RECORD NO. 121472

IN THE
Supreme Court of Virginia

HORACE F. HUNTER,
Appellant,

v.

VIRGINIA STATE BAR,
EX REL. THIRD DISTRICT COMMITTEE,
Appellee.

BRIEF FOR AMICI CURIAE VIRGINIA PRESS ASSOCIATION, NEWSPAPER ASSOCIATION OF AMERICA, GANNETT CO., INC., THE NEW YORK TIMES COMPANY, AND THE WASHINGTON POST IN SUPPORT OF APPELLANT HUNTER

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INTEREST OF AMICI CURIAE

Amici have a profound interest in the scope of First Amendment protection regarding public discourse about public issues.

As news media organizations and companies, amici seek to provide a robust and informed perspective on issues of interest to readers, viewers, listeners, and users of a broad range of media. Legal rules that inhibit discussion of public matters interfere with amici's ability to fulfill their core mission. Sanctioning legal professionals for discussing public-record information, and mandating that lawyers' truthful speech about public-record matters be categorized as advertising, risks severely chilling legal commentary and inhibiting valuable public discussion.[1]

The Virginia Press Association

The Virginia Press Association was founded in the late 19th century and incorporated by a special act of the Virginia General Assembly in 1881. Its mission is to support its membership through responsive services and resources, championing the common interests of Virginia newspapers and the ideals of a free press in a democratic society.

[1] In accordance with Rule 5:30, amici have obtained and submitted written consent to file this brief from counsel for appellant and appellee.

The Newspaper Association of America

The Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

Gannett Co., Inc.

Gannett Co., Inc., is an international news and information company based in McLean, Virginia. It publishes 82 daily newspapers, including *USATODAY* and *The Daily News Leader* in Staunton, as well as hundreds of non-daily publications across the United States. The company also operates 23 television stations, and more than a 100 websites that are integrated with its daily publishing and broadcasting operations.

The New York Times Company

The New York Times Company is a leading global multimedia media news and information company, which publishes The New York Times, the International Herald Tribune, and The Boston Globe and operates NYTimes.com, BostonGlobe.com, Boston.com, and related properties.

The Washington Post

The Washington Post is a leading newspaper with daily circulation of over 525,000 and a Sunday circulation of over 735,000. The Post also operates a website that had an average of 35.7 million unique visitors per month in 2011. As part of its coverage, it reports frequently on issues and events in Virginia.

INTRODUCTION

This is a case about a lawyer's truthful discussion of public-record information. There is no suggestion that the lawyer's statements about judicial cases are not truthful. Nor is there any suggestion that the case rests on statements about information that was not already in the public domain.

The Virginia State Bar ("State Bar") nevertheless seeks to impose sanctions on the lawyer on two grounds. First, without reference to any specific comments, the State Bar maintains that the lawyer's truthful discussion of public-record information is inherently "embarrassing" to his clients. Second, the State Bar maintains that the lawyer's truthful discussion of public-record information is "advertising" that must carry advertising disclaimers.

Both grounds, if upheld, would severely chill the speech of legal professionals in Virginia. And, from amici's perspective, both grounds would substantially interfere with the ability of news organizations to inform the public about important legal matters and would unjustifiably disrupt the free flow of information about matters of great public significance.

Amici will discuss two points. First, sanctioning a lawyer's truthful speech about public-record information on the ground that it "embarrasses" the client impermissibly burdens protected speech and thereby interferes with the public's right to information about vital public matters. Second, categorizing a lawyer's truthful speech about public-record information as "advertising" and requiring advertising disclaimers likewise inhibits valuable speech and threatens to stymie public discourse about matters of considerable import.[2]

[2] The Richmond Circuit Court ruled for Appellant on the "embarrassing" sanction and against him on the "advertising" sanctions. Richmond Cir. Ct. Mem. Order, at 3 (June 29, 2012). Because amici understand that both issues will be before the Court on cross-appeals, amici will address the two asserted grounds for sanctioning the lawyer.

ARGUMENT

I. The State Bar's Imposition of an "Embarrassing" Sanction For Truthful Speech About Public-Record Information Limits the Public's Access to Information of Vital Importance.

