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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES AND VAN O'STEEN, APPELLANTS

v.

STATE BAR OF ARIZONA

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

More than six years ago the United States initiated a program of antitrust enforcement directed at restraints of trade in the commercial aspects of various professions and other providers of personal services.[1] The United States has instituted Sherman Act

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[1] See, *e.g.*, McLaren, *Antitrust—The Year Past and The Year Ahead*, 1970 N.Y. State Bar Ass'n Antitrust L. Sym. 15, 23; *An Interview With Richard W. McLaren, Assistant Attorney General, Antitrust Division*, 39 ABA Antitrust L.J. 368, 377 (1970); Hearings on Legal Fees before the Subcommittee on Representation of Citizens Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part I, 164-165 (1970).

cases challenging "ethical" restraints upon price competition promulgated by professional associations of lawyers, engineers, architects, accountants, and realtors.[2] Regrettably, however, the prohibition of private price fixing among providers of professional services, see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, will not necessarily provide the public with the benefits of competition. As a practical matter, meaningful competition in the professions is often severely hampered by various "ethical" restrictions on the ability of members of the profession to make known to the public information concerning their prices, their qualifications, or even their existence.

Consequently, the government has instituted a number of proceedings designed to eliminate unnecessary restrictions upon the advertising of professional and other services. The United States has charged that advertising restrictions imposed by the code of ethics of the American Pharmaceutical As-

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[2] *E.g.*, *United States* v. *Prince Georges County Board of Realtors*, Civ. No. 21545, D. Md., terminated by consent decree on December 28, 1970; *United States* v. *American Society of Civil Engineers*, Civ. No. 72 C 1776, S.D. N.Y., terminated by consent decree on June 1, 1972, CCH 1972 Trade Cas. ¶ 73,950; *United States* v. *American Institute of Architects*, Civ. No. 992-72, D.D.C., terminated by consent decree on June 19, 1972, CCH 1972 Trade Cas. ¶ 73,981; *United States* v. *American Institute of Certified Public Accountants, Inc.*, Civ. No. 1091-72, D.D.C., terminated by consent decree on July 6, 1972, CCH 1972 Trade Cas. ¶ 74,007; *United States* v. *National Society of Professional Engineers*, decided in the government's favor November 26, 1975, 404 F. Supp. 457 (D.D.C.) (bar against competitive bidding); *United States* v. *Oregon State Bar*, dismissed as moot, October 20, 1975, 405 F. Supp. 1102 (D. Ore.).

sociation violate the Sherman Act.[3] More recently, the United States filed a Sherman Act complaint against the American Bar Association, challenging the advertising restrictions embodied in its Code of Professional Responsibility.[4] The Federal Trade Commission has instituted inquiries or complaint proceedings concerning advertising restrictions relating to prescription drugs,[5] ophthalmic goods and services,[6] the funeral industry,[7] and medical services.[8]

This case presents the question whether a total ban on lawyers' advertising, promulgated and enforced by the Supreme Court of Arizona, is forbidden by the Sherman Act or the First Amendment.[9] These questions implicate important federal enforcement activities. The claim is often made that anti-competitive practices have been approved or mandated by state officials and are consequently exempt from the Sherman Act. Because the United States has primary responsibility for the enforcement of the Sherman Act, it has an interest in ensuring

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[3] *United States* v. *American Pharmaceutical Association*, No. G 75-558-CA5, W.D. Mich., filed November 24, 1975.

[4] *United States* v. *American Bar Association*, No. 76-C-3475, N.D. Ill., filed June 25, 1976.

[5] 40 Fed. Reg. 24031.

[6] 41 Fed. Reg. 2399.

[7] 40 Fed. Reg. 39901.

[8] *American Medical Association*, F.T.C. Docket No. 9064 (December 19, 1975).

[9] The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow* v. *Virginia*, 421 U.S. 809, 811; *Schneider* v. *State*, 308 U.S. 147, 160.

that the state action exemption is not interpreted more broadly than is necessary to protect legitimate decisions, by the States themselves, to substitute regulation for competition.[10] Moreover, if the restrictions challenged here are held not to violate the Sherman Act, the United States has an interest in the resolution of the First Amendment issue both because of its interest in appropriate regulation of deceptive or otherwise harmful advertising and because of the broader interest of ensuring the access of its citizens to the competitively significant nondeceptive information that is essential to the proper functioning of our economy.

STATEMENT

Appellants are members of the State Bar of Arizona. Since 1974 they have been engaged in a form of law practice that they call a "legal clinic." Appellants have endeavored to provide inexpensive legal services to persons of low or moderate income. In order to keep their fees low, they have permitted paralegal personnel to perform work commonly performed by attorneys, they have largely confined their practice to types of cases lending themselves to sys-

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[10] Different principles may apply under the Federal Trade Commission Act, and we do not suggest that the decision in this case would necessarily govern Federal Trade Commission proceedings. Cf. *Spiegel, Inc.* v. *Federal Trade Commission*, 540 F.2d 287 (C.A. 7); *Royal Oil Corp.* v. *Federal Trade Commission*, 262 F.2d 741 (C.A. 4); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F.2d 673 (C.A. 8).

tematization, and they have accepted a relatively low profit from their services (A. 70-84). Appellants believe that, if their "legal clinic" is to be successful, it must attract large numbers of clients; this cannot be accomplished without widespread dissemination of information about the clinic to potential customers (A. 122-131).

In order to achieve the volume of business that they believe is necessary, appellants placed, in a daily newspaper of general circulation in the Phoenix area, an advertisement notifying the public of the existence of their law office and stating their fees for certain services (A. 409). During the six weeks following the placement of the advertisement, appellants attracted new clients at a rate greater than before (A. 235-236, 479).

The State Bar of Arizona charged appellants with violating Disciplinary Rule 2-101(B), of Rule 29(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (Cum. Supp. 1975), which prohibits attorneys from advertising, in any way, in newspapers of general circulation (A. 6-7).[11] Appellants

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[11] Disciplinary Rule 2-101(B) proscribes any "commercial" advertising by attorneys. It provides (emphasis added):

> *A lawyer shall not publicize himself*, or his partner, or associate, or any other lawyer affiliated with him or his firm, *as a lawyer through newspaper or magazine advertisements*, radio or television announcements, display advertising in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by, or whose legal services are

admitted that their advertisement violated the Rule, but they argued that the Rule is invalid under the First Amendment to the United States Constitution and under the state and federal antitrust laws (A. 8-12). Following a hearing, a Special Local Administrative Committee of the State Bar concluded that appellants had violated the Rule. It recommended that both be suspended from the practice of law for not less than six months (A. 481-483).

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furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

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

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

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

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

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

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102 (A) (6), directed to a member or beneficiary of such organization.

Appellants sought review by the Board of Governors of the State Bar, pursuant to Rule 36 of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (Cum. Supp. 1975). The Board agreed with the Committee that appellants had violated the Rule, but it reduced the recommended penalty to one week's suspension for each appellant (A. 485-487).

The Supreme Court of Arizona affirmed (J.S. App. 1a-17a). The court concluded, without reference to the competitive effects of the Rule, that it does not violate the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2, because it does not explicitly fix prices (J.S. App. 4a). It also held that regulation of the bar "is an activity of the State of Arizona acting as sovereign and exempt by the very provisions of the Sherman Act" (*id.* at 5a).

The court concluded, moreover, that state restrictions imposed on advertising by attorneys are immune from scrutiny under the First Amendment. It did not offer any justification for the ban on advertising in the public media; it did not suggest that some less sweeping regulation of advertising would not as well serve the State's purposes. It held, instead, that "[r]estrictions on professional activity, and in particular advertising" (*id.* at 5a), need not be subjected to the scrutiny ordinarily applied to restrictions on speech. It wrote that because "[t]he legal profession, like the medical profession, has always prohibited advertising since it is a form of solicita-

tion deemed contrary to the best interests of society" (*id.* at 6a), there was no need for further inquiry.[12]

The court censured appellants but did not suspend them from practice (J.S. App. 11a). One Justice concurred in the result (*id.* at 11a-12a); one Justice dissented, arguing that the penalty selected by the majority is too mild (*id.* at 13a); and one Justice dissented because, in his view, the Rule violates the First Amendment (*id.* at 13a-17a).

SUMMARY OF ARGUMENT

I

The Sherman Act is designed to prevent restrictions upon competition, not merely the direct fixing of prices. Prohibitions upon advertising prevent lawyers from competing in that fashion; they indirectly increase prices and deprive consumers of options. Therefore, even if the special interest in the self-regulation of the legal profession is a sufficient justification for applying a special rule to legitimate restraints that are part of that program of self-regulation, the total ban on advertising still can not survive scrutiny. The serious anticompetitive effects of such a ban outweigh any conceivable benefits.

Although we believe that the ban on attorneys' advertising in the commercial media violates the sub-

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[12] The court also concluded that the Rule does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that it is not unconstitutionally vague (J.S. App. 8a-11a). Appellants have not sought review of these holdings.

stantive standards of the antitrust laws, we agree with the Supreme Court of Arizona that it is immune from antitrust challenge under the principles of *Parker* v. *Brown*, 317 U.S. 341, 350-352. *Parker* and the cases that follow it teach that a deliberate decision by the State to substitute some form of regulation for the forces of competition, and the necessary actions of private persons compelled by the State's directive, are beyond the scope of the Sherman Act. We submit that the restraint challenged in this case meets that standard.

The Supreme Court of Arizona promulgated the challenged restraint. It did so with full authority to speak for the State; the Supreme Court of Arizona possesses both the legislative and the judicial powers of Arizona with respect to the legal profession. The rule adopted by Arizona is of statewide applicability and is cast in imperative form: no attorney may advertise in any way in the commercial media. It reflects a deliberate policy of the State to substitute regulation for competition. That is enough, under *Parker*, to show that the Sherman Act does not reach the restriction in question here.

II

Appellants have been punished for placing an advertisement in a newspaper, a form of "pure speech." They were not entitled to defend against the charges by showing that the statements in the advertisement were true and not deceptive. The state court thought that it was enough that appellants had identified

themselves to the public as lawyers. We submit that the State's prohibition is unnecessarily broad.

Bigelow v. *Virginia*, 421 U.S. 809, and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, hold that commercial advertisements are protected by the First Amendment. Advertisements by attorneys also are speech within the meaning of the First Amendment. The free flow of information about legal services is no less important than the free flow of information about abortion referral services (as in *Bigelow*) or the prices of prescription drugs (as in *Virginia Pharmacy*).

The applicability of the First Amendment to advertisements by lawyers does not mean that a State is powerless to deal with misleading or deceptive advertisements by lawyers. A State may ensure "that the stream of commercial information flows cleanly as well as freely" (*Virginia Pharmacy*, *supra*, slip op. 24). But Arizona has not advanced any reason to believe that *all* advertisements concerning legal services are deceptive or misleading. A claim that some legal services are "better" than others might be misleading because of the difficulty of comparing the quality of attorneys' performance; no such claim of professional superiority is involved here, however, and the Arizona ban is not so limited. Factual material such as the name, address, and foreign language ability of an attorney is of obvious interest to consumers, yet it is not likely to mislead or deceive. The

other justifications for restrictions upon the advertising of professional services also fall short of supporting a flat ban on advertising in the commercial media. Because of the breadth of the Arizona ban, and because the Arizona court did not articulate any reasons for its breadth, this case does not require the Court to decide whether some more specific prohibition would be constitutional.

ARGUMENT

I

THE RESTRAINT UPON ATTORNEY ADVERTISING IMPOSED BY THE SUPREME COURT OF ARIZONA IS NOT SUBJECT TO ATTACK UNDER THE SHERMAN ACT

The Supreme Court of Arizona held both (1) that its restrictions upon advertising by attorneys do not violate the Sherman Act because they do not directly fix prices and (2) that any violations are immune from scrutiny because they represent a deliberate state choice to replace competition with regulation. Appellants argue, to the contrary, that the State Bar's conduct is private action violating the Sherman Act. They maintain that the antitrust violation is a defense in the disciplinary proceedings. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173. We submit that the challenged restraint upon advertising violates the substantive standards of the Sherman Act, but that because the restraint is imposed by the State of Arizona it is not subject to the federal statute.

