In the

Supreme Court of the United States

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,

PETITIONER,

V.

UNITED STATES,

RESPONDENT,

No. 76-1767

C.4

Washington, D. C.
January 18, 1978

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NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, Petitioner,	:	
v.	:	No. 76-1767
UNITED STATES, Respondent.	:	

Washington, D. C.

Wednesday, January 18, 1978

The above-entitled matter came on for argument at 2:05 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

LEE LOEVINGER, ESQ., 815 Connecticut Avenue, N.W., Washington, D. C. 20006, for the Petitioner.

HOWARD E. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1767, National Society of Professional Engineers against United States.

Mr. Loevinger.

ORAL ARGUMENT OF LEE LOEVINGER, ESQ.,

ON BEHALF OF THE PETITIONER

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

The National Society of Professional Engineers, the Petitioner here, appears in a most extraordinary position. It is opposing the Government and advocating the public interest by arguing for an ethical principle which protects the public against injury and clients against cheating. The Government, on the other hand, takes the position that these matters are not matters for consideration by the Court because it invokes the rubric of per se. Indeed, as I read the Government's brief, the term "public interest" doesn't appear in it once.

The principle that we sustain declares the solicitation of engineering work by competitive bidding before consultation with a client or determination of the scope of the work to be contrary to the public interest, and therefore unethical.

The alternative method of solicitation of work by bidding is the traditional ethical method which involves an

initial selection of an engineer by qualification, with fees proposed after consultation with the client and after determination of the scope of the work. It is basic to understand that engineering involves solving practical problems by the application of science -- there is a great deal of testimony on this subject -- so that each engineering problem is essentially unique and, indeed, each engineering solution is really a new scientific invention.

To determine the nature and the scope of engineering problems and their solution requires substantial consultation and negotiation between engineer and client. The fee is then calculated and the client is perfectly free to accept or reject any fee that is calculated and to engage the engineer or not engage the engineer and go on and negotiate with other engineers if he likes.

QUESTION: Is there a law preventing him from asking two engineers to embark on this process at the same time?

MR. LOEVINGER: It is impractical, Mr. Chief Justice. It has been found that it doesn't work. It's like trying to conduct a private discussion with two people. I don't know that there is any specific statement on the subject. There is explicit testimony that there is nothing to prevent a client from negotiating with as many engineers as he likes, even on the same day.

QUESTION: But if he doesn't like the first engineer's

estimate, he certainly -- you've already said --

MR. LOEVINGER: He is free to negotiate with a second, a third, a fourth, a fifth, as many as his patience will sustain. There is no question about that.

QUESTION: Are charges routinely made for these negotiations, Mr. Loevinger?

MR. LOEVINGER: No, sir, there are no charges made. There is no engagement. There is no obligation on the part of the client at this stage of the proceeding.

QUESTION: There is a good deal of engineering work that goes into the sale of some complex electrical equipment that's manufactured by electrical equipment manufacturers, too, is there not?

MR. LOEVINGER: This engineering principle -- this principle, incidentally, has four important exceptions. In the first place, it is confined exclusively to the design -- to work related to the design of real estate structures. It does not apply to research and development work. It does not apply to study contracts. It does not apply to, so-called, "turn key" contracts. Engineering work that relates to the design of products to be manufactured is not involved in this principle for the very good reason that products are tested before they are sold. The reason that this applies is that real estate structures aren't tested. There are no prototypes.

R&D work, on the other hand, results in a prototype.

A prototype is thoroughly tested before it is exposed to the public. Whereas, real estate structures are occupied by the public. There is no chance for testing them. If a building falls down, the public is injured. It is exclusively confined to matters that immediately affect the public interest.

QUESTION: So, you say, then, that this principle which you are enunciating, which your clients have enunciated, is an exception for the engineers from the per se rule only in the case of structures on real property?

MR. LOEVINGER: I don't say it's an exception to the per se rule, Mr. Justice Rehnquist. I say that the per se rule doesn't apply. The argument for the per se rule applies because of a strained construction which says that because this somehow or other affects price, therefore, it is price fixing, therefore, the per se rule applies. Actually, it's an entirely circular argument.

QUESTION: Perhaps I can ask you a question that will solve my problem more quickly.

Your distinction for antitrust purposes between manufacturers of electrical equipment, which may be a one-item deal and may take a great deal of engineering design skill, and your client's code of ethics is that your client's code of ethics applies only to structures on real property which are not pretested for safety.

MR. LOEVINGER: Yes, precisely.

QUESTION: Is there any way to -- I thought you said there is really no way to test the structure --

MR. LOEVINGER: Yes, Mr. Chief Justice.

QUESTION: In the sense that you do a prototype of an airplane, an automobile or a washing machine.

MR. LOEVINGER: Yes, Mr. Chief Justice. That's as I understood Mr. Justice Rehnquist's question, that this applies only to real estate structures, precisely because they are not subject to testing. If you are designing equipment for sale, whether it is automobiles or gadgets or jewelry, or whatever, these are articles that are designed and manufactured in prototype and tested before sale. Consequently, the public has the protection of this testing. And there are many opportunities for testing.

QUESTION: I suppose a substitute for that testing, or at least a partial substitute, is the building inspection which goes on from day to day or even hour to hour as a building is going up. Is that correct?

MR. LOEVINGER: There is, in fact, testimony on that precise subject which points out that the building codes are not adequate substitutes for the code of ethics because they are usually behind times, because they are not effectively enforced, because they do not subject the buildings to the same kind of tests as they get from the engineer who was on top of the job. In any event, we argue that to say that because

there may be laws that relate to the same subject, therefore ethics are not applicable, is as inappropriate as to say that because there are laws against homocide, therefore, we don't need the Fifth Commandment.

QUESTION: There was something wrong out in Bailey's Crossroads when that building came down, wasn't there?

