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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,*

VS.

**STATE BAR OF ARIZONA,**

*Appellee.*

**On Appeal from the Supreme Court of Arizona**

## BRIEF FOR AMERICAN VETERINARY MEDICAL ASSOCIATION AS AMICUS CURIAE

*May It Please The Court:*

The American Veterinary Medical Association respectfully submits this brief *amicus curiae* in support of the appellee. Written consents to the filing of this brief have been obtained from all parties and have been filed with the Clerk pursuant to Rule 42.

## INTEREST OF AMICUS

The American Veterinary Medical Association ("AVMA") is the national organization of the veterinary medical profession. Historically, AVMA has served both the profession and the public by (i) preparing a Model Veterinary Practice Act for the consideration of the various state legislatures, and (ii) recommending ethical standards for the guidance of those veterinarians who desire to belong to AVMA. Advertising standards represent an important aspect of AVMA's work and one that is essential to the proper functioning of a responsible veterinary medical profession.

The veterinary profession's advertising policies are currently being challenged, as are the advertising ethics of several other professions. In December 1975, the Federal Trade Commission initiated a formal investigation of veterinary advertising standards along with many other issues.[1] Also, earlier this year, the Arizona Attorney General filed suit against the Arizona Veterinary Medical Association attacking certain restrictions on advertising by veterinarians within the State of Arizona, among other things.[2]

Here, appellants Bates and O'Steen attack the validity of attorney advertising restrictions under untenably broad theories of Sherman Act and First Amendment construc-

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1 Federal Trade Commission File No. 762-3074.

2 *State of Arizona* v. *Arizona Veterinary Medical Ass'n*, Ariz. Superior Ct., County of Maricopa (No. C-334115).

tion. Their theories overarch vast differences in the public-private regulation of the various professions and run roughshod over intricate questions of social policy affecting the professions. AVMA and the veterinary medical profession are vitally interested in the preservation of sound professional attitudes and practices under the laws of this Nation. Their advertising standards are essential to this goal and serve the best interests of society.

## ARGUMENT

Appellants openly justify promotional advertising within the professions as a means to accentuate the commercial side of professional activity at the expense of professional service to the public. Appellants admit they advertised specifically to increase volume and thus to alter the economics of law practice in favor of their standardization of so-called "routine" legal services. The ethics of appellants' operational system are plainly the concern of the bar, not of AVMA. Nevertheless, we reiterate the Court's own recent observation that:

> "Physicians and lawyers, . . . do not dispense standardized products; then 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." (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817, 1831 n.25 (1976)).

Here, appellants' advertisement was premised on an oversimplification of the manner in which a consulting profes-

sional person functions. The inherently misleading and destructive character of such advertising techniques has motivated regulatory effects of long standing among the professions, including the veterinary medical profession.

We stress two facts at the outset. *First,* appellants seem to have designed a so-called "professional clinic" to dispense what is virtually a scrivener service by paralegal and clerical assistants. It does not appear that appellants offer significant professional judgment with respect to their clients' individualized problems or their clients' need for the requested service. This is hardly the manner in which attorneys, physicians, veterinarians and other professional persons render personalized and judgmental services to the public. Medical professionals, for example, must engage in individualized consultation and observation in order to diagnose disease, prescribe dangerous or restricted drugs, and watch even for uncomplained-of communicable diseases in their everyday client contacts. The commercial needs of appellants' peculiar operation neither typify the professions nor substantiate the broad legal theories they propose.

*Second,* the Court does not have a full factual record, either here or in prior cases, regarding the legal issues of advertising in the veterinary and human medical professions. The self-regulatory experience of lawyers has been, if anything, atypical among the professions. The veterinary medical profession, like many others, is regulated by state licensing boards empowered to establish licensing criteria and binding ethical standards for persons who wish to practice within the jurisdiction. Rarely, if at all, are veterinary medical associations involved in the regulatory process, except insofar as they may petition state governments and otherwise express the profession's views.