A. The Ban On Public Advertising Violates The Substantive Standards Of The Antitrust Laws

"We live in a society where the distribution of legal assistance * * * is generally regulated by the dynamics of private enterprise." *Fuller* v. *Oregon*, 417 U.S. 40, 53. The provision of legal services is a vast enterprise; in 1973 more than $9.3 billion was paid for those services.[13] The Court thus held in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785-788, that, at least in its commercial aspects, the legal profession is subject to the antitrust laws.

The state court's holding that the ban on advertising does not offend the substantive principles of the Sherman Act because it does not directly fix prices is incorrect. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, made it clear that the Sherman Act is designed to prevent restrictions upon competition, not merely the direct fixing of prices. Combinations and conspiracies in restraint of trade can work through clever or indirect devices as well as through direct increases of price or decreases of quantity supplied. Prohibitions upon advertising indirectly increase prices and deprive consumers of options.[14] Any private agreement by competitors to

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[13] Statistical Abstract of the United States 387, 770 (1975).

[14] Steven R. Cox, Associate Professor of Economics at Arizona State University, testified (A. 187-188):

> Q. BY MR. CANBY: Is it fair to conclude from your examination of these studies and from any other experi-

refrain from advertising therefore would be presumed to have serious anticompetitive effects. The

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ments that you have done that a ban on price advertising in general marketing tends to drive up prices?

A. You are being very cautious. I can be even stronger. The answer definitely is yes.

* * * *

Yes, price advertising is pro-competitive and will decrease prices, and conversely, a ban on price advertising will be anticompetitive and will increase prices.

There are very few areas where they are going to get that kind of an agreement among economists, but here's one of them.

Professor Cox's conclusions are supported by three recent studies of the effect of prohibitions on price advertising. See Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421 (1975); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & Econ. 337 (1972); Cady, *Restricted Advertising and Competition, The Case of Retail Drugs* (Exh. 13). Although comparable studies have not been undertaken for legal services, Professor Cox testified that advertising by lawyers could be expected to lead to a reduction in the price lawyers charge for their services (A. 193). He also testified that advertising would improve the quality of legal services (A. 193-194).

This evidence is consistent with economic theory, which explains that an advertising prohibition increases the cost to consumers of discovering the lowest cost seller of acceptable quality; as a result, sellers obtain greater independence in setting prices and lack incentives to price competitively. Also, advertising prohibitions tend to allow individual prices to diverge more widely than usual from the industry average. Even in the professions, where differences in quality of service naturally account for some dispersion of prices, these differences could not create the pervasive price dispersion now experienced. See Stigler, *The Economics of Information*, in *The Organization of Industry* ch. 16 (1968). When price and

Seventh Circuit therefore has held that agreements among competitors not to compete by price advertising are *per se* violations of the Sherman Act. *United States* v. *Gasoline Retailers Association, Inc.*, 285 F.2d 688.

Even if the special public interest in the self-regulation of the legal profession were deemed a sufficient justification to apply a special rule to restraints imposed as part of a legitimate program of self-regulation, the Rule at issue here still is unreasonable. The serious anticompetitive effects of such a sweeping ban outweigh any conceivable benefits. After a careful study, two economists concluded that a ban on advertising increased the price of optometric services by 25 to 40 percent. Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421, 446 (1975). It is fair to assume that the restraint challenged here also has a significant effect on the price of legal services. As we discuss at pages 25-37, *infra*, alternatives less restrictive than Arizona's flat ban on advertising are available; these would serve the legal profession's legitimate ethical need to prohibit false or misleading advertising, or advertising that serves to foment litigation or bring the legal profession into disrepute.

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other information is readily available, searching for appropriate low-cost sellers becomes practical for consumers. Sellers in turn are forced to be more competitive with regard to both price and quality. See Telser, *Advertising and the Consumer*, and Nelson, *The Economic Value of Advertising*, in *Advertising and Society* 25-42, 43-66 (Brozen ed. 1974).

This Court has long recognized that even when there is a legitimate right and interest in self-regulation that restrains competition, the restraint must be no more restrictive than is necessary to achieve its proper objectives. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357. The Arizona restriction on attorneys' advertising fails that test, for Rule 2-101(B) denies to consumers almost all information about the costs and availability of legal services.

B. The Arizona Prohibition Against Lawyer Advertising Reflects A Deliberate State Policy

Although we agree with appellants that the ban on advertising offends the substantive principles of the antitrust laws, we agree with the Supreme Court of Arizona that this ban on advertising is immune from antitrust challenge under the principles of *Parker* v. *Brown*, 317 U.S. 341, 350-352.

We take this position with some reluctance. Because private parties often seek shelter from the antitrust laws behind a claim that they have obtained state approval of or acquiescence in their anticompetitive practices, the United States repeatedly has urged that the antitrust immunity accorded to state action be narrowly construed. Thus, in *Goldfarb* v. *Virginia State Bar*, *supra*, the United States expressed its view that the state action exemption should be invoked only where the challenged conduct was "directed, commanded or imposed by the state legisla-

ture or by a duly authorized arm of the state." [15] We contended in *Goldfarb* that the actions of the Virginia State Bar in promulgating and enforcing a minimum fee schedule for attorneys constituted private conduct.

Similarly, in *Cantor* v. *Detroit Edison Co.*, No. 75-122, decided July 6, 1976, the United States took the position that "for private anticompetitive conduct to be state action and therefore immune from the antitrust laws, it must be conduct that the state affirmatively has required as part of a deliberate state regulatory policy or program." [16] We contended there that a public utility's practice of selling light bulbs and electricity in a single package, set forth in a tariff filed with and "approved" by the State public utility commission and that State law required the utility to observe, reflected a policy of the utility, rather than a policy mandated by the State.

It continues to be the position of the United States that the state action exemption to the antitrust laws should not be extended to what are principally private actions, merely because of some approval of or participation by state officials or agents in such conduct. To do so would remove a significant amount of commercial activity from the scope of the antitrust laws without a clear determination by Congress that such anticompetitive conduct is permissible, and without an explicit decision by the State that a de-

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[15] Brief for the United States as *Amicus Curiae* 36-37.

[16] Brief for the United States as *Amicus Curiae* 9.

parture from the national policy of competition is in the public interest. On the other hand, *Parker* v. *Brown* and the cases that followed it teach that a deliberate decision by the State to substitute some form of regulation for the forces of free competition, and the necessary actions of private persons compelled by the State's directive, are beyond the scope of the Sherman Act.[17] We submit that the restraint challenged in this case meets that standard.

1. *The Supreme Court of Arizona acts for the State in Promulgating Restrictions Upon Attorneys' Conduct*

Appellants characterize the challenged advertising restriction as predominantly the product of appellee, a largely private group (Br. 60-66). Appellants point to Disciplinary Rule 2-101(B) as the source of the restraints. That Disciplinary Rule, however, has been adopted as part of Rule 29(a) of the Rules of the Supreme Court of Arizona and enforced with full knowledge of its effects upon competition. The Supreme Court of Arizona, not appellee, promulgated the challenged restraint. Unlike the situation in *Goldfarb*, where the Supreme Court of Virginia merely acknowledged the existence of minimum fee

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[17] The State may not frustrate federal antitrust policy by allowing (or even compelling) private individuals to enter into restrictive agreements the substance of which is left to private determination. *Parker* v. *Brown*, *supra*, 317 U.S. at 351; *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384. In this case, however, the substance of the restriction is itself a choice of the State.

schedules, here the Supreme Court of Arizona has itself promulgated the prohibition on attorney advertising.

When it promulgated Rule 29(a), the Supreme Court of Arizona acted with full authority to speak for the State.[18] The Court is not faced here (as it was in *Goldfarb*) with action by a private body that is a "state agency" only for limited purposes and is comprised of persons having a direct financial interest in the subject matter of the competitive restraint. The Supreme Court of Arizona, none of whose members may practice law during their term on the court,[19] adopted the restriction on advertising pursuant to authority "vested in it by the Constitution of [Arizona] and its inherent power over members of the legal profession as officers of the Court * * *." Rule 27(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (1973). The Supreme Court of Arizona is the ultimate body wielding the State's power over the practice of law; that court may preempt any laws passed by the Arizona legislature concerning the practice of law. See, *e.g.*, *In re Bailey*, 30 Ariz. 407, 248 Pac. 29.

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[18] This Court need not address here the issue whether immunity from the Sherman Act extends to anticompetitive rules promulgated by a state agency that does not have clear authority to do so under either the agency's enabling legislation or its purposes. See, *e.g.*, *Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277, 1280 (C.A. 3); *Allegheny Uniforms* v. *Howard Uniform Co.*, 384 F. Supp. 460 (W.D. Pa.).

[19] Ariz. Rev. Stat., Constitution, Article 6, Section 28 (Cum. Supp. 1975).

The Supreme Court of Arizona thus possesses both the legislative and the judicial power of Arizona concerning the practice of law. This Court must defer to Arizona's allocation of legislative powers to its Supreme Court. *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 210. Under these circumstances, a rule promulgated by the Supreme Court of Arizona restricting advertising by attorneys is an official act of the State of Arizona.

2. *The Supreme Court of Arizona's Active Role in Enforcing the Restriction on Lawyers' Advertising Demonstrates that the Restrictions are State Rather than Private Action*

The role of the Supreme Court of Arizona in creating and enforcing the challenged restraint can hardly be described as neutral or incidental to private action. On the contrary, in addition to promulgating the restraint on advertising, the Supreme Court of Arizona has established the procedures by which appellee must assist it in enforcing the restraints, and it has reserved to itself the final enforcement decision. Appellee's role with respect to the challenged restriction is determined by the state court: appellee helps the court to weed out spurious complaints and to establish an evidentiary record. Appellee acts at the compulsion of the Rules of the Supreme Court of Arizona, and that court retains ultimate authority over the entire process.

When a complaint is received indicating that a member of the bar may be guilty of violating Rule 29(a)'s restrictions upon advertising, Rule 33 re-

quires a local committee of appellee to conduct a preliminary investigation. If a complaint appears to be substantial, Rule 35(a) requires the committee to convene a hearing to consider the matter. If the committee determines that discipline is appropriate, Rule 35(c)(3) requires the committee to forward its findings of fact and recommendations to the Board of Governors of the State Bar. If the attorney desires to contest the committee's findings or recommendations, Rule 36 requires the Board to afford the attorney certain hearing rights and to make its recommedation to the Supreme Court within a specified period. Finally, and most importantly, if the attorney desires to contest the Board's recommendations or findings, Rule 37 provides that the Supreme Court of Arizona shall review the matter. That court is the ultimate trier of fact and law. See, *e.g.*, *In the Matter of Wilson*, 106 Ariz. 34, 470 P.2d 441.

Because the Arizona court is directly responsible for both the promulgation of the rule against advertising and its enforcement, the rule represents state action and not private conduct. Unlike *Cantor*, where the restrictive practice did not reflect a considered policy decision by the State, the decision of the Supreme Court of Arizona to prohibit advertising by attorneys is a uniform rule of statewide applicability. Unlike *Goldfarb*, where the Virginia Supreme Court's ethical codes mentioned minimum fee schedules but did not require either state or local bar associations to adopt them, the decision of the Supreme Court of Arizona is that all attorneys

in the State must conform to the prohibition upon advertising.

