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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,
Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF FOR THE VIRGINIA STATE BAR, COMMONWEALTH OF VIRGINIA, AS AMICUS CURIAE

This brief as *amicus curiae,* in support of the petition of appellee, is filed by the Virginia State Bar, Commonwealth of Virginia, by its counsel, the Attorney General of Virginia, pursuant to Rule 42(4) of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The Virginia State Bar is a defendant in two pending cases which involve the legality of a prohibition against the advertising of legal services. *Hirschkop* v. *Virginia State Bar,* Civil Action No. 75-629-A (E.D. Va. 1975); *Consumers Union of United States, Inc.* v. *American Bar Association,* Civil Action No. 75-0105-R (E.D. Va. 1975).

QUESTIONS PRESENTED

1. Whether a ban against promotional advertising of legal fees promulgated by a state supreme court violates the First Amendment.

2. Whether, in light of *Parker* v. *Brown,* 317 U.S. 341 (1943), the Sherman Act is applicable to a Disciplinary Rule promulgated by the Supreme Court of Arizona and to enforcement of the Disciplinary Rule by the State Bar of Arizona pursuant to the Court's command.

3. Whether, if the Sherman Act is applicable, enforcement of the Disciplinary Rule by the State Bar of Arizona constitutes a contract, combination or conspiracy in unreasonable restraint of trade.

SUMMARY OF ARGUMENT

I. This case involves the question of the extent to which a state can regulate the conduct of attorneys in the public interest. It is undisputed that courts have inherent power to regulate the practice of law. Advertising by attorneys with limited exceptions is inimical to the public interest.

To prohibit only "false, misleading and deceptive" advertising will not sufficiently protect the public: (a) Because legal services are not fungible, any advertisement of fees for specific legal services is inherently deceptive. Reasonable fees can only be established after consultation; (b) an attorney cannot comply with DR 2-106(B) if he advertises standard fees. (c) A general "false, misleading and deceptive" standard would be unenforceable given the variety of advertisements likely to be published by enterprising and imaginative attorneys and the size of the disciplinary machinery available to police such activity.

There is no constitutional infirmity to a prohibition of advertising by attorneys. The necessity of such laws in the professions has been recognized since *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935). *Bigelow* v. *Virginia,* 421 U.S. 809 (1975) and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 96 S.Ct. 1817 (1976), do not require a different result. *Bigelow* involved an effort by Virginia to regulate activities outside of Virginia. Arizona is, of course, regulating the practice of law in Arizona. *Pharmacy* involved the advertisement of drug prices. Drugs are fungible goods, and no public interest is served by a prohibition against price advertisement. Legal services are not fungible, not standard, and not subject to quality control.

II. *Parker* v. *Brown,* 317 U.S. 341 (1943), held that Congress did not intend the Sherman Act to apply to activity otherwise violative of the antitrust laws, where such activity was authorized by a state legislature, even if the activity was initiated and promulgated by private competitors in the marketplace. Accordingly, where a state, through one of its constitutionally created branches, has made a decision that some policy other than completely free and open competition is in the public interest, federal courts are not free to review the wisdom of the enactment under the guise of the antitrust laws.

That the *Parker* rationale is still viable today is shown by this Court's analyses thereof and reference thereto in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), *Cantor* v. *Detroit Edison Co.,* 96 S.Ct. 3110 (1976), and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 96 S.Ct. 1817 (1976).

The implicit holding in *Goldfarb* requires that the instant case be affirmed. A defense based upon the *Parker* doctrine was not sustained because the activity held to violate the Sherman Act was not commanded by the state as sovereign, but rather was only implicitly approved by an inferior state body. In the instant case, the challenged action was required by the Supreme Court of Arizona, the highest judicial authority of the state and an entity with no possible economic interest in the result of the command.

In *Cantor,* a majority of this Court held that approval by an inferior state agency of otherwise illegal conduct engaged in by private entities was not protected by the *Parker* doctrine, at least where the civil action did not charge state officials with illegal conduct. Although a majority of the Court set forth "unfairness" and "implied repeal" tests under which an exemption might be applicable, a plurality held that where the acts of state agencies or officials were challenged, the *Parker* doctrine was applicable, and the analysis need go no further. A majority of the Court held where (1) the command came from the state as sovereign, and (2) the acts of state agencies or officials were challenged, the antitrust laws were inapplicable. Because the State Bar of Arizona is a state agency and was commanded to implement the challenged Rule of the Arizona Supreme Court, the Sherman Act is inapplicable to the challenged conduct of the Bar.

