaimlerChrysler's repurchase of the Caravan.

owners of these vehicles, the names and addresses of all subsequent purchasers of these buy-back vehicles, and the disclosure statements for all the buy-back vehicles that had been repurchased since 1994. DaimlerChrysler refused to produce the requested information, objecting on grounds that the request was vague, overly broad, unduly burdensome, and propounded for an improper purpose.

On 21 October 1999, Judge Gregory A. Weeks, ruling on a motion to compel discovery that had been filed by Kirkhart, ordered DaimlerChrysler to produce the materials and information requested by Kirkhart. On or about 26 November 1999, DaimlerChrysler responded to the discovery requests, but provided incomplete information, choosing to disclose only partial vehicle identification numbers, and failing to provide the names and addresses of the original and subsequent purchasers of buy-back vehicles. However, DaimlerChrysler did provide approximately 850 disclosure statements, the majority of which were not signed by the subsequent purchasers. Using these disclosure statements, which contained complete vehicle identification numbers, Kirkhart was able to determine the identity of current owners of vehicles that had previously been repurchased by DaimlerChrysler pursuant to the Lemon Law Statute. Kirkhart contacted these subsequent purchasers by letter to determine whether they had been advised that their vehicles were manufacturer's buy-backs. Several of the owners contacted by Kirkhart subsequently requested that he represent them in their own lawsuits against DaimlerChrysler for violations of the Lemon Law Statute. In March 2000, Kirkhart filed five additional lawsuits against DaimlerChrysler.

DaimlerChrysler filed a motion for a temporary restraining order which was granted ex parte by Judge Stafford G. Bullock ("Judge Bullock"). Finding that Kirkhart had been "soliciting business in violation of the discovery rules and ethical rules applicable to all attorneys," Judge Bullock restrained him "from any actions that use discovery material to generate litigation," specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants." On 13 January 2000, DaimlerChrysler filed a motion for a temporary restraining order which was granted ex parte by Judge Stafford G. Bullock ("Judge Bullock"). Finding that Kirkhart had been "soliciting business in violation of the discovery rules and ethical rules applicable to all attorneys," Judge Bullock restrained him "from any actions that use discovery material to generate litigation," specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants." On 3 February 2000, Judge Henry V. Barnette ("Judge Barnette") converted this temporary restraining order into a preliminary injunction specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants whose names were discovered during discovery in [the Pleskach] case." On 2 March 2000, Judge Barnette granted the Pleskaches' motion to set aside the preliminary injunction and ordered that the injunction be withdrawn on the grounds that the trial court did not have personal jurisdiction over Kirkhart since he was not a party in the Pleskach case. On 3 March 2000, Judge Henry W. Hight,

Jr., denied DaimlerChrysler's previously filed motion for a protective order, by which DaimlerChrysler sought the exact relief that had been granted by Judge Barnette's dissolved preliminary injunction.

On 6 March 2000, DaimlerChrysler filed its complaint in the instant case against Defendants alleging that Kirkhart's use of the information obtained through discovery in the Pleskach case to solicit potential clients violated N.C. Gen.Stat. § 84–38, which prohibits the solicitation of legal business, and the rules of civil discovery and ethics applicable to all attorneys. In addition to seeking a permanent injunction prohibiting Defendants from using discovery material from the Pleskach case to solicit potential litigants, DaimlerChrysler asserted the following five causes of action: (1) barratry, (2) libel, (3) prospective interference with contractual relationship, (4) tortious interference with business enterprise, and (5) unfair and deceptive trade practices.

On 2 May 2000, Judge Barnette entered a temporary restraining order identical to the injunction that had previously been entered and dissolved in the Pleskach case. On 16 May 2000, Judge Bullock entered an order converting this temporary restraining order into a preliminary injunction. On 2 June 2000, Defendants filed a motion to dissolve or rescind the injunction, arguing (1) that no discovery rule prohibited attorneys from using information obtained through discovery in one case as the basis for instituting one or more new cases, (2) that the ethical rules of the legal profession did not prohibit the solicitation of clients, but, in fact, expressly permitted it, subject to certain restrictions, and (3) that the injunction violated Defendants' free speech rights under the First Amendment to the United States Constitution.

Defendants' motion to dissolve or rescind the injunction was heard by Judge Bullock on 12 June 2000. At the conclusion of the hearing, Judge Bullock stated:

> The motion to dissolve the injunction is denied; however, the injunction may be modified to the extent that it does not violate Rule 7.3, direct contact with prospective clients[,] and to the extent that it does not violate any of the ethical rules.

