Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

UNITED TRANSPORTATION UNION, Petitioner, vs. THE STATE BAR OF MICHIGAN, Respondent.	**Docket No.** 434

Place Washington, D. C.

Date January 20, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

UNITED TRANSPORTATION UNION, Petitioner	)	
vs	)	No. 434
THE STATE BAR OF MICHIGAN, Respondent	)	

The above-entitled matter came on for argument at 10:15 o'clock p.m., on Wednesday, January 20, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JOHN J. NAUGHTON, ESQ.
120 West Madison Street
Chicago, Illinois 60602
On behalf of Petitioner

A. D. RUEGSEGGER, ESQ.
Detroit, Michigan
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in Number 434: United Transportation Union against the State Bar of Michigan.

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

ORAL ARGUMENT BY JOHN J. NAUGHTON, ESQ.

ON BEHALF OF PETITIONER

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

This case is the second dealing by this Court with the Legal Aid or Legal Services Plan of the Brotherhood of Railroad Trainmen. The Petitioner here comes under the different name of the United Transportation Union, but the reason for that is because the Trainmen have been merged into that successor union.

At all times that the injunctions were issued in this case the Brotherhood of Railroad Trainmen was the defendant. On the appeal to the Michigan Supreme Court, the merger into the surviving union took place.

The questions presented in this case are whether the injunction issued deprives the union members of rights arguably guaranteed by this Court in Brotherhood of Railroad Trainmen. Or, whether those injunctive provisions are contrary to this Court's subsequent opinion in Mine Workers

versus Illinois State Bar Association.

Alternatively the Petitioner contends that the proceedings after remand on the first appeal by the Michigan Supreme Court were such as to deprive the union of its constitutional rights to procedural due process.

This case began at the filing of a complaint in 1959 and basically that complaint paraphrased some of the language and the holdings of the Illinois Supreme Court in the opinion of In Re Brotherhood of Railroad Trainmen. In fact, one of the defenses of the Brotherhood to the complaint was that the case was moot because of the fact that it had complied with the decision of the Illinois Supreme Court.

In that defense the Brotherhood alleged that the State Bar of Michigan had presented evidence before the Illinois Supreme Court. That allegation is not denied in the reply. And, indeed, during the trial of 1961 the Counsel for the State Bar at appendix 39 and 40, stated that its evidence and its charges were presented to the Illinois Supreme Court and that the Illinois Supreme Court held that there should be no further proceeding on those charges.

Nonetheless, before the Illinois Supreme Court opinion, by its turn, became effective, which was to be on July 1, 1959, the State Bar filed this complaint. Basically the State Bar claimed that the Brotherhood had a plan of recommending and urging its members seek legal advice and not

only the seeking of advice, but retaining of union counsel.

The union admitted such in its answer. The State Bar alleged by a majority that such Brotherhood employees -- went to the union counsel. The union denied that allegation but did admit that some cases but not all went to such counsel.

The possibility of a dissent decree proving fruitless, the case went to trial, and at the trial the counsel for the State Bar said the only issue in the case was whether or not large numbers of cases went to the legal counsel of the union. And so he proceeded to prove through only one witness, a man by the name of Walsh, who was employed by the Association of American Railroad Trainmen Research Bureau, and who in such employment, received reports from other railroads as to how many cases, FELA, cases were handled by various attorneys, were the residents for Michigan residents.

The witness also testified at appendix 102 that since 1953 the Association of American Railroads had been the chief investigating agency for the State Bar and had been in the Michigan State seeking evidence. After the hearing, briefs were filed and the 1962 Virginia Decree was handed down by the Chancellor of the Circuit of the Chancery Court of the Cityof Richmond.

After the briefs there was a 1962 injunction decree issued in this case. An appeal was taken by the Brotherhood to the Michigan Supreme Court. While the appeal

was pending, this Court handed down its opinion in 1964 Brotherhood.