Whatever may be the case with other restrictive practices, the combination of direct promulgation and enforcement of the rule by the Supreme Court of Arizona, acting in both a legislative and judicial capacity for the State of Arizona, leads inescapably to the conclusion that both the substance and procedure of the Rule are the product of the State and not subject to the Sherman Act.[20]

II

ARIZONA'S TOTAL BAN ON ADVERTISING BY LAWYERS IN THE COMMERCIAL MEDIA VIOLATES THE FIRST AMENDMENT

Appellants have been punished for placing an advertisement in a newspaper, a form of "pure speech." *Buckley* v. *Valeo*, 424 U.S. 1, 16-23; *Bigelow* v. *Virginia*, 421 U.S. 809; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266. They have been punished, moreover, for violating a total ban on such advertisements, a ban that closely resembles a "prior restraint" because it prohibits broadly defined categories of speech without respect to whether the speech is harmful in particular cases. Cf. *Nebraska Press*

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[20] Because the restriction challenged in this case is at the core of the rule of *Parker* v. *Brown*, we express no opinion on the question whether other programs formulated or administered by other bodies must yield, under the Supremacy Clause of the Constitution, to the commands of the Sherman Act. Cf. *Cantor, supra*, slip op. 5-8 (Blackmun, J., concurring).

Association v. *Stuart*, No. 75-817, decided June 30, 1976, slip op. 15-18. Appellants were not entitled to defend the charges brought against them by demonstrating that the statements in the advertisement were true. The state court was not required to find —and did not find—that the advertisement was deceptive, misleading, unfair, undignified, or likely to bring the legal profession into disrepute. It was enough, the court held, that the advertisement identified appellants to the general public as lawyers.

The ban on advertising at issue in this case is exceedingly broad. It sweeps within its prohibition all advertising by attorneys that is likely to call their existence to the attention of the general public. We submit that a ban of this scope violates the First Amendment, although a narrower rule calculated to prevent deceptive or unfair advertising would not. Appellants' censure therefore must be set aside, whether or not the antitrust laws provide them a defense.

A. The First Amendment Protects Advertising By Lawyers In The Commercial Media

Bigelow v. *Virginia*, 421 U.S. 809, and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, hold that commercial advertisements are protected by the First Amendment. These cases make it clear that there is a strong public interest in the free flow of accurate information about commercial services and commercial products, and that

the flow of information cannot be stanched simply because it has a "commercial" subject matter.

Any suggestion that a different rule applies to the professions overlooks the fact that *Bigelow* itself involved an advertisement (not placed by a physician) describing the availability of abortions, a routine medical service. There is no material difference between legal and medical services that would make the First Amendment applicable to advertisements concerning abortions but not to advertisements concerning uncontested divorces.

It is true that the Court observed in *Virginia Pharmacy*, *supra*, slip op. 25 n. 25, that "the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." We do not read this, as the Supreme Court of Arizona did, as implying that the First Amendment does not apply at all to advertising by attorneys. It means only that "certain kinds of advertising" by lawyers and physicians may be deceptive and properly may be prohibited.

Such a prohibition would presuppose the applicability of the First Amendment and would reflect only that the State had overcome the presumptive protection accorded to speech with a demonstration that unrestrained advertising likely would be harm-

ful. The Supreme Court of Arizona did not attempt to demonstrate that the advertisement placed by appellants was deceptive; it relied, instead, on a blanket rule against advertising of all sorts. This rule cannot withstand First Amendment scrutiny.

The Court observed in *Virginia Pharmacy*, *supra*, slip op. 17, that a free flow of commercial information "is indispensable to the proper allocation of resources in a free enterprise system, [and] it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." This is true about information concerning legal services no less than it is true about information concerning drug prices or the availability of abortions. "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse" (*Goldfarb*, *supra*, 421 U.S. at 788). It is therefore a matter of public interest that consumer decisions about legal services be intelligent and well informed.

Unfortunately, however, there is not now sufficient information available to the public concerning legal services. Study upon study, author after author, reveals the gross ignorance of the public with respect to lawyers and legal services. We have set out at length in Appendix A, *infra*, pp. 1a-9a, some of these findings. One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices, and even their existence. Such a ban, far more extensive than the ban struck down in

Virginia Pharmacy, is fundamentally incompatible with a system of free expression.

B. Arizona's Restrictions Upon Advertising Are Broader Than Is Justified By The Considerations Supporting Some Restrictions Upon Deceptive Advertising

Although the United States believes that Arizona's broad prohibition on attorney advertising violates the First Amendment, we do not imply that the States are powerless to deal with misleading or deceptive advertisements by attorneys. We appreciate the special relationship among the State, the legal profession, and the public that has arisen from the attorney's unique status as an "officer of the court." Moreover, we have no doubt that the bar and the courts must carefully scrutinize the profession and its members to ensure that attorneys do not deceive or mislead the public.

All of this, however, does not support a total ban upon advertising in the commercial media. Many considerations of the public interest might support rules that require communications by attorneys to be scrupulously correct and fair, but none supports a complete prohibition. Many services and products are important to the public health and welfare; most services and products are unique in one way or another; most services and products are provided by groups that have a special concern about those services or products, and that have expertise not shared by the public at large. Yet advertising is allowed with respect to almost all services and products. Any

holding that legal services are in a class apart would rest upon a view of legal services not likely to be shared by those outside the legal profession.

This Court has recognized that there is a "fundamental right within the protection of the First Amendment" to engage in "collective activity undertaken to obtain meaningful access to the courts." *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585. See also *United Mine Workers of America, District 12* v. *Illinois State Bar Association*, 389 U.S. 217; *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1; *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415. That right cannot realistically be used by the people unless they are aware of the availability of legal services and believe that they can afford them. As the studies we discuss in App. A, *infra*, pp. 1a-9a, indicate, however, such information is not now widely available.

The cases cited in the preceding paragraph stand for the rule that there is a collective right of access to the courts that overrides restrictions imposed on the practice of law by state regulatory bodies. The rule should be no different when single practitioners, or partnerships such as appellants, seek to publicize their existence.[21] The right to speak, in this regard,

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[21] The First Amendment right of collective action to obtain meaningful access to the courts includes elements of three freedoms: speech, assembly and petition. *United Mine Workers of America, District 12* v. *Illinois State Bar Association, supra,*

is a right of the public to receive valuable information no less than a right of the speaker to transmit it. *Virginia Pharmacy, supra,* slip op. 8-9, 15-22.

The Supreme Court of Arizona did not point to any justification for an absolute prohibition on lawyer advertising in the commercial media. It wrote that "[r]estrictions on professional activity, and in particular advertising, have repeatedly survived constitutional challenge" (J.S. App. 5a-6a), but the cases on which it relied [22] did not consider the First Amendment. Justifications sufficient to survive attack on due process or equal protection grounds will not necessarily survive First Amendment challenge. *Virginia Pharmacy, supra,* slip op. 20-21. The state court also sought comfort in the fact that "[t]he legal profession, like the medical profession, has always prohibited advertising since it is a form of solicitation deemed contrary to the best interests of society" (J.S. App. 6a). Habit, however, is not an answer to a constitutional argument.

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389 U.S. at 221-222. The freedoms of speech and petition do not require joint activity. See Note, *Advertising, Solicitation and the Profession's Duty To Make Legal Counsel Available,* 81 Yale L.J. 1181, 1186 (1972); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Court and Lawyering Services,* 48 N.Y.U.L. Rev. 595, 628-636 (1973).

[22] *Williamson* v. *Lee Optical Co.,* 348 U.S. 483; *Barsky* v. *Board of Regents,* 347 U.S. 442; *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608.

The ban on advertising seems to have originated as a rule of etiquette rather than of ethics. Early English lawyers were wealthy individuals—

> who traditionally looked down on all forms of trade and the competitive spirit characteristic thereof. They regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident. * * *
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> * * * They were a select fraternity who lived together and met one another every day, both at dinner and in court, on a friendly basis. Obviously this intimacy would have been impossible for men who were continually blowing their professional horns and plotting to steal away one another's clients, and hence looked down on by their colleagues.

Drinker, *Legal Ethics* 210 (1953). The codes and canons of ethics have incorporated this position, branding attempts to encroach upon the professional employment of another lawyer as unethical.[23]

The belief that lawyers are "above" competition, however, is nothing more than a prejudice. It reflects a desire for a peaceful, noncompetitive, friendly existence. But it is hardly a satisfactory answer to a First Amendment argument. The notion that the public interest in competition does not apply to legal services was laid to rest in *Goldfarb* v. *Virginia State Bar*, *supra*. A nostalgic attachment to the prohibition

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[23] Drinker, *Legal Ethics*, *supra*, at 190-191; Canon 7 of the Canons of Ethics (superseded in 1969 by the Code of Professional Responsibility).

on advertising is not sufficient justification for a restriction which is not required by an articulable public interest.[24]

To the extent that certain kinds of advertising by attorneys may be inherently misleading, the proper remedy would be to ban such advertisements, not to prohibit all advertising in the commercial media.[25] For example, the quality of legal services rendered may be impossible to measure, and this may make a claim by one lawyer that he is "better" than another misleading. There is a ready remedy. Such claims can be prohibited without banning all advertising by attorneys.

Nothing about the practice of law makes *every* advertisement by an attorney deceptive or confusing. Lawyers now may place certain information in law lists, which are available in public libraries. See Dis-

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[24] See also Christensen, *Lawyers for People of Moderate Means* 102 (1970).

[25] Misleading, deceptive or unfair advertisements unquestionably may be forbidden. See *Virginia Pharmacy, supra,* slip op. 23-25 and n. 24; *Young* v. *American Mini Theatres, Inc.*, No. 75-312, decided June 24, 1976, slip op. 18 and n. 31 (plurality opinion of Stevens, J.). Disciplinary Rule 1-101 (A) (4) (incorporated in Rule 29(a) of the Supreme Court of Arizona) prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See also *Health Systems Agency of Northern Virginia* v. *Virginia State Board of Medicine,* N.D. Va., No. 76-37-A, decided November 9, 1976, slip op. 13: "Narrowly tailored statutes, rather than broadside bans on advertising, are sufficient to prevent fraud and deception."

ciplinary Rule 2-102(A)(6) of the Supreme Court of Arizona.[26] If such information is not misleading to the layman when published in law lists, it would not be misleading when printed in a newspaper. Factual material such as name, address, and foreign language ability would be of obvious interest to the consumer, yet it would be unlikely to confuse or mislead.

It is conceivable that advertising of the price of legal services may be misleading, because the amount of work involved varies from case to case. But the Supreme Court of Arizona did not articulate such a rationale, and the Arizona Rule is not so limited. In any event, the argument would be untenable.

It is not misleading to advertise a set fee if the lawyer actually charges it. An attorney may offer certain routine services at a set fee, assuming that some cases will require more time than others but that the average return will be satisfactory. Attorneys agree to precisely such an arrangement when they join the Arizona Legal Services Plan (A. 239-

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[26] The American Bar Association adopted amendments to that rule in 1976. The amendments expand the range of information that may be placed in law lists to include: "whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services * * *." The same information may also be placed in a directory published by a state, county, or local bar association and the classified section of the telephone directory. The Supreme Court of Arizona has not yet adopted these amendments.

241, 459-478). A similar system governs many prepaid legal service plans.[27] Many other professions do the same, with full knowledge that some jobs are more difficult and time consuming than others.

If an attorney conducts part of his practice on a flat fee basis, it is not misleading to publish that information in the newspaper. What is more, not all price advertising necessarily involves a set fee for a single service. The price of an initial half-hour consultation, for example, would be of interest to consumers. So would be the attorney's hourly rate. There is no reason to believe that such information is usually deceptive.

Some testimony in the record displayed a concern that an attorney who advertises fees would cut quality or engage in deceptive "add-on" tactics when confronted with a more complex case (A. 155, 378-381). Expert testimony in the record indicates, however, that advertising would not detrimentally affect the quality of legal services.[28] Indeed, this Court noted in *Virginia Pharmacy, supra*, slip op. 21, that an "advertising ban does not directly affect professional standards one way or the other." A professional inclined to cut corners will do so without regard to the existence of a ban upon advertising; such a ban merely tends to insulate him from competition.

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[27] Cf. Meeks, *Antitrust Aspects of Prepaid Legal Services Plans*, 1976 A.B.F. Res. J. 855; Pfennigstorf and Kimball, *Legal Service Plans: A Typology*, 1976 A.B.F. Res. J. 411.