Both sides submitted proposed orders to Judge Bullock reflecting their respective interpretations of his ruling. On 27 June 2000, Judge Bullock entered the order prepared by Plaintiff's counsel, which read as follows:

> It is ORDERED that the defendants be and are hereby restrained from using information that the defendants obtained from the plaintiff through discovery requests to generate unrelated litigation against the plaintiff, and may not use such materials for illegal solicitation.
>
> It is also ORDERED that the defendants in their solicitation must obey laws relating to unfair and deceptive trade practices, common law barratry, G.S. Section 84–38, which prohibits the solicitation of legal business, and Rule 26(b)(1) of the North Carolina Rules of Civil Procedure.

Defendants appealed from the injunction entered on 16 May 2000 and the modification entered on 27 June 2000.

IV. Analysis of Plaintiff's Claims

A. Barratry

Plaintiff alleged that Defendants had committed barratry by willfully, intentionally, and wantonly soliciting or attempting to solicit a large number of claims against Plaintiff in return for forty percent (40%) of the recovery from those claims. At common law, barratry was defined as " 'the offense of frequently exciting or stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.' " *State v. Batson*, 17 S.E.2d 511, 512 (N.C. 1941) (quoting 4th Blackstone, p. 134). The common law offense of barratry has also " 'been applied independently of statute to one soliciting a large number of claims of the same nature, and charging a fee for his services in connection with the claim contingent on the amount recovered.' ". In *Batson*, our Supreme Court held that the common law offense of barratry was still in full force and effect in this State, stating, in pertinent part:

> Barratry being a common law offense, and having never been the subject of legislation in North Carolina, and not being destructive nor repugnant to, nor inconsistent with, the form of government of the State, is in full force therein.

Subsequent to the Court's decision in *Batson*, the General Assembly enacted N.C. Gen.Stat. § 84–38, which codified in part the common law offense of barratry. N.C.G.S. § 84–38 remains in effect, and reads in pertinent part:

> It shall be unlawful for any person … to solicit or procure through solicitation either directly or indirectly, any legal business whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney … to perform or render any legal services, whether to be performed in this State or elsewhere.

While the General Assembly has chosen to codify the common law offense of barratry in the context of the solicitation of legal business, we find no decision of the Supreme Court or this Court recognizing the existence of a civil cause of action based on the common law principle of barratry.

However, the courts of this State have applied the related common law principles of champerty and maintenance in the context of a civil action. The term "maintenance" has been defined by our courts as "an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." "Champerty" is a form of maintenance whereby a stranger makes a "bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." While recog-

nizing their continued force and effect in this State, our Supreme Court in Smith noted that many exceptions to the principles of champerty and maintenance have been recognized, "so that they may be adapted to the new order of things in the present highly progressive and commercial age." Among the exceptions recognized by the Court in Smith is that the relationship of attorney and client will often justify parties in giving each other assistance in lawsuits.

Based on our reading of the Supreme Court's decision in *Batson*, and other learned authorities on the subject, we conclude that the common law offense of barratry was a crime against the Crown (i.e, the State), but did not support a civil cause of action against a private individual, whereas the related principles of champerty and maintenance did create a civil cause of action that could be brought against another person. Therefore, our Supreme Court's recognition of the common law offense of barratry in *Batson*, and the General Assembly's subsequent codification of barratry in the context of the solicitation of legal business, do not support the existence of a civil cause of action for barratry. In addition, a mere violation of N.C.G.S. § 84–38 does not form the basis for a civil cause of action against the alleged violator.[2] Therefore, we conclude that there does not exist in this State a civil cause of action for barratry. Further, to the extent that Plaintiff's first cause of action is an attempt to state a claim for champerty and maintenance, we conclude that Defendants' conduct is covered by the recognized exception for the relationship between attorney and client. For the foregoing reasons, we conclude that Plaintiff has failed to show a likelihood of success on the merits of its first cause of action.

[2] (n.2 in Opinion) We also note that application of N.C.G.S. § 84–38 to prohibit licensed attorneys from soliciting legal business through targeted, direct-mail solicitations would raise serious constitutional questions in light of the United States Supreme Court's decision in *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988).

VI. Conclusion

We conclude that Plaintiff has failed to show a reasonable likelihood of success on the merits of its case, and has failed to show a reasonable probability of substantial injury if the injunction does not stand. Thus, we hold that it was error to grant the preliminary injunction and it is hereby dissolved. Having so concluded, we need not consider the First Amendment arguments advanced by Defendants concerning the nature and scope of the injunctive relief.