The Michigan Supreme Court, after being informed of the opinion in this Court, reversed and remanded and specifically stated that permission for the amendment of Plaintiff's bill to seek, if it be so advised, relief not inconsistent with this Court's opinion in 1964 Brotherhood.

The next action in the trial court was a motion for a judgment in accordance with a 1965 injunction decree of theCity Court of Richmond. That motion was not acted upon. In 1966 the Virginia Supreme Court entered its opinion on the appeal from the 1965 decree and reversed the -- part of that opinion which attempted to draw a line between solicitation and between recommendations and urging.

The State Bar of Virginia petitioned for a certiorari to this Court and the Brotherhood of Railroad Trainmen opposed the petition; so the petition was denied. In 1967 this Court handed down its Mine Workers' decision and following that decision the trial court in this case handed down the 1968 decree which is now before this Court.

In handing down that decree the trial judge in this case stated that the Virginia Supreme Court's reading of this Court's opinion in Brotherhood was sufficient to warrant the promulgating of the decree in this case.

As to the Mine Workers' decision whichwas brought

to its attention, it said that it was irrelevant, that the Mine Workers' decision dealt only with the financial connection. There was then an appeal to the Supreme Court of Michigan and that is the judgment immediately below. By a 4 to 3 decision the Michigan Supreme Court affirmed the judgment. It did not look at the injunctive provisions; instead it proceeded upon the analysis of this Court's 1964 Brotherhood of Trainmen as it was stated by the Virginia Supreme Court. Accepting that analysis it stated that it would offend its understanding of the tenets of equal justice under the law if the Brotherhood were to receive more relief in Michigan than it had already obtained in Virginia. Indeed, it said that absent a specific order from Washington it would not enter such an order or a judgment.

The dissent agreed with the contention of the Petitioner here. It stated that the decree could not be entered because of this Court's decision in 1964 Brotherhood, and said even if that were not so, it would say that the Mine Workers' case was sufficient to bar the entry of the decree. And finally, under Michigan law, it stated that the proofs were stale; that the pleadings were stale and that there was no clear and convincing proof of any violations and therefore under Michigan law it should not have been entered.

We then turn to the first question in this case: whether or not this decree is contrary to this Court's

opinion in 1964 Brotherhood. In that opinion, as in many other opinions dealing with free speech, this Court has consistently stated a rule of law which was ignored in this case. The burden, this Court has stated, very clearly, very correctly, so far as I'm concerned, is upon the State Bar to prove substantive evils. In this case there was no proof of any substantive evils; indeed there was no updating of the complaint or any updating of the proof.

The proof in this case relates at the very latest to the year of 1960 when the Petitioner here requested that there be an amendment of the complaint so that there could be a sharpening of the issues. That request was ignored, despite the language in the first Michigan Supreme Court opinion which stated that permission was granted for leave to amend.

In the second Supreme Court opinion that court stated in a majority opinion that the right to amend was an alternative and that the State Bar did not have to avail itself of the accorded right to amend; indeed, it didn't avail itself of the accorded right to amend. It's counsel at one point stated: we do not choose to amend.

Until the Michigan Supreme Court had spoke it was unknown to this Petitioner that there was any alternative whatsoever. Assuming that there was such an alternative it would seem that this would be a denial of due process.

Turning again to the Brotherhood case, that case

held, at pages 6 and 7 of the United States Report, that this case did not involve ambulance chasing; it did not involve unauthorized practice; it did not involve the commercialization of the legal profession. The contention of the Respondent in the court below seems to be directly contradictory to that language of this Court.

Q Is there anything in this record that would indicate the members who would not be free to go out and engage their own counsel of their own selection?