This brief is divided into three principal parts, which will demonstrate in respective sections that:

(i) The state-action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), creates a federal antitrust exemption for private professional activity conducted in compliance with mandatory state ethical standards;

(ii) Professional advertising restrictions are reasonable, ancillary restraints that do not violate Section 1 of the Sherman Act; and

(iii) Appellants' First Amendment arguments should be rejected in light of the inherently misleading character of the professional advertising exemplified by this case.

## I.

## PARKER v. BROWN EXEMPTS PROFESSIONAL ADVERTISING RESTRICTIONS FROM SHERMAN ACT APPLICATION, NOTWITHSTANDING SO-CALLED "PRIVATE INITIATIVE" BY THE PROFESSIONS.

The professional associations of this Nation have a long and salutary history of writing ethical standards for the guidance of their membership. The professions hold a collective trust to society, and their practitioners have the fullest working knowledge of the duties, the shortcomings and the potential abuses most directly affecting the particular profession.

Appellants propose restrictions on the state-action antitrust exemption of *Parker* v. *Brown,* 317 U.S. 341 (1943), that would effectively preclude association initiatives for the regulation of their professions. Appellants attack the state-action doctrine with a broadaxe:

> "Since the [appellee] bar association exercised a high degree of individual choice in privately initiating the ban upon advertising, the prohibition violates the Sherman Act despite its adoption into a state regulation of binding effect." (Brief for the Appellants, p. 27).

Appellants have seized upon the peculiar integration of the Arizona bar and state supreme court to blur the distinction between private and public rulemaking. (*Id.*, pp. 60-64). Appellants seem to contend, in the politest possible terms, that the state court lacks detachment and independence as a rulemaking body and, on these grounds, that the advertising ban represents no true state interest.

Appellants' distrust of the public-private relationship in Arizona state lawmaking supplies no proper basis for their sweeping assault on *Parker* v. *Brown.* Indeed, the Court recognized in *Parker* that California's agricultural proration program was "proposed by [private] producers" and, to become effective, "must also be approved by a referendum of producers." Nevertheless, the Court ruled ". . . it is the state, acting through the Commission, which adopts the [proration] program and which enforces it with penal sanctions, in the execution of a governmental policy." (*Parker* v. *Brown, supra,* 317 U.S. at 356). The *Parker* decision leaves no room for appellants' "private initiative" theory of antitrust liability.

Moreover, the full impact of appellants' state-action arguments cannot be appreciated on the present record alone. The formalized regulatory duties of the "integrated" Arizona State Bar hardly typify the advisory relationships which generally exist between state governments and many professions. Certainly this *amicus* knows of no "rubber

stamp" among the state governments of this Nation, despite appellants' contrary insinuation.

To illustrate, the AVMA exercises no state-delegated disciplinary authority over licensed veterinarians. Its Judicial Council has undertaken, nonetheless, to draft and periodically to update a Model Veterinary Practice Act for consideration by the various state legislatures.[3] Many states have enacted portions of the Model Act, providing for executive appointment of licensing boards independent of the AVMA and of its constituent state veterinary associations. Of special note, the Model Act (§11) recommends that a licensing board should be empowered to discipline a veterinarian for:

> "The use of advertising or solicitation which is false, misleading, or is otherwise deemed unprofessional under regulations adopted by the Board."

AVMA does not promulgate or recommend advertising standards for the consideration of state licensing boards. Again, however, AVMA's Judicial Council does publish *Principles of Veterinary Medical Ethics* in which the Council attempts to formulate a professional consensus on objectionable advertising practices, applicable to AVMA's member veterinarians: *e.g.,* advertising personal superiority over one's colleagues, advertising secret remedies or exclusive methods, or advertising fixed fees for given services. Some state licensing boards may have considered AVMA's recommendations; others may not have. Whatever the case, AVMA has well served the public and the profession by rendering its opinion on these matters.

