4

In the

Supreme Court of the United States

JOHN R. BATES and VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

No. 76-316

Washington, D.C.
January 18, 1977

Pages 1 thru 77

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

nks

IN THE SUPREME COURT OF THE UNITED STATES

JOHN R. BATES and VAN O'STEEN, Appellants, v. STATE BAR OF ARIZONA, Appellee.	No. 76-316

Washington, D. C.,

Tuesday, January 18, 1977.

The above-entitled matter came on for argument at 11:00 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM C. CANBY, JR., ESQ., 413 E. Loyola Drive, Tempe, Arizona 85282; on behalf of the Appellants.

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

JOHN P. FRANK, ESQ., Lewis and Roca, 100 West Washington Street, Phoenix, Arizona 85003; on behalf of the Appellee.

- - -

C O N T E N T S

[Afternoon session - pg. 47]

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-316, Bates and O'Steen against Arizona.

Mr. Canby, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM C. CANBY, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. CANBY: Mr. Chief Justice, may it please the Court:

This case is about two lawyers who advertised in their local newspaper and were disciplined for it. But, as I intend to show, it's also a case about the delivery of legal services in the United States.

The question presented here is whether a disciplinary rule, Rule 2-101(B) of the Code of Professional Responsibility, which is embodied in a rule of the Arizona Supreme Court, violates the First Amendment or is invalid for conflict with the Federal Antitrust laws.

The rule itself prohibits any attorney from publicizing himself or his partner in local newspapers, among other things. It is set forth at pages 3 and 4 of our brief.

The facts which gave rise to this controversy concern a very unusual law practice. Mr. Bates and Mr. O'Steen, upon graduation from law school, worked a couple of years for -- about a year and a half for the Maricopa County Legal Aid

Society and then set out on their own to develop a very special kind of practice, which they intended to aim at that group of people who were above the poverty line and not eligible for legal services, but are below the level of affluence which the regular users of the legal profession enjoy.

Consequently, they set up a firm which was organized to do a business depending greatly on systems where the attorneys set up forms of their own design, used paralegals to a great extent, used automated equipment, and, most important of all, charged very little profit for each case.

As a result, they were able to offer a fairly narrow line of services which lended themselves to standardization, but they found a great deal of difficulty in getting the word out and, in the course of a two-year period, their practice did not thrive. They wanted to make it thrive and they wanted to produce the services, and they wanted to have clients, so they put together an advertisement which appears at page 409 of the printed Appendix, and they ran it in the Arizona Republic, a newspaper of general circulation, at Phoenix, Arizona.

This advertisement, among other things, advertised "uncontested divorce, both spouses sign papers, $175 plus a stated court filing fee", "name change" for a stated fee, uncontested adoptions and bankruptcies for stated fees, and an uncontested divorce where the attorneys would prepare all

the papers for a person who was intent upon getting his own divorce himself.

This was published and, as a result of it, disciplinary proceedings were started by the State Bar of Arizona. Hearings were held, and the administrative committee which first heard the case found that they had violated the law. They permitted a full record to be made, but their finding was simply that the rule of the Arizona Supreme Court had been breached by the publication, and that the two appellants here should be suspended from practice for six months.

On appeal to the Board of Governors of the State Bar of Arizona, this was modified to a week's suspension for each, and when it went to the Supreme Court of Arizona, that was changed to a censure, but a finding that they had violated the canon was upheld and a censure was ordered by the Supreme Court of Arizona.

The Supreme Court, in their opinion, specifically rejected the First Amendment claims and the antitrust claims, which appellants here had asserted.

Now, a restraint on this kind of advertising, of course, strikes appellants as a severe interference, a classic interference with the communication of information to their clients. And, as I say, their clients were ones who are perhaps the great middle mass, by and large, of the popula-

tion.

QUESTION: Do you mean clients, Mr. Canby, or --

MR. CANBY: Pardon? Potential clients.

QUESTION: You mean clients or potential clients?

MR. CANBY: Potential clients, Mr. Chief Justice.

And I might add that the American Bar Foundation study, the Curran and Spalding study, which is cited in our brief, indicates that one-third of all the adult Americans never use a lawyer in their lifetime, another third do so once, and it also indicates that a great number of people in the United States don't know how to find a lawyer, they don't have regular contacts with lawyers, and they also don't have a very good idea, many of them, of what lawyers charge for their services.

And, in fact, a good portion of them tend to overestimate the cost of lawyer services.

QUESTION: Mr. Canby, you've emphasized the modest means type of client. The firm was also in the business of representing plaintiffs in personal injury cases. Did they draw any line with respect to the economic status of that type of client?

MR. CANBY: No, Mr. Justice, and I hasten to add that they did not draw an economic line with any client. The record indicates that the overwhelming majority of their clients range from the poverty level, practically, up to very

few with incomes over $25,000 a year per family.

But they do not have a policy of turning away people who have greater income than that, for any case.

The first contention which we assert here is that this provision violates the First Amendment. And, of course, on the commercial speech doctrine, we rely very heavily on Bigelow v. Virginia, which upheld the First Amendment right to advertise an abortion service; and we also rely, of course, very heavily on the decision last term in Virginia State Board of Pharmacy, which held that there was a First Amendment right for drug price advertising. That case being brought by consumers who wanted to know drug prices.

But I submit that all of the elements which the Court found commanded First Amendment protection in Virginia State Board of Pharmacy are present in this case. In other words, the great public interest in the economic allocation of resources, the importance of economic information, and particularly price information to the consumer in making up his decision as to whether or not to avail himself of legal services, and what attorney to get, are served by the kind of ad that my clients ran.

QUESTION: Mr. Canby, would they have a First Amendment right to advertise the quality of their services?

MR. CANBY: I think they would if it's not deceptive and misleading, and I believe that --

QUESTION: Well, for example, in the personal injury phase of it, would they have a right to give a list of the recent verdicts they just recovered?

MR. CANBY: I think that the bar, Mr. Justice Stevens, could regulate in ways that the Federal Trade Commission sometimes regulates, to make a full disclosure. In other words, if they gave ten recent recoveries that were very high, this, it seems to me, could be misleading if it gave a false idea of their practice, or it might even be argued that it overstates the role of the attorneys in getting those judgments.

QUESTION: Well, assume it's completely factual: the last 20 cases we tried had the following results: 9 of them were settled, 4 of them we lost, and in 7 of them we got $200,000 verdicts.

MR. CANBY: I think there would be a First Amendment right to make that kind of an advertisement, assuming that the last 20 cases wasn't the beginning of a run of good luck.

QUESTION: Was typical, yes. Assuming --

QUESTION: Well, Mr. Canby, the only thing this case involves is the total and complete ban on advertising.

MR. CANBY: That's correct, Mr. Justice --

QUESTION: That's all we have here now.

MR. CANBY: That is correct, and no advertising by

an individual attorney in a newspaper is permitted in Arizona, or, indeed, in the classified section.

QUESTION: And you do not take the position that it cannot be regulated?

MR. CANBY: I do not. In fact, I am sure that false and misleading advertising can be regulated. I am also --

QUESTION: You are suggesting, I take it, that they could advertise that they got a $200,000 verdict, that that would be protected by the First Amendment?

MR. CANBY: I think that there's a danger of under-disclosure in that, Mr. Chief Justice, and I think that the bar could reasonably regulate to require full disclosure of facts like that. I think occasionally a single fact that's advertised could be misleading, even if technically accurate.

QUESTION: Let's test out this First Amendment -- the scope of your view -- your view of the scope of the First Amendment protection. Could they, in describing in an ad the settlement for $200,000, document it with a copy of the check, the settlement check?

MR. CANBY: Here again, Mr. Chief Justice, in my opinion they could, if it were not misleading in other ways. But, of course, no one has to go that far to rule that the ad which the appellants put in the newspaper is protected by the first Amendment.

QUESTION: Well, in a case where there is what is

regarded by some as an opening wedge, don't you think these are appropriate areas to explore?

MR. CANBY: Undoubtedly they are. And that's why I say I think that a good deal more advertising, and a good variety of it would be entitled to First Amendment protection. There are others who do not go that far, but I do.

QUESTION: Mr. Canby, in endeavoring to have some conception of the scope of the First Amendment right that you are asserting, you've been asked questions about the type of advertisements, would there be any limitations as to the means, what about television, for example?

MR. CANBY: I think that television advertising would be protected. It seems to me that the tests of Virginia State Board of Pharmacy are: Does this serve to get information to the consumer? Is there a First Amendment right to convey this information?

And television, particularly with a certain segment of the population, would be a very good way to get the availability of certain legal services made known to the population.

QUESTION: It is often said in our profession that the best place to reach prospective personal injury plaintiffs is in the hospital. What would you think of, say, handbills that had the information you said a little while ago would be protected by the First Amendment, that is the number of

successful verdicts and the average size of verdicts,being handed out in the Emergency Room of every public hospital?

MR. CANBY: I think that is purely prohibitable.

QUESTION: Why?