Florida Bar v. Went for It

515 U.S. 618 (1995)

Justice O'CONNOR delivered the opinion of the Court.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such Rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

I

In 1989, the Florida Bar completed a 2-year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. Two of these amendments are at issue in this case. Rule 4-7.4(b)(1) provides that "a lawyer shall not send, or knowingly permit to be sent, a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." Rule 4-7.8(a) states that "a lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer." Together, these Rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4-7.4(b)(1) and 4-7.8(a) as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc., represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit. Another Florida lawyer, John T. Blakely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Bar had substantial government interests, predicated on a concern for professionalism, both in protecting the personal

privacy and tranquility of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Bar's extensive study, the Magistrate Judge found that the Rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Bar's motion for summary judgment on the ground that the Rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, relying on *Bates v. State Bar of Ariz.* and subsequent cases. The Eleventh Circuit affirmed on similar grounds. The panel noted, in its conclusion, that it was "disturbed that *Bates* and its progeny require the decision" that it reached. We granted certiorari, and now reverse.

II

A

Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. "Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." We have observed that "to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson*. Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."

B

The Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "neg-

atively affect the administration of justice." Because direct-mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately. The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, "is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families."

We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." In other contexts, we have consistently recognized that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions."

Under *Central Hudson*'s second prong, the State must demonstrate that the challenged regulation "advances the Government's interest in a direct and material way." That burden, we have explained, "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

The Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that directmail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24%

reported that it "made you angry." Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail.

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" and "Solicitors Out of Bounds," newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was "appalled and angered by the brazen attempt" of a law firm to solicit him by letter shortly after he was injured and his fiancee was killed in an auto accident. Another found it "despicable and inexcusable" that a Pensacola lawyer wrote to his mother three days after his father's funeral. Another described how she was "astounded" and then "very angry" when she received a solicitation following a minor accident. Still another described as "beyond comprehension" a letter his nephew's family received the day of the nephew's funeral. One citizen wrote, "I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste. I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind."

In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the Rule lacked "any factual basis"—we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. In dissent, Justice Kennedy complains that we have before us few indications of the sample size or selection procedures employed by Magid Associates (a nationally renowned consulting firm) and no copies of the actual surveys employed. As stated, we believe the evidence adduced by the Bar is sufficient. In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense." After scouring the record, we are satisfied that the ban on directmail solicitation in the immediate aftermath of accidents targets a concrete, nonspeculative harm.

In reaching a contrary conclusion, the Court of Appeals determined that this case was governed squarely by *Shapero*. Making no mention of the Bar's study, the court concluded that "a targeted letter does not invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." In many cases, the Court of Appeals explained, "this invasion of privacy will involve no more than reading the newspaper."

While some of *Shapero*'s language might be read to support the Court of Appeals' interpretation, *Shapero* differs in several fundamental respects from the case before us. First and foremost, *Shapero*'s treatment of privacy was casual. Contrary to the dissent's suggestions, the State in *Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests. Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations. Second, in contrast to this case, *Shapero* dealt with a broad ban on all direct-mail solicitations, whatever the time frame and whoever the recipient. Finally, the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State's effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and overreaching. Because the State did not make a privacy-based argument at all, its empirical showing on that issue was similarly infirm.

We find the Court's perfunctory treatment of privacy in *Shapero* to be of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents. While it is undoubtedly true that many people find the image of lawyers sifting through accident and police reports in pursuit of prospective clients unpalatable and invasive, this case targets a different kind of intrusion. The Bar has argued, and the record reflects, that a principal purpose of the ban is "protecting the personal privacy and tranquility of Florida's citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." The intrusion targeted by the Bar's regulation stems not from the fact that a lawyer has learned about an accident or disaster, but from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untargeted letter mailed to society at large is different in kind from a targeted solicitation; the untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Bar's study.

The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former.

Passing to *Central Hudson*'s third prong, we examine the relationship between the Bar's interests and the means chosen to serve them. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest.

The "least restrictive means" test has no role in the commercial speech context. "What our decisions require," instead, "is a fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective." Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati v. Discovery*, for example, we observed that the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech is certainly a relevant consideration in determining whether the fit between ends and means is reasonable."

Respondents levy a great deal of criticism, at the scope of the Bar's restriction on targeted mail. "By prohibiting written communications to all people, whatever their state of mind," respondents charge, the Rule "keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice." This criticism may be parsed into two components. First, the Rule does not distinguish between victims in terms of the severity of their injuries. According to respondents, the Rule is unconstitutionally overinclusive insofar as it bans targeted mailings even to citizens whose injuries or grief are relatively minor. Second, the Rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for victims' attentions. Any benefit arising from the Bar's regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents' allegations of constitutional infirmity. We find little deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regulation that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are "severe" and some situations appropriate (and others, presumably, inappropriate) for grief, anger, or emotion, the Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. Unlike respondents, we do not see "numerous and obvious less-burdensome alternatives" to Florida's short temporal ban. The Bar's rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.