[28] See the testimony of Professor Cox (A. 210).

Other professional sanctions are available to ensure quality. *Id.* at 21-22. The legal profession is closely regulated, and independent disciplinary rules prohibit an attorney from providing service of inadequate quality and from engaging in deceptive practices.[29] There is simply no evidence—and the Supreme Court of Arizona cited none—to indicate that the unscrupulous attorney is deterred from cutting corners by the advertising prohibition, or that the conscientious attorney would ignore the dictates of the Code of Professional Responsibility if he were permitted to advertise.

Concern has been expressed that laymen would blindly follow the lowest advertised price without considering the quality of legal service offered. Even if this were a proper consideration, it would not support a ban on all advertising. And it is not a proper consideration. This Court rejected precisely that argument in *Virginia Pharmacy*, slip op. 21-22, as inconsistent with the philosophy of the First Amendment. The Arizona ban on attorney advertising in

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[29] Disciplinary Rule 6-101(A)(2) prohibits an attorney from handling a matter without adequate preparation, and Disciplinary Rule 6-101(A)(3) prohibits neglect of a matter entrusted to an attorney. The Supreme Court of Arizona has adopted those rules. The Supreme Court of Arizona has not adopted Disciplinary Rule 6-101(A)(1) of the Code of Professional Responsibility, which prohibits an attorney from handling a matter he knows he is not competent to handle without associating competent counsel. Disciplinary Rule 1-102(A), which has been adopted by the Arizona Court, prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

the commercial media does not ensure that individuals will choose the most competent attorney; it merely deprives most consumers of the information on which to base their choice.

The United States recognizes that many attorneys are concerned that advertising will seriously erode the dignity or public esteem of the legal profession. The effectiveness of the legal profession stems, at least in part, from public respect. We doubt that a concern about "dignity"—a concern held in common with other professions—is an adequate justification for a total ban on advertising. But however that may be, the Supreme Court of Arizona did not find that advertising would impair public respect for the legal profession.

Engineers advertise, as do bankers and investment counselors; these professions are not regarded by the public as undignified. Clients might generally be expected to value respectability and dignity in a lawyer, so that few lawyers would engage in undignified advertising. Public cynicism concerning lawyers who publicly eschew solicitation—while structuring their social, civic, and even religious associations to provide contacts with clients—may be a much greater threat to public regard for the profession than a frank admission that lawyers are interested in attracting clients.[30] Thus, as the British

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[30] See Thurman, Phillips and Cheatham, *Cases on the Legal Profession* 122-123 (1970); Note, *Advertising, Solicitation and Legal Ethics*, 7 Vand. L. Rev. 677, 679 (1954).

Monopolies and Mergers Commission reported to Parliament:[31]

> [T]he public are well aware that solicitors are in practice for the purpose, among others, of earning a living. We do not think they will be surprised or shocked if members of the profession invite custom explicitly and informatively.

There has also been concern that advertising by attorneys may stir up unwarranted litigation. See, *e.g.*, Drinker, *Legal Ethics*, *supra*, at 212. That view cannot be reconciled with the modern acceptance of the courts as a forum for vindicating individual rights. See *N.A.A.C.P.* v. *Button*, *supra*.[32] There is no justification for discouraging litigation of all sorts in order to deter unwarranted litigation. The encouragement of frivolous, harassing, malicious, or unwarranted litigation is independently prohibited by Disciplinary Rule 7-102(A). The ban on advertising inhibits the assertion of legal rights by the segment of society least familiar with its rights; it

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[31] Monopolies and Mergers Commission, *Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising* 40 (1976).

[32] See also Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48 (1935); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. Chi. L. Rev. 674 (1958); Comment, *The Bar As a Trade Association: Economics, Ethics, and the First Amendment*, 5 Harv. Civ. Rts.—Civ. Lib. L. Rev. 334 (1970); Christensen, *Lawyers for People of Moderate Means*, *supra*.

does not discourage litigation generally or ensure that litigation will be meritorious.[33]

The United States therefore submits that none of the justifications for a sweeping ban on advertising by attorneys in the commercial media is sufficient to overcome the First Amendment rights of willing speakers and willing listeners. Appellants were penalized for violating such a broad ban, for the very act of notifying the public of their existence. Because of the breadth of the Arizona ban, and because the Arizona court did not articulate any reasons for the ban, this case does not require the Court to decide whether some more specific prohibition would be constitutional.

We believe, however, that more specific and less restrictive means can be devised to address legitimate public concerns. The Standing Committee on Ethics and Professional Responsibility of the American Bar Association has proposed a revision of Canon Two that would permit advertising unless the material contains a "false, fraudulent, misleading, deceptive or unfair statement or claim." [34] The Board of Gov-

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[33] In any case, the broad Arizona restraint cannot be justified by concern about unwarranted litigation, because it applies equally to the advertisement of services not directly related to litigation, such as changes of name and the drafting of wills.

[34] The proposed disciplinary rule would define ten categories of prohibited statements. See *Discussion Draft: Proposed Amendments to Ethical Considerations and Disciplinary Rules*

ernors of the District of Columbia Bar has petitioned the District of Columbia Court of Appeals to modify Canon Two, and Disciplinary Rules 2-101 through 2-105, to permit advertising.[35] The Board of Governors of the California State Bar has proposed a rule that would expand the information permitted to be contained in law lists, and would permit the publication of identical material in the commercial media.[36] The British Monopolies and Mergers Commission has recommended that solicitors be allowed to advertise by any method, provided only that:[37]

(1) No advertisement, circular or other form of publicity used by a solicitor should claim for his practice superiority in any respect over any or all other solicitors' practices.

(2) Such publicity should not contain any inaccuracies or misleading statements.

(3) While advertisements, circulars and other publicity or methods of soliciting may make clear the intention of the solicitor to seek custom, they should not be of a character

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of Canon 2 of the Code of Professional Responsibility (December 6, 1975) (reproduced as Appendix C, *infra*, pp. 62a-94a).

[35] See Petition of the Board of Governors of the District of Columbia Bar For Amendments to Rule X of the Rules Governing the Bar of the District of Columbia, filed in the District of Columbia Court of Appeals, November 10, 1976 (reproduced as Appendix B, *infra*, pp. 10a-61a).

[36] See Appendix D, *infra*, pp. 95a-130a.

[37] Monopolies and Mergers Commission, *supra*. See Appellants' Br. App. 9a-10a.

that could reasonably be regarded as likely to bring the profession into disrepute.

The United States does not necessarily endorse any of these proposals. They demonstrate, however, that the legitimate concerns of the public and the profession can be vindicated by rules less restrictive than Arizona's total ban on advertising by attorneys. Arizona has not attempted to tailor its rules to any specific legitimate concern. The absolute ban Arizona has imposed on advertising by lawyers in the commercial media is not responsive to any legitimate justification for restrictions on attorney advertising, and it cannot stand.

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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Attorneys.

DECEMBER 1976.

APPENDIX A

THE INADEQUATE DISTRIBUTION OF LEGAL SERVICES IN THE UNITED STATES

Legal services are not equitably distributed. The American Bar Association has stated that "the middle 70% of our population is not being reached or served adequately by the legal profession." [1] Professor Cheatham has explained:[2]

> As the proportion of the poor has gone down, the proportion of the middle classes has gone up, so that an increasing proportion of our people

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[1] American Bar Association, *Revised Handbook on Prepaid Legal Services: Papers and Documents Assembled by the Special Committee on Prepaid Legal Services* 2 (1972). See also the statement of Orville H. Schell, Jr., President of the Association of the Bar of the City of New York, during the Hearings on "The Organized Bar: Self-Serving or Serving the Public," before the Subcommittee on the Representation of Citizens Interests of the Senate Judiciary Committee, 93d Cong., 2d Sess. (1974), reprinted in Curran and Spalding, *infra,* at 11:

> [A] high percentage of people in this country are not receiving adequate legal services. The estimated percentages run from 60-90% of the population. Whatever estimate you take the numbers are staggering.

See generally Christensen, *Lawyers for People of Moderate Means* (1970); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Court and Lawyering Services,* 48 N.Y.U. L. Rev. 595 (1973); Meserve, *Our Forgotten Client: The Average American,* 57 A.B.A.J. 1092 (1971).

[2] Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes,* 63 Colum. L. Rev. 973, 973-974 (1963).

> are able to pay for the legal services they need. Further, the increase in wealth brings an increase in the legal problems of acquiring and disposing of property, and thus the need for legal services goes up faster than the proportion of the middle classes.
>
> Yet these growing classes with an increasing need for legal services do not obtain in proportionate measure the legal services they need, at least from lawyers. The wide gap between the need and its satisfaction by the bar has been indicated by numerous studies beginning in the 1930's. * * *
>
> * * * The middle classes lack the sentimental appeal of the poor, and they are unprofitable clients for the most successful members of the profession. Neither sentiment nor interest has led the profession to give to this largest part of our people the attention they merit.

A recent study commissioned by the American Bar Association's Special Committee to Survey Legal Needs indicates that more than 30 percent of the population has never consulted a lawyer, and almost another 30 percent has consulted a lawyer only once.[3]

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[3] Curran and Spalding, *The Legal Need of the Public* 79-81 (1974) (Preliminary Report of a National Survey by the Special Committee to Survey Legal Needs of the American Bar Association, in collaboration with the American Bar Foundation). The survey showed that 67 percent of the population has consulted a lawyer, of which 28.9 percent of the population has consulted a lawyer only once. See also Missouri Bar-Prentice Hall Survey, *A Motivational Study of Public Attitudes and Law Office Management* (1963), in Murphy and Walkowski, *Compilation of Reference Materials on Prepaid Legal Services* 4 (American Bar Association 1973),

A study of working class Americans indicated that only 54 percent had ever consulted a lawyer, and that more than half of those individuals had done so only once.[4]

Individuals unfamiliar with legal services often do not realize that the services of a lawyer would be desirable.[5] For example, only 68 percent of the

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which concludes that only 64 percent of their sample had ever consulted a lawyer; Industrial Social Welfare Center of the Columbia University School of Social Work, *Legal Need of Clerical Workers Members of the New York District of American Federation of State, County and Municipal Employees* (1972), summarized in Murphy and Walkowski, *supra*, concludes that only 69 percent of the respondents had ever consulted a lawyer.

[4] Marks, Hallauer and Clifton, *The Shreveport Plan: An Experiment in the Delivery of Legal Services* 33 (1974) (study of the members of a construction union). See also Marks, *The Legal Needs of the Poor: A Critical Analysis* 8 n. 10 (American Bar Foundation 1971); Pfennigstorf and Kimball, *Legal Service Plans: A Typology*, 1976 A.B.F. Res. J. 411 (collecting sources); Getman, *A Criticism of the Report on the Shreveport Experiment*, 3 J. Legal Studies 487 (1974). Professor Getman suggests that the study of the Shreveport Plan was improperly executed, but he does not call into question the gist of the argument in this appendix.

[5] See Koos, *The Family and the Law: Report of a Study of Family Needs as Related to Legal Services* (1952), summarized in Murphy and Walkowski, *supra*, at 7 (although 41.6 percent of the middle class families surveyed had experienced a "legal" problem in the preceding year, only 80 percent of the families with a problem recognized the need for legal assistance, and only 60 percent obtained legal counsel. Among working class families, 35.6 percent had experienced a prob-

union members questioned in one study realized that a lawyer could be of any assistance if an individual were threatened with eviction by his landlord in retaliation for complaints about defective wiring.[6]

Even individuals who realize that the services of a lawyer would be of assistance frequently do not obtain counsel. The American Bar Association's recent study indicated that 19 percent of the respondents had not obtained counsel in situations where they felt a need for it.[7] Of 1,040 New York City clerical workers responding to another survey, 564 reported unfulfilled needs for legal services. The same survey showed that the number of occasions on which legal representation had been obtained was approximately equal to the number of occasions on which the workers did not obtain such services, despite recognizing the need.[8] Similarly, the Shreveport study of construction workers indicated the following high percentages of

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lem, but only 44.2 percent of those families obtained counsel). See also American Bar Association, *Revised Handbook on Prepaid Legal Services, supra,* at 2:

> The public fears the cost of legal services. They are frequently not aware of what problems are "legal" and what lawyers can do to solve such problems. They seldom avail themselves of the counselling skills of the lawyer to plan for the future or to prevent future difficulty. Their contact with a lawyer occurs only when a crisis situation demands it.