MR. CANBY: It seems to me there is a time, place and manner regulation that could be made here, and it could be based on a high interest in protecting people who are in various stages of physical disarray,really, from being importuned by advertisements. I think it's important to get infoxmation to people, but I don't think that hospital emergency rooms, scene of the accidents, is the place; and if the bar prohibited that but let general public advertising go, it seems to me that kind of a narrow regulation could be permitted.

QUESTION: Yes, but you wouldn't say the State could prohibit a candidate for office from canvassing in a hospital, just because the people might not be in the best possible shape, would you?

MR. CANBY: Correct, Mr. Justice Rehnquist.

QUESTION: Was this because you think the protection accorded to this type of speech is less than that accorded to political speech?

MR. CANBY: I think it is. I think that the circulation of a commercial handbill is entitled, certainly, to less protection than First Amendment speech of a political nature.

But I -- and I would not assume the same test.

For instance, false and deceptive political speech is obviously not prohibitable, but --

[Laughter.]

MR. CANBY: I do think, however, that false and deceptive advertising should be, and that it is not protected by the First Amendment.

QUESTION: Well, last term's case said as much, didn't it?

MR. CANBY: Yes, it did. I don't think that the -- and that, of course, and your concern established clearly --

QUESTION: That is Virginia Pharmacy. Beg pardon?

MR. CANBY: Yes. That was clearly stated in more than one of the opinions in that case, that because of the likelihood that commercial speech won't be killed, and the fact that the facts are really within the peculiar knowledge of the advertiser, that probably some different rules can be made on false and misleading advertising regulations, one of them.

I think it's important to add in this case, too, that the practice of influence does serve consumers, and it seems that it serves them in obtaining what really is a constitutional right. I think there is a constitutional right to legal services, and extending the access to legal services is really a way of saying that the constitutional

rights of the recipients will accord with the constitutional rights of the would-be commercial speakers in this case.

QUESTION: Are you suggesting that the function of a pharmacist is to be equated with the function of a physician or a lawyer?

MR. CANBY: No, Mr. Chief Justice, I think that physicians and lawyers clearly have a much greater variety of services they dispense. There is a great deal more judgment involved, but the American Medical Association, for instance, has taken a position contrary to the State of Arizona here. The Governing Council of the American Medical Association, this year, held that physicians can advertise fees for specific services. And that ruling is set out in the Appendix to their amicus brief, the American Medical Association.

In other words, they do not see it as inconsistent with professionalism of the most discretionary sort, to advertise a set fee for a set service. And, in fact, set fees are even permitted by the American Bar Association. In its 1975 amendments it authorized attorneys to advertise in the classified pages that a list of fees, a written list of fees is available on request.

Well, if an attorney can make up a written list of fees, and give it to people who see reference to it in an advertisement, I see no reason why that written list can't simply be advertised and it makes the consumer have that

information at much greater ease. But the set fee is still there, and it's written down and it's chosen by the attorney.

On the side of the State in the First Amendment question, there is really here quite a burden to be sustained. I think that Bigelow and the State Board of Pharmacy are clear that there is a very high State interest required, that the First Amendment, since the protection does extend to commercial speech, the First Amendment tilts in favor of publication, the State really ought to show interest which justifies the prohibition of all of this information.

The first justification which is heavily urged by the appellee in this case is that this is really a form of barratry, that if advertisements are widespread, then people, who would not have availed themselves of legal services, will do so. And if that's the definition of barratry, then we simply have to face that and say we're guilty.

Because ignorance is not a very good way to control who uses the legal system. And to say that those who know they have causes of action or those who know they need wills or those who know they need divorces can get them, but those who don't know this can't, and that that's the way we control the flow of litigation or the use of legal services.

QUESTION: But haven't bar associations, as such, for many, many years, issued free brochures explaining the title problem, and explaining joint tenancy, explaining the

problems of acquiring and financing the purchase of a home, issuing them in public places without directing anyone to a particular lawyer, but merely acquainting the public with these kinds of services?

MR. CANBY: They have --

QUESTION: That's been very common, hasn't it?

MR. CANBY: They have, and you're right, Mr. Chief Justice, this has been going on for several years; but the great need is still there. The studies, the preliminary report is a couple of years old and the final report of this legal needs of the public survey is due for publication by the American Bar Foundation this coming February, next month, and it indicates that the people really aren't being reached by this information, and they are certainly not being reached by price information. People don't know what this costs, and it's very burdensome to find out what it costs, and when you find out what a lawyer that you have gone to is going to charge, there's no way of telling what other lawyers charge for anything like this service.

QUESTION: Have not these same bar associations, usually the State and local as distinguished from the American Bar, published recommended schedules of fees, not binding as in the Goldfarb case, but merely communicating to the public that the examination of a title has a certain range, that probate of an estate has a certain figure, preparing a deed or

a will, et cetera?

MR. CANBY: There is no evidence in the record of this, and I don't know if it's being done in Arizona, it may well have been done elsewhere, I just can't answer the question. I don't know.

It seems to me there might be antitrust problems with those fees if there is -- if it's used as a means of agreeing on fees to be charged. But, to my knowledge, at least in the record in this case, there's no indication this has been done.

I think the reason that these institutional efforts, although they are very helpful, really haven't succeeded are two: One is that they do not permit enough information to be conveyed; and, second, it's a limited effort because it's really not directly in the economic interest of those disseminating the information to disseminate it.

And because of that the efforts don't work as well as they do when the person who is disseminating has a personal interest in getting the message across.

Another argument that's used by the State, although I should say before I bring this one up that we're talking here about the State interests which might support this kind of a regulation, we're not talking about anything in this record, really, because the appellants were charged not with deceptive advertising or not with poor quality of services or

anything else else, they were charged with advertising.

And the findings all along the way simply said they advertised their disciplines.

So we're really simply anticipating arguments the State might make for a constitutional rule justifying this kind of an overbroad total ban, and we submit that its overbreadth itself is enough to strike it down.

This, in our -- excuse me?

QUESTION: Mr. Canby, you said a moment ago that you thought perhaps there was some difference in the protection accorded to commercial speech than to traditional political speech. Do you think the doctrine of overbreadth would apply with all its force in the area of commercial speech the way it does with ideological or political speech?

MR. CANBY: I think that it would, because, largely, when you say all its force, perhaps there are instances when it wouldn't. It seems to me when it is just speech, in other words, the publication of something in the paper, overbreadth is appropriate, and, indeed, a great part of the opinion in Bigelow v. Virginia was that overbreadth when it's the pure transmission of a message is quite appropriate an approach here, even though it is strong medicine.

This ban, for instance, does not permit the kind of thing that the ABA has said is permissible, setting up a display box in the classified pages, giving the fee for

initial consultation, the ABA has permitted this in its amendments, which are in the Appendix at 449, and the morning press tells me that the Michigan Court has adopted this. But Arizona does not. It seems to me that's an example of overbreadth.

But we would also be quite content, Mr. Justice Rehnquist, to stand on the ad here. We think that this ad is protected, and we are very anxious to establish that the advertisement of a fee for a particular service, which is in fact held to and performed competently, is not deceptive, and in fact it's very helpful to the consumer to have that information.

The arguments that professionalism is simply inconsistent with advertising might have been easily accepted several years ago, but there simply is too much advertising done now, or there are too many organizations which are willing to endorse it, to entertain the idea that somehow the profession simply cannot operate with advertising.

QUESTION: Well, the trend, though, in the legal profession has been just the -- in the opposite direction, hasn't it?

MR. CANBY: The one century trend certainly has. There was advertising --

QUESTION: Because 100 years ago lawyers did advertise, didn't they?

MR. CANBY: That's correct.

QUESTION: Routinely, or standard operating procedure.

MR. CANBY: Yes. And, in fact, the first Code of Ethics of any bar association in this country, the Alabama Bar in the 1880's, specifically stated that newspaper advertisements were proper.

And it was subsequently, after the American Bar Association was organized after the turn of the century, they began to restrict this.

QUESTION: Mr. Canby, does Arizona have an integrated bar?

MR. CANBY: It does, yes.

QUESTION: Every lawyer is a member of the bar there?

MR. CANBY: That is correct, Your Honor.

It's interesting that even the seat of the profession seems to be changing, too. The monopolies commission in England has recommended that solicitors be permitted to advertise, and action is being taken on that recommendation.

The Governors of the D. C. Bar Association, here in the District of Columbia, have recommended advertising which would permit price advertising by individual attorneys. That has not yet -- in fact, it was just recently submitted to the District of Columbia Courts. There's been no action on that.

In summary of the First Amendment problems, I think that all of the arguments of the State really depend on the public's not knowing something, and this runs afoul of the Virginia State Board of Pharmacy strictures that protecting the public by keeping it in ignorance really is not the way of the First Amendment.

The question, it seems to me, that has to be asked in this case is: What is it in this ad that the consumers or the public really ought not to know?

Apparently it would be all right to put it in a written list, and there is evidence in the record that when people telephone attorneys, the attorneys "set fees" for things like uncontested divorces. Well, if that can be told to a person when he calls, what is it about the advertisement that means that the public shouldn't generally be told that without having to call and compare?

QUESTION: Would you think it would advance professionalism if your clients having the ad which they used, then another group of lawyers would publish an ad of ten percent less?