Respondents' second point would have force if the Bar's Rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population,

or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. These ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding a lawyer when they need one. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "subordinate position" of commercial speech in the scale of First Amendment values.

We believe that the Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged Central Hudson test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

Justice Kennedy, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting.

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. The Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of

legal assistance. With all respect for the Court, in my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures. If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in enacting the speech restriction is a substantial one. The State says two different interests meet this standard. The first is the interest "in protecting the personal privacy and tranquility" of the victim and his or her family. As the Court notes, that interest has recognition in our decisions as a general matter; but it does not follow that the privacy interest in the cases the majority cites is applicable here. The problem the Court confronts, and cannot overcome, is our recent decision in *Shapero*. In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct, in-person solicitations and direct-mail solicitations. *Shapero*, like this case, involved a direct-mail solicitation, and there the State recited its fears of "overreaching and undue influence." We found, however, no such dangers presented

by direct-mail advertising. We reasoned that "a letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. We pointed out that"the relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." In assessing the substantiality of the evils to be prevented, we concluded that "the mode of communication makes all the difference." The direct mail in *Shapero* did not present the justification for regulation of speech presented in *Ohralik*.

To avoid the controlling effect of *Shapero* in the case before us, the Court seeks to declare that a different privacy interest is implicated. As it sees the matter, the substantial concern is that victims or their families will be offended by receiving a solicitation during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these "are classically not justifications validating the suppression of expression protected by the First Amendment." And in *Zauderer*, where we struck down a ban on attorney advertising, we held that "the mere possibility that some members of the population might find advertising offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."

We have applied this principle to direct-mail cases as well as with respect to general advertising, noting that the right to use the mails is protected by the First Amendment. In *Bolger*, we held that a statute designed to "shield recipients of mail from materials that they are likely to find offensive" furthered an interest of "little weight," noting that "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." It is only where an audience is captive that we will assure its protection from some offensive speech. Outside that context, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." The occupants of a household receiving mailings are not a captive audience, and the asserted interest in preventing their offense should be no more controlling here than in our prior cases. All the recipient of objectionable mailings need do is to take "the short, though regular, journey from mail box to trash can." As we have observed, this is "an acceptable burden, at least so far as the Constitution is concerned." If these cases forbidding restrictions on speech that might be offensive are to be overruled, the Court should say so.

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the amicus brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from no

other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise from an unethical or improper practice, the majority begs a most critical question by assuming that direct-mail solicitations constitute such a practice. The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to the extent the bar seeks to protect lawyers' reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more (as amicus the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public's opinion by suppressing speech that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban advance that asserted state interest in a direct and material way. The burden of demonstrating the reality of the asserted harm rests on the State. Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar (Bar), one of the adverse parties, and submitted to the District Court in this case. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," but when examined, it is noteworthy for its incompetence. The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct-mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct-mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct mail (some of them favorable), excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic. Our cases require something more than a few pages of

self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech.

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. Indeed, when asked at oral argument what a "typical injured plaintiff gets in the mail," the Bar's lawyer replied: "That's not in the record, and I don't know the answer to that question." Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss, but our speech jurisprudence requires that it do so.

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, but making such distinctions is not important in this analysis. Even were it significant, the Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement.

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.

Even as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents. The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it concedes the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services.

The reasonableness of the State's chosen methods for redressing perceived evils can be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried. Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed. The State's restriction deprives accident victims of information which may be critical to their right to make a claim for compensation for injuries. The telephone book and general advertisements may serve this purpose in part; but the direct solicitation ban will fall on those who most need legal representation: for those with minor injuries, the victims too ill informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties. One survey reports that over a recent 5-year period, 68% of the American population consulted a lawyer. The use of modern communication methods in a timely way is essential if clients who make up this vast demand are to be advised and informed of all of their choices and rights in selecting an attorney. The very fact that some 280,000 direct-mail solicitations are sent to accident victims and their survivors in Florida each year is some indication of the efficacy of this device. Nothing in the Court's opinion demonstrates that these efforts do not serve some beneficial role. A solicitation letter is not a contract. Nothing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel, after an interview with one or more interested attorneys, can be deliberate and informed. And if these communications reveal the social costs of the tort system as a whole, then efforts can be directed to reforming the operation of that

system, not to suppressing information about how the system works. The Court's approach, however, does not seem to be the proper way to begin elevating the honor of the profession.

IV

It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct-mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. I agree that if this amounts to mere "sermonizing," the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients."

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. "The general rule is that the speaker and the audience, not the government, assess the value of the information presented." By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.