ORIGINAL

In the

Supreme Court of the United States

ALBERT OHRALIK,

Appellant,

--VS--

OHIO STATE BAR ASSOCIATION,

Appellee.

No. 76-1650

Washington, D. C.
January 16, 1978

Pages 1 thru 34

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

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Monday, January 16, 1978

The above-entitled matter came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

EUGENE GRESSMAN, Esq., 1828 L Street, N.W., Washington, D.C. 20036; for the Appellant.

JOHN R. WELCH, Esq., 33 West 11th Avenue, Columbus, Ohio 43201; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 1650, Ohralik against the Ohio State Bar Association.

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

ORAL ARGUMENT OF EUGENE GRESSMAN, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is here on appeal from the Supreme Court of Ohio, which ordered that the appellant, Albert Ohralik, be suspended indefinitely from the practice of law in Ohio on the ground that he did solicit and obtain retainer agreements from two accident victims in violation of two sections of the Disciplinary Code of Professional Responsibility, numbers 103(A) and 104(A), under canon 2 of the Code.

It is important to understand the sole and the critical issue now before this Court, to understand that there was a single unitary charge and finding with respect to the activities of this appellant. The charge was that he did solicit and did obtain agreement from these two individuals. The finding was that he did solicit and did obtain agreement from these two individuals. This falls squarely, without more, within the ambent of these two disciplinary rules which in effect prohibit a lawyer from recommending his own employment

or accepting employment from a layman who has not sought his advice regarding the employment of an attorney. So that based upon that simple determination, the federal constitutional issue was premised and raised in the court below, and it has been accepted for review by this Court. Two wit: Does the First Amendment entitle a lawyer to recommend his own employment or to accept employment in the context, the simple context, of giving unsolicited advice respecting the need for counsel and respecting the desirability of taking legal action, of which the prospective client may be ignorant?

Q Does the charge require proof of advice with respect to the need for counsel?

MR. GRESSMAN: That is the way the disciplinary rule reads.

Q So that it just is not the business of soliciting business. He also says, "You should have a lawyer." That is involved here.

MR. GRESSMAN: That is true. That is essentially--it is a combination, I would suspect, of giving legal advice about the need.

Q The need, and then recommending himself.

MR. GRESSMAN: And recommending himself. And in the context, of course, of a situation where that person does not come to the lawyer seeking such advice and recommendation.

In this limited context I think our first point has to

be an understanding of just what are the basic elements of this kind of solicitation of legal business. As I view it, reading the text of these disciplinary rules. The elements are, first, a truthful conveying of information concerning the person's possible legal rights and the conveying of truthful information concerning his need for counsel. The second element that the lawyer speaks with a commercial or profit-seeking element in mind. He is soliciting business for the sake of his personal pecuniary gain, as most lawyers do practice law for pecuniary gain.

Thirdly, like many commercial solicitations, this one may be and is designed to be somewhat persuasive in nature. And, fourth, the element that has already been mentioned, that ordinarily, according to the rule, this kind of conveying of information and solicitation is in the context of proffering unsolicited legal advice and conveying the need for counsel, competent counsel, to represent the individual in pursuit of what may be his legal rights.

Q Do you think, counsel, that it would be fundamentally any different if a physician observing some person, a stranger to him, thought he detected symptoms of diabetes or any other disease, superficial symptoms, and then solicited the person to come to his office for an examination?

MR. GRESSMAN: An examination of his--you mean, speaking of a doctor now? Well, I am not sure that doctors have ever

aggressively sought their medical practice in that manner. Basically that would be essentially the same situation, I would agree.

Q Mr. Gressman, I think there are those who do.

MR. GRESSMAN: If they do, I would say that it is essentially the same situation. I suppose there are many doctors who may, in the company of their friends, notice a medical problem that might encourage him to do exactly what the Chief Justice suggests, that he come in for an examination. That may done informally or otherwise.

Q That this is done to some extent in various areas would be at least indicated by the fact that hospitals have committees of surgeons to monitor surgery to see whether unnecessary surgery is being performed, do they not?