This principle is bolstered by the decision in *Olsen* v. *Smith,* 195 U.S. 332 (1904), where it was recognized that no combination was formed when agents of the state simply performed their legal duties. This Court, moreover, realized that the antitrust laws are not the proper vehicle to challenge state regulation.

If the *Parker* doctrine is not applicable in the instant case, it then becomes necessary to determine whether any actions of Appellees are violative of the Sherman Act. A necessary ingredient of any Section 1 violation is some type of contract, conspiracy, or combination. Although it is not clear who the alleged conspirators are in the instant case, it is clear that under any factual situation, the alleged conspirators were ordered to engage in the challenged action. Under the *Olsen* rationale, *supra*, since all parties simply were performing their legal duties, no combination in law existed. Moreover, because if any agreement did exist, it was among other entities who were an integral part of the judiciary of the State of Arizona, the rationale of the intraenterprise conspiracy cases is applicable, and it cannot be held that the state judiciary conspired with itself. *See Joseph E. Seagram & Sons* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

If this Court holds that a combination did exist, then the legality of the alleged restraint should be tested under the rule of reason rather than the *per se* rule. Although one court has held that an agreement not to advertise, in at least some circumstances, is akin to price fixing and is *per se* unreasonable, *United States* v. *Gasoline Retailers Association*, 285 F.2d 688 (7th Cir. 1961), this Court has recognized that legitimate professional objectives make it improper to automatically apply antitrust standards and concepts which originated in other contexts to the professions. *Goldfarb* at 787 n.17. A *per se* standard is applicable only after long experience demonstrates that the challenged practice is both unnecessarily anticompetitive and has no redeeming virtue.

PRELIMINARY STATEMENT

This case involves the question of to what extent a state can regulate the conduct of attorneys in the public interest. Only last year, this Court while finding that minimum fee schedules violated the Sherman Act, nevertheless stated:

> "We recognize that States have a *compelling interest* in the practice of professions within their boundaries, and as a part of their power to protect the public health, safety and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 336 (1952), see also *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 611-613 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.' See *Sperry* v. *Florida,* 373 U.S. 379, 383 (1963); *Cohen* v. *Hurley,* 366 U.S. 117, 123-124 (1962); *Law Students Research Council* v. *Wadness,* 401 U.S. 154, 157 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." (Emphasis added.) *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792-93 (1975).

It should not be overlooked that the disciplinary rule under attack here is that promulgated by a sovereign court governing the conduct of attorneys within its jurisdiction. It has long been the rule that courts have inherent power to regulate the practice of law. *Lathrop* v. *Donohue,* 367 U.S. 820

(1961); *Theard* v. *United States,* 354 U.S. 278 (1957); *Powell* v. *Alabama,* 287 U.S. 45 (1932).

DR 2-101 in substance prohibits advertising by attorneys with specific exceptions. The premise upon which the rule is based is that advertising by attorneys is inimical to the public interest. EC 2-9 provides:

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

ARGUMENT

Appellants' basic position is that a general prohibition against advertising is unnecessary and unconstitutional. Their view is that a proscription against "false, misleading and deceptive information" is all that is required. They assert that the information which they wish to publish is not misleading and is necessary for a consumer to make an intelligent choice of an attorney. Appellants' position is unpersuasive for at least three important reasons: (1) information regarding legal fees, which appellants wish to publish and which is prohibited by the Code of Professional Responsibility, is deceptive and misleading; (2) a standard of "false, misleading and deceptive" as applied to the information sought to be published is unenforceable; and (3) the information sought to be published is not in the public interest.

1. The Information Which Appellants Seek To Publish Is Deceptive And Misleading.[1]

In substance, the prohibited information which appellants wish to publish relates to an attorney's fees for legal services. These cannot be provided in a way which would be less harmful than helpful to the public. Appellants' belief that fee information would be helpful in the selection of an attorney is based upon at least two false premises: (1) there are certain "standard" legal services, easily capable of definition, fees as to which rarely vary; and (2) application of a "false, misleading and deceptive" standard to the advertisement of legal fees would prevent any evils flowing from that practice.