A No, there is not, Your Honor. In the 1964 Brotherhood opinion we asserted that there were, and in fact, the Virginia case, in one of its findings, held that all of the cases or substantially all of them were channeled through the legal counsel. In this case the allegation was a majority, but the proofs failed to prove any majority and the finding was that a large number, and infact, the finding does not really show a large number. At page 168 of the appendix there is a summary sheet which is Plaintiff's Exhibit 17, which shows a summary of the evidence presented to the Association of American Railroads and as Your Honor will note, the bottom line deals with the year 1960, the latest year, and shows a total number of FELA cases of 34. Of those, in the second column, only six were handled by the legal counsel; 20 by Michigan attorneys and eight by other attorneys. The only substantial amount of cases shown is in the first line,

which is July 1, '53 to March 31 of 1955. There it is 197 cases of which 126 supposedly went to the firm to the Legal Counsel firm, but when the data on which that summary is based was examined it would seem that this number of cases does not deal with '53 but deals with a great number of years; as a matter of fact, the Plaintiff's Exhibit 4, I believe it is -- Plaintiff's Exhibit 3, shows great numbers of cases which were undated.

Then, it shows for the Legal Counsel:'45 settlements, '46 settlements, '47 settlements and '48, '49, '50, '51, '52, and then goes into the '53 settlements. Now, the reason for that was that in 1953 the Associationof American Railroads formed this Claims Research Bureau which went out to obtain evidence against various counsel and as a starter, they had these cards sent in from the various railroads. So, the first cards that came in dealt with many other years outside of the years within the exhibit of '53 through '55.

It's also, I believe, noteworthy, that primarily in those earlier years are shown only the legal counsel cases. Any cases by other counsel are not shown by the year. And so it creates a problem as to whether this is selected evidence or not. But, be that as it may, and we always have had in this Virginia case and in the Michigan case, questions as to the substantial evidence backing any of the injunctive provisions the fact remains that the State Bar's own exhibits show that

immediately preceding issuance of the first injunction, a very minor number of cases handled by the Legal Counsel's firm.

I don't think that I need belabor the proposition that there has been a shifting of the burden there by the Michigan Supreme Court and by the court below. If I have not adequately set it out in my brief I am quite sure that the brief of the amicus, the AFL-CIO clearly and succinctly shows what is required here. I think I would like to particularly note page 7 of that brief for the amicus, which states that the restrictions on group legal practice plans must be justified by proof, tending to show that the practice, which is enjoined as: "An oppressive, malicious and avaricious use of legal process for purely private gain, according to this Court's opinion in N.A.A.C.P. versus Button." And then in the commercialization language from the Trainmen opinion.

I think that being the standard that there is a complete failure of proof in this case, whether it's judged as of 1960 or as of 1968 when this injunction was issued.

Now, it seems also to me that the Mine Workers' decision adds a further reason why this case should be reversed. In Mine Workers, as this Court will recall, the union counsel was on a salary and all the cases went to him without any further compensation. Indeed, the evidence showed that the fact that he filled out an injury form was sufficient to cause

the legal counsel to begin processing the workmen's compensation claim in that case. That case also was completely an unauthorized practice of law case and that seems to be the principal defense of the State Bar as to the injunction here that we are engaging in unauthorized practice of law, although there was no such allegation in the only complaint filed below.

That Mine Workers' case I think is also particularly relevant on the first injunctive provision about which we complained. The injunctive provisions are set out at appendix 176 and 177; also set out at various points in the brief. The first provision enjoined the union from giving or furnishing legal advice.

It seems to me that for reasons which we state in our brief at pages 23 and thereafter that this is not part of the Brothers' plan. The Brothers' plan is exactly the opposite: it is not the unauthorized practice of law; the union is not practicing law; the union is sending the cases to the union lawyer and seeing that the lawyer practices law. If this is the practice of law it's a new definition of the unauthorized practice of law, typically that arising when a corporation itself acts through lawyers and the lawyers are merely agents.

In this case there is no doubt that a retainer contract is entered into between an injured employee and the

lawyer and then that becomes then a simple handling of a case by a lawyer-client relationship. There has been no proof either in Virginia or here that anything else occurs.