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[3] The current Model Veterinary Practice Act is reprinted in the *Journal of the American Veterinary Medical Association,* Vol. 167, No. 11, at pages 1021-28 (Dec. 1, 1975).

No responsible profession could reasonably be expected to continue this important work if it were threatened with antitrust treble damage liability arising either (1) from its mere communication of recommended ethical standards to state officials, or (2) from the profession's later reliance on any such recommended standards if and when they were given the force of state law. The first of these two liability concepts was expressly repudiated by the Court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).[4] Here, appellants try to finesse *Noerr* by proposing the second liability concept, which in truth is nothing but a circumlocution that would, as a practical matter, revive the first form of liability. The cardinal principles of this Court's *Noerr* decision could never tolerate an antitrust rule that condemns, directly or indirectly, the participation of professional associations in ethical rulemaking by the states.

Appellants find no help in the Court's recent decisions interpreting *Parker* v. *Brown*. To the contrary, appellants' entire "private initiative" theory seems calculated to avoid the force of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975), where the Court stated:

> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is *whether the activity is required by the State acting as sovereign.*
>
> . . . Here we need not inquire further into the state-action question because it cannot fairly be said that

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[4] In *Noerr*, the Court upheld the right of certain railroads and other parties collectively to conduct a publicity campaign for the purpose of inducing favorable legislation. Sherman Act liability may not be imposed for an exercise of the right to petition government. (*See* 365 U.S. at 139-40).

> the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." (Emphasis supplied).

The Virginia bar's fee schedules in *Goldfarb* had not been officially adopted by the state supreme court as mandatory codes of professional behavior; indeed, enforced fee schedules appeared to contravene the state's regulatory policy. (*Id.*, pp. 789-90). Here, of course, the Arizona advertising ban *is required* "by the State acting as sovereign."

Appellants turn to *Cantor* v. *Detroit Edison Co.*, 96 S.Ct. 3110 (1976), as support for their notion that any element of "private initiative" must preclude the state-action exemption. Their reliance is misplaced. In *Cantor,* while Detroit Edison's state-approved "light bulb supply" tariff was compulsory in the short term, the state Commission clearly had no intention to regulate the statewide distribution of light bulbs:

> "Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. The Commission's approval of [Detroit Edison's] decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program." (96 S.Ct. at 3114).

Thus, not only the creation but the perpetuation of the light bulb supply program was realistically at the utility's private discretion:

> "[T]here can be no doubt that the option to have, or not to have, such a program is primarily [Detroit Edison's], not the Commission's." (*Id.*, p. 3118).

Appellants gain nothing from the *Cantor* analogy. Rather, "[T]he States have a compelling interest in the prac-

tice of professions within their boundaries." (*Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 792). The states have a proper interest in *every* facet of professional conduct that touches the public, and historically they have regulated a broad range of professional activities.

The *Parker* v. *Brown* antitrust exemption ineluctably governs in these circumstances. In complying with the state's regulations, neither the practitioner nor his professional association engages in a concerted restraint of trade within the purview of Section 1 of the Sherman Act; for as in *Parker* (317 U.S. at 350), the general application of any such restraint on professional advertising "derive[s] its authority and its efficacy from the legislative command of the state" and in no sense operates "by force of individual [private] agreement or combination." The state itself may be susceptible to Supremacy Clause attacks for allegedly creating a restraint of trade that unreasonably derogates federal antitrust policy. But so long as the state's command has force of law, its compulsory restraint operates on the profession without a private concert of action. Accordingly, the private sector neither incurs liability for its compliance, nor does it have the power to void the state's restraint.

Appellants thus try to find private anticompetitive activity by the appellee State Bar which exists separately from the mere compliance with state law. What they formulate, in the end, is some sort of "private agreement" between the State Bar and the American Bar Association *to advocate and enact* the advertising ban presently at issue.[5]

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[5] *See* Brief for the Appellants, pp. 64-65.