Turning to the "standard" legal services, an example from the proposed advertisement will suffice to show the fallacy in this approach. Appellants advertise the fee for an uncontested divorce. No mention is made of property settlements or custody arrangements. Clearly, these factors would cause substantial variation in that fee. Moreover, is there any room in appellants' "systems approach"[2] for determining whether a couple should be divorced or whether there is a possibility of a reconciliation? It is precisely because of such

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[1] There is clearly no First Amendment protection for deceptive or misleading advertising. *See, e.g., Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 340 (1974); *Konigsberg* v. *State Bar,* 366 U.S. 36, 49 and n. 10 (1961); *Donaldson* v. *Read Magazine, Inc.,* 333 U.S. 178, 189-90 (1948).

[2] Appellants' Brief at 7.

unanswered questions that fee advertising should be prohibited. It is often true that an attorney has a standard fee for certain types of legal services. This fee cannot be stated in the abstract, however. It can only be quoted after an assessment of a potential client's legal problems. Such an assessment cannot, of course, take place absent a consultation.

Apart from the problem of the impossibility of a client's knowing what a "standard" legal service is, there is in addition the ethical requirement of the Code that a lawyer consider certain factors in a determination of a reasonable fee for his services. DR 2-106(B) lists those items which must be taken into consideration:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the locality for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

"(8) Whether the fee is fixed or contingent."

Only items (3) and (7) could be considered without regard to the individual client involved. It is impossible for a lawyer to advertise a "standard fee" while meeting the requirements of DR 2-106(B).

2. A Standard Of "False, Misleading And Deceptive" As Applied To The Information Sought To Be Published Is Unenforceable.

It is argued that there is no need to prohibit advertising because false and misleading conduct is already prohibited by DR 1-102. One need only view a few commercials on television to realize how ineffective a "false, misleading and deceptive" standard is as applied to advertising under the jurisdiction of the Federal Trade Commission. How much more ineffective it would be in an area involving legal services, which are not standard and not fungible. It is well known that the disciplinary process is nearly always manned by volunteer lawyers who receive no compensation. It would be virtually impossible to police the myriad of kinds of advertising which could be promoted by enterprising attorneys. The disciplinary machinery would collapse under its own weight. The problem was stated perhaps as succinctly and well as it could be by Michael Frank, Executive Director of the Michigan Bar and author of the American Bar Association's new proposed DR 2-102, when he responded to the question whether he would agree that DR 1-102 prevented false and misleading statements made by lawyers:

> "I would totally disagree. I would say that the rule prohibits such conduct, certainly doesn't prevent it."[3]

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[3] *Consumers Union of United States, Inc.* v. *American Bar Association, supra,* Frank deposition, p. 74.

3. The Information Appellants Seek To Publish Is Not In The Public Interest.

A. THERE IS NO CONSTITUTIONAL INFIRMITY IN PROHIBITING ADVERTISING BY ATTORNEYS.

The landmark case with regard to advertising by professionals is *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935). In upholding an Oregon statute prohibiting the advertisement of prices by dentists, Chief Justice Hughes, writing for the Court, stated:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The Legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the marketplace. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." 294 U.S. at 612.

See also, Head v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955); *Johnston* v. *Board of Dental Examiners,* 134 F.2d 9 (D.C. Cir.), *cert. denied,* 319 U.S. 758

(1943); *Toole* v. *State Board of Dentistry,* 300 Mich. 180, 1 N.W.2d 502, *appeal dismissed,* 316 U.S. 648 (1942).

Toole is particularly interesting since it involved challenges to statutes regulating the practice of dentistry on due process and free speech grounds. In upholding the statutes the Supreme Court of Michigan said:

> "The claim that the Act violates the free speech section of the Constitution [Art. 2, § 4], and the due process section [Art. 2, § 15], as well as the Fourteenth Amendment to the Constitution of the United States, is fully answered in *Semler* v. *Oregon State Board of Dental Examiners* (citation omitted) . . . ." 1 N.W.2d at 504-505.

See also Patterson Drug Company v. *Kingery,* 305 F.Supp. 821 (W.D. Va. 1969); *Economy Optical Company* v. *Kentucky Board of Optometric Examiners,* 310 S.W.2d 783 (Ky. 1958); *Levine* v. *State Board of Registration and Examination in Dentistry,* 121 N.J.L. 193, 1 A.2d 876 (S.Ct. 1938); *Sherman* v. *State Board of Dental Examiners,* 116 S.W.2d 843 (Texas 1938).

That *Semler* has continued vitality is shown by the fact that it has been cited with approval by this Court in two recent cases. *Goldfarb* v. *Virginia State Bar, supra,* at 792-793; *Bigelow* v. *Virginia,* 421 U.S. 809, 825 n. 10 (1975). The reaffirmation of *Semler* in *Bigelow* is particularly significant since *Bigelow* was a First Amendment case.