The second provision, it seems to me, also is such that would strike, as it could be interpreted, and that is an ambiguous section, against the operation of this plant. That prohibits informing any lawyer or lawyers that an accident has been suffered by a member and furnishing the name and address for the purpose of obtaining legal employment for any lawyer. And this, I think, is part and parcel of the Brotherhood's Plan as it reads. As Virginia interpreted it it seems to be a method of subverting this Court's language in Trainmen.

In Trainmen this Court stated that of course counsel had the same right to accept the case that the union had in channeling the cases. Virginia recognized that language, but stated that it did not interpret it as such that would permit the lawyer to do more than accept and never intended to bring injunction action or disbarment actions against any lawyer who did any more than accept.

Again, it seems to me that it should be stricken down.

The third provision deals with the defraying of expenses. That is, from stating that they will suggest or defray. I don't know that this is part of the Brotherhood

Plan. There is no evidence in the record as to it, in any event, and finally, under Illinois law, which is the state in which the legal counsel in this case, practices, it's permitted after a retainer is obtained.

The fourth provision: from controlling directly or indirectly the fees charged. It seems to me they have been stricken down by the Mine Workers' case, because if you can place a lawyer on a salary and not be guilty of any violations constitutionally, it would seem to me that you would have the right to do less than that, and that is to do what the union used to do in this case, to limit the counsel's fee to 25 percent.

The fifth injunction provision is a rather peculiar one. It prohibits accepting or receiving compensation of any kind directly or indirectly for the solicitation of legal employment for any lawyer.

Now, the Virginia Supreme Court said that there could be no decree which prohibited solicitation, but yet let this provision stand, which does not prohibit solicitation but prohibits solicitation plus the receiving of compensation, as I read it.

It would seem to me that there is no evidence in the record as to this and it would seem to me to be a most peculiarly ambiguous section that should be stricken down.

The remainder of these provisions are such that

they deal with financial connections of some sort. I would like to particularly note that the last one: from sharing in any recovery for personal injury by death by gift assignment or otherwise, is a brand new one. It was not in the 1962 Virginia decree. It was added in 1965 by the Chancellor for some reason, because in that case there was no additional evidence taken, either.

Now, turning to the question of the evidence in this case, we have to generally deal with the Michigan statutes which I suppose is the basis on which this injunction is issued. It's the only thing in the complaint under which they justify the issuance of the 1961 injunction.

On page 32 we set out the interpretation of that statute by the Supreme Court of Michigan in Hightower versus Detroit Edison Company, which the court said that the purpose of the act was to discourage the practically known as ambulance chasing, and then stated that there were four separate indications of it: fomenting litigation, subornation of perjury, mulcting of innocent persons by judgment upon manufactured causes of action, or defrauding an injured person having proper causes of action but ignorant of legal rights, by means of contracts which retain the exhorbitant percentages of recovery.

Now, in this case the percentage of recovery in the Illinois case was a 25 percent then prevalent in the

Brotherhood Counsel. And that was stricken down by the Illinois Court because it was undercutting its fees, rather than the charging of exhorbitant fees.

So, it seems to me under the Michigan Supreme Court reading of that statute there was absolutely no evidence whatsoever that there was any violation of the statute. But, even assuming that the Michigan statute can be read to cover the facts in this case we would strongly submit that this Court's opinion in N.A.A.C.P. versus Button, dealing with a criminal statute would require its striking down.

Q Is there a limitation in Michigan on the amount of a contingent fee? Statutory limitation or a court rule?

A Not that I know of, Your Honor.

Q Not such as we have in New York?

A No; not such as you have in New York.

The remainder of my argument I would like to devote to the problem which it seems is raised in this case by the action of the Court --

That problem is the problem of whether the union, after remand, received procedural due process. After remand the Brotherhood wished an updating of the complaint and updating of the proof; indeed it wished an opportunity to present some evidence because, as the record shows, in the 1961 hearing

after the close of the State Bar's evidence, the Brotherood rested without presenting any evidence on the ground that there was no prima facie showing of any reason for an injunction. So we are now faced with this injunction which was taken from Virginia. And as to that injunction we submit that there is no evidence; there is no contemporaneous pleading; there are no allegations of the provisions in the injunction and surprisingly when they copied the Virginia injunction they did not copy the findings of facts. So you have an injunction without any findings of fact.