[6] Marks, Hallauer and Clifton, *supra,* at 49.

[7] Curran and Spalding, *supra,* at 85.

[8] Industrial Social Welfare Center, *Legal Needs of Clerical Workers Members, supra.*

union members who did *not* consult an attorney with respect to matters generally recognized as requiring the services of a lawyer: drawing of will, 92 percent; representation in connection with an arrest, 86 percent; experienced racial discrimination in obtaining employment or housing, 100 percent; purchasing a house or land, 69 percent.[9]

There are several reasons why individuals fail to obtain counsel even when they recognize a need for it. Foremost among those are the high cost (or fear of the cost)[10] of legal services and inability to locate a lawyer willing and competent to deal with the problem.[11]

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[9] Marks, Hallauer and Clifton, *supra*, at 35.

[10] See *Report of the Special Committee on the Availability of Legal Services*, adopted by the House of Delegates of the American Bar Association (February 1968), noted in American Bar Association, *Revised Handbook on Prepaid Legal Services*, *supra*, at 26:

> We are persuaded that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wide utilization of legal services.

See also Industrial Social Welfare Center, *Legal Need of Clerical Workers Members*, *supra*, at 2 (514 of 1,040 respondents said that expected costs are a reason for not using a lawyer's services); Koos, *supra*, at 11.

[11] See Curran and Spalding, *supra*, at 95. Among the respondents to that survey, 48.3 percent strongly agreed, and another 30.9 percent slightly agreed, with the statement that people do not go to lawyers because they have no way to learn the names of lawyers competent to handle the problem. See also Christensen, *Lawyers for People of Moderate Means*, *supra*, ch. IV.

The individual's fear of the cost is often exaggerated. A study of middle class individuals revealed that they overestimated lawyers' fees by 91 percent for the drawing of a simple will, 340 percent for reading and giving advice about a two-page installment sales contract, and 123 percent for 30 minutes of consultation and general advice.[12]

At least part of the failure of people to realize their own needs for legal services results from a lack of communication by the bar. The same can be said of decisions not to seek legal services that are based upon mistaken notions about the cost or availability of such services. Not surprisingly, therefore, most scholars on the subject agree that advertising would be of significant value in improving the delivery of legal services to those most in need. See, *e.g.*, Christensen, *Lawyers for People of Moderate Means* 137-138 (1970):

> Such an increase in information would almost surely help people to recognize their legal problems, to see their need for lawyers' help, and to get in touch with the right lawyers more readily than at present * * * . The end result should

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[12] See the study by James G. Frierson, described in the Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia (App. B, *infra*, pp. 24a-25a). The Shreveport study similarly demonstrated that 62 percent of the respondents estimated that an initial half-hour consultation would cost more than $10, although half of the lawyers in Shreveport reported that they did not charge for such a consultation if no further work was involved. Marks, Hallauer and Clifton, *supra*, at 50.

> be increased public utilization of lawyers, with people of moderate means obtaining much legal help they would not otherwise get. This is clearly the most important value that may be served by allowing lawyers greater freedom to advertise and solicit legal business.

Similarly, the Monopolies and Mergers Commission recently presented a report to the British Parliament recommending that British solicitors be permitted to advertise.[13] The Commission concluded that the public was in need of additional information concerning legal services, that advertising may increase public trust and confidence in the profession, and that the current prohibition on advertising deprives the public of legal services and reduces the stimulus to efficient delivery of those services. Monopolies and Mergers Commission, *Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising* (1976).[14]

Economic theory and empirical evidence support the conclusion that dissemination of price information would help to lower the cost of legal services through

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[13] See also Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available,* 81 Yale L.J. 1181 (1972).

[14] In a companion study concerning barristers, the Commission concluded that no changes were necessary, primarily because barristers are not hired directly by laymen. Monopolies and Mergers Commission, *Barristers' Services: A Report on the Supply of Barristers' Services in Relation to Restrictions on Advertising* 22-24 (1976).

competition.[15] Comparison shopping for legal services is difficult, and more difficult for some than others.[16] Unless an attorney is willing to quote a price on the telephone,[17] the client must go to an unfamiliar office and discuss his problem with the attorney in person before discovering the approximate cost of the service. He must face the potential embarrassment of having to admit, after consultation, that he cannot afford the fee. The cost of gathering fee information is especially high if a working person must visit an attorney during working hours. These impediments make effective price comparisons impractical.

The ban on advertising in the commercial media also inhibits the development of new forms of legal practice designed to improve the delivery of legal services. Appellants' legal clinic is an example of such an experiment. Such clinics are valuable to the middle class, for they offer a limited range of routine services at a reasonable cost by relying on the

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[15] See note 14, *supra*, in the text of the brief.

[16] The record includes testimony from a representative of a senior citizens' group indicating that its members are particularly concerned with obtaining advance knowledge of the cost of legal services. See testimony of James L. Jones, a Director of the Phoenix Chapter of the American Association of Retired Persons (A. 133-144). Mr. Jones testified that appellants' advertisement would be of assistance to members of the group in obtaining legal services because it discusses cost.

[17] If an attorney is willing (and allowed) to quote a price over the telephone, there is no sound reason why he should not be allowed to advertise that price.

use of paraprofessionals and specialization.[18] Appellants testified that a "legal clinic," which requires a large volume, cannot succeed without advertising.[19] Even if legal clinics, or other experimental forms of practice, could exist without advertising, the Arizona rule would inhibit those in need of such services from learning of them.

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[18] See Interview with Thomas Ehrlich, then Dean of Stanford Law School, *Complaints About Lawyers, Are They Justified,* U.S. News and World Rep. 49 (July 21, 1975); Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism,* 71 Colum. L. Rev. 1153 (1971); Note, *supra,* 81 Yale L.J. at 1206; Christensen, *supra,* at 45, 81; Johnstone and Hopson, *Lawyers and Their Work* 543-545 (1967); Hearings before the Subcommittee on the Representation of Citizen Interests of the Senate Judiciary Committee, *supra,* at 43 (statement of Stuart Kadison, Chairman of the ABA Special Committee on the Delivery of Legal Services), *id.* at 85 (statement of Orville Schell, President of the Association of the Bar of the City of New York), *id.* at 88 (statement of Thomas Ehrlich).

[19] See A. 129. Dean Ehrlich agrees that advertising is necessary for the development of legal clinics. See Interview, *Complaints About the Legal Profession, supra,* at 49.

APPENDIX B

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION OF THE BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR FOR AMENDMENTS TO RULE X OF THE RULES GOVERNING THE BAR OF THE DISTRICT OF COLUMBIA

The Board of Governors of the District of Columbia Bar respectfully petitions this Court, pursuant to Rule XIII, Section 1 of the District of Columbia Court of Appeals Rules governing the Bar of the District of Columbia, to amend the American Bar Association's Code of Professional Responsibility as amended by this Court, and incorporated in Rule X of the Rules of the District of Columbia Court of Appeals governing the Bar of the District of Columbia. The proposed amendments are set out in Exhibit A hereto.

The amendments proposed by the Board of Governors are explained in the report of the Legal Ethics Committee on proposed amendments to the Code of Professional Responsibility dealing with advertising and solictation by lawyers. The full report and recommendations of the Legal Ethics Committee were adopted with the exception of ethical consideration EC 2-9 at its regular meeting on Tuesday, November 9, 1976. A copy of that report, together with the dissent of one member of that committee, is attached hereto as Exhibit B.

As Exhibit C, the Board of Governors also submits a copy of the monograph prepared under the direction of Lewis A. Rivlin, entitled "The Future of the Regulation of the Legal Profession: Antitrust Jurisdiction in the District of Columbia after *Goldfarb*".

WHEREFORE, the Board of Governors respectfully requests this Court grant the petition and amend the Rules as set forth herein in Exhibit A.

Respectfully submitted,

/s/ CHARLES R. WORK
Charles R. Work, President

Dated: November 10, 1976

PROPOSED AMENDMENTS

Note: Boldface indicates proposed additions; (*Parenthesis and Italics indicates proposed deletions.*)

ETHICAL CONSIDERATIONS

EC 2-1. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of *(acceptable)* **competent** legal counsel **whose fees they can afford.** Hence, important functions of the legal profession are to educate *(laymen)* **members of the public** to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

RECOGNITION OF LEGAL PROBLEMS

EC 2-2. The legal profession should assist *(layman)* **members of the public** to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers *(acting under proper auspices)* should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. *(Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of*

permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.)

EC 2-3. Whether a lawyer acts properly in volunteering advice to a *(layman)* **member of the public** to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist *(laymen)* **members of the public** in recognizing legal problems. The advice is proper *(only if)* **whenever it is** motivated **in whole or in part** by a desire to protect one who does not recognize that he **or she** may have legal problems or who is ignorant of his **or her** legal rights or obligations. *(Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.)*

EC 2-4. *(Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept em-*

ployment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.) **The purpose of encouraging lawyers to volunteer advice to members of the public is to fulfill the duty to make legal counsel available by informing members of the public of their legal rights and of the availability of effective legal assistance. Accordingly, lawyers should scrupulously avoid making any false or misleading statements to members of the public regarding their rights or regarding the ability of lawyers in general or of particular lawyers to provide effective assistance.**

EC 2-5. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for *(laymen)* **members of the public** should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

SELECTION OF A LAWYER: GENERALLY

EC 2-6. Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he **or she** had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable *(laymen)* **members of the public** to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many *(laymen)* **members of the public** have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. **In addition, many people feel uncertain about whether lawyers are interested in helping them, and about the possible expense of preliminary interviews, and they are therefore reluctant to approach lawyers to seek legal counsel.**

EC 2-8. *(Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers. A layman is best*

served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.) **Because of changed conditions, lack of knowledge about the availability of lawyers, and the reluctance of many people to seek needed legal assistance, people are, as a practical matter, being denied effective legal assistance. In order to inform people of the availability of counsel, increase the likelihood of intelligent selection of attorneys by members of the public, and eliminate misunderstanding about fees, lawyers should freely provide information about their availability to accept particular kinds of cases, their experience in handling such cases, and their fees.**

SELECTION OF A LAWYER: PROFESSIONAL NOTICES AND LISTINGS

(EC 2-9 The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of profes-

sional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.)

EC 2-10. *(Methods of advertising that are subject to the objections stated above should be and are prohibited. However,)* The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer *(while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.)* **and such additional information that is accurate and that might assist a potential client in making an informed choice of an attorney. Care should be taken, however, to avoid creating unrealistic expectations in particular cases. In addition, lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice.**

EC 2-11. The name under which a lawyer conducts his **or her** practice may be a factor in the selection process. The use of a trade name or an assumed name **should be avoided if it** could mislead *(laymen)* **members of the public** concerning the identity, responsibility, and status of those practicing

thereunder. *(Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.)* For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his **or her** name to remain in the name of the firm if he **or she** actively continues to practice law as a member thereof. Otherwise, *(his)* **the lawyer's** name should be removed from the firm name, and he **or she** should not be identified as a past **or** present member of the firm; and *(he)* **the lawyer** should not *(hold himself)* **be held** out as being a practicing lawyer.

EC 2-13. In order to avoid the possibility of misleading persons with whom he **or she** deals, a lawyer should be scrupulous in the representation of his **or**

her professional status. *(He)* **A lawyer** should not hold himself **or herself** out as being a partner or associate of a law firm if he **or she** only shares offices with another lawyer.

(EC 2-14. In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability, other than in historically excepted fields of admiralty, trademark, and patent law.)

(EC 2-15. The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.)

DISCIPLINARY RULES

(Present Disciplinary Rules DR 2-101 thru DR 2-105 are deleted and rewritten as follows.)

