In the

Supreme Court of the United States

In the Matter of:)
)
EDNA SMITH,) No. 77-56
)
Appellant.)

Washington, D. C.
January 16, 1978

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In the Matter of	
EDNA SMITH,	No. 77-56
Appellant.	

Washington, D. C.,

Monday, January 16, 1978.

The above-entitled matter came on for argument at 11:01 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:

RAY P. McCLAIN, ESQ., American Civil Liberties Union Foundation, Inc., P. O. Box 608, Charleston, South Carolina 29402; on behalf of the Appellant.

RICHARD B. KALE, JR., ESQ., Assistant Attorney General of South Carolina, Post Office Box 11549, Columbia, South Carolina 29211; on behalf of the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-56, In the matter of Edna Smith.

Mr. McClain, you may proceed whenever you're ready.

ORAL ARGUMENT OF RAY McCLAIN, ESQ.,

ON BEHALF OF THE APPELLANT

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

I am Ray McClain of Charleston, South Carolina. I represent Edna Smith of Columbia, South Carolina, a member of the bar of this Court, who is seated to my left this morning.

Miss Smith is before this Court seeking reversal of professional disciplinary punishment imposed on her for advising one Marietta Williams that the services of the American Civil Liberties Union were definitely available for Mrs. Williams, with whom she had previously consulted.

Mrs. Williams was a welfare recipient in Aiken, a small community in South Carolina. Mrs. Williams had been sterilized in early July 1973 as a condition of her receiving treatment as a Medicaid patient by a physician in Aiken.

This case presents important questions, both under the First Amendment and the due process clause. The due process clause particularly as to the vagueness of the rules prior to their construction by the -- or, in fact, as construed by the court below.

I shall limit my comments here to those issues relating to various aspects of the First Amendment concerns and rely on the brief as to other due process matters, unless the Court has specific questions.

It's our position that this case is squarely controlled by this Court's opinion in NAACP vs. Button, a decision in which the organizational activities of the American Civil Liberties Union were expressly referred to, and referred to with approval. And that decision, as it has been amplified in cases of Brotherhood of Railroad Trainmen vs. Virginia, United Mine Workers vs. Illinois, and the United Transportation Union vs. Michigan.

The force of those cases, we submit, has been augmented also by this Court's decision last term in Bates vs. State Bar of Arizona, where the Court extended the application of these prior associational cases to protect advertising of the availability and price of legal services.

Based on these prior decisions, --

QUESTION: Would you suggest that the right to solicit, face-to-face solicitation is co-extensive with the right to advertise and announce the fees which will be charged for a particular service?

MR. McCLAIN: Certainly not co-extensive. But, to the extent that the same interests of providing information for informed decision-making by the person to whom the information

is directed. First Amendment concerns are equally relevant, the balancing of interests may be different.

QUESTION: Well, as solicited, do you suggest that a face-to-face solicitation by a trained lawyer on the one hand and the untrained layman, untrained at least in the law, presents the same kind of arm's length factors as an announcement in the paper of Schedule of Fees?

MR. McCLAIN: Well, in the first place, I think I should point out that in this case the conduct which is alleged to be solicitation, the letter which was written by Miss Smith, was not a face-to-face confrontation of that sort.

QUESTION: I was referring to -- relating it to the case which we just heard argued.

MR. McCLAIN: Right. And with respect to the prior -- I think that clearly any time there is a face-to-face confrontation, there are other factors operating that are not operating in a written communication.

QUESTION: Do you tend to -- do you think the written letter is equated roughly to the announcement in the newspaper?

MR. McCLAIN: I think it's closer to that, certainly, than an impersonal solicitation.

The scope of the First Amendment protection, as we read the Button case and the succeeding cases,

is that it protects associational activity to initiate litigation, to support litigation in so far as such litigation may further legitimate goals of the organization by assuring meaningful access to the courts. And that meaningful access does not depend on whether or not the persons who are being informed of their rights are members of the association or not. They were not in the Button case. Obviously, the information disseminated in the Bates case was not disseminated to any particular limited associational group.

And, further, that attorneys may participate in such organizational and associational activities with similar First Amendment constitutional protection.

Indeed, the parallels that this case presents with the Button case are very striking. A very important activity of the NAACP in Button was providing legal services. The Court said it had an extensive program of providing legal services to aggrieved parties, in certain types of cases. That's similar to the situation here.

The NAACP limited the scope at the outset of its undertaking representation of anyone, but thereafter exercised no control over the actual conduct of the litigation. The ACLU follows a similar practice.

In Button, attorneys really rather aggressively solicited parties who, according to the opinion in the Virginia Supreme Court, had never expressed any interest in litigating,

had no idea they would be met by an attorney when they went to various community meetings, and yet attorneys were there participating in the attempt to persuade people at these meetings to join lawsuits, to attack practices of segregation. And those attorneys, in the litigation that follows, were compensated on something which was not the case with respect to ACLU attorneys.

The matter here, as in Button, was a suit attacking government practices; in this case the provision of Medicaid services.

QUESTION: In this case, Mr. McClain, though, your client pursued a little more aggressively than in Button, didn't she? I mean, wasn't she present at the initial meeting and then was told that if the client wished to employ her services, the client would let her know, and then, nonetheless, your client followed up with a kind of a second solicitation?

MR. McCLAIN: The record does not really reflect that, Your Honor. The only thing that's clearly reflected by the record is that one Gary Allen, who had organized the meeting, was, according to Mrs. Williams' testimony, advised that she would call if Mrs. Williams wanted further assistance.

