In the

Supreme Court of the United States

LEWIS H. GOLDFARB, et al.,

Petitioners,

v.

VIRGINIA STATE BAR, et al.,

Respondents.

No. 74-70

Washington, D. C.
March 25, 1975

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Washington, D. C.,

Tuesday, March 25, 1975.

The above-entitled matter came on for argument at 11:28 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALAN B. MORRISON, ESQ., Suite 700, 2000 P Street, N.W., Washington, D. C. 20036' on behalf of the Petitioners.

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae, supporting Petitioners.

LEWIS T. BOOKER, ESQ., Hunton, Williams, Gay & Gibson, Post Office Box 1535, Richmond, Virginia 23212; on behalf of Respondent Fairfax County Bar Association.

APPEARANCES [Cont'd]:

ANDREW P. MILLER, ESQ., Attorney General of Virginia, Supreme Court Building 1101 East Broad Street, Richmond, Virginia 23219; on behalf of Respondent Virginia State Bar.

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C O N T E N T S

[Afternoon Session - pg. 28]

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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 Goldfarb against Virginia State Bar, No. 74-70.

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

ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.,

ON BEHALF OF THE PETITIONERS

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

In early 1962, the Committee on Economics of Law Practice of the Virginia State Bar issued its report on minimum fees.

The opening sentence of that report neatly summarizes its intent and sets the background against which the activities of the respondents must be judged. And I quote:

"The lawyers have slowly, but surely, been committing economic suicide as a profession."

The remedy suggested by the State Bar, minimum fee schedules to be adopted by the local bars in the State, patterned on the suggested schedule, contained in the State Bar's own fee report.

Shortly thereafter, the Respondent, Fairfax County Bar Association, effective May 1, 1962, adopted its own fee schedule for the first time, essentially the same fee schedule as that suggested in the State Bar's report.

That fee schedule continued in effect, unchanged,

for a period of seven years, until the Virginia State Bar, once again, issued another fee report by a similar committee as the one that issued the first one. This report reflected, and I quote, "a general scaling up of fees."

The report indicated it was necessary because of escalating costs and the spiraling increase in the cost of living.

The committee acknowledged that there were substantial differences between some of the old schedules and the new fees for title examinations, which are the services particularly at issue in this case.

The title examination charge went to one percent of the purchase price of the home, up to $50,000; and a half of one percent thereafter.

We can read through the minimum fee schedule reports of the State Bar, and the minimum fee schedules of the Fairfax Bar in vain to find a single reference to any protection of the public interest or the promotion of quality legal services at a reasonable cost.

But there are indications of what these fee schedules and reports were intended to do.

In the 1962 Report the State Bar says that fee schedules should be promulgated because it is in the best interest of the Virginia State Bar.

And in 1969 the Fairfax Report noted that the fee

will enhance the prestige of the State Bar.

But the State Bar here was not content merely to publish its own fee reports and to allow the local bar associations to publish their own fee schedules. It wanted to put some teeth behind these fee schedules, to be sure that they would be followed.

And so it issued two ethical opinions: one in 1960 and one in 1971. Opinions numbered 98 and 170.

And, in substance, these two fee opinions state that any attorney in Virginia who habitually charges less than the minimum fee schedule amount shall be presumed to have acted unethically, and can be subject to discipline on proceedings brought by the Virginia State Bar in the State courts of Virginia.

QUESTION: Does this record show whether any such disciplinary proceedings have ever been embarked on --

MR. MORRISON: It does, Your Honor, and it suggests, Mr. Chief Justice, that there have never been any disciplinary proceedings brought for that very reason.

However, I think it's also important to note that the record does show two other factors in that regard:

No. 1, one of the attorneys to whom the Goldfarbs wrote suggested in his response to their letter about what kind of fees they could expect to pay, that he felt that he was ethically required to adhere to the schedule; and it was

also stipulated between the parties that the existence of these two opinions was a substantial influencing factor in the adherence found by the district court to the fee schedules in Northern Virginia.

QUESTION: Is there any indication in that stipulation or in any of the findings of the district court as to whether this adherence came about because of a fear of disciplinary action, or because of a desire to persuade the client that the fee had to be charge for pecuniary motives?

MR. MORRISON: I don't think there's anything that directly responds. I would refer to Stipulation No. 20, which is in Petitioner's appendix at page -- to the petition for writ of certiorari, at page 19, and I think that that about says what could be found and agreed upon. I don't think there's anything further in the findings with regard to that, Mr. Justice Rehnquist.

In any event, it is no small wonder, based upon this history --

QUESTION: Excuse me, Mr. Morrison, at what page?

MR. MORRISON: That's page 19 in the Appendix to the Petition for Writ of Certiorari.

QUESTION: Oh, the Petition, I'm sorry.

QUESTION: What color?

MR. MORRISON: Blue.

QUESTION: Thank you.

QUESTION: It isn't in the regular Appendix --

MR. MORRISON: No, Your Honor, that was one of the findings of fact that was included in the trial court's opinion. Sorry, it was presented in connection with our petition, and was therefore not required to be reproduced.

QUESTION: That's finding 20, is it?

Or stipulation 20?

MR. MORRISON: That is right.

QUESTION: Yes, thank you.

MR. MORRISON: It is no small wonder that the Goldfarbs were unable to find a lawyer who would charge them less than the minimum fee for title examination for their home. They indeed wrote 36 letters to attorneys in Northern Virginia who had expressed interest in real estate practice work. They received 19 replies. None of which indicated a willingness to charge less, and in almost every case the reply was something to the effect that "the fee is established by the Fairfax County Bar Association", or "I know of none of my brethren who would charge any less, and I feel that I am ethically required to adhere to those charges."

QUESTION: I take it you're asserting that the Virginia State Bar effectively enforced the minimum fee, is that it?

MR. MORRISON: That is correct. We assert that the Virginia State Bar has two very important roles in this matter.

First, the promulgation of the fee reports in 1962, which got the ball rolling in Northern Virginia, and then in 1969 when they effectuated the revision of the fee suggestion.

And I might point out, Your Honor, that in 1969 the increase in the minimum fee for title examination alone was an increase of 67 percent.

QUESTION: So the Virginia State Bar, you are saying, invited local bar associations to promulgate minimum fees, and then enforced them through the ethical mandates?

MR. MORRISON: Precisely. Indeed, I would say beyond inviting, they suggested, recommended that the local bar --

QUESTION: Well, do you suggest that the Virginia State Bar was acting outside the scope of its authority under the Virginia law?

MR. MORRISON: I would say, Your Honor, that the Virginia Bar has been given the authority to issue ethical opinions by the State Court of Virginia. There is nothing any place that indicates that they were ever specifically given the authority to publish fee schedules or fee reports or ethical opinions enforcing minimum fee schedules.

QUESTION: So you're suggesting, then, that there isn't any clear authority in the Virginia law, you are saying, for that?

MR. MORRISON: I would say that's correct, Your Honor; but that even if there were authority under Virginia

law, that is, we in this case are not, I don't believe, deciding a question of whether the issuance of these reports is somehow a violation of Virginia law. Although in the Parker v. Brown area it does become of some relevance, and I'm not trying to avoid that question.

QUESTION: Yes, well, you can't have it both ways, I don't think. You can't say that -- you can't say that the State Bar was adopting and enforcing fee schedules, and then turn around and say that it wasn't really doing anything official.

As long as you -- unless you say that it just wasn't an administrative agency of the State.

MR. MORRISON: Well, we do say that it was an administrative agency of the State for only very limited purposes. The statute upon which the State bar relies, Section 54-49 of the Virginia Code, says that the Virginia State Bar has the authority to "act as an administrative agency".

QUESTION: So you're saying that it was acting outside the clear scope of its authority as far as fee schedules were concerned?

MR. MORRISON: That's right, Your Honor. But I would say that even if we decided as a matter of State law that the authority was so broad to the Virginia State Bar that there was nothing that prohibited the State Bar from

issuing fee reports or these ethical opinions, that under this Court's decision in Parker vs. Brown, that that would not be sufficient to create an antitrust exemption, that there needs to be more, and that, as we'll show later on, that they have not met those tests here.

As I say, I have discussed these matters relating to the importance of the Virginia State Bar because two of the judges in this case, the district court judge and the dissenting judge in the Court of Appeals, both suggested that the State Bar was immune because of what they termed the State Bar's minor role.

I think that any realistic assessment of this record inevitably reaches the conclusion that the State Bar was, if not the prime mover, certainly a co-equal partner in this entire matter.

QUESTION: That is, by Opinions 98 and 170, in 1962 and 1968, and further by being a brooding omnipresence that threatened to enforce these, as -- on the basis of violation of ethics if there were a violation of these minimum standards; is that it?

MR. MORRISON: And further the issuance of the two fee reports. You remember in 1962 the State Bar issued the fee report. That was the first time that one was issued in Northern Virginia. The fee schedule followed that, and --

QUESTION: The fee report had to do with a comparative

study of doctors' and lawyers' incomes and so on; is that it?

MR. MORRISON: Only very slightly, Your Honor. Most of it was a recommendation to the local bar associations to adopt fee schedules and contained in that recommendation was not simply the suggestion to go out and figure out your own fee schedule, but these were the fees that you ought to charge; and, indeed, the fees that were actually contained in the Fairfax schedule and in the other schedules were virtually identical in both '62 and again in '69, when the scaling up took place.