Appellants place great reliance upon the *Bigelow* decision. The reliance is misplaced. Apart from the fact that the *Semler* line of cases was reaffirmed in *Bigelow,* the case does not support the proposition for which appellants cite it. Under attack in *Bigelow* was a criminal statute which prohibited the dissemination of information about abortions. Bigelow was convicted under the statute for advertising the availability of abortions in New York where such medical services were legal. After stating that "commercial advertising enjoys a degree of First Amendment protection . . ." (421 U.S. at 809), the Court said:

> "The State of course, has a legitimate interest in maintaining the quality of medical care provided within its borders. *Barsky* v. *Board of Regents,* 347 U.S. 442, 451 (1954). No claim has been made however, that this particular advertisement in any way affected the quality of medical services within Virginia.
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> * * *
>
> "Here Virginia is really asserting an interest in regulating what Virginians may hear or read about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances." 421 U.S. at 827-28.

Of course, in the instant case Arizona is regulating only the activities of attorneys within its borders.

It is also interesting to note that the Court in *Bigelow* did not analyze the Virginia statute under a "compelling interest" test, the standard normally associated with First Amendment issues. That the "speech" in that case was entitled to only a "degree" of protection manifests a less rigorous test for advertising than for noncommercial speech.[4] Moreover, even under a compelling interest test, the rule under attack here should be sustained.

Finally, there was no argument in *Bigelow* that the advertisement was deceptive, 421 U.S. at 828. For the reasons discussed, *infra,* the information which appellants seek to publish here is deceptive and misleading.

[4] *See* 89 Harv. L. Rev. 111, 119-120 (1975).

B. Consumers Have No Constitutional Right To Compel Advertising By Lawyers.

Appellants place great reliance on the so-called "right to know" cases, finding their primary comfort in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 96 S.Ct. 1817 (1976). That case does not provide the decision in this case. There, this Court found that no State interest was served by a prohibition against the advertisement of drug prices and that the ban did not serve the public health. *Terry* v. *California State Board of Pharmacy,* 395 F.Supp. 94 (N.D. Cal. 1975), *aff'd,* 96 S.Ct. 2617 (1976), involved a statute similar to Virginia's. A primary distinction between those cases and advertising by lawyers is highlighted by a statement in the opinion of Judge Peckham in *Terry.* In distinguishing the *Semler* line of cases, he said:

> "These cases upheld certain state regulations of the advertising of professional services. They are distinguishable from the present case in which the California statutes prohibit the advertisement of price of a commodity, a specific item prescribed and identified by a physician. The pharmacist does nothing more than provide exactly what the doctor ordered. While the pharmacist's function is very important and attendant with great responsibility and risk, *it is more akin to the provision of a product than the rendering of a service,* which is commonly thought of as involving greater flexibility and discretion on the part of the provider." (Emphasis added.) 395 F.Supp. at 108.

Legal services by contrast are not fungible. They are highly individualistic and not subject to reasonable quality control. For the reasons given, *supra,* it is not in the public interest to permit advertisement of fees.

4. The State Bar Of Arizona Has Not Violated Federal Antitrust Law.

A. Federal Antitrust Laws Are Not Applicable To The Disciplinary Rule, Or Action Of The State Bar Of Arizona Pursuant Thereto, Challenged By Appellants.

In actuality, the question presented to this Court under the antitrust laws cannot be whether the challenged Disciplinary Rule falls within the state action exemption advanced by *Parker* v. *Brown,* 317 U.S. 341 (1943), if the doctrine of *Parker* retains any viability whatsoever; for if there is any life left in the state action exemption, certainly the doctrine applies in this case.

Yet it is clear that the rationale of *Parker* retains vitality, notwithstanding that the scope of its applicability may have been narrowed from that perceived by many attorneys before 1975. In fact, the very cases upon which some rely, when espousing *Parker's* demise, attest that the state action exemption lives, and is especially appropriate in the factual context of the case at bar. In both *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), and *Cantor* v. *Detroit Edison Co.,* 96 S.Ct. 3110 (1976), this Court made it clear that the state action exemption is applicable in a proper case. Moreover, the passing reference to and citation of *Parker* in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 96 S.Ct. 1817 (1976), exemplifies this Court's support of proper state regulation of the professions, even when such regulation, if it had been initiated by those in the private sector of the economy, would violate antitrust principles.