MR. GRESSMAN: That is true. And at the same time we have many programs that solicit individuals to have medical examinations to check their heart, to check possible cancer symptoms and what have you.

Q But not the by the person who is going to profit by it. Are you referring to the life insurance companies who have institutional ads suggesting--

MR. GRESSMAN: Yes, I suppose in the medical field you get more of that in the organizational areas and that individuals, doctors, are not as many in number compared to the types of organizations that would, you might say, solicit

medical treatment by unsuspecting victims of some defect.

In a real sense, therefore, it seems to me that the action, the context in which this commercialized solicitation does occur--to wit, that freely giving legal advice and recommendations of attorneys is really in the highest tradition of the profession. This may not be an ideal way of obtaining legal business, and certainly is not the only way; but the freedom, the circumstance of discussing, conveying legal information and advice to those most in need of it is a situation that I think warrants commendation rather than condemnation and leads to my next point as to what it is about this kind of solicitation that has encouraged the wrath and the prohibition by the organized bar of this solicitation.

Q Mr. Grassman, let me interrupt. Your reference to the highest tradition of the profession makes me pause just a minute. Would it be in the highest tradition of the profession for a prosecutor to give legal advice to a criminal defendant freely?

MR. GRESSMAN: I would say in given situations that might be true.

Q Do you seem some problem about a prosecutor acting as counsel for the man he is prosecuting?

MR. GRESSMAN: If he is doing it in terms of the precise case he is prosecuting, that is one thing. I was suggesting only that he might give an individual advice about a

collateral or unrelated legal problem which he is not directly involved in.

Q The thing you are trying to avoid is the conflict of interest.

MR. GRESSMAN: That is right. That is another problem.

Q Do you not see a conflict of interest between an unemployed lawyer, volunteering free legal advice about the merits of a case, purportedly in the interests of the client, when he is also acting in his own self-interest to try to persuade the client to employ him?

MR. GRESSMAN: I do not believe that is the ordinary sense in which we use the term "conflict of interest" or in which the disciplinary code uses that concept.

Q Is that not the underlying reason why the lawyer should not mix up his own self-interest by giving advice when he is supposed to be disinterested?

MR. GRESSMAN: I think that if you accept that doctrine, Mr. Justice Stevens, that would mean that no lawyer should take a case where he has discussed with the client who has come to him the advisability of instituting legal suit of some sort. Because inevitably, if this solicitation or rather this advice is sought in the first instance by the client himself, the lawyer may inevitably have his own self-interest and may give advice that will promote his own interest in

obtaining that case. I think that is an inevitable situation when you have the lawyers talking to clients.

Q Would not the consultation itself in Mr. Justice Stevens' hypothetical be paid for so that the lawyer is not having to seek gains only by further employment?

MR. GRESSMAN: He may be paying for that initial consultation or he may not.

Q Is that not the custom of the profession? You do not just walk into a lawyer's office and say, "I have got a problem. And after you tell me what my problem is and what I should do about it, maybe I will decide to retain you."

Q But it does not breach the canons of ethics if he does not charge, does it?

MR. GRESSMAN: No. I frankly have given that type of free advice many times myself to individuals who come to me with a problem. "Should I take my case to the Supreme Court?" And without charging them anything, I will give my estimation of that. So, it could be a consultation fee or it could not.

Q Is not the fundamental difference in these hypotheticals the manner in which the relationship began? In the one case the client has gone to the lawyer to solicit his advice. In the other, the lawyer has gone to the client and volunteered for this--

MR. GRESSMAN: That is essentially the difference, Your Honor, yes. And I think that what happens after that is

likely to be fairly identical in nature.

Q Is there any prohibition against the insurance company lawyers talking to him? I always thought the answer was they did not chase the ambulance.

MR. GRESSMAN: Plenty of them do. [Laughter]

Q That is right.

MR. GRESSMAN: That is one of the ironies of this situation, Your Honor.

Q And there is nothing in the Ohio rules that covers that at all?

MR. GRESSMAN: Let us say that an insurance lawyer may not go into the hospital room and seek to settle a case with a victim, no.