DR 2-101. A lawyer shall not knowingly make any representation about his or her ability, background, or experience, or that of the lawyer's partner or associate, that is false or misleading, and that might reasonably be expected to induce reliance by a member of the public.

DR 2-102. A lawyer shall not knowingly give a client or potential client a false or misleading impression of the state of the law, such as by overstating the likelihood that a particular outcome will result from litigation, or by stating what is merely the lawyer's opinion about the law as if it were a conclusively established rule of law.

DR 2-103. A lawyer shall not solicit or advertise to potential clients in any way that would violate a valid law or regulation, or a contractual or other legal obligation of the person through whom the lawyer seeks to communicate.

DR 2-104. A lawyer shall not solicit a potential client who has given the lawyer adequate notice that he or she does not want to receive communications from the lawyer.

DR 2-105. A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners. A partnership shall not be formed or continued between or among lawyers licensed in different ju-

risdictions unless all enumerations of the members and associates of the firm on its letterhead and in other listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.*

RATIONALE OF THE AMENDMENTS

Rules of legal ethics are, broadly speaking, of two kinds. Rules of the first kind relate to the integrity of the system of administering justice and are designed to insure that the system will function effectively and fairly. Those rules include such matters as full access to the legal system, the competence and independence of counsel, preservation of clients' confidences, and zealous representation within the bounds of law. Rules of the second kind are those that are concerned less with the integrity of the system and more with the conduct of lawyers as members of a guild or trade association. Such rules, which are principally anticompetitive, include maintenance of minimum fees and restrictions on advertising and solicitation.

Canon 2 of the Code of Professional Responsibility contains both provisions that relate to the integrity of the system and provisions that relate to restrictions on competition. The guild or anticompetitive

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* Proposed DR 2-105 is derived substantially from the present 2-102(C) and (D).

provisions of Canon 2 may have perverted the more fundamental provisions of that Canon, which are concerned with the integrity of the system.

The "axiomatic norm" [1] that serves as the headnote to Canon 2 is: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." The Ethical Considerations and the footnotes to Canon 2 explain the crucial relationship of that Canon to the integrity of the administration of justice. Members of society "have need for more than a system of law; they have need for a system of law which functions, and that means they have need for lawyers." [2] However, legal problems "may not be self-revealing and often are not timely noticed." [3] The need of members of the public for legal services is met, therefore, "only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel." [4] Quoting Justice Lewis F. Powell, Jr. (then President of the American Bar Association), the Code notes that, when people are denied their day in court because ignorance has prevented them from obtaining counsel, there is a denial of the fundamental right to equal

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[1] See Code of Professional Responsibility, Preliminary Statement.

[2] Cheatham, "The Lawyer's Role and Surroundings," 25 Rocky Mt. L. Rev. 405 (1953), quoted in Canon 2, n. 1.

[3] EC 2-2.

[4] EC 2-1.

justice under law.[5] Thus, a "basic tenet" of the professional responsibility of lawyers is that "every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." [6]

The scope of our failure to achieve equal justice under law, in the rudimentary sense of providing access to legal services, is illustrated by the estimate of a Special Committee of the American Bar Association that effective access to legal services is being denied to at least 70 percent of our population, which amounts to as many as 140,000,000 people.[7] Other responsible authorities suggest that the correct figure is substantially higher.[8] Moreover, as recognized in the Code of Professional Responsibility, a principal cause of the under-use of available legal services is ignorance on the part of members of the public regarding the need, availability, and cost of legal services.[9] Furthermore, the Code also recognizes that institutional advertising has been employed for decades,[10] but such efforts obviously have proved inadequate to cope with the problem.

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[5] Canon 2, n. 3.

[6] EC 1-1.

[7] ABA Special Committee on Prepaid Legal Services, a Primer of Prepaid Legal Services (1974).

[8] Tunney and Frank, "Federal Roles in Lawyer Reform," 27 Stan. L. Rev. 333, 343 & n. 36 (1975).

[9] See EC 2-1, 2-2, 2-6, 2-7, and footnotes 1 through 7, and 17.

[10] Canon 2, n. 4-7.

A dramatic illustration of the relationship between under-use of legal services and ignorance on the part of members of the public is provided in a study undertaken by James G. Frierson, who is both an attorney and an associate professor of business administration at East Tennessee State University. Professor Frierson first determined what the charge would be in Johnson City, Tennessee, to have a lawyer draw a simple will for a husband, or read and give advice on a two-page consumer installment contract, or discuss a potential legal problem and give some general advice without any research, spending about 30 minutes with the client. He then determined what middle class people in the same city expected to have to pay for those services. Frierson discovered that middle class consumers overestimated lawyers' fees by 91 percent for the drawing of a simple will, 340 percent for reading and giving advice on a two-page installment sales contract, and 123 percent for 30 minutes of consultation and general advice.[11]

Professor Frierson also found that 75 percent of his sample had not seen a lawyer on any personal matter within the previous five years, that 75 percent had no will, although a substantial number were married with children, and that 75 percent had signed an installment sales contract in the previous

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[11] Affidavit of James G. Frierson in Consumers Union of the United States, Inc. v. American Bar Association, No. 0105-R (E.D. Va. 1975).

five years.[12] On the basis of his survey Frierson concluded that average middle class consumers do not use the services of a lawyer "primarily because of their grossly inflated expectations of lawyers' charges." [13]

Frierson's study, of course, serves only to confirm what has been known by the profession and recognized in the Code of Professional Responsibility. As we have seen, the axiomatic norm that stands as a headnote to Canon 2 that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." The difficulty arises from the fact that the first five Disciplinary Rules under Canon 2 are devoted not to ensuring adequate information about the availability and cost of legal services but, rather, to restricting the communication of relevant information by proscribing advertising and solicitation by lawyers. Thus, DR 2-101 forbids a lawyer to use any means of commercial publicity, DR 2-102 imposes narrow limitations on the use of such things as professional cards, letterheads, and telephone directory listings, DR 2-103 forbids a lawyer to recommend that a non-lawyer retain the lawyer's services if the non-lawyer has not initiated the contact by seeking legal advice, DR 2-104 says that a lawyer who has given unsolicited legal advice to a member of the public shall not accept employment resulting from that advice, and DR 2-105 for-

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[12] Ibid.

[13] Barrister Magazine, vol. 2, n. 1, pp. 6, 8 (Winter, 1975).

bids a lawyer to indicate that he or she specializes in a particular area of the law.[14]

Those are the provisions, of course, that have effectively blocked any real efforts to provide relevant and necessary information to members of the public, and have thereby made a mockery of the overriding professional obligation to provide access to the legal system. It is becoming increasingly recognized, however, that the prohibitions against advertising and solicitation are not only unwise as a matter of public policy but also of dubious validity under both the antitrust laws and the Constitution.

In the antitrust area, the Supreme Court recently decided in *Goldfarb* v. *Virginia State Bar*[15] that the publication and enforcement by bar associations of minimum fee schedules violate the Sherman Act. The principal issue in *Goldfarb* was whether the practice of law, as a "learned profession," is outside the scope of the Sherman Act, which is concerned with "trade or commerce." The Supreme Court held that the sale of a service for money is "commerce" and went on to observe that, "It is no disparagement of the practice of law as a profession to acknowledge that it has

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[14] In each of those instances, arbitrary exceptions are provided, e.g., self-laudatory advertising can be purchased in a number of publications approved by the American Bar Association, a lawyer may solicit employment among friends, relatives, and former clients, and specialists in patent, trademarks, and admiralty law may so designate themselves.

[15] 421 U.S. 773 (1975).

this business aspect. . . ." [16] The Court also noted that, "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitve activities by lawyers may exert a restraint on commerce." [17]

The *Goldfarb* opinion was written by the Chief Justice and there was, remarkably, not a single dissent. (Mr. Justice Powell, who had been president of the Virginia State Bar, did not participate.) In addition, the Antitrust Division of the Department of Justice has adopted the position that a proscription of advertising and solicitation also violates the Sherman Act.[18]

Antitrust policies are not, however, the most appropriate concerns in assessing advertising and solicitation by attorneys. As indicated at the outset, the Ethical Considerations dealing with access to the legal system are rooted in the fundamental right of equal justice under law. In addition, the right of lawyers to communicate with potential clients, and the rights of members of the public to be informed by those communications, are protected by a variety of constitutional rights, including freedom of speech, the right to petition for redress of grievances, freedom of association, and the right to due process of law. Indeed, the Supreme Court has already held

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[16] *Id.* at 787.

[17] *Id.* at 788.

[18] See "Law Firm Advertising," 44 U.S.L.W. 2008 (July 1, 1975).

in a series of cases of major importance that rules of professional ethics, including those relating to advertising and solicitation, must give way to constitutional rights.

The first case in that series was *NAACP* v. *Button*,[19] which considered solicitation of clients in the context of efforts of the NAACP to recruit plaintiffs for school desegregation cases. The NAACP called a series of meetings, inviting not only its members, and not only poor people, but all members of the community. At those meetings, the organization's paid staff attorneys took the platform to urge those present to authorize the lawyers to sue in their behalf.[20] The NAACP maintained the ensuing litigation by defraying all expenses, regardless of the financial means of a particular plaintiff.

Virginia contended that the NAACP's activities constituted improper solicitation under a state statute and fell within the traditional state power to regulate professional conduct. The Supreme Court held, however, that "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 . . . upon protected freedoms of expres-

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[19] 371 U.S. 415 (1963).

[20] The Court has recognized the critical importance of solicitation to effective litigation in noting that proscription of solicitation in *Button* would have "seriously crippled" the efforts of the NAACP. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967).

sion." [21] The Court concluded: "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." [22]

Subsequently, in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*,[23] the Supreme Court considered the question of solicitation in a case in which a union's legal services plan resulted in channeling all or substantially all of the railroad workers' personal injury claims, on a private fee basis, to lawyers selected by the union and touted in its literature and at meetings. The Court again upheld the solicitation on constitutional grounds, despite the objection of the two dissenting justices that by giving constitutional protection to the solicitation of personal injury claims, the Court "relegates the practice of law to the level of a commercial enterprise," "degrades the profession" and "contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct." [24]

In *United Mine Workers* v. *Illinois Bar Ass'n*, the Supreme Court dealt with the argument that *Button*

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[21] NAACP v. Button, *supra* note 19 at 438.

[22] *Id.* at 438-39.

[23] 377 U.S. 1 (1964).

[24] *Id.* at 19 (dissent of Mr. Justice Clark).

should be limited to litigation involving major political issues and not be extended to personal injury cases. The Court held: "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones are guarded. . . .' " [25] Finally, in the *United Transportation Union* case, the Court reversed a state injunction designed, in Mr. Justice Harlan's words, "to fend against 'ambulance chasing.' " [26] In that case a union paid investigators to keep track of accidents, to visit injured members, taking contingent fee contracts with them, and to urge the members to engage named private attorneys who were selected by the union and who had agreed to charge a fee set by prior agreement with the union. The investigators were also paid by the union for any time and expenses incurred in transporting potential clients to the designated lawyers' offices to enter retainer agreements.

In approving that arrangement, the Court reiterated that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." [27] What is important to bear in mind, how-

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[25] 389 U.S. 217, 223 (1967).

[26] United Transp. Union v. State Bar, 401 U.S. 576, 597 (1971) (dissent of Mr. Justice Harlan).

[27] *Id.* at 585.

ever, is that: (1) the attorneys in question were not in-house counsel for the union but private practitioners; (2) the attorneys earned substantial fees; (3) the cases were not "public interest" cases in the restricted sense but were ordinary personal injury cases; and (4) the attorneys were retained as a result of the activities of "investigators," paid by the union, whose job it was to find out where accidents had occurred, to visit the victims as promptly as possible, to "tout" the particular lawyers and, if necessary, to take the victim to the lawyers' office to get a contingent fee contract signed.[28]

It might be suggested that the three union cases involved group legal services, with the solicitation restricted to members of the union. Although there are references in those cases to rights of association, other language in the opinions is much broader. The Court noted in *United Mine Workers* that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." [29] Similarly, the First Amendment does not pro-

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[28] The only question not decided by the Court was whether the investigators could properly have been paid directly by the lawyers. The dissenting Justices would have disapproved such a practice, while the majority simply did not reach the issue, on the ground that it was not in the record before them. It is difficult, however, to see why a significant distinction should turn on who pays the investigator. An unsophisticated person needs information about the availability of legal services, regardless of whether he or she is a member of a union and regardless of who pays the informant.