So that that's a very important factor in moving ahead of the advent of fee schedules in Northern Virginia.

QUESTION: Now, were there, in fact, disciplinary proceedings initiated against people who charged less than this minimum fee schedule?

MR. MORRISON: No, Your Honor.

QUESTION: Never?

MR. MORRISON: Never.

QUESTION: I mean never in so far as this record goes, in Virginia.

MR. MORRISON: The State Bar has so represented, and we are unaware of any cases. It, of course, being to the economic advantage to an attorney if the fee schedules, working across the board effectively, where none of his brethren are going to undercut him; there is very little economic

incentive to violate it.

But, in any event, it has not been violated.

QUESTION: And the ethical violation would be soliciting business -- would it be on that theory?

MR. MORRISON: That is on that general theory, although there needn't be a specific requirement of solicitation in the sense that a lawyer need not advertise or go out and tell people that he does -- that he --

QUESTION: But if he undercuts other lawyers, --

MR. MORRISON: But if he consistently undercuts, if he charges three-quarters of a percent of the purchase price, or makes the break at 25 instead of 50 thousand dollars; that's considered unethical. Or if he charges on the basis of time, or the value of the services, --

QUESTION: That fact alone would support disciplinary action?

MR. MORRISON: That is precisely correct.

QUESTION: But on the theory of solicitation of business, is that it?

MR. MORRISON: In the general -- on that general theory, yes, Your Honor.

Yes, sir. That fact alone would be sufficient.

This of course is different from the American Bar Association's position.

QUESTION: Some added there.

MR. MORRISON: That's right. But that it must be more, there must be more. It can be taken into account as a factor, but it's not sufficient in and of itself.

QUESTION: Do you think there's a general public interest factor, call it social interest, in not having a system which permits lawyers to charge, let us say, a straight $15 for every title examination -- fifteen, not fifty --

MR. MORRISON: Yes.

QUESTION: -- and then gradually get most of the, or a great deal of the work, but for $15, obviously performing shoddyprofessional work, as it would have to be.

MR. MORRISON: I would certainly never counsel this Court or anyone to adopt any sort of situation under which the lawyers were required to charge any sort of minimal fee such as that. I would say that the lawyers should be left free to determine the amount.

QUESTION: But would that not be possible, a possible consequence of no standards for fees?

MR. MORRISON: I don't think so, Your Honor. There are bars all around the country, for which there are no minimum fee schedules.

Indeed, --

QUESTION: Minimum fee schedules have been disappearing, have they not, over the country as a whole?

MR. MORRISON: Yes, Your Honor.

Indeed, I would point out that during the course of this proceeding the Arlington County Bar Association and the City of Alexandria Bar Association withdrew their minimum fee schedules in order to settle this case out; and, indeed, on the 16th day of September of this very year, while our petition for a writ of certiorari was pending, the Fairfax County Bar Association, the respondent in this case, withdrew its own minimum fee schedule, thereby belying any notion that they are necessary to insure the maintenance of ethical standards, and to insure that attorneys do quality work.

I hope, Your Honor, that we can rely upon the members of the bar by means other than minimum fee schedules not to do shoddy work. And that I would never suggest that we ought to establish any kind of fee schedule, maximum, minimum or anything else. Those are matters to be left to the marketplace for each individual attorney to decide what his services are worth and what a reasonable fee ought to be.

QUESTION: Well, what if you're just out of law school and have hung up your shingle and somebody comes to you and asks for a divorce. How do you know what to charge them if you don't have some guidance from somewhere?

MR. MORRISON: Your Honor, I would say, the first thing I would do, before I hung up my shingle, is I would go around and talk to my fellow members of the bar. I would ask them what is the kind of rate they charge? There are courses these days

in law and economics, the bar may have an obligation to teach lawyers, in some sense, when they are going out on their own, how to figure out whether they're going to make enough money.

QUESTION: Well, isn't that one purpose of at least a suggested minimum fee schedule, is it's going to distill the experience of other lawyers and say, This is about what we get for it?

MR. MORRISON: Your Honor, that may be a purpose, but that would be a purpose in almost any other form of price fixing. And we don't allow it in the antitrust laws. And I think Congress wisely said, No, that's not what we're going to permit.

QUESTION: But it would be all right for a lawyer to go out and talk to ten other lawyers and see what they were charging, and charge the same thing himself?

MR. MORRISON: If he felt that was a fair, just and reasonable fee. Absolutely, Your Honor. Indeed, I would say the First Amendment would compel the conclusion that the State could not prohibit a lawyer from discussing that.

QUESTION: But haven't corporations gotten in trouble doing just that?

[Laughter.]

MR. MORRISON: If they've asked them what they in fact have charged, Your Honor, with respect to a particular matter, perhaps so; that if they're asking, What are you

/sic/ charging for a particular price?

But to find out what is the going rate on divorces, I would say that that certainly ought not to be, even under the reasoning of this Court's decision in Container Corporation, that that would not be prohibited from finding out that general kind of pricing information, for someone who is just starting out in the business.

QUESTION: I realize you don't have very much time, but are you going to refer at all to the possible impact of this case, depending on its outcome, on group prepaid legal services?

MR. MORRISON: Your Honor, that is a matter of great concern to me personally. I have been working quite closely with a number of organizations in that area, and I would think that this case -- that the favorable outcome in this case would aid the development of prepaid legal services, that the bar could properly do many things in the prepaid area. Although the Justice Department's position with respect to prepaid legal services, under bar-established programs, under which the bar sets all the fees, without any kind of consumer input at all, without any statutory authority or court authority to promulgate fees, without any kind of openness in the process, may not be sufficiently strong to qualify under Parker-Brown exemption.

But those matters can be cured. And I would have to,

Your Honor, look at the specifics of a particular prepaid legal services program.

Those programs in which, for instance, a group of consumers entered into an agreement with a law firm to provide services at a given fee would be no different than any corporation or any other entity providing services.

QUESTION: Mr. Morrison, did the Fairfax Bar make any statement when they withdrew their fee schedule recently?

MR. MORRISON: There is, Your Honor, in its brief in opposition to certiorari, there is a resolution, which is their full statement, it's attached as Appendix, I believe it's Appendix I in the brief from the Fairfax Bar, and that is the only statement we have in the record, Your Honor.

QUESTION: Does that statement contain a justification for their action?

MR. MORRISON: I wouldn't want to characterize it one way or the other, Your Honor.

QUESTION: I'll ask the other side.

MR. MORRISON: Thank you, Your Honor.

The Court of Appeals below, the majority, relied very heavily on the so-called learned profession exemption to the antitrust laws, in finding immunity for the bar, for these activities.

We believe that that reliance was misplaced, and that the proper focus was on -- should have been on this Court's

decision in United States v. American Medical Association.

In that case, this Court held that it was immaterial what the professions of the defendants were who were charged with that criminal conspiracy. Provided that the effect and purpose of that restraint was to restrain the trade of group health.

The defendants there were the Medical Society and 21 doctors, who opposed the establishment of prepaid medical services, a matter not dissimilar to prepaid legal services, about which the Chief Justice just asked me.

And the medical societies there issued rulings which said that it was unethical for a lawyer -- excuse me, for a doctor to work for Group Health, and that it was unethical for another doctor to consult with that doctor, or is unethical for a hospital to -- and they threatened boycotts of hospitals that cooperated. And the result of this was, of course, a serious impairment of the proposal to deliver prepaid medical services to the workers in that particular case.

In our view, the Court's holding there that the profession was immaterial requires a rejection of the attempt of the bar here to spread an ethical umbrella over its activities and to insulate it from the true effects which is, as it was there, to deprive consumers of the opportunity for the free market.

In AMA, this Court said that a conspiracy allegedly

aimed at restraining or destroying competition or limiting the free availability of medical services violated the Sherman Act. And it surely does here, also.

I want to turn, if I may, to the alternative basis upon which the bar can escape -- if escape is the proper word -- from the structures of the Sherman Act, for those truly legitimate activities which the bar has and which do need to be carried forward.

Now, if the bar can establish under Parker that there has been State action and that the State has intended to replace competition --

QUESTION: Just, if I may, before you get into that, I want to be sure I understand your previous point, that you say that there may be a so-called learned profession exemption, but we need not decide that here because if the exemption exists it has to do with the pinch not with the squeeze -- to use Justice Jackson's metaphor -- and that here the pinch was on the public.

MR. MORRISON: That's certainly true, Your Honor, and to the extent to which the special status of the bar becomes relevant, of course, it is in the rule of reason cases where, like every other characteristic of any business or industry, we certainly must look to the obligations of that industry and its peculiarities.

QUESTION: That people in the learned profession,

let's say you had three or four Ph.D.'s and a couple of Doctors of Divinity, and maybe a dentist and an M.D., all members of learned professions, but that they could conspire to violate the antitrust laws if the effect of that were on the general public. Is that it?

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

QUESTION: But, on the other hand, if the effect were wholly within a Divinity school or a university graduate school, there might be a learned profession exception; is that it?