It seems to me that the evil--or what is the cause for this--the rationale for this disciplinary prohibition of solicitation is not in terms of its communicative aspects. They are not really objecting to this lawyer conveying to the prospective client advice about his legal rights, nor are they really objecting to his soliciting his own employment or conveying information about his own availability as counsel in the situation. Certainly they are not objecting to a system, imperfect though it may be, by which legal representation is accorded an individual who might not otherwise either know of his legal rights or have counsel available to him. No, we must turn rather to what this Court turned to in the Bates decision

last term about the historical basis of the rules against advertising by attorneys which, not strangely enough, have the same historical source as the ban on solicitation. And that is that the ban on solicitation, like the ban on advertising, originated in the inns of court of England as a matter of etiquette, that the barristers, simply as gentlemen of the bar, do not seek to compete with each other; they do not seek to solicit, to advertise, to act as ordinary tradesmen act.

Q Of course barristers in England--maybe it has not always been so--but as I understand it, do not communicate with clients at all.

MR. GRESSMAN: That is true. But they still have the rule against advertising and soliciting which has been the source from which we have inherited the concepts against advertising.

Q It is an entirely different setting.

MR. GRESSMAN: That is true. They have what you would call--

Q Here it is a relationship between a lawyer and a client, and a barrister in England does not have any relationship directly--

MR. GRESSMAN: True.

Q --between himself and a client but only with a solicitor.

MR. GRESSMAN: But he has a very rigid rule of

etiquette that would prohibit him even from attempting to contact a client.

Q They just never do.

MR. GRESSMAN: That is right. But what is significant about this, as it was in the Bates case, is that this was developed in England as a matter of etiquette and to this very day the ban on solicitation with respect to barristers in England--and I have cited this pamphlet in my brief--is contained in a pamphlet put out by the Inner Temple, addressed to the barristers, entitled "Conduct and Etiquette at the Bar."

In other words, this was a basic matter of good manners and etiquette as to how a lawyer should conduct himself vis-a-vis other attorneys.

Q Do not the same rules of solicitation apply to solicitors in England?

MR. GRESSMAN: I assume they do, and they probably inherited this notion too from the original rules of etiquette.

Q They inherited it, but they have no connection with the inns of court, do they?

MR. GRESSMAN: No, but I think the same etiquette, the same manners, in this sense have been adopted by the solicitors as well. And Henry Drinker's great volume on legal ethics, the prime authority in this field, has noted this in no uncertain terms, that these rules that we now have in the Code of Professional Responsibility are largely derived from,

inherited from, what can only be described--and was described by this Court last term in Bates--as matter of legal etiquette.

Q I do not know why we have to deny what the state claims are the bases for its rule. They are not talking about etiquette. They claim that there are some substantial ends served by--

MR. GRESSMAN: Yes.

Q You do not deny those, do you? You just say they are insufficient.

MR. GRESSMAN: That is true. But I am saying that I think you have to have an understanding of what the motivation or the origin behind the rule--

Q It may be the origin, but the state does not say now that it is any matter of etiquette.

MR. GRESSMAN: Basically they do when they are saying that this solicitation, like they said about advertising, is contrary to the high ideals of the profession. What high ideals other than this is not the way gentlemen of the bar--

Q It is not a matter of etiquette when the state says that one of the things this rule is designed to do is prevent overreaching and undue influence.

MR. GRESSMAN: Yes.

Q That is not etiquette.

MR. GRESSMAN: That is true. Those are latter day justifications.

Q Yes, but real.

MR. GRESSMAN: Right.

Q I mean, but they are real claims--

MR. GRESSMAN: Right.

Q Do you think a lawyer who is trained as an advocate, or presumably trained as an advocate, dealing with a lay person in the hospital or in sickbed or whatever, is engaged in an arm's length transaction where the two parties, the person being solicted and the person doing the soliciting are on the same parity?

MR. GRESSMAN: No. I do not think, in the first place, any lawyer is on the same parity with a layman.

Q He is much more skilled at persuading, is he not?