The point of origin in explaining the applicability of the state action exemption is *Parker* itself. That case tested the validity of a California statute which *authorized* the establishment of admittedly anticompetitive marketing programs and acts pursuant thereto by state officials. Interestingly, those who actually established the programs were competitors in the market which was subject to the restraint of trade. Thus, the program was one of self-regulation, although ultimate authority to administer the program was placed by statute with the Director of Agriculture. Upon this set of facts, this Court noted that the program "was never intended to operate by force of individual agreement or combination," 317 U.S. at 350, but rather "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Id.* Nothing in the Sherman Act even suggests or hints that the statute is intended to restrain state or official action directed by a state or its legislature.

Thus, the crux of *Parker* is that where a state has made a conscious decision that economic competition or some other policy goal of the antitrust laws is not the "summum bonum" in a particular relevant product market, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 421 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970), Congress intended that the state's judgment be given credence and, *a fortiori,* federal antitrust laws are not applicable. There is no indication that Congress intended federal courts to second-guess the states in such matters to determine whether the directive of the state is wise or unwise. *Cf., Ferguson* v. *Skrupa,* 372 U.S. 726 (1963).

This Court's decision in *Goldfarb* is consistent with the *Parker* decision in all respects relevant to the case at bar. Although in both cases the state command concerned a general program rather than specific activity, and although in both, authority was delegated to subordinate state self-regulating bodies, and although opposite results were rendered on the state action exemption question, the present set of facts neatly falls within the *Parker* doctrine, without offending the rationale of *Goldfarb*. Indeed, the case at bar presents a stronger set of facts for application of the state action exemption than did *Parker* itself.

Goldfarb holds that for the exemption to be sustained, the challenged activity must be "required by the state acting as sovereign." 421 U.S. at 790. This Court held that the minimum fee schedule there challenged was not required by Virginia statute or court rule, but instead was the action of the Virginia State Bar and a local bar association. If anything, the state as sovereign, through the Virginia Supreme Court, had directed attorneys " 'not to be controlled' by fee schedules." *Id.* at 789. Accordingly, it was held that the *Parker* rationale was inapplicable and that the challenged activity would be scrutinized under the Sherman Act.

Although cases subsequent to *Goldfarb,* decided by the Circuit Courts of Appeal for the Third and Fifth Circuits, relaxed the seemingly strict rule of *Goldfarb* by holding that the challenged action only need be intended or contemplated by the state in its sovereign capacity, *Duke & Co.* v. *Foerster,* 521 F.2d 1277 (3d Cir. 1975), and *City of Lafayette* v. *Louisiana Power & Light Co.,* ...... F.2d ...... (5th Cir. 1976), the State Bar of Arizona need not rely on this more liberal principle. For in the case at bar, the state as sovereign, in the form of the Supreme Court of Arizona, clearly and without doubt, commanded the *specific* prohibition here in question by promulgating the challenged rule. Accordingly, the State of Arizona has made a reasoned judgment that the dangers of advertising in places, manners and content proscribed by the Disciplinary Rule outweigh any benefit there might be in the allowance thereof. Certainly, this judgment by the sovereign state should not be overruled lightly, especially in the context of an antitrust analysis.

The weight of a rule promulgated by a state's supreme court is equal to that of a legislative enactment in determining whether the challenged directive is one of the state as sovereign. A command from any of the constitutionally coequal branches of government, *i.e.,* the legislative, the executive or the judicial, is of identical weight. Indeed, this was recognized in *Goldfarb,* especially when this Court noted "that the State of Virginia through its Supreme Court Rules [had not] required the anticompetitive activities of either respondent." 421 U.S. at 790. The paradigm has been echoed by the Antitrust Division of the United States Department of Justice: "Clearly the Legislature, the Judiciary or the Executive exercising those functions entrusted to them by the state constitution are the 'state as sovereign.' "[5] Any other decisional rule would defy logic.

Perhaps this Court's rationale for its holding in *Goldfarb* is synthesized and advanced most cogently by its passing reference to *Gibson* v. *Berryhill,* 411 U.S. 564 (1973). A state agency, where it is composed of competitors in the market regulated by the state, cannot promulgate "anticompetitive practices for the benefit of its members," *Goldfarb, supra,* at 791, unless it is commanded to do so by the state as sovereign. But this is not what happened in the case at bar. Here the challenged action was that of the Supreme Court of Arizona. Accordingly, even if the proscription of advertising is unwise, it cannot be assumed that the challenged prohibition was enacted to benefit State Bar of Arizona members, and the *Goldfarb* analysis is inapposite. The conclusion which must

[5] Address of Assistant Attorney General Donald I. Baker, Before the Council of the American Bar Association, Public Utility Law Section, Oct. 28, 1976.

be drawn is that nothing said in *Goldfarb* lends support to the thesis of the Appellants; in fact, *Goldfarb* detracts from their arguments. The facts of the case at bar are neatly congruent with that niche recognized by this Court in *Parker* and *Goldfarb,* where Congress did not intend the Sherman Act to apply.