Appellants' last-ditch theory cannot withstand scrutiny, for in their effort to escape *Parker* v. *Brown,* appellants have run squarely into the Court's holding in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra.*

## II.

**PROFESSIONAL ADVERTISING RESTRICTIONS, WHETHER BY THE STATES OR BY THE ASSOCIATIONS, CONSTITUTE REASONABLE, ANCILLARY RESTRAINTS PERMISSIBLE UNDER THE SHERMAN ACT.**

*Parker* v. *Brown* resolves any question of private antitrust illegality in the professions' compliance with state ethical standards having general and binding effect. Of necessity, the state-action exemption operates despite allegations (as in *Parker* itself) that the ultimate regulatory effect is anticompetitive and would violate the Sherman Act if it were accomplished without state mandate. Appellants erroneously presume the inapplicability of *Parker* v. *Brown* in order to reach their substantive Sherman Act considerations.[6]

Even then, appellants' antitrust argument consists mainly of oversimplifications and truisms that do not come to grips with the hard issues raised by professional advertising and its regulation. Key points in their argument are barely more than assertions: (1) that restrictions on direct

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[6] Appellants are in certain respects unclear whether, on the one hand, they are primarily attacking the State Bar's allegedly "private" actions (as implied by appellants' *Parker* v. *Brown* arguments), or on the other hand, are challenging the validity of Arizona's sovereign prohibition of lawyer's advertising (as implied when they claim to be "simply seeking to invalidate the restraint, not to impose treble-damage liability upon the State Bar or the American Bar Association," at pp. 64-65).

price advertising by professionals invoke a *per se* rule of Sherman Act illegality (Brief for Appellants, p. 56); (2) that price advertising by lawyers, and impliedly by other professionals, is certain to bring a decrease in prices and in costs to the consumer (*id.*, p. 11); and (3) that appellants' own advertisement cannot be deemed deceptive or misleading because they performed the advertised services at the promised rates (*id.*, pp. 16-17, 45-46).

AVMA submits that none of these assertions is a self-evident truth or principle suitable for use in judging professional advertising restrictions under the federal antitrust laws.

### A. Professional Advertising Restrictions Are Properly Governed by the "Rule of Reason," Not by Per Se Standards of Illegality.

In *Goldfarb* v. *Virginia State Bar, supra,* the Court explicitly cautioned against the facile application of antitrust concepts developed in other business settings to the conduct of the professions. As Chief Justice Burger explained:

> "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." (421 U.S. at 787-88 n.17).

These well-founded observations directly contradict any *per se* approach to restraints on the practice of professions, whether those restraints arise from state action or even from private consensus among practitioners.

The Court has upheld rules of *per se* Sherman Act illegality only for the very few classes of agreements or practices whose "pernicious effect on competition and lack of any redeeming virtue" had become apparent from prior judicial experience. *Northern Pacific Railroad Co.* v. *United States,* 356 U.S. 1, 5 (1958); see *White Motor Co.* v. *United States,* 372 U.S. 253, 263 (1963). No *per se* rule applies to advertising restraints generally, and certainly none can be invoked as to advertising restrictions governing the professions.[7]

Restrictions on professional advertising can only be judged under the "rule of reason" of the Sherman Act. The Court has recognized that most trade regulations cause some degree of commercial restraint, and yet these do not offend the Sherman Act where the restraint is merely ancillary to a reasonable and proper regulatory objective. Thus:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint

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[7] Appellants' principal authority for a *per se* rule on advertising restraints, *United States* v. *Gasoline Retailers Ass'n., Inc.,* 285 F.2d 688 (7th Cir. 1961), does not support their theory. There, the court determined that a conspiracy between service station operators and a union local—which included among other things a price advertising ban—cause a *price fix* that was itself *per se* unlawful under Sherman Act precedents. (285 F.2d at 691).

> is applied. . . . The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." (*Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918)).