MR. GRESSMAN: Of course. He is supposed to be. And that is why he is in the business of practicing law, among other reasons. But that does not mean that he should not promote those qualities in appropriate situations where he does not overreach himself, where he does not incur any of the attendant evils that may arise out of taking advantage of an individual who is not in, say, full control of all of his faculties. That is another problem.

Q How do we know he is not overreaching himself?

MR. GRESSMAN: Because there are many instances where solicitation occurs and is permitted where there is no element of overreaching. That is not an inherent part of these

disciplinary prohibitions that we are dealing with here. By their very terms, they carve out an exception for soliciting your close friends, your relatives, your former clients, and those whom we reasonably may think is a client. No, this is--

Q Mr. Gressman, that is not quite right, is it? The exception is from 104(A), not 103.

MR. GRESSMAN: Right, 104(A).

Q There is no exception in 103.

MR. GRESSMAN: That is true.

Q With the distinction between the two canons in mind, the former prohibiting speech and the second prohibiting acceptance of employment, which one might describe as conduct rather than speech, assume we were to agree with you on the speech but not agree with you as to the acceptance of employment after having given unsolicited advice; what should we do with the case?

MR. GRESSMAN: That it--

Q Assume we thought that you were right about canon 103 but wrong about canon 104. What would be the proper disposition of the case?

MR. GRESSMAN: It is impossible to say--

Q In other words, you would say that speech is protected.

MR. GRESSMAN: Speech is protected.

Q But is it proper to prohibit the conduct of

accepting employment after giving unsolicited--

MR. GRESSMAN: I am not sure I would designate accepting employment as a matter of conduct. I think that is an essential attribute or result of the oral communication between the two individuals.

Q Surely less clearly speech than the other.

MR. GRESSMAN: I think, well, perhaps. But I would not want to concede that that is such conduct that it may be regulated to the detriment of what I concede to be First Amendment freedom.

Q Supposing we disagree with you just for a moment and we thought the former was protected speech, the latter was unprotected conduct. What, in your view, would be the proper way to dispose of the litigation?

MR. GRESSMAN: The Ohio court did not make a distinction--

Q I understand that.

MR. GRESSMAN: --between the application of these two rules. So, we do not know what they meant to apply to which situation or not. I would say though that if you were to agree that there was protected speech here, I think the same result would have to follow under 104, that the result of that speech, the formation of a retainer agreement, was also a protected activity because I am not sure that in any of the decided cases in this court respecting solicitation that they

have made that kind of distinction, that they have dealt with the whole unitary action known as solicitation--that is, the use of speech and communication to advise and thereupon obtain retainer agreement. So, I think there can be no constitutional distinction between those two elements.

That leads me directly to the First Amendment implications of these acts of solicitation as I have described them. There are two lines of cases that I think justify the conclusion that this is protected activity. The first line of cases, of course, starts with NAACP v. Button. And indeed this Court held in Button that solicitation is not only outside the area of freedom protected by the First Amendment and that First Amendment cannot be ignored under the guise of prohibiting professional misconduct. That is almost the complete answer to this constitutional question posed to you in this case. There has to be, under that formulation of constitutional doctrine in the Button case, there has to be an area of freedom to solicit that is protected by the First Amendment.

Q Then your submission would necessarily apply to every profession, would it not? You could not grant this freedom of speech to lawyers and deny it to doctors and dentists and--

MR. GRESSMAN: I think those are the next cases perhaps, but you have already granted that kind of freedom say to the pharmacists in the Virginia Pharmacy case. You have

granted this kind of freedom to the--

Q That was not face-to-face solicitation. That was advertising.

MR. GRESSMAN: Advertising. But you had face-to-face solicitation in the cases subsequent to Button involving various unions, the United Mine Workers, United Transportation Workers, the Brotherhood of Railroad Trainmen cases.

Q Limited to the members of the organization.

MR. GRESSMAN: That is true. But there was face-to-face solicitation by union agents.

Q Were those not freedom of association cases?

MR. GRESSMAN: Of course they were, Your Honor, but they also involved the actions of individual attorneys who were in agreement or had contracts with the union to accept the results of this solicitation.

Q But you do not claim your client is relying on any freedom of association concept.