The record is not clear that Miss Smith was ever told that. The Attorney General at the hearing never asked Miss Smith had she told --

QUESTION: So, roughly, it appears though that your

client did make a second attempt to persuade the litigant to file a suit?

MR. McCLAIN: I don't agree with that characterization of the letter, Your Honor. I believe that the record is clear that Miss Smith wrote a letter. I do not believe that it can fairly be characterized as an attempt to persuade her, and in her testimony she explicitly stated that she was not trying to persuade anyone -- in fact, Mrs. Williams testified, the only evidence that Mrs. Williams, the person allegedly solicited, had on the question of persuasion was that Edna Smith had not attempted to persuade or pressure her in any way to file a lawsuit.

QUESTION: Well, putting to one side the characterization of the letter, which may be subject to reasonable interpretations on both sides, the follow-up letter is a fact that wasn't present in Button, isn't it?

MR. McCLAIN: To my knowledge, in fact, there were -- that was actually probably one of the problems in Button, that many of the people who signed retainer agreements did not even know that lawsuits were going to be filed until after they read about them in the newspaper.

QUESTION: Well, was there or was there not evidence of follow-up letters in Button?

MR. McCLAIN: To my knowledge, I know of none.

QUESTION: Now, I'm not sure whether your colloquy

with Mr. Justice Rehnquist refers to the letter which I thought was the only letter, you read part of it and --

MR. McCLAIN: It is.

QUESTION: -- she wrote and said, "You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor"; is that the letter we're talking about?

MR. McCLAIN: That is the letter that we're talking about, Your Honor. The letter goes on to state in addition that the -- in the next paragraph -- in fact, there in the next sentence she said: "We will be coming to Aiken in the near future and would like to explain what is involved" -- this is on page 9 of the State's brief -- "so you can understand what is going on."

The next paragraph proposes a magazine interview, if Mrs. Williams is interested in publicizing the issue of forced sterilizations, which Miss Smith makes quite clear is totally up to Mrs. Williams, whether she would participate in that practice or not, in that interview or not. And asks, in the last paragraph: "About the lawsuit, if you are interested, let me know"; there's really no persuasive content to this letter. And, in fact, as it was characterized by Miss Smith in her testimony before the hearing panel, this letter was

essentially an attempt to advise Miss Smith -- excuse me, advise Mrs. Williams that the ACLU would in fact give Mrs. Williams assistance if she wanted it.

We have to take into consideration, Your Honor, the fact that Mrs. Williams was relatively uneducated, that Miss Smith had perceived her as not being very well informed about her rights, not understanding the initial conversation very well, and this was simply a letter in which there was an attempt made to be sure Mrs. Williams had considered the matter fully before she decided what she was going to do.

Mrs. Williams, shortly thereafter, called Miss Smith, said, "I'm not interest in bringing a lawsuit", and that was the end of it.

Mrs. Williams never made any complaint to any agency that she had been pressured by Miss Smith, or never complained in any way about Miss Smith's conduct.

QUESTION: Mr. McClain, would the theory of your case be different if your client had been an ACLU lawyer who would have tried the case, had the solicitation been successful?

MR. McCLAIN: I don't believe that there is a distinction in the Button case. The Button -- that's what happened in Button. People solicited clients and tried the cases and were paid for them. Which the ACLU cooperating attorneys were not.

QUESTION: And you stand on Button on that particular

point?

MR. McCLAIN: Well, I think that this case is less extreme than Button.

QUESTION: Right. Yes. To carry it one step further, assume further that the ACLU lawyer, contrary to its practice, allowed counsel to handle damage suits, which would have been this suit, a percentage recovery as the fee -- a percentage of the recovery as the fee; would that make this commercial speech rather than noncommercial speech?

MR. McCLAIN: I believe, Your Honor, that the distinction between commercial and noncommercial speech is a much more narrow one, that Your Honor's opinion in the Pittsburgh Press case, for example, appears to characterize commercial speech as only that speech which has no other purpose but commercial.

QUESTION: So even if there were an interest, fee interest in the damage recovery, you would not regard that as commercial speech?

MR. McCLAIN: I don't believe that makes it commercial speech. And that's true in the -- that's been true in the pornography and obscenity area, that's been true in the -- in many cases before this Court, that there is a financial element does not make the speech, per se, commercial, as I read the opinions.

QUESTION: Then what does make it commercial?

MR. McCLAIN: If the only purpose is commercial, as in the case that was just argued before ours, then it's commercial.

QUESTION: So if a drug store had a sale and if you bought one cake of soap, you could get a second cake free, that wouldn't be commercial for the second cake of soap?

MR. McCLAIN: I would certainly think that's commercial speech, Your Honor. There is --

QUESTION: Isn't any offering of goods or services, at any price, commercial in the general sense of the word, as contrasted to the other kind of speech, social, economic, political or religious, among others?

MR. McCLAIN: I think that it's -- that the offer of goods for benefit --

QUESTION: Goods or services.

MR. McCLAIN: Goods or services -- to the individual who is offering, for compensation. I don't think that the offer of free services, for example, would fairly be characterized as commercial. And, in fact, that's the distinction that I believe Mr. Justice Powell was just pointing to, that were the client charged something for his -- the services he was receiving, would the client -- would that make it commercial. I don't believe that it would, but that's certainly a different case from the situation that the ACLU has consistently practiced, and that there's never been any change in, and it's presented in

this case.

QUESTION: Mr. McClain, I don't think that distinction would hold up. Supposing the letter were written to a stockholder and there was an offer to represent a class of stockholders to get a big recovery, and a statement in the letter that "we won't charge you a dime, it would be free to you", would that be noncommercial solicitation?