MR. LOEVINGER: Yes, sir. That is one of the incidents that was testified to by a witness whom we called. Probably no case that has ever come before this Court involving the application of the rule of reason in which there has been testimony that has been so inclusive. We had as a witness the head of the company that engineers -- I am sorry, that insures over 60% of the professional engineers and architects of the country and who had over a period of seventeen or eighteen years personally investigated or in the later years when there became more, personally supervised the investigation of every malpractice claim that arose for this entire group of engineers. He kept statistics on the claims, on their causes. He investigated the conditions under which the solicitation occurred. And, as a matter of fact, he concluded -- and the testimony stands uncontroverted in the record -- that there was a high correlation between the awarding of engineering jobs by bidding and claims of malpractice, inadequacy or negligence, and it reached such a point that his company finally concluded that they would not issue malpractice insurance when there was any

evidence that a job had been awarded by bidding. That's how inclusive the evidence was. In fact, he testified that over 17,500 claims that he had investigated and at the time of his testimony the claims were coming in at the rate of ten a day, of which more than one every single day involved injury or death to a member of the public. That's how ubiquitous the threat that we are confronting in this case is. And the Government takes the position that this is irrelevant. They don't take the position that simply it's not true. They say it should not be considered by the Court, and the courts below believed them and proceeded on that basis. And that is why we are here today.

Now, there is the testimony of many eminent engineers which stands, essentially, uncontroverted in the record, as to the public value of the ethical method of awarding engineering jobs and of the bidding method. In the first place, the ethical method encourages a free exchange of information among engineers, the exchange of technical and scientific information, whereas, bidding tends to make them like businessmen who seek to hoard trade secrets, and there is a public value in this. There is no Government response to this point, and there were no findings by any of the courts below.

The ethical method, it was well testified, produces completely adequate plans which permits competitive bidding at the construction phase which, incidentally, costs about twenty

times as much as the total cost of engineering, and, therefore, increases and permits competition in construction, whereas, bidding results in inadequate and incomplete plans and specifications, and, therefore, frustrates competitive bidding at the construction phase. There was no response to this point in the Government's brief and no findings below.

The ethical method gives --

QUESTION: Mr. Loevinger, could I just ask a broad question. What is the scope -- In what area should anti-competitive agreements be permitted? Is it because you deal with very dangerous products or because it is a professional society?

MR. LOEVINGER: Mr. Justice Stevens, this is not an anticompetitive method. As we point out, and as I believe --

QUESTION: Well, then, if that's true, the potential for buildings falling down and the fact it is professional is really all irrelevant.

MR. LOEVINGER: No, sir.

QUESTION: What is the relevance then, if it is not anticompetitive at all?

MR. LOEVINGER: It's relevant because our ethical principle is being attacked by the Government under the Anti-trust Laws. But, as we explained, in fact, bidding is false, deceptive. Bidding cheats clients because it is not, in fact, genuine competition.

Let me give you an example and, as a matter of fact, there are two examples in the record. The Government had a massive discovery procedure and got thousands of documents. And, incidentally, this old illusion -- I am sorry to divert from answering your question. I will in a second.

QUESTION: You know, for years and years, it has been argued that the price-cutter is unethical and occasionally cheats the consumer. And he does, and he defrauds people and all that. But why is this industry different from other industries?

MR. LOEVINGER: It is different because when there is bidding for engineering services the consumer doesn't know what he is getting. There is no way to specify what he is getting.

QUESTION: These are unsophisticated buyers we are dealing with?

MR. LOEVINGER: No.

There is no possible way because you don't know. If a sophisticated buyer comes in and says, "I want to construct a bridge from Brooklyn to Manhattan. How much will you charge me to design it?" There is no way to tell what he is talking about. As a matter of fact, there is in the record an example of almost this kind of a proposal which the Government put in by way of exhibit and which it cites in its brief as an example of an invitation to bid which the Metropolitan Transit Authority

of New York talked about an invitation to present engineering bids on some -- they don't even say how many -- transportation centers -- some centers that serve five communities. And this invitation consists of five pages of questions. You don't even have to be an engineer to read this invitation and find out it doesn't specify anything. There isn't the vaguest idea of what it is they want.

QUESTION: Supposing you are selling computers and the customer doesn't understand very much about it, would that justify anticompetitive arrangements among computer manufacturers?

MR. LOEVINGER: Computers are not in the same situation.

QUESTION: I am asking -- trying to understand -- what is the scope of the area in which you say the per se rules don't apply or anticompetitive arrangements may be made? Is it the difficulty of understanding the business on the part of the buyer or the fact it is professional or the fact that it is dangerous?

MR. LOEVINGER: It is the fact that in the situation, the special situation presented on the record here it is impossible to specify in advance either what is sought or what is being offered. The buyer cannot specify. No matter how expert he is, he cannot know what it is that he seeks, because he has a problem. He does not have a notion of the solution to the

problem. He doesn't know how the problem is going to be solved.

QUESTION: The rule identifies to the medical profession and the legal profession quite clearly, because that characteristic applies there.

MR. LOEVINGER: As far as I am aware, medical problems are encompassed within a somewhat smaller scope and don't involve --

QUESTION: Surely the client when he goes to the lawyer doesn't understand the answer.

MR. LOEVINGER: No, he doesn't have to understand the answer.

The client who goes to the engineer doesn't know the question.

QUESTION: Does the rule that you are seeking the Court to adopt apply to the legal profession as well as the engineering profession?

MR. LOEVINGER: I am not prepared to say that it does because no such record has been made. We have a very extensive record here which presents precisely what the problems are in engineering. And, as I believe our initial brief points out, there are substantial differences between the engineering profession in this respect and the other learned professions, law and meddicine. The engineer deals with problems of a different kind of order, different magnitude, different kind. Engineers design vast structures. They don't treat individuals,

by and large. Whereas, the lawyer treats the individual.