MR. GRESSMAN: No, not at all. I recognize that those were organizational cases. But I say there is no provision or concept within the First Amendment that would give an organization greater First Amendment rights to solicit than an individual attorney.

Q The dissenters in those cases thought so too, I think.

MR. GRESSMAN: In one of these cases--I think it was

the United Mine Workers case--and the Court was dealing in all these cases both with the organization and with the individual attorneys, some of whom had been charged, I assume, with violations of the Professional Code of Ethics. But in the Brotherhood of Railroad Trainmen, at 337 US at page 8, the Court made this rather significant comment, and this was the unanimous opinion, as I recall, Mr. Justice Black, writing that "Lawyers accepting employment"--these were retainer agreements that had been solicited--"accepting employment under this constitutionally protected plan have a light protection which the state cannot abridge."

It seems to me that this Court was there indicating that there was the area of First Amendment freedom to solicit that the state cannot protect.

I would be remiss if I did not mention of course the other line of cases that lead to the conclusion that this is indeed a protected area within the First Amendment, and those cases of course primarily are the Virginia Pharmacy case and the Bates decision. And what is significant about these notions? As Mr. Justice White indicated, the attempted justifications for the ban on solicitation all relate to projected fear that there is something inherently going to and inescapably going to happen when the lawyer confronts a prospective client, that that lawyer cannot be trusted to do anything other than to misrepresent, to--

Q May I ask you a question right there?

MR. GRESSMAN: Yes.

Q I think this record indicates that tape recorders were used by your client without divulging to these two young ladies that they were being used. Does that suggest to you the danger of overreaching in this sort of activity?

MR. GRESSMAN: That is of course not the subject of any determination, finding, or charge. That is not the basis on which this case arose.

Q You would concede a state interest in protecting unsophisticated people from overreaching by members of the bar, I assume.

MR. GRESSMAN: I am not for one minute suggesting that reasonably drawn rules might be drafted controlling the time, place, and manner in which solicitations may be made.

Q Could that include a requirement that the client have counsel before any agreement of the employment was signed, separate independent counsel?

MR. GRESSMAN: That could well be. I would suggest that you might require that the contract itself be filed in court or with the bar, a grievance.

Q Something like importing the Miranda concept into the civil employment.

MR. GRESSMAN: That is right, that there be rigid controls. I understand strong arguments are made that it is

impossible to control or supervise oral solicitations that may be far removed from any--that has always been true. We have had this ban on solicitations. We have had the ban on advertising. And we never know about, we never enforce it, until a complaint, until some evil ensues that makes it evident and makes it possible therefore to enforce. And so in this case the prime concept and idea I want to leave with this Court is that it is constitutionally insufficient with respect to restricting the First Amendment freedom, recognizing the Button case, to say, "Well, this is so likely to produce misrepresentation, contrary interest, deceit, fraud, or whatever else may be conceived of." I do not believe that the First Amendment can be swept aside with articulated but unfounded fears in the abstract situation, the abstract constitutional situation that we are speaking of.

Q Do you think a state can prevent a lawyer from financing litigation?

MR. GRESSMAN: I think with properly drawn rules, yes.

Q I know, but that is purely prophylactic. Why should it not have to prove actual fraud or misrepresentation or something?

MR. GRESSMAN: I am not sure that those situations may have developed--those rules may have developed out of--

Q That is not etiquette, is it?

MR. GRESSMAN: No, Your Honor; that may be the

difference, one of the major differences. Every other aspect of the Professional Code relates to what you might call malum in se, something that is inherently wrong, something that inherently justifies the imposition of the state's interest. I suggest that state interest, however, cannot be grounded on speculation and fear because we have adequate rules, and we can add more rules, to take care of each of these anticipated fears that can arise from the solicitation concept.

Thank you, Your Honor.

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

Mr. Welch.

ORAL ARGUMENT OF JOHN R. WELCH, ESQ.,

ON BEHALF OF THE APPELLEE

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

I would like first to address the question of the matter of the proceedings in the court below, in the Supreme Court of Ohio. There are some misimpressions that may be gained from what is said in the briefs.