The proper objectives of professional advertising restrictions brook no dispute. In other contexts, the Court has upheld society's compelling interest in restraining professional advertising activities in order to avoid misleading the public and to maintain professional standards and competence. (*Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 611-12 (1935); see also *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489-91 (1955)). These concerns reflect the fundamental reality that society's interest in professional services is in large measure non-commercial in character. By its very nature, promotional advertising would establish a commercial ethic of individual self-advancement, an ethic that contradicts the historic function and public trust of the professions.

Appellants bear a heavy burden under these circumstances to show serious ancillary restraints which override the clear and longstanding purposes of professional advertising restrictions. Far from doing so, appellants rely upon quasi-economic arguments which, in fact, highlight the reasonableness and necessity of the very restrictions they attack.

### B. Unrestricted Advertising of Professional Services Has Grave Hidden Costs to the Public.

Appellants contend that fee advertising by lawyers and other professionals would automatically decrease prices,

suggesting a simplistic comparison between advertising restrictions and the fee schedules in *Goldfarb*. Appellants' price-reduction theory has no basis in fact, not even if consideration were limited to (1) the unit price, (2) of routine procedures implemented without professional judgment, and (3) without any adjustment for the cost (both in monetary and emotional terms) of dispensed services which a consulting professional person might persuade the client are unnecessary or inadvisable. The stripped-down economics of appellants' case offer poor criteria for evaluating the propriety of unrestricted professional advertising. Of most immediate importance, though, appellants' economic contentions gravely oversimplify the restraint-of-trade issue presented to the Court.

Appellants stress the fact that their legal practice is "a highly unusual one" in which the emphasis "is very clearly upon matters of a routine nature." (Brief of Appellants, pp. 6, 8). More specific characteristics of appellants' practice are as follows:

> (1) They are experimenting with a so-called "systems approach" to the practice of law, ". . . in which many repetitive tasks are put together by attorneys into systems which can then be operated by paralegals." (*Id.*, p. 7). Appellants never explain what function the professional attorney performs in their "system" beyond the drafting of form documents, the organization of paralegal and clerical workers, and the required signature of documents for court filing.
>
> (2) Appellants appear to apply no significant professional judgment to the individual circumstances of their clients. This characteristic is particularly evident from appellants' refusal to accept either contested divorces *or* divorce matters in which the potential clients "have not reached agreement with their

spouses on the terms of the divorce." (*Id.*, p. 8). In short, appellants will undertake to prepare and execute papers, but they are apparently unwilling to render professional advice, not even on the basic alternatives for property settlement in an uncontested divorce.

In all matters which appellants accept, *the client must tell the attorneys* exactly what he wants and needs to have done.

(3) Appellants nevertheless advertise publicly under the headline "DO YOU NEED A LAWYER? LEGAL SERVICES AT VERY REASONABLE FEES." (Juris.Stat., Exh. A).

(4) The stated purpose of appellants' advertisement is to generate large-volume business from people who *believe* they know precisely what "legal service" they need and whose questions for the attorney are simply procedural-mechanical. (Brief for Appellants, p. 10).

Appellants practice law almost as foremen of a mass production system. At the same time, they seek to advertise fees for the rendering of professional "legal services."

Projected consumer cost-savings lie at the heart of appellants' argument, but their empirical analogies are revealing. Appellants refer to studies showing the reduction of retail prices, (1) for prescription drugs and (2) for eyeglasses, in states which have permitted price advertising in those product lines. (Brief for Appellants, pp. 11-12). Both analogies involve products rather than judgmental services, and even then, products which the pharmacist or optician typically prepares on the order and specification of a patient's consulting physician.

Appellants' economic proposition, based on these analogies, is premised upon reducing the practicing lawyer to

a dispenser of standardized products who may decline to exercise professional judgment on the client's need for a requested service. Appellants offer this proposition in the name of increased volume, greater efficiency and reduced unit costs. Conceivably, prices *might* be lowered if individual lawyers were encouraged to run "specials" on uncontested divorces, if physicians did so on children's shots, and if veterinarians did so on rabies vaccines—all on the condition (whether fairly disclosed or not) that the client or patient was the sole judge of his own needs and would receive no professional advice in the bargain.