There is, as this Court has held certain -- There are certain functions which this Court has said in Bates can be considered as repetitive and even as routine. I understand there are some differences among the Court on that point, but we accept the majority opinion of the Court. But the testimony is clear and uncontroverted that there are no such matters in engineering, that when a client goes to an engineer the definition of his problem becomes a matter that requires extensive consultation and negotiation before it is possible to begin to formulate a solution. And after the beginning of the formulation of the solution -- the testimony was that it took about a third of the total amount of work before you arrived at that point. And then you formulate a solution, then the engineer proposes a fee. The client is still free to reject it and to talk to other engineers.

QUESTION: Well, it is part of your argument, isn't it, Mr. Loevinger, that unlike the Virginia State Bar case, this is not price-fixing.

MR. LOEVINGER: This is not price-fixing. Indeed, this is the antithesis of price-fixing. It is inherent in the principle that we are arguing for that every single job shall be separately negotiated and a fee separately arrived at, based upon the scope of the work involved. I can imagine nothing more antithetical to price-fixing than the principle that we

here advocate.

QUESTION: Well, even assuming that it is a concerted action which affects price, nonetheless, your claim is, even accepting that much, which I know you don't, that in any event it's not price-fixing, and therefore, just not amenable to any per se rule that this Court has ever announced.

MR. LOEVINGER: Precisely. It is not price-fixing, sir. The most that can be said of it is that it affects the time and manner of arriving at the price. In that respect, we believe, that it is an a fortiori case, under Chicago Board of Trade.

QUESTION: Mr. Loevinger, does your principle forbid two engineers from engaging in the same conversations about the same contract with the same client?

MR. LOEVINGER: It doesn't say anything about that, Mr. Justice Rehnquist.

QUESTION: So, it's really just bidding. It doesn't forbid competition.

MR. LOEVINGER: That's correct, sir.

QUESTION: It is not unethical in this business for an engineer to talk with a client when he knows that the client has had precisely the same preliminary conversation with another engineer?

MR. LOEVINGER: Well, indeed, it has been testified that a client may have serially a whole series of conversations.

QUESTION: So that the principle is not to prevent competition among engineers.

MR. LOEVINGER: That's correct, sir.

QUESTION: Goldfarb, on the other hand, had a record which showed that no lawyer consulted -- and there was a great many of them -- would do the work for less than the price specified in the fee schedule. That was price-fixing, clearly, to the board tells.

MR. LOEVINGER: Mr. Chief Justice, if I remember Goldfarb correctly, it was specifically recited in your opinion that no lawyer even asked for additional information about the matter. He simply quoted the fee schedule price.

This principle requires engineers to get in and find out what the scope of the work is and, separately, consider and ascertain what this involves and to arrive at an independent judgment.

QUESTION: What if one engineer has had this preliminary conversation with a client, and he will give the client some figures, won't he?

MR. LOEVINGER: Yes, sir. This has been testified to.

QUESTION: Then the client goes to another one and has a conversation. And the second one says, "Have you talked with another engineer?" "Yes, I have." 'Did he give you some figures?" "Yes, he gave me some figures," and so he gives the

second engineer the figures. And the second engineer cuts them. I mean he just gives them a lower bid, if you want to call it that. Is that forbidden by your ethical principle?

MR. LOEVINGER: It would be forbidden if he did it simply on the basis of saying, "Tell me how much the other man --"

QUESTION: No, no. He has the conversation. He goes through the whole conversation.

MR. LOEVINGER: If it is his independent judgment that this is an appropriate figure, it is not forbidden, no, sir. It is encouraged. And it, indeed, occurs. There is testimony to that effect.

QUESTION: And the bid might be higher or lower.

MR. LOEVINGER: It might be higher or lower, correct, sir.

QUESTION: If bid is the right word. The response may be --

MR. LOEVINGER: I prefer that word, yes, sir.

QUESTION: Isn't there some restriction on when the information may be given by the engineering firm to the client?

MR. LOEVINGER: Yes, that is precisely what this is. The engineer is not to give the client such information until he has enough negotiation and consultation with the client to be able to ascertain the scope of the work. That's the restriction.

QUESTION: Not until after he has been selected to do the work.

MR. LOEVINGER: Well, it is an initial selection. It does not involve an engagement, Mr. Justice Stevens.

QUESTION: It does involve an initial selection and all that's left after that is to negotiate the price of the service.

MR. LOEVINGER: No, it has to negotiate the scope of the work, which involves the fee for the services. But it is impossible for an engineer to talk to a client until the client has selected that engineer for the purposes of conversation. This is simply inherent in the nature of the problem.

QUESTION: But a client can find out how much it is going to cost him and still walk away from the engineer.

MR. LOEVINGER: Yes, sir. No question about it.

QUESTION: He can't find out how much it's going to cost him until the engineer has a general notion of the scope of the work.

MR. LOEVINGER: Yes, sir. That is correct.

QUESTION: And if it is a big bridge, for example, the engineer might have to invest a great deal of time which he is then at risk of losing without compensation.

MR. LOEVINGER: This happens, yes, sir, no doubt about it.

I find that I have only ten minutes left.

Mr. Chief Justice, I think that the basic principle has been explained to the Court.

I would like to reserve my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Shapiro.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE RESPONDENT

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

It would be useful, I think, for us to look at the text of the ethical rule which is the subject of this litigation. It is printed in the Government's brief at page 4, as well as in the various opinions of the District Court, the Court of Appeals and findings. It defines competitive bidding as "the formal or informal submission or receipt of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis, prior to the time that one engineer or engineering organization has been selected for negotiation. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to be competitive bidding."

Now, the purpose and effect of the rule were found by the two courts below to be the total suppression of price

competition. The Court of Appeals described it as a price maintenance mechanism.

Petitioner does not challenge any of the findings of the District Court as clearly erroneous, and they were found not to be clearly erroneous by the court below.

