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By Lawrence E. Walsh

The following is reprinted from American Bar News, a publication of the American Bar Association.

On June 25, 1976, the Department of Justice commenced a legal action against the American Bar Association under the Sherman Antitrust Act alleging that the Association conspired to restrain competition among lawyers by restricting advertising by lawyers. Actually the Association has no power to restrain advertising. It merely promulgates a model Code of Professional Responsibility for consideration by the state bodies regulating the practice of law. This effort by the Department of Justice to extend the antitrust statutes to prevent such an activity raises constitutional and political problems of fundamental importance to our profession. The question is whether the Department of Justice under the guise of the antitrust laws can dominate the recommendations of the American Bar Association to states which are themselves exempt from these statutes.

In the preparation of its model Code, the American Bar Association Committee on Ethics and Professional Responsibility serves as a clearinghouse for information and views and as an expert analyst of ethical problems. Before adoption by the Association, the Code must be approved by the Association's broadly representative House of Delegates. It is then frequently followed by state courts, legislatures, and other agencies responsible for the regulation of the profession. The House of Delegates which determines the contents of its recommended Code of Professional Responsibility includes representatives of most of the organizations concerned with the practice of law and the administration of justice. Because these organizations have different points of view and because of the different personal judgment of the members of the House, controversial provisions of the Code are subject to vigorous debate and modification on the floor. After passage, its provisions are codified, then circulated to the state and local bar associations and to state agencies as recommendations for uniform action among the states. In most instances, the states have adopted the substance of these recommendations, but some have not. The Association's efforts to keep the states abreast of the needs of the profession in its service to the public and in undertaking the development of its uniform Code have been useful to the states and to the public.

By this action, the Department of Justice seeks to end this free thought and discussion in the development of the Code and to superimpose its own policies (which of course it could advance directly to the states if they were persuasive). The Association's proposal to the state courts and legislatures would no longer be the free judgment of the members of the House of Delegates and the Committee on Ethics and Professional Responsibility. They would be forced to promulgate under the name of the Association the views of our Nation's dominant litigant, the Department of Justice. Inasmuch as one of the legal profession's principal responsibilities is the protection of the rights of the private citizen *against* the government, it is singularly inappropriate that the Department of Justice, the principal advocate for the government, should come to dominate the regulation of the profession, under the guise of the antitrust laws.

ADVERTISING

The claim of the plaintiff is that the restraint on advertising reduces price competition among lawyers and therefore disserves the public. Although in some fields and as to some products, particularly uniform products, advertising as to price is useful, a heavy preponderance of the lawyers commenting on lawyer advertising have felt that it would not be useful. They are also concerned that advertising has in it the danger of deceit and overstatement. Proponents say that this danger can be controlled by supervision and prosecution. Yet we are aware of the delay and frequent omissions and failures of the Federal Trade Commission, with a staff of thousands, and that there is no comparable agency now capable of monitoring the advertisements of lawyers. The efforts of the American Bar Association to encourage the states to improve professional discipline have barely reached a level that enables it to deal appropriately with gross misconduct, let alone policing the subtleties of lawyers' advertising claims.

There is also concern that the expense of advertising would bear hardest on the new members of the profession rather than established firms and that all expense would inevitably be passed on to the public. If advertising expenses became heavy enough, they could also serve as a force for concentration of the profession and ultimately reduce the proportion of individual practitioners and small firms.

It is nevertheless recognized that advertising is one of the problems which the profession must keep under active consideration, not because of its own value, but because it is a problem incidental to valuable new forms for the delivery of legal services to the public and in particular to the poor and lower income groups. The Legal Services Corporation, which was created with the support of the American Bar Association, now provides free legal services for

the indigent. Prepaid legal service plans (like Blue Cross and Blue Shield medical plans) now provide service for over 800,000 individuals. Under these plans a person for a relatively small annual payment is assured of legal services from a panel of lawyers should he need them. In addition, experimentation is going forward with legal clinics in an effort to find whether greater simplification, efficiency of operation, and high volume and routine types of service can be made available to the public at a rate lower than those of the average practitioner.

Each of these efforts to improve delivery brings with it the problem of advertising. If these plans are to be fully useful to the public, the public must be told about them. On the other hand, some lawyers competing with these plans complain of discrimination. Specialization which is expanding in several states raises the additional need for a lawyer to inform the public of his specialty.

These problems and the incidental relationship of advertising have been under active consideration by the Association, and the subject of exchanges of views between the Association and Department of Justice during the past year and a half. They were sharply focused a year ago when the Supreme Court of the United States in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), held that the legal profession was not exempt from the antitrust laws.

Following that decision, the Standing Committee on Ethics and Professional Responsibility reviewed the Code of Professional Responsibility with particular emphasis on the problem of advertising. After its preliminary study, it held two public hearings, one for consumer groups and one for lawyers. In December 1975, the Association held a major conference in Chicago of the presidents, presidents-elect, and executive directors of each state and large local bar association. After a full day's conference, the discussion was capsulized in a one hour film which has been viewed by over 70 state and local bar assocations.