MR. CANBY: I think it would, if they published ads stating that --

QUESTION: You think it would advance professionalism?

MR. CANBY: I think it would. Because I think the

greatest duty of the profession is to extend legal services that does not have it, and that legal services have regularly been available to a very restricted portion of the population. And I think that this kind of thing would tend, for one thing, to -- and there's economic expert testimony on this -- this kind of advertising will tend to drive prices of legal services down.

QUESTION: Is there a reproduction of the ad as it appeared in the paper somewhere?

MR. CANBY: At page 409 in the Appendix -- 409 in the Appendix, Mr. Justice.

I'd like to say a few words here about the antitrust portion of this argument.

QUESTION: Before you do that, Mr. Canby, --

MR. CANBY: Yes?

QUESTION: -- would you tell us which issue you think we should decide first of the two. The government has a different view than the litigants, apparently.

MR. CANBY: Well, the normal rule, I suppose, of this Court is that you decide statutory grounds and avoid constitutional decisions when possible.

I think that in this case the First Amendment argument is admittedly simpler. And there certainly are occasions when this Court has decided a constitutional argument where there is a clear violation of the Constitution without entering

the statutory grounds.

Incidentally, in the other drug price case, Terry v. State Board of Pharmacy out in California, the three-judge court did just that. There were both First Amendment and antitrust grounds set forth in that case. They decided the First Amendment ground. This was before the Virginia State Board of Pharmacy case was decided here.

Andthen they said: We simply won't reach the anti-trust issues.

The antitrust issues in this case, of course, revolve primarily around the State action so-called exemption of Parker v. Brown, and here the Justice Department, whose support we welcome on the First Amendment, takes leave of us and takes this position with some reluctance; and I can understand their reluctance, because, in the record in this case for instance, other professions testified as to their practices.

The accountants, for instance, had a rule against competitive bidding. It was a rule of their national association, and it became a rule of their State association, and it became a rule of the State Board of Accountancy in Arizona. No competitive bidding.

This was abandoned at the national level, according to the record, under threat of Justice Department action. It was abandoned at the State level by the State Board when our State Attorney General wrote an opinion to the Board that

it violated State and federal antitrust laws.

Other kinds of restraints are common, the architects, for instance, who permit solicitation -- permit solicitation, but not price competition.

Well, these are restraints of trade, and they are restraints of trade that regulated professions can easily get incorporated into rules of the profession, and the restraint is great, as it is in this case.

The Parker v. Brown, of course, dealt with an anti-competitive raisin marketing scheme that was imposed by legislative command of the State. The evolution of Parker, to which we believe this case -- into which this case can be fit, is that announced in Cantor v. Detroit Edison, where this Court said that the practice of furnishing free light bulbs by a regulated utility violated the antitrust laws, even though it was incorporated in a tariff which had been approved by the State Utilities Commission, and the utility was not free under State law to deviate from that practice.

Now, in Cantor, -- the Cantor case, of course, is distinguishable in that the State was not the one which was doing the enforcing, it was a suit against the private utility. Here we're taking the next step, basically, and trying to prevent the enforcement of a restrictive trade practice which the State has approved by adopting this rule, which was clearly originated by the ABA, both its predecessor

and the present one, and adopting it into a rule of the State Supreme Court.

The language which, it seems to me, the government is overlooking in Cantor is that which deals with the fact -- and this was dealt with also in Goldfarb -- that whether or not the State is involved is a threshold question. And if the State is not involved, as this Court really didn't feel it was in Goldfarb, then there is no immunity. But that's the threshold question, and of course the State is involved here, the court's enforcing this. Well, then, what question comes after the threshold? And that is, is this rule really necessary to make the regulatory system work? How badly does it interfere with the system of free competition that the Sherman Act has mandated? And what interests of the State make this rule necessary and what ones don't?

And in this case we submit that the same interests which we find to be weak when they are measured as a First Amendment part of the State's balance are equally weak when they're measured in the antitrust balance.

There's no question here, of course, that this is a restraint and that restraint of price advertising affects the price structure. A more or less classic antitrust restraint.

The fact that the State is enforcing it is not the whole answer. For instance, the State was enforcing its own

rule basically, or at least a State rule, a State command was involved in the Schwegmann case. The Schwegmann case was an attempt basically to invalidate the State non-signer law, under the Fair Trade Acts, and it succeeded: the State command was invalid because it conflicted with the command of the Sherman Act.

In other words, it did not fall -- that fair trade practice did not fall within an exemption to the Sherman Act that Congress had created.

QUESTION: Well, has this -- have the restrictions however originated with the State or with the bar?

MR. CANBY: The restrictions here originated with the American Bar Association.

QUESTION: Well, they may have, but the bar hasn't any choice any more, does it?

MR. CANBY: They haven't, but,I would submit, neither did the utility in Cantor. They no longer had a choice.

QUESTION: Well, yes, but they did originally. They could have filed a new tariff.

MR. CANBY: That's true, --

QUESTION: Well, the State can't -- the bar can't here file some new rules with the Supreme Court and automatically be out from under these rules?

MR. CANBY: No, it certainly wouldn't be automatic.

QUESTION: Well, then it's State prescribed, isn't it?

MR. CANBY: It is State commanded, that's correct, by the --

QUESTION: But in the Cantor case, once you filed you had to do what you said you were going to do.

MR. CANBY: That's true.

QUESTION: But you had to live up to your own tariff.

MR. CANBY: I believe, though, that those tariffs --

QUESTION: But they could have discontinued the tariffs.

MR. CANBY: I believe that technically that has to be approved --

QUESTION: Well, the bar can't send a notice to the Supreme Court here and say, by the way we're now discontinuing the rules you published.

MR. CANBY: No, they certainly can't.

QUESTION: Well, what would be left of Parker if you --

MR. CANBY: Well, there would be less left of Parker, I think,

QUESTION: Quite a bit. But what would be left of Parker?

MR. CANBY: Well, in the first place, where there is a high State interest, and I think that the best example, I suppose, of what would be left of Parker is the natural monopoly which public utilities are an example of. If the State wants to regulate the price structure of attorneys, then,

fine, I think that if they decide, for instance, either to hire the lawyers or to put the lawyers under the State Corporation Commission and regulate their rates, then there's a very considerable argument that the State has substituted interests which restrain the accesses of monopoly from those which otherwise are provided by the Sherman Act.

Here, of course, the State command frees lawyers from a certain kind of price competition, but it does not exert any real pressure on the lawyers to keep their rates down.

QUESTION: Well, would you be making the same argument if, say, the Legislature of Colorado suddenly reared back and said there shall be -- passes a law and says, there shall be no advertising, price advertising, or any other kind of advertising by lawyers?

And the lawyers live up to it as a group.

MR. CANBY: I think that would violate the Sherman Act, but I must say that that's a much weaker case, because there at least the political arm of the State has presumably considered the matter and --

QUESTION: Well, how would you -- even if Parker wasn't available, how would you prove a Sherman Act violation, if lawyers just obeyed that law?

MR. CANBY: Well, that's --

QUESTION: They don't agree to anything, they just live up to the law.

MR. CANBY: That's the importance, it seems to me, of the fact that there is more than a mere request by the bar in this case, to pass this rule. This rule was --

QUESTION: That makes your Sherman Act case weaker, doesn't it?

MR. CANBY: No.

QUESTION: Mr. Canby, instead of a defense, you are bringing an antitrust action, who would you name as defendants in this case?

MR. CANBY: If I were bringing an antitrust action, I imagine that I would bring it against the State Bar. But it seems to me it's a different --

QUESTION: Could you get relief against the State Bar --

MR. CANBY: -- it's a very different question.

QUESTION: -- as long as the Supreme Court rule remains in effect?

MR. CANBY: The State Bar might well be exempt from -- as a matter of fairness -- from damages, if it had no option but to obey the law.

QUESTION: But supposing you got -- you won your case against the State Bar and the Supreme Court of Arizona said: We don't care what happened in that litigation, we still have this rule; we're going to disbar people who don't follow our rule.

Wouldn't you have to name the members of the Supreme Court in order to prevail?

MR. CANBY: Well, perhaps, or at least if enforcement was attempted, then, to defend on that ground. And it seems to me if the Michigan Utilities Commission, the day after the Cantor decision came down, said: All right, now we're holding the utility to its tariff, because our State law says you have to be held to it. Then I think the utility would have a defense against that.

QUESTION: Would the utility have a defense if the tariff it proposed itself was unlawful?

MR. CANBY: It seems to me the intervening decision of this Court would provide that. Otherwise, of course, this Court and the Utilities Commission will be commanding consistent conduct, and I would suggest that the supremacy clause here simply dictates that the federal command prevail.

If I answered Mr. Justice White's question --

QUESTION: Well, don't be too quick to bring the suit.

[Laughter.]

MR. CANBY: No. Right. I will not.

In summary, I will simply say that, in our view, both the antitrust laws and the First Amendment apply and a balancing test applies. The balance here in favor of public information of this kind is tremendous, and the State's interest, to the

contrary, are not.

The decision should be reversed.