QUESTION: Well, they just suggested, as I understand it, that a client may have a conversation with one engineer and get a price from him and have a conversation with another engineer and get a price from him.

MR. SHAPIRO: I must respectfully disagree with my colleague on that.

QUESTION: Yes, but that's what he --

MR. SHAPIRO: That's his contention.

QUESTION: That's his contention. And you think the findings below are contrary to that?

MR. SHAPIRO: That is my understanding. Certainly, Professional Policy 10(f), which is their interpretation of the rule that's incorporated into its enforcement and application, does provide that although a client may talk to other engineers sequentially, he can't do it simultaneously. He is required to completely sever the relations before approaching another firm.

Or, putting it another way, other engineers will not talk to the client while he is talking to another engineer. It is considered unethical.

QUESTION: Are there findings in the record that attest to that fact, or not?

MR. SHAPIRO: The District Court didn't make a specific finding to that effect. I would refer the Court to Joint Appendix --

QUESTION: Because, if it is, that's just saying what the rule means is that one engineer won't compete with another.

MR. SHAPIRO: That's what the rule means, according to what the courts below found, Your Honor.

QUESTION: You were going to give us an Appendix reference.

MR. SHAPIRO: Yes, Your Honor. This is in our brief at page 42. We cite Joint Appendix 5767 and 9930, that's Professional Policy 10(f). The professional policies are interpretations of the rules of ethics by NSPE's board of directors or board of ethical review, I've forgotten which.

QUESTION: You spoke of prohibition against talking to a second engineer until the severing of the relationship with the first one. Is there any relationship in the ordinary legal sense with the first?

MR. SHAPIRO: Only in the sense of a -- not in a legal sense, Your Honor --

QUESTION: You are having conversations.

MR. SHAPIRO: You are having conversations but the

second engineer will not talk to you while you are talking to the first engineer. This has a very practical effect.

QUESTION: Is that different from, let us say, the medical profession, unless there is open consultation?

MR. SHAPIRO: I imagine you can talk to more than one doctor at a time without --

QUESTION: If you don't disclose it.

MR. SHAPIRO: There is nothing in the record. I don't know the answer to your question, Your Honor. But I would like to return to the record here because this is a worthwhile point.

The rule on its face does not permit the disclosure of any price comparison information. So that, since you have no price comparison information, you simply cannot have any kind of price competition. There is no competition. It is something of a paradox, I think, for the Petitioner to argue.

QUESTION: How can the rule prevent -- keep a client from disclosing the price he got from one engineer to another?

MR. SHAPIRO: It can't keep the client from doing it, but it can encourage the engineer not to talk to the client. And that's what happens, because this rule is enforced, in effect, by --

QUESTION: Then the second engineer, under this rule, shouldn't listen to any price information received from the former one.

MR. SHAPIRO: Shouldn't even talk to the client until he knows that the first engineer has totally withdrawn. If there has been a negotiation and they have failed to reach agreement on a price, then he can come in and talk.

What we have, therefore, is not any kind of price comparison or price competition. You have nothing but bargaining and that's all that's allowed. Now, this has significant practical effects. It means that the client seeking to go from one engineer to another has a very significant search cost. It is an expensive project. It takes time.

QUESTION: How can an intelligent bid be made without -- on a large project -- without a very great deal of exploration and study and discussion? They don't have specifications handed to them, as a contractor does, do they?

MR. SHAPIRO: No. And that's why no one suggests that there has to be rigid, absolute advertised price bidding. The Sherman Act doesn't require that. What the Sherman Act condemns in this case is the collective imposition on clients and on engineers of a bar that let's them consider any aspect of price. They can't even ask the engineer, "What's your hourly rate?" to give themselves some idea before they begin going further.

These are matters --

QUESTION: Now, wait a minute. You say that they can't ask the engineer. These rules can't control the clients.

The engineer may be prohibited from quoting an hourly rate.

MR. SHAPIRO: I mean as a practical matter they can't ask, because not only will the engineer not quote it, but if the client persists in asking any engineer, the rule says, and the record shows, that the engineer approached must withdraw.

In short, what we would have here -- and this is how the rule is actually enforced -- is not only a rule against price comparison information, but a rule that restricts the disclosure of price information except where minimum fixed fee schedules are involved and, in addition, is enforced by boycotts. And we have incidents where that kind of a threat has been made.

QUESTION: Mr. Shapiro, you said toward the outset, I think, of your remarks, that there was no claim here that the findings of the District Court, approved by the Court of Appeals, were erroneous.

I call your attention to Appendix to the Petition for Writ of Certiorari, page A-11, which no more than incorporates the -- sets out, reproduces the opinion, Judge Leventhal's opinion for the Court of Appeals, in which he says, and I am reading, "We approve the approach taken by the district court, its comment that the Rule is classic price-fixing, and hence illegal 'per se.'"

I understood Mr. Loevinger strongly to contest that,

that this is, whatever else it is, it is not classic price-fixing to which any per se rule has ever attached. And the District Court and the Court of Appeals explicitly found that it was.

MR. SHAPIRO: Yes, they did, Your Honor, and Mr. Loevinger contests the ultimate --

QUESTION: No, no, this characterization of it. He says that this is not price-fixing of a kind that any per se rule has ever attached to, in any decision of this Court. Didn't you understand him to say much the same thing.

MR. SHAPIRO: He said in his contention in this Court --

QUESTION: And in his brief and in the District Court and in the Court of Appeals, I presume.

MR. SHAPIRO: But, as far as the findings of fact in the District Court, the specific findings, he does not suggest that this rule has any other effect than what has been described for it. He doesn't argue that there is any disclosure of price information. He doesn't argue that there is any price competition under the rule.

QUESTION: But that's quite different from price-fixing, which is an agreed upon, uniform single price. That's what price-fixing means.

QUESTION: Goldfarb price-fixing.

