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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and
VAN O'STEEN,
Appellants,

v.

STATE BAR OF ARIZONA,
Appellee.

On Appeal From the Supreme
Court of Arizona

BRIEF OF THE CHICAGO COUNCIL OF LAWYERS, AS AMICUS CURIAE, IN SUPPORT OF APPELLANTS

This brief is submitted by the Chicago Council of Lawyers as *amicus curiae*, pursuant to written consent by all parties filed with this Court, in support of Appellants' contention that a state-enforced prohibition on advertising by lawyers violates the First Amendment. The Court in this case need not reach, and the Council takes no position on, the question of whether a voluntary agreement by lawyers to restrict their own advertising (whether embodied in the ethical canons of a bar association or otherwise) is in violation of Federal antitrust laws. The type of advertising prohibition involved in the present case is enforced by state authority upon *all* lawyers, including individual

lawyers and associations of lawyers who, like the Council, are of the view that such a restriction is contrary to the ethical and other interests of the legal profession and of the public. Such a state-enforced prohibition cannot be justified under the First Amendment.

INTEREST OF AMICUS

The Chicago Council of Lawyers is a bar association which was founded in 1969 and currently has approximately 1,100 lawyer members. In 1972 it was admitted as an affiliated local bar association with a seat in the House of Delegates of the American Bar Association. It is involved in a variety of matters affecting the legal profession, including evaluations of candidates for state and Federal judicial positions, the conduct of surveys on the performance of judges, and legislative and other activities relating to substantive areas of the law.

The Council has been concerned for some time about the impact of canons of legal ethics on the delivery of legal services to poor and middle-income persons. In 1971 the Council submitted to the Illinois Supreme Court an extensive report on the entire ABA Code of Professional Responsibility which was then being considered for adoption in Illinois. That Report focused on the extent to which provisions of the Code inhibited fulfillment of the basic professional mandate, set forth in Canon 2, to make legal services available to all persons who need them. It urged that the Illinois Supreme Court reject those provisions of the Code which imposed restrictions on group and prepaid legal services and it suggested reconsideration of the prohibition on advertising by attorneys. *Report of the Chicago Council of Lawyers on the Code of Professional Responsibility,* In the Matter of the Adoption of the Code of Professional Responsibility, Ill. Sup. Ct. No. MR 1353 (October,

1971) [hereinafter cited as *"1971 Council Statement"*]. The Illinois Supreme Court subsequently declined to adopt the ABA Code citing its concern about the provisions restricting group and prepaid legal services.

In 1975 the Council submitted to the ABA a statement urging that the general prohibition on advertising contained in the ABA Code, which is substantially the same prohibition upheld by the Arizona Supreme Court in this case, be eliminated. *Chicago Council of Lawyers Statement on Advertising by Attorneys,* Submitted to the ABA Standing Committee on Ethics and Professional Responsibility (November, 1975) [hereinafter cited as *"1975 Council Statement"*]. The Council's statement set forth our own proposed Rule, a copy of which is attached hereto as Appendix A, to replace the present provisions of the Code. In December, 1975, the ABA Standing Committee on Ethics and Professional Responsibility circulated as a "discussion draft" proposed amendments to the Code which would permit legal advertising along lines comparable to the Council's proposal. However, those "discussion draft" amendments have not been adopted by the ABA House of Delegates, and the only change since made in the ABA Code has been an amendment to permit certain additional information (including the amount of a lawyer's initial consultation charge) to be included in law lists and legal directories and in the classified sections of telephone directories (although such classified sections generally refuse to allow inclusion of any price information).

The Council is currently engaged, with the support of the ABA and with financing from several major foundations, in the development of an experimental legal clinic designed to provide a model for the efficient delivery of legal services to middle-income persons. The operation of the clinic will make heavy use of paralegals, questionnaires,

and mechanical word processing devices. It will also entail a model advertising program in order to generate the volume of routine legal matters necessary to support economical operation of the clinic. *South Shore Experimental Legal Services Program Proposal,* Submitted by the Chicago Council of Lawyers to the ABA Special Committee on the Delivery of Legal Services (March, 1976).

The Council has also had an interest in the application of the First Amendment to other restrictions on the free speech of lawyers. In recently-concluded Federal court litigation, the Council successfully challenged as violative of the First Amendment certain rules of the Federal District Court for the Northern District of Illinois, incorporating in part provisions of the ABA Code, restricting public comments by lawyers on pending civil and criminal cases. *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3756 (1976).

A state-enforced prohibition on advertising by lawyers would prevent the members of a bar association such as the Council from acting in accordance with their own considered judgment that such advertising, subject to appropriate limitations, would be beneficial to the profession and to the public. While Illinois currently has no such formal legal prohibition, in view of the Illinois Supreme Court's refusal to adopt the ABA Code, the enactment of such a prohibition remains a possibility and has been urged upon the Illinois Supreme Court by other Illinois bar associations. The Council and its members, therefore, have an important interest in the outcome of this case.