MR. McCLAIN: Would the attorney in that case be looking to seek to get an award of fees from the defendant on some, I guess --

QUESTION: Yes, from the corporation, just like here --

MR. McCLAIN: But, of course, in a sense --

QUESTION: Just as in this case.

MR. McCLAIN: But I think it's really different, because when you're looking to get compensation from the corporation in which the person holds stock, that's --

QUESTION: You say it's a class action instead of a derivative suit, then, but it just wanted to get money, and would the mere fact that there would be no charge unless the litigation were successful make it not commercial speech; is that your position?

That I understood you to say, that --

MR. McCLAIN: No, sir. No, sir. Not unless it were successful. But just the fact that there would be no

charge for the litigation, that was my position.

QUESTION: No charge to the person being solicited for the litigation. Isn't that -- what about this case? It was contemplated that they would recover dollars, and that those dollars would in part go into the coffers of the ACLU, that's what the --

MR. McCLAIN: No, sir, not at the time the letter was written I don't believe the record supports that.

QUESTION: Suit for damages; it was described as a suit for damages.

MR. McCLAIN: That's correct.

QUESTION: Money damages.

MR. McCLAIN: A suit for money damages; but that all would go to the client. None of that would go to the ACLU, in any respect.

QUESTION: Well, the -- don't we have to accept that the State Court's view of that matter, that it was contemplated that a fee would be paid to the ACLU, and that would be dollars.

MR. McCLAIN: That might be ordered by the court.

QUESTION: Yes. Just like the damages would be ordered by the court.

MR. McCLAIN: What I would -- but in a different sense. But the important, or one important factor is that, for example, the record does not support any notion that Miss

Smith knew that the ACLU would ask for attorney's fees in connection with any litigation. Part of that --

QUESTION: Isn't that a reasonable inference?

QUESTION: Well, what if she did, what would that violate?

MR. McCLAIN: Sir? I'm sorry.

QUESTION: What if she did? Then what would that violate?

MR. McCLAIN: Well, I'm just making the point, Your Honor, that the record in this case does not reflect that Miss Smith was acting in a fashion to get money for the ACLU.

QUESTION: Well, what if she were?

MR. McCLAIN: I think it's protected --

QUESTION: I mean, she was charged with aiding an organization to promote her legal services, or that of her associate. She wasn't charged with helping some organization raise some money.

MR. McCLAIN: Well, one of the things that the State Court relied on was the possibility of financial benefit to the organization, making it a non-exempt organization. I did not find that persuasive. But that was relied on below.

QUESTION: But I had understood all of this colloquy was directed at whether this was commercial or noncommercial speech. At least I understood Mr. Justice Stevens' question to, it was directed at that.

MR. McCLAIN: I believe that is the way it started out, Your Honor.

And I think that brings me back to a point which I wanted to make, that the court found, as far as this case is concerned, the ACLU had only entered cases in which substantial civil liberties questions are involved. So that with respect to the ACLU's activities, we are dealing with a situation where, even if some fees might be paid to them eventually, it's in the context of substantial civil liberties litigation.

QUESTION: When you say substantial civil liberties litation, what do you mean? You mean a constitutional right?

MR. McCLAIN: That constitutional or possibly a statutory right protects these civil liberties --

QUESTION: Well, how does one know the contours of that, if you include within it statutory rights?

MR. McCLAIN: Well, for example, the -- there are a number of statutes which are deemed to enforce provisions of the Bill of Rights or interests related to the Bill of Rights. Certain provisions of the Omnibus Crime Control Act involving electronic eavesdropping, go after the -- or are aimed at the same interests that are protected by the Fourth Amendment.

QUESTION: What about a State statute that gives you a right of action against someone who deliberately runs you down in a car for personal damages; is that -- that is not a civil liberties statute?

MR. McCLAIN: No, sir. That's not.

QUESTION: Well, what's the difference between that and a sterilization, which is a bad form of battery, I guess.

MR. McCLAIN: Well, the issue that was raised in the litigation which -- the related litigation on behalf of other women who had been sterilized by this doctor, was whether or not that violated -- making that a condition of receipt of governmentally supported services violated the Civil Rights Act, 1983 and 85.

QUESTION: I was under the impression -- maybe I have the wrong view of the record -- that this doctor did these services free at this --

MR. McCLAIN: That is not correct.

QUESTION: That's not, I see. He would do it if the patient would agree to this condition, is that what it was?

MR. McCLAIN: Well, the patients were Medicaid patients, --

QUESTION: Right.

MR. McCLAIN: -- and the doctor would accept them as Medicaid patients only if they would accept sterilization. He in fact -- if the patient were able to pay, he would not require sterilization after the third pregnancy; but that's what he would require with respect to Medicaid patients.

QUESTION: They were -- these were all maternity

cases?

MR. McCLAIN: With respect to this doctor, that's correct.

QUESTION: They were Medicaid cases of pregnant women, and the expenses were in connection with the birth of their children;is that it?

MR. McCLAIN: That's my understanding, Your Honor.

QUESTION: And after the second or third -- I guess it was the third child, he said, "No, I won't be your physician any more unless you agree to be sterilized"?

MR. McCLAIN: That's my understanding of that record. I was not involved in that case, myself.

I would simply like to emphasize that the State concedes that the first meeting at which Miss Smith met with Mrs. Williams was protected, and, in its brief on page 30, it said it was protected to advise her of her legal rights, her legal remedies, and of the availability of the ACLU. We find it difficult to see why a letter to a person who Miss Smith did not perceive to fully understand her rights, even after that conversation, a single letter, is stripped of all constitutional protection once that first concession is made that the initial meeting was a protected meeting.