The Committee made available for this conference a discussion draft which proposed a substantial liberalization of lawyer advertising. It was distributed to every state and local bar association with a request for comments. Numerous comments were received. The preponderance was against the wide liberalization proposed. As a result, the Committee narrowed its draft and recommended to the House of Delegates at its midwinter meeting a less extensive change. It recommended that the material heretofore included in law lists be expanded to include a statement of preferred areas of concentration and a statement of a fee for first consultation, plus a statement as to a range of fees provided that all of the contingencies were adequately outlined. After three hours of debate, the House of Delegates substituted a somewhat similar proposal drafted by the Committee on Professional Discipline. The proposal as adopted permits the inclusion in law lists of a statement of the fee for first consultation, a statement that an estimate of fees will be made available at that first conference, and a statement as to credit arrangements. It went further than the proposal of the Ethics Committee by authorizing the publication of all of the law list information in the classified pages of the telephone directory.

Thereafter, the Ethics Committee resumed consideration of the problem. In addition to its continued responsibility for further consideration of its December discussion draft, it addressed two questions arising from the action of the House: the first was the issuance of an opinion that consumer groups as well as any other reputable group could publish law lists; the second has been the revision of a complicated proviso which the House included to emphasize the control of the states and suggesting a possible use of state approved forms. This will be submitted to the House of Delegates in August after concurrence has been sought with the Committees on Law Lists and Professional Discipline.

On May 24, 1976, the Supreme Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* No. 74-895. It struck down a Virginia statute which prohibited advertisement of the prices of prescription drugs. It found that these drugs were in fact almost always pre-packaged and that there was no true professional service in counting them out for delivery to an individual. It held the First Amendment protected, to some extent, commercial as well as ideological communication; that the prospective recipient of the communication had standing to claim this right; and that the restriction on price advertising to these uniform, prepackaged and standardized drugs violated the First Amendment of the Constitution.

As soon as this opinion was published, the Ethics Committee undertook a study to determine whether there were aspects of the practice of law which were analogous to the standarized vending of prepackaged drugs. The Committee has established a subcommittee for this purpose which is working with the American Bar Foundation in the planning of the study. More recently, I have asked the Committee to address specifically the problem of the possible discrimination resulting from permitting certain plans for the delivery of legal services to advertise but not permitting other lawyers in competition with these plans to have the same privilege.

Lawyer referral advertising which might have solved some of the problems with which the profession is now confronted has been inadequate in the past. The Board of Governors has recently approved a greater expenditure of funds of the American Bar Association for use in the development of more effective advertising and the promotion of its use by state and local bar associations.

LEGAL PRINCIPLES INVOLVED

The American Bar Association is the major national association of the legal profession. It has over 200,000 members and its membership is well represented in each state. It has 25 sections and over 70 special and standing committees, each developing programs for the education and improvement of lawyers and for the resolution of difficult public problems which have some relation to law. It has traditionally been an Association of free and wide ranging professional discussion. It has no power to enforce its views. It deals with matters that are controversial. It attempts to supply an orderly analysis of these problems

as a service to the public as well as governmental agencies. The Association is an opinion formulating body using its immense membership and its widely representative House of Delegates to develop plans and positions which hopefully will be useful to those who must ultimately make some decision of public policy.

In the performance of its work, the Association has cooperated frequently with the Department of Justice, with the Judicial Conference of the United States, with the Advisory Committees of the Supreme Court, and with countless state organizations and governmental entities. It has not—certainly within recent years—attempted to impose upon its members any standard of conduct other than that of compliance with the law and court rules of their respective states. Membership in the Association is open to any person who is a member of the state bar in good standing.

The First Amendment of the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Supreme Court has recognized a First Amendment right to attempt to influence the passage or enforcement of laws, and that the Sherman Act is inapplicable to such attempts. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court was confronted with a Sherman Act suit brought by motor truck operators and the Pennsylvania Motor Truck Association, alleging that the defendant had used an unfair and deceptive public relations campaign to secure state weight limit and road tax legislation adverse to the truckers. The Supreme Court unanimously held that the Sherman Act has no application to attempts to influence the passage or enforcement of laws:

". . . To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important Constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." 365 U.S. 137-38. (Footnote omitted.)

In the present suit, the Justice Department makes the same arguments that were rejected by the Supreme Court in *Noerr*. The Association promulgates a model Code for the states. It does not have the power to enforce it, and *Noerr* demonstrates that the Sherman Act cannot be used to prevent the Association from urging the states to adopt this Code. The Supreme Court reaffirmed its position in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965), stating that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purposes." [See also *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).]