ARGUMENT

A state-enforced prohibition on advertising by lawyers is not supported by any compelling state interest; on the contrary, advertising by lawyers would be beneficial to the public and the legal profession and is, at a minimum, a matter about which lawyers and associations of lawyers have a constitutional right under the First Amendment to exercise and act upon their independent judgments.

The Council believes that advertising by lawyers would be beneficial to the public and would assist the profession to fulfill its basic mandate to make legal services available to all persons who need them. We base this belief on our perception of the need for much greater public awareness of the availability and costs of legal services and our conclusion that only commercial advertising by lawyers offers a realistic prospect of meeting that need.

In urging that the ABA eliminate the Code prohibition on legal advertising, the Council has stated:

> "[T]here is a substantial need for more public information about the availability of legal services. In a large metropolitan area such as Chicago, for example, most people have little or no direct contact with lawyers. When people think that they may have legal problems, they generally have no way to know whether legal services are available at a cost they can afford. Further, they generally have no way to compare the services and fees which different lawyers may offer. The effect of this lack of information is to deter many persons from seeking legal help altogether and to make an intelligent choice of an attorney difficult or impossible in individual cases. From an overall point of view, the effect is to minimize effective competition among lawyers and a further consequence may be to inhibit the development of low-cost delivery methods which are dependent upon economies of scale achiev-

> able only when a sufficiently large number of clients are aware and able to take advantage of available legal services." *1975 Council Statement* at pp. 2-3.

A recent survey found that 80% of the public agreed that "a lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem." B. Curran & F. Spalding, *The Legal Needs of the Public* at p. 95. (Am. B. Found. 1974). Our own association office receives dozens of calls daily from persons in the Chicago area seeking information about where to get legal help.

There is no realistic method in prospect, apart from advertising by lawyers, to meet the foregoing need. Lawyer referral services are presently utilized by a bare fraction of the population (see B. Curran & F. Spalding, *supra,* at p. 89), and such services are a cumbersome and unfamiliar method of imparting information which is unlikely ever to be widely accepted by the public. Lists or directories of lawyers may be a useful supplement to advertising, but they are currently even more limited in access than referral services and they are similarly unlikely ever to reach the desired mass audience. Further, as the Council knows from its own experience in attempting to devise an effective lawyer referral service and to develop plans for a legal directory, efforts of that kind on a large scale require large-scale funding which is not generally available. Even if one were otherwise inclined to believe in the potential efficacy of such alternative measures, there is no basis for confidence that the required commitment to the wide availability of legal services will be forthcoming from a profession which until very recently was generally engaged in "attempt[ing] to restrict the extension of group legal services as far as constitutionally permissible." *1971 Council State-*

ment at pp. 15-16 (commenting on ABA Code provisions which were not significantly liberalized until 1975). Unlike such alternative ways of providing information to the public, advertising by lawyers allows the individual service providers themselves to bear the cost, with the major and immediate economic incentive of obtaining legal business by doing so.

The question before this Court, of course, is not whether, as a matter of policy, the Council and others are correct in believing that lawyer advertising would generally be beneficial to the legal profession and the public. Rather, the question in the present case is whether lawyers, individually or through bar associations such as the Council, have the right to make such judgments and to act in accordance with their views of what the interests of the profession and the public require, or whether, as the Arizona Supreme Court has held, a state may deny such freedom by imposing and enforcing through state authority a virtually absolute prohibition on lawyer advertising of the type embodied in the current ABA Code. This Court has now held in *Bigelow* v. *Virginia,* 421 U.S. 809 (1975), and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 96 S. Ct. 1817 (1976), that commercial speech, such as advertising, is not excluded from the protections of the First Amendment. The rationale of those cases applies with particular force to advertising which entails the communication of information about the price and other aspects of the availability of legal services—information which may well be a practical prerequisite to the assertion by many members of the public of constitutional and all other legal rights.

Once this Court determined that First Amendment protections extend to advertising, a restriction on such pro-

tected freedom of expression became constitutionally justifiable only if supported by a "compelling state interest." See, e.g., *NAACP* v. *Button,* 371 U.S. 415, 438 (1971). In other cases dealing with the availability of legal services, this Court has refused to uphold restrictions on First Amendment freedoms based on alleged dangers which are merely speculative or "conceivable" in nature. See, e.g., *United Mine Workers* v. *Illinois State Bar Association,* 389 U.S. 127, 223-24 (1967). Further, this Court has held that any restriction on First Amendment freedoms "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier* v. *Martinez,* 416 U.S. 396, 413 (1974).* Under these well-established First Amendment principles, a state-enforced ban on virtually all legal advertising cannot withstand constitutional scrutiny.