QUESTION: Well, certainly you don't claim that just because something is a letter the writer of it can't be punished in all sorts of context. A blackmailing letter

certainly can be punishable under the criminal law of any State constitutionally; can't it be?

MR. McCLAIN: That's correct, sir. But there would have to be some interest like that.

QUESTION: A letter written by -- demanding ransom, or --

MR. McCLAIN: That's correct.

QUESTION: But just the fact it's a letter doesn't give it a free ticket constitutionally to go unscathed through all the criminal statutes, State and federal, of the United States, does it?

MR. McCLAIN: Just as speech, which is extortion in nature is not protected at all by the First Amendment.

QUESTION: And all sorts of speech, isn't it? Deceptive speech, fraudulent speech, --

MR. McCLAIN: Agreed.

QUESTION: -- blackmailing speech.

MR. McCLAIN: Agreed. We have no dispute with that.

QUESTION: That would be true also if a coded classified ad were put in the paper, in a newspaper, a legitimate newspaper, taking out the ad which purported to be an ad for the sale of a house which, in fact, was, by a pre-arranged code, a direction for how to pay the ransom in a kidnapping, that wouldn't be protected, would it, just because it was in the newspaper?

MR. McCLAIN: I would hardly think so.

QUESTION: No.

QUESTION: Mr. McClain, you said you didn't see a difference between the oral meeting in July and the letter in August. But the oral meeting was advice on the merits, as I understand it, and the August letter was a solicitation after giving advice on the merits. There's at least a difference, isn't there?

MR. McCLAIN: Well, Your Honor, the only difference is advising the client, a prospective client, that the ACLU is definitely available to provide counsel --

QUESTION: "Would like to bring an action on your behalf, and this practice must stop" and so forth. It is -- it was within the power of the court to treat that as a solicitation, I believe. Wouldn't you agree with that?

You couldn't say such a finding was clearly erroneous.

MR. McCLAIN: One of the problems, Your Honor, is that solicitation was never defined. So I'm not absolutely clear as to what was meant by solicitation. It was not the recommending of her own services, because she was not found guilty of 2-103(A).

QUESTION: But don't you think it's fair to read that letter as recommending that she file a lawsuit?

MR. McCLAIN: I think it could be subject to that

interpretation.

QUESTION: I would think so. "This practice must stop" is what the letter says.

MR. McCLAIN: That's an expression of an opinion about the distinct activity --

QUESTION: By the author of the letter to the person who's reading it, yes.

MR. McCLAIN: It's a speech activity in commenting on an issue of public interest.

QUESTION: Then, towards the end of the letter, she said, "Call me after Labor Day, call me collect", and gave her a telephone number.

MR. McCLAIN: That's correct.

QUESTION: Doesn't that support the concept of solicitation in the finding?

MR. McCLAIN: You have to remember that the letter also said, "If you are interested, let me know." It does not -- it does invite further discussion.

QUESTION: Well, presumably, by hypothesis, you wouldn't say in a letter, "If you are not interested, let me know."

[Laughter.]

MR. McCLAIN: No, but it also did not say, "Please sign this letter and return by return mail and we will represent you." It was an invitation for further discussion with

respect to the conversation.

QUESTION: Could I ask you: What rule was she found to have violated?

MR. McCLAIN: It was 2, Your Honor, DR 2-103(D), which, as you commented earlier, involves promoting her activities, and 2-104(a)(5), which I never understood.

QUESTION: Well, that isn't a -- do you think that's an independent rule; is that a prohibition? I thought it was just an exception to the --

MR. McCLAIN: That's been my understanding and my argument throughout this litigation, Your Honor; but the State court below did not accept that.

QUESTION: Where did the court not accept that?

MR. McCLAIN: I believe it refers on --

QUESTION: It just quotes the panel --

MR. McCLAIN: On page 1A of the Jurisdictional Statement, Your Honor.

QUESTION: And what's that?

MR. McCLAIN: It says she was found guilty of violating both of these rules. That's the court opinion.

QUESTION: Well, but it goes on and says that the court adopts the panel report as an accurate --

MR. McCLAIN: That's certainly correct, yes, sir.

QUESTION: Isn't that right?

MR. McCLAIN: Yes, sir.

QUESTION: And what's the final --

MR. McCLAIN: Both rules are referred to in the panel report, Your Honor. It's somewhat opaque to me, too. I think perhaps you should ask Mr. Kale exactly how that is related.

QUESTION: Because (D)(5) doesn't independently proscribe any conduct, does it?

MR. McCLAIN: That's been my argument all along, Your Honor. I agree.

But the court found otherwise.

QUESTION: And what conduct do you think it proscribes? That you may not solicit business for an organization if its primary purpose is to litigate?

Is that the way it's been interpreted, do you think? In this case.

MR. McCLAIN: I'm really not sure, Your Honor.

QUESTION: I suppose it can only be read as saying that her conduct, in the view of the court, didn't come within the exception of (D)(5).

QUESTION: By that --

MR. McCLAIN: Then she'd have accepted employment, which was the original --

QUESTION: Well, then, it doesn't come within the exception, but then what she violates is (d).

QUESTION: Yes.

QUESTION: And that requires solicitation for her own benefit. It requires leading an organization to --

MR. McCLAIN: To promote her services.

QUESTION: -- to promote her services.

MR. McCLAIN: That's my -- that's the way I've been reading the rules all along, Your Honor.

QUESTION: Do you still argue -- let me have this clear -- that this letter does not constitute a solicitation?

MR. McCLAIN: I don't believe we would concede she did not agree to that, Your Honor.

QUESTION: Let me just call your attention to the last five lines: "About the lawsuit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters" and so forth.