I reserve any remaining time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Canby.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. FRIEDMAN: Mr. Chief Justice, may it please the Court: --

QUESTION: Mr. Friedman, before you commence, let me share with you at least my primary concern with this case. I think all lawyers agree that the problem being discussed here today is a very serious one, important for the public and the profession. The delivery of legal services in our country obviously is defective. The problem that I think concerns all of us on this bench and at the bar is what to do about it. Lawyers have advertised, to some extent, always. Anybody who knows about Martindale can find out where lawyers went to school, how old they are, and, until recently at least, who their clients were.

They can also find out what areas of specialization lawyers profess to be competent to practice.

I hope you have time to address, not just the bare bones issue of whether or not there can be any advertising --

I don't perceive that as the basic issue in this case. The question is what limits, rationally, fairly, constitutionally, may be imposed, who imposes those limits, and how are they enforced.

These are the broader contours of the problem. We could decide this case, and may very well do it, in a very narrow way. But that wouldn't advance the resolution of the fundamental problem.

MR. FRIEDMAN: Let me address myself directly to that question, Mr. Justice Powell.

I think we start with the basic issue that has been suggested in this case as a narrow one, whether there can be an absolute ban on all advertising, and the position of the United States is that this absolute ban imposed by the State of Arizona goes beyond the permissible limits of the First Amendment, it's inconsistent with the First Amendment because of the strong interest of members of the public in getting information about legal services, both their availability and their cost.

Now, we also of course recognize that there is a very strong interest in insuring high ethical standards at the bar. As this Court has indicated, both because of the critical role that lawyers play in the administration of justice, and their role as officers of the Court. Obviously, lawyers do not stand in exactly the same position as the

average merchant who is selling a standardized product, he is selling a special service.

But we think that the First Amendment requires that any restraints that the State does impose upon the dissemination of information by lawyers to the public as potential clients cannot go beyond what is necessary adequately to protect the State's interest.

Now, that ultimate balancing in First Amendment cases has to be drawn -- done by the courts. Of course the State has the power to prevent misleading, deceptive, false advertising by lawyers. And the State has a broader authority than that. There may be many things that a merchant can do that it is not proper for a lawyer to do, because it is important, it is important to this country that the people of this country have a high regard for the legal profession, because of its critical role in the administration of justice.

But we don't think that because of the importance that the laywers play in the legal system and in the operation of our country that this means the bar can say there can be no advertising at all. We don't think the bar can go that far.

Now, there are problems, of course, of policing these things. And I might just add in passing that we have indicated in our brief that there's some recent indications of suggestions of what would be permissible. We're not espousing any of these, all that we cite these for is to point out that the

problem is not to us an all-or-nothing problem, it isn't either there can be no advertising or that there's got to be enormous discretion. There has to be some limitations.

Now, one of the problems --

QUESTION: May I interrupt you just a minute right there? I think we start from the premise that some advertising already is permitted, so the total ban issue, as I perceive it, is not here. You do have the extent of the ban under the Arizona rule.

But Mr. Canby stated, quite explicitly, that he thought the First Amendment entitled lawyers to talk about the quality of their services. What is the government's position on that?

MR. FRIEDMAN: Well, that, it seems to me, again would depend on what is said. If statements with respect to the quality of services are misleading, the State can prohibit them. I don't think a lawyer could publish an ad saying "Come to me, I'm a better lawyer than anyone else in town"; it seems to me that's not the kind of statement, although permissible to a merchant, that a lawyer could properly state.

QUESTION: Well, suppose, in this case, a competing lawyer had published an ad saying "The partners in this clinic have been practicing divorce law on a part-time basis for four years; I'm a specialist in divorce law, I've been practicing it for twenty years, my fees are the same"; is that all right?

MR. FRIEDMAN: I would think the derogatory thing would present problems to me. I would think that it was impermissible if the ad stated merely that "If you need a divorce, we've been practicing divorce law for twenty years, we are experts in" --

QUESTION: What's derogatory about that comparative statement, if it's true?

MR. FRIEDMAN: Well, it seems to me it is derogatory, Mr. Chief Justice, because the suggestion is somehow that "we are better than they are", and it's the negative suggestion against them. It seems to me this gets into the area where I think that there may be problems with respect to what is permissible.

QUESTION: Well, does the First Amendment prohibit derogatory communication?

MR. FRIEDMAN: No. No. It isn't -- it isn't the First Amendment prohibits derogatory communications, Mr. Justice, we think it is that the First Amendment does permit -- does permit -- lawyers to get to the public their position, that they are available to the public and indicating what their services are and what they will charge for them.

Now, --

QUESTION: What about simply saying "anything you can do, I can do better"?

MR. FRIEDMAN: I don't think that would be permis-

sible, Mr. Justice.

QUESTION: Why? Why not?

QUESTION: If the First Amendment compels the inclusion that you suggest, then what -- where do these limits come from, then?

MR. FRIEDMAN: I think the limits come --

QUESTION: They certainly don't come from the First Amendment.

MR. FRIEDMAN: No, they --

QUESTION: Where do they come from?

MR. FRIEDMAN: The limits come, I think, Mr. Justice, from the role of the lawyers and the differences, the kind of differences that exist with respect to what is an appropriate kind of regulation of the legal profession.

QUESTION: Since when, under the First Amendment, is a governmental body, whether it be a judicial, executive or a legislative, allowed to say -- to regulate speech?

MR. FRIEDMAN: Well, it's not regulating speech in that sense. What it is saying is that there's certain kinds of speech, certain kinds of speech, certain kinds of things done by lawyers that are not consistent with the standards that we accept of lawyers.

If I may give a simple example, I suppose there's no question under the First Amendment that a merchant can put out the most far-reaching and the most sweeping claims for his

stuff, "Come to our store, the best store in town, don't buy -- patronize anyone else"; that kind of thing.

QUESTION: Well, there's been no question for something less than a year. A year ago there would have been a great question whether a merchant had any First Amendment right at all to do that.

MR. FRIEDMAN: That, I think now, has to be accepted that there is -- there is a First Amendment protection to commercial speech.

But the fact that there is a commercial speech protection under the First Amendment doesn't necessarily mean, as this Court itself has suggested in those cases, that when you are dealing with members of the profession, that necessarily there has to be the same sweep to the protection they have, as is to be given to the common garden variety of commercial speech. That is, the things that can be said about advertising prescription drugs are not necessarily the same things that can be said when a lawyer brings his message to the public.

QUESTION: Quite obviously. But I wonder where -- I can understand -- this is a Court that decides questions of federal constitutional or statutory law, the issue here is whether or not the First Amendment of the United States Constitution requires Arizona to do something else than it did. And if it does, then it requires Arizona to allow

lawyers to advertise.

But now, where do all these limitations come from in federal law, constitutional or statutory?

MR. FRIEDMAN: Well, I think it comes in, Mr. Justice, in the balancing process, in determining -- in determining just how far the State can go in respect --

QUESTION: Do you think it's up to us to say that? Where does our power come from?

MR. FRIEDMAN: Well, in the first instance -- in the first instance it has to be the State that makes the judgment, and the State in this case has not made any judgment other than the judgment that there shall be no advertising at all by lawyers in the State of Arizona, and that's what we think is bad, this absolute ban.

Now, if the Court agrees with us that the absolute ban is bad, that doesn't mean that you have to go all the way and say that there can be absolutely no limits at all.

QUESTION: Arizona, as my brother Powell has pointed out, doesn't really mean what it has said, does it? It doesn't ban the circulation of Martindale-Hubbell in the State of Arizona, does it?

MR. FRIEDMAN: No. But what they really -- what they are really talking about, it seems to me, is advertising directed to the public. Martindale-Hubbell is basically, I think, directed to members of the bar. I think what Arizona

does do is bar any advertising by lawyers to the public. Anything that the lawyers do that gets to the public, the lawyer's position, making and announcing the availability of their services and indicating the costs at which they will furnish them.

I think --

QUESTION: What is the thought to federal constitutionalize it that says Arizona can't do what it did, but another State could prohibit derogatory advertising by one lawyer about another?

MR. FRIEDMAN: I would think so.

QUESTION: But where does that come from?

QUESTION: Where does it come from?

MR. FRIEDMAN: Well, I think it comes from the recognition -- it comes from the recognition that the First Amendment protection given to commercial advertising by lawyers is not necessarily to have the full force and effect as the First Amendment protection given to advertising by merchants. That it's protected, it is protected by the First Amendment, but the scope of the protection isn't as sweeping as the protection given to the more traditional kinds of commercial --

QUESTION: Mr. Friedman, are you not suggesting a distinction based squarely on the content of the advertising? The content of the speech?

MR. FRIEDMAN: Yes, I think I am, Mr. Justice, and I think the Court last year in the American Mini Theatres case recognized that there may be situations in which you can refer to the content of the speech.

QUESTION: Well, would you agree that your position must fail unless the Court is willing to say that the content may be the basis for differentiating between the kinds of protected speech and unprotected speech?

MR. FRIEDMAN: Well, I -- no, Mr. Justice White, there have -- there are situations, it seems to me very clearly, where the content of the speech does control the measure to which it can be regulated. In the field of commercial advertising, the Court pointed out last year that while it was a First Amendment right to distribute and announce the prices at which prescription drugs were being sold, it didn't follow from that there was a First Amendment right to make false and misleading statements.