MR. MORRISON: I gave an example in my brief, Your Honor, of lawyers agreeing that sixty years is an appropriate time for title examination,to go back sixty years will be considered prima facie reasonable, in terms of what's required.

Now, there may be a restraint. I would think it would be satisfied under the rule of reason. But the restraint there would be simply upon the internal workings of the professions, and while there might be some tangential effect on the public in the long run, it would be very small and would probably be protected.

QUESTION: What about agreements not to advertise?

MR. MORRISON: Your Honor, that of course is not the very case we have before us. We have price fixing, and --

however, I would say, Your Honor, that if in the commercial context the per se rule applies in that case, then I would say that the bar, to escape Sherman Act liability, would have to come either under Parker-Brown directly under the authority to regulate, or under a specific State statute.

QUESTION: I know. You said "if" it comes under per se. Now, what do you think about that?

MR. MORRISON: Your Honor, I've read the case cited by the American Bar Association, and if I had to extrapolate, I would say that that probably is a per se violation. There has been no decision, specifically of this Court, that reached the precise question. But if I had to give my opinion, and were advising a client, I would say: Yes, it is a per se violation.

QUESTION: How about a rule -- how about agreements not to solicit otherwise than advertising?

MR. MORRISON: I would say, Your Honor, that it is under the same rule, and that if the bar needs an exemption, there are two ways that the bar can get an exemption. Under Parker-Brown, where there is meaningful State regulation, where there's an important State end to be achieved by that, I'm prepared to say that that can be achieved.

QUESTION: But you would say if there's a specific State statute that forbade solicitation.

MR. MORRISON: That's right. Where the State has

made a decision to --

QUESTION: Well, there you'd have pure Parker v. Brown, wouldn't you?

MR. MORRISON: Exactly, Your Honor. Exactly.

Or if Congress -- as Congress has so often done for other business problems, labor unions, the airlines, fair trade laws, there are a whole raft of areas in which Congress has said, No, competition is not the be-all and end-all for everybody, not on a State-by-State basis but for everybody. And we want those situations to be covered by another rule.

With regard to Parker-Brown, I want to point out several important things about Parker that are different from this particular case.

In Parker, first, there is a terribly important role played by the State Agriculture Commission, who were all appointed by the Governor, confirmed by the Senate of California, one of them included the State Agriculture Director, and others included consumers and handlers as well as growers.

Now, these individuals made the key and essential decisions in Parker. There was no more way in which the State could operate that program unless there was positive, specific approval given by these individuals.

Moreover, there had to be beyond that a good deal, and of this I speak of the specific factual findings that the program for the particular industry was to be carried out in accordance

with the statutory scheme, and assurance against any form of unreasonable profits, and then, after full hearings and full determination, that competition ought to be replaced in that particular instance by some other form of control in order to preserve the agriculture wealth of the State. That in that case the Court held, Yes, there was an exemption.

This was indeed action of the State.

We don't have anything of that kind here. The real activities here were conducted by the State Bar. None of the committee who issued the fee schedules, fee reports, wrote the ethical opinions, none of them was appointed by the governor, confirmed by the State Senate, there were no hearings, there were no factual findings, there was no kind of procedural assurance that any kind of policy mandate from the State of Virginia was being carried out.

There was, in short, a very different kind of situation than we had in Parker-Brown.

The State Supreme Court has done only two -- taken two actions which might conceivably be brought within the notion of an approval as in Parker:

No. 1, the Canons of Ethics, No. 12, which the State Bar adopted verbatim in this regard from the ABA's Canons of Ethics, indicated that in determining what a reasonable fee was, it was proper to consider the customary fees in the area, and that the customary fees in the areas included proper

reference to minimum fee schedules. That's the one item.

Then in 1969 and '70, when the Canons of Ethics were replaced by the Code of Professional Responsibility, that language was taken out and the question of reasonable fees was again included, and in Ethical Consideration 2-18, the American Bar Association and adopted by the Virginia State Bar -- the Virginia Supreme Court said that minimum fee schedules are some guidance on what a reasonable fee is.

Now, that is a very different kind of approval than was required in Parker-Brown. There was no consideration by the Virginia Supreme Court of either the Ethical Opinions, the Fee Reports, or the Fee Schedules, and, most particularly, there was no consideration of the numbers involved. How much was a reasonable fee? Was there any assurance that the consumers were not being unfairly abused by the fee schedules, as there was in Parker; none of that took place here.

And we suggest that that is a fatal flaw in the entire manner by which the minimum fee schedule system operated in Virginia.

Finally, as in Parker -- unlike Parker, rather, there are no statutes here which give an indication to the State Bar or anyone else that these activities ought to be carried out as a replacement for competition.

A careful statutory scheme was taking place in Parker, a scheme fully consistent with the federal practice, and

indeed a scheme intended to preserve the agricultural wealth of the State without unreasonable profits and, further, without profits in a situation that once the scheme went into effect, the program was approved after these long hearings and findings of fact that it no longer was optional, that it became mandatory, and any person who didn't follow that scheme for the growers of raisins in that case, was subject to criminal prosecution.

Your Honor, it is clear that if all of the developers in Reston, Virginia, and all the bankers in the area and the neighboring areas, and all the real estate brokers and sellers of title insurance had gotten together and published minimum fee schedules, and that anyone could be disciplined for not adhering to them, there can be little doubt that the Sherman Act would have been violated.

The question before this Court is: Are lawyers any different, or do they have to meet the tests that everyone else has to meet?

We suggest that the Court of Appeals below was in error in reaching the contrary conclusion; and, accordingly, we ask this Court to reverse.

Thank Your Honors.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

You'll have a few minutes before lunch.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS

CURIAE, SUPPORTING PETITIONERS

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

I was hoping that Mr. Morrison would talk for two more minutes, but --

[Laughter.]

I should say that the United States supports the petitioners here, and we believe that these minimum fee schedules are, in fact, illegal per se under Section 1 of the Sherman Act.

And I hope to spend my time primarily on the issues known, somewhat inaccurately, as the learned profession exemption and the State action exemption.

It is clear, I think, that Section 1 of the Sherman Act applies to personal services, and it's also clear that the circulation of minimum price schedules for personal services, even without an explicit agreement to adhere to them, would be a violation of the per se rule against price-fixing, if the respondents here were stenographers or violinists or cosmetologists or somebody else.

And the question we have is: Why should not the per se rule be applied to lawyers?

The answer is said to be the ethical responsibilities

of the bar, and while one may concede that the bar has strong ethical responsibilities, and indeed the power to police those violatsions of their standards, one searches in vain for the connection between professional ethics and price-fixing for professional services.

At least one searches in vain for a connection that leads to the conclusion that price-fixing is ethical.

The charging of a fee is the one place where the lawyer and his client have an inescapable conflict of interest, and it's rather mystifying why an agreement among lawyers to pit their collective strength against the individual client, so that the lawyers may win out in that conflict of interest, should be required as a matter of legal ethics.

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

[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: Mr. Solicitor General, you may continue.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

IN SUPPORT OF PETITIONERS -- Resumed

MR. BORK: Mr. Chief Justice, --

QUESTION: Mr. Solicitor General, I don't mean to infringe on your very short time, but is somebody from your side of the lectern going to discuss interstate commerce?

MR. BORK: Well, we had hoped that Mr. Morrison would. He did not. It seems to me perfectly clear in this case that there is no problem with interstate commerce, or the effect upon interstate commerce.

QUESTION: Well, were these particular plaintiffs no lender outside of Virginia?

MR. BORK: Well, I don't think the plaintiffs have to affect interstate commerce, it's the defendants that have to affect interstate commerce to violate the Sherman Act.

And I think it's quite clear that the flow of mortgage money --

QUESTION: In the specific cases, or in the generality of their law practices?

MR. BORK: Well, I think that in this case the effect

upon interstate commerce, Mr. Chief Justice, is the particular fees being charged on closings of real estate.

QUESTION: For the particular people who are plaintiffs?

MR. BORK: The particular people who are plaintiffs are people who purchased a home at a -- and had a somewhat inflated cost in the minimum fee schedule. But it's not necessary that the plaintiffs be in interestate commerce, as long as the violation affects interstate commerce. And I think under cases like the Employing Plasterers case, and Burke v. Ford, and so forth, where it is necessarily true that the -- and the law infers it, the law implies it, that the flow of mortgage money into the State, for example, will be diminished as the price rises.

That standard --

QUESTION: Where do you get that --

MR. BORK: -- is as to how the interest law operates.

QUESTION: Where do you get that legal inference from?

MR. BORK: A legal inference?

QUESTION: Yes.

MR. BORK: Well, I think it was first enunciated in the Joint Traffic case in 1897 by Mr. Justice Peckham, when he said that the restraint of trade was a lessening of the flow of commerce, which could be infered from a rise in the

price.

QUESTION: And that that same would carry over to mortgage money into Northern Virginia?

MR. BORK: Yes. In the Employing Plasterers' case there -- the Employing Latherers' case, around Chicago, I believe, the Court inferred that the flow of building materials into the area would be diminished as the prices were raised artificially. And that gives you the necessary effect upon interstate commerce, I believe.

I think, in fact, that with these minimum fee schedules here, there would be little difficulty in concluding that the Sherman Act per se rule had been violated. Indeed, I think any other conclusion would be logically impossible after -- certainly after footnote 59 in the Socony-Vacuum case.