MR. McCLAIN: Certainly.

QUESTION: Having said, "Call me collect" and all these other preliminaries, do you still maintain that is not a solicitating letter?

MR. McCLAIN: Your Honor, I don't want to make a concession to that effect. I don't understand precisely what soliciting means in this context.

QUESTION: Let me put it another way. You say that that letter is not an adequate basis for a finding by the fact finder that solicitation took place.

MR. McCLAIN: Your Honor, my understanding is that a disciplinary rule has to be violated. The only disciplinary rule that talks about what I would think of as solicitation is DR 2-103(A), which is the recommending of the employment of yourself or your associates. And 104(a) which is the acceptance. The rules that are clearly involved in Mr. Ohralik's case. Neither of those rules is involved in this case, and so it's hard for me to admit that this is a solicitation case. I'm not really sure exactly what the interpretation was.

QUESTION: Mr. McClain, before you sit down, I understand your argument on 104(a), there was no acceptance of employment.

MR. McCLAIN: Yes.

QUESTION: That the language just doesn't seem to apply.

I don't thoroughly understand your position on 103(D)(5), I understand the exception part doesn't apply, but why doesn't the first sentence cover this transaction -- one of the first sentences would be: "A lawyer shall not knowingly assist a person or organization", the client shall not assist the ACLU, "that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates."

Now, wasn't it clear that the "associates" of your client were involved in the litigation, and one of them was

paid by the ACLU?

MR. McCLAIN: Well, Your Honor, I think you have to look at that in contrast with 2-103(A) which talks also about recommending the services of the partners and associates. And she was not found -- although that was argued below -- she was not found to have recommended those services.

Now, I really don't --

QUESTION: But she assisted an organization that was using the services of those partners in the very matter.

MR. McCLAIN: Well, she was using -- that was -- well, now, that's correct, and it seems to me that that's exactly what the court said in Button, because --

QUESTION: Of course, your answer to that is that if it's covered by this it's constitutionally protected, that's your main argument; not within the language.

MR. McCLAIN: That's certainly the principal argument, yes, sir.

QUESTION: Well, whether or not it's within or without the language, it's a matter of State law, isn't it? None of our concern, except in so far as it may go to show how vague and unconstitutionally broad, perhaps, in your submission, the language is.

MR. McCLAIN: That's correct, Your Honor.

QUESTION: Whether or not it's inside it or outside it is a matter for the State court to decide, and it has

decided it. Isn't that correct?

MR. McCLAIN: Except with respect to vagueness or whether there is any evidence to support the --

QUESTION: Or overbreadth, right.

MR. McCLAIN: Yes.

QUESTION: I'm interested in finding out what your understanding is as to what the conduct was that violated 103(D), that first sentence that brother Stevens talked about. Is it recommending the services of the ACLU which was using an associate of hers as a lawyer?

MR. McCLAIN: Your Honor, the construction that's placed on that rule in the State's brief does not require that there be any connection between her associates and the ACLU; if she assists or cooperates with the ACLU in any way, she cannot offer its services to anyone, recommend its services to anyone. That's the construction that's put on this rule in the State's brief at page 49, and it's the construction that I've understood to be put by the State throughout. And that that's what makes it such an overbroad rule, to totally prohibit a member attorney from recommending the services of your organization.

Thank you, Your Honor.

QUESTION: Mr. McClain, I take it you feel this case is very different from the Ohralik case?

MR. McCLAIN: I don't think there's any question

about that, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Kale.

ORAL ARGUMENT OF RICHARD B. KALE, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. KALE: Yes.

QUESTION: You might tell me early in the game what -- how you think the conduct involved here involved 103(D), that first sentence, if that's your claim.

MR. KALE: Yes, sir, Mr. Justice White. It is, of course, our claim that the conduct in this case did violate DR 2-103(D), and I think it's important to look at the South Carolina Supreme Court's --

QUESTION: Well, you can just tell me: how did it? Was it --

MR. KALE: It violated the disciplinary rule because it recommended the services of the ACLU which had members, cooperating attorneys, both Miss Smith's private law partners. One was a staff attorney for the ACLU, and the other one was a cooperating attorney who was -- both of which were participants in the subsequent litigation that arose out of these events.

QUESTION: And you think, then, that she was aiding an organization to promote her services or an associate's services?

MR. KALE: Yes, sir.

QUESTION: And the associate was not a law partner, I take it? That's the --

MR. KALE: The associate was not a law partner -- of the firm?

QUESTION: Yes.

MR. KALE: Yes, her -- I don't quite understand what you mean by that.

QUESTION: Well, they were sharing expenses and keeping their own fees, that's what the finding is.

MR. KALE: Yes, sir.

The court and counsel --

QUESTION: But you say that makes -- that brings them within the definition of associate?

MR. KALE: Yes, sir. I think it's very definite that they had established a firm, they were portraying to the public that they were a firm and that they were partners in the pursuit of their legal practice.

QUESTION: Well, do they have to be partners to get within 103(D), or doesn't it also provide --

MR. KALE: No, sir, it also provides associates. Yes, sir.

This counsel and Court today are required to perform the unpleasant task of examining the ethical conduct of a fellow member of the legal profession. Appellant Smith, who is a licensed attorney in the State of South Carolina, was

found by the South Carolina Supreme Court to have violated its disciplinary rules and was publicly reprimanded for this conduct.

The enforcement of disciplinary rules, while perhaps an unpleasant task, is a necessary one for the protection of the welfare of the public and for the protection of the administration of justice. For, indeed, an attorney's conduct as an officer of the court does reflect upon the judicial system.