So it seems to me the Court does look to see what the content is, if it's false and misleading, certainly the maker of these statements cannot claim that it's constitutionally protected. I think --

QUESTION: But it seems to me that you're taking two different positions. One time you say -- you and Mr. Canby both kept saying, well you can prohibit false and misleading. But Mr. Justice Rehnquist asked you about derogatory. It can

be truthfully derogatory.

MR. FRIEDMAN: Well, --

QUESTION: Your only line surely is not the false and misleading line, is it?

MR. FRIEDMAN: No. Well, it may -- no, it goes somewhat beyond that. I don't know precisely at what point the line has to be drawn. That, it seems to me, is a line that in the first instance has to be drawn by the State, because the State has the broad regulatory authority over the legal profession.

QUESTION: You gave an example earlier about the merchant puffing, in effect, saying he's the best in town, or something like that.

Are you suggesting that that could be prohibited? for example, could the State say that a lawyer may not advertise that his fees are "very reasonable"?

MR. FRIEDMAN: I --

QUESTION: Which is precisely what this person did.

MR. FRIEDMAN: Well, this person merely stated "reasonable fee".

QUESTION: No, "very reasonable".

MR. FRIEDMAN: "Very reasonable fees", "very reasonable fees".

QUESTION: Is that permissible under your view?

MR. FRIEDMAN: I would think that kind of a statement

is permissible.

QUESTION: So, some statement of opinion about --

MR. FRIEDMAN: Some statement, yes.

QUESTION: Other than the mere fact --

MR. FRIEDMAN: But again I think it has to take into account the whole matrix of the relationship of the bar to the public. That is, there are certain things, it seems to me, that the State fairly can conclude are not properly to be done by members of the bar. They could be done by non-professionals.

QUESTION: And one of them may be to advertise, at all?

MR. FRIEDMAN: Well, it --

QUESTION: If what you say is correct.

MR. FRIEDMAN: That's where we disagree, Mr. --

QUESTION: Well, where do these limitations come from? They either have a First Amendment right to do this, short of defrauding people or being deceptive or false, or they don't.

MR. FRIEDMAN: Well, I --

QUESTION: And where in the Constitution or the federal law, the Federal Constitution, or any federal statute, do these limitations come from?

MR. FRIEDMAN: I think these limitations derive, Mr. Justice, from the nature of the legal profession, and from the fact that traditionally, in evaluating First Amendment

rights, there has to be this balancing test. And when you consider a limitation on all advertising, as distinguished from the limitation on certain types of advertising, it seems to me the State's interest in restricting certain forms of advertising may be much, much greater than the State's interest in --

QUESTION: And it occurs to me that what you're proposing is a considerably more arbitrary standard than the one that Arizona has adopted.

MR. FRIEDMAN: I don't --

QUESTION: Where, anywhere, has there been -- once it has been recognized that there is a First Amendment to speak or to write, where, anywhere, has there ever been found any permissible limitation upon it, so long as it's true?

MR. FRIEDMAN: But I think, Mr. Justice, I would sugges that --

QUESTION: Where? I would like to have an answer to that question.

MR. FRIEDMAN: Well, let me see if I can answer it this way, that in determining what the First Amendment right is, when we say there's a First Amendment right to advertise, that doesn't mean a First Amendment right to advertise any conceivable thing, and I --

QUESTION: There's not a First Amendment right to

speak the truth; --

MR. FRIEDMAN: No, but there is, Mr. --

QUESTION: -- since when?

MR. FRIEDMAN: There is a First Amendment right, of course, to speak the truth. But --

QUESTION: All right. Then why can you have any limitations if you're correct about the First Amendment requiring that, where does any limitation come from that allows any governmental agency, executive, legislative or judicial, to impose any limitations on lawyers' right to speak the truth when they advertise, including saying "I have been practicing divorce law for twenty years and am the most experienced divorce lawyer in this community"?

MR. FRIEDMAN: Well, I think the -- the latter, it seems to me, I'd think they could say. I think they could say the latter.

QUESTION: "And here are my fees, and they are no higher than any other lawyer in town".

MR. FRIEDMAN: I think that up to that point, yes; up to that point, yes. But at some point, it seems to me, they may go beyond this, because at some point they are likely to say things that seemingly are wholly factual, but in fact may not be that factual. If one --

QUESTION: Let me try balancing on that score with you, since you mentioned the balancing process.

Suppose this lawyer or law office has advertised wills for $25, and then they put, along with the supermarket ads, an ad of their own thing, "$25 wills, Saturday only, $14.95"; do you think they could do that?

MR. FRIEDMAN: I would think -- I would think, if they were prepared -- if they were prepared for any client who came in on Saturday to draw a will for $14.95, although $25 is the regular price, they could state that.

QUESTION: But does anybody know what a $25 will is, in the first place?

MR. FRIEDMAN: Well, there may be something -- there may be something deceptive if, in fact, they never draw wills for $25. But if they say a simple will -- "Simple will, $25" and in fact they are drawing wills for people for $25, it seems to me they could state that. And I think they could also state that on Saturdays, a special for the man who is working five days a week and can't come to see us during the week, $14.95. I think they could say that as long as it's truthful, as long as it's truthful.

If, in fact, when people came in for their $25 wills or their $14.95 wills, they quickly told them: Well, your will is much more complicated, it's going to cost you $150. That would seem to me to be misleading in the classical traditional sense.

But I don't think they can be stopped from telling --

QUESTION: Well, that's just a bait-and-switch trick, that's -- we're not talking about that.

[Laughter.]

QUESTION: We're talking about -- well, you go ahead.

MR. FRIEDMAN: If I may, Mr. Chief Justice and members of the Court, I'd just like very briefly to speak about the Parker v. Brown point, which has been discussed briefly here.

It seems to us that what the cases in this Court, starting with Parker v. Brown and going through Cantor, establishes one fundamental principle: that if the action challenges a violation of the antitrust laws is, in fact, action of the State or compelled by the State, it's State action not subject to the strictures of the antitrust laws.

Now, in this case, unlike the Virginia case, where all that happened with regard to the fee schedules was that the State approved them or suggested them or authorized them, here the State commands it. It's a rule of the State Bar of Arizona. The State -- I'm sorry, the State Supreme Court of Arizona.

And if I may just complete, Mr. Chief Justice, the State Supreme Court is the one that exercises the function of the State of Arizona in dealing with lawyer discipline. This is not a case where the bar association suggests some-

thing and the State Supreme Court says "If you want to do it, go ahead and do it". Here, as has been brought out, it's the State Supreme Court, the final arbiter on these matters, that has ordered the lawyers in Arizona not to advertise. It's the State Supreme Court that has disciplined these lawyers for advertising.

The State is speaking, in this matter, through the only agency by which it functions with respect to disciplining of lawyers, and that, it seems to us, is State action under any standard of the term, and is therefore not a violation of the Sherman Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Frank, we will not ask you to go for a minute and a half, we'll let you begin at one o'clock.

MR. FRANK: Thank you, Mr. Chief Justice.

[Whereupon, at 11:59 a.m., the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Frank.

ORAL ARGUMENT OF JOHN P. FRANK, ESQ.,

ON BEHALF OF THE APPELLEE

MR. FRANK: Mr. Chief Justice, and may it please the Court:

From Mr. Canby and the amici government, I draw a certain common syllogism. The major premise is that not enough people receive legal services. The minor premise is that solicitation by advertising will greatly aid the deprived.

The conclusion is that the First Amendment of the Federal Constitution requires that advertising be permitted.

In response to this, my own single greatest obligation from all of the sources on which we have drawn is to Mr. Frederick Ballard of the bar of this city, who, almost, Mr. Justice Powell, in response to your comment, in making a speech of his own on this subject, directed me to a singularly eposic aphorism by H. L. Mencken, which I repeat:

"For every serious problem there is a solution which is simple, direct, and wrong."

Well, we acknowledge the sincerity of those who, with Biblical fervor, contemplate the vision of striking the rock and having a stream of pure water come out to slake the thirst of the multitude. We frankly find it astonishing

that they can be so blind to the cataclysmic flood which they seek to unleash.

What you are asked to believe is that if you give your permission, the nation will be dotted with noble souls, who will, by advertising, communicate to those otherwise unaware their desire to perform worthwhile and needed service at very low cost.

This frankly visionary speculation overlooks the human experience which tells us that you would be unleashing quite a different flood. The plain truth of the matter is that advertising law business leads to incompetence at best. And the experience of the Patent Office which tried it, and, after full hearing, concluded in formal opinion that this was exactly true, is good documentation.

But, to put it bluntly, it leads to lying, cheating and swindling at its worst.

We don't have to guess about this, we know. We know because, as Justice Stewart reminded us this morning, there was no limitation on advertising in the Nineteenth Century, and what I am talking about is exactly what happened.

The only notes we have of an oral argument that was ever made by Abraham Lincoln at the trial court involved the case of a widow of a Revolutionary War veteran, who was represented by what was then called a claims agent, who was permitted to get his business by solicitation. And he was

doing what would in our own time be regarded as legal work.