All of the dangers which are alleged to flow from advertising by lawyers, assuming (although this Court need not now decide) that they are sufficient to warrant any form of state-enforced prohibition, may be met by more specific restrictions. The Council's proposed Rule (attached hereto as Appendix A) is an example of a rule that attempts to deal specifically with those practices that the state may have a substantial governmental interest in preventing. Section (A) of that Rule is divided into three subsections which (1) specify the types of information to be permitted in advertising by lawyers, (2) prohibit any false or misleading statement as well as certain other specific types of

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* For a specific application of these principles to restrictions on free speech by lawyers, see *Chicago Council of Lawyers* v. *Bauer, supra,* in which the Seventh Circuit determined that restrictions on public comment by lawyers on pending cases, as set forth in District Court rules and the ABA Code, were over-broad and violative of the First Amendment.

statements, and (3) set a general standard regarding the manner of presentation of information. Subsection (1)(d) specifically allows inclusion in advertising by lawyers of the hourly rates or other basis on which a lawyer's fee will be determined:

> "We recognize that the disclosure of hourly rates may often be only partially adequate to allow a potential client to determine the likely costs of legal services. Without permitting the disclosure of fees, however, advertising by lawyers will clearly fail to deal with the most serious existing problems and we do not think that the imperfections of such disclosure represent an excuse for maintaining the present widespread ignorance." *1975 Council Statement* at p. 6.

The Council does not assert that its own proposed Rule on legal advertising is necessarily the perfect resolution of the various possible concerns about such activity. We do strongly assert, however, that only such a narrowly-drafted restriction, directed toward specific and defined dangers, may conceivably withstand constitutional scrutiny when enforced by state authority. The virtually absolute bar on advertising set forth in the ABA Code and upheld by the Arizona Supreme Court, in contrast, is no resolution at all. That simplistic prohibition cannot, we submit, be imposed by a state upon individual lawyers or associations of lawyers who conclude that legal advertising is desirable and in the public interest and who propose to exercise their freedom under the First Amendment to act upon that judgment.

CONCLUSION

For the foregoing reasons, the Chicago Council of Lawyers respectfully urges that the judgment of the Arizona Supreme Court be reversed.

Respectfully submitted,

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APPENDIX A

CHICAGO COUNCIL OF LAWYERS DRAFT PROPOSED RULE ON ADVERTISING (TO REPLACE PRESENT RULES DR 2-101 (A)-(B) AND 2-102 (A))

DR 2-101, Publicity and Advertising.

(A) A lawyer shall not publicize him/herself as a lawyer through any commercial publicity or other form of public communication (including, without limitation, any newspaper, magazine, telephone directory, radio, television or other advertising) unless such communication meets all three of the following conditions:

(1) Such communication shall be limited to one or more of the following types of information:

(a) the name of the lawyer;

(b) the lawyer's address and telephone number;

(c) the educational and other background of the lawyer (including, without limitation, date and place of birth; date and place of admission to the bar of state and federal courts; schools attended with dates of graduation, degrees and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; and memberships in scientific, technical and professional associations and societies);

(d) the hourly rates or other basis on which the lawyer's fees are determined (any disclosure of hourly rates to include a statement to the effect that total time spent may depend on various factors, including the ability and experience of the lawyer);

(e) a description of the types of legal matters in which the lawyer will accept employment;

(f) the lawyer's foreign language ability;

(g) the names and addresses of references and, with their consent, names of clients regularly represented; and

(h) other information about the lawyer, the lawyer's practice, or the types of legal matters in which the lawyer will accept employment, which a reasonable person might regard as relevant in determining whether to seek the lawyer's services.

As used herein, references to a "lawyer" shall also permit inclusion of information as to the lawyer's law firm and the lawyer's partners or associates.

(2) Such communication shall not contain any statement which constitutes dishonesty, fraud, deceit or misrepresentation by the lawyer. Further, and without limitation on the foregoing, such communication shall not:

(a) contain any estimate, promise or prediction of the result of any future legal proceeding or proceedings;

(b) contain any statement of the results of any prior or pending legal proceeding or proceedings;

(c) be communicated in such a manner that a reasonable person might not understand that it constitutes publicity by the lawyer; or

(d) make any comparative statement regarding any other lawyer.

(3) The form of such communication shall be designed to communicate the information contained therein to the public in a direct and readily comprehensible manner.

(B) A lawyer may provide information in a comnmunication which meets the conditions of DR 2-101 (A) (1) and (2) in response to a request for such information from any organization or group, including, without limitation, any such request from an organization or group which proposes to communicate such information to its members or the public at large.