This Court has long recognized the right and, indeed, the necessity of the States to regulate the practice of law within its borders.

The two disciplinary rules which the court found that Appellant Smith had violated were Disciplinary Rules 2-103(D)(5) and 2-104(A)(5) of the American Bar Association's Code of Professional Responsibility. This Code was adopted in the State of South Carolina by the South Carolina Supreme Court in 1973.

Both of these rules concern the solicitation of business by a lawyer. However, the instant case involves more than the mere recommendation of -- by an attorney, of his employment, or the employment of his partners or associates. The instant case involves the question: Can an attorney attempt to induce or persuade a prospective client to bring a lawsuit and to permit the attorney, his partner or associates

to handle the case?

Because of the differing factual interpretations in this case, I would like to briefly refer to the record. It is undisputed that Mrs. Williams, who appellant sought as a client for the American Civil Liberties Union, had not requested legal assistance from Miss Smith or from any other person. In July of 1973 a meeting was arranged by Appellant Smith and a Mr. Gary Allen, for the purpose of Miss Smith advising certain women about the sterilization performed upon them by their private physician.

This meeting was attended by members of the press. Mr. Williams had not requested this meeting and, in fact, did not know of the meeting until she was approached by Mr. Allen as she left the hospital where her child was critically ill and was not expected to live.

Mr. Allen requested Mrs. Williams to accompany him to meet the appellant.

Miss Smith advised Mrs. Williams about her legal rights, they went into depth about the sterilization question, she told her of her legal rights and remedies, and she even advised her at that time that the American Civil Liberties Union could render legal services to Mrs. Williams.

Mrs. Williams left the meeting after informing appellant that if she decided to bring a lawsuit, that she would contact appellant. Mrs. Williams never contacted Miss

Smith to make any such request.

It is the position of the State that the appellant's further attempt to secure Mrs. Williams as a client by writing the letter of August 30th, 1973, is not protected by the First Amendment and is clearly prohibited by the disciplinary rules in question.

Certainly when Mrs. Williams left the meeting she was in a position to decide her own best interest about the lawsuit. To permit the conduct in this case would only encourage attorneys to be persistent with potential clients. The danger of permitting the conduct, I think, is well illustrated by the testimony of Mrs. Williams, which I'd like to quote to the Court.

"I got tired of everybody aggravating me" --

QUESTION: Where do we find that?

MR. KALE: That is at page 57 of the Appendix.

"Everyone was coming to ask me wasn't I going to sign to file a lawsuit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I did sue maybe they'd leave me alone, I'm tired of being bothered."

This points up, I think, a very important reason for having rules against solicitation, in that people ought to be able to decide whether they want to bring a lawsuit or select an attorney without pressure, any type of inducement by an attorney.

QUESTION: Mr. Kale, may I just ask one question here? Supposing the letter had not been written by Miss Smith, but rather had been written by the ACLU; would such a letter have been constitutionally protected?

MR. KALE: Your Honor, we do not believe it would be.

QUESTION: I'm just wondering, that's not a distinction that you rely on with respect to the Button case, then.

MR. KALE: No.

QUESTION: The letter is written by the lawyer rather than by the --

MR. KALE: No, sir. Of course, the State -- of course, as a disciplinary action we have ability to discipline attorneys, we do not have the ability to confront the organization.

QUESTION: Well, presumably you could get an injunction against a lay person or something like that.

What if she had just given advice at the first meeting and had not said, "We will represent you" or "The ACLU will represent you", and then she went home and a month later the ACLU decided, yes, it would finance such a lawsuit, and then they had written this letter; would it have been protected then?

MR. KALE: Your Honor, I can only refer to the decision of the South Carolina Supreme Court. They did not, in their opinion, find any misconduct because of the first

letter, it was the subsequent seeking of the client that they found was reprehensible conduct.

QUESTION: Well, if that's so, and if the ACLU did not decide to provide free legal services for this person until after the first meeting, how could the ACLU communicate that information to that person? Is there any way in the world they could do it, without --

MR. KALE: Your Honor, I don't think it's necessary that the organization state to the potential client that they desire to bring it, I think Mrs. Williams knew at the time she was advised that this --

QUESTION: Well, I'm saying that supposing the first meeting were a little more inconclusive, and it's just -- in other words, assume that the first meeting is legal advice about a potential lawsuit and nothing about financing or willingness to participate, and then the lawyer goes home. After that the ACLU decides, yes, we would like to sponsor this litigation, --

MR. KALE: Your Honor, --

QUESTION: -- can they constitutionally tell the potential client that fact?

MR. KALE: Your Honor, under my reading of the disciplinary rules, they would not be able to communicate the letter, even if they had not advised her in the July meeting.

QUESTION: Is there any way you consider -- then there

is just no way that information could be communicated to the potential client; that's what you're saying?

The Constitution doesn't afford any protection to that particular --

MR. KALE: Not through personal solicitation.

QUESTION: Well, would you say the same if the writer of the letter was an employee of the American Civil Liberties Union, a hired lawyer, a paid staff member?

MR. KALE: Yes, sir, I do not believe that he would be able to convey to the organization --

QUESTION: You don't think that's covered by Button?

MR. KALE: No, sir.

Perhaps at the outset we should deal with appellant's argument that the disciplinary rules in this case are overbroad. Of course we contend that the activities on this record were not protected by the First Amendment. But even if the Court should find that solicitation by attorneys is afforded some protection under the First Amendment, we would urge the Court, or we would submit to the Court that such would be commercial expression, to which the overbreadth doctrine applies weakly at all. As the Court noted in Bates vs. State of Arizona, commercial expression is not likely to be crushed by such restriction, and we would urge the Court not to apply overbreadth to the case of solicitation by attorneys as they

decline to apply it to professional advertising.