Lincoln took the widow's case without charge, to try to recover some of what that agent had kept, and perhaps some of you have seen the notes of that argument and can imagine the immense force of the underlying phrase at the end of it, which says: Skin the defendant.

It isn't any wonder that Lincoln told the law students: "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 [sic] would drive such men out of it."

Now, I want to make very clear that for those of us who uphold the ban on solicitation, we do not regard this as the pieties of the dead to which we are somehow paying lip service.

The other side says in its brief that what a different era called runners and cappers are quaint anachronisms which don't need to concern us any more.

We don't see it that way.

We say that the lawyer who directly or through his intermediary goes to the hospital to line up the injured to sue is unworthy of the profession and, in Mr. Lincoln's phrase, "ought to be driven out of it".

Mr. Canby says that he would like to see controls on that score, but his clients said at trial, in response to

the question: "Do you believe you have the same First Amendment right to go to the hospital, or give your cards at the scene of the accident?" was, after some waffling, "I think that it may well be true that, if tested, a lawyer has a constitutional right to engage in that solicitation."

No lawyer of integrity -- I put it this strongly -- no lawyer of integrity can read our recitation of what actually happens with actual solicitation -- we took the cases from California as an example -- frankly without his stomach turning.

Even when our guard is all the way up, there are persons who solicit the widow and the orphan and the sick to bring actions which are, first and foremost, intended to line the pockets of those who represent them.

We say that this is absolutely bad business. We take, as our contemporary champion, Chief Justice Roger Traynor, who wisely said, speaking of the very persons that our friends here wish to help, the persons who are inexperienced, who don't know about legal counsel, who are having their first run at it; what Chief Justice Traynor said was: "Clients who need legal assistance only rarely and are therefore inexperienced in selecting counsel may be induced by advertisement to select unsuitable counsel, with consequent injury not only to themselves but to the reputation of the bar as a whole."

Now, the argument which you heard this morning, the counter argument, is that all these evils can be avoided by permitting only honest advertising, and by controlling the deceptive.

If there is one element of sanctimonious pap in this whole case, that is it.

The argument fails for three reasons:

First, advertising to be gravely undesirable doesn't have to be misleading. There were examples mentioned this morning. Exuberant puffing of the raps beaten here or the six $100,000 verdicts last year may be true, without being very desirable.

Second, the hustle is peculiarly likely to push people where they shouldn't go. When there is no real likelihood that they can appraise their own situation -- a matter to which I want to return.

But, third, and the main point I would develop now, the whole talk of controlling misleading advertising by criminal or regulatory sanction is, itself, the biggest hoax, the biggest misleading of all.

The plain truth is -- and I direct myself, Justice Marshall, to the exchange you had about, are we talking only about an absolute control -- what we are talking about is a prohibition of legal advertising in newspapers in this case by people who are trying to make money out of it. And that is

prohibited in our State.

And I point this out, that in all of the briefs you've had, Mr. Canby, the government, the rest of them, no one has ever yet told you how these controls are supposed to function. No one gives you more than the name or invocation of honesty. The grand-dad of all false professional advertising, of course, is medicine. The spellbinding patent medicine vender with his snake-oil cures is a Nineteenth Century legend, which we allowed to become amusing because it is so remote.

We have created a Food and Drug Administration which works in a kind of a way, sluggishly and expensively, to control the abuses of the national drug concerns, few in number, which manufacture the bulk of the products you spoke about in the prescription drug case.

But the only protection the public gets from misleading advertising at the grss-roots level is the ethical system of the doctors themselves.

I level a direct challenge to our adversaries here: if you allow a general pattern of advertising -- and what you do here for lawyers you're going to do for accountants and for doctors, they're in the same pot -- if you allow this, just exactly who is going to look at the hundreds of thousands of ads which may come out? Who is to appraise whether they are misleading? Who is to do anything about it?

The institutions do not exist. There is no procedure, no structure. All we are doing is opening the gate and saying: Let 'er come.

Now, Justice Rehnquist, you raised in colloquy the argument of overbreadth, which Justice Canby talked about; the argument that the ban is too broad.

Chief Justice Hughes, than whom no more towering devotee of free speech ever sat here, told us in the Semler case that society did not need to pick and choose which professional ads are invidious and which are not.

This Court, in the recent Mini Theatres case, observed that in commercial speech the content of a particular advertisement may determine the extent of its protection.

Chief Justice Hughes had something to say about content. He told us that professional advertising is what it is, inherently misleading. He expressly rejected the concept that control of professional service advertising must be as narrow as possible to fit only precise abuses.

QUESTION: What is inherently misleading about the ad in this case, on page 409?

MR. FRANK: This is a good example, Mr. Justice Blackmun.

QUESTION: I'd like to have you point it out.

MR. FRANK: I'd like to be specific about it. The Supreme Court of Arizona pointed out instances in which

even this ad, which is a little squib of an ad, meant to be a test case, and they make it as perfect as they can. So they tell us, first of all, that this is a legal clinic, and they somehow imply that there is something virtuous or cheaper about it -- virtuous or inexpensive.

But when we cross-examined them on the stand, there is no conception of what a legal clinic is, it's a meaningless term, simply a kind of an invocation of nothing.

More than that, they are offering, proposedly, particularly economical services, particularly beneficial prices. Take, for example, the one of their consent divorces.

They have also told us on this record that they charge $40 an hour for their time. They have told us on this record that their divorces taken between an hour and a half and three hours maximum. And it is no wonder that the Supreme Court of Arizona observed that this is outright misleading on its face, this indication of some great bargain for these so-called consent divorces.

The one on which there is the greatest tone of misleading, a matter to which I may come back, is to talk about name changes; and that also was picked up by the Supreme Court below.

The truth of the matter is that anybody in our town who wants to can go in and get his name changed for nothing.

And you don't need legal services for this.

So the question of whether somehow this is a great benefaction to mankind is highly doubtful.

QUESTION: What is it precisely that you feel is misleading about the divorce at $175 plus $20 court filing?

MR. FRANK: The point that is misleading is the suggestion that somehow this is some kind of a grand public service bargain.

QUESTION: Well, where do you get that out of the ad? Are you saying that that is not a very reasonable fee?

MR. FRANK: I am saying that given the standards of these people, who are purporting to be entitled to special dispensation because they are being so generous to the lower middle class, that the answer is no, it's not.

QUESTION: But that's not in the ad, is it?

MR. FRANK: It is when you connect it with the notion of the legal clinic and the special service and that somehow we are prized and special.

I agree, Mr. Justice Rehnquist, that I can't make this ad into a devastating falsehood. It isn't. It's marginal.

The point that I want to make here --

QUESTION: Well, that was my initial question.

MR. FRANK: Yes. It is, and I am answering it as hard and as solid as I know how.

QUESTION: It took you a little while to get there, Mr. Frank.

MR. FRANK: All right. What I'm saying, Mr. Justice Blackmun, is that the three items, which we have suggested in our brief, which we suggest are at least marginally misleading are, No. 1, the suggestion that there is something called a legal clinic. On the record, it is apparent that this is an empty term, which somehow imputes special value and special economy.

On examination as to what the legal clinic is, and there's a full-scale record before you showing it, it turns out that what a legal clinic does is what every office in Phoenix does: that they use paralegals, that they have forms, and so on.

Secondly, the Supreme Court below broadly suggested, and I think correctly, that the suggestion that this is somehow a great bargain price for divorces is misleading, especially measured by their own hourly rate and the time that it takes for them to do it.

And finally, --

QUESTION: But they don't even say it's a bargain, they just say it's reasonable.

MR. FRANK: They say it's reasonable, but I think, Mr. Justice White, --

QUESTION: You'd better stay close to that mike, --

MR. FRANK: I'm sorry; thank you.

QUESTION: -- if you want your imperishable words recorded --

MR. FRANK: All right, posterity will not be let down.

QUESTION: Exactly.

[Laughter.]

MR. FRANK: Mr. Justice White, I think that it is fair to say that the whole tone of this advertisement, the whole tone of the brief is that somehow we are doing something very special for the community, we're being just great folks, and we're giving you wonderful bargains.

Now, on the matter --

QUESTION: Mr. Frank, --

MR. FRANK: If I may conclude with the name change, and then pick that up, sir.

On the name change point, what the attorney said, when he was examined on the stand about the fact that you can get those for nothing, you don't need to pay $95, is: I feel under no obligation to tell people that they can get services cheaper somewhere else.

I submit that the tone of the thing is not quite what is being presented to you here today, of some great virtue and economy.

Mr. Justice Stevens?

QUESTION: Mr. Frank, what is the prevailing fee in this community for an uncontested divorce?

MR. FRANK: The problem -- let me answer by saying first, --

QUESTION: Do you know?

MR. FRANK: -- that the difficulty arises because the term "uncontested divorce" is a sliding term.

I would say that uncontested divorces could run, depending on how uncontested they really are, anywhere from around $150 to around $300. I've handled them myself for anything in that whole zone, in the course of the years, from time to time.

