IN THE

Supreme Court of the United States

October Term, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN
Appellants,

v.

THE STATE BAR OF ARIZONA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF OF APPELLEE

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JURISDICTION

This is a State Bar disciplinary proceeding. The final order of the Arizona Supreme Court imposing discipline was entered on July 26, 1976. The defenses were constitutional and antitrust challenges to an Arizona Supreme Court disciplinary rule concerning lawyer ethics. The opinion, as yet unpublished, is attached to the Jurisdictional Statement. The Notice of Appeal to this Court was filed on July 28, 1976. Probable jurisdiction was noted here on October 4, 1976. This Court has jurisdiction under 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Does Disciplinary Rule 2-101(B) of the Code of Professional Responsibility as adopted by the Arizona Supreme Court violate appellants' rights to freedom of speech and

press under the First Amendment as incorporated in the Fourteenth?

2. Does a ban upon lawyer advertising originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court violate the Sherman Act notwithstanding the state-action exemption doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

1. The core of Disciplinary Rule 2-101(B), as embodied in Rule 29(A) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. (1976 Supp.) is as follows:

> "DR 2-101
>
> . . . .
>
> "(B) 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 advertisements 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. . . ."

(Seven exceptions follow, including those for legal assistance organizations, which appellants' "clinic" does not purport to be.)

2. The applicable provisions of the First and Fourteenth Amendments are as follows:

> (a) First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press.
>
> (b) Fourteenth Amendment: "No state shall . . . abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law. . . ."

3. The portion of the Sherman Act, 15 U.S.C. § 1,

relied upon by the appellants is as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

STATEMENT OF FACTS

Appellants, two members of the Arizona Bar, operating what they have styled a "legal clinic," placed an advertisement in a Phoenix newspaper offering their services and stating their prices. The advertisement is reproduced in Appendix A hereto. This was a flat violation of the Arizona Supreme Court's Disciplinary Rule 2-101(B) which prohibits lawyer advertising; the precise relevant language is: "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 . . . ."

The rule is one adopted by the Arizona Supreme Court under the express statutory authority of A.R.S. §§ 32-237, 264. It is essentially the same as the disciplinary rule of the American Bar Association, without certain variations recently recommended by the House of Delegates. The violation was uncontested (App. 70, 127). After proceedings before a Special Local Administrative Committee, an appeal to the Board of Governors of The State Bar, and a further appeal to the Arizona Supreme Court, the violation was confirmed and the rule upheld in an opinion by Chief Justice Cameron against the various attacks made upon it. Since, while the dispute is earnest, the violation was a good faith challenge to the validity of the rule, the Arizona Supreme Court contented itself with the imposition of censure. This has been stayed by order of Justice Rehnquist pending final disposition of the matter here.

There are two questions presented: first, whether the Disciplinary Rule denies free speech, and second, whether

it violates the antitrust laws. From these three factual areas emerge for discussion: first, the identification of the appellants, their activities, and their advertisement; second, the professional tradition and practice in respect to advertising; and third, the competitive consequences of the advertising restriction. To avoid duplication, we reserve the latter two for the Argument portion of this brief.

The appellants purport to operate what they denominate a "legal clinic" (App. 69). Since an important portion of their position is that a legal clinic is somehow materially different from a conventional law firm, and is somehow better, more wholesome, more socially serviceable and therefore subject to some special consideration under the laws, we turn to the precise nature of their professional operation.

Putting the matter most favorably to the appellants, we set forth their description of what they are doing. They seek:

> ". . . to extend legal services, quality legal services at the most reasonable fees possible to persons of moderate and low income; people who were not capable of qualifying under the financial guidelines of the Legal Aid Society, and therefore had traditionally had difficulty finding lawyers." (App. 75).

This, according to appellants, is achieved by cost-saving features, by specialization, and by the extensive use of paralegal or legal assistant personnel (App. 75-76). Illustrations of their economies are the use of printed forms and automatic typewriter equipment along with the maintenance of a very small library (App. 79).

Chief Justice Burger in his concurring opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817, 1832 (May 24, 1976) (hereafter the *Prescription Drugs* case) observed: "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." The

good faith of the appellants in this case is apparent from the record, and very obviously the simple advertisement published represents a meticulous effort to avoid error. It thus puts to the test the question of the Chief Justice as to whether legal service advertising is highly likely to be "inherently misleading," for even this carefully prepared blurb is probably deceptive.

The ad describes the office as a "legal clinic." Appellants acknowledge that the term cannot be defined in any regularly established definition of which they are aware (App. 84-85). So nearly as appellants can describe it, a legal clinic is a body which attempts to supply low and middle income persons with standardized legal services, through automatic equipment and liberal use of paralegals, at low prices. Appellants recognize that law offices in the State of Arizona commonly have many of these identical features, *i.e.*, they use paralegals, they use automatic equipment, they have so-called systems operations (App. 79-80). Moreover, the appellants' "clinic" is not restricted at all, except by the happenstance of who comes to them, to persons of any particular income level. The clients of the office range from the welfare level to persons with a family income of $25,000 a year, and a few with even more than that (App. 81-82); they would take a client with a $50,000 income (T. 51). The fact is that the appellants are willing to serve anyone in the community, regardless of income (App. 82).

The appellants' clientele is a mixture. Some persons are sufficiently poor so that they might be able to apply to Legal Aid for assistance (App. 86). Others could perfectly well take their work to any law office, and the appellants are "undoubtedly competing for that work" (App. 88). In part the appellants believe that they are performing legal services for persons who would otherwise not get such services—in other words, expressly, they handle divorces, bankruptcy matters, and personal injury matters which would not otherwise be in court (App. 89-90).

Appellants take personal injury work. They wish to advertise for that work by newspaper advertisements but do not care to walk through hospitals or knock on doors or press cards into the hands of the injured after the accident (App. 90-91). However, they believe that the same First Amendment rights they assert for newspaper advertisements would probably give them an equal right to solicit the injured or the hospital patient if they were of a mind to do so (App. 91-92). On the other hand, the appellants are not of clear opinion at the moment as to whether they have the right to circulate handbills throughout the community looking for law business (App. 92-94).

Appellants make no pretense of offering a complete service, even in the divorces they commonly handle. They accept no contested divorces (App. 96-97). If, after the clients have come to the office, any difficulty crops up, no matter how small, the clients are turned away (App. 100).

The services purport to be offered "at very reasonable fees." The price for an uncontested divorce is $175. The time required on these divorces ranges from a minimum of an hour and a half to three hours, but the same fee applies (App. 105). Yet the hourly rate of the office is $40 for lawyers and $20 for assistants (App. 131-32). This led Justice Gordon of the Arizona Supreme Court, concurring, to observe that there are "instances in which $175 fee quoted for this service would be unreasonably high."

The price for a name change is $95. A person can, through the Clerk of the Court, perform this service for himself without charge, but the clinic does not regard itself as obligated to disclose this to its clients. As put by one of them, "[I]t's not my job to inform a prospective client that he needn't employ a lawyer to handle his work." (App. 112-13). In much the same spirit, appellants make no systematic effort to determine whether their clients are eligible for the (free) Legal Aid service (App. 88). The price for adoptions with uncontested

severance is $225, and Justice Gordon queried whether it was "deceptive to advertise legal services in connection with an uncontested adoption proceeding when by statute the County Attorney, upon application, is required to perform similar services without expense to the petitioner."

Appellants' trade did increase after the ad; see Ex. 17 (App. 479), which lists a number of cases "opened due to advertising." This two-column, eight-inch ad was accompanied by a news story on page 1, and other news stories following it, and appellants acknowledged that they had no way of knowing whether their business boost was due to the ad or the stories (App. 228-29; 230-31).

SUMMARY OF ARGUMENT

The power of the state to forbid advertising of professional services has been universally recognized; this Court dismissed the last appeal here on free speech grounds for want of a substantial federal question; *Toole v. State Board of Dentistry*, 316 U.S. 648, 62 S. Ct. 1299, 86 L. Ed. 1731 (1942), following the lead decision of Chief Justice Hughes in *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S. Ct. 570, 79 L. Ed. 1086 (1935). While no case in this Court has deviated from this conclusion, Footnote 25 in *Prescription Drugs, supra*, seems to warrant a fresh look at the whole topic and so we take that look here.

At the same time we rely on the train of thoughtful opinions in the past as our prime authority. Were Chief Justice Hughes now to be overruled, we believe it would be the first time for any of his powerful civil liberties opinions. We have gone back to the briefs in *Semler* which demonstrate that if the great Chief Justice were ever thoughtless or accidental, which we doubt, he was surely not so here.

Nonetheless we go behind established law to first principles. If there are to be special rules for the professions, we must first know what a profession is and so we analyze

the sociological literature to recognize the core elements of professionalism. Those elements can be clustered around four essentials: the first, a special training and long experience required beyond the usual callings of life; second, an ideal of service to the public and the client which puts a limitation on normal trade acquisitiveness; third, the performing of services which are sufficiently beyond common understanding that the public frequently can neither know what it truly wants nor evaluate what it has received, thus creating special problems of social control and avoidance of deception; and fourth, that the professions have a certain autonomy, dignity and status which together create, in the sociological phrase, the *esprit de corps* of a sub-culture.

These are real things. Plato, who thought of professionals as healers and navigators, was the first to discuss the difficult problem of balance between service and gain for a professional man. Professionals sacrifice many liberties of speech besides the sacrifice of advertising; for one illustration, the oldest restriction on professional speech is the provision in the Oath of Hippocrates on maintaining confidences; lawyers keep the same tradition.

Dicey, like Plato an observer outside the profession, recognized that professionals must "sacrifice a certain amount of individual liberty in order to insure certain professional objectives."

Given the definition and concept, we turn to historical analysis. In the nineteenth century in America the profession both permitted solicitation including advertising and failed badly to achieve its standards of service. We discuss the relationship of these conditions not as cause and effect but as companion evils. We advance the argument that advertising conflicts with the essences of a profession. For all of the failures of the profession (and they are conceded) we do find that it performs great service quite incompatible with that commercialism of which advertising is the very

spirit.

We turn then to the problems of "balancing" in connection with commercial speech which is mandated by the opinion of this Court in *Bigelow v. Virginia,* 421 U.S. 809, 825 n.10, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975). We advance the argument, following Chief Justice Hughes, that professional advertising is inherently deceptive. We demonstrate with specific references that this deceptiveness is uncontrollable and that it is an outright invitation to fraud and overreaching. We argue that advertising is incompatible with every element of a profession which makes a profession worthwhile as a calling, except money-making. While, without doubt, the public service of the law is not enough and community needs are not met by existing institutions, advertising will make a bad matter worse. There is no good answer to the opinion of Chief Justice Traynor that the prime victims of legal advertising will be the very persons whom these appellants earnestly seek to aid.

On the antitrust aspect of the case, we deal with express state enforcement of an express state rule, not with private conduct; we are squarely within the rule of *Parker v. Brown, supra,* and nothing in *Cantor v. Detroit Edison Co.,* 96 S. Ct. 3110 (1976), which deals with the action of private individuals is involved. Even if the advertising restriction were not exempt, it would be a reasonable restraint.

ARGUMENT

I. *The Ethical Standard Does not Conflict With First Amendment Rights.*

We approach the constitutional question from three standpoints: first, the decisions; second, the professional tradition from the standpoints of sociology, history, and practice; and third, the balance of values.

A. *The Cases Overwhelmingly Support the Canon.*

Viewed from a standpoint simply of case law, the question is whether *Prescription Drugs*, under the guise of putting the question aside in Footnote 25, somehow overruled or rejected the fifty or more years of decisions which have upheld prohibitions on professional advertising. We think not.

Restrictions on professional advertising were expressly upheld in *Semler v. Oregon State Board of Dental Examiners, supra* at 612. The Supreme Court, through Chief Justice Hughes, there stressed proper community concern with the maintenance of professional standards:

> ". . . 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."