The litigation which appellant sought to promote in this case was an action for, as she expressed it, money against Mrs. Williams' private physician. We maintain that this was private litigation, which the Court in Button clearly recognized as being traditionally condemned.

I would point out that last week this Court considered another sterilization case, in Stump vs. Sparkman, in which a daughter had been sterilized at the request of her natural mother and sole parent.

Regardless of whether one considers the mother's actions in that case to be right or wrong, it occurs to me that if we accept appellant's argument that an attorney has the right to persuade or induce potential clients to file suit, then an attorney in that case could of course persuade or induce the daughter to file suit against the mother.

I could not think of any conduct which would be less desirable by an attorney.

QUESTION: But can you decide this case on the basis of how you feel about particular kinds of lawsuits? Doesn't there have to be some sort of general rule one way or the other?

MR. KALE: Your Honor, I think it would be difficult to draw a disciplinary rule that distinguished between conduct on the basis of the type of lawsuit that was brought.

The role of an attorney in this society should be to

settle disputes and not assume the role of provoking such disputes. The Court in Button clearly recognized the undesirability of stirring up litigation which interferes with established relationships, as in this particular case the relationship between a private physician and his patient.

I find it interesting to note appellant's argument --

QUESTION: Well, how about Rule 10(b)(5) for example, that certainly encourages litigation between the established relationship of a client and a stockbroker. Can you make that generalization that the -- against a constitutional challenge, that the State has the right to discourage stirring up litigation that questions or challenges an established relationship?

MR. KALE: Your Honor, I think that you can if it's a private relationship. For example, the Court noted in NAACP vs. Button, litigation which would sow family discord or litigation which interfered with private relationship, I wouldn't assume that the relationship between the stockbroker and his client would be such a private relationship as between a physician and his patient.

I find it interesting to note appellant's argument that what she was trying to convey to Mrs. Williams in her August 30th letter was to bring action against government, as she maintains. If you look at the letter, this was not what she told Mrs. Williams. She said, "The ACLU would like to file

a lawsuit on your behalf for money against the doctor who performed the operation."

The letter, I think, was clearly misleading to Mrs. Williams, who, at the panel hearing, stated that she had only been told by appellant that the only thing that could be accomplished by the lawsuit was to get money.

I feel that the letter of August 30th was clearly an inducement to Mrs. Williams, with the prospect of receiving money, to allow the American Civil Liberties Union to file suit for her.

QUESTION: Now, see, if the legal department of a union writes to one of its members, recommending that the member start litigation with respect to something that's happened to him, would that be proscribed by these rules; or is it because -- or is it that the union isn't the kind of organization that's covered by the rules?

MR. KALE: Your Honor, I think the rules in question specifically have excluded the Court's line of decision in the union cases, where collective activities to members to obtain access to the legal system has been protected. I think it's an important point here to note the difference, in that Mrs. Williams was not a member of the organization. There was no protection of collective activities by the members who, I think in the Court's decision in the union cases, it was always the aggrieved party that should obtain access to the court. I don't

believe that the Court ruled in the union cases that attorneys can participate in collective activities to obtain access to the courts. I think it was always from the standpoint of the aggrieved parties obtaining access to the courts.

QUESTION: But the -- if the union were involved, I suppose its lawyers could make recommendations to its members?

MR. KALE: Yes, sir; to its members.

QUESTION: But not to outsiders.

MR. KALE: No, sir.

QUESTION: Wasn't there something in Justice Black's opinion to the effect that this was embraced within the services that the union members were receiving in exchange for their dues, to have a lawyer experienced in these kinds of cases? Isn't there some hint of that in his opinion?

MR. KALE: I believe you're right, Your Honor.

I think another important consideration that you have in this case, which justifies the prohibitions of solicitation, are the potential conflicts that arise with an organization that attempts to achieve organizational goals through litigation in their representation of non-members. Certainly the interests of the organization and the non-member are not so identical as the Court noted in NAACP vs. Button that the potential conflicts of interest cannot arise. For example, --

QUESTION: What rule in -- what rule would cover, if

there is one, a direct solicitation by the ACLU? Say the president of the ACLU, a non-lawyer wrote the same letter to this lady; would there be some --

MR. KALE: Well, we could not prohibit a non-lawyer under the disciplinary rules from doing anything.

QUESTION: Yes. Well, is there a statute that prohibits that form of solicitation?

MR. KALE: There is a statute in South Carolina prohibiting solicitation by a lay person.

QUESTION: Would it cover my example?

MR. KALE: Your Honor, I cannot say for sure. I don't think there's ever been a prosecution that I know of under that criminal statute.

QUESTION: But if the organization uses a lawyer to solicit, it is covered under this rule?

MR. KALE: Yes, sir. Lawyers' activities are, of course, proscribed under these rules.

QUESTION: Well, I take it you indicate there are other prohibitions about a non-lawyer soliciting business for lawyers?

MR. KALE: We have a criminal statute in the State of South Carolina which prohibits solicitation.

QUESTION: What -- well, "solicitation" has a variety of meanings.

MR. KALE: Yes, sir.

[Laughter.]

QUESTION: Does it prohibit --

MR. KALE: Solicitation of legal business, excuse me, sir.

[Laughter.]

QUESTION: By a non-lawyer?

MR. KALE: Yes, sir; right.

QUESTION: Mr. Kale, the distinction between members and non-members, the Button case, if I remember, involved solicitation of law business -- of litigation of non-members of the NAACP, didn't it?