This is a low price, but it is not some spectacular bargain.

QUESTION: But judged by the standards of the community, rather than their own hourly charge, it is a reasonable fee, is it not?

MR. FRANK: It is certainly a moderate fee.

QUESTION: Then what is misleading about the reference?

MR. FRANK: Well, again, I come back to the fact that -- and this is simply the best I can do with it, Mr. Justice Stevens -- is that I think even in this simple ad they are trying to suggest some extra-special, and there isn't anything that extra-special here.

In the Williamson v. Lee Optical case, this Court, in a unanimous opinion by Justice Douglas, which followed Chief Justice Hughes' opinion in Semler, expressed, in dealing with advertising which related to health, said that the legislature was entitled to conclude that advertising could be limited or even abolished in the public interest. And the Court said: We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession, who should use no merchandising methods for obtaining customers.

We submit that it is plain false logic for the other side to say that the Hughes opinion or the Cardozo opinion that preceded it, or the Douglas opinion that followed it, somehow are all immaterial because they didn't use the precise words "free speech".

QUESTION: Well, Mr. Frank, what if the United Mine Workers or the United Transportation Union published this same ad, and at the bottom it said, "United Mine Workers Legal Clinic", and then under it it gave the names of the lawyers? Otherwise published this same ad, and they just circulated it -n their union newspaper, published it in their union newspaper to all their members, or to anybody else who wanted to buy it.

MR. FRANK: Mr. Justice White, you have, in effect, raised the question of the series of cases which have come up

here, which upheld group legal services and permitted effective advertising communication to them. And the answer is that that wouldn't be a violation in the State of Arizona either.

The talk that you've been given today suggests that somehow Arizona blacks out all kinds of communication. The fact is that the rule of the Supreme Court, the one under discussion about newspaper advertising is a particular rule, there are others, and there is an express rule -- and I understand it has been one of the very first ones -- to permit institutional advertising for legal services and institutional advertising for groups.

QUESTION: So you are saying that -- you're saying that something that you wouldn't call a group legal service exactly, but a union -- well, your answer is that you would not say that the Arizona rule would forbid this advertisement published by a union?

MR. FRANK: What I am saying, Your Honor, -- I am being brief because of the exigency of time -- but if you will look at our Rule 2-101, subparagraph 7, you will find -- I hold it in my hand -- that that kind of thing would be allowed.

What our State sees fit to bar is advertising by individual lawyers in newspapers for the purpose of lining their own pockets. It expressly permits institutional

advertising and benefit of lawyer referral services, it permits advertising for legal aid organizations, and it would permit, certainly, the union to tell its people what the services are which are part of the program.

These are matters of very subtle distinction which our Supreme Court has seen fit to make. But our Supreme Court has not seen fit to allow this kind of advertising of the individual pocket-lining variety.

QUESTION: Well, do you think the ad that I spoke about, published by the union, would be constitutionally protected under our cases or not?

MR. FRANK: I am in doubt, frankly, I'd want to give it tighter thought than I have.

QUESTION: Well, isn't that a --

MR. FRANK: I do think that it is permitted at least under the rules which we have.

QUESTION: I understand that. I just wonder what your view was of the constitutional protection or not, for an ad as I described.

MR. FRANK: I am in doubt as to whether there is constitutional protection. I simply -- as I say, I haven't thought it through to my satisfaction.

But that is because I approach it from a different standpoint. I approach it in terms of who is to make these decisions, a matter to which I will come; and the contending

circumstance here is that the Arizona Supreme Court has determined to do precisely that.

Now, we know that --

QUESTION: I have to admit, Mr. Frank, I am puzzled by your being willing to admit that "may" be constitutionally protected, but this clearly may not be; and the only distinction is that there's pecuniary gain as the motivation for the person that publishes here. Is that a constitutional distinction? In First Amendment terms?

MR. FRANK: As I say, in respect to the ads which are the ads for the group services where, for example, a union wishes to tell its members --

QUESTION: Well, precisely this ad by a union.

MR. FRANK: Yes. And the answer is that, for example, you have one of the briefs before you, it's the brief of the Arizona Credit Union League, and what the Arizona Credit Union League says expressly is: We don't want to be associated with the argument that Mr. Canby is making.

What they say is that it's enough that we are entitled to tell our own members in some effective way about the services which are available to our own members. And that, under the cases, I submit, is permitted and is acceptable.

Where we are drawing the line for a lot of reasons, which go to the nature of professionalism, to which I come,

and which we briefed with determination, is that there is less onslaught and destruction of the profession by allowing groups of that sort to communicate with their members about services available than there is about the kind of thing the Chief Justice talked about, having the lawyer saying "I'll give it to you for $19.95 on a hot Saturday afternoon."

QUESTION: Well, you wouldn't permit the Credit Union to do that, would you?

MR. FRANK: All we permit the Credit Union to do is to inform -- first, to arrange for legal services, and, second, to tell people that they're there.

I want to make clear that we are no more regressive than our friends about the problem raised by Justice Powell. Of course, we have to do the best we can to extend legal services in the United States, and we have to do a better job than we're doing, and we're trying; and that's one of the ways we try.

But the bludgeon of the First Amendment, the main point of the colloquy this morning with Justice Stewart, is simply not a suitable tool or device for doing it.

Let me turn, if I may, to the concept of commercial speech as being balanced against the community values of the control of that speech.

My own syllogism, unlike the other side's, is: the legal profession is worth preserving. Its good vastly out-

weighs its evil.

The minor premise is that commercialization is incompatible with professionalism. And the conclusion is, therefore, the profession should avoid commercialization.

Now, I know I have to defend that syllogism against hard attack. We all know that law offices are big businesses, that they may have billion-dollar or million-dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them noncommercial is sanctimonious humbug.

But my response, developed more fully in my brief than I can here, is very much the response that Plato made to the same argument 2,000 years ago. Plato, in his dialogue with Thrasymachus in the Republic, makes two points which have some real bearing here. His first point is that because of the degree of special knowledge involved, the professional on the one hand and his client on the other are, as he saw it, almost like the ruler and his subjects were the fancy words he used. In everyday terms, this means that professional -- the professional diagnoses the problem, and he makes his recommendation.

While the client has some choice of rejection or selection of alternative courses of action, he is basically dependent on the advice he receives. In short, Plato saw a profound difference between buying a pot and obtaining a

remedy for a disease. Just as there is a profound difference between going to the drug store and getting a bottle of standard produced pills, and going to the doctor and finding out what one ought to do for his illness.

Now, this,we developed again extensively in the brief before you, is developed by the sociologists as a recognition that this condition still exists, and it puts very serious problems of social control.

The plain truth is that laymen cannot judge the professional performance in many cases. Indeed, they may not even be able to set the goals for the professional's work.

And this means that the two most common forms of control of work in industrial society, either bureaucratic supervision or customer judgment, are of only limited applicability to the professions.

At the same time there's a need for social control, and so we come to the ultimate question: Who is going to exercise it?

Our adversaries wish it to be exercised by the policemen or a legal equivalent of the Food and Drug Administration.

We want it exercised by the court, taking such help as they need from the profession.

Now, Plato makes another point which is serious here. I go into this, because if we are talking about professionalism

and what this is going to do to the profession, then we need to know what a profession is and what this one is.

Plato says: "Is the physician a healer of the sick or a maker of money?" And his answer is that "no true professional considers his own good in what he prescribes, but, rather, the good of his patient, because the true professional is not a mere money maker."

And this leads to the related concept of the professional and service. And that has lived with us for 2,000 years.

Roscoe Pound was no high priest of sanctimony, and he gave us a firm reminder of the professional who performs service for little or nothing. He says, "This spirit of public service in which the profession of law is or ought to be exercised is a prerequisite of sound administration of justice according to law."

This, I submit, is a key difference between commercialization and professionalism.

QUESTION: Mr. Frank, getting back to the present time, if there is a person in Arizona who wants a divorce, and he's a perfectly ordinary person, I want to compare him with the well-educated, extremely wealthy person who has an antitrust matter, he can use Martindale-Hubbell to find out all he wants.

MR. FRANK: That's right.

QUESTION: Now, the poor man who has -- he's got 195 bucks to get a divorce. How would he go about finding a lawyer in Arizona?

MR. FRANK: The first thing that he would do, Mr. Justice Marshall, is go to the Legal Aid Society -- and I am able to testify to that, because I personally have served there for a long time, and so has my office -- and he would come in there and he would very possibly get his divorce for nothing.

But because of breakdown, because it doesn't move fast enough to satisfy him and he wants it right now, he will call the Lawyer Referral Service -- we have in the room today somebody from the ABA's Lawyer Referral Service, which is doing the best it can to get names distributed --

QUESTION: And how would the man find the Lawyer Referral Service?

MR. FRANK: He will find the Lawyer Referral Service, because the bar is able to advertise that this institution exists.

QUESTION: And where is that advertised, in the newspapers --

MR. FRANK: It can advertise it in the newspaper or on the radio or in any way it wishes.

QUESTION: All right. Well, is it done?

MR. FRANK: It is done. And there are --

QUESTION: Regularly?