First, the Supreme Court of Ohio has sole and exclusive jurisdiction as to what are the facts in a disciplinary matter and what the discipline should be. When a complaint is filed against an attorney such as Mr. Ohralik, it is heard by a board of commissioners, a panel of three of the board of commissioners. They make findings of fact and

send it on to the full board of commissioners who themselves review the record and make findings of fact and recommendations to the Supreme Court. After that proceeding is finished, they lose jurisdiction. What they find as fact and what they recommend has no bearing whatsoever from there on. It is for the guidance of the Supreme Court of Ohio of course, but the Supreme Court of Ohio, I repeat, has sole and exclusive jurisdiction as to what the findings of fact are and as to what the discipline should be. So, where it is referred to in the brief that the--appellant's brief--that the board of commissioners made certain findings with respect to the relinquishment of the contracts, they found it was not unethical for the appellant to cling to his contracts. There was no finding on that matter by the Supreme Court of Ohio.

Q How are the commissioners appointed?

MR. WELCH: They are appointed by the court, the Supreme Court of Ohio, and there are 17 districts; and one member is appointed from each district, and they rotate the court as to who will appoint the next member--

Q And the appellee, your client, in this case is the Ohio State Bar Association, which was the what--the charging party?

MR. WELCH: The Ohio State Bar Association was the charging party. We brought the charges against Mr. Ohralik, and I think it is worthy of repeating that we charged him with

in-hospital solicitation--it is set forth in the charge--of the one young woman. And the other young woman was charged with--he was charged with soliciting the other young woman in her home. And the Supreme Court of Ohio found as fact that those solicitations did occur where it was alleged, and they found other facts in addition to those.

Q But the commissioners are agents and officers of the Supreme Court of Ohio rather than of the Ohio State Bar Association; is that correct?

MR. WELCH: They are agents of the Supreme Court of Ohio, yes, Your Honor, and have no connection with the Ohio State Bar Association whatsoever.

Q Were both the conversations--that is, in the hospital and in the home--tape recorded or just the one in the home?

MR. WELCH: Just the one in the home of Wanda Lou Holbert was tape recorded. She was the second young woman. But the other tape recording was made with the parents of Carol McClintock on the same day in which the appellant solicited Carol McClintock in the hospital.

The Supreme Court of Ohio did not refer to that tape recording at all. It was submitted as evidence, and the decision of the Court makes no mention of the second or the one with the parents of Carol McClintock. It makes no mention whatsoever of that tape recording.

Appellee--we would like to make it clear to the Court in speaking to the due process matter that is alleged in the complaint, that we in no way intended to transform the charges against the appellant in this Court. That is, we do not intend to allege new charges. No question but that he was disciplined in the court below for violation of the two disciplinary rules cited by the court, and it was for soliciting and obtaining agreements to represent the two young women. However, the court, as I have indicated, made findings of fact that are incorporated in their decisions. They do not operate in a vacuum. The charges were made that the solicitation was made in the hospital, and the court has found--

Q Mr. Welch, is there any punishment for solicitation alone?

MR. WELCH: In Ohio there is. The General Assembly of Ohio has spoken for many years that solicitation by an attorney such as Mr. Ohralik is against public policy.

Q Has anyone been punished for it, for solicitation alone?

MR. WELCH: Not within my knowledge as--

Q So, the two are really tied together, are they not?

MR. WELCH: The two are really tied together?

Q Yes, sir.

MR. WELCH: Yes. The Ohio State Bar Association,

Your Honor, to answer that question, never made a charge of criminal solicitation. They would rather take disciplinary actions.

We do not, as I have said, intend to transform these charges against the appellant. We have no intention whatsoever.

Q If the soliciting lawyer had used, as some of them traditionally have, photostatic copies of checks in prior settlements they made for other clients and perhaps testimonial letters from clients, would that under Ohio practice be the subject of a special finding, or would that simply be regarded as evidence in support of the general finding?