MR. KALE: Yes, sir, I believe that is correct.

However, if you look at the case, NAACP vs. Button, you will note that the normal way that the NAACP obtained clients was not through solicitation but from a request directly by the client to the NAACP. Except in desegregation cases. And in desegregation cases, the NAACP undertook a program in order to implement the Court's decision in Brown vs. Board of Education in 1954 and subsequent, to tear down --

QUESTION: How is that different from an ACLU program to put an end to sterilization?

MR. KALE: Well, Your Honor, we would maintain that -- the difference being that the action in desegregation cases were actions against government; here, as the Fourth Circuit noted in the subsequent litigation that came out --

QUESTION: It ultimately found no State action. But at the time of what we're describing as a solicitation, it was the view of the ACLU and its attorneys that there was a valid State action theory that they could proceed on, wasn't it?

MR. KALE: Your Honor, --

QUESTION: They could file a 1983 case.

MR. KALE: -- I think you would have to look at the view, as far as this disciplinary action, of the appellant at the time she wrote the letter. In the letter she said, "We would like to file an action for money" --

QUESTION: Against the doctor.

MR. KALE: -- "against the doctor". Now, --

QUESTION: On the theory that the doctor is acting under color of State law.

MR. KALE: Well, if we -- we have to go one step farther and say, well, what happened in subsequent litigation, didn't we envision an action against government? Then I think you would have to take it maybe one step further and say that, well, maybe we have to wait until the conclusion of the litigation to determine whether this was in fact an action against government.

My point, in as far as this particular action, I do not believe it was the type of action which the Court intended to carve out any type of exception; no more so than,

for example, if an individual had brought a suit and named the State of South Carolina as a defendant under the Motor Vehicle Tort Claim Act.

QUESTION: But why not? I just don't -- I really don't quite get your theory. Is it because it ended up with a finding that there was no State action? Or is it because it was a frivolous State action claim? Or does the difference between sterilization and segregation -- precisely what is the difference between this and the kind of litigation involved in Button?

MR. KALE: Your Honor, the difference is that, of course, I think it interfered with a private relationship, that being the relationship --

QUESTION: Well, I imagine that some of the litigation that grew out of the NAACP activities interfered with quite a few private relationships.

MR. KALE: Yes, sir, but not the established type of relationship you have between a doctor and his patient.

Moreover, the type of litigation that they had in Button did not -- the Court recognized -- have any financial benefit to the organization, which of course it has in this particular case through the possibility of court-awarded attorney's fees.

QUESTION: But that doesn't turn on the kind of litigation then, that turns on --

MR. KALE: No, sir.

QUESTION: -- the kind of compensation.

QUESTION: Then, Mr. Kale, with all respect to my colleagues and many here in the room, what is the difference for constitutional purposes between the relationship between a doctor and his patient or a lawyer and his client, and the relationship between an Avon Lady and the lady, the person she calls on to sell cosmetics?

MR. KALE: Well, of course the Avon Lady and her client is purely a commercial type of relationship.

QUESTION: Yes, ordinarily I would think of her as a customer rather than a client.

MR. KALE: Yes, sir. I think it's the professionalism that is involved in this particular relationship of a patient and his doctor, which requires a certain amount of trust, and if lawsuits are prescribed, I think that, very seriously, it will interfere with the type of professional relationships that --

QUESTION: You say it heightens the State's interest when you have this kind of professional relationship, do you?

MR. KALE: Yes, sir.

QUESTION: Well, would the NAACP today violate this rule if -- or the lawyers for the NAACP, the paid staff lawyers for NAACP -- if they wrote non-members of the NAACP suggesting litigation to cure some situation that NAACP thinks

should be cured?

MR. KALE: Your Honor, I do not believe that the Court intended in NAACP vs. Button to give the NAACP a complete blanket exception to this --

QUESTION: Well, what is your answer? Is it yes?

MR. KALE: Yes, sir, I think it very well could be.

QUESTION: Well, I didn't -- do you think it would or not?

MR. KALE: What was the specific litigation they were soliciting?

QUESTION: To -- a school suit.

MR. KALE: Oh, not a school suit, no, sir. I think --

QUESTION: What do you mean "not a school suit"?

MR. KALE: You mean for desegregation or --

QUESTION: Yes, and it wants to get specific clients to -- specific individuals to bring the suit. And they will represent them.

MR. KALE: Then I think the Court's getting very -- almost on point in the factual situation in NAACP vs. Button.

QUESTION: Even though the paid lawyer for the NAACP is writing a letter soliciting business or soliciting a lawsuit, and the NAACP will profit from an attorney's fee?

MR. KALE: Well, Your Honor, of course the type of conduct that was involved in the case before the Court in 1963, which the Court I think very closely stated they were limiting

their decision to the record on the Court --

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, counsel.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: You may resume, Mr. Kale.

ORAL ARGUMENT OF RICHARD B. KALE, JR., ESQ.,

ON BEHALF OF THE APPELLEE -- Resumed

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

At this point I think I would like to make some brief summary remarks, and close my argument.

I would like to urge the Court to consider, in the facts of this case, that the prospective client, Mrs. Williams, had been advised prior to the August letter from Appellant Smith of her legal rights and remedies, and the availability of the ACLU to represent her.

Appellant Smith, in her testimony before the grievance committee, testified that in her letter she was seeking members of the plaintiff class, so that the American Civil Liberties Union could have clients.

I would submit that the First Amendment was not intended to protect or afford the attorney a right to secure the client.

We would respectfully request that this Court consider these facts and affirm the decision of the South Carolina Supreme Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:02 o'clock, p.m., the case in the above-entitled matter was submitted.]

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