The State Bar seeks to impose a "misconduct" sanction on attorney Horace Hunter for including truthful, public-record information in his blog about criminal cases that he litigated. The State Bar charges Hunter with a violation of Virginia Rule of Professional Conduct 1.6(a). That Rule, in turn, prohibits a lawyer's disclosure of information "which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation." Virginia Rule of Professional Conduct 1.6(a).

The State Bar does not point to any particular content on Hunter's blog – not a single word – that it finds "embarrassing" or "detrimental" to a client. Instead, the State Bar rests its punishment of Hunter's speech on the notion that any discussion of a case – including a truthful discussion of public-record information – without a client's explicit consent is inherently embarrassing and detrimental.

The State Bar's "embarrassing" sanction would chill speech and violate the First Amendment. The scope of the State Bar's overreach is breathtaking. Under the State Bar's view, attorneys may be sanctioned if they discuss routine factual points from their clients' cases *even if those*

issues have already been fully aired in open court and placed on the public record. Such a sanction for truthful discussion of public-record information interferes with the ability of the public to evaluate and understand information disclosed on the public record in open court. Without such information, public discourse about legal proceedings, the judicial system, and the rule of law suffers.

Indeed, on a daily basis journalists across the Commonwealth communicate with lawyers about their trials. Journalists confirm facts, learn the law, and come to appreciate the importance of particular issues. From daily news stories to in-depth reports, the quality of this reporting is significantly enhanced by the ability of journalists to learn from lawyers – those closest to the cases and issues, including those that otherwise might escape public attention. In Virginia, for example, interviews with lawyers involved in the now-famous Norfolk Four case have been essential to understanding the issues in those proceedings.[3]

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[3] *See, e.g.*, Tania Karas, *The Hogan Lovells Lawyer Who Helped Clear One of the Norfolk Four*, The AmLaw Daily (Aug. 9, 2011), *available at* http://amlawdaily.typepad.com/amlawdaily/2011/08/norfolk-four.html; Interview with Danny Shipley, Frontline (Mar. 23, 2010), *available at* http://www.pbs.org/wgbh/pages/frontline/the-confessions/interviews/danny-shipley.html; Interview with Michael Fasanaro Jr., Frontline (Mar. 24, 2010), *available at*

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The State Bar's attempted sanctions would inhibit this journalistic practice because lawyers understandably would be reluctant to engage in *any* discussion of public record information. As a result, audiences would be deprived of meaningful, clear, and thorough coverage of public proceedings, as well as robust discussion of public events. In the end, the State Bar's attempted sanctions handicap journalists in their reporting, compromising the public's full understanding of important issues and information.

The State Bar does not dispute that the lawyer's comments are entirely truthful; it does not contend that any of his comments are factually inaccurate or erroneous. The State Bar's effort to punish the lawyer for his truthful speech about public-record information conflicts with core First Amendment principles. Whatever issues may arise at the margins of the First Amendment, truthful speech is in the very heartland of the First Amendment's protections. As the Supreme Court emphasized almost five decades ago, "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

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http://www.pbs.org/wgbh/pages/frontline/the-confessions/interviews/michael-fasanaro.html.

Protecting truthful speech is fundamental to the First Amendment. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 533-34 (2001) (imposing "sanctions on the publication of truthful information of public concern" implicates "the core purposes of the First Amendment"); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) ("State action to punish the publication of truthful information seldom can satisfy constitutional standards."). Indeed, the Supreme Court recently has emphasized the limits on the permissibility of punishing *false speech*. *See United States v. Alvarez*, 132 S. Ct. 2537 (2012) (invalidating Stolen Valor Act on First Amendment grounds). The protection for *truthful speech*, of course, must be at least as robust as the protection for *false speech*. Truthful speech unquestionably serves a First Amendment value of the highest order – "the truth-seeking function of the marketplace of ideas." *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

The fact that the lawyer's truthful statements in this case are based on public-record information further strengthens the applicable First Amendment protection.[4] As the Supreme Court has explained in the

[4] With one exception, the State Bar does not dispute Hunter's statement that "the matters discussed were in the public domain." Virginia State Bar, "Charge of Misconduct" at 3 (Mar. 24, 2011). The State Bar's charge of misconduct does not rest on the lone exception; instead, the *(cont'd)*

context of judicial proceedings, public-record information is "the basic data of governmental operations." *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 492 (1975). Just as denying public access to public-record information about judicial proceedings will "breed ignorance and distrust of the courts and suspicion concerning the competence and impartiality of judges," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring), so too preventing lawyers from discussing public-record information about judicial cases through sanctions under the "embarrassing" rule will undermine public understanding of the judicial system. Discourse about public-record information from judicial proceedings, in contrast, will "contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Id*.