The findings of fact that now remain in Virginia are the findings of fact that were made in the 1962 decree. The court there took the position that this Court's judgment did not affect the findings of fact so therefore you have a problem there that the findings of fact are directly contradictory to many of this Court's holdings.

The findings of fact in the 1961 Michigan decree donot apply to these particular injunctive provisions. On this procedural due process point we would submit that the Ruflow(?) case by this Court, requiring a fair notice of the reach of the procedure, and also the precise nature of the charges, was directly relevant. We would also submit that the Woodner(?) case by this Court requiring a hearing so that there could be a rebuttal of any charges is directly relevant. And we would submit that the general injunctive law is, as stated in our

brief, is directly relevant here and in accordance with the constitutional standards which this Court has promulgated in Brotherhood and in Mine Workers.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Ruegsegger.

ORAL ARGUMENT BY A. D. RUEGSEGGER, ESQ.

ON BEHALF OF RESPONDENT

MR. RUEGSEGGER: Mr. Chief Justice and may it please the Members of this Court:

We have in this csae, I believe, the interesting issue as to the constitutionality of the decree below. This decree is exactly duplicative of the final decree in the Virginia Brotherhood case, the decree of the Supreme Court of Virginia.

The Virginia Supreme Court decision in 207 Virginia entirely was concerned with the interpretation and the consideration of what it considered were the findings and opinion of this Court in this Court's Brotherhood decision.

Now, from the decision of the Virginia Supreme Court, the Virginia State Bar made an application to this Court for certiorari, as my brother indicated, which was opposed by the Brotherhood and that petition was denied.

The interesting thing, I believe, and the procedural steps in the two cases, I think, need a little consideration in

order to keep them straight, and I have found it helpful to me to put in chronological order, side-by-side, the occurrences in the Michigan case, this case here, and in the Virginia case.

Q What is thename of the Virginia case?

A The name of the Virginia case is exactly the same as the Brotherhood, namely: State Bar of Virginia versus the Brotherhood.

I assume, Mr. Justice Black, that when you say the "name of the Virginia case," you are talking about the title --

Q I'm talking about the one you were talking about.

A Well, I --

Q You said that this was kind of a duplicate of it.

A Yes.

Q I just wanted its name and --

A All right; it's name is: Brotherhood of Railroad Trainmen versus Commonwealth.

Q At page what?

A It is 207 Virginia, page 182. Also 149 Southeastern 2d, 265.

Q Have you the citation of our denial of cert in that Virginia case?

A Yes.

Q Whatis that? I don't find it in the briefs.

Q That was 1967, I think.

A That was on March 6, 1968.

Q '68.

A Pardon me -- The Virginia State Bar's petition to this Court for certiorari denied on January 16, 1967; 385 US 1027. 17 -- 675.

Q Thank you.

A I would be happy -- it makes me happy that this chronology of the Michigan case and the Virginia case and I would be happy to give these to Your Honors or send them in later. I found it very helpful in my considerations to have the steps that occurred from time to time.

Q You may lodge it with the Clerk.

A Pardon?

Q You may lodge it with the Clerk. I see you have given one to Mr. Naughton.

A Yes. Thank you, sir.

Now, in both the Petitioner's application for certiorari in this case and again in its brief in this case, the -- is registered that the decision of the Virginia Supreme Court did not comport with the holding of this Court in this Court's Brotherhood case, and that because of what occurred in the case of Virginia after the Brotherhood case, the Virginia case went back to Virginia. It has been deprived of a review of the Virginia Supreme Court decision. Andthe reason for that,

Petitioner says: after the Virginia Supreme Court rendered its decision in 207 Virginia, in which was a decision considered in the light of this Court's holding and opinion in Brotherhood. It considered each one of the injunction provisions of the second, or 1965 injunction of the Richmond Chancery Court and the entire verbatim injunction of the Richmond Chancery Court of 1965, is set forth in the -- in Footnote 4 in the opinion of the Virginia Supreme Court. And certain provisions of those injunctive paragraphs are put in italics for emphasis and the sum and substance of the Virginia Supreme Court's decision was to strike from the 1965 injunction, ????? which is quoted in footnote 4, as being repugnant to this Court's holding in Brotherhood --

Q May I ask you: was that Chancery Court injunction entered on our remand of the case in the --

A Yes.