[29] United Mine Workers v. Illinois Bar Ass'n, *supra* note 25 at 223 n. 25.

tect speech and assembly only in the context of unions or other membership associations. Further, the solicitation in the *Button* case was not limited to members of the NAACP.

On the same day that *Goldfarb* was decided, the Supreme Court handed down an opinion in *Bigelow* v. *Virginia*,[30] a case that has not attracted as much attention as *Goldfarb* in connection with advertising and solicitation by lawyers but that is of far greater significance. In *Bigelow*, the defendant was convicted of violating a provision of the Virginia anti-abortion statute by publishing an advertisement offering to make low-cost arrangements for legal abortions in New York. The importance of the *Bigelow* case to the issue of advertising by lawyers is emphasized by the similarity between arguments typically made in support of the anti-advertising provisions of the Code and the arguments made by the Virginia Supreme Court in affirming Bigelow's conviction. That court held that the advertisement "clearly exceeded in informational status" and "constituted an active offer to perform a service, rather than a passive statement of fact."[31] In rejecting Bigelow's First Amendment claim, the Virginia court said that a "commercial advertisement" "may be constitutionally prohibited by the state," particularly "where, as here, the advertising relates to the medical-health field," *i.e.*, a professional area in

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[30] 421 U.S. 809 (1975).

[31] See *id.* at 814.

which the state's regulatory power presumably would be at its maximum. In addition, the court noted that the purpose of the statute was to insure that pregnant women in Virginia, making decisions with respect to abortions, did so "without the commercial advertising pressure usually incidental to the sale of a box of soap powder." [32] Those of course, are precisely the kinds of arguments that are made in support of regulations against advertising by lawyers.

Significantly, in striking down the Virginia statute on First Amendment grounds, the Supreme Court relied on *NAACP* v. *Button* for the proposition that a state cannot foreclose the exercise of constitutional rights simply by labeling the speech "solicitation" or "commercial advertising." [33] In the course of reaching that conclusion, the Court severely restricted, if it did not overrule, *Valentine* v. *Chrestensen*,[34] which had suggested that commercial advertising was not fully protected by the First Amendment.[35]

Finally, the Court made a strong bridge between the protected advertising in *Bigelow* and advertising by lawyers, by stressing the fact that the *Bigelow* advertisement contained information about legal issues:

> "Viewed in its entirety, the advertisement conveyed information of potential interest and value

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[32] *Ibid.*

[33] See especially *id.* at 826.

[34] 316 U.S. 52 (1942).

[35] 421 U.S. at 819-21 and especially n. 6.

> to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. . . . Also, the activity advertised pertained to constitutional interests. . . . Thus, in this case, appellant's First Amendment interests coincide with the constitutional interests of the general public." [36]

Thus, the *Bigelow* advertisement was given First Amendment protection expressly because it was directed to a "diverse audience" (not just the membership of an association), conveying information to those with a "general curiosity about, or genuine interest in . . . the law . . . and its development. . . ." Presumably, that same language would be descriptive of any advertisements offering legal services. Moreover, the reference in the *Bigelow* advertisement to the fact that abortions are legal in New York was made only in passing. Certainly the communication of legal information ("Abortions are legal in New York") was quite limited, and there was no explicit suggestion of the desirability of law reform. In the same sense, therefore, any advertisement relating to the availability of legal services would convey information of "potential interest and value" to people having a "general curiosity" about the law, its development, or law reform.

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[36] *Id.* at 822.

It seems abundantly clear, therefore, that the present provisions of the Code of Professional Responsibility, forbidding advertising and solicitation by lawyers, are constitutionally invalid. Accordingly, it is appropriate, if not urgent, that we undertake the task of redrafting Canon 2.

In an earlier effort to that end, a draft of proposed amendments was circulated to the members of the Legal Ethics Committee of the District of Columbia Bar (as well as to the Subcommittee on Professional Responsibility of the Society of American Law Teachers).[37]

One concern expressed in response to that draft is that advertising by lawyers may prove to be "undignified" in some instances. The concern is a legitimate one. The appearance of justice, though not as important as the substance of it, is a matter of legitimate concern. If lawyers conduct themselves in an undignified way, the law itself may, to that extent, lose the appearance of dignity. On the other hand, a disciplinary standard that would require dignity and yet withstand constitutional attack may be impossible to achieve. In reversing a conviction in a rather extreme case of undignified expression ("Fuck the Draft"), Mr. Justice Harlan observed

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[37] The author of that draft and principal author of the current proposal and of this statement is Monroe H. Freedman, Dean of the Hofstra Law School and Chairman of the Legal Ethics Committee and of the SALT Subcommittee on Professional Responsibility. The text of the draft appears in the New York Law Journal, p. 1, May 28, 1975.

that "One man's vulgarity is another's lyric." [38] "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," [39] and standards like "undignified" or "in good taste" clearly cannot meet that test.

Although it would not be feasible to draft a Disciplinary Rule forbidding lawyers to be undignified, the structure of the Code does permit the expression of aspirational guides in the Ethical Considerations. Accordingly, the draft proposed here does urge in the Ethical Considerations that "lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice."

Since the earlier proposed redraft of Canon 2 would have imposed no prohibition on advertising and solicitation other than to forbid false and misleading representations, comments also expressed concern with a variety of offensive kinds of conduct that might result. For example, police officers might hand out lawyers' cards at the scenes of accidents.[40] Accident victims, strapped into stretchers, might be importuned by hospital orderlies to retain particular lawyers. Lawyers or their representatives might in-

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[38] Cohen v. California, 403 U.S. 15 (1971).

[39] NAACP v. Button, *supra* note 19 and 438.

[40] Interestingly, one member of the Subcommittee on Professional Responsibility, objecting to individual advertising, suggested as a desirable alternative that police officers might be required to distribute institutional advertising about legal services at accident scenes.

terrupt funeral services to solicit probate work. People might be solicited through unwanted telephone calls or visits at home. And so on.

Those concerns also are legitimate, and an effort should be made to deal with them. However, that effort should not consist of prohibitions on communications by rules that are broader than necessary to serve the legitimate governmental purpose. As the Supreme Court observed in *Shelton* v. *Tucker*:[41]

> "In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Certainly it is not necessary to impose a broad ban on advertising and solicitation by lawyers in order to deal with such cases as the hospital orderly or the police officer. For example, if it is inappropriate for an orderly to solicit legal business (or, indeed, to speak to a patient at all, other than as required by the performance of hospital duties) hospitals can, and presumably do, issue appropriate directives to their employees. It would seem entirely appropriate, therefore, to discipline a lawyer who knowingly induced a breach of such an obligation by an orderly or by a police officer or any other employee. Simi-

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[41] 364 U.S. 479, 488 (1960).

larly, a lawyer could be disciplined for soliciting business in a cemetery or any place else where business activity may be generally forbidden.

The appropriate approach to dealing with such cases, as well as with those cases involving harassing telephone calls or unwelcome visits to homes, is suggested in four Supreme Court decisions involving closely analogous situations. The first case is *Martin* v. *Struthers*.[42] There the Court invalidated a city ordinance that made it unlawful for any person distributing handbills, circulars or other advertising matter to ring a door bell or otherwise summon a householder to the door. The Court recognized a legitimate governmental interest in such a prohibition since "burglars frequently pose as canvassors, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." [43] The Court held, however, that the right of fredom of speech and press embraces not only the right to distribute literature, but also necessarily protects the right to receive it.[44] Moreover, the city could have used a less drastic means to achieve its end, and one that would not have impinged upon those First Amendment rights:

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[42] 319 U.S. 141 (1943).

[43] *Id.* at 144.

[44] *Id.* at 143.

> "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive these strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." [45]

That is, the ordinance "substitute(d) by judgment of the community for the judgment of the individual householder," subjecting the distributor to criminal punishment for annoying another person "even though the recipient of the literature . . . is in fact glad to receive it." [46] The Court noted, however, that its holding did not prevent the city from punishing those who call at a home "in definance of the previously expressed will of the occupant." [47] Supreme Court in *Breard* v. *Alexandria*,[48] a decision written by Mr. Justice Reed, who had dissented in *Martin*. In *Breard* the ordinance restricting door-to-door solicitation was directed against those who failed to obtain the prior consent of the owners of the residences solicited. Thus the legislative standard in *Breard* did not meet the test established in *Martin*, because the Court in *Martin* would have required an "explicit command from the owners to stay away." [49] How-

[45] *Id.* at 147.

[46] *Id.* at 144.

[47] *Id.* at 148.

[48] 341 U.S. 622 (1951).

[49] 319 U.S. at 148.

Martin v. Struthers appeared to be severely limited in the subsequent decision of the

ever, in dealing with the First Amendment aspect of the case, Justice Reed distinguished *Martin* v. *Struthers* expressly on the ground that that case had involved the distribution of leaflets advertising a religious meeting, whereas the defendant in *Breard* had been selling magazines. The selling, Justice Reed said, "brings into the transaction a commercial feature." [50] Emphasizing that point, he noted that the Court in *Martin* had directed attention to the fact that the ordinance there had not been aimed "solely at commercial advertising." [51] Thus, insofar as *Breard* appeared to represent a retreat from the Court's position in *Martin* v. *Struthers*, it was based expressly upon the notion that "commercial speech" is not entitled to full constitutional protection. As indicated in the discussion above, that idea has recently been decisively rejected by the Supreme Court in *Bigelow* v. *Virginia*.[52]

Even before the rejection of *Valentine* v. *Chrestensen* in *Bigelow*, a standard similar to that approved in *Breard* was unanimously struck down by the Court. The case of *Lamont* v. *Postmaster General* [53] involved a federal statute that permitted the Post Office to hold "communist political propaganda" arriving from abroad, unless the addressee requested delivery. The Supreme Court invalidated that statute

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[50] 341 U.S. at 642.

[51] *Ibid.*

[52] See *supra* at pp. 14-17.

[53] 381 U.S. 301 (1965).

on the ground that it abridged the addressees' First Amendment rights by burdening the exercise of those rights with an affirmative obligation on the part of the addressee. By contrast, in *Rowan* v. *Post Office* [54] the Supreme Court upheld a statute that did not interpose the Postmaster General between the sender and the addressee but, rather, established a procedure whereby the householder could reject certain mailings in advance. Chief Justice Burger, writing for a unanimous Court, quoted with approval from *Martin* v. *Struthers* in holding that the freedom to distribute information to every citizen can only be limited if the power to prevent a distributor from calling at the home is left with the ~~[sic].~~

~~*Martin* v. *Struthers* appeared to be severely limited in the subsequent decision of the~~ individual homeowner. On that authority, the statute in *Rowan* was upheld because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." [55] Thus, in *Lamont* and *Rowan, Breard* was ignored and the rule of *Martin* v. *Struthers* was applied.

The proposed amendments to Canon 2 take their cue from those decisions. A community, or professional, judgment is not substituted for that of the individual citizen as to whether solicitation is de-

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[54] 397 U.S. 728 (1970).

[55] *Id.* at 737.

sirable. Rather, a lawyer would be subject to professional discipline for soliciting a potential client only after that person has given the lawyer notice that he or she does not want to receive communications from the lawyer.

In sum, then, the proposed redraft of Canon 2 would (a) eliminate the general proscription against advertising and solicitation, but would (b) urge lawyers to advertise in a dignified manner, (c) forbid lawyers to solicit in ways that would violate valid laws or regulations, or that would involve the breach of a contractual or other legal obligation of the person through whom the lawyer seeks to communicate (e.g., a hospital attendant or police officer), and (d) further forbid lawyers to solicit anyone who has made it clear that he or she would prefer to be left alone. That approach, it is submitted, is pursuant to the need to ensure access to legal services by providing adequate information to the public and is consistent with the requirements of the First Amendment.

DISSENT TO REPORT AND RECOMMENDATIONS

BY S. WHITE RHYNE, JR.

The Legal Ethics Committee has proposed a drastic revision of the rules of conduct under Canon 2 of the Code of Professional Responsibility. Just how drastic the revision really is can be seen from the following hypothetical examples of lawyer conduct, all of which would be permissible without disciplinary action under the proposed new rules:

Lawyer A employs an agent to cruise the city in a car equipped with a police radio. The agent drives to the scene of automobile accidents and attempts to persuade accident victims or their families to retain Lawyer A. The agent is instructed by Lawyer A to try to get signatures on retainer contracts at the scene.

Lawyer B employs an agent to call on the families of decedents whose names appear in newspaper obituaries or are supplied by morticians to whom the lawyer pays a commission. The agent carries retainer contracts for estate work.

Lawyer C has an office with his name and the words "Attorney at Law" in the front window in two-foot-high flashing neon letters. On top of the building is a billboard with a picture of the blindfolded goddess "Justice," holding scales in one hand a large illuminated dollar sign in the other. Beneath the picture is the legend, "Lawyer C for Big Judgments." On weekends, C's employees walk the streets,

handing out balloons and bumper stickers with the same legend, and an airplane writes it in the sky. Lawyer C later begins practicing under the trade name, "Big Judgments, P.C."

The **Law Firm of D and E** advertises: "You saw your doctor and you still hurt? See us and perhaps we can help relieve the pain. Our prescriptions can restore your wealth if not your health." On radio and television, the same message is preceded by a dulcet voice crooning "Zap your M.D., hire D and E."

The **Law Firm of F, G and H** promotes itself with the motto, "Prestige for Particular People," Its advertisements, mostly on the financial pages of local newspapers and in programmes at the Kennedy Center, depict the distinguished-looking senior partner in a vested suit sitting in his walnut pannelled, handsomely appointed office, chatting with various smiling clients. Several volumes of the Supreme Court Reports are always at his elbow.

These examples are cited only as possibilities. The manner and style of individual efforts at advertising and solicitation could be as diverse as the 20,000 members of the D.C. Bar. The point is not what most will do but what some may do. Because the Code prescribes what is permissible, a judgment as to whether or not a change in the Code would serve the public interest cannot be made without a full awareness of the extreme range of what the change would permit.

I share the concern of the majority of the Committee with opening up the channels of communication so that the public will have what the Committee report describes as "adequate information about the availability and cost of legal services." I don't think that removing the proscriptions on advertising and solicitation by lawyers is a desirable, appropriate or even a particularly effective way of achieving that objective. It should be noted, for instance, that not one of the examples of permissible lawyer conduct set out above involves the communication of any information to the public which is necessary or relevant to the selection of a lawyer.

Principal Reasons for Opposition

There are four principal reasons, all grounded in the public interest, why I am opposed to removing the proscriptions on lawyer advertising and solicitation. Two are mainly philosophical and two are practical. I shall state the philosophical reasons first because they seem to me to go to the heart of how one views the role of a lawyer, both in relationship to clients and as a participant in the process of administering justice.

First, advertising and solicitation seem to me to be basically inconsistent with professionalism. Professionals hold themselves out as willing to serve. When they step from that passive posture into a role of actively trying to attract business for profit, they appear to be and are self-seeking. Client confidence in their professionalism is eroded, and the

manner in which they perceive their own role may also be affected.

Granted, there are business aspects to the practice of law as there are professional aspects to the rendition of services by many businessmen. Lawyers who do not follow good business practices may not be practicing their profession for very long. Nevertheless, the practice of law should still be regarded primarily as a service to people and not as a business for profit. There are countless instances where considerations of personal profit run counter to considerations of client welfare, and where the client must depend on the lawyer's professionalism in putting the client's interests first. Clients, and lawyers too, must always know that this type of selfless professionalism is what is expected of lawyers. Introduction of commercial marketing practices common to the business world will tend to obscure the very real distinction between the practice of law as a profession and the carrying on of business.

Some say the present provisions of the Code on advertising and solicitation merely cause lawyers to be devious rather than direct in promoting themselves with prospective clients. Certainly there are instances now of client solicitation by lawyers, from courtroom hallways to country club greens. However, that is no reason to abandon provisions of the Code which are honored by most reputable lawyers. The Code should proclaim standards of good professional conduct, not those of the lowest common denominator.

A second fundamental reason why I oppose removing the proscriptions on advertising and solicitation is that it will open the door to practices which are undignified. I refer here to dignity in the process of administration of justice and not to dignity of lawyers as a group. The selection of a lawyer is an essential step in the process of the administration of justice. For some people, it is the most important step. It should not take place in an aura of "hucksterism" such as surrounds the marketing of soap powder. The right to counsel does not commence in the courtroom, and neither should basic decorum of counsel in fulfilling their vital role in the administration of justice.

The Committee's proposal recognizes the desirability of maintaining dignity by providing in an "ethical consideration" (as opposed to a "disciplinary rule") that "lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice." However, the proposal recognizes that this admonition is an "aspirational guide" only. It would not be subject to enforcement in a disciplinary proceeding, no matter how flagrantly or frequently it might by violated.

The third reason I oppose advertising and solicitation by lawyers is that they encourage people to select lawyers for the wrong reasons—reasons not related to the competence and integrity of the lawyer being selected. For instance, advertising may encourage people to select lawyers because of "name-

recognition," or "image." Both can be created by advertising, as every political candidate knows. Image and name-recognition—not the dissemination of information—often seems to be the primary functions of commercial as well as political advertising. See, e.g., ads for Marlboro cigarettes (image) and the "Goodyear Blimp" (name-recognition).

Solicitation may encourage people to select lawyers on the basis of who gets there first, or who makes the most attractive sales pitch. The Committee majority, in citing *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), argues that antitrust considerations support removal of the Code proscriptions on advertising and solicitation. *Goldfarb*, of course, dealt with price-fixing and not with advertising or solicitation. Moreover, dropping the bars on client solicitation is not necessarily pro-competitive. Where practices of client-solicitation permit an aggressive lawyer to lock up an unsophisticated client with an early retainer contract, those practices are actually anti-competitive. Such a client is foreclosed from price-shopping or any other investigation of possible alternatives to the services of the lawyer who made the "early bag."

Even price-shopping is not the best way of selecting a lawyer, though I believe clients should be provided with the information necessary to do that if they wish; and, at certain economic levels, it may be essential to obtaining needed legal services. However, the best way of selecting a lawyer is and always has been on recommendations from satisfied clients, at-

torneys and others with knowledge of the lawyer's competence and integrity.

Whether this process operates in a corporate board room or in a neighborhood civic association or storefront chuch, it remains the way that most clients are most likely to find lawyers who will serve them well. Commercial advertising and solicitation may distort that process by encouraging the selection of lawyers for other reasons, and by making it possible for lawyers who are not competent and do not enjoy a good reputation nonetheless to subsist through the type of "one-time client" that advertising and solicitation can provide.

Fourth, I oppose removing the proscription on solicitation because it may result in harassment of members of the public. The Committee recognized that possibility and inserted in an earlier draft of the proposed new disciplinary rules the language which now appears in proposed DR 2-104: "A lawyer shall not solicit a potential client who has given the lawyer adequate notice that he or she does not want to receive communcations from the lawyer."

However, that does not solve the problem. It merely tells the lawyer not to be persistent. Any lawyer is entitled to one try, even if it happens to be the tenth approach by a lawyer that day. The proposed rule does not even protect the public against the single solicitation which is so out-of-taste as to be annoying by its very nature, such as an approach to the bereaved at a funeral home.

In summary, therefore, I oppose removing the proscriptions on lawyer advertising and solictation because such activities are inconsistent with professionalism, because they demean the process of administration of justice, because they encourage members of the public to select lawyers for the wrong reasons and because, in the case of solicitation, they may result in harassment of members of the public. I think these public interest detriments would be offset by few if any public interest benefits. There is some prior experience to support this view.

THE PATENT LAW EXPERIENCE

At the public hearing conducted by the Legal Ethics Committee, a statement opposing the proposed changes was made by a representative of the Steering Committee of Division XIV (Patent, Trademark and Copyright) of the D.C. Bar. That statement brought to the attention of the Ethics Committee the fact that advertising by patent practioners had been permitted by the Commissioner of Patents until 1959. The experience was so unsatisfactory that, after extensive hearings and briefs and arguments by interested parties, the Patent Office adopted a rule which is currently in effect barring "the use of advertising, circulars, letters, cards and similar material to solicit patent business, directly or indirectly."

The patent experience was that only 2% of 6,700 practitioners chose to advertise. Statements by three

former Commissioners of Patents at the public hearings leading to the 1959 rule revision indicated that the services rendered by the advertisers were of poorer quality and more expensive than those rendered by other practitioners, and more frequently occasioned client complaints. Tr. 188, 191, 196, 197, attached as Exhibit 3 to Division XIV statement. I believe we should profit from the patent law experience, and not regress to a system that has been proved in practice to be contrary to the public interest.

ANTITRUST CONSIDERATIONS

Prominent in the majority report of the Ethics Committee are references to the recent Supreme Court decisions in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The *Goldfarb* case, dealing with applicability of the Sherman Antitrust Act, is simply inapplicable to the Code of Professional Responsibility as it regulates the practice of law in the District of Columbia. The Court recognized in its opinion that the Sherman Act "was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." 421 U.S. at 788. See also *Parker* v. *Brown*, 317 U.S. 341 (1943).

The Code of Professional Responsibility is promulgated in this jurisdiction by the D.C. Court of Appeals, exercising delegated legislative power. See 11 D.C. Code § 2501 and Rule X of the Court. That is

clearly state action. The proscriptions under Canon 2 will not change until the D.C. Court of Appeals adopts the change. The Court will undoubtedly consider thoughtfully any recommendations for change from the D.C. Bars, as it should. However, the final decision will be made by the Court.

The Legal Ethics Committee received a statement at its public hearing from the Steering Committee of Division II (Antitrust, Trade Regulation and Consumer Affairs) of the Bar. The representative of that Division, while supporting generally the Committee proposal, acknowledged that "court regulation in the District would overcome the Federal antitrust laws." Tr. 55.

In the follow-up letter, the Division II Steering Committee appeared to advocate retention of something like the provision in present DR 2-103(B) which says that, except for payments of fees to bar-sponsored lawyer referral services, "a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client." That provision, along with most of the rest of the disciplinary rules under Canon 2, is eliminated in the Committee's proposed revision. The Committee proposal speaks to the matter of paying for recommendations only in instances where the activity violates a contractual or other legal obligation of the person hired as a solicitor—for instance, where the "capper" is a police officer or hospital attendant.

The Division II follow-up letter said that payments to cappers could be prohibited, consistent with the policies of the antitrust laws, "because they involve a payment which ultimately would be passed on to the public." Apparently advocating such a prohibition, the letter went on to say: "Foreclosing these practices would not appear to restrict competition between lawyers, but it would have the beneficial effect of insuring that the public not indirectly subsidize activities which cannot add to the value of legal services being offered." I don't see a difference between payments for solicitation and payments for advertising insofar as the likelihood of a cost-pass-through to consumers is concerned. Both kinds of payments have the potential for making the public subsidize activities which do not add to the value of legal services.

CONSTITUTIONAL CONSIDERATIONS

The other recent Supreme Court case cited in the majority report, *Bigelow* v. *Virginia*, applied constitutional protection of free speech to commercial advertising. The case did not involve advertising or solicitation by lawyers. It did recognize that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." 421 U.S. at 826.

The Committee majority seems to find, in four earlier cases involving solicitation of clients for lawyers, an indication that the Court would—if faced with the question—rule that restrictions on lawyer