It is beyond dispute, moreover, that the truthful discussion of public-record information at issue in this case concerns a topic of great public importance and concern – the operation of the judicial system. As the

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State Bar sanctions Hunter for all of his comments, including those in the public domain. Amici express no position on any statement regarding information not in the public domain.

Supreme Court has emphasized, "[a] trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired [at the public trial] can report it with impunity." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Consequently, the government "may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Cox Broad. Corp.,* 420 U.S. at 495. Restricting the free reporting of public-record matters in judicial proceedings would "invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public." *Id*. at 496. Punishing a truthful discussion of public-record information about judicial proceedings inflicts the same injury on the public's ability to know and to understand.

"The operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). This is particularly true with regard to the criminal justice system, in which an individual's liberty – and even his life – may be at stake. The State Bar's attempt to sanction the truthful discussion of those events thus interferes with the public's ability to evaluate these public proceedings. Although the State Bar's attempted sanctions do not directly interfere with media access to judicial process,

they do interfere with the media's ability to make this access as meaningful and comprehensible to the public as possible. The State Bar's sanctions present significant roadblocks to public discussion and insight.

In contrast to the State Bar's position, robust public discussion about judicial proceedings serves to strengthen public confidence in the courts. Access to the courts "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984). Punishing truthful discussion of public-record matters regarding judicial proceedings interferes with the ability of the press to serve this important function, and interferes with the ability of the public to understand these critical issues.

For the above reasons, amici respectfully submit that this Court should affirm the City of Richmond Circuit Court's dismissal of the State Bar's charge of misconduct against Hunter for violating the "embarrassing" prohibition in Virginia Rule of Professional Conduct 1.6.

II. Requiring Advertising Disclaimers For A Lawyer's Truthful Speech About Public-Record Information Inhibits Valuable Speech.

In addition to sanctioning the lawyer for violating the "embarrassing" rule by engaging in truthful speech about public-record information, the

State Bar seeks to punish him for creating "an unjustified expectation about results the lawyer can achieve" (in violation of Virginia Rule of Professional Conduct 7.1(a)(4)) and for "advertis[ing] specific or cumulative case results" without a required advertising disclaimer that includes specified content, font size, uppercase letters, and bold print (in violation of Virginia Rule of Professional Conduct 7.2(a)(3)). With regard to the content of Hunter's discussion, the State Bar relies simply and entirely on the fact that he discusses cases; it points to no promotional language.[5] Like the sanction for the "embarrassing" rule, the sanction for purportedly violating the advertising rules would chill important speech and inhibit public understanding of the legal process.

The phenomenon of lawyers writing about legal cases for the general public has a rich and storied history. For example, Clarence Darrow published his thoughts about his most celebrated and history-making cases, including a union's right to strike in the Woodworkers' Conspiracy Case and the defense of a teacher's right to present the

[5] The State Bar quotes general language on the web site of Hunter's law firm, where his blog is found. Charge of Misconduct, Virginia State Bar, at 2 (Mar. 24, 2011). With respect to Hunter's discussion of cases, it points to no specific language to justify its conclusion that the discussion is "advertising."

Darwinian theory of evolution in the Scopes trial.[6] Louis Nizer vividly described his representation of writer Quentin Reynolds in a libel action against columnist Westbrook Pegler.[7] Other examples abound. Watergate Special Prosecutor Leon Jaworski provided the public with his perspective on that uniquely historic case.[8] Floyd Abrams recently discussed his role in the Pentagon Papers litigation and other landmark First Amendment cases.[9] Other well-known lawyers who have written about their cases include Robert Bennett,[10] F. Lee Bailey,[11] Johnnie Cochran,[12] Gerry Spence,[13] Alan Dershowitz,[14] and Lawrence Walsh.[15]

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6 CLARENCE DARROW, THE STORY OF MY LIFE (1932).