MR. SHAPIRO: In that sense, the engineers have agreed

among themselves to maintain a certain price, the answer is no, they haven't agreed --

QUESTION: So, the District Court and the Court of Appeals were wrong if we are talking about price-fixing in that rather pristine sense of its --

MR. SHAPIRO: The Court of Appeals was more careful. In its opinion, it recognizes that --

QUESTION: I just read you what the Court of Appeals says, "We approve of the District Court's description that this is classical price-fixing."

MR. SHAPIRO: Because of its overall effect, because there has been a total suppression of price competition here. There can't be any --

QUESTION: Well, on the tip of your tongue, what are the cases here that say that if competitors agree not to compete, that is per se illegal?

MR. SHAPIRO: Well, we would start with Socony-Vacuum. We would point to Container Corp. We would point to --

QUESTION: Did the cases say it's per se because it is the other side of the coin from price-fixing?

MR. SHAPIRO: In effect, yes. If there is a tampering with the price system that so operates that price competition can't function -- and that's what's involved here -- then that is also illegal, per se. That's what Socony says. That's

what Container describes, and that is what we are arguing here.

QUESTION: Where would we find in this record evidence or a finding that they agreed in advance, the engineers agreed among themselves in advance, on certain prices, such as is found in Goldfarb?

MR. SHAPIRO: You won't find that. We don't charge that. What we charge is a total suppression of price competition. What the District Court found was a total suppression of price competition. What the Court of Appeals affirmed was a finding that there was a total suppression of price competition, and they found it so closely related to price-fixing that they considered it to be the same thing.

QUESTION: How could they have found agreement not to compete on the facts in this record?

MR. SHAPIRO: The language of the rule so provides if you totally suppress all price comparison information you are agreeing --

QUESTION: There is nothing like any sort of a territorial allocation, or any of those agreements not to compete. Isn't there a good deal of competition among engineers to get clients' business.

MR. SHAPIRO: Yes, there is, but not price competition, Your Honor, and that's what we are talking about, total suppression of price competition, or the possibility of price competition.

I just suggested a moment ago that no one is arguing that clients or engineers have to resort to some sort of rigid competitive bidding. They can decide for themselves the extent to which they will consider price.

QUESTION: What if the rule was no engineer gets a price until he has had a talk, a good enough talk, and at the end of it he can give a price, but that it is perfectly all right for a second engineer to talk to the same client, know what the price offered was, but after he has had a good enough talk he can give a price. Now, if that were the case, would you be here or not?

MR. SHAPIRO: If we permitted simultaneous discussion that would be a different case, but simultaneous discussion is not allowed, only sequential discussion is allowed under this rule, and this effect --

QUESTION: And it is not enough for you, if there can only be sequential discussion, but the second fellow can know all he needs to know about what the first fellow offers that still isn't enough for you?

MR. SHAPIRO: If there can only be sequential discussion, then the client suffers a very severe and burdensome additional cost.

QUESTION: The client can always go back to the first engineer.

MR. SHAPIRO: Always go back to the first, but the

point is that there isn't an opportunity for price comparison in the way that price comparison is available everywhere else in our economy.

QUESTION: In this very large record that's been compiled, is there any expert testimony making comparisons, analogies with the legal profession, the medical profession?

MR. SHAPIRO: No, Your Honor. There was expert testimony of this kind. There were officials and members -- officials past and present of NSPE who, as engineers, testify that in their opinion price competition or price comparison would be very harmful and undesirable. When they were asked on cross-examination: "Do you have any specific instances in which it has ever been shown that safety is impaired by the existence of some consideration of price," they would invariably answer, "I have no specific instances."

Reference was made to the testimony of an insurance executive, Mr. Duval. Mr. Duval's testimony certainly established that engineering is related to safety, but his testimony does not establish that price bidding or price competition is automatically tied to unsafe practices. For example, he mentioned the Bailey's Crossroads incident which was in Mr. Duval's testimony. Mr. Duval said, "That building fell because cement supports were withdrawn too soon. That's a construction man's error." And the testimony went on to say, of course, "The case is in litigation. I can't say any more."

QUESTION: Was there an appropriate foundation laid for his opinion? Did he testify that he had examined the Bailey's Crossroads --

MR. SHAPIRO: No, he didn't, Your Honor. He was testifying from his experience as an insurance executive in the business of insuring engineers and construction people. He gave a great many examples, but if each one is examined in detail, one finds that what he described was the fact that accidents can occur when there is bad engineering or dishonest engineering.

QUESTION: In the Bailey's Crossroads incident had the engineers competed for the engineering job?

MR. SHAPIRO: The record doesn't show, as far as I know.

Well, proceeding on with the effects of this rule, what we see is that it is based on two premises, one, that engineering clients should always be kept in ignorance of the price comparison information, for their own good. They can't be allowed to know anything about price comparison information, and engineers can't be trusted to do their job safely if clients can make price comparisons. So it denies relevant information to the client. It prevents the engineers from offering services on their own terms. It allows only price bargaining, not price competition, because it totally suppresses price competition. The rule is certainly not pro-competitive, unless you want to

say that the total suppression of competition is pro-competitive.

Now, these were the findings --

QUESTION: The question is was it a per se violation, not admitting the possibility of any justification in terms of the rule of reason?

MR. SHAPIRO: And our argument is --

QUESTION: Is, of course, it has to be that it is.

MR. SHAPIRO: Yes, Your Honor, and that it really is a classic case of price-fixing because it serves as a price maintenance device.

The economic testimony in this case by Professor Arnold of the University of Illinois, who was a Government witness, was to the effect that with this kind of a rule engineers do not have any incentive to cut their prices, because they are not competing with each other. They have an incentive to cut the costs, but not the prices. So you have a kind of price maintenance effect. And that's what Judge Leventhal summarized these findings as meaning.

Now, I should say that a per se rule here does not bar NSPE from adopting any kind of specific rules. It requires aims at fraud, at deception, at overreaching, at disregard of engineering standards. These are rules aimed at specific abuses, but they were not before this Court. They were not before the District Court. The only thing before the Court is this total aberration of price competition.