Every true profession, however, has a diagnostic and advisory function. Even on the most routine matters, clients-patients frequently have only a general idea of the service they need. And those clients-patients who do have specific requests must sometimes be dissuaded from their plans or be urged to take an alternate course of action that may be either more or less costly than the original request. Consulting professionals encounter these situations daily. Medical practitioners may have explicit requests for unnecessary surgery; requests for potentially dangerous drugs; and requests for simple treatments when an examination reveals the need for more serious measures. Legal practitioners confront a different range of problems. Clients may offer pre-arranged divorce settlements without adequate provisions for the maintenance of insurance policies; they may seek declarations of bankruptcy on misconceptions of the dischargeability of specific debts; and they may request, in infinite varieties, a lawyer's procedural expertise to facilitate questionable transactions.

When professionals cease to provide judgment and begin merely to dispense, the individual and social costs can be

enormous. We concur most vigorously with Chief Justice Burger's separate comments in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817, 1832 (1976):

> "Attorneys and physicians are engaged primarily in providing services in which professional judgment is a large component....
>
> ". . . I think it important to note also that the advertisement of professional services carries with it quite different risks than the advertisement of standard products."

Here, appellants have advertised their legal clinic in order to promote volume and minimize the unit price of a standardized service. They have done so, and have constructed their case, on a false theory that the "sovereign consumer" can prescribe his own professional services in the same manner he selects a detergent. Unfortunately, the client-patient who *does* get exactly what he requests from a professional dispensary may not receive what he really needs, and yet having been "served", he may not seek separate professional advice.

The professions have struggled continuously over the years with consumer misunderstanding of their functions. Advertising by professionals has the capability to accentuate that misunderstanding, and the result has staggering implications in social cost. The professions owe society their best effort to regulate misleading advertising within their own ranks, and such efforts cannot reasonably violate the Sherman Act. Competition among professionals based on public misunderstanding is not competition in the economic or legal sense.

### C. Appellants' Promotional Advertising of Professional Fixed Fees Was Inherently Deceptive.

Appellants further contend that their advertisement cannot be considered misleading because they performed competent services at the advertised rates. To the contrary, appellants' conduct provides a vivid illustration of the deleterious purposes that unrestrained professional price advertising can serve.

Advertising is a subtle medium that carries many messages besides that of product availability and price. Advertising communicates an entire ethic as to the manner in which people should evaluate their needs in relation to the product or service being advertised and as to the factors they should emphasize in making a selection. Here, appellants advertised pre-packaged legal services at fixed fees, and they did so precisely to promote fee competition on discrete and standardized services. The inescapable *message* of an advertisement of this nature is that clients-patients can and should shop for professional service on this basis alone. Appellants' message has misleading and dangerous connotations.

*First,* many clients-patients do not and would not understand appellants' standardization and pre-packaging of the advertised legal service, and these clients are deceived outright. Laymen can be expected to trust that professional practitioners will always perform the essentials of professional service despite any apparent haste—that counseling not rendered is counseling not needed. For this reason alone, appellants' advertising technique would be fatally misleading without a franker disclosure of the *de minimis* counseling service which seems to underlie their clinic "systems approach."

*Second,* appellants cannot openly promote their pre-packaged legal services without implicitly urging the public to accept routinized procedures in lieu of normal professional consultation. Once underway on a large scale, such advertising could be expected to mold the public's concept of the profession's function and services. Some laymen may be persuaded, as many may already believe, that they are fully capable to define their own needs and that professionals exist solely to dispense pre-packaged services. Misconceptions of this sort are easier to promote than they are to dispel. When appellants advertise their peculiar form of professional relationship, their message touches the entire profession in its effort to bring service to the public.