Semler has been repeatedly followed. Appellants' Brief at 52-53 recognizes that *Semler* is adverse, but minimizes it as not a free speech case. The *Semler* factors are indistinguishable from the "balancing" factors applicable to "commercial" speech, as is developed below, and in any case, the issue was raised in free speech terms in *Toole v. State Board of Dentistry, supra*, which, resting precisely on *Semler*, found no violation of rights to free speech in such a restriction. What is important about *Toole* is that this Court dismissed the appeal in that case for want of a substantial federal question, 316 U.S. 648, 62 S. Ct. 1299, 86 L. Ed. 1731 (1942), citing *Semler* as authority.[1]

[1]Treating *Semler* for the authority the 1942 Court thought it was, Justices who have upheld professional advertising restrictions on speech include Chief Justices Hughes and Stone and Justices Brandeis, Cardozo (cited to the same effect in another leading case *infra*), Black and Douglas, some of the foremost exponents of free speech ever to sit here.

In this area new times have not brought new law. An abortion clinic may disseminate abortion information by advertisement, *Bigelow v. Virginia*, *supra* at 825 n.10, but the note cited says, "Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity," citing, *inter alia*, *Semler.*[2] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), cited seven times by appellants, said at 421 U.S. 773, 792-93, "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,' " citing, among other cases, *Semler.*

California decisions of great authority reinforce this interpretation of the federal rule. Present California Disciplinary Rule 2-101 expressly prohibits advertising as a means of soliciting professional employment. While the number of exceptions has grown, they are immaterial here and the fundamental rule is as it has been for 50 years. The rule was upheld in *Barton v. State Bar*, 209 Cal. 677, 681-83, 289 P. 818, 820 (1930), as necessary to the "fidelity, honesty, and integrity of the profession." *Mayer v. State Bar*, 2 Cal. 2d 71, 39 P.2d 206, 208 (1934), describes advertising as "utterly intolerable."

Lest this be derided as merely ancient wisdom, we bring it closer to date. Chief Justice Traynor, dissenting in *Hildebrand v. State Bar*, 36 Cal. 2d 504, 225 P.2d 508, 518, 519 (1950), used language directly applicable here: "Clients who need legal assistance only rarely, and are therefore inexperienced in selecting counsel, may be induced by advertising to select unsuitable counsel, with consequent injury not only to themselves but to the reputation of the bar as a

[2] *Bigelow* rests heavily on the fact that those advertising in Virginia were offering services in New York, and that neither the persons performing the services nor those utilizing them were subject to discipline in Virginia; 95 S. Ct. at 2234.

whole." *Belli v. State Bar,* 10 Cal. 3d 824, 112 Cal. Rptr. 527, 519 P.2d 575 (1974), considered advertising in the light of First Amendment principles. It held that Belli could solicit lectures but could not engage in communications principally directed to generating business for his law practice. A few months later, the same California Supreme Court issued its current disciplinary rule, essentially similar to Arizona's, prohibiting advertising by the Bar.

1. *Commercial Speech.*

We are dealing here with the purest imaginable commercial advertising. The appellants avowedly are advertising for the purpose of bringing in more money (App. 120-22, 128), and while they clearly think they are engaged in activity of some nobility in offering their services at a low price (App. 75-76, 123), the immediate object of this advertisement is to increase the flow of dollars into their pockets. The appellants offer simple services in this particular advertisement but they are also engaged in the personal injury practice (App. 71-72). In bringing in clients for the uncontested divorces, which may well be pure loss leaders, they may also pick up wills, probates and personal injury cases involving persons of very substantial means. As concrete evidence of the pure commercialism of the advertising process, we recall from the Statement of Facts that appellants find no necessity or duty to tell those who respond to their ad that they are paying a price which, in fact, may be totally unnecessary.

When the glow of self-righteousness is stripped off this advertisement and the business with which it is connected, we have nothing other than a cut-rate market on selected services, a bargain in some instances and not in others.[3]

[3]The ad does not involve solicitation of legal business for political purposes, *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), nor is there any aspect of group legal services and communications necessary for that purpose, as with labor union-sponsored legal services, *United Mine Workers v. Illinois Bar,* 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967); this case has no relation at all to the "basic

What was said earlier is sufficient to sustain the prohibition so far as the free speech attack is concerned on the basis of decisions aimed squarely at professional practices. The same result could have been reached by viewing the advertisement here as a matter of "commercial speech," long held to be subject to greater control than those forms of speech which present ideas. See *Valentine v. Chrestensen*, 316 U.S. 52, 54, 62 S. Ct. 920, 86 L. Ed. 1262 (1942), which expressly holds that the traditional limitations of the First Amendment do not apply to "purely commercial advertising." See also *Breard v. City of Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), a case upholding limitations on door-to-door solicitation by magazine salesmen, with which compare the testimony recited in the Statement of Facts in this case that the appellants reserve their position on their right to distribute the same advertisement door-to-door or put it directly into the hands of the injured.[4]

More recent decisions modify this power to control purely commercial speech, but do not give it the same insulation as "ideaful" speech. In the cigarette smoking advertising case, *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971) (3-judge court), *aff'd without opinion*, 405 U.S. 1000 (1972), the court noted that "product advertising is less vigorously protected than other forms of speech." We believe the sound view to be that of Judge Hufstedler, concurring in *Rowan v. United States Post Office*, 300 F. Supp. 1036, 1042, 1044 (C.D. Cal. 1969) (3-judge court),

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right to group legal action." *United Trans. Union v. State Bar of Mich.*, 401 U.S. 576, 585, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971); and see similarly *Bro. R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964).

[4] *Cf.*, however, *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943), where door-to-door solicitation is upheld when it is religious literature which is being distributed; and see *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) ("commercial" speech of clear social value protected).

aff'd, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

> "The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. 'Purely commercial advertising' has never received the same kind of constitutional protection as that afforded to expressions of greater public concern. The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales. . . ."

Prior to the *Prescription Drugs* decision the last word on the subject had been *Bigelow v. Virginia, supra*, the case involving an advertisement in Virginia for a New York abortion referral service. That advertisement was held to give information on the "availability of legal abortions" so that "appellant's First Amendment interest coincided with the constitutional interests of the general public." Nonetheless the Court concluded that: "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." 95 S. Ct. at 2233, 2234.

2. *Prescription Drugs.*

This important decision on May 24, 1976, held that the Virginia statutory bans on advertising prescription drug prices violated the First and Fourteenth Amendments.

Justice Blackmun's opinion noted that pharmacists are substantially trained. At the same time the advertising prohibition was not "confined to prescriptions that the pharmacist compounds himself. Indeed, about 95% of all prescriptions now are filled with dosage forms prepared by the pharmaceutical manufacturer." 96 S. Ct. at 1821. Prices varied widely for identical doses of these identical drugs.

In these circumstances, Justice Blackmun's opinion sharply restricted the concept that speech is automatically subject to regulation because it is "commercial." He declared that Virginia may not keep "the public in ignorance of the

entirely lawful terms that competing pharmacists are offering." The flow of price information is "protected by the First Amendment . . . ." 96 S. Ct. at 1830. While the states could deal "effectively" with "deceptive or misleading" information it could not "suppress the dissemination of concededly truthful information about entirely lawful activity. . . ." 96 S. Ct. at 1831.

For purposes of this case, the most important passage of *Prescription Drugs* is Footnote 25, 96 S. Ct. at 1831. The footnote warrants complete repetition:

> "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. 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 possiblity for confusion and deception if they were to undertake certain kinds of advertising."

Chief Justice Burger, concurring, made special reference to note 25 to observe that "quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law. . . . Attorneys and physicians are engaged *primarily* in providing services in which professional judgment is a large component, a matter very different from the retail sale of labeled drugs already prepared by others." 96 S. Ct. at 1831-32.

The concurrence of Justice Stewart does not bear directly on this point; the dissent of Justice Rehnquist does cover the entire subject.

Chief Justice Burger observed that *Prescription Drugs* "deals largely with the state's power to prohibit pharmacists from advertising the retail price of prepackaged drugs."

He said further, "The advertisement of professional services carries with it quite different risks than the advertisement of standard products."

This distinction was pursued closely in this record with appellants' own economist witness, Professor Steven Cox of Arizona State University. Professor Cox affirmatively testified that price advertising would benefit consumers, as demonstrated by a study of the effect of advertising drugs, Ex. 13, and eyeglass frames, Ex. 14. On cross-examination, Professor Cox described the drugs as standard items purchased from national manufacturers. When the druggist gets a prescription "[H]e simply goes to the shelf; gets a large bottle; pours out some standard items and puts them in a smaller bottle and hands them over and charges some money." (App. 197). With the eyeglass purveyor, the function is equally mechanical; the product consists of frames and lenses manufactured nationally (App. 199-200). So far as the pharmacist is concerned, the extent of his professionalism on these products is, "He has to be able to read, and he has to be able to count." (App. 202). These are "the most standardized items that could conceivably be found." (App. 202).

The same witness was then examined as to how he would study the effect of advertising on the price for legal services. The matter for illustrative analysis was an appeal of a murder case (App. 204). The first step, according to the witness, is to standardize "the lawyer doing the appeal" (App. 205);

> "[Y]ou can try to get two degrees of lawyers as comparable as possible, the same number of years, the same number of cased handled on appeal, the same number of cases won . . . ." (App. 207)

On further cross-examination, when the witness had been informed of the hopelessly nonstandard nature of murder cases, he was asked whether there were "any empirical studies which have been made of the effect of advertising

on the price of wholly nonstandard items." He answered "No, and it would be inappropriate to do so." (App. 209-10).

As this Court noted, 95% of the prescription drugs sold are nationally manufactured identical items; and we would wager that there won't be any advertising of the remaining 5% which require individual preparation. These are sales of simple standard products, not services. The kindest thing that can be said for the notion that handling murder appeals is on a par with dishing out Darvon is that it is foolishness. When in Footnote 25 in *Prescription Drugs*, this Court declared that it was not deciding the lawyer's case, we believe it. When it said that "the distinctions, historical and functional, between professions, may require consideration of quite different factors." we accept the declaration and in the balance of this argument will consider those "quite different factors." When this Court declared that "physicians and lawyers, for example, do not dispense standardized products," we read it to declare that *Prescription Drugs* is a determination as to standardized products and not as to professional services.

B. *The Professional Tradition.*

Goldfarb v. Virginia State Bar, supra, while it upholds antitrust restrictions on fee fixing, continues to recognize the force of professional traditions on ethical practices of the professions:

> ". . . 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. . . ." 95 S. Ct. at 2013 n.17.

This is also true of free speech concepts, and so we turn

to an analysis of the "features of the professions."

The existing provision of the Code of Professional Responsibility traces its way to the Canons of Ethics as adopted in 1908 by the American Bar Association. Advertising has been deemed obnoxious throughout the twentieth century.[5]

The new proposal is that the profession radically change its relation to the community. This Court must assess "the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." *Bigelow v. Virginia, supra* at 826.[6] We therefore lay the foundation for that balancing function. In so doing, we appreciate that one must not confuse the familiar with the necessary, that the best of traditions may outlive their usefulness, and that the tradition against advertising must be justified on its merits as a continuing rule for our times.

What is proposed seems simple enough: a profession which, with an irregular pattern marked by great deviation in the 1900's, has thought solicitation improper should now go out looking for business by advertising. To perceive the

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[5]Advertising was permitted in the American practice in the nineteenth century and was limitedly used, though not in appellants' fashion. For an earlier example, Thomas Jefferson and a number of other lawyers notified the public that legal work would not be done without payment of fees; 1 *The Papers of Thomas Jefferson* 98 (J. Boyd & M. Bryan eds. 1954) (original 1773). English barristers in the eighteenth century had a fixed practice against soliciting. Samuel Johnson believed that where litigation was inevitable, a lawyer might as well endeavor "that he shall have the benefit, rather than another," though he would "disdain" to do so himself. J. Boswell, *Life of Johnson* 683 (Oxford Standardized ed. 1953). The profession regards advertising as a subdivision of solicitation and so does medicine (Helme Dep., App. 28-29) and accounting (Davidson App. 44); in this view the prohibition of solicitation covers advertising as one particular means of soliciting. The architects, on the other hand, bar advertising but do not prohibit certain other forms of solicitation (Arnold, App. 149-50).