It is suggested that the case should, nevertheless, be reviewed under the Rule of Reason because a learned profession is involved, because price competition isn't feasible in engineering or because engineering affects public safety.

Well, as I understand it, NSPE now concedes that except for real estate construction price competition is feasible in engineering. It is certainly practical for routine tasks. It applies in the most difficult area of all, research and development contracts, where it is most difficult to predict what costs will be. And the engineers, themselves, have had fixed-fee schedules for years in their state societies which this rule specifically refers to. Now, that, again, implies that there are certainly tasks where price information can be disclosed.

The second possibility for a Rule of Reason argument is that there is a learned profession exemption. Certainly, in Goldfarb, there was a note of caution sounded in Footnote 17. The Court, in holding that Goldfarb involved classic price-fixing and that the learned professions were not exempt, also said in Footnote 17 there might be situations where the public service obligations of the learned professions require a different approach under the Antitrust Laws. "We express no view except with respect to the matters before us."

I think the short answer is that, yes, in the learned professions there may be different public service

requirements that justify a Rule of Reason approach where they wouldn't apply in other professions, or other activities.

QUESTION: How do we know a learned profession when we see one?

MR. SHAPIRO: That is one of the problems, that the term is not defined and would have to be explored. I don't contest the learned profession nature of the engineering profession. We didn't contest it below. But I do suggest that whatever the scope of the learned profession caution light in Footnote 17 may be in Goldfarb, it does not authorize the total suppression of all price competition, because price is the central nervous system of our economy.

Finally, there is another aspect to this learned profession problem. Up to now in the Antitrust Laws, we have not considered Rule of Reason or per se, except in terms of the marketplace, in terms of competitive effects. A per se rule is a rule which, on balance between pro-competitive effects and anti-competitive effects, almost always has anti-competitive effects, and, therefore, we don't make any further inquiry.

A Rule of Reason approach says, "Let's see what the other competitive effects are." But there has been a caution in the law since Trenton Potteries not to step beyond competition, which is what the Sherman Act is concerned about -- for the courts not to step beyond competition and to go into the questions of social policy that involve other justifications.

Now, in this record, we have a rather strongly contested contention that public safety requires the abolition of price competition in engineering. There is a contrary view. We presented an expert witness, former Assistant Secretary of the Air Force, who said there is no objective evidence to support the view that price competition results in unsafe practices.

QUESTION: Mr. Shapiro, what do you think Congress had in mind when it enacted the Brooks Act?

MR. SHAPIRO: The Brooks Act is a good example of what we are contending for, namely, that the client should decide for himself whether, and to what extent, he wants to consider price. The Brooks Act certainly wasn't an exception to the Antitrust Laws. It represented a judgment by Congress in a particular area of Government procurement that engineering services would be acquired by the so-called "traditional method." Many States also have such provisions and we don't deny that. That's a case where Congress did the balancing and Congress made the determination. It, incidentally, did not appear to be motivated primarily by safety. It was concerned more with the traditions of the profession, and it expressly said in the report --

QUESTION: May I ask you this question: Did the legislative history include any discussion of this particular ethical rule?

MR. SHAPIRO: I don't recall, specifically, that it did. It did include a discussion of the then pending report of the Commission on Government Procurement and noted that the matter was still under discussion. That report, which is in the record, concluded here that -- It's CX-346 -- concluded that there is no objective evidence that there is a threat to safety because of price competition.

The problem with relying on public safety arguments in the context of an antitrust case in which a court would balance public safety against competition or some other non-competition factor against the suppression of price competition is that it is a slippery slope. That's the term that was used in their reply brief. The same argument could justify privately imposed restraints in most industries. You could take the construction industry. The same --

QUESTION: Doesn't your case depend on your making stick the per se approach?

MR. SHAPIRO: That is the case which we have made, Your Honor, and we stay with that.

QUESTION: And you don't think the Brooks Act bears at all on whether or not the per se rule should be applied in this case?

MR. SHAPIRO: No, we do not, Your Honor.

QUESTION: Then you have Congress saying, "We prefer to get engineering services by this particular method, but

just remember that we have another statute that says that no one else may do it. No one else shall have this privilege."

MR. SHAPIRO: Congress will, in effect, balance the considerations itself and lift or --

QUESTION: And say that because it is such an unreasonable method that it should be, per se, illegal.

MR. SHAPIRO: What is unreasonable is the concerted imposition --

QUESTION: Well, your answer is yes. Can you say that these two statute, side-by-side, you can ride both horses?

MR. SHAPIRO: Yes, we can, Your Honor.

And I will explain it in this way. What the Sherman Act is aimed at is the concerted imposition of the suppression of price competition by private action. What the Brooks Act reflects is the decision by Congress or an appropriate Government agency to forego price competition.

If this case stands, it doesn't mean that there is going to be price competition across-the-board. Some engineering clients are going to say, "Let's just pick the engineer we consider the best and talk with him. If we can't reach a price, we'll go through sequential negotiations." Some people will attempt what was attempted by the Department of Defense here until it was frustrated by a boycott by the National Society of Professional Engineers, as the District Court expressly found. That was an experiment, under which there were two proposals:

"Let's have your technical proposals," which the engineers were willing to submit, and "We will rank you on your technical proposals, engineers, and then submit to us your price proposals, and then we will see whether we change our mind about our rankings of the technical proposals."

That project failed in the summer of 1970.

QUESTION: Did that take into account whether the particular engineer who had made a bid had ever engaged in that kind of work before? Suppose it was a bridge to replace the Brooklyn Bridge, and --

MR. SHAPIRO: It would certainly take into account things like reputation and ability. Clients are free to do this under the position we take. They may not want to use any kind of price competition. They may not want to know anything about price. It depends on the nature of the project and the circumstances. Some projects are so repetitive that they can almost be handled like standard construction bidding contracts. Others would be so unique, for instance, a research and development contract, to which price competition applies, incidentally, that you might not really want to let it in the ordinary sense.