Cantor v. *Detroit Edison Co.,* 96 S.Ct. 3110 (1976), offers the Appellants less solace than *Goldfarb.* One need look no further than the first paragraph of the opinion to discover that it is not apposite to the instant factual situation:

> "In *Parker* v. *Brown,* . . . the Court held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the *Parker* rationale immunizes private action which has been approved by a State. . . ." *Id.* at 3112.

Apparently, a majority of this Court felt that the utility was asking that the *Parker* doctrine be *extended* to protect it. The majority questioned the applicability of *Parker* because the restraint involved had "substantial impact on the otherwise unregulated business of distributing electric light bulbs." *Id.* But the case at bar is not analogous to *Cantor.* The market for legal services is a regulated market; in every state, at the very least, the practice of law is a regulated occupation. The alleged restraint in the instant case, having been *commanded* by the State Bar of Arizona, clearly is state action as opposed to the *authorization* of conduct by a state regulatory commission subordinate to the state legislature. The doctrine of *Parker* needs no expansion to encompass the case at bar; the action here simply was not "private."

Because of the diversity of opinions, *Cantor* is somewhat difficult to analyze. However, none of the separate opinions support the Appellants' argument. The majority, for example, in Part I of the opinion, carefully chose to view the action of the public service commission, not as a "command" of the state, but as "approval." Perhaps it was concerned that rather than carefully considering the utility's tariff before approving it, the process was one of automatic acceptance or "rubber stamping" of the utility's *fait accompli;* or perhaps the majority was concerned because the state's policy was "neutral" with respect to regulation of the light bulb market. It is difficult to make such arguments here. Even assuming, *arguendo,* that insufficient consideration was given the challenged Disciplinary Rule by the Supreme Court of Arizona at the time of its adoption, since the validity of the Rule was placed before that court in this very case, it cannot be argued seriously that mature consideration was not given; nor can it be argued that the state's policy is neutral on the question of whether the challenged prohibition should prevail.

But the Appellants argue that even if the command of the state is sufficient to meet the *Goldfarb* "threshold inquiry" test, 421 U.S. at 790, the actions of Arizona must pass muster under the "unfairness" and "implied repeal" tests of the *Cantor* plurality. 96 S.Ct. at 3117. Overlooked, however, is the fact that where the "threshold inquiry" test is met and the action of state officials challenged, the two-pronged *Cantor* test set forth in the plurality opinion is not even reached. Although it is true that state officials were challenged in *Goldfarb,* this Court did not hold that a state bar was never a "state agency" for state action exemption purposes; it held only that the exemption would not be sustained where the bar was not commanded to take the challenged action, and such action was taken by it for the benefit of its members. In such a case, and only in such case, the bar's status as a state agency for exemption purposes evaporates. In any other factual setting, however, such as one where the bar is "commanded," the *Parker* doctrine applies with full force. Accordingly, the plurality in *Cantor* reached its two-pronged test only after a clear determination that the suit did not "call into question the legality of any act of the State . . . or any of its officials or agents . . . ." 96 S.Ct. at 3117. *Parker,* therefore, was inapplicable and only then was it necessary to further analyze the case to see if any *other* type of exemption or immunity was proper.

Although the dissenting Justices objected strenuously to the plurality's analysis, it is obvious that they would agree that, *at a minimum,* the state action exemption is viable where the civil action challenges the state, state officials or specific action commanded by the state legislature or the state supreme court. The plurality's view, that the exemption is sustained where the state has spoken through one of its constitutionally established supreme bodies, is certainly correct. Each of the three coequal branches should and can be presumed to have no personal interest in its promulgations and to have acted in the best interests of its citizenry. It is only where the challenged action is essentially private, where a private group is "masquerading under the banner of state action," *New Mexico* v. *American Petrofina, Inc.,* 501 F.2d 363, 370 (9th Cir. 1974), that the federal court need go behind action defended as being that of a state. Even then, it is debatable whether the antitrust laws are the proper route. *Cf. Ferguson* v. *Skrupa, supra.*

The concurring opinions in *Cantor* are not inconsistent with the arguments presented here. Mr. Chief Justice Burger evinced concern that the challenged program of the utility affected a "separate, competitive" market from that of the regulated market for electricity. 96 S.Ct. at 3124. Given this finding, and that the state's policy is neutral, indeed silent, on the question of whether the light bulb product market should be regulated, the challenged program was found to have overstepped any directive of the legislature as sovereign. But as noted *supra,* in the instant case, the market is regulated; there is no allegation that it should not be regulated; and the state's policy, with respect to the specific prohibition challenged, is not neutral.