Now, this morning there was some -- there's some questions I'd like to respond to now, if I may.

The Chief Justice asked the question: What about the bar's responsibility with respect to a lawyer who charges fees much too low and therefore necessarily does shoddy work.

I think there are two answers to that.

One is that in Sherman Act terms, in other contexts, we never allow price-fixing on the ground that the product will be made better if the price is higher. We let the quality and the price both be set by the market.

The second is, I think, that the bar --

QUESTION: Well, that may be one thing for a box of matches, and at least some people have thought in the past, including Justice Holmes and others, that that was perhaps a different thing when it came to the services of professional people.

MR. BORK: Well, I think the bar, Mr. Chief Justice, has perfect authority to discipline for shoddy work, which deprives the client of effective legal representation. That seems to me different than disciplining for charging too low a price. I have no problem with the discipline for not behaving as a professional man should, in giving the proper legal services.

QUESTION: Is there much evidence that that has been done?

MR. BORK: I -- across the country? As a matter of fact, --

QUESTION: Anywhere.

MR. BORK: -- professional discipline is perhaps, has not been as effective as it should be. But I think now we're discussing -- and in this case there's been no discipline for cutting fees.

I think we're discussing now conceptually what it is that justifies a price-fixing agreement. I don't think the fear of shoddy services or shoddy work and shoddy products, under the antitrust laws, does; and I think the bar, if it

wishes to guard against that, should guard against the provision of shoddy services rather than the price.

The second question was asked by Mr. Justice Rehnquist, who asked if this minimum fee schedule did not provide information to a young lawyer, to other lawyers, about what prices were current. I'm sure it does, but fee or price schedules have been defended on that ground before, and that argument has never succeeded. You don't set the price to provide information.

Trade association cases indicate that if you wish to provide information about the range of prices currently being charged in an area, you may; but that is a far different thing from setting the price which the man must charge.

And, thirdly, there was the question about whether or not -- several questions about whether or not there had been enforcement by the bar in disciplining people for charging low prices, or whether there was the threat of it.

The usual antitrust rule is that the circulation of the price which is to be charged is sufficient for a violation of the Sherman Act, and that there need not be a mechanism or a threat of compulsion behind that.

For example, the Nationwide Trailer System case, which -- I think part of which was summarily affirmed in this Court -- holds that.

I think the real problem in this case is really the

slippery slope argument, and that is the fear expressed by various bar associations that any application of a per se rule to any practice of the legal profession endangers all ethical regulations of the profession. And I think that fear is groundless. I think there is room for legitimate regulation of professional behavior.

Now, the per se rule: there are at least four defenses to an attempt to apply it. I don't think any of them applies here. But any of them may apply in other cases.

The first one, of course, is simply the defense that the restraint, whatever it is, is ancillary to a legitimate joint venture.

And that kind of an argument, of course, justifies restraints within a law firm, within an economic unit, to make it more efficient.

But, as recognized ever since Addison Pipe and Steel, when Judge Taft explicated that branch of the antitrust law; but there is here no economic integration between the entire bar, no joint venture to which the restraint could be ancillary.

The second offense is State action within the meaning of Parker v. Brown. That defense is not available here, because the fee schedules here were not imposed by the Virginia Legislature, nor by any State agency charged by the Legislature with the setting of fees.

The Supreme Court's -- Virginia Supreme Court's minimal relationship to fee schedules is not enough to satisfy Parker v. Brown. The Court hasn't really proved or commanded these schedules, and mere silence isn't enough. Some affirmative supervision, extensive affirmative supervision, and affirmative State policy I think are required by Parker v. Brown.

And, secondly, although we need --

QUESTION: Well, what if -- what about a State Supreme Court providing an ethical standard that indicates that ethical conduct or reasonable fees should take into account fee schedules as an element?

MR. BORK: You mean in the terms of State action, Mr. Justice White?

QUESTION: Yes.

At least you would think the Supreme Court, which is an agency of the State, didn't disapprove of fee schedules, and, as a matter of fact, invited lawyers to pay some attention to them.

MR. BORK: I think the -- in this case, I think Canon 12 says that, of the factors that may be considered are customary fees which may not be fee schedules, I think may be the market range of fees. But, that aside, perhaps I can answer your question best by moving to the case where a State Supreme Court does put out a fee schedule and says: Abide by

it as a matter of ethics.

I have severe doubt that that would be a valid fee schedule, and that the Sherman Act would not apply to people who followed it, for following for a variety of reasons.

One is that that Court, although it may have the power to regulate ethics, clearly cannot call anything ethics that it wishes to; it could not say, You may not pay a secretary more than $6,000 a year.

QUESTION: But if a State statute said you may -- you may impose fee schedules if you want to, Mr. Supreme Court; and the Supreme Court did.

MR. BORK: Oh, well, I think in that case we get very close to Parker v. Brown, and if you have a legislative determination that the Supreme Court is to supervise fees, and the Supreme Court does supervise fees, then I think we have a real Parker-Brown question.

QUESTION: But there's nothing close to that here, you say?

MR. BORK: Nothing close to that at all.

QUESTION: Well, Mr. Solicitor General, suppose you have under State constitutional system, where the Legislature can't do this sort of thing but the Court may?

MR. BORK: Oh, well, I think it -- in part, that depends upon the nature of the form of government. In Virginia we happen to have the separation of powers specified

in the Constitution, much like the United States Constitution, so that I don't think the problem arises.

There may be States where a Court has legislative authority, and if it does by the State Constitution have legislative authority, then we have a very different question.

QUESTION: If it sets fees.,

MR. BORK: If it sets fees, or if it does anything else that is --

QUESTION: But you suggest that no State agency here has really set a fee, anyway, in this case.

MR. BORK: No, the State agency, I don't believe, has set a fee in this case.

QUESTION: Because, on this problem, Lathrop v. Donohue involved a State Supreme Court that did have legislative authority. There the creation of an integrated bar.

MR. BORK: Yes, I quite agree. As to whether or not it is the State policy, when a Court does it, the question must be answered by reference to whether or not the Court has, under State law, the authority to do that.

But I wanted to say that there is -- because of time I will move to the last point, which answers the fears rather than the -- rather than -- answer the fears in this case; and that is this:

When the Sherman Act was passed, I think nobody who framed it had any idea that it was going to strike at the core

of the bar's ability to regulate itself as to professional ethical conduct, and therefore I think it would be quite wrong to strike at that kind of self-regulation. And I don't suggest -- for example, I don't think there's any doubt that the bar association under the Sherman Act has the power to discipline a member for supporting perjury, or for converting a client's funds. Maybe businessmen couldn't discipline their rivals in this way, I think the bar can, for traditional and historical reasons.

QUESTION: Well, how about an agreement not to advertise?

MR. BORK: I think the agreement not to advertise becomes between the examples I just gave and the straight price-fixing, which we have here.

QUESTION: So do I, that's the reason I asked the question.

MR. BORK: Yes, sir.

[Laughter.]

MR. BORK: And to say that this is per se illegal, I think is not to say that advertising is; and frankly I think the question of the relationship of advertising or the ban upon it to the lawyers, to the legal profession's professional and ethical obligation, is a question that would have to be decided on the full record. I just don't know all the functions that a ban on advertising may serve in this profession.

And I think to decide this case is not to decide that case.

QUESTION: And the same goes for solicitation?

MR. BORK: I believe so. Yes, Mr. Justice White.

I don't think one can say that lowering your price is a method of solicitation, and therefore unethical. That is merely to say that price competition is unethical.

One might equally say that providing better services for the same price is a way of soliciting business, and is therefore unethical.

I hope one would not say that; but one might, on the same rationale.

QUESTION: It would be a little hard to communicate that without advertising, wouldn't it?

MR. BORK: Well, I think most -- you mean the better services, Mr. Chief Justice?

QUESTION: Yes.

MR. BORK: I think, --

QUESTION: Except as it passes by word of mouth on a man's reputation.

MR. BORK: Yes. It would be. But I trust that --

QUESTION: Or a woman's reputation.

QUESTION: Would an agreement by bankers as respects the interest on purchasing a home be covered by the Act?

MR. BORK: The Sherman Act? I certainly think it

would, Mr. Justice Douglas. Yes, it would. And I think -- I see no reason in this context why the lawyer's participation in that same process should be governed differently.

I think we knw enough, this Court over the years has worked out the rules about price-fixing, and there is no occasion here to jettison those rules just because lawyers rather than cosmetologists or somebody else are involved. To decide this case, I stress, does not decide other issues of professional obligation.

So the government asks that the judgment of the Court of Appeals be reversed in order to vindicate the Sherman Act; and indeed, I think that would help to vindicate the legal profession.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Booker, you may proceed.

ORAL ARGUMENT OF LEWIS T. BOOKER, ESQ.,
ON BEHALF OF RESPONDENT FAIRFAX COUNTY
BAR ASSOCIATION

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

We submit there are five issues here for this Court's determination today, and the very first one is the one Mr. Justice Rehnquist just turned to: Is any interstate commerce involved here in the first place? Is there, indeed, any

basis for jurisdiction? Was there in the trial court and is there here?

Secondly, is there any exemption or exclusion of the practice of law, because of the so-called learned profession decisions over the years?