Q The proceedings in the Chancery Court then were on our remand under Justice Black's opinion in 377 --

A Actually yes. What actually happened was that on remand it went back to the Virginia Supreme Court. -- I mean remanded it down to the original Virginia Chancery Court.

Q Right. Now, what of the record -- was there a new record made in the Chancery Court? Was that action then on the initial record which we had considered when we had 377?

A I'm not sure that I can answer that. Onthe

initial record was it, Mr. Naughton? I'll accept the statement.

But initial agreement of the Richmond Chancery Court opinion in the 1965 decree which then was appeal --

Q And obviously the Chancery Court thought the decree it entered was consistent with our opinion on the remand?

A Yes; yes. And interestingly enough, the Richmond Chancery Court decree -- the Court's decree held that there was nothing in this Court's opinion that prevented a restraint against solicitation. And so, in that Chancery Court decree they tried to draw a fine distinction between recommendation and solicitation. And that was one of the subjects that the Virginia Supreme Court then spent considerable time in determining whether or not that distinction set forth in the decree by the Chancery Court was consistent with this Court's holding.

And the Virginia Supreme Court then came to the conclusion that that entire provision should be stricken, saying that whatever they called it: recommendation or solicitation, we think that that goes beyond the constitution on the provisions that are set forth in this Court's decision in the Brotherhood.

Justice Karacul(?) of the Virginia Supreme Court, dissented and felt that this Court did not mean that in your Brotherhood decision and he hopefully will find that some day

that matter will be decided and I think this case -- the other interesting thing about this case to me --

Q Is that before us?

A Pardon?

Q Is that before us?

A That is what I was about to come to.

Q May I ask it this way: would the provision which was stricken by the Virginia Supreme Court, that does not appear in this Michigan proceeding?

A No; it does not.

Q Well, then how could that provision be before us for consideration?

A Perhaps only inferentially in a determination as to whether or not the injunctive provisions that are in the lower court's injunctionhere, being exactly duplicative of the final injunction in Virginia, whether or not that bears the constitutional and the propriety and I think to that extent --

Q I mean, I gather no effort was made in Michigan to have the trial injunction --

A Include --

Q -- the Virginia Supreme Court agreed --

A You are absolutely right, Your Honor.

The point that I was endeavoring to cover and indicate, was and is that counsel for the Petitioner here, has

steadfastly claimed that the Virginia Supreme Court interpretation of your Brotherhood decision was improper and that they had been deprived of a review of that decision because of the fact that after the Virginia Supreme Court sent the case back down to the Chancery Court and the Chancery Court then rendered its 1965 decision. And then after the Virginia Supreme Court rendered its decision in 207 Virginia it then remanded that case back down to the Chancery Court of Richmond and said: here it is; take whatever proceedings you consider appropriate.

And so the Chancery Court then entered a new third injunctive decree exactly in the terms that the Virginia Supreme Court said should be entered. The Brotherhood then made an application for leave to appeal to the Virginia Supreme Court from that injunction which was denied, the Virginia Supreme Court saying: now, we won't entertain this because what you are, in effect, doing is attempting to appeal to us from our previous decision.

And so the point is made by the Petitioner thatit has been deprived, really, of a review of its position that decision of the Virginia Supreme Court is consistent with and in conformity with your decision in Brotherhood.