The extent to which price goes into the equation is something for the client and engineer to decide for themselves. That's all we are arguing for, not to have it determined by a private organization.

QUESTION: That sounds something closely approaching

a Rule of Reason.

MR. SHAPIRO: Well, we think that it follows almost automatically from applying the per se approach. The consequence -- I mean as far as the client is concerned -- applying the Antitrust Laws in this way, lets the reasoned choice, the Rule of Reason, let me put it that way, be applied by the individual client or the individual engineer.

QUESTION: Of course, that's not what the Rule of Reason means as a term of art in Antitrust Law, at all, is it?

MR. SHAPIRO: No. In Antitrust Law, the rule really means that balancing pro-competitive and anti-competitive effects, not all kinds of social considerations.

QUESTION: And it doesn't mean you can justify it for safety reasons either. It justifies for competitive reasons. The rule tends to promote competition.

MR. SHAPIRO: That is exactly the point. And if there is to be a justification for safety reasons, that the Congress should make that kind of decision.

Now, one very brief word on the judgment in this case. It has been attacked as being over-broad and violating the First Amendment. We think that if it is examined it will be seen that if the finding of liability stands here that this judgment precisely fits the violation found, because it simply calls for a correction of the practice by eliminating the ethical restraint from any provisions of NSPE's rules by

barring any attempt to achieve the same result through affiliated state societies, by eliminating the fixed-fee schedules mentioned in any of the rules and preventing continuation of the practice.

QUESTION: You are speaking of the judgment as modified by the Court of Appeals?

MR. SHAPIRO: As modified by the Court of Appeals.

QUESTION: And the modification you do not quarrel with?

MR. SHAPIRO: We do not quarrel with it, no.

QUESTION: Mr. Shapiro, one last question. What is the significance -- What's the Government's view of the significance of the fact, as I understand it, that before serious negotiations begin and when it is appropriate to talk price there is a lot of work done by the engineering firm and there is no charge during that period? That is a correct version of -- description of what happens, isn't it?

MR. SHAPIRO: It's not absolute. It varies. There may be some preliminary discussion. There may be a charge for what amounts to an initial consultation. The rule --

QUESTION: I had the impression the general practice was that it takes quite a bit of work to find out what a job -- what is the scope of the job. And during that period the preliminary work is really not paid for.

MR. SHAPIRO: Let me refer the Court to a definition

of engineering services in Professional Policy 10(g) which was adopted by the engineers in 1972, and which is the basis for their restriction of this practice to real estate construction. Prior to that time, under Policy 10(f), it applied to everything, as we read the rule, at least it literally did.

It defines engineering services as including pre-feasibility and feasibility studies. So that comprehensive and general planning, preliminary studies, preparation of drawings, plans, designs, specifications, in short, the rule defining engineering services recognizes that there may be paid services that amount to fairly preliminary conversation, preliminary study.

QUESTION: Do you understand the rule to permit the firm to quote in advance a fee on doing a pre-feasibility study?

MR. SHAPIRO: It is an engineering service, and therefore they cannot do that either. They cannot quote a price, or they can't even tell what their hourly rates are.

QUESTION: Until after the pre-feasibility study is done?

MR. SHAPIRO: Until after they've negotiated, until they've been accepted by the client.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Loevinger?

REBUTTAL ORAL ARGUMENT OF LEE LOEVINGER, ESQ.,

ON BEHALF OF THE PETITIONER

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

I think that the last colloquoy illustrates the difficulties of the per se rule as applied in this case. Mr. Shapiro didn't try the case. I believe he is not fairly familiar with the record and his application of 10(g) is simply erroneous.

Mr. Justice Stevens is entirely correct that in negotiating the scope of the work and the possibility of engagement by a client there is no charge. This is eminently clear. The difficulty is that you can't take a simple rule, particularly when drafted by engineers -- you can't even take one drafted by lawyers -- but you can't take a general rule drafted by engineers and apply it without understanding the circumstances out of which it grew, any more than you can take the Sherman Act and talk about the Rule of Reason, the per se rule and all the rest of this, without having some idea of the interpretations made by this in other courts. And, indeed, the engineers had a formal body known as the Board of Ethical Review which made these interpretations and there are these interpretations, and there is a body of testimony relating to this matter which makes it perfectly clear -- and Mr. Shapiro misinterprets Policy 10(g). Incidentally, earlier in his

argument, he referred to Policy 10(f), which was superseded by Policy 10(g), and simply isn't in effect and isn't involved.

QUESTION: What about simultaneous conversations, Mr. Loevinger?

MR. LOEVINGER: Mr. Justice White, I think the difficulty with simultaneous conversations are that they are a little bit like simultaneous consultations with a doctor. It is very difficult to see how you could get simultaneous --

QUESTION: That may be, but does the rule forbid them?

MR. LOEVINGER: There is nothing in the record, nothing in the rule that I am aware of that forbids them.

QUESTION: Mr. Shapiro says that there is.

MR. LOEVINGER: Well, there is nothing in the record. I am familiar with the record. I know the record. I've read the briefs, and if there is anything in it I would like to have it referred to because I am not familiar with it. The rule is as it stands, and there is simply no testimony.

QUESTION: Well, what was the basis for his saying then -- I guess I should have asked him -- saying that the rule forbids an engineer to talk to a client if he is already talking to an engineer, until his relationship with the first engineer has terminated? What's the basis for that?

MR. LOEVINGER: There is testimony that once a client has begun talking to an engineer he has to complete his

conversations with that engineer before consulting another. That they say.

QUESTION: So, he is right on that. You just won't find under this rule one engineer dealing with the same client that already has an engineer.

MR. LOEVINGER: Marching in in the middle of a consultation, that is correct.