Third, is the Virginia State Bar and the State of Virginia so intimately involved in the promulgation of advisory fee schedules that in fact the Parker v. Brown doctrine is applicable to the fees promulgated evern by voluntary local bar associations, such as the Fairfax County Bar Association?

Fourth, if advisory fee schedules be determined to be violations of Section 1 of the Sherman Act, in fact should per se treatment be accorded them?

And, finally, if the Fourth Circuit was wrong in its decision below, should any adverse decision by this Court be applied prospectively only or should it be applied retroactively?

The nature of this transaction is simplicity itself. Residents of Virginia, who liked Virginia, and who wanted to purchase another home in Virginia, went to Reston, Virginia, and there purchased a home and had the title to that home examined by a Virginia attorney who never left his home county to go from his office to the Clerk's office of the Circuit Court of Fairfax County to examine the title; the transaction was closed in the office of the Virginia attorney in Virginia; the money which had to be borrowed to finance the transaction

was borrowed from the Northern Virginia Savings and Loan Association, a savings and loan association in Virginia. There has --

QUESTION: It was mortgage money?

MR. BOOKER: Sir?

QUESTION: It was mortgage money?

MR. BOOKER: Yes, Your Honor, it --

QUESTION: Isn't that, by the decision of this Court, in the Interstate Commerce Commission? All mortgage money.

MR. BOOKER: If Your Honor please, this money did not move out of Virginia.

QUESTION: How did it get there?

MR. BOOKER: The money -- it was a savings and loan association in Arlington, Virginia, Your Honor; the money was deposited presumably by Virginia residents who desired to purchase shares or to make investments in a Virginia savings and loan association.

QUESTION: And the flow of mortgage money is not in interstate commerce? You say.

MR. BOOKER: Whether the flow of mortgage money is in interestate --

QUESTION: I'm just using that one phrase, which this Court has used.

MR. BOOKER: We submit that not in this instance,

there's certainly no showing that the money which the Goldfarbs borrowed flowed in interstate commerce.

Now, mortgage money may flow in interstate commerce. But it didn't here, so far as there's any proof.

Furthermore, this is not a case involving mortgage money, this is a case involving title examination; and the title examination was done in Virginia and nowhere else.

The only contact the title examination had with any State was with Virginia.

Let me see whether I can't illustrate that point more clearly.

Suppose there are two lots in Reston, side by side; in one of the lots the purchaser has all the money he needs, he's always lived in Virginia, he never intends to live anywhere else, he works in Virginia. He has an attorney examine the title.

His next-door neighbor, on the other hand, lives in Ohio. He moves to Virginia, because he's going to work for the government in Washington. He borrows money from a bank in Maryland. The loan is guaranteed by the Veterans Administration. The price for the property is identical. The work required by the title examiner is identical.

What is the title examiner to do when he fixes his fee? One transaction has no contact whatever with interstate commerce, under any stretch of the imagination. Is the

attorney in that case to disregard the Canons of Ethics at his peril, and charge whatever he thinks is appropriate, or must he not consider the Canons of Ethics?

QUESTION: Did you mean to use the phrase "disobey the Canons of Ethics"?

MR. BOOKER: The Canons of Ethics prescribe what an attorney must condiser in fixing the schedule, in fixing the fee, Your Honor; and if he is --

QUESTION: Could he follow those canons and set it at less than this fee?

MR. BOOKER: Excuse me, Your Honor?

QUESTION: Could he follow the Canons and set and fee at less than this?

MR. BOOKER: Absolutely he could have, Your Honor.

QUESTION: And what would happen to him if he did?

MR. BOOKER: If he consistently did it, for the purpose of solicitation, he would be disciplined --

QUESTION: All right, let's say if he just consistantly did it. He would be disciplined.

MR. BOOKER: He might or might not be disciplined, Your Honor. It depends on the purpose for which he was doing it. There was evidence in the record, for example, that the minimum fee was not followed for a number of title examinations in Reston, because the attorneys doing those examinations were doing a number of them and could do them

economically at a lesser charge than the suggested fee schedule. So it would have to depend on the transaction itself. And the attorney is told in the introduction to the fee schedule that it is only one of the elements to be considered, and that it is not to be controlling, it is purely, as the Canons of Ethics say, one factor to be considered.

So where the attorney examines a piece of land, where the title is clearly involved only in Virginia, he must, at his peril, disregard, we say, the Canons of Ethics.

And yet the very next lot, which has the kinds of insubstantial contacts with interstate commerce described in the record below, must, at his peril, not consider the minimum fee schedule, or consider the Canons of Ethics. For the minute he begins to consider them, in setting his fee, the petitioners would contend he has violated the antitrust laws.

We say, just as the Fourth Circuit said, that this is a test, this is a conflict that no attorney need be put to.

In this instance, there is simply no substantial effect on interstate commerce. There is nothing in the record below to indicate that the choice of a home in Virginia is, in any way, influenced by the cost of title examination.

The title examination is something which one, after he decides upon the purchase, then is concerned about. There is no evidence of any kind in the record that title examinations in Virginia are more or less expensive than in Maryland or the

District of Columbia. There is a complete absence of any evidence that there is any effect on interstate commerce, and counsel for the petitioners have very fairly conceded in their brief that clearly this transaction is not in interstate commerce.

This Court spoke to the question of interstate commerce just three months ago, in Copp v. Gulf. In that case, which was a Clayton Act case and not a Sherman Act case, this Court nevertheless said what we say is very important in this case, and I might quote from the Court:

"Even if the Clayton Act were held to extend to acquisitions and sales having substantial effects on commerce" -- and that's a test which must be met here -- "a court cannot presume that such effects exist. The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust provisions" [sic].

And there simply is no such evidence in this case. This is simply not a case involving interstate commerce.

But if --

QUESTION: How about Judge Bryan's findings, on pages 9 and 10 of the Appendix, he found contrary to your contention, didn't he?

MR. BOOKER: Yes, Your Honor, but that is a conclusion of law, we submit, and this Court, as the Fourth

Circuit, has the right to review that. And the Fourth Circuit did review that, and the Fourth Circuit concluded there were no substantial effects on interstate commerce.

And therefore there was no basis for jurisdiction.

QUESTION: Do you agree with the Solicitor General that the test is whether the defendants' activities affect interstate commerce rather than whether the plaintiffs' activity was in interstate commerce?

MR. BOOKER: No, sir, we do not. We say the question is whether the transaction affects substantially interstate commerce. Has this transaction substantially affected interstate commerce? And there is no evidence that it has.

This is a title examination, at a cost of $522 on a house which was valued at over $50,000. And we say that does not show an effect of any substantial nature on interstate commerce.

But turning now from that to the question of whether there is a learned profession exemption or exclusion from the antitrust laws: It is incorrect, we submit, to say that we seek here today an exemption for the practice of law.

To the contrary, the practice of law has never been considered to be trade or commerce before. We are not seeking an exemption here. We are saying that the coverage of the antitrust laws, as Congress intended the term "trade and commerce"

to mean in 1890, simply does not extend to the learned profession.

There are Acts where Congress has carved out legislative immunity from the antitrust laws. The Capper-Volstead Act, for example; trade associations; and the Kern-Ferguson Act; insurance. Where, absent some congressional authority, commerce; insurance, clearly commerce; agricultural organizations, clearly commerce; were said to be exempt because of congressional declaration from the antitrust laws.

But that is not this case.

There is no case which has said that law is trade or commerce. To the contrary, everything the courts have said and we have called the Court's attention to each one of those instances in our brief, over the past eighty years and perhaps even if we wanted to go back to The Schooner NYMPH, to 1833, has said that there is a distinction between trade and commerce, and the professions.

In fact, the phrases of the Sherman Act in 1890 had only the precedent of The Schooner NYMPH before them at that time, and in that case Mr. Justice Story very clearly said that trade is one thing and the learned professions and the arts are another.

So if there was anything which the Congress had in its mind at that time, in 1890, it would have been the decision in The Schooner NYMPH.

In that connection it is significant, we submit, that the Department of Justice in 1961 and again in 1965, when the question of advisory fee schedules were put to it by a sister bar organization of the Fairfax Bar Association, said: We gard this as not falling within the Sherman Act.

Why? Because the Sherman Act does not apply to the practice of law. It's not in commerce, it's not commerce. That was the Department of Justice's view ten years ago, fifteen years ago. A view which the Department of Justice changed only last year.

The Solicitor General has not commented upon that change in the Department of Justice's view; but I submit that that is persuasive evidence that the Department of Justice, along with the Congress, along with this Court, along with other courts which had spoken to the issue, had concluded that the antitrust laws in fact do not apply to the practice of law.

But if we're wrong as to that, should, in fact, per se treatment be accorded to the practice of law?

And let me also suggest another analogy, and I think this takes off on what the Solicitor General said: Suppose there is a town in which there are two businesses, a large one and a small one. Both of these businesses are in the process of trying to develop a breakthrough invention, a means of turning solar energy into nuclear energy. They are both working on it as hard as they can.

In order to do that, they need a particular kind of refractor which is available only from one company. The large company goes to the manufacturer of the refractor and says, I want to purchase a refractor from you, but I want you to agree with me that you will not sell it to my competitor who is also working on this process.