Now, because of what occurred in Michigan when this Court accepted certiorari in the Brotherhood case, and our case was then on its way to and had landed in the Michigan Supreme Court and because the issues in the Brotherhood Case

were very similar to -- at that time very similar to the Michigan case. The Michigan Supreme Court, in a short opinion, remanded it to the Jackson Circuit Court, awaiting -- to await the decision of this Court. And then because of the many things that occurred in Virginia after the decision of this Court in Brotherhood -- it took about four years for these things to occur in Virginia until a final injunction in Virginia was finally on the books and records, then that took about four years and that's the reason why this case was delayed the length of time that it was and why the evidence up to the year 1960 is stale, according to what the Petitioner contends in this case and a decision was made after the case came back to the Jackson Circuit Court and after the final decree had become final a decision was made by the General Counsel of the State Bar of Michigan, working with Mr. Kelley, who had handled this case in collaboration with the General Counsel of the State Bar, not to introduce any additional evidence, but to ask the Circuit Judge, based upon the record before -- made before it, at the original hearing to enter a decree exactly duplicative of the final decree in Virginia.

Q So there is a ten-year gap in the --

A There is practically a ten year -- you are absolutely right, Mr. Justice Harlan.

Q And does the record indicate anything that might have been supplied or that was suggested could have been

supplied to fill that gap if there had been a further --

A I don't think the record indicates that.

Now, this case presents the opportunity for this Court to do three things which I have indicated in my brief and that is, to resolve the Petitioner's contention that the Supreme Court decision -- the Virginia Supreme Court's decision did not comply with the holding of this Court in Brotherhood and it also presents this Court with the opportunity to give to the Petitioner, the review that it claims it has been deprived of because of procedural problems. And thirdly, to clarify and set at rest the concern on the part of some Justices, specifically Justice Karacul(?) of the Virginia Supreme Court and a large segment of the Bar --

Q Could I ask just one more --

A Yes.

Q Do you know whether when was denied by the Virginia Supreme Court to appeal to that Court from the final judgment entered by the Richmond Chancery Court, on that denial of the Virginia Supreme Court, did the union attempt to get certiorari here?

A It did not and the reasons for that, I do not know. I can only surmise. Mr. Naughton can undoubtedly tell you, b ut I imagine it was because earlier, when the Virginia State Bar made an application for writ of certiorari here, the union opposed that.

Q And the union did not cross-petition at that time, as far as I can see from our records.

A No.

Lastly, and in these three areas that I have already indicated, and in this last area we agree absolutely with the Petitioner's position that this Court should speak out in very determinative terms as to the length that a state may go in regulating the practice of law in these areas, particularly in light of a new rule -- 2-103B5 of the new Professional Code, the new Code of Professional Responsibility, because that provision gives the specific, or sets forth the specific exception, consistent with constitutional interpretations and referring -- it is specifically referred to there the issues and questions existing here by reason of this Court's holding in Button and Brotherhood and Mine Workers.

Q (Inaudible)

A I'm not sure just exactly how much I put in my brief on that, but I would advise the Court that --

Q You say it is not yet acted upon --

A It is not yet acted upon. We presented two of -- in Michigan it has to be adopted by the Supreme Court. We had a special committee of the State Bar review the Code and they presented to the Board of Commissioners their recommendations that it be adopted, with two or three limitations, not in this area. And we had a meeting with the full court in the

early part of October and requested that the Court adopt the code as we had recommended, with two slight exceptions, not material here.

Q Is it feasible to you in our argument if you could capsulize or summarize the portions of the decree where there is a difference between you?

A I'm not sure that it is, because as I understand the Petitioner's petition that every one of the provisions generally they make the claim now that they are vague and they claim that to comply with the provisions of the decree would chill their constitutional rights under the First Amendment. And I think that Counsel would forthrightly say that he feels, as they have set forth in their brief, that every one of these provisions, because of the language of them, restrict the full operations of the Brotherhood's Plan, and that is the very thing that we are concerned about because we feel that the full operations of the plan just naturally result in solicitation of FELA cases. And we feel that it is absolutely contrary to what the great large segments of the bar have always considered as improper and we feel that each one of these provisions that are exactly the same and have been in effect in Virginia since 1966, when the final decree was finally laid on the books. There has been no chilling or restraint upon the rights of the members of the Brotherhood and that therefore this Court should affirm the decision of the court below.