Mr. Justice Blackmun's concurrence is less easy to analyze because through its "rule of reason" rationale, it seems to merge the question of exemption with that of whether, assuming no exemption, a violation of the statute has occurred. Yet the question in every antitrust case is whether or not a restraint is reasonable. *See Chicago Board of Trade* v. *United States,* 246 U.S. 231 (1918). Although some practices are illegal *per se* because of "their pernicious effect on competition and lack of any redeeming virtue . . . ," *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958), this simply means that experience has shown the practice to be unreasonable *per se.* Accordingly, the standard used in determining whether the Sherman Act is violated is always one of reasonableness. One is led to believe, therefore, that perhaps the more traditional *Parker* analysis holds little credence under this concurring opinion. In any event, discussion on this matter is deferred until the immediately succeeding section of this brief, where it is shown that a rule of reason analysis is applicable if the *Parker* doctrine does not prevail.

It is submitted that when the question of exemption is considered in the context of the most relevant cases decided by this Court, *i.e., Parker, Goldfarb* and *Cantor,* one realizes that *Goldfarb* and *Cantor* simply are inapposite. The instant case is a *Parker* case. Moreover, reliance on *Schwegmann* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951), is misplaced.[6]

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[6] Appellants' Brief at 64.

Although it is appealing at first blush to cite *Schwegmann* in support of the proposition that Congress acted specifically where it intended an exemption, *Schwegmann* really stands only for the thesis that when Congress enacted a specific exemption for certain state fair trade programs, it did not intend to exempt non-signer schemes. *Parker,* itself, destroys the interpretation of *Schwegmann* posited by Appellants.

Perhaps the most succinct and concise analysis of the applicability of antitrust law to state action is found in the seminal decision of this Court on the subject. In *Olsen* v. *Smith,* 195 U.S. 332 (1904), Texas laws regulating pilotage which, in effect, established a monopoly by board regulatees, were attacked, *inter alia,* as being violative of the antitrust laws. This Court, meshing somewhat the concepts of applicability of the law and actual violation thereof, noted that "no monopoly or combination in the legal sense can arise from the fact that . . . agents of the state are alone allowed to perform the duties devolving upon them by law." 195 U.S. at 345. This means that although there may be a combination in the true sense of the word, *i.e.,* some type of collective behavior, there was no intent by Congress that state action undertaken by two or more government officials leads to the identical legal conclusion. Moreover, this Court in *Olsen* recognized that what, in actuality, is a substantive due process question, *i.e.,* whether or not a state regulation is wise or unwise, should not be analyzed in the context of the antitrust laws. To paraphrase the language of the Ninth Circuit in *American Petrofina, supra,* the case before this Court is a substantive due process case "masquerading under the banner" of antitrust. Again and again in recent years this Court has advanced its disdain for nullifying state action, even where the Court felt the action economically unwise. *Ferguson* v. *Skrupa, supra.* Here the Appellants, realizing that a direct attack on such ground would fail, simply attempt to come in the back door.

B. Even If The Prohibition In Question Is Subject To The Antitrust Laws, The Prohibition Does Not Violate The Sherman Act.

If the *Parker* doctrine is applicable, then, of course, this Court's inquiry need go no further. If the state action exemption is not sustained, it then becomes necessary to determine whether the challenged conduct violate the substantive antitrust statutes.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1969), requires that some type of contract, combination or conspiracy exist before its prohibitions are triggered. In the case at bar, it is difficult to determine who the conspirators are. In *Goldfarb,* the tainted "agreement" was between the Virginia State Bar and the local bar association, membership in the latter being completely voluntary. In contrast, if the combination here is asserted to be between the Supreme Court of Arizona and the State Bar of Arizona or its governing body, no combination can be found for two reasons. First, under the rationale of *Olsen, supra,* there is no combination in a legal sense where the purported participants simply are doing what the state as sovereign requires them to do. Second, the rationale of the intra-enterprise conspiracy cases, *e.g., Joseph E. Seagram & Sons* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970) and *Nelson Radio & Supply Co.* v. *Motorola, Inc.,* 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953), are applicable and negate any possibility of a combination where, as here, the bar, an administrative agency of the court, is an integral part of the judiciary and simply implements court directives.