I suggest to you that that manufacturer has a serious antitrust problem on his hands.

But suppose there's only one patent lawyer in the city? And the first manufacturer goes to the patent lawyer and says, I want to apply for a patent, and here is the background of the patent, and I want you to agree with me that you will not represent my competitor in a patent action.

Is there any antitrust violation there? Of course not. The attorney there is following the Canons of Ethics, which forbid any conflict of interest.

Now, the Solicitor General would suggest that some of the Canons of Ethics are good ones and some of them are bad ones. I suspect the Solicitor General would say: I think Canons of Ethics forbidding conflicts of interest are good, and that we should have them, and that we should prevent attorneys from having conflicts of interest.

The Solicitor General seems not quite as certain as counsel for the Goldfarbs as to whether advertising by attorneys is good or bad. Both seem to believe that minimum

fee schedules and a recommendation that they be considered along with many other factors are bad.

So we see before us three different Canons of Ethics in the illustrations I've suggested.

One involving a minimum fee schedule.

One involving advertising.

And one involving a conflict of interest.

And some of us would say that they are all proper, that the bar is capable and responsible for self-regulation. Some would say some are good and some are bad.

But is that any way for laws to be enforced? Is that any way for an attorney to know how to determine how he should perform his practice?

We submit not. That there is no way that can be selective or choice enforcement of the antitrust laws.

If, indeed, certain aspects of the practice of law do involve interstate commerce, and we assert they do not; if, indeed, certain aspects of the practice of law ought to be regulated by some other body than by professional responsibility, then we submit that regulation should be made by the Congress and not by the Courts. By the Congress which has the opportunity to examine the entire background of the matter, to determine what is appropriate under all the circumstances.

QUESTION: Do you have any doubt that the Virginia Legislature could provide by law that the minimum fee schedules

were against the law in Virginia?

MR. BOOKER: Virginia has an antitrust law. No actions have been brought under that antitrust law against advisory fee schedules, Your Honor.

QUESTION: Well, what if the Virginia Legislature, at its next session, were to say: We don't care whether the federal antitrust laws apply or not, we don't want minimum fee schedules for lawyers here in Virginia; is there any reason why they couldn't pass a law to that effect?

MR. BOOKER: Certainly the problem of interstate commerce is solved by that. The State can certainly regulate in that area.

I would believe that Virginia Legislature could, if it saw fit to, enact such a law, Your Honor; yes, sir.

In fact, the State of Virginia has enacted certain laws relating to the practice of law. It's a misdemeanor in Virginia, for example, to solicit. And if that's the case, then certainly the State, if it saw fit, after consideration, were to make such a rule, it obviously would be subject to the same type of constitutional review as any other State statute, but certainly it's within their power to do so.

QUESTION: Does it still have the running and capping statute?

MR. BOOKER: Yes, it does, Your Honor. That's still very much with us.

QUESTION: [Laughing] I'm still trying to find out what it meant.

I'm still open to be told what it meant.

MR. BOOKER: [Laughing] Well, that's sort of like champerty and maintenance, Your Honor, I've never quite understood the distinction, either.

QUESTION: Yes.

MR. BOOKER: Turning to the question as to which the Attorney feneral of Virginia will spend more time than I today, on the question of whether the Parker v. Brown doctrine insulates the advisory fee schedules of the Virginia State Bar, or of local bar associations, from the antitrust laws, I pause only to point out, in that context, that counsel for the Goldfarbs, in his opening argument, has generally agreed with our position; and that is that when the State promulgated minimum fee schedules in 1962 and 1969, under the imprimatur of the Virginia State Bar, which is an administrative agency of the Virginia Supreme Court, and then issued the opinions which it did, it thereby did indeed sanction and direct State action.

And as I understand the argument for petitioners here today, that State action was bad as to the Virginia State Bar, and so it's bad as to local bar associations.

But if this Court concludes, as the court below did, that the action is proper as to the Virginia State Bar, then we say it must follow that that action was proper as to the Fairfax

Bar Association.

And in addition to the promulgation of the two collections of the minimum fee schedules, the Virginia State Bar has indeed issued various ethical opinions considering minimum fee schedules.

Let me simply call to the Court's attention Opinion 98, which is reproduced in the Joint Appendix at page A.46. I simply wish to read one sentence from that: "To ignore such schedules under these circumstances has no ethical justification and deserves censure."

These opinions are available to and are furnished to every member of the Virginia State Bar. What is he to do when he reads that? Is he not to consider that?

Of course it's not binding. Of course it's not the only thing he will consider.

There were six considerations under the Canons of Ethics. There are eight considerations under the Code of Professional Responsibility. But it's one of the things he must consider.

I would be surprised if there is a lawyer within the sound of my voice today who has not, at one time or another, considered the propriety or the ability of a client to pay a fee in establishing the proper fee to charge that client.

If a businessman were to pick and choose among his customers as to what he would charge them, he would pretty

clearly be in violation of the antitrust laws.

Would anyone suggest that an attorney, who follows the Canons of Ethics, which say that he should consider the ability of the client to pay -- it's set forth right in this opinion -- would anyone suggest that he has thereby violated the antitrust laws?

Of course not. That's the nature of the profession. It's a service. It's a service to society, and not a mere money-making occupation. As the Canons of Ethics has so frequently pointed out.

Even if none of the protections which I suggest exist, that is, that there is no substantial effect on interstate commerce, that the practice of law is not included within the ambit of Section 1 of the Sherman Act, that the Parker v. Brown doctrine does indeed insulate the Fairfax Association schedule from the antitrust laws.

Even if we and the court below were wrong on all of those, we submit this is nto a per se case. It is not a case in which this Court, or any court, without consideration of all of the factors, without consideration of all the professional responsibilities, can act.

But even if we're wrong about all of that, we suggest that this fee, this decision should not be applied retroactively. That attorneys who, as the court below said, have in good faith followed the Canons of Ethics, should be

punished in a punitive way; for that's what treble-damage recovery is, it's punitive in nature. This Court has said it dozens of times, and indeed it is. Why they should be punished in a financial way because of their adherence to the minimum fee schedule, because of their consideration of these advisory schedules, along with all the other tests, this Court in the Chevron decision set forth the circumstances under which it would excuse retroactive application of the law.

Without going into that case in detail, we suggest that if this Court gets to that point, and we say there's no reason for it to get to this point, it should apply the Chevron test and decide that any decision shou be applied in the future only.

But we get back to the same thing, as we began.

There is no substantial effect on interstate commerce here. There is no basis for this Court to say some Canons of Ethics are good and some Canons of Ethics are bad, and we'll award the attorney who follows the good ones and we'll punish the attorney who follows the bad ones. Those are not matters as to which this Court should speak. Those are matters as to which Congress, if speaking must be done, should speak.

So we say, in conclusion, that the professional system of self-regulation of the practice of law, the discipline and ethics of the attorney, which we suggest have furnished this country exceptionally good legal services over the years,

services which are often provided free, or at minimal cost, to those who are unable to pay for them.

If this system is to be changed upon a plea of consumer interest, and the distinctions between trades and professions obliterated, we suggest that that obliteration should not be done by the courts but by the Congress.

And if it must be done, it may be the consumers who suffer the most.

There is no evidence to the contrary.

QUESTION: Mr. Booker, this doesn't bear on this case, but I'm looking at the next case down the road.

You have spoken of the "learned professions", and would you define that for me? Would it include engineers? Would it include registered nurses, who these days are unionized? And Chiropractors, Osteopaths, and Natureopaths, and all the others?

MR. BOOKER: Your Honor, I speak only for a bar association. I speak in the context of what I understand the traditional professions to have been at the time Mr. Justice Story spoke in 1832. The professions are: medicine, law, and the divinity.

I do not speak for other organizations which call themselves professions, whether they are or not, I do not know. I do suggest that traditionally England and in the United States, and certainly at the time Mr. Justice Story

spoke, those were the professions.

QUESTION: Your retroactivity points goes only to the damages?

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

QUESTION: Was there a prayer for injunction here?

MR. BOOKER: There was.

QUESTION: Is that moot or not? I just don't --

MR. BOOKER: It is moot because the Fairfax Bar Association has rescinded its schedule.

QUESTION: Well, that's -- you think that moots it in an antitrust case, just the cession of an alleged illegal activity?

MR. BOOKER: In this case if there is to be prospective application only, that's correct, Your Honor. But in fact, there was no suspension of the injunction below. When the injunction below was entered on February 2, 1973, the Bar Association immediately sent notice to everyone not to consider the advisory fee schedule any longer.

QUESTION: Well, suppose we agreed with you on the damages, it shouldn't be prospective -- or retroactive, would -- should the case be dismissed as moot or would -- what would -- but assume we disagreed with you on all your antitrust points, what would --

MR. BOOKER: We would suggest at that point, the case is moot, Your Honor, because the fee schedule has been

rescinded, and because there is no question --

QUESTION: Well, isn't there an antitrust principle that this continuance of an antitrust violation doesn't guarantee that you're not to get an injunction?

MR. BOOKER: Yes, I hesitate to reach that point because we say there's no antitrust violation, --

QUESTION: Yes, I know you do.