MR. WELCH: It would be my judgment on that, Mr. Chief Justice, that it would be incorporated in the general allegation, that it would be evidence of how he solicited, the manner, and what he did, just the same as in this case, as indicated by the findings of the court below, they made a number of findings that would not be specifically charged in the complaint. But the evidence indicates that these things did occur, such as the suit after against Carol McClintock, after the solicitation had occurred. The court makes a specific finding on that, and they make specific findings with respect to the fact that Wanda Lou Holbert discharged the appellant after she had had time to reflect upon the matter

overnight and had talked with her mother about it. That is after the solicitation. So, of course it is our position that that is incorporated in the general charge, although the charge is specific as to time and place.

In essence, appellant is arguing here, as I understand it and as I understand his brief, that there is need for some state regulation of a lawyer. Nevertheless, he says that the Ohio rules are overbroad and inhibit objectionable as well as unobjectionable conduct. He also argues that appellant's conduct was unobjectionable, innocent, pure, benign, perhaps other labels he puts on the conduct. However, it is--and he also argues that there is no harm done to the clients in this case and that there is no stated compelling interest by the court below.

It is our position that the record plainly demonstrates that the appellant's conduct poses precisely the dangers that support the Ohio rules. It is clear, we believe, we submit, that the purpose of the disciplinary rules, DR 2-103(A) and DR 2-104(A), are to eliminate or at least to reduce to the greatest extent possible the injury to potential clients that is caused by solicitation.

In other words, the rules have as their purpose the protection of the public from the harm and the dangers of harm that flow from commercial solicitation.

Furthermore, it is, as I have indicated, the public

policy of Ohio, as expressed through its General Assembly, that commercial solicitation is prohibited. Secondly, even if there are some conceivable situations that the rules challenged by appellant may be deemed to be overbroad, the appellant should not be permitted to avail himself of the overbreadth doctrine as expressed in Bates to secure reversal of the judgment of the court below. In Bates this Court held that the justification for the overbreadth analysis applies weakly, if at all, in the ordinary commercialcontext, and declined to apply it to professional advertising, a context where the Court said it is not necessary to further its intended objective. The Court said since advertising is linked to commercial well being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulations. And since solicitation is similarly linked to commercial well being and is a practice that is no more deserving of First Amendment protection than commercial advertising, we submit that the appellant should not be able to avail himself of the overbreadth doctrine.

Q Mr. Welch, if I may interrupt you, you spoke a few moments ago of the Ohio State Legislature and its policy.

MR. WELCH: Yes.

Q My understanding is--and you tell me if I am mistaken--that the Code of Professional Responsibility in Ohio was promulgated by the Supreme Court of Ohio.

MR. WELCH: Yes, that is correct.

Q Not by the legislature, that is correct?

MR. WELCH: Not by the legislature but by the Supreme Court of Ohio--

Q And is--

MR. WELCH: --and the constitution of Ohio. Excuse me, Your Honor. The constitution of Ohio mandates--gives that responsibility for admission and discipline to the Supreme Court of Ohio.

Q The state constitution explicitly confers that authority on the Ohio Supreme Court?

MR. WELCH: Explicitly confers that authority, yes, Your Honor.

Q Are there any state statutes bearing on it?

MR. WELCH: On the matter of solicitation?

Q Either on the matter of authorizing the Court to do it or substantively on the matter of solicitation.

MR. WELCH: There are some statutes that deal with other matters involving the court and may--there is one involving judges, Your Honor, yes, where the legislature did pass laws asking the Supreme Court of Ohio to promulgate rules for inquiries about the competency and so forth of judges. And the Supreme Court of Ohio has promulgated separate rules covering that subject.

Q But there are no state laws--by that I mean

enacted by the state legislature--bearing directly or affecting this case?

MR. WELCH: Yes, Your Honor, there are laws still on the books--I believe it is Chapter 47 of the Ohio Revised Code--that are still on the books that were on the books before the Supreme Court of Ohio was given constitutional authority over admissions and discipline, and they have just remained on the books.

Q Is it generally understood in Ohio that the Supreme Court's actions supersede those old statutes?

MR. WELCH: Yes. Yes, I think that they are merely an aid of, I think the way the court expresses it now, if the Court wishes to consult them. But we never bring any charges based upon statutes.