The same rules of law apply if the combination is asserted to be among the members of the bar's governing body or between the bar and its regulated members. Although at first blush the intra-enterprise conspiracy argument seems to be weakened by cases such as *United States* v. *National Trailer Rental System, Inc.,* 156 F.Supp. 800 (D. Kan. 1955), *aff'd per curiam,* 355 U.S. 10 (1957), which held that the defense was inapplicable to individuals where their trade association, the vehicle through which they conspired, was not an integration of its members' businesses. However, this rationale would seem to be inapplicable where, as in the instant case, the entity is an integrated bar in which membership is required and the entity's allegedly illegal action is not voluntary, as in the case of a trade association, but is commanded by the state.

Assuming, *arguendo,* that a combination within the meaning of the Sherman Act is found, it then must be determined whether the behavior, itself, unreasonably restrains trade. It is true, as noted in Appellants' Brief at 55, that one court has declared an agreement not to advertise, at least where combined with other collective action, to be *per se* violative of the Sherman Act. *United States* v. *Gasoline Retailers Association, Inc.,* 285 F.2d 688 (7th Cir. 1961). Moreover, to the extent that Appellants' bald assertion that "[s]tatus as a profession does not authorize substitution of a 'rule of reason' for a *per se* rule,"[7] is deemed to be synonomous with the assertion that there is no blanket "learned professions" exemption from applicability of the antitrust laws, such is true. However, in light of this Court's comments in *Goldfarb,* especially the recognition that "[i]t

[7] Appellants' Brief at 55.

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," 421 U.S. at 787 n.17, it cannot be argued that an automatic *per se* standard attaches to the conduct in question here. This statement and the sentence immediately subsequent thereto, which expressly states that differing treatments under the Sherman Act may be necessary, clearly advance some type of reasonableness concept. In fact, this concept of reasonableness was recently applied in *Feminist Women's Health Center, Inc.* v. *Mohammad,* 415 F.Supp. 1258 (N.D. Fla. 1976). The court there was concerned with a group refusal to deal by physicians, a violation traditionally classified as *per se* unreasonable. Although recognizing the usual applicability of a *per se* rule in the situation presented, the court also recognized that the public was acutely concerned with the standard of medical care it received. A standard of reasonableness was introduced into the case by the court holding that no violation of law by the physicians would be found if

> "their action was motivated by a bona fide concern over the existence of satisfactory medical care rather than by concern over the economic impact of competition upon their medical practices. For only if they were motivated by such bona fides can their actions be deemed reasonable under the *per se* doctrine, if plaintiff has established a prima facie *per se* case." 415 F.Supp. at 1263.

Accordingly, if the *Parker* doctrine is inapplicable, if this Court allows the antitrust laws to be used as a vehicle to challenge the wisdom of a state enactment, and if a combination is possible between the entities here involved, the questions reduce to whether or not the prohibition is reasonable. The analysis of Mr. Justice Blackmun, in his concurrence in *Cantor, supra,* would seem to conclude that a rebuttable presumption of reasonableness attaches to state sanctioned activity. *Id.* at 3127. It would be appropriate to require Appellants to prove unreasonableness by "clear and convincing evidence," rather than by a simple preponderance.

Even if, therefore, *Parker* v. *Brown* is not applicable in this case, a violation of the Sherman Act has not been shown. The challenged activities certainly are not *per se* illegal, and Appellants have not met their burden of persuasion under the rule of reason.

CONCLUSION

For the reasons stated herein, the decision of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stuart H. Dunn, a member of the Bar of the Supreme Court of the United States and counsel for the *amicus,* hereby certify that I have served three copies of the foregoing Brief by depositing same in the United States Post Office, first class postage prepaid, this 16th day of December, 1976, to William C. Canby, Jr., 413 E. Loyola Drive, Tempe, Arizona 85282 and Melvin L. Wulf, 22 East 40th Street, New York, New York 10016, counsel for appellants, and to Orme Lewis and John P. Frank, 100 West Washington Street, Phoenix, Arizona 85003, counsel for appellee. All parties required to be served have been served.

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