MR. BOOKER: -- but assuming we're wrong on that, assuming we're wrong on that, we say that the fact that a practice which everyone regarded as a proper practice until suit was brought in this case, but which has now been discontinued, was discontinued long before there had been any definitive statement by this Court, is moot.

If this were something which were continuing in the future, that might be different if this Court had spoken. But this Court had not spoken and has not spoken.

QUESTION: But you're not -- you're just speaking for Fairfax County Bar?

MR. BOOKER: I am, Your Honor. That's my client here today.

QUESTION: Exactly. And we haven't --

QUESTION: So it may or may not be moot, even if you're right about the mootness as to your client, it may or may not be moot as to the Virginia State Bar?

MR. BOOKER: It may not be, and I speak not to the

mootness question as to the Virginia State Bar.

QUESTION: Right.

QUESTION: Mr. Booker, would you give your answer to the question I asked of Mr. Morrison?

MR. BOOKER: Yes, sir.

QUESTION: As to what is the Fairfax Bar's stated justification for the recision of its schedule?

MR. BOOKER: If Your Honor please, the Fairfax Bar Association has long since exhausted all of its resources and ability and means to defend this litigation. When the Fairfax Bar Association was successful in the Fourth Circuit, it sought to avoid further expense, further threats, further uncertainty as to its members.

Without in any way conceding that the adoption and the promulgation of the advisory fee schedule was illegal or wrong, and the resolution reprinted so reflects. The Association concluded that in order to remove this uncertainty, and in order, it hoped, to avoid the expense and necessity of further litigation, it would rescind its advisory fee schedule.

QUESTION: So you're not charging minimum fee schedules now?

MR. BOOKER: We are not, Your Honor.

MR. CHIEF JUSTICE BURGER: Perhaps there won't be any.

Mr. Attorney General.

ORAL ARGUMENT OF ANDREW P. MILLER, ESQ.,

ON BEHALF OF RESPONDENT VIRGINIA STATE BAR

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

My name is Andrew Miller. I am Attorney General of Virginia, and counsel for the Virginia State Bar.

My portion of the argument will be devoted to a discussion of the nature of the organization known as the State Bar, its role in the activities which form the basis for this proceeding, and the reasons why this role constitutes a State action.

Now, the State Bar is an administrative agency of the Supreme Court of Virginia, created by that Court pursuant to the laws of the Commonwealth in 1938.

The Virginia Supreme Court has promulgated rules governing the conduct of attorneys and the operation of the State Bar, which are found in Part 6 of the Court's Rules.

The powers of the State Bar were assigned by the Supreme Court to its counsel, to which, in addition to certain elected members, six persons are appointed by the Court itself.

Now, there are a number of voluntary bar associations in the Commonwealth, both at the local and at the State level. At the State level there's the Virginia Bar Association, the Old Dominion Bar Association, the Virginia Trial Lawyers' Association, et cetera.

But each attorney practicing law in Virginia is required by statute and by rule to be a member of the State Bar. The State Bar is mandated, both by the General Assembly and the Supreme Court of Virginia to investigate alleged violations of prescribed standards of conduct, and to report its findings to a court of appropriate jurisdiction for any disciplinary procedures.

These investigations are carried out by district committees of the State Bar, organized in each of the ten congressional districts in the Commonwealth.

Pursuant to the Code, the funds for the operation of the State Bar are appropriated from a special fund in the State Treasury by Act of the General Assembly of Virginia. This special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set pursuant to statute by the Supreme Court. And the General Assembly has established a ceiling on the setting of such fees.

The State Bar has given, been given authority by the Supreme Court of Virginia to issue advisory opinions on matters involving questions of ethics. Analyses of existing fee schedules of local bar associations by the State Bar involve questions of ethics, in that they may provide some guidance on the subject of fairness of fees.

It has been stipulated that the State Bar has been authorized, Mr. Justice White, by the Supreme Court to issue

opinions, such as legal ethics opinions 98 and 170, which relate to the significance of minimum fee schedules adopted by local bar associations, and to disseminate studies on such schedules.

I refer you to Stipulation 19.

In Parker v. Brown, this Court stated that the Sherman Act was not intended by Congress to restrain actions by the State, its officers or agents. Now, while the fact that there is State action does not automatically confer antitrust immunity upon a person or corporation, I submit that the Sherman Act sanctions are inapplicable to a State agency involved in such activity. And this is true, I submit, whether the State action is mandated by a command of the Legislature, as in Parker, or by the Judiciary -- and, Mr. Justice Brennan, you raised the question of inherent power earlier in this argument -- or by both, as in this case.

Now, the conduct of the State Bar alleged to have contributed to a restraint of trade relates to its role in enforcement of the Code of Professional Responsibility promulgated by the Supreme Court of Virginia in 1970.

Now, pursuant -- and the Supreme Court made this very clear -- both to the statute and its inherent authority, the Supreme Court of Virginia organized the State Bar to act as its administrative agency for the purpose of investigating and reporting violations of such ethical standards as the Court

has promulgated.

Further, pursuant to both statute and inherent authority, the Court has implemented specific disciplinary procedures, should violations be deemed to have occurred.

In 1970 the Supreme Court amended its rules by substituting a new Code of Professional Responsibility for the Canons of Professional Ethics, which had been promulgated in 1938 at the time that the State Bar was created.

Now, pursuant to this Code, an attorney is prohibited from charging an excessive fee. In determining his fee, it is provided that an attorney should consider, among seven other factors, the fee customarily charged in the locality for similar legal services.

It is further stated that suggested fee schedules provide guidance as to what might be considered reasonable fees.

Now, clearly, the State Bar has the duty to provide attorneys and local bar associations with sub-guidelines by which the reasonableness of fees can be judged. And the minimum fee schedule reports circulated in 1962 and 1969 serve this purpose.

I want to emphasize to the Court, in response to some previous questions from the bench, however, that the State Bar did not undertake to establish a minimum fee schedule for the State as a whole. All that these reports of 1962 and 1969 address themselves to were an analysis of the fee schedules

which had in fact been adopted by local bar associations.

QUESTION: Was there a good deal of variation among the various localities of the State?

MR. MILLER: That is exactly correct, sir. And as a consequence the reports showed that there was a variation, that this was an analysis, and the results of the analysis were submitted to the local bar associations for their consideration.

But in this particular case, I would like to point out, Your Honor, that, as shown on page 11 of our brief, that the minimum fee schedule which was adopted by the defendant Fairfax County Bar Association, contrary to assertions which appear in the brief of petitioners, did in fact contain significant variations from the minimum fee report which the Virginia State Bar sent out in 1969. That is footnote 4 on that page, Your Honor.

QUESTION: Mr. Attorney General, what has the State Bar done since the injunction was issued?

MR. MILLER: As far as issuing advisory opinions?

QUESTION: As far as this case is concerned.

MR. MILLER: Well, sir, of course, as far as the State Bar is concerned, the State Bar was not found to have been in violation of the Sherman Act, and, as a consequence, the State Bar has proceeded to continue with respect to its operations as mandated by the Rules of Court adopted by the

Supreme Court of Virginia.

QUESTION: In regard to minimum fees?

MR. MILLER: I know of no instance in which an advisory opinion has been requested, Your Honor, of the State Bar since this case started with respect to minimum fees. As counsel for petitioners indicated this morning, there has never been a complaint to the Virginia State Bar that in fact an ethical violation has occurred.

Now --

QUESTION: Well, is there any more suggested fees that's going to be sent out?

MR. MILLER: I know of no plans of the Virginia State Bar to send out another report, such as was sent out in 1962 and 1969, Your Honor.

QUESTION: Do you -- the Supreme Court has not required any local bar to make up a minimum fee schedule or hasn't required lawyers to follow it?

MR. MILLER: I think that the record reflects, Your Honor, that in 1962 there was some 21 minimum fee schedules in effect, our local bar association --

QUESTION: Yes, but the Supreme Court hasn't required local bars to propound them, has it?

MR. MILLER: Well, that was my point, of course, because there are many more local bar associations, and 21 --

QUESTION: Yes. And I suppose if it did require it,

Fairfax would not have discontinued its fee schedule. And certainly the State Bar has neither required nor suggested that local bars have minimum fee schedules, I take it?

MR. MILLER: As far as the State Bar is concerned, it has not required the local bar associations adopt a minimum fee schedule. That is correct, no.

QUESTION: But if some -- now, and you're still suggesting, however, that there's enough official action behind fee schedules to satisfy Parker?

MR. MILLER: As far as the State Bar is concerned, I don't think there's any question about it, sir.

QUESTION: What you mean there isn't any -- you mean that it does or it doesn't?

[Laughter.]

MR. MILLER: Well, I mean that in fact the Parker doctrine applies to the State Bar.

QUESTION: Well, it hasn't required anything of local bar associations.

MR. MILLER: Well, as representing the State Bar, it's the -- the suit is against the State Bar, as well as against the local bar association.

QUESTION: Yes, it is.

MR.MILLER: Now, whether or not a local bar association adopted a minimum fee schedule, --

QUESTION: Yes.

MR. MILLER: -- would be a matter for the local bar association to determine.

QUESTION: Well, I'll put it another way: Has the Supreme Court required the State Bar to adopt or suggest minimum fee schedules?