[6]This decision is expressly said to be "'in no way inconsistent'" with, *inter alia, Semler*, 95 S. Ct. at 2234n.10.

consequences—to strike the balance—we need to know what a profession is, particularly this one, and how the proposed course would affect the profession and the public.

1. *The Concept of Professionalism.*

We begin with the definition of a profession.

We do so with the recognition that the borders between professions and trades are not sharply fixed. Near the margins we have problems. In *Prescription Drugs*, the activity in question achieved its professional status in part by stipulation; see 96 S. Ct. 1820 n. 3. At the same time, as the opinion makes clear, neither the training nor the functions there involved are at the same level of professionalization as medicine, to which pharmacy is so closely connected. The occupations of a society distribute themselves along a continuum, but clearly law is at the inner core of any definition of profession.[7]

[7] *E. Krause, The Sociology of Occupations* 75-76 (1971), adopts the usual view that the classic professions are medicine, law, clergy, and the military. The debasement of the label "professional" to mean little more than "expert" by endless extension of the category is extensively discussed in *R. Lewis & A. Maude, Professional People in England* (1953). On "professions" and "non-professions" see *W. Goode,* discussing librarianship in *Professionalization* 33 (H. Vollmer & D. Mills eds.) (Prentice-Hall, Inc. 1966), hereafter cited as *Vollmer & Mills.* In the same work see *E. Sutherland, Professionalization in Illegitimate Occupations* (Professional Theft) 28. On the development of the "continuum" analysis, see *E. Greenwood* at *Vollmer & Mills* 10. He notes that the U.S. Census Bureau divides occupations into six categories ranging from professionals and semi-professional technical workers to unskilled laborers and domestic workers, and he enumerates more than a dozen professions listed by the Census Bureau.

DIAGRAM 1

The Process of Professionalization in the United States[8]

Profession	Became full-time occupation	First training school	First university school	First local professional association	First national professional association	First state license law	Formal code of ethics adopted
Established							
Accounting (CPA)	19th cent.	1881	1881	1882	1887	1896	1917
Architecture	18th cent.	1865	1868	1815	1857	1897	1909
Civil Engineering	18th cent.	1819	1847	1848	1852	1908	ca. 1910
Dentistry	18th cent.	1840	1867	1844	1840	1868	1866
Law	17th cent.	1784	1817	1802	1878	1732	1908
Medicine	ca. 1700	1765	1779	1735	1847	Before 1780	1912
Others in process (some marginal)							
Librarianship	1732	1887	1897	1885	1876	Before 1917	1938
Nursing	17th cent.	1861	1909	1885	1896	1903	1950
Optometry	–	1892	1910	1896	1897	1901	ca. 1935
Pharmacy	1646	1821	1868	1821	1852	1874	ca. 1850
Teaching	17th cent.	1823	1879	1794	1857	1781	1929
Social work	1898(?)	1898	1904	1918	1874	1940	1948
Veterinary medicine	1803	1852	1879	1854	1863	1886	1866
New							
City management	1912	1921	1948	After 1914	1914	None	1924
City planning	19th cent.	1909	1909	1947	1917	1963	1948
Hospital administration	19th cent.	1926	1926	–	1933	1957	1939
Doubtful							
Advertising	1841	1900	1909	1894	1917	None	1924
Funeral direction	19th cent.	ca. 1870	1914	1864	1882	1894	1834

[8] *M. Zald, Occupations and Organizations in American Society* 20-21 (1970) (footnotes omitted).

The question remains as to what the concept of professionalism is.

Any definition broad enough to include both theologians and military generals must necessarily be highly abstract, and the definitions even among the specialists are not uniform. Putting together the key elements from four sources, a profession may be defined as an occupation which requires "the possession of esoteric but useful knowledge and skills, based on specialized training or *education* of exceptional duration and perhaps of exceptional difficulty. . . . [T] he professional is expected to exhibit a *service orientation*, to perceive the needs of individual or collective clients that are relevant to his competence and to attend to those needs by competent performance. Finally, in the use of his exceptional knowledge, the professional proceeds by his own judgment and authority; he thus enjoys *autonomy* restrained by responsibility."[9] Again, "[A] ll professions seem to possess: (1) systematic theory, (2) authority, (3) community sanction, (4) ethical codes, and (5) a culture. . . ."[10]

What is referred to in the passage just quoted as a culture is more sharply defined as, "the existence of a vocational sub-culture which comprises explicit or implicit codes of behaviour, generates an *esprit de corps* among members of the same profession. . . ."[11]

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[9] *W. Moore, The Professions: Roles and Rules* 6 (Russell Sage Foundation, 1970). *N. Elias*, "Professions" in *Dictionary of the Social Sciences* 542 (J. Gould & W. Kolb eds. 1964), defining the term as "occupations which demand a highly specialized knowledge and skill acquired at least in part by courses of a more or less theoretical nature and not by practice alone, tested by some form of examination either at a university or some other authorized institution, and conveying the persons who possess them considerable authority in relation to 'clients.' " *E. Krause, supra* at 76, similarly notes that the "professionals must control their clients."

[10] *E. Greenwood, Social Work*, in *Vollmer & Mills, supra* at 10.

[11] Quotation from *C. Turner & M. Hodge, Occupations and Professions* in *Professions and Professionalization* 24 (J. Jackson ed. 1970).

It is a "community within a community."[12]

Professional and non-professional distinctions are illustrated in the table following:[13]

DIAGRAM 2

Continua in the Professional Ideal Type

Non-Professional		*Professional*
Technical, Craft skill	Knowledge	Broad, Theoretical knowledge used in
Routine	Tasks	Non-routine situations to reach
Programmed	Decision-making	Unprogrammed decisions according to
Ends decided by society (or other institution)	Authority	Ends (derived from knowledge) decided for society (or institution within it) and supported by
Other or non-work	Identity	Occupational Group because work and occupation are
Means to non-work ends	Work	Central life interest and are also the basis for
Occupational/ Class advancement	Career	Individual achievement which involves meeting initial entry qualifications through
Limited	Education	Extensive Education, showing skill and meeting other latent status requirements involved in the
Specific	Role	Total Role (that is expectations extend beyond expertise and work situation)

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[12]Goode, *Community Within a Community: the Professions*, 22 *Amer. Soc. Rev.* 194 (1957).

[13]*P. Elliott, The Sociology of the Professions* 96 (1972).

The argument following develops that advertising is incompatible with most of the activities and values in the professional column.

The systematic body of knowledge of professionals is applied to the problems:

> ". . . highly relevant to central values of society. Their high degree of learned competence creates special problems of social control: Laymen cannot judge the professional performance; in many cases they cannot even set the concrete goals for the professional's work. This means that the two most common forms of social control of work in industrial societies, bureaucratic supervision by virtue of a formal position and judgment by the customer, are of only limited applicability. The need for social control is, on the other hand, especially urgent because of the values and interests that are at stake."[14]

Given the limitation just quoted, the same author moves to what this case is all about. How can society cope with the problem that social control of a profession is needed and yet difficult because the normal methods don't work? The answer is by harnessing the *esprit de corps* of the subculture:

> "The dilemma is solved by a strong emphasis on individual self-control, which is grounded in a long socialization process designed to build up the required technical competence and to establish a firm commitment to the values and norms central to the tasks of the professional. The values and norms are, furthermore, institutionalized in the structure and culture of the profession. Individual self-control is therefore supplemented by the formal and informal control of the community of colleagues. Accepting the pledge to a self-controlled 'collectivity orientation' as trustworthy, society grants in return privileges and advantages, such as

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[14] *D. Rueschemeyer, Doctors and Lawyers: A Comment on the Theory of the Professions* in *Sociological Perspectives on Occupations* 27 (R. Pavalko ed. 1972).

high income and prestige, and protects the profession's autonomy against lay control and interference. . . ."[15]

It is precisely the operation of this sub-culture which appellants seek to upend. The Code of Professional Responsibility, including the Rule in question, has emerged from very long experience as a means needed to maintain the proper operation of a system of distribution of community services. The regulations ("ethical standards") are presented by the profession to the leadership constituted for it by the State, in this case the State Supreme Court.[16]

There are three other distinguishing features to be mentioned. Professions give to their members a certain traditional status and dignity. It was the first means by which those without inherited wealth could make a living except by manual labor. Second, "the term usually denotes certain occupations whose members give service rather than engage in the production and distribution of goods."[17] Finally, the concept involves the ideal of service. A classic and often reprinted analysis by Professor Robert MacIver is credited with first developing the concept that a singular aspect of professions is the degree of their own autonomy and collective self-control over their standards of performance and behavior. This he found an auxiliary to the ideal of service, of which discussion will follow.[18]

2. *Brief Historical Overview of This Profession.*

We have defined the professions, of which theology, medicine and law are the most ancient in sociological terms, and now speak briefly of the history of this profession.

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[15] *Id.*

[16] The Arizona Supreme Court does in fact utilize discriminating judgment in deciding which portions of recommended ethical codes to select as the law in Arizona, as is developed below.

[17] *N. Elias, Dictionary of the Social Sciences, supra.*

[18] *R. MacIver, Professional Groups and Cultural Norms* in *Vollmer & Mills, supra* at 51-52.

The profession began in the teaching of it; in Roman times there were no law schools, no requirements for admission, no license to practice. Nonetheless there was knowledge to be gained for those who would perform this service. "Scaevola taught Cicero, who in turn taught Caeser and Brutus and became the model for Quintilian and succeeding generations."[19] This teaching function was institutionalized in England so that by the fourteenth century English apprentices studied the common law at the Inns of Court in London. Completion of the studies qualified the student to practice.[20] By the seventeenth century the solicitors had separated from the barristers and lost their ties to the Inns of Court. Because they were not organized, they lost much of their professional tradition, discipline and organization, whereas the barristers became, through their societies, a well-developed, well-organized, well-educated profession.[21]

Lawyers came early to America, trained in the English tradition, and in 1710 Cotton Mather gave us the first recorded American statement on the special need to balance between professional service and professional income. The lawyer, said Mather, had a capacity to do good. Speaking to the lawyers of the new land, he said:

> "Your opportunities to do good are such, and so liberal and gentlemanly is your education . . . that proposals of what you may do cannot but promise themselves an obliging reception with you. . . . When you were called upon to be wise, the main intention is that you may be wise to do good. . . . A lawyer must shun all

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[19] *R. Wilkin, The Spirit of the Legal Profession* 17 (1938). The Oath of Hippocrates makes teaching the first duty of the doctor; 11 *Encyc. Brit.* 827.

[20] *R. Pound, The Lawyer From Antiquity to Modern Times* 85 (1953).

[21] *Id.* at 86, 93.

those indirect ways of making haste to be rich, in which a man cannot be innocent."[22]

Side by side with Mather's concept of the good man grew another conception of a lawyer in America. This was the knave, the spellbinder, the pettifogger. Frequently these were persons who stirred up litigation for the sake of the fees, "the man of easy penmanship and clever volubility."[23] At the time both of the Declaration of Independence and the Constitution, the balance of public opinion still favored lawyers and the weight of esteem recognized the value of the good. Twenty-five of the fifty-six signers of the Declaration of Independence and thirty-one of the fifty-five delegates to the Constitutional Convention were lawyers. But after the Revolution, this esteem disappeared. Lawyers "were denounced as banditti, as blood-suckers, as pick-pockets, as windbags, as smooth-tongued rogues."[24]

The post-Revolutionary attitude continued, and was deserved, for most of the nineteenth century. The hostility was accompanied by the breaking down of professional boundaries. Between 1800 and 1860 the proportion of the states making any requirement of professional qualification to become a practicing lawyer shrank from three-fourths to fewer than one-fourth; for illustration, in Indiana from 1851 until 1940's any person of good moral character could practice law.