QUESTION: Simultaneous conversations are not permitted under the rule?

MR. LOEVINGER: I wouldn't say they are not permitted. They are certainly not favored.

QUESTION: On a strict factual question like that, I am surprised that counsel are not able to come to closer agreement, frankly.

MR. LOEVINGER: The question -- There were seventeen witnesses. I don't believe the question was asked of any of them.

QUESTION: It certainly is not irrelevant, is it?

MR. LOEVINGER: I think it is not a practical -- It is about as impractical as simultaneous consultation with doctors. I believe this is the difficulty.

QUESTION: Mr. Loevinger, what does this mean in the rule: It says -- according to page 4 of the Government's brief -- an engineer requested to submit a fee proposal of bid prior to the selection of an engineer or firm subject to the

negotiation of a satisfactory contract shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work.

What does that mean?

MR. LOEVINGER: It means that if an engineer is asked to come in and give a bid prior to the opportunity to discuss with the client the scope and nature of the work that he shall not do it. The testimony is pretty clear on that.

QUESTION: Let me see if I can get that concretely. Suppose a building is pointed to by a prospective client and they say to the engineer, "We want a building just like that one. What will it cost? Will you give us a figure right now?"

MR. LOEVINGER: Mr. Chief Justice, the repetitive project is a false issue. If what a client wants is a building just exactly like the one that has been erected, all he has to do is to use the plans and specifications for that building. He has already got them. By definition, he's got the building, he's had it erected.

QUESTION: I am speaking now of a building that he did not engineer himself, someone else did. Is there anything to prevent him from going to the other engineer and getting the plans?

MR. LOEVINGER: The testimony is clear that there are not two identical buildings. You can't build it in the same

place. In a different place, you've got different problems. You have sub-soil problems. You have wind problems. You have traffic problems. There are a host of different problems. And, in order even to determine the distance between partially repetitive projects you have to consult with the client and find out what it is. Where do you want that other building? Where is it going to be designed? What's the purpose? What's the soil going to be like? There are a host of problems. They are explored at great length in the record, and this is precisely the problem. There aren't identical problems. You can't do this. That's a hypothetical that simply --

QUESTION: Suppose I am a client and I go to an engineer and I have as much talk as Mr. Loevinger thinks I ought to have. And I talk to him and I want a proposal from him, and the engineer gives it to me. And then I say to the engineer, "By the way, I am going to take this proposal and submit it to another engineer. And I am going to certainly talk to him all he wants to talk about." Now, what would be wrong with that? Why would that be unethical?

MR. LOEVINGER: There is nothing in the Rules of Ethics that relate to this. As a matter of fact --

QUESTION: I thought you said the second engineer shouldn't talk to the client until he has terminated his relationship with the first.

MR. LOEVINGER: At this point he has.

QUESTION: He hasn't. He says to the first one, "I am going to come back to you if I can't get a better deal out of the next fellow."

MR. LOEVINGER: He can say that, but he has terminated those talks with the first man. The consultation has been completed. This, in fact, does happen.

QUESTION: Then, the word "terminated" is about like talking to a used car dealer. You know, you say -- one guy will give it to you for $4400 and you say, "I'll come back in a few hours and if it is still there I'll buy it." Meanwhile, you go out and talk to three or four others.

MR. LOEVINGER: This is conceivable. I don't know. I understand that the practice isn't exactly like that of used car dealers, but there is nothing that relates to this, the testimony is clear, that there can be and are serial consultations.

QUESTION: But "terminated" is not a word of origin --

MR. LOEVINGER: No, it is not.

QUESTION: Suppose the first man says, "Number one, I want this distinctly understood, I have not terminated this. I am still proceeding with it, but I want to talk to somebody else."

I don't think you can terminate it. He has to terminate it, doesn't he?

MR. LOEVINGER: I don't know.

Mr. Justice Marshall, I'd have to say that the record -- again, this is one of those things that, despite everything, was not explored either on examination or cross-examination. It would seem to me that had the conversations progressed to the point where the first engineer had been fully consulted, had made a fee proposal as to the scope of the work. The man said, "Okay, now I want to go see somebody else," that that is termination for the purposes of this thing. The point is these are not words of art. We have no problem with the concept that this may be inartistically stated. Indeed, we have stated from the very beginning that it can be reformulated, that the principle can be restated in any manner that is necessary in order to explore --

QUESTION: Mr. Loevinger, just using lawyer's language, when does this rule require the engineer to withdraw from consideration of the proposed work? Describe some situation in which the engineer has a duty under the rule to withdraw. When does that happen?

MR. LOEVINGER: When he is asked to give a fee bid before he has had an opportunity to study the nature and scope of the work.

QUESTION: I see.

QUESTION: Mr. Loevinger, wouldn't you say that the rule at least forbids this. The client calls up the engineer and says, "I want to talk to you about a building." When the

engineer arrives there, he finds another engineer there. And the client says to both of them, "Now, look, we are going to have to talk as long and as hard as necessary so you both will understand the scope of the work and everything else. And then I want you both to listen, ask as many questions as you want to and I want you both to go off and give me a proposal."

Now, I take it the rule forbids that.

MR. LOEVINGER: The rule forbids that.

QUESTION: Why would it forbid that? That certainly isn't impractical.

MR. LOEVINGER: The engineers consider it impractical, Mr. Justice White. They consider simultaneous -- that they are stepping on each other's toes.

QUESTION: So that is an example when both engineers should withdraw.

MR. LOEVINGER: At least one of them, in fact, yes, should.

What this basically all comes down to is that if you apply the per se rule there is no way to accommodate what the Government and the Court of Appeals concede to be a legitimate objective to the demands of the Antitrust Law. It is only by the application of the Rule of Reason that the law can be accommodated to what both the Government and the Court of Appeals concede to be a legitimate objective.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:06 o'clock, p.m., the case in the above-entitled matter was submitted.)