MR.MILLER: I think if you take a look at the --

QUESTION: Well, it hasn't, has it? It hasn't required it to suggest fee schedules.

MR. MILLER: As far as what the State Bar has done in this instance, which is to issue advisory opinions, there are two of them, that is clearly required under the Rules of the Supreme Court, Rule 10.

QUESTION: Yes, but that's --

MR. MILLER: As far as circulating the minimum fee schedules, Your Honor, I think clearly the State Bar had a duty in light of the reference not only in ethical consideration 2-18, but disciplinary rule 2-106, where references are made to customary fees and suggested fee schedules, to provide some guidance under the mandate from the Supreme Court.

QUESTION: Well, would you suppose that Parker v. Brown is satisfied, or the exemption is -- comes into being if the State simply passes a law and says, The sellers of tobacco in this State may now agree, if they want to, on prices.

MR. MILLER: I think, Your Honor, that this case is

completely different from the Asheville Board of Trade, which I assume you may be referring to, because there was a local association of warehousemen, who set about to restrict prices and restrict selling space on the floors of the warehouse.

This is not that case at all. Here you have --

QUESTION: Well, how about my question, though, Mr. Attorney General? A State simply authorizes a group of businessmen, if they want to, to fix prices. Now, does that bring into being Parker v. Brown, do you think?

MR. MILLER: No, sir, it does not.

QUESTION: And so if the Supreme Court simply authorized the State Bars to propound, but didn't require it, if you want to propound fees, go ahead; if you --

MR. MILLER: I thought I alluded to that point earlier, in saying that the State Bar has not promulgated a fee schedule here which is applicable to all attorneys in the State. All that the State Bar has done in this particular instance is to provide analyses of existing local minimum fee schedules.

As far as issuing the advisory opinions are concerned, there again that was part of the role of the State Bar, as the administrative agency of the Supreme Court. This is entirely different from simply allowing individuals, the businessmen whom you allude to, to go out and decide what they're going to do on their own. Because I think you have to

take a look at the minimum fee schedule in the context of the Code of Professional Responsibility. And the minimum fee schedule simply relates to one of the criteria set forth in disciplinary rules --

QUESTION: Do you think the State Bar would be within its authority, if it put out an order to -- as an adminsitrative agency of the State, which you suggest that it is, if it put out an order to all local bar associations to propound a fee schedule, --

MR. MILLER: Well, sir, --

QUESTION: -- and then said all lawyers must obey it. Is that within its authority?

MR. MILLER: It is not, because that has not been authorized by the Legislature or the Supreme Court of Virginia.

However, if in fact it were authorized by the Legislature and the Supreme Court of rirginia, I think it could, yes, sir.

QUESTION: Well, yes, but it isn't; it is not.

MR. MILLER: Well, no, and it hasn't been done.

QUESTION: Yes. All right. Thank you.

QUESTION: Mr. Attorney General, --

MR. MILLER: Yes?

QUESTION: -- in Virginia is there any State law or Court regulations specifically and explicitly regulating fees to be paid in the administration of an estate, of a decedent's

estate by the -- do you have probate courts, or I'm sure you have the equivalent, whatever you call them. In many States, I think there are statutes or Court rules, which explicitly provide what the fees shall be to counsel for the executor or administrator of a decedent's estate. Does Virginia have anything such as that?

MR.MILLER: No, sir. We do not.

QUESTION: Then those, I guess, then are covered by -- well, the 1969 State Bar report, are they?

MR. MILLER: Well, that would, as again just a report, --

QUESTION: Yes.

MR. MILLER: -- it was not a requirement that in fact those fees be charged.

QUESTION: Yes, but they are covered in there?

MR. MILLER: That is correct, sir.

QUESTION: This was simply by way of a service of the State Bar Association to its local components, is that what you suggest about that analysis?

MR. MILLER: Well, I think, may it please the Chief Justice, you have, as far as the Code of Professional Responsibility, two concerns: one, that there not be an excessive fee charged, nor that solicitations be permitted to occur.

And I think when you have one factor which may be

considered in determining the reasonableness of the fee, obviously any information which impinges on that determination should be made available, and that's precisely what the State Bar was attempting to do in this instance. But it was not requiring that such fee schedules be adopted locally, and in fact the majority of local bar associations, no such fee schedules were adopted.

QUESTION: You say that they also aimed at excessive charges. Do you have any opinions on that?

MR. MILLER: Well, I think the DR-2-106 clearly states that a lawyer shall not enter into an agreement for a charge or collect an illegal or clearly excessive fee.

QUESTION: Was that the case that was involved? I wasn't sure that was the case. I didn't understand that.

Was that the charge in that case?

MR. MILLER: You're talking about the present case?

QUESTION: No, in that case there. There seem to be several things in there.

Well, I can't hold you responsible for that.

I just find it kind of confusing is all.

MR. MILLER: All I'm trying to suggest to the Court is that the Code of Professional Responsibility deals with both aspects, excessive fees on the other hand, and solicitation on the other. And there's a separate --

QUESTION: Well, I define an excessive fee as being

very unethical, but I have great difficulty in finding a lower-than-minimum fee unethical.

MR. MILLER: Well, sir, I think if you take a look at the --

MR. CHIEF JUSTICE BURGER: Go ahead, you may respond.

MR. MILLER: All right. Thank you, sir.

What the --in the Appendix at pages 47 and 48, Opinion No. 170 of the Virginia State Bar --

QUESTION: Right.

MR. MILLER: What that does is simply to require a lawyer to produce evidence that such charges are not made for the purposes of soliciting business. And if in fact he shows that he's not using this as an advertising device, then there is no ethical violation.

QUESTION: But there seems to be a presumption, doesn't there?

MR. MILLER: No, sir, I would not regard it as a presumption, I would say it was --

QUESTION: Well, I have great difficulty in --

MR. MILLER: -- the burden of going forward in terms of the --

QUESTION: -- finding it a violation of ethics when you don't charge me as much as you should.

MR. MILLER: Well, sir, I think that --

QUESTION: I think that's very ethical, myself.

[Laughter.]

MR. MILLER: I think that --

QUESTION: You agree, don't you?

[Laughter.]

MR. MILLER: I'd enjoy representing you on some occasion, Your Honor.

[Laughter.]

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

We'll enlarge your time a little bit, from one minute to three minutes, counsel.

REBUTTAL ARGUMENT OF ALAN B. MORRISON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MORRISON: Thank you, Mr. Chief Justice.

I'd like to respond to the question that Justice Rehnquist asked about the commerce matter.

We believe that the Solicitor General is entirely correct in his position that the focus should be on the activity of the defendants, whereas we have here a broad-base conspiracy involving all of the attorneys in Northern Virginia who have agreed to a per se violation constituting price-fixing, and we look to the decision of this Court in Burke v. Ford for that kind of analysis, where we plainly have a restraint against title examinations which are not only an integral part of home

financing in Northern Virginia, but an absolute necessity because under the opinions of the Virginia Bar only the lawyers can give opinions on title examinations.

QUESTION: You're not however attacking this minimum fee schedule only in so far as it involves a title examination, are you?

MR. MORRISON: The complaint is directed in that, solely toward title examinations. The only evidence came in with respect to title examinations. We believe, however, that once fee schedule is declared unlawful with respect to that, we've met our jurisdictional requirement as to that, then the remainder of the fee schedule also must be declared --

QUESTION: Even though they would clearly not defect to interstate commerce at all?

MR.MORRISON: I think that's right.

QUESTION: Providing local little-old-ladies will, in a small town, and right in the middle of a State.

MR. MORRISON: That's right, Your Honor.

[Laughter.]

MR. MORRISON: On the assumption that you didn't have any relatives in another State or --

QUESTION: You didn't have any out-of-State property --

MR. MORRISON: That's right. That's right.

[Laughter.]

MR. MORRISON: That, then, is our position, Your Honor. That is our position, Your Honor.

That where we have a massive involvement, as we have here, with interstate commerce, that once we've established the jurisdictional nexus and shown that the transaction, the restraint here operates on an integral part of what is a larger interstate transaction, and we have a per se violation that under Burke we need not inquire further.

As the Court said there, such per se restraints inevitably affect interstate commerce. And that the kind of proof which Mr. Booker suggests is required, certainly is impossible to do with lots of little small transactions. So we look at the entire context, and in that way we believe that we satisfy the commerce requirements.

My time has been limited here, so I would refer the Court only to my brief with the issues -- with regard to the issue of prospectivity, and as far as the question of mootness is concerned, the case is certainly not moot as to the Virginia State Bar, which has, to this date, insisted upon its right to issue the Ethical Opinions, to continue them in force, it has not withdrawn them. It may, tomorrow, issue another updated fee report, with recommendations to the local bars, or indeed promulgate its own fee report as to which this Court should and ought, in this posture, to adjudicate the lawfulness of it.

And, finally, I would just say that with regard to the position previously taken by the Justice Department, those letters appear in the Appendix, at pages 49 to 58, and indicate in that context that the Justice Department was primarily concerned about the commerce question, indicating that the practice of law did not affect commerce. And for that reason, minimum fee schedules were not subject to the Sherman Act. Not because lawyers were exempt from the antitrust laws.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:03 o'clock, p.m., the case in the above-entitled matter was submitted.]

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