As Roscoe Pound reviewed the nineteenth century, "In the era of decadence it was assumed for the first time in Anglo-American law that the bar was not to be regarded as a profession, with requirements for admission such as public policy may prescribe, but as a mere private money-making

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[22]1 *A. Chroust, The Rise of the Legal Profession in America* X-XI (1965).

[23]*Id.* at 6.

[24]*C. Warren, A History of the American Bar* 216 (1966).

occupation."[25] During this period there were no inhibitions on lawyer advertising or indeed, any other inhibitions upon lawyers other than the general law as applicable to the entire society. In territorial Arizona, the practice was to publish classified cards. For illustration, on April 11, 1874, the *Arizona Citizen* in Tucson carried two columns of classifieds which noted two doctors, three attorneys, two dentists, a notary public, a stage station ("ample variety of well cooked food"), and an offer to "ranch" horses and mules at $2.50 a month.[26]

We do not mean to suggest that the low state of the bar in the late nineteenth century was the product of the practice of advertising; it was simply the manifestation of a larger destruction. What had happened, as a sum of many factors, was that the whole concept of professionalism in law was on its way to extinction. The elements of education, honor and service were vanished or vanishing. In the Guilded Era the quick buck was the order of the day.

It was against this background that in 1905 the American Bar Association adopted its first code of ethics and recommended that professional ethics be taught in the law schools and be a subject of examination.[27] By 1922 an A.B.A. committee had begun the function of issuing the advisory opinions interpreting the Canons with which all are familiar.[28]

The twentieth century has seen vast changes in the practice, with giant offices sometimes soberingly described as factories. The rise of big government has created a large role for the government lawyer; these and other changes are legend. This ever-increasing prominence and prosperity of lawyers increases their social responsibility.

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[25]For elaboration see *Pound, supra* at 232, 355.

[26]*J. Murphy, Law, Courts, and Lawyers* 55 (Univ. of Ariz. Press, Tucson, 1970).

[27]*E. Sanderland, History of the A.B.A. and its Work* 112 (1953).

[28]*Id.* at 113.

Concomitant with this growth in the twentieth century has been the effort to restore law as a profession. To put the matter back into the sociologist's terms, the effort has been to rebuild what had existed in America and England in the eighteenth century, a sub-culture with an *esprit de corps* capable of a quality of self-discipline which could lead once again to education, honor and service.

We preach no sanctimony here, no smug complacency. The path has been checkered and the failures disastrous. The profession took a step backward from which it will take decades to recover when the television eye in the great Watergate scandals revealed lawyer after lawyer as a liar or cheat; but at least there is a comfort that it was an intra-professional fight. Those doing the revealing and exemplifying a pattern of morality in public affairs were lawyers, too.

The mid-century and beyond have put enormous demands on lawyers to make services available to the entire community. Inflation and the rising cost of legal services as matched against welfare and unemployment or the shrinking real incomes of the lower middle class and the retired have compelled a reconsideration of the means of distributing legal services. The fervor, mistaken we believe, with which the instant case is presented reflects these current demands. Happily the profession is responding, doing better as it learns how, with legal aid, lawyer referral and various forms of public interest practice. Honor, honesty and public service have taken some bruises; the most strenuous single criticism of the Code of Professional Responsibility is that it is not enforced often enough or hard enough to protect the public. Nonetheless, particularly in the rise of integrated bars in some twenty or more states of which Arizona is one, the profession seeks *as a profession* to meet new and unexpected responsibilities.[29]

[29]For discussion of the integrated bar *see E. Griswold, Law and Lawyers in the United States* 28 (1965).

C. *Professionalism, Service, and Revenue.*

One of the key elements of the profession is a concept of service to the public and service to the individual client. This is a special sort of service, different from the general flow of commerce, serviceable as it also may be. This inevitably leads to the problem of balancing service and revenue. MacIver speaks of "the ethical problem of the profession . . . to fulfill as completely as possible the primary service for which it stands while securing the legitimate economic interest of its members. It is the attempt to effect this reconciliation, to find the due place of the intrinsic and of the extrinsic interest, which gives a profound social significance to professional codes of ethics."[30]

All contemporary expression from within the profession on the relation of the professional and his income, or the distinctions between professionalism and commercialism, are open to the charge of self-service. But Plato, in Book I of the *Republic* said much the same thing as Roscoe Pound in the twentieth century, and both are right.

Plato was talking to the cantankerous Thrasymachus of professionalism and commercialism. For Plato, the obvious professionals were doctors and navigators, and he spoke of their "art." He developed the paradox: "Is the physician . . . a healer of the sick or a maker of money? And, remember I am speaking of a true physician." The answer is a healer of the sick, and it is agreed that "no physician, insofar as he is a true physician [read true professional] considers his own good in what he prescribes, but the good of his patient; for the true physician . . . is not a mere money maker."

Plato develops that these arts must be mastered by those who practice them, and that this mastery makes the professional into a kind of a ruler and the beneficiaries (or

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[30] *R. MacIver, supra.*

clients) the subjects. In short, precisely as today, the client is inescapably dependent upon the judgment of the professional. Since the professional must be paid, there are two "arts"; the "art of medicine gives health," but there must be an "art of pay" as well.

Yet, "in the execution of his work, and in giving his orders to another, the true artist does not regard his own interest, but always that of his subjects." To be willing to do this, he "must be paid in one of three modes of payment, money, or honor, or a penalty for refusing."[31]

Thus, the Platonic paradox. The professional does not seek money, but he must have money. He must make the welfare of others be his first goal ("speaking of the true physician"). His compensation may be money or honor; he is subject to penalty if he fails properly to serve others.

Twenty-three hundred years ago that description did not fit, say, a potter. It did fit the professional, and it still does. In the same spirit, Roscoe Pound spoke of the distinctions between the legal profession and the trades; *R. Pound, The Lawyer From Antiquity to Modern Times* 6, 10 (1953):

> "Historically there are three ideas involved in a profession: organization, learning, i.e., pursuit of a learned art, and a spirit of public service. These are essential. A further idea, that of gaining a livelihood, is involved in all callings. It is the main if not the only purpose in the purely money making callings. In a profession it is incidental.
>
> "The best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law. The other two elements of a profession.

[31] *Plato, The Republic*, Bk. I, as reprinted in 7 *Great Books* 303-06 (*Encyc. Brit.*, 1952).

> namely, organization and pursuit of a learned art have their justification in that they secure and maintain that spirit."

The question must be faced whether these principles are simply self-serving pieties left over from an ancient day when "gentlemen" were officers of the court. In our own time our fellow professionals have the same problems as the rest of struggling humanity in paying the mortgage, buying the car, educating the children. We, as well as the shoemaker, must be in a "money making calling." At the same time, very generally, we perform professional services at low or no cost for those who need them. The Platonic dilemma of service and revenue is thus everlastingly with us.

1. *The National Scene.*

Charles Darwin tells us that, "The more efficient causes of progress seem to consist of a good education . . . and of a high standard of excellence, inculcated by the ablest and best men, embodied in the laws, customs and traditions of the nation, and enforced by public opinion."[32]

An illustration of the Bar's effort to progress toward that high standard of excellence is the recent revision of the Code of Professional Responsibility, which, among other things, mandates the lawyer to promote the availability of competent lawyers for all, to aid in establishing and enforcing standards of professional conduct to protect the public, and to encourage and aid in making needed changes and improvements in our legal system.[33] Canon 8, headed, "A lawyer should assist in improving the legal system," breaks new ground in establishing as an actual ethical duty the responsibility to propose and support legislation and other programs to

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[32]*C. Darwin, The Descent of Man* 49 *Great Books* 328, *Encyc. Brit.* (1952). Frank, *Canon 8 and a Rising Aspiration*, 48 *Texas L. Rev.* 380 (1970), hereafter referred to as *Canon 8*, develops the Darwin theme as applied to lawyers.

[33]Code of Professional Responsibility, *Canon 8.*

improve the system and its procedures.

Within the space of a brief it is impractical to make even a preliminary survey of the lawyer's contribution to public service and so we pause with only this one illustration. Canon 8 postulates as an ethical ideal a mandate to the Bar to use our skills in the social service of mankind by the everlasting improvement of the system with which we work.

In the Canon 8 essay, *supra*, an effort was made to determine the norm which should become the aspiration of lawyers seeking to live up to this standard. Inquiry was made of a small sample of the practitioners on the Council of the American Law Institute and the Committees of this Court, and from persons suggested by the Institute of Judicial Administration and others. Those answering are something of an honor roll of the law, though of course not even a significant partial list from among the thousands of lawyers giving time to these ends every year.[34] The list includes lawyers of from ten to fifty-seven years of experience and practitioners in small towns and great cities.

What have they done? Uniform state laws have been a

[34]Persons responding were: Walter P. Armstrong, Memphis, Tennesee; Joe C. Barrett, Jonesboro, Arkansas; Stuart B. Bradley, Chicago, Illinois; John G. Buchanan, Pittsburgh, Pennsylvania; Paul Carrington, Dallas, Texas; Homer D. Crotty, Los Angeles, California; Norris Darrell, New York, New York; Jordon A. Dreifus, Los Angeles, California; Burnham Enerson, San Francisco, California; Hicks Epton, Wewoka, Oklahoma; Arthur Freund, St. Louis, Missouri; Richard A. Givens, New York, New York; William T. Gossett, Detroit, Michigan; William A. Grimes, Baltimore, Maryland; Erwin Griswold, Washington, D.C.; DeWitt A. Higgs, San Diego, California; Charles Horsky, Washington, D.C.; Seth M. Hufstedler, Los Angeles, California; Albert Jenner, Jr., Chicago, Illinois; Robert A. Leflar, Fayetteville, Arkansas; William L. Marbury, Baltimore, Maryland; Orison Marden, New York, New York; Vincent L. McKusick, Portland, Maine; Robert W. Meserve, Boston, Massachusetts; W. Brown Morton, Jr., Washington, D.C.; Franklin M. Schultz, Washington, D.C.; Craig Spangenberg, Cleveland, Ohio; John A. Sutro, San Francisco, California; Theodore Voorhees, Philadelphia, Pennsylvania; Edward Wright, Little Rock, Arkansas.

consuming interest of the lawyer active in law improvement. So has procedural reform ranging from national to local rules. The responding lawyers have been deeply involved in improving the process of judicial selection and administration.

As those interested in adjusting the legal system to changing social realities, the leaders in law improvement are active in developing a means for bringing legal services to the poor. They may be members of the Special Committee of the ABA on Availability of Legal Services, promote lawyer referrals and group legal services, work for the provision of legal services for the indigent in criminal and civil matters, reform laws governing landlord-tenant relations, assure equal opportunity in housing, education and employment, act as President of the National Legal Aid and Defender Association, or participate on the National Advisory Committee of the OEO Legal Services Program.

These activities of typical leaders in law improvement reflect the high standards by which they abide. They also participate in formally setting ethical standards for the entire profession. As Chairmen and members of the ABA Professional Ethics Committee, they undoubtedly influenced all the Canons, including Canon 8, which sets the standard of which they are prime examples. Such lawyers might have participated in the Special Committee of the ABA on Evaluation of Ethical Standards, improving Congressional ethics, setting ABA standards for disciplining lawyers' misconduct, or as Chairmen and members of the Committee that produced the Code of Professional Responsibility.