Q Always the Code of Professional Responsibility.

MR. WELCH: Always under the Code of Professional Responsibility.

Q And when was it--

MR. WELCH: Promulgated October 5, 1970. And the rules that here are under consideration were then promulgated, became effective October 5th.

Q And they were modeled on--with some modifications--on the rules proposed by the American Bar Association committee?

MR. WELCH: They are modeled on those. And there are

other instances, not pertinent here, where we have--the Ohio Code is not the same as the American Bar Association Code.

Q But these are identical?

MR. WELCH: These are identical with the American Bar Association rules, at least at the time when this occurred.

Q When did the State of Ohio give rule-making power, the legislature or the constitution, to the Supreme Court, about '57 or '58?

MR. WELCH: It is more recent than that, Your Honor. I would say the Ohio constitution was amended, giving this power to the Supreme Court, in the late sixties, perhaps as late as '68.

Q That is, rules of civil and criminal procedure?

MR. WELCH: Yes. Yes, Your Honor. And the control over admissions and discipline of lawyers.

There is one other matter that is brought to the Court's attention for which we do not apologize, but we recognize that it is not a part of the record of this case. And it has to do with the finding of fact of the court below as to the testimony of the appellant in the proceedings in the court below--testimony of the appellant that he would abandon his claim for compensation, for attorney fees, against Wanda Lou Holbert. He did so testify, and the court below made a finding of fact that he, the appellant, testified to that effect. That is not true. Had it not been twice stated in

appellant's briefs--that is, his jurisdictional statement and in his main brief, that testimony of the appellant--we would not have made any statement about it whatsoever. But it is important we think for the Court to note in considering the First Amendment argument made here that the appellant did sue Wanda Sue Holbert four days after he had testified that he would sue her or that he would abandon his claim against her--only two business days, as a matter of fact. The hearing concluded on a Thursday, and there was a Friday, and the suit was filed the next Monday. We think that candor on this matter should have impelled the appellant to disclose in his brief that the suit was filed.

Q That was filed after the hearing on the disciplinary matter?

MR. WELCH: It was filed after the hearing, the disciplinary hearing concluded.

Q In the disciplinary hearing did he represent that he was going to forego his compensation?

MR. WELCH: He did, Mr. Chief Justice. Yes, he did.

Q Was that testimony under oath?

MR. WELCH: Under oath.

Q Mr. Welch, the support of that statement I guess is there is a public record of the suit being filed?

MR. WELCH: There is.

Q Does the public record show that he appeared

pro se, or did someone else represent him?

MR. WELCH: He was represented.

Q I was just wondering if it is conceivable that some lawyer went ahead and filed a suit without being aware of the testimony. Do we know that it had been prepared in advance and there was some failure of communications?

MR. WELCH: We do not have that knowledge. I would say that it is my recollection that he did have an attorney.

Q Does the record tell us whether anything happened other than the filing of the complaint?

MR. WELCH: I am sorry, I did not understand.

Q Do the public records tell us whether anything happened beyond the filing of the complaint itself on the following Monday?

MR. WELCH: Yes, they do. Wanda Lou Holbert obtained an attorney and filed a counterclaim against Mr. Ohralik, and that suit did pend up uhtil the time these proceedings began in this Court.

Q A countersuit against Mr. O'Reilly?

MR. WELCH: Mr. Ohralik, yes.

Q But I thought the claim was filed by Ohralik.

MR. WELCH: It was, Your Honor. Ohralik sued Wanda Lou Holbert.

Q Oh, Ohralik. I am sorry. I thought you said "O'Reilly."

MR. WELCH: The appellant.

Q Yes.

MR. WELCH: This record--the appellant has failed to demonstrate that his conduct is entitled to First Amendment protection. His commercial solicitation of the two young women served his interest, not their interest. And his conduct was such as to harm them rather than to help them. We believe that the state has a legitimate interest in preventing that type of conduct and protecting the citizens of Ohio from such solicitation.

That is all I have, Mr. Chief Justice. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[The case was submitted at 10:59 o'clock a.m.]

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