7 LOUIS NIZER, MY LIFE IN COURT (1962).

8 LEON JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE (1976).

9 FLOYD ABRAMS, SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT (2005).

10 ROBERT S. BENNETT, IN THE RING: THE TRIALS OF A WASHINGTON LAWYER (2008).

11 F. LEE BAILEY, THE DEFENSE NEVER RESTS (1971).

12 JOHNNIE COCHRAN, A LAWYER'S LIFE (2003).

13 GERRY SPENCE, THE MAKING OF A COUNTRY LAWYER (1997).

14 ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE (1986); ALAN M. DERSHOWITZ, THE BEST DEFENSE (1982).

Under the State Bar's approach, all of these books by lawyers about their cases presumably would be required to be treated as "advertising." And all would be required to bear the disclaimers dictated by the State Bar about content (including required disclosures about "context," "unique" factors, and the lack of a guarantee or prediction of "a similar result in any future case") and appearance (including font, uppercase letters, bold type face, and colored background). Virginia Rule of Professional Conduct 7.2(a)(3). The result would be to inhibit public speech about public issues. The result also would be to interfere with public understanding of these issues.

The troubling consequences are not hard to foresee. If a modern-day Thurgood Marshall were inclined to share truthful comments about public-record information regarding his civil rights cases, would he refrain because his discussion would be labeled as advertising and he would be compelled to use the State Bar's highly scripted disclaimers? Would the same be true of the successors to Ruth Bader Ginsburg's legacy who would be otherwise inclined to discuss their gender equality cases? And would it be true, for example, of the Second Amendment lawyers who recently litigated the

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[15] LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP (1997).

Supreme Court's historic recognition of an individual's right to keep and bear arms? In all of these contexts – and in countless others – speech in the public square would suffer from the State Bar's unjustified imposition of an advertising label and requirement of advertising disclaimers.

Finally, from a media company perspective, the official labeling of a truthful discussion of public-record information in this context as "advertising" – and the corresponding requirement of advertising disclaimers – is particularly troubling. Media businesses, of course, are heavily dependent on advertising revenues to support their vitally important news-gathering and reporting operations. At the same time, the separation of advertising and editorial – and the distinction between the two – is a cardinal principle of the news business.[16] Accordingly, where, as here, a state licensing entity seeks judicial enforcement of its "advertising" label and of accompanying sanctions for advertising violations for truthful

[16] *See, e.g.*, The New York Times Company, Policy on Ethics in Journalism (last accessed Oct. 9, 2012), *available at* http://www.nytco.com/press/ethics.html#A7 ("The relationship between the company and advertisers rests on the understanding that news and advertising are separate"); Society of Professional Journalists, Code of Ethics (last accessed Oct. 9, 2012), *available at* http://www.spj.org/ethicscode.asp ("Journalists should . . . [d]eny favored treatment to advertisers and special interests and resist their pressure to influence news coverage.").

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discussion about public-record information, it is a source of great concern. This Court should not lightly accede to the State Bar's ill-advised "advertising" determination.

For the foregoing reasons, amici respectfully submit that the Court should reject the State Bar's contention that Appellant violated the "advertising" rules.

CONCLUSION

For all these reasons, this Court should affirm the Circuit Court of the City of Richmond's dismissal of the charge of violating Virginia Rule of Professional Conduct 1.6(a), and reverse the Circuit Court of the City of Richmond's judgment, and resulting sanction, finding violations of Virginia Rules of Professional Conduct 7.1(a)(4) and 7.2(a)(3).

Dated: October 10, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this tenth day of October, 2012, I have filed an electronic PDF version of the foregoing Brief of *Amici Curiae* in support of Appellant Hunter with the Clerk of the Court via e-mail to scvbriefs@courts.state.va.us and I have caused to be filed fifteen copies of the foregoing with the Clerk of Court by Federal Express next day delivery. I certify that I have caused three copies to be sent by Federal Express next day delivery and by email to the parties listed below. I further certify that the foregoing brief does not exceed 50 pages and that I have otherwise complied with Rules 5:26 and 5:30 of the Rules of the Supreme Court of Virginia.

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