Canon 8 is essentially a call to the profession to give time, and unless the lawyers who are carrying Canon 8 duties are willing to give materially of their time, they may as well not start. The average number of hours given to law improvement annually among the lawyers surveyed was 350 and the average percentage of their total working time was

20%. They could sell all of their time if they wished. If we assume that the time given could have been charged at fifty dollars an hour (in the circumstances a deliberately low figure) then the average dollar contribution in time of each is $17,500. Their associates are also participating. One firm, for example, reports, on the basis of closely kept statistics, over 5,000 hours a year in defense of prisoners and in both Bar-oriented and other law reform projects. The dollar measure is staggering. As Mr. William Gossett, a distinguished leader in Bar public service, has said, a particular individual may meet his responsibility "through his firm, by financing the activities of some of his partners or associates in law improvement efforts." Mr. Gossett estimates a 5% to 10% time allocation as a minimum, the amount rising with age and experience as the lawyers become capable of making a greater contribution.[35]

2. *The Arizona Bar and Public Service.*

Arizona is a brilliant demonstration of this professional tradition. For purposes of determining whether, at this point in the late years of the twentieth century and in Arizona, the law is still being practiced as a public calling, we have polled a substantial portion of the Bar of Central Arizona; the results are in the record as Ex. 2, at p. 245 of the Appendix. The survey covered 16% of the lawyers in Central Arizona. The firms represented range from as few as a half dozen to fifty or more lawyers. All the firms have grown within the past twenty-five years from a very few lawyers, if they existed at all, to their present size. None has advertised.

The public service work of these firms can be divided into work of the kind contemplated by Canon 8, the obligation to improve the law itself and charitable work in the representation of clients.

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[35] *Canon 8* essay, *supra* at 396

The work of these firms includes participation in educational seminars, administering the Bar exams, serving in responsible ways with substantive law ABA committees and legal writing. In one firm which over the years has included two presidents of the Association of Trial Lawyers of America, the time of an individual given to professional and public service has reached 100% for substantial periods. Rule making, uniform jury instructions, revisions of the Internal Revenue Code, reorganization of the justice courts, American Law Institute work, revision of the Uniform Commercial Code in Arizona and the preparation of other codes have been activities of some firms. One firm includes a member of the Board of Directors of the National College of the State Judiciary which puts him constantly on the move for public service meetings in various parts of the country. One lawyer initiated the Citizens Conference which led to the adoption of merit selection of judges in Arizona.

We say with some small measure of justified pride that Arizona has been one of the most progressive states in the country in the field of procedure. It is not immodest for the Bar to take pride in the fact that it has assisted its Supreme Court in that work.

Appellants pride themselves in having done some free work (Appellants' Br. 6). They thus join the club of Arizona lawyers. The firms queried have also been very active in the affairs of the Legal Aid Society; one of them for almost two years operated a branch of the Legal Aid office on a regular basis. Several of the firms advise or represent at reduced fee, or no fee, individuals and organizations who warrant help; one firm gives a full 10% of its time to *pro bono* work. One firm has served as Arizona counsel for the United Farm Workers without charge and another is actively involved in the Lawyers Referral Program. One firm has represented low income minority group home buyers and has counseled many poor persons at special rates on workmen's compensation and tax problems; another has given legal

services to the Arizona Foundation for the Handicapped, the Seventh Step Foundation, and the Northside Mental Health Project.

One firm can recount one hundred and fifty instances in the past year of completely free services to the indigent and several others have liberally served the poor. The firms have served churches and church-related societies, as well as other charities; one reported that its time contribution for the past ten months to legal aid services had been $21,736, and reported a court appointment to represent the prisoners at the State Penitentiary on disciplinary matters at total hourly costs of $19,300.

What all this comes to is that even in an age of computers and high taxes and electric typewriters and social security and group health and enormous libraries and all the rest, if a measure of a profession is, as Dean Pound said, that it truly provides a public service, then the Bar of Arizona is a profession.

D. *Direct Injury to the Public by Solicitation.*

The substance of the argument in divisions D and E of this brief is that advertising is in fact directly destructive of the public interest, and is indirectly injurious to the public by being destructive of the profession.

1. *The Problem of Deception and Fraud.*

The suggestion that the states should not prohibit all lawyer advertising, but rather merely control that which is deceptive, is an evasion of reality. Under existing disciplinary procedures, there is no possible way in which vast numbers of advertisements could be inspected and enforcement proceedings be brought to handle those which are misleading. On the practical problems of administration of discipline, see the deposition of Arizona State Bar President Harrison (App. 383-93). The creation of an entirely different enforcement system would be required, a

burden to which neither the general public nor the clients should be put. The advertisement in question itself illustrates the problems of what is deceptive and what is not. Here services are presented as somehow special and a bargain and advantageous because the firm is called a "clinic" when, by the direct testimony of the Appellants, they have no definition whatsoever for that term (App. 84-85) and their practice is indistinguishable in method of operation and services performed from any other law office; it is simply, hopefully, a cut-rate operation. As Justice Gordon below observed, the suggestion that some kind of a bargain is being offered for one of the services is probably itself deceptive outright since the charge, whatever it is, is more than is necessary for persons of reasonable intelligence; and the divorce price in some cases is excessive.

Appellants' Brief at 46-48, contends that some lawyer's work, some hourly rates, permit of advertising without being deceptive, and that "it is inconsistent with the First Amendment to ban *all* advertising simply because some of it might be misleading." Chief Justice Hughes saw this differently and would not require the Bar to make this kind of distinction between ads which are deceptive and ads which are not. As the testimony of Mr. Harrison (App. 371-81); of ATLA President Robert Begam (App. 291-92), (ATLA takes an even stricter view of advertising than some ABA members, App. 284-87); of Dr. Helme (App. 315-16); and of Mr. Arnold (architects) (App. 154-55) clearly shows, the heavy weight of professional judgment is that professional services cannot fairly lend themselves to advertising techniques without being necessarily deceptive. As Chief Justice Hughes expressly held in *Semler v. Oregon State Board of Dental Examiners*, *supra*, the professions need not attempt to sort out that advertising which is deceptive and that which is not, an impossible administrative task. As the Supreme Court said:

> ". . . In framing its policy the legislature was not bound to provide for determinations of the relative proficiency

> of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement. Booth v. Illinois, 184 U.S. 425, 429; Purity Extract and Tonic Company v. Lynch, 226 U.S. 192, 201; Hebe Company v. Shaw, 248 U.S. 297, 303; Pierce Oil Corp. v. Hope, 248 U.S. 498, 500; Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388, 389." 294 U.S. at 612-13.

To give simply a hint of the magnitude of deception control, it takes the large staff of the Food and Drug Administration and a large appropriation to make some effort to control deceptive advertising in the drug industry although this is at least rendered a little easier because the bulk of the product is produced and advertised nationally, thus requiring control of only a limited number of sources. If individual doctors advertised, the administrative problem would be insuperable. We have perfectly hard experience here; it was phoney medical advertising which helped give rise to the limitations on professional solicitation in nineteenth century England.[36] We have more immediate experience that advertising of legal services is an open invitation to take advantage of the uninitiated.[37]

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[36]See, *W. Reader, Professional Men, The Rise of the Professional Classes in Nineteenth-Century England* 159-60 (Basic Books, Inc. 1966). The author observes that the effort to stop doctors from advertising, while doubtless in part for reasons of self-interest, was also to get rid of outlandish medical advertising, which he illustrates.

[37]See Report and Recommendations of Special Committee on Lawyer Advertising, American College of Trial Lawyers, approved by its Board of Regents Aug. 6, 1976, p. 10:

> "The dangers of allowing lawyer advertising have been tested in the past. Advertising by patent lawyers was allowed under Patent Office Supervision until 1952 and some four percent of the patent lawyers did advertise. However, as a result of the inability of the Patent Office to control abuses, advertising was

Advertising and solicitation result in fraudulent claims or practices; see *Settlement of Personal Injury Cases in the Chicago Area*, 47 *Nw. U. L. Rev.* 895-99 (1953); Note, *Ambulance Chasing*, 30 *N.Y.U. L. Rev.* 182-88 (1955). The leadership of the personal injury bar is emphatically opposed to advertising (App. 287-93). It is clear that these appellants draw back with a little embarrassment from the possibility of pressing their cards into the hands of the injured at the scene of the accident, but if they have the First Amendment right, as they assert, it is difficult to draw the line. So far as the message is concerned, its validity can scarcely depend upon whether it is printed in newsprint for circulation to hundreds of thousands, as was this advertisement, or is on another kind of paper for distribution door-to-door or in a hospital.

2. *Stirring up Litigation and its Consequences of Deception and Overreaching.*

There are many roots to the anti-solicitation practice. One of the ancient foundations of the matter is outlined in Vol. 4, Bk. 4, *W. Blackstone, Commentaries on the Law*

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totally banned in 1959.

> 'One of the conclusions reached by the commissioner of patents was to the effect that advertising permits those who lack competence and integrity to generate new business that would never come to them if they had to depend on reputation alone.' (Charles A. Hobbs, Vol. 62, A.B.A. Jour. p. 737, June 1976)
>
> "Further dangers in 'advertising' have been demonstrated. In the State of California, a member of the State Bar Disciplinary Board and a member of the State Bar Client Security Fund reports that in many cases misconduct by lawyers involved instances of soliciting employment among low and moderate income people who were ill-equipped to resist the lawyers' promises of performance. The solicitations often resulted in payments being made without any services being rendered and with some embezzlements. (Allan N. Littman, Esq. Fellow ACTL in an Address to the San Diego Bar Association on February 20, 1976)."

of England 133-37 (2d Amer. ed., Bumstead Printing Office 1799), on the sins of stirring up litigation. Barratry is "the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects." Maintenance is a "near relation" which is "an officious intermeddling in a suit that no way belongs to one, by maintaining, or assisting either party with money or otherwise, to prosecute or defend it." Champerty is a species of maintenance whereby one purchases a suit or the right of suing. While these ancient concepts have dwindled over the years, and it is not useful to bring them directly to bear in the instant situation, they evoke the fixed principle that it is socially undesirable to push people or disputes into courts.[38] This is precisely what appellants seek to do. By their own express statement, they acknowledge that they seek to cause divorces to be litigated which would not

[38]Appellants do not share this view; they believe the need to promote legal services is enough "to outweigh traditional proscriptions, upon barratry, or running and capping." (Appellants' Br., 4). The three cases cited are no help to Appellants. *NAACP v. Button*, 371 U.S. 415, 440-41, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), expressly repeats condemnation for urging another to engage in private litigation where monetary stakes are involved. In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 6, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964), the Court upheld the capacity of the railroad workers "recommending competent lawyers to each other." It expressly noticed that this was "not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice," precisely what is being done here. *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1947), which holds that a union may hire a lawyer for its members, does not even touch this problem.

At root here is a conflict of values on which we stand. Appellants assert with pride that they secure divorces, get bankruptcy discharges, and bring personal injury suits where otherwise there would be no litigation, App. 89-90; the advertising provides a means to these ends. Abraham Lincoln said, "Never stir up litigation. A worse man can scarcely be found than one who does this. A moral tone ought to be infused into the profession which should drive such men out it." *Collected Works of Abraham Lincoln (Notes for Law Lecture, July 1, 1850)* (2 R. Basler ed. 1953).

otherwise be litigated or sought, and seek by virtue of their services to cause persons to become bankrupt who would not otherwise do so (T. 55). This activity is not in the true sense either maintenance or champerty, but it is pure barratry. For general review of these concepts see Radin, *Maintenance by Champerty,* 24 *Calif. L. Rev.* 48 (1935).

The inhibition on barratry carries forward as a limitation on solicitation. Professional tradition has recognized precisely the argument which is offered by these appellants and has rejected it. For illustration of the view that activities such as advertising and solicitation tend to result in stirring up litigation, see *Petition of Hubbard*, 267 S.W.2d 743 (Ky. 1954). Appellants of course conceive of themselves as stirring up "good" litigation, but there is no such limitation inherent in advertising, and the advertising does not have to be deceptive in the legal sense to be injurious; a little puffing will do. Even with vigilance, abuses creep in; appellants would drop the bars. We take illustration from neighboring California.

The soliciting attorney often puffs his own abilities. In *Geffen v. State Bar*, 14 Cal. 2d 843, 537 P.2d 1225, 122 Cal. Rptr. 865, 868 (1975), it was represented that the firm were "specialists in automobile accidents." In *Younger v. State Bar*, 12 Cal. 3d 274, 522 P.2d 5, 113 Cal. Rptr. 829, 832 (1974), an attorney represented that he and his partners had handled several of "these accident cases" and had "won them all." There have been instances of dissemination of laudatory statements such as the designation of an attorney as a specialist, *Bushman v. State Bar*, 11 Cal. 3d 558, 522 P.2d 312, 113 Cal. Rptr. 904, 909 (1974); and letters sent by an attorney's agent describing the attorney as the "King of Torts" and a "brilliant attorney," *Belli v. State Bar*, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527, 536 (1974). *See also Millsberg v. State Bar*, 6 Cal. 3d 65, 490 P.2d 543, 98 Cal. Rptr. 223, 227-28 (1971), where there was dissemination of a seminar announcement describing the attorney as

a "specialist," and *Libarian v. State Bar*, 25 Cal. 2d 314, 153 P.2d 739, 740 (1944), in which an attorney solicited income tax work by postcard describing the services offered. There have been instances of an attorney showing a prospective client a check purportedly representing a settlement negotiated for another client, *Fish v. State Bar*, 214 Cal. 215, 4 P.2d 937, 940 (1931). The soliciting attorney may even guarantee success at a specific dollar figure, *Geffen v. State Bar, supra* at 867; in *Younger v. State Bar, supra* at 831, the attorney guaranteed the client $20,000, a brand new car, and that she would not have to work another day in her life. A client facing a criminal charge was assured that he would either be freed or placed under the Youth Authority for not more than 18 months, *Best v. State Bar*, 57 Cal. 2d 633, 371 P.2d 325, 21 Cal. Rptr. 589, 591 (1962).

The pitch frequently includes deprecation of the abilities of other attorneys. In *Younger v. State Bar, supra* at 832, the attorney told a client he could do more good for him than another attorney. One client was told that his present attorney was not a very good one because he was not known to an employee of the soliciting attorney, who "knew all the good personal injury attorneys," *Geffen v. State Bar, supra.* In *Recht v. State Bar,* 218 Cal. 352, 23 P.2d 273 (1933), the attorney claimed that he and no other attorney could make recovery for the clients.

What may be the most reprehensible aspect of solicitation is the influence it has on the quality of representation the client receives and the price he pays. The attorney often becomes dependent on solicited as opposed to client-generated employment. In turn, he becomes more dependent upon the associates who feed him legal business. Frequently the agents become the employers and the attorneys merely "fronts" for

their business efforts; *Dahl v. State Bar*, 213 Cal. 160, 1 P.2d 977 (1931); *Dudney v. State Bar*, 214 Cal. 238, 4 P.2d 770 (1931). There have been several cases of insurance adjusters receiving percentages of settlements from which they paid the attorneys, *Smallberg v. State Bar*, 212 Cal. 113, 297 P. 916, 917 (1931); *Smith v. State Bar*, 211 Cal. 249, 294 P. 1057 (1930); *Townsend v. State Bar*, 210 Cal. 362, 364, 291 P. 837 (1930). The soliciting practices may be accompanied by other abuses as in *Tonini v. State Bar*, 46 Cal. 2d 491, 496, 297 P.2d 1 (1956), which involved extensive solicitations of personal injury business, coupled with falsification of a verification, various other deceptions and failure to make proper accountings to clients. In *Roth v. State Bar*, 8 Cal. 2d 656, 67 P.2d 337 (1937), the soliciting attorney did not pay the client's share of a settlement until disciplinary proceedings were commenced.

These practices, which the rules seek to control, are matters of great public concern and outrage when discovered.[39]

[39] *See, e.g.*, Reasons & Rosenzweig, *To Mask Illegal Activities Ring Used Hospital Charity*, Los Angeles Times, Mar. 19, 1974, at 1-3; Reasons & Rosenzweig, *Promises of Windfall Settlement, Ring Preyed on Accident Victims in Barrios*, Los Angeles Times, Mar. 20, 1974, at 1; Reasons & Rosenzweig, *Profitable Sideline, Ring Wrote Medical Reports to Back Claims*, Los Angeles Times, Mar. 21, 1974, Section II at 1; Reasons & Rosenzweig, *Auto Accident Victims, Aliens Steered to Ring by Mexican Consulate*, Los Angeles Times, Mar. 22, 1974, Section II at 1.

E. *Injury to the Public by Injury to the Profession.*

We begin with the four key elements of a profession. They are (1) a skill acquired by a particularly elaborate course of learning; (2) its clients are to a peculiar degree, more than with most other needs of life, unable to know the service they need or to evaluate the quality of that service; there is special need for earned trust and confidence; (3) the professional has a special duty to perform public service; money making, though it be indispensable, must be subordinated. Closely related (4) is a certain dignity or style—what Plato called honor—which minimizes acquisitiveness as the *raison d'etre* of life; this honor leads to a duty of self-discipline, subject of course to the power of the community to control abuses. Commercialization of the profession strikes at all the elements of professionalism.[40] The least direct injury is to

[40]All this was directly before the Court in *Semler, supra.* The Oregon trial court opinion, see *Semler* record in this Court, T. 20-21 says:

> "It is to be remembered that we are dealing here with a profession, and not a business. True, men make their living by the one as by the other, but the entirely legitimate methods by which a merchant builds up his business may be objectionable and fruitful of evil if employed by the members of a profession. . . .
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> ". . . It would be a legitimate concern of the State to make a profession as unattractive as possible for those who look upon that profession as purely a money-making pursuit, and are little mindful of the important duties, binding in conscience and rarely enforceable by coercive measures, which they assume when they are licensed by the state to practice one of the healing arts."

The Appellees' brief, at 91 in *Semler*, described the situation to which Chief Justice Hughes responded:

> "The practice of employing so-called 'cappers,' 'steerers,' and 'runners,' by attorneys, physicians and dentists as a means of inducing the patronage of clients and patients has long been prohibited in almost all states by specific prohibitions in the professional practice acts under penalty of disbarment or revocation of license. These prohibitions, however, which relate to solicitation of practice through lay persons are not efficacious in preventing similar solicitation through impersonal instrumentalities, the use of which has largely replaced the old evil of the 'capper,' 'steerer,' and 'runner.' The more recent practice developed by imitation of

the educational qualifications, though students frequently undertake the long grind because of misty notions of the other three values.

1. *Client Dependence and the Problem of Deception.*

The subject has been adequately discussed. The plain fact is that in this field, hustle means lies, pushing people into litigation, and abuse.

2. *Public Service, Client Service, and the Balance with Gain.*

Advertising is the most conspicuous single badge of commercialization. Commercialize the profession, and Plato's paradox between service and money is irreparably tilted in the direction of money.

3. *Professional Self-Discipline.*

What we are really talking about is whether the State Supreme Court is to have the freedom to make Rules for the governance of its officers in the light of the collective wisdom of the profession. The precise substance of the rule may be less important than the process. We cannot in good faith say that the precise method of regulating solicitation adopted by the Arizona Supreme Court is the only possible

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certain types of predatory business has been largely through the use of impersonal agencies, including displays, signs and newspaper and radio advertising, coupled with the employment of advertising solicitors and free publicity press agents have also seriously affected conditions in the practice of the learned professions. There has been a serious infiltration of these practices [displays, signs, newspapers and radio advertising] into the professions, particularly into the practice of law, medicine and dentistry. Under the pressure of this infiltration the practice of the learned professions has threatened to cease to rest upon a well-merited reputation for the ability and integrity with which the lawyer, the physician and the dentist render these intimate and personal services to the sick and perplexed. In short, the learned professions have threatened not only to degenerate into a business but a 'predatory' business."

way of dealing with the subject. The House of Delegates of the American Bar Association has recently proposed certain variances.[41] The Supreme Court of Arizona would be free if it wished, but not required, to adopt those variations.[42]

Appellants pick the isolated strand of the ban on advertising, measure it against the First Amendment, equate legal counsel and professional services to the dispensing of standardized products, and the case is over for them.

But the matter is not so simple. It is a profession with which we are dealing, a profession of traditions, duties and responsibilities. In common practice, the young lawyer completes four years of college and three years of law school. He then passes a bar examination and is admitted. Between the time he graduates from law school and is admitted, his speech is restricted; that is to say, he cannot hold himself out as a lawyer nor speak as a lawyer would. He may have passed his examination and the actual taking of the oath may be only a delayed matter of form, but in the meantime he is not free to speak as a lawyer.

He is then admitted to the bar and becomes an officer of the court. He undertakes to honor and abide by the ethical standards of the profession. In so doing he not only gives up the right to advertise but also accepts any number of other

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[41]The amendment of February 17, 1976, permits listing in appropriate directories and the classified telephone pages of office hours, credit information, and the availability of fee information upon request. The big change is the addition of the yellow pages to the law lists and directories as a depository of this information (App. 446).

[42]Something is made of the distinction between a legislative rule and the professional recommendation on the same subject in *Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine*, E.D. Va., Alex. Div. Civ. No. 76-37-A, which, in invalidating a prohibition on medical advertising in reputable medical directories, notes that the Judicial Council of the American Medical Association had approved of the type of statements in issue. In the instant case, the advertisement is not remotely within the scope of the recent suggestions of the House of Delegates.

restrictions upon his freedom of speech. For example, he may not further the application for admission to the bar of someone "unqualified in respect to character, education, or other relevant attribute," DR 1-101 (B). Unless the knowledge is privileged, he is given a positive duty to speak concerning misconduct of lawyers or judges in a manner which could be compelled for the rest of the citizenry only by subpoena. His speech is restricted in the advice he may give his clients—"the attorney should not advise or sanction acts by his client which he himself should not do." Op. 75. He is barred not merely from advertising in newspapers but from having himself generally puffed by payment to media representatives, DR 2-101, a privilege which non-professionals may freely enjoy. There are limitations on what the lawyer may say about himself as a specialist or as limiting his practice, DR 2-105. He is not allowed to make arguments, which is to say to speak or to print, to advance positions unwarranted under existing law unless such arguments can be made in good faith, DR 2-109; in short he may not speak for purposes of delay.

Particularly restrictive of speech is the Rule under which a lawyer must preserve the confidences and secrets of a client.[43] Under Canon 5 a lawyer may not speak unless he is exercising independent professional judgment on behalf of a client. There are also sharp economic limitations upon his capacity to speak from the witness stand; with qualifications immaterial here he cannot accept representation at all if testimony will be expected of him. The duty to represent a client zealously within the bounds of the law (Canon 7) puts all sorts of limitations on what a lawyer can say; almost every subdivision of the rule is some kind of speech control.

[43]The protection of confidences is perhaps the oldest professional restriction on speech. The Oath of Hippocrates concludes, "Whatever things I see or hear concerning the life of man in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting those things to be as sacred secrets." 11 *Encyc. Brit.* 827.

Where a layman might engage in undignified or discourteous conduct, which would include speech, a lawyer may not, and DR 7-107 puts comprehensive limitations on what the lawyer may say concerning his own case. DR 8-102 sharply limits what a lawyer may say about the qualifications of a candidate for judicial office, limitations which would not apply to the general public. A layman may state that he has improper influence with a legislative body or a public official, and so long as he does not accept or give bribes, he violates no legal restriction. Under DR 9-101 (c) a lawyer could be disbarred for the same statement.

There are additional limitations, but these will make the point. When a lawyer becomes an officer of the court, when he is admitted to the profession, he obtains numerous privileges and accepts numerous duties. He also accepts as part of his professional status a whole series of restrictions upon his self-expression, restrictions which do not apply to the rest of the public. The restrictions on advertising are but a part, a sort of specialized application, of an overall pattern of restrictions on communication which in turn are part of the profession of being a lawyer.[44]

The matter before the Court therefore is only incidentally the restrictions on solicitation and advertising. The larger matter is whether the Constitution of the United States

[44]"A. V. Dicey took the point in 1867. 'The chief difference between a profession and a trade or business', he said, 'is, that in the case of a profession its members sacrifice a certain amount of individual liberty in order to ensure certain professional objects. In a trade or business the conduct of each individual is avowedly regulated simply by the general rules of honesty and regard to his own interest.' This was a charitable view of much of the business practice of his day. Honesty often weighed rather lightly in the scale against self-interest, not in acknowledged 'trade' only but also in aspiring professions, and the early campaigners for professional ethics were performing a genuine public service at the same time as they endeavoured to raise their own standing." *W. Reader, Professional Men: The Rise of the Professional Classes in Nineteenth Century England* 159 (1966).

deprives one of the most traditional of true professions of a certain right of self-government subject to the control and direction of the State Supreme Courts under whom the members of that profession dominantly serve.

4. *Advertising is Destructive of Professional Pride and Dignity.*

We ask the Court to take judicial notice of what every member of it has experienced, that a good lawyer takes pride in his profession. That pride is part of what makes him a lawyer. It is a part of the pull to the better side of his nature, the pull which causes him to honor his ethical obligations to seek to serve. This is another way of speaking of a certain professional dignity. The wrongest single sentence in appellants' brief is the line (p. 49), "A desire to uphold the dignity of the profession is not primarily a public concern." That pride and dignity are an important part of the fabric separating the twentieth century lawyer from the clawing pack of the nineteenth.

A portion of this pride is born of the traditions of the profession. A portion of it comes from the realization and exercise of skills hard-acquired. A portion of that pride, with all deference to our commercial clients, is because we are not a part of commerce. What we mean may be mystical, but it is a mystique which every member of this Court knows full well; it is that we are professionals. We all know, or overoptimistically think we do, that life could be more lucrative if we shifted to the world of capital gains or were involved in the distribution of goods instead of services; we take a certain portion of our pay in pride, or what Plato referred to as pay in honor.

A most conspicuous badge of that professionalism is the prohibition on soliciting business. As Mr. Robert Begam, President of the 25,000 member Association of Trial Lawyers of America, put it:

"First, a matter, I guess, of dignity, not in any great abstract sense, but I have the feeling that the dignity of a learned profession is seriously compromised by shopkeeper advertising. We have traditionally obtained clients through executing well our professional duties on behalf of our clients, through development of reputation among our peers and in our community, not only through service to out clients, but through service to the public and to the community and to our country. That complex of traditions leads to our right to call ourselves a learned, independent and dignified profession. Dignified in that sense.

"I have a feeling that those values are compromised by commercial advertising." (App. 287-88).

A real part of that pride derives from the absence of advertising,[45] and the cases so hold. All of these objections are facets of a central theme, that advertising is repugnant to the dignity of the profession. As put in one of the earliest cases, *People v. MacCabe*, 18 Colo. 186, 32 P. 280 (1893):

"The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares. . . ." 32 P. at 280.

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[45] See the statement of Mr. Lyman Davidson, a distinguished accountant, App. 44:

"Well, I think anytime you advertise you imply that some kind of a profit motive—that your first obligation is not to the public, it is to yourself, to make a profit. That is my feeling, and the way it would be taken.

"I think the public, over this period of 70 years has been educated to the fact that accountants do not solicit or advertise, and it would be degrading to the profession and not in the best interest of the public if they did."

Appellants' argument that Bar institutional advertising of lawyer referral services for the poor somehow helps their cause (Appellants' Br. 37) misses the mark. The distinction is between individual advertising for purposes of individual gain, and advertising with no shred of personal benefit in it; the distinction of the gain and non-gain elements in relation to the Canons is fully recognized in *NAACP v. Button*, 371 U.S. 415, 443, 444, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

The leading disbarment for advertising case usually cited both for its majority and its dissent (which went off on grounds not material here) is *In re Schwarz,* 195 App. Div. 194, 186 N.Y.S. 535, *aff'd,* 231 N.Y. 642, 132 N.E. 921 (1921). Finding that the advertisement was "typical of modern advertising business methods" and "abhorrent to professional standards," the Appellate Term Opinion, adopted per curiam in the Court of Appeals, said:

> ". . .It is evident that the respondent has no conception of the ethics of the profession, and is obsessed by the notion that self-advertisement is a proper means of obtaining professional employment. . . . ." 186 N.Y.S. at 538.

The dissenting opinion of Judge Pound, joined by Judge Cardozo, in the Court of Appeals, said:

> "The profession has ever discountenanced as undignified and indecorous the conduct of the lawyer who blatantly advertises for business as those engaged in trade may do without exciting unfavorable criticism. Attorneys are officers belonging to the courts and subject to their control and discipline. . . . Advertising or soliciting business is censurable as a form of self-laudation unbecoming the traditions of a high calling. The canon thus incorporates in the Code of Ethics an ideal standard of conduct which has been long and well recognized and upheld in theory both by bench and bar. The attorney who disregards the rule is properly subject to rebuke if not to disbarment. . . ." 132 N.E. at 922.

See also *In re Cohen,* 261 Mass. 484, 159 N.E. 495, 496 (1928):

> ". . . Codes of legal ethics adopted by bar associations of course have no statutory force. They are illuminating as showing views entertained by organizations of members of the bar concerning the tests of proper conduct for those charged with the important functions of attorneys admitted to practice within the courts. They are commonly recognized by bench and bar

> alike as establishing wholesome standards of professional action. It has long been a part of the ethics of lawyers that the solicitation of clientage by advertisements such as that here disclosed is contrary to sound practice. That has been the consensus of opinion manifested both by writers on legal ethics and by the standard maintained by the great mass of the profession. . . ."

For other cases to the same general effect, see *In re Oliensis*, 26 Pa. Dist. 853 (1917); *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933); *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 98 S.W. 178 (1906); *In re Duffy*, 19 App. Div. 2d 117, 242 N.Y.S.2d 665 (1963); *State v. Crocker*, 132 Neb. 214, 271 N.W. 444 (1937); *People v. Berezniak*, 292 Ill. 305, 127 N.E. 36 (1920); *Mayer v. State Bar of California*, 2 Cal. 2d 71, 39 P.2d 206 (1934). The latter case says:

> ". . . If the respect of the people in the honor and integrity of the legal profession is to be retained, both lawyers and laymen must recognize and realize the fact that the legal profession is a profession and not a trade, and that the basic ideal of that profession is to render service and secure justice for those seeking its aid. It is not a business, using bargain counter methods to reap large profits for those who conduct it. The blatant methods and the offensive type of advertising used by petitioner are utterly intolerable. Such methods cast discredit, not only upon the petitioner himself, but upon every member of the legal profession. Such advertising is not only contrary to the ethics of the profession, but is repugnant to all canons of good taste, and is made a crime by the statutes of this state." 39 P.2d at 208.

The court decisions are paralleled by ethics determinations of Bar Associations all over the country. *O. Maru, Digest of Bar Association Ethics Opinions* (1970), has some 4,786 opinions dealing with some 6,631 points of ethical concern. Almost twenty-five percent of those opinions and points deal with advertising and solicitation. There was in

fact some advertising by lawyers in the United States in the nineteenth century; *Sharswood's Professional Ethics*, published in 1854, says nothing about advertising, and the earliest Code of Ethics of an American bar association, that of Alabama in 1887, approved of some forms of advertising. However, after 1908, the practice stabilized as reflected in the Canon 27 adopted at that time that "solicitation of business by circulars or advertisements . . . is unprofessional." The first of the many advisory formal opinions of the A.B.A. in 1924 stated:

> "Any conduct that tends to commercialize or bring 'bargain counter' methods into the practice of the law, lowers the profession in public confidence and lessens its ability to render efficiently that high character of service to which the members of the profession are called." *ABA Comm. on Professional Ethics, Opinions*, No. 1 at 58 (1924).

The many subsequent advisory opinions include: Formal Opinion No. 4 (1924), *id.* at 60, bars advertising regardless of local custom; Formal Opinion No. 13, *id.* (1928) at 85, rejects the notion that there somehow is a "need to know" which warrants advertising; Formal Opinion No. 42, *id.* (1931) at 129, notes that advertising is not made better because a court acquiecses in it; Formal Opinion No. 73, *id.* (1932) at 174, has an extensive discussion of the impropriety of advertising for divorce business, precisely what has been done here. Formal Opinion No. 184, *id.* (1938) at 366, decries as "highly reprehensible" self-laudation by way of advertising, as bound to be misleading.

In Arizona the opinions have been the same. Opinion No. 3 (1954), 9 *Ariz. B. J.*, No. 3 at 9 (1973-74) notes that printing of a professional card in a local newspaper would "offend the traditions and lower the tone of our profession and is reprehensible." Opinion No. 48 (1959), *id.* at 13, disapproved of puffing listings in an automobile service manual.

The law is a profession and, to borrow a phrase from a great lawyer, there are those who love it.

5. *Apologia.*

The thrust may be made that we write of a dream world, that lawyers have not performed with honor, with charity, with service, that whatever right we may have had in the past to regard ourselves as a profession, we have somehow lost it in failure to serve the needs of the community.

We repeat the charge at its cruelest because this is the moment of truth, and there is some merit in it. The better elements of the profession are neither smug nor complacent. We could do better, and for our failures there is every reason to recite the *mea culpa.* Yet we again ask the Court to take judicial notice that the long haul spiral is upward, that the efforts to achieve professional goals are enormous, that while there are failures to meet the aspirations of, for example, Canon 8 and the rest, there are also successes. The good in terms of sacrifice and service far outweighs the bad. If appellants succeed in turning law into a straight commercial venture, like selling shoes or aspirin, the first loser will be the public service function of the Bar, for which commerce has no parallel.

F. *The Need for Legal Service at Affordable Fees.*

The lament of the consumer group and the under-represented is twice sad; first, because it is justified and second, because it is misdirected. The essential justification offered by appellants for advertising is that legal services are needed by the poor, and that advertising is the way to supply them at low cost, that economies of scale can be secured in no other way (Appellants' Br. 33).

Nobody doubts the first half of this proposition, which is why the Bar is making major efforts to help; see the testimony of Arizona Bar President Mark Harrison, a brilliant exemplar of action to this end (Harrison dep. App. 374-75).

The issue is whether advertising will serve this end without intolerable social loss. The answer is No.

First, there is no evidence offered and no reason to suppose that lawyer advertising would be used generally for this benign purpose. What is considerably more probable quantitatively is advertising of the "Let us beat your raps" or "Five verdicts of more than $100,000 last year" variety; see the cluster of unappetizing California cases cited, *supra.*

The sole evidence on the economy of scale hypothesis is a statement by one of the appellants (App. 122-25). He is a young man, but briefly out of law school, and however earnest, has no qualifications as an expert on service marketing.[46] As was noted earlier, the methods and devices so proudly proclaimed by appellants are equivalent to the reinvention of the wheel; the use of efficient equipment, paralegals, and so on, is old stuff.

So far as the price effect is concerned, the record is barren and the Court can use only its informed judgment. Appellants' only expert witness testified as to the effect of advertising on standard products, not services (App. 172, *et seq.*), and expressly disclaimed the capacity to make empirical studies where what was advertised could not be standardized (App. 209-10). As for the amount of price effect, the two studies offered showed a price differential in favor of advertised products of 5% on drugs (App. 178) and a five or six dollar differential on a $30 to $40 pair of eye-

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[46] "What you are saying, the systems approach, as you have described, is not economically viable unless it can rely upon substantial volume; is that true?

"A. By Mr. O'Steen: Precisely.

"Q. Do you think that you could accomplish the same objective [creating a better system of delivery of legal services for those not receiving them] without quoting prices for services in the advertisement?

"A. By Mr. O'Steen: No. . . ." (App. 122-23).

glasses (App. 183). Putting aside all question of desirability for other reasons, there is not a whiff of factual evidence in this record as to whether advertising would (a) depress the cost of legal services (b) in a degree significant enough to do the poor the slightest good.

On the other hand, the tradeoffs are terrible. If lawyer advertising in the drift of time converted the profession into a commercial operation, those not able to afford services would be the losers. Convert the law into just another retail operation, and the public service goes with it. We trust we have not minimized the contributions to charity of countless commercial enterprises; the factories doubtless give more to the Community Chest than the Bar. The profession, for the very reason that it is not commercial, is giving of itself, its services.

For a good presentation that "The rules against advertising and solicitation serve chiefly to protect clients of low or moderate income rather than commercial clients familiar with legal problems and lawyers," see Comment, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 *Calif. L. Rev.* 1135, 1150 (1976); and see the observation of Chief Justice Traynor in *Hildebrand, supra*, that it is persons in the category of appellants' hoped-for clients who will be the biggest losers by these practices. It is not the rich who are abused by solicitation in violation of the existing Canons; it is the low-income, occasional user of legal services.

G. *Conclusion.*

On balance, the rules should be sustained.

By its course of decision, the Court has assigned itself the duty of balancing the good to be achieved by the advertisement of legal services as against the evil, to the end of determining whether, under the First Amendment, this

communication may be restricted.[47] As will be more fully developed in the antitrust portion of this argument, this record clearly shows that advertising is in no way essential in Arizona to permit young people to enter the profession of law, or for that matter accounting or medicine or architecture, and quickly develop their practices; in Arizona this has been happening for years. Appellants present themselves in a cloak of nobility and high purpose. The fact is that we are talking about very ugly business. Appellants acknowledge that if they have a right to publish this ad, then they also have a right to solicit the injured at the scene of the accident or to distribute leaflets in the hospital.[48] The damage to the public as well as to the profession by depriving it of the key elements which make it a profession outweighs the good of solicitation.

We have said earlier that it is not so much the details of the particular Rule which are involved as the procedure for establishing it. The Rule is not sacrosanct; as noted, the

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[47]If the so-called "absolute" view of the mandate of the First Amendment were taken that there may be "no law of any kind abridging the freedom of speech or of the press," we would contend that this is neither the "abridgment" nor the "speech" contemplated by the Amendment.

[48]This is not fanciful. For examples, see *Younger v. State Bar*, 12 Cal. 3d 274, 522 P.2d 5, 113 Cal. Rptr. 829 (1974) (the attorney or his capper frequently solicited in the hospital at which prospective clients were being treated. In one count, the solicitation occurred a day after a serious injury where patient's eye was swollen shut so as not able to read retainer agreement; in another count, solicitation occurred three days after injury while the prospective client was "in a lot of pain"); *Honoroff v. State Bar*, 50 Cal. 2d 202, 204-07, 323 P.2d 1003 (1958) (a Los Angeles attorney and his associate traveled to Illinois to solicit clients taken from a "serious condition" list of a train accident); *Tonini v. State Bar*, 46 Cal. 2d 491, 492-95, 297 P.2d 1 (1956) (solicitations by attorneys and their agents within one day of serious injuries); *Roth v. State Bar*, 8 Cal. 2d 656, 657-58, 67 P.2d 337 (1937) (two clients solicited at a hospital); *Fish v. State Bar*, 214 Cal. 215, 218, 220, 4 P.2d 937 (1931) (solicitation by associate within one day of serious burns; in another count solicitation occurred in the hospital by the attorney); also see *McCue v. State Bar*, 4 Cal. 2d 79, 80, 47 P.2d 268 (1935).

House of Delegates has recommended certain minor modifications, none of which, however, would permit advertisement such as that here in issue. If appellants prevail, this Court discards the systems of professional analysis, experience and recommendation to the state authorities. This professional responsibility is at the heart of the concept of professionalism.

Apart from the many other considerations involved, the public gets more good from letting the law be a profession than it will get from upsetting the Platonic balance and sanctifying the commercial at the expense of ethical reserve. The case must be decided in the light of the standard unanimously expressed for the Court by Justice Douglas in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491, 75 S. Ct. 461, 99 L. Ed. 563 (1955): it is constitutionally legitimate to "attempt to free the profession, to as great an extent as possible, from all taints of commercialism."

II. *The Advertising Restrictions do not Violate the Sherman Act.*

No one could contend that the professions are exempt from the Sherman Act. *Goldfarb v. Virginia State Bar, supra.* The activities of appellants so far as commerce is concerned are marginal at best because of their nature, but the rule under challenge is statewide and is imposed by the Arizona Supreme Court on all lawyers handling all business. No issue was made of the commerce point below nor do we here, because the antitrust laws are, independently, inapplicable.

A. *The Antitrust Assertion is Barred by the Rule of Parker v. Brown.*

Assuming that there were, otherwise, an unreasonable restraint of trade in restrictions of advertising, the challenge cannot be made in circumstances where the particular restriction is imposed directly by the state itself. *Parker v.*

Brown, supra, expressly holds that where activity which might otherwise be regarded as a violation of the antitrust laws is either undertaken or required by the state, the antitrust laws are inapplicable:

> ". . . We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . [I]n view of the [Act's] words and history, it must be taken to be a prohibition of individual and not state action. . . . The state . . . imposed the restraints as an act of government which the Sherman Act did not undertake to prohibit. . . ." 317 U.S. 350-51, 52.

This issue was fully presented in *Goldfarb, supra.* In that case the question was whether a minimum fee schedule for a County Bar Association violated the antitrust laws. The Supreme Court held that there was no state requirement of the fee schedule in any way—this was simply an activity of the County Bar Association. It therefore held that to be within the *Parker v. Brown* exemption, "It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 95 S. Ct. at 2015.

In the instant case, the conduct is more than expressly required by the Supreme Court by its official action; it is the Supreme Court Rule which is here being enforced, by the Supreme Court itself.[49]

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[49]For some of the countless cases holding particular restrictions not subject to the antitrust laws because of state action, see *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) (state as purchaser); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966) (port authority); *S & S Logging Co. v. Barker*, 366 F.2d 617 (9th Cir. 1966) (government employees); *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968) (REA loan); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (exclusive franchise for garbage collection); *Gas Light Co. of Columbus v. Georgia*

Nothing in *Cantor v. Detroit Edison Co., supra*, is to the contrary. We abstain from close analysis of the several opinions in *Cantor* because *Cantor* fully recognizes and does not vary the rule it accepts from *Parker* that "action taken by state officials pursuant to express legislative command did not violate the Sherman Act." The instant case does not deal in any way with the subject of *Cantor*, "private conduct required by State Law." In this case direct state action has been taken by the State Supreme Court, after hearing by persons who for this purpose are functioning as officials for the courts, but on the independent judgment of the Court itself. The Supreme Court is enforcing a rule issued by it under express legislative authorization. *Cantor*, dealing with private action taken under state sanction, is simply irrelevant. It is true that the Canons as proposed to the State Supreme Court come from the Bar but it is not the law that any private role in procurring a state rule of law will preclude immunity. Such a rule would effectively emasculate the closely related "lobbying" exemption created by the *Noerr-Pennington doctrine,*[50] by causing it to evaporate if lobbying is successful. The exemption exists if the State, after a meaningful opportunity for independent consideration of the restrictive requirement, adopted it as its own. *Cf. Wood's Exploration & Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *Gas Light Co.*

Power Co., 440 F.2d 1135 (5th Cir. 1971) (electric rates); *Howard v. State Department of Highways of Colorado*, 478 F.2d 581 (10th Cir. 1973) (state authorized monopolization of camp ground and recreational facilities); *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) (organization controlled by state university); *Padgett v. Louisville & Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974) (exclusive contract to taxicab company at airport).

[50]So named from the two leading Supreme Court decisions announcing it: *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir. 1970); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1134 (5th Cir. 1973).

As has been noted, if it matters, the adoption of the Code of Professional Responsibility by the Supreme Court was neither a rubber stamp function nor routine acquiescence in a private proposal. The Rule involved is adopted under Rule 29(A) of the Rules of the Supreme Court which adopted the ABA Code "as amended by this Court," betokening the careful scrutiny it obtained. Because we think *Cantor* inapplicable to direct state action, as distinguished from private action, we think it unnecessary to speak at length to the qualification in the plurality opinion that an exemption applies where it is necessary "to make the regulatory act work...."[51] We do note, however, that the object of the Canons, among others, is to maintain professional integrity. We have argued

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[51] Justice Stevens in *Cantor* says:

"[T]he standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation." 96 S. Ct. at 3120.

The standards for the federal regulatory exemption include (1) a pervasive general regulatory scheme that makes part of the scheme the specific anti-competitive conduct involved. This would mean either a specific statute as part of that scheme prohibiting the competitive conduct or a rule with direct guidelines; (2) there must be substantial government involvement in the anti-competitive project. This means that the government is not merely rubber-stamping the acts of private parties, but that the anti-competitive conduct is subject to regulation, supervision and approval by a government body, preferably following public hearing; and (3) the failure to follow this anti-competitive course would substantially undermine the total regulatory scheme. See *Gordon v. New York Stock Exchange, Inc.*, 95 S. Ct. 2598 (1975); *United States v. National Association of Securities Dealers, Inc.*, 95 S. Ct. 2427 (1975); *Ottertail Power Co. v. United States*, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963). All exist here.

at length that this restriction is necessary to assure professional integrity. The power of the State to deal with "prevention of practices in a profession which will tend to demoralize the profession" was upheld in *Semler, supra*, and it is that with which we deal here.

B. *The Restriction, in any Case, is not an Unreasonable Restraint of Trade.*

While *Parker v. Brown* ends the discussion as to the application of the Sherman Act to this direct state action, we are of course aware that the country's professions are watching this case with intent interest. As this record shows, in Arizona, advertising is categorically prohibited by state law for law, medicine, and accountancy, while for architecture the only sanction is professional association action. We appreciate that there are too many professions with their own individual traditions and practices to permit a generalization,[52] but assuming traditions similar to the law, professional restraints on solicitation or advertising may well be reasonable for much the same reasons as those advanced in the free speech portion of this Argument.

This record is overwhelming that solicitation or, more narrowly, advertising restrictions in no way limit the access of young professionals to the field. There are 4,000 active lawyers in Arizona, none of whom has ever advertised, and all competent young persons are advancing suitably; Harrison, App. 373; Begam, App. 294-95. Able beginners in accounting (Davidson, App. 40-41) medicine (Helme, 318-19), and architecture (Arnold, App. 151) rapidly establish themselves in Arizona. Advertising restrictions have not limited law firm growth. Exhibit 2 shows a pattern of prodigious expansion, and all without advertising.

[52]Thus accountants, for example, have a special duty to give independent opinions which would be compromised by soliciting business; see discussion by Lyman Davidson at App. 43.

CONCLUSION

We appreciate that the profession has not always had the respect of the community; it was an uphill fight in the nineteenth century to establish lawyers as anything but a public affliction. Yet progress has been made, and in real part by virtue of the Canons of Ethics.

For most lawyers, the sense of professionalism and the decent dignity which goes with it is one of the great rewards of life. We write in the water of contemporary controversy and we earn livelihoods which, principally by virtue of the personal gains taxation system, are not with us long. Basically, we pass on not things but traditions.

We do not here bespeak tradition for its own sake. We recognize that trappings pass, and indeed they should; it was no loss for the lawyer to take off the wig and the robe and assume the business suit. But some elements of professionalism, of tradition, and of dignity are genuinely vital; the profession is entitled to make its own judgments, to preserve them or, perhaps, to modify and alter them as experience teaches new wisdom. Advertising will serve no social purpose or legitimate legal end; much which is valuable will be lost if we are to fill the press or the third-class mail with the word that wills may be obtained for $19.95, with special sales in July.

The decision of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,
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APPENDIX

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