The rights of groups to assemble in order to become more effective partisans has been dramatically asserted by the Supreme Court in a series of cases growing out of the activities of the National Association for the Advancement of Colored People.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), the Supreme Court held that "[i]t is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assumed by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

Representatives of the Department suggest the need for them to commence this action against the American Bar Association because they have started similar actions against other professional groups, such as the Professional Engineers. Such consistency has not always concerned the Antitrust Division in the past but there must be one of two answers: either the earlier cases are distinguishable because of the control by the Association of the conduct of its members, or they should not have been brought. It may be that some professional organizations have been obdurate. We do not know. The American Bar Association, however, has made a significant change of position in an effort to voluntarily reach a solution to the advertising problem. Its House of Delegates meets twice a year. Its first meeting after the decision of the *Goldfarb* case preceded completion of the Committee study of advertising. At its next meeting, the House of Delegates *acted*. For the first time in 70 years it substantially liberalized the restrictions on professional advertising. Moreover, it went directly to the most difficult aspect of the question—fee advertising—and opened the advertising of some professional fees.

Because these amendments were virtually drafted on the floor, they have their imperfections, but for all that, they represent an obvious good faith effort by the Association to deal constructively with a difficult, complex, and highly controversial problem. What the Department of Justice would now do is to destroy the independence of this group and its value as an independent force in seeking the reforms also sought by the Department of Justice. During the pendency of this action there is little likelihood that the House of Delegates will recommend further liberalization of advertising. The studies described above will go forward but the action of the Department of Justice will undoubtedly be counter-productive as far as the House of Delegates is concerned.

Further, the policy decision to bring this action overlooks the inappropriateness of such a dominant litigant as the Department of Justice attempting to force the Association to advocate its views with the states. The Department

may itself do this, but it may not prevent the Association from advocating differing views as to desirable state action.

The final aspect of this bizarre action by the Department is that even if the Department prevails, it will achieve no relief against the 50 states which actually control the conduct of lawyers. The American Bar Association cannot obtain the desired relief by its own action. The value of its advocacy will be destroyed by its loss of independence.

CONCLUSION

At the time this action was brought, there was pending in a federal district court of Virginia the case of *Consumers Union of America, Inc. v. American Bar Association,* C.A. No. 75-0105-R, an action raising issues relating to advertising. That action has been argued to a three-judge court and its decision is now being awaited. In addition to the antitrust question which would be raised by the government action, there are equally important constitutional questions which are raised by the plaintiff in that case, but which cannot be raised by the Department of Justice because of its lack of standing. The court also has before it the question of whether the American Bar Association is a proper party. Nothing is gained in the resolution of the advertising question by this last minute effort by the Department to project itself into the controversy, but we are all damaged by the ugly picture of the Department of Justice attempting to dominate the professional regulation of lawyers. The advertising issue is only one of many areas in which the antitrust laws can be a guise for Justice Department intrusion. Because this is a matter of fundamental concern to the profession, this report is submitted to insure that all members of the House of Delegates are promptly made aware of this state of affairs. There will be a further report at the Annual Meeting in August.

The Bar Exam

By J. Cheever Loophole,
Recent Law Graduate.

I just took the Bar Exam. (Maryland State Bar Exam, July 27-28, 1976, 9:00 A.M.) I bet I failed it. (Gambling debts are unenforceable.) I was so angry at the end, that I could have hit all the Bar Examiners in the Face with a Cream pie. (No assault, technically, because no threat was made which would produce apprehension of immediate physical harm in the mind of the Reasonable Man.)

All of my friends said (Hearsay) that they thought the Exam was impossible, (opinion) but I don't think so, (present state of mind.)

If I were President (Corporate employee, or Political Power?) I would abolish the Bar Exam (within his power? Constitutional? Express or implied?) because I don't think (opinion-admissible?) that it properly tests (Aguilar-Spinelli?) one's ability to practice Law. (Law?—Statutory, or Common—?) Many Law Graduates work for Corporations (Close, Subchapter S—Blue Sky Laws?) (also Fiduciary) or for Banks (Articles 3 & 9) in Private Enterprise (Corp., Partnership, or Proprietorship?) or for a Governmental Agency. (What Branch?) (Balance of Power—Commerce Clause—see Constitution)

In my opinion (inadmissable—Pseudonym) if one graduates from an Accredited Bar Review Course, he should be admitted to the Bar automatically. (HE?——Sex Discrimination—1983)

Although the Bar Exam (February 27-28, 1976) didn't bother me, personally, oh no, not at all, oh no, of course not, ME?, some of my friends (who?) are still quite upset about it, (intentional infliction of mental Distress.)

Lawyers are a bunch of Crooks (not actionable,—Truth is a good defense.) If they were Honest, and moral (Hypothetical) they would tell the Bar Examiners (see Sodomy) to hit the Road (not battery) and they would abolish the Bar exam forever. (Rule against Perpetuities?) It (Maryland State Bar Exam, July 27-28, 1976) is an archaic remnant of a bygone era when one could practice law without formal schooling.

I went to College (Best Evidence is certified Diploma, enclosed) and then Law School. (Best Evidence is an overbearing manner, a Messiah Complex, and acute Schizophrenia, all injected into this amusing piece.) If they won't let me practice Law now, I'm going to take my gall and go home!