Q I gather the Michigan Supreme Court has not yet given you an answer as to your --

A That is correct. I guess I didn't -- I meant to say that undoubtedly the reason for that is, if I may say so, we had a change of two members on the Michigan Supreme Court as of January 1, including a change in the Chief Justice, and our new Chief Justice has voiced his feelings somewhat strongly during our meeting with them in October, as having some concern about some provisions of the code, not material here.

But, I gather that because of that there has been a delay in making a decision on the -- code.

Thank you, Your Honors.

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

Mr. Naughton, you have five minutes remaining.

REBUTTAL ARGUMENT BY JOHN J. NAUGHTON, ESQ.

ON BEHALF OF PETITIONER

MR. NAUGHTON: May it please the Court:

Q Would you mind, Mr. Naughton? You did not cross-petition when the Virginia State Bar brought its petition here; did you?

A That is correct, Your Honor.

Q And you did not seek certiorari here when leave was denied to appeal from the final decree finally entered

in the Richmond Chancery Court?

A That is correct, also, Your Honor. My reasons for that were that I felt both of them were really not right for a decision by this Court, first because I didn't believeit was a final judgment, although I was told later it was; and then the second time it was technical since the court below claimed that it was not appealable under Virginia law.

In any event, the Virginia Supreme Court interpretation of this Court's opinion seems to me to be its interpretation and I would not presume to suggest to this Court that it's at all definitive or binding on it. The courts below seem to think that it was; that that Court's opinion of your opinion is the last word. I don't believe so.

I would like to mention that in regard to the rehearing in Virginia when it came back down, there was a new Chancellor. The Chancellor who heard the first Virginia case in 1962 and issued that decree, had retired. The 1965 decree and the 1967 decree were entered by the Chancellor who did not hear the evidence.

The question as to the new Code of Professional Responsibility, I think, is pertinent here. I don't feel I go quite as far as my position was represented by the State Bar. That new canon says that it's a lawyer's duty to see thatlegal business is widely disseminated. The actual language is that a lawyer should assist the legal profession, fulfilling its duty

to make legal counsel available.

However, it does have a caveat in it that legal services plan is that you can tell people that they have lawsuits; you must not take the case unless you are constitutionally protected. This has been criticized as saying that the bar associations are willing to recognize their prospective client's constitutional rights, but no other rights. And I think that for that reason this Court should be clear in delineating what the constitutional rights of the Brotherhood here and of other legal service groups is in this case.

The question as to no chilling in Virginia. There is no evidence in the record, of course, as to whether thereis any chilling in Virginia or not. The Virginia case, in 1962 was not based on any evidence as to Virginia.

I don't know if Your Honors recall it, but I do very well, that the evidence was from other States in the Union. And there was nothing said about anything in Virginia. At that time there was no legal counsel in Virginia. The legal counsel involved was situated in Baltimore. Since that time there has been a legal counsel appointed in Virginia.

The question as to whether the assertion of legal rights is chilled in Virginia is -- well, I would suggest, in any event, a very peculiar one and maybe only a Virginia lawyer would know just exactly whether there was any chilling or not. My experiences in Virginia showed that the recognition of legal

rights of individuals was certainly much less than Illinois, and at many times I was amazed to hear the constructions of ethical canons that were promulgated in the Virginia case.

All in all, I feel this case, through many hearing and arguments that have gone on for a great number of years, and it is for that reason that I would respectfully submit to this Court that the proper action here should be a reversal, without any remandment and in ending this case.

Q Without what?

A Without remandment.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Naughton. Thank you, Mr. Ruegsegger. The case is submitted.

(Whereupon, at 11:10 o'clock a.m., the argument in the above-entitled matter was concluded)