*Third,* the appellants purvey a form of professional relationship that not only minimizes counseling on the client's immediate problem but discourages broader consultation on matters beyond the limited purpose of a visit. Appellants' system plainly seems designed to sell a discrete service rather than a relationship. By contrast, the character of a genuine professional contact can be illustrated from familiar procedures in the medical fields: thus, a dentist may be asked to perform a hygienic prophylaxis, and yet he routinely examines the patient's teeth whether requested to or not; the veterinarian may be asked by his client to administer a vaccine, and yet he observes the animal for visible disease which could be communicable to humans or to other animals; the physician may be asked to vaccinate a child, and yet he inquires about the child's general health. This is the nature of professional service as it has existed and should continue to exist in this country.

The conscientious practice of a profession demands judgment *and* initiative; it may involve counseling of the client-patient that was not expected. These are facets of professional service that cannot readily be priced-out and packaged, nor can they be advertised effectively to a public which does not have the expertise to value services it may not even foresee needing. Individualized advertising that depreciates the importance of genuine professional services and the underlying professional relationship is inherently misleading.

Appellants seem to have placed themselves squarely within this category of deceptive advertising, insofar as they have dissected legal service into discrete operations, abandoned the counseling function of their profession, and advertised the residue as "LEGAL SERVICES AT VERY REASONABLE FEES." To restrain advertising of this character can hardly violate the Sherman Act, whether such restraints are imposed by the state or by the profession.

## III.

### THE INHERENTLY MISLEADING CHARACTER OF APPELLANTS' ADVERTISING PRECLUDES ANY RELIANCE ON FIRST AMENDMENT PROTECTIONS OF COMMERCIAL SPEECH.

Appellants' theory of First Amendment "commercial free speech" likewise presumes that their fixed-fee/standardized-service advertisement was non-deceptive. To the contrary, the inherently misleading connotations of appellants' advertising and their implied depreciation of professional services far exceed any recognized constitutional guarantees.

Appellants oversimplify the governing First Amendment principles. Commercial speech admittedly warrants a degree of constitutional protection; but for compelling practical reasons, the Court has previously distinguished commercial from non-commercial speech, noting that ". . . a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* 96 S.Ct. at 1830 n.24). In many contexts, commercial speech requires special regulation only in its "time, place, and manner." (*Id.*, p. 1830). And yet even as to source and content restrictions, the Court expressly withheld judgment in *Virginia State Board of Pharmacy* with regard to First Amendment applications to the legal and medical professions:

> "Although we express no opinion as to other professions, 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." (*Id.*, p. 1831 n.25).

Here, appellants not only neglect these considerations but confirm, by their own facts, the uncompensated dangers of professional fee advertising.

*First,* appellants' fixed-fee/standardized-service advertising projects an image of professional activity that directly contradicts the historic function of the professions. The Court has observed in *Bigelow* v. *Virginia,* 421 U.S. 809, 826 (1975), that:

> "To the extent that commercial *activity* is subject to regulation, *the relationship of speech to that activity* may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." (Emphasis supplied).

If ever "the relationship of speech to activity" called for advertising regulation, appellants' conduct here poses such a case. The states have a compelling interest in defining the character of services that a profession *should* bring to the public and, thus, an essential corollary interest in regulating conduct, such as unfettered advertising, that threatens in the long-run to depreciate those services.

*Second,* the inherently misleading nature of appellants' advertising transforms it into a form of "commercial speech" that the Court has on no occasion deemed worthy of constitutional protection. Chief Justice Burger foretold the present situation in his separate comments in *Virginia State Board of Pharmacy:*

> "Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." (96 S.Ct. at 1832).

The deceptive qualities of appellants' advertising, previously described, go far beyond the issue of "competent work at the promised fee." Rather, their message to consumers—their portrayal of standardized, non-consultative functions as "legal service"—supplies hard confirmation of the inherently misleading character of professional fixed-fee advertising.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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