MR. FRANK: I can't tell you as to the frequency of the pace, I can vouch for the fact that serious efforts are made by the bar to get the word out.

QUESTION: Well, it doesn't -- it didn't get to this man.

MR. FRANK: If it doesn't get to this man, then he may have to do what people have traditionally done. And let me say it's not much of a problem. Our town has 50 percent over the national advertisers in divorces, and people aren't having any trouble finding someone to get them for them. Not any. It's just a zero problem in our community.

If any, we have too many, they may be finding them too easily. But they are there.

QUESTION: Then they are just wasting their money with this ad?

MR. FRANK: These people say they're making money -- I suppose it --

QUESTION: They're just wasting their money, according to your story.

MR. FRANK: Pardon?

QUESTION: They're wasting their money with this ad.

MR. FRANK: They may or may not, it depends, obviously,

on how many do it.

But they make money, as one of them said, and I quoted him before: "It's not my job to inform a prospective client that he needn't employ a lawyer to handle his work."

To the true professional and to most of the lawyers in this room, that's shocking. It's turning a law office into a butcher shop.

QUESTION: Well, Mr. Frank, there was a -- at least when I practiced in Phoenix -- the County Attorney would do adoptions, but people who could afford adoptions would go and have a private lawyer do it. And I'm not at all sure that all, every private attorney who was consulted necessarily said, "Well, you could do just as well with the County Attorney."

MR. FRANK: I am satisfied, however, that those who sought to be conscientious, that you, when you were in practice and I must say I and Mr. Lewis, as practitioners, don't sell people services that they don't need. And we're mighty scrupulous and invariable about it, and I hope true professionals are; that's part of the meaning of professionalism.

I pass over a little of the talk of what the profession is and what we're trying to do with it simply as a matter of time economy, but I want to drive this home: that if part of the business of being a professional is --

and we acknowledge it -- a kind of a status, part of the privilege of that status, of being a lawyer and an officer of the court, is a meaningful set of duties which go with it. We're talking about one of them.

More than a hundred years ago, the English jurist, A. V. Dicey said: "The chief difference between a profession and a trade is that in the case of a profession its members sacrifice a certain amount of individual liberty in order to insure certain professional objects."

What I am saying is that being a professional means taking your place in a whole network of privileges and duties.

As this Court said, in Cohen v. Hurley, it was overruled later, but on this point, this quote, the majority quoted it and the minority adopted it. And what you said goes to those duties: It is certainly not beyond the realm of permissible State concern to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to the duties which a lawyer has to the court.

Now, I have spoken of the direct damage to the public, the kind of thing Chief Justice Traynor was talking about, in letting the snake-oil peddlers loose in the legal profession. But beyond that there is the injury which comes to the profession itself and, through it, to the public, which,

I submit, benefits from it.

First of all, --

QUESTION: Of course, Mr. Frank, I suppose this is arguable in a way: didn't this morning's local paper carry an article that the Michigan court is approving this very thing?

MR. FRANK: Yes, Your Honor. Yes, Your Honor. And let me go to that this moment and reorder what I have to say and pick that up.

The key point is, one, your comment goes directly to Justice Powell's first question. The problem is, who is going to deal with this situation?

The fact is that there are a whole variety of possible solutions, and what I am contending is that it ought to be the Supreme Courts or the State Legislatures that can determine, in the particular State, what is best to do.

There are a whole variety of proposals in the country. There is the California proposal, there is the District of Columbia proposal, there is what Michigan adopted today. There is movement on the way to try to deal with the problem of legal services.

And what we face in this case is another example of a wise observation attributed to Mr. Justice Byrnes, when he was a Senator at the time of the court acting plan, and after there had been a resignation and a replacement, he went to

Mr. Roosevelt, runs the legand, and says "Why run for a train after you've caught it?"

The fact of the matter is that all over the country there is movement, there is in my State, and these are matters which are commonly and traditionally entrusted to the State bars and the State courts to solve. They do not lend to legislation. The plain truth is that to deal with all those refinements you asked the other side about, the question of this kind, that kind, and the other kind, you can't do that by constitutional mandate; those things take the kinds of regulation that the FTC has, pages of them. This will be permitted; that will not. To make the selectivity which may be required.

The Michigan example is one. The ABA proposal is another.

The ultimate issue which is before you is: Are you going to seek to solve this problem by the constitutional bludgeon, or are you going to permit fine, close work to be done in the States where there is responsibility to, in dealing with these problems of extending legal services?

QUESTION: I suppose one answer to one of those questions about Michigan is that Michigan has elected to experiment in one way, and Arizona has elected to experiment in another way.

MR. FRANK: You've said it, Mr. Chief Justice,

better than I, and that is exactly what I wanted to say.

They are entitled to do it.

QUESTION: The reason I made the observation was because of your "parade of horribles", that all I asked was whether it wasn't arguable because one State goes one way and another State goes the other way.

MR. FRANK: It is -- but you will notice that all of these proposals are very sharply limited to date.

Now, with the experimentation, it may go farther. But what we are really pleading for is: in the desire to solve this problem, let us not destroy the substance of the sheer professionalism which we have built up, and I don't apologize for being classical on this score, Mr. Justice Marshall, because we are dealing with a professional tradition of hundreds and hundreds of years. But --

QUESTION: And hundreds and hundreds of years ago you had law offices with a maximum of three lawyers, with an income of about $10,000 a year; and now what are we talking about?

MR. FRANK: Well, I'm delighted to report to you that at least the incomes have gone up, and some of the offices are bigger, some are not.

I would like to, if I may, because I speak here for the profession, --

QUESTION: For example, Abraham Lincoln, in the case

you talked about, served for nothing.

MR. FRANK: Frequently served for nothing, and frequently took ten-dollar cases. But Abraham Lincoln never made but one ad in his life, and that was to put an announcement in the paper when he returned from Congress, to say that his office was open.

QUESTION: All I'm trying to say is that this is a different day and age. That's all I'm trying to say.

MR. FRANK: It is a different -- it is a different day and age, but it is an age in which professional tradition has a contribution still to make.

Let me, if I may, conclude on a note of unabashed sentiment. I won't refer to the antitrust subject, merely because it's fully briefed.

But I sit here with my partner, Lewis, he has just celebrated his 74th birthday. His father, with whom he once practiced, was a Territorial Judge in our State, and the roots of his practice extended back to the Nineteenth Century.

My own father died forty years ago. He or I have been members of the Bar of Wisconsin almost for all of this Century -- my native State.

We have with us today a young lady who assists us as the new breed of legal assistant. Because of her age, she probably will be linked with the law until the millenium.

The point is that just in this one case, on this

one side, the professional ties represent a hundred consecutive years in the law.

We know the weaknesses of this profession, its limitations and its failures. So, obviously, do the members of this Court.

We also, all of us, the few at this table, this Court, the lawyers in this room, the thousands outside, and those who came before them have taken pride in being associated with what is good about this profession, pride in being associated with it.

Minor figures, we, as individuals, may be; but our line runs to Cicero and to Marshall and to Hughes, and we, too, hope that we serve in our small way.

May it never be said that this profession was cheapened here, in this, its highest sanctuary.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Frank.

You have a few minutes left, do you have anything further, counsel?

REBUTTAL ARGUMENT OF WILLIAM C. CANBY, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. CANBY: Mr. Chief Justice, just two points.

The material where the name change is discussed appears on pages 111 to 113 of the record, where Mr. O'Steen was asked whether he ever takes up whether a lawyer is needed

at all with a client --

QUESTION: What page?

MR. CANBY: Well, 111 of the record, and I'm going on to 113. I'll paraphrase, I won't read this.

And he says: Well, no, except when it can be done by administrative procedure, going to a department or something. Then we send the client on his way with instructions how to do it.

But if it's -- then the next question is: Yes, but nothing in the law requires a person who is getting a judicial name change to go to a lawyer, three out of ten in this county go to the court, go to the clerk and do it themselves. And the answer was -- what do you say, then, to that? And the answer was: Well, we don't know how well it's done, we don't know where instructions exist for this kind of things, but we don't feel that we have to advise the people that they could do it themselves.

Now, this -- the final answer to this, of course, is that it doesn't have anything to do with the ad itself. If the bar wants to make a general rule that every attorney should advise every client that all litigants are entitled to handle their matters themselves, then I think that's perfectly proper and all lawyers can be instructed to do it.

But it doesn't go to the question of what has been advertised in this case. The ad itself offers a service, and

it's not deceptive.

The other point that I would like to make has to do with the comments that the court below found the charge misleading.

The only mention about the expense of the divorce in the lower court's opinion, The Supreme Court of Arizona's opinion, is on 12a of our Jurisdictional Statement, which is that blue -- it's in the Appendix. And it says: Mr. Justice Gordon concurring separately says, "Moreover, I am able to foresee instances in which the $175 fee quoted for this service would be unreasonably high."

Mr. Clients, in addition to the hours they put in, the brief hours on a divorce, have put in, as the record shows, many, many hours devising systems so that they can handle it this briefly, and they also use paralegal time.

If divorces can be had more cheaply than this, let another attorney advertise that fact, and the public will be even better served than they are by my clients.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:44 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -