

In the

ORIGINAL

Supreme Court of the United States

AMERICAN MEDICAL ASSOCIATION ET AL., :

Petitioners, :

v. :

FEDERAL TRADE COMMISSION :

No. 80-1690

Washington, D. C.

Monday, January 11, 1982

Page 1 thru 51

ALDERSON  REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x  
:  
AMERICAN MEDICAL ASSOCIATION ET AL., :  
:  
Petitioners : 80-1690  
v. :  
:  
FEDERAL TRADE COMMISSION :  
:  
- - - - -x

Washington, D.C.  
Monday, January 11, 1982

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 11:53 a.m.

APPEARANCES:

NEWTON N. MINOW, ESQ., Chicago, Illinois; on behalf  
of the Petitioners.  
HOWARD E. SHAPIRO, ESQ., Federal Trade Commission,  
Washington, D.C.; on behalf of the Respondent.

- - -

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
NEWTON N. MINOW, ESQ., on behalf of the Petitioners	3
HOWARD E. SHAPIRO, ESQ., on behalf of the Respondent	23
NEWTON N. MINOW, ESQ., on behalf of the Petitioners -- rebuttal	46

- - -

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in the American Medical Association against the Federal Trade Commission.

I think you may proceed whenever you're ready, Mr. Minow.

ORAL ARGUMENT OF NEWTON N. MINOW, ESQ.,  
ON BEHALF OF PETITIONERS

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

This is a case where the FTC has been obsessed with the past, unconcerned with the present, and blind to the future.

This Court decided the important Goldfarb case in June of 1975. The American Medical Association immediately recognized the profound implications of Goldfarb for the medical profession and promptly undertook a major revision of its ethical standards and policies in light of Goldfarb. Without any investigation of any kind to learn the AMA's position, the FTC filed this complaint in the dark. We first heard of it when the FTC had a press conference in Washington and a reporter called the AMA's office in Chicago to inquire about the AMA's position.

Once it had been filed, the FTC gave its attention only to the past. Five years later Judge Mansfield observed



1 the Commission "was still pressing for its pound of flesh."  
2 He said the FTC's action "has been unjustified, unnecessary,  
3 a waste of administrative and judicial resources, and in my  
4 view the FTC," he said, "is engaged in the futile business  
5 of beating a dead horse."

6               Why? How did such a thing happen?

7               Ethical principles in the medical profession are  
8 nothing new. They go back thousands of years before the  
9 time of Hippocrates. In 1975 when this case began most  
10 states throughout the United States had laws that prohibited  
11 professional advertising. In the light of Goldfarb,  
12 however, we recognized there was a need for change. So in  
13 the spring of 1976 the AMA published a new statement on  
14 advertising and solicitation.

15              QUESTION: Well, does Goldfarb deal with  
16 advertising or solicitation?

17              MR. MINOW: No, Mr. Chief Justice, but it did deal  
18 with the fact that the learned professions were subject --

19              QUESTION: Were not exempt.

20              MR. MINOW: Were not exempt from the antitrust  
21 laws. And we knew, I must say as well, we knew Bates was  
22 pending in the lower courts on its way up here, so we were  
23 aware of the change, the fundamental change that was  
24 evolving in the law with its relationship to professions and  
25 with its relationship to the First Amendment in

1 advertising. We could see the winds of change were coming  
2 fast.

3           So what we stated in the spring of '76 was this:  
4 the public is entitled to know and the physician is entitled  
5 to advertise useful information provided -- including  
6 information about fees -- provided only that the information  
7 was not false or misleading or deceptive. And we suggested  
8 and defined four practices that we believe have a  
9 significant capacity to mislead patients.

10           Now, that was 14 months before Bates was decided.  
11 Consumer groups, including the Ralph Nader organization,  
12 immediately congratulated the AMA as being the first  
13 profession to move with the evolving law. We went to  
14 Washington. We told the FTC what had happened, what we had  
15 already done about advertising. To no avail. We told the  
16 FTC of our new positions on contract practice, practices to  
17 which the FTC has not objected to this day. We got nowhere  
18 with the staff so we filed a formal motion with the  
19 Commission and said to the Commission you ought to  
20 reconsider this in light of what we've done. Besides, the  
21 Supreme Court is considering Bates. It's on the docket of  
22 the Supreme Court. Why don't you wait until the Supreme  
23 Court decides the law in Bates and then decide whether our  
24 current positions are appropriate to meet the law. Denied.  
25           June '77 this Court decided Bates. The Court's

1 opinion, written by Justice Blackmun, refers to the AMA's  
2 current standards. The Court says professional societies  
3 should help to define the line between deceptive and  
4 nondeceptive practices -- precisely what the AMA had done 14  
5 months earlier. And as the law further developed, values  
6 changed, the AMA continued to revise and to improve its  
7 guidelines.

8           You would think the FTC would have given us a  
9 medal. Instead, we had a long, tedious trial concentrating  
10 on the events of the '20s, and the '30s, and the '40s, and  
11 the '50s, and the '60s and the early '70s, all pre-Goldfarb,  
12 in what Justice Jackson when he wrote the opinion in 1952 in  
13 Oregon State Medical Society called a great amount of  
14 archaeology.

15           After exhuming all this archaeology, the FTC  
16 introduced no evidence whatever on the competitive impact of  
17 the AMA's current policies on price, quality, availability  
18 of medical care.

19           We called witnesses like the late Dr. Michael  
20 Halberstam, the late Dr. France Inglefinger, who was then  
21 the editor of the New England Journal of Medicine; and they  
22 told how the practices that we thought were misleading could  
23 horribly misguide and mislead patients, particularly the  
24 poor, the unsophisticated.

25           We showed through the tragic testimony of victims,

1 particularly women who responded to ads about cosmetic  
2 surgery, who ended up being butchered on a filthy operating  
3 table and even to death.

4           The response of the FTC was rescind all your  
5 guidelines, get out of the business of trying to define the  
6 line between deceptive and nondeceptive practices, make no  
7 pronouncements whatever on advertising for two years, and  
8 then even after the two years don't do anything without our  
9 permission first.

10           We went to the FTC. We said good lord, if  
11 Hippocrates were alive today, he'd need your permission  
12 before he could write the Hippocratic oath.

13           CHIEF JUSTICE BURGER: We'll resume there at 1:00.

14           (Whereupon, at 12:00 p.m., the case in the  
15 above-entitled matter was recessed for lunch, to be  
16 reconvened at 1:00 p.m.)

17

18

19

20

21

22

23

24

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Minow, you may resume  
your arguments.

ORAL ARGUMENT OF NEWTON N. MINOW, ESQ.,  
ON BEHALF OF THE PETITIONERS -- Resumed

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

Just at the break I was saying we then appealed to  
the full Commission. The Commission made no analysis of any  
kind about whether our current positions promoted or impeded  
competition. They didn't even look at any anti-competitive  
consequence, pro-competitive consequence. Then in a curious  
opinion it said that it itself was not capable of writing  
new guidelines with respect to advertising; but then in a  
process which it called exegesis, it then proceeded to say  
that our guidelines were "troublesome," "worriesome,"  
"overbroad."

We've got a strange opinion. It's not a case  
where the FTC is saying we have a better set of guidelines  
that we want you to follow. It's not a case where the FTC  
is saying why we think your guidelines are wrong or violate  
the law. It's not a case where the FTC found that our  
current guidelines have any anti-competitive consequence.

It is a case where the law, where social values  
were exploding and changing very quickly, where Goldfarb,

1 Bates were creating a revolution in the thinking about the  
2 law and the professions.

3 Now, in the light of Bates why does the FTC press  
4 on? Why are we still fighting?

5 QUESTION: Well, did you press your W.T. Grant and  
6 Company argument before the FTC?

7 MR. MINOW: Very much, Justice Rehnquist. We also  
8 did at the Court of Appeals. We said there's no cognizable  
9 risk of any recurrence here. All these practices have  
10 stopped. But the FTC said in the exercise of its discretion  
11 that our pre-Goldfarb orders, pre-Goldfarb orders violated  
12 the Federal Trade Commission Act, and therefore, in its  
13 discretion it would take the action that it did.

14 Now, I think there is an important question of  
15 jurisdiction involved. Perhaps that's why the FTC presses  
16 on. I think the FTC is stretching to establish a precedent  
17 that it has jurisdiction under the Federal Trade Commission  
18 Act over not-for-profit professional associations.

19 Unlike the Sherman Act, unlike the Clayton Act,  
20 the Federal Trade Commission Act does not apply to  
21 everybody. The Clayton Act, passed at the same Congress as  
22 the Federal Trade Commission Act, applies to all  
23 associations, all persons. But when it got to writing the  
24 Federal Trade Commission Act, Congress very carefully  
25 limited the language of the FTC's jurisdiction to an

1 association "organized to carry on business for its own  
2 profit or the profit of its members." Unlike the Sherman  
3 Act, the Federal Trade Commission Act is not a carefully  
4 studied attempt to bring everyone within its jurisdiction.

5           Now, the three not-for-profit institutions,  
6 professional associations that are here simply are not  
7 organized to carry on business for their own profit or for  
8 that of their members. It is undisputed, undisputed in the  
9 record, even taking the FTC's witness, that the bulk, the  
10 principal part of each association's resources are devoted  
11 to furthering not economic interests, not profit.

12           It is equally undisputed that when the Federal  
13 Trade Commission Act was passed in 1914 that learned  
14 professions were not regarded as business.

15           QUESTION: Does the AMA conduct any business  
16 enterprise other than perhaps the AMA Journal?

17           MR. MINOW: The AMA's biggest activity in dollars  
18 is publishing, and a lot of scientific journals, magazines.  
19 On its business activities it pays taxes. The bulk of its  
20 activity involves accreditation of medical schools,  
21 scientific work, research, validating drugs. The Chief  
22 Justice is familiar with its work involving prisons and  
23 health in prisons. It's involved fundamentally in work  
24 involving advancing health is the bulk of its activity.

25           Now, we don't suggest that the medical profession

1 is outside the antitrust laws. We don't suggest that at  
2 all. We understand that the Justice Department can invoke  
3 the Sherman Act against professionals in the federal  
4 courts. The federal courts are equipped to make the  
5 delicate assessments required of purpose and effect required  
6 to apply antitrust standards to the not-for-profit sector.  
7 But the FTC, we contend, with its tunnel vision is not so  
8 equipped to make those judgments.

9 We do say the FTC was on the right track in --

10 QUESTION: Well, you wouldn't suggest that would  
11 be a reason for deciding in your favor. What you're really  
12 saying is that Congress didn't intend it to cover it, is  
13 that it?

14 MR. MINOW: Justice White, I was just saying  
15 Congress didn't intend --

16 QUESTION: I mean Congress might have covered it  
17 whether they had the ability or not.

18 MR. MINOW: We think Congress did not intend it  
19 originally. Moreover, Congress did not intend it in 1977.  
20 The FTC went to Congress in --

21 QUESTION: But that question doesn't depend on how  
22 able the FTC is.

23 MR. MINOW: No, but we think the FTC was designed  
24 at the beginning, based on its legislative history, to have  
25 expertise involving industries, and there was nothing at all



1 talked about at that time involving the professions.

2           In 1977 the FTC went to Congress and said we'd  
3 like you, Senators, Congressmen, to change the law to expand  
4 our jurisdiction over the not-for-profit sector. I think  
5 that was the right way to deal with this question. They  
6 went to Congress. They put in their case. Congress said  
7 no, absolutely no. So the law was not changed in 1977.

8           To show you that another reason --

9           QUESTION: That doesn't tell us what the law was.

10          MR. MINOW: The law was left as it was written in  
11 1914.

12          QUESTION: Yes.

13          MR. MINOW: To show you again its --

14          QUESTION: The proposed change, Mr. Minow, would  
15 have added all nonprofit corporations, right?

16          MR. MINOW: That's correct, including professional  
17 associations as well.

18          QUESTION: Right. Do you think that it makes any  
19 difference how much economic assistance an organization such  
20 as the AMA would give to its members? Could it change its  
21 activities in such a way as to bring it under the act, in  
22 your view, by increasing the amount of the assistance?

23          MR. MINOW: We think that the statutory language,  
24 unlike the FTC's argument, first of all talks about profit  
25 rather than economic benefit. We think any not-for-profit

1 association, whether it be the Smithsonian Institution, the  
2 American Bar Association, or the American Medical  
3 Association, any such institution offers some benefits to  
4 its members, whether it be -- whether I'm involved in public  
5 broadcasting, whether it be involved in getting a free  
6 subscription to a magazine, or free parking, or buying  
7 insurance or whatever. There's some amount of it.

8           We say when the bulk, predominant part of an  
9 activity and its purpose and its motivation is not designed  
10 for its own profit or that of its members, then clearly it's  
11 not within the Act.

12           QUESTION: Well, when you say the bulk do you have  
13 any percentage figure in mind?

14           MR. MINOW: Well, the FTC says you should weigh  
15 your budget and see what it is. If you take that test, we  
16 don't think that's a very sensible test, but if you take  
17 that test, we each produced experts. Our experts said 91  
18 percent goes for scientific, educational. Their experts  
19 said something like 35 percent goes for economic benefits;  
20 35 to 43 they said goes for economic benefits.

21           I don't think that's it. I think it's whether  
22 it's organized -- I'll go back to the statutory language --  
23 is it organized for the benefit of itself, for profit for  
24 itself or its members. What was its intention.

25           We recognize, Justice Rehnquist, that trade

1 associations are subject to the Act. We recognize that.

2 QUESTION: Why are they? They don't make profit  
3 themselves, but they're organized to --

4 MR. MINOW: For the profit of their members.

5 QUESTION: Well, doesn't the AMA have any impact  
6 on the profitmaking capabilities of doctors? They certainly  
7 are in business for a profit.

8 MR. MINOW: If it does, it's insignificant. The  
9 Administrative Law Judge, Justice White, said that if the  
10 AMA improves medical standards of medical schools or  
11 advances health, that's for the economic benefit of the  
12 doctors because that will produce more patients. We think  
13 that's preposterous. That was not the purpose of doing  
14 medical research or validating of drugs.

15 I think we're not any different from the lawyers,  
16 or any other professional association, or librarians. I  
17 don't think people join professional associations with the  
18 idea that they're going to make money off it.

19 QUESTION: So what if the AMA, perhaps what it  
20 does has a series of adult education programs for doctors to  
21 keep them up to date.

22 MR. MINOW: Would you believe that it was  
23 contended here that our continuing education programs are  
24 for the profit of our members, because if you learn  
25 something there, you'll get more patients. That's silly.

1 That's not why professionals conduct continuing education  
2 programs. It's to keep --

3 QUESTION: Well, that may not be why, but you  
4 don't suggest that it doesn't help.

5 MR. MINOW: Help advance your knowledge, help  
6 advance your professional skills, yes, but you don't go  
7 there for profit.

8 QUESTION: Well, I don't know. The more skillful  
9 the physician, I take it the more other physicians would  
10 lean on him, for example.

11 QUESTION: Is the cost of attending those programs  
12 deductible for income tax purposes?

13 MR. MINOW: I would think so, Justice Stevens.

14 QUESTION: Because they produce income.

15 MR. MINOW: I would think so, but I don't think  
16 that has anything to do with whether the AMA or the  
17 Connecticut Medical Society or the New Haven Medical Society  
18 were organized for the purpose of producing profit for their  
19 members. That's a different question.

20 QUESTION: I suppose, Mr. Minow, that if it is  
21 deductible, and I would assume that it is, it's on the same  
22 basis that a schoolteacher taking summer courses can deduct,  
23 summer courses at the university.

24 MR. MINOW: To advance your skills or advance your  
25 -- right. I would think so, Mr. Chief Justice.



1 QUESTION: But that isn't probably profitmaking  
2 except that it's profitable for the teacher in the long run,  
3 but we would hope for the public, too.

4 MR. MINOW: For the public good as well.

5 In 1978, as the Court knows, it decided  
6 Professional Engineers. That is the third case. As far as  
7 we're concerned, what's important here is Goldfarb, Bates,  
8 Professional Engineers. Professional Engineers said when  
9 you look at an ethical canon, a professional canon, and that  
10 case involved engineers, you judge as to whether it promotes  
11 or it impedes competition.

12 What did the FTC do? It didn't even look at that  
13 question. It didn't even look at our 1976, our current  
14 standards. How did they get around it? They got around it,  
15 as Justice Rehnquist said, they said your '71 standards are  
16 no good pre-Goldfarb. And therefore, in the exercise of our  
17 remedial discretion we're going to knock you for '76 out as  
18 well, and we're just going to put you under this order where  
19 you're out of the business.

20 Now, we think that's wrong. Why do we think  
21 that's so wrong? Because we think there's a big risk and a  
22 big danger to patients. If a doctor says I cured my last 25  
23 patients, we think that's false, deceptive, misleading; we  
24 think it's dangerous. No two patients are alike. It  
25 doesn't say anything about the difficulty, the danger, the

1 risk.

2 I ask the Court to take the time to read the  
3 evidence, read the testimony of these poor patients who saw  
4 an ad in a magazine or a newspaper, usually a woman with a  
5 cosmetic surgery. They ended up, as I say, being  
6 butchered. That's the risk. You're not dealing here with  
7 products. You're dealing with health. You're dealing with  
8 life. You're dealing with safety.

9 We think there should be guidelines and protection  
10 for the public. We've said to the FTC repeatedly why don't  
11 you get the Consumer Protection Division of the FTC and do  
12 something about stopping these things instead of trying to  
13 deal with us who are trying to establish guidelines to  
14 protect the public? We get no answer. The FTC says,  
15 moreover, and I'm sure you'll hear from it, that there were  
16 some activities post-Goldfarb by the states, by the local  
17 societies.

18 I point out to the Court there are some 1,900  
19 state and local medical societies in this gigantic country  
20 of ours with 230 million people spreading across 3,000  
21 miles. We are not in control or in charge at the AMA of  
22 state and local societies. They are independent. They are  
23 autonomous. They're on their own. They may or may not  
24 choose to follow AMA principles or standards. In many cases  
25 we don't even know what they do, and I point that out.

1           With respect to the AMA, which is the party in the  
2 case, the AMA immediately after the 1976 publication of its  
3 standards did nothing whatever to do with advertising at any  
4 time.

5           QUESTION: You wouldn't rule out the possibility  
6 of some local or state association being included within the  
7 FTC's jurisdiction, would you?

8           MR. MINOW: I think it would depend, Justice  
9 Rehnquist, whether it was in the statutory test organized  
10 for its own profit or the profit of its members.

11          QUESTION: Well, suppose that fixed minimum fee a  
12 la the Goldfarb case had the same experience, the same kind  
13 of a record as appeared before this Court in the Goldfarb?

14          MR. MINOW: We have absolutely no restrictions  
15 whatever on minimum fees, on maximum fees.

16          QUESTION: No, but I was giving you a hypothetical.

17          MR. MINOW: Yes.

18          QUESTION: Suppose it went that far.

19          MR. MINOW: Right. Oh, I think that would be --  
20 of course, under the Sherman Act it's been held that --

21          QUESTION: It would fall under Goldfarb then,  
22 would it not?

23          MR. MINOW: Yes, it would. I'm not sure that it  
24 would be under the Federal Trade Commission's jurisdiction,  
25 but certainly under Goldfarb it would, Mr. Chief Justice.

1                   Now, the FTC has --

2                   QUESTION: I thought your position was not that  
3 you weren't sure, but it definitely would not be under the  
4 Federal Trade Commission Act because you're not a  
5 corporation.

6                   MR. MINOW: Well, but I was saying if there was an  
7 association that was organized for profit --

8                   QUESTION: No, but say you have exactly the same  
9 organization you have today.

10                  MR. MINOW: Yes.

11                  QUESTION: But then you engaged in the activity of  
12 price fixing.

13                  MR. MINOW: I'd say we are certainly subject to  
14 the Sherman Act --

15                  QUESTION: I know, but --

16                  MR. MINOW: I think there's a serious question of  
17 whether we -- I do not change our position, Justice Stevens.

18                  QUESTION: Yes, that's what I thought. Your  
19 position is you're not a corporation, so even if you did  
20 that, you would not be subject to the Federal Trade  
21 Commission.

22                  MR. MINOW: We're not a corporation within the  
23 meaning of Section 4.

24                  QUESTION: So you would not be subject to the  
25 Federal Trade Commission Act even if you engage in price



1 fixing.

2 MR. MINOW: That's correct. We'd say that the  
3 remedy lies -- in fact, there have been cases, there have  
4 been cases where state associations have been sued by the  
5 Justice Department for such actions. We say that's where it  
6 belongs. Other states as well, other states as well.

7 QUESTION: Mr. Minow, is there a jurisdictional  
8 agreement between the Department and the Commission in terms  
9 of what kind of cases the Department will handle, or do you  
10 know?

11 MR. MINOW: Not that we're aware of. Well, I'm  
12 aware of it this way, Justice White. We're also counsel for  
13 the American Bar Association in its case in this area where  
14 the Justice Department pursued the case. As you'll recall,  
15 as soon as the ABA changed its rules, the Justice Department  
16 dropped the case. They said it's finished, over, done. But  
17 the Federal Trade Commission, that's why I --

18 QUESTION: But you're not aware of any  
19 jurisdictional infighting on this case.

20 MR. MINOW: No, no, no.

21 QUESTION: Well, are you telling us that as a  
22 result of that development that you just mentioned that  
23 Chief Justice Taft was not in any trouble by chairing the  
24 commission that wrote the code of -- what did they call it  
25 -- the canons of judicial ethics in that day back in '25?

1 MR. MINOW: We'd be glad to defend Chief Justice  
2 Taft any time, Mr. Chief Justice, on that. We think it was  
3 a perfectly proper role in the administration of justice.

4 QUESTION: To announce standards of ethics.

5 MR. MINOW: Yes. We think that ethics --

6 QUESTION: Do you think there's any First  
7 Amendment right on the part of the Bar Association or the  
8 Medical Association to announce any standards it wants to?

9 MR. MINOW: I think that professionals are  
10 citizens who under the First Amendment have a right to  
11 freely associate with each other, to join in trying to  
12 establish professional ethical standards. We recognize if  
13 they got together and fixed prices or did something like  
14 that, we recognize that's wrong. But there is an area of  
15 speech which is protected, which is constitutionally  
16 protected.

17 You know, when we had Dr. Halberstam looking at it  
18 from a doctor's point of view, what did Dr. Halberstam say  
19 about this? He said if there is anything that's erosive to  
20 the very nature of professionalism it's the idea that a  
21 profession cannot govern its members' ethical standards.

22 QUESTION: Well, lumber dealers and potters may  
23 have thought they had a First Amendment right to get  
24 together and govern the professions, so to speak, govern the  
25 business by setting prices, but certainly that wouldn't

1 carry the day, would it?

2 MR. MINOW: Not in this case, Justice Rehnquist,  
3 where we're saying yes, advertise; in fact, we think that  
4 that promotes competition to have information in the  
5 marketplace for patients, we think it's desirable, but don't  
6 do it in a false or misleading way. That's our position.

7 QUESTION: Well, I understood you to carve out  
8 price fixing as always being subject to --

9 MR. MINOW: I think that's per se improper. We  
10 don't defend that. But what we do say is that when  
11 professionals in this case are trying to advance ethical  
12 standards for the benefit of patients, of informing patients  
13 without deceiving them, we think the government ought to  
14 encourage them, not condemn them. We think that that's  
15 what's involved. The record shows that the state licensing  
16 body said we welcome the role of the professional  
17 societies. They help us. This Court said in Bates we think  
18 it's important.

19 I come back to what Judge Mansfield said.

20 QUESTION: Mr. Minow, before you close would you  
21 just say a word or two about the contract practice aspect of  
22 the case, because that really isn't right within the line of  
23 cases you've been discussing.

24 MR. MINOW: When the case began, when the FTC had  
25 its first announcement of it, all the attention was on

1 advertising. When they got into that and saw we had changed  
2 our rules, they changed their focus to talking about  
3 contract practice.

4 All those contract practice rules have gone by the  
5 boards years, decades long ago. Most of the doctors today,  
6 Justice Stevens, who are in practice one way or another, in  
7 HMOs, hospitals, are involved in some contractual  
8 relationship for their services. So we regard that as  
9 archaic, gone; it has nothing to do with anything current of  
10 any kind.

11 We don't defend those old practices. We published  
12 new ones in 1977 in the first edition of our guidebook that  
13 we could, and that's gone by the boards. We don't defend it.

14 Thank you.

15 CHIEF JUSTICE BURGER: Mr. Shapiro, you may  
16 proceed when you're ready.

17 ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,  
18 ON BEHALF OF THE RESPONDENT

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

21 In this case the Federal Trade Commission, acting  
22 under Section 5 of the FTC Act, found a continuing  
23 nationwide private agreement in restraint of trade among AMA  
24 and its affiliates and its members. This agreement was  
25 effectuated by certain ethical restraints. The restraints



1 on which the Commission focused were in effect at the time  
2 the Commission filed its complaint in December 1975. They  
3 almost totally banned advertising by physicians, and they  
4 protected traditional fee-for-service practice from  
5 competition by alternative contract arrangements of  
6 physicians. So we dealt with advertising and what is  
7 usually denominated by the American Medical Association as  
8 contract practice.

9           Now, the Commission entered a cease and desist  
10 order designed to eliminate the conspiracy, which was  
11 nationwide, and its effects throughout the nation. The  
12 order was intended to leave physicians free to choose  
13 whether and how and with whom they will make contractual  
14 arrangements for their services and whether and how they  
15 will compete through nondeceptive advertising. It was  
16 intended to open the previously blocked flow of information  
17 needed by consumers seeking access to the market for medical  
18 services, for I emphasize to Your Honors that there is a  
19 market.

20           Now, the Commission also found that because  
21 advertising in the medical context involves public interest  
22 considerations sharply different from those applicable in  
23 the ordinary commercial context that the American Medical  
24 Association and similar organizations may and should  
25 continue through ethical standards to police false or

1 deceptive or oppressive advertising by physicians.

2           The issues that my brother has discussed with you  
3 are two. First, does the Commission have jurisdiction over  
4 AMA under Section 4 of the FTC Act; that is, is the American  
5 Medical Association a corporation within the meaning of that  
6 statute. And should the Commission have terminated the case  
7 after AMA began to make changes subsequent to the filing of  
8 the complaint.

9           Now, the only matters before the Commission when  
10 that occurred are AMA's statements in April 1976 dealing  
11 with advertising, and its March 1977 revision of its  
12 opinions and reports.

13           I think that I should touch a bit on the  
14 chronology because I think it's important. The April 1976  
15 statement was not an abstract new piece of writing. The AMA  
16 was very careful in drafting that statement to assert that  
17 it was reaffirming its prior position on advertising.  
18 Moreover, the Commission -- all this is in the findings,  
19 incidentally -- the Commission found that this April 1976  
20 statement and the March 1977 version of it reflected a very  
21 close link to the previous restrictions. The statements did  
22 not contain any express recision of what had gone before.  
23 There is no statement in this record in which AMA tells the  
24 affiliates, who are the means by which this conspiracy is  
25 enforced, that they are to disregard the previous

1 restrictions. It doesn't even identify what they are to  
2 disregard.

3 QUESTION: Yes, but some previous restrictions  
4 were eliminated.

5 MR. SHAPIRO: Well, we have had some difficulty  
6 identifying precisely what was eliminated.

7 QUESTION: Well, are you suggesting that there was  
8 no change at all in '76 and '77?

9 MR. SHAPIRO: It was so highly ambiguous that it  
10 is unclear whether there was a change or not. The  
11 Commission ultimately concluded that there had not been any  
12 really clear, unambiguous abandonment of the conspiracy.  
13 This was reflected in other findings. For example, in the  
14 very statements which AMA says today represented a change,  
15 it was also saying that local societies could have  
16 restrictions that exceed anything that AMA had in its  
17 current principles of ethics with respect to advertising.  
18 It left the ban against solicitation in the principles of  
19 ethics unchanged.

20 AMA's own witnesses who were put on in surrebuttal  
21 to explain its current position on advertising -- and this  
22 included the chairman of its board of trustees, a members of  
23 its House of Delegates, chairman of the section on medical  
24 schools -- each seemed to be stating positions that were  
25 clearly reflected in what had gone before.

1           Moreover, and perhaps most important given the  
2 fact that we are concerned with dissipating the effects of a  
3 conspiracy, the evidence before the Commission indicated  
4 that even after AMA's March 1976 statements the old  
5 restrictions were being applied by AMA's affiliates in  
6 numerous circumstances, ranging from one of the Connecticut  
7 petitioner's warnings to an ophthalmologist who had  
8 benefitted from some newspaper publicity to the Maryland  
9 Medical Society's published ethical guide, based on AMA  
10 standards, which condemned advertising --

11           QUESTION: Well, what do you do with a statement  
12 in the -- the '76 statement which says that the principles  
13 do not proscribe advertising; they proscribe solicitation?  
14 Now, there was no statement like that before that.

15           MR. SHAPIRO: Well, there was, Your Honor, and  
16 that is one of the interesting things. In the record you  
17 will find, in the findings --

18           QUESTION: You mean they never have banned  
19 advertising, is that it?

20           MR. SHAPIRO: Well, that was their position at  
21 times.

22           QUESTION: And yet you need a cease and desist  
23 order to keep them from banning advertising?

24           MR. SHAPIRO: Well, the wording of their position  
25 has changed considerably, I must say. We have outlined in



1 the brief and the Commission has outlined in its findings  
2 positions by the FTC which seemed to indicate that all  
3 advertising was bad, that all solicitation includes  
4 advertising. And then there would be a slight shift because  
5 they would allow obviously some of the simplest forms of  
6 advertising -- a card, a sign, an official directory. So  
7 that the Commission's finding on this matter is that the  
8 AMA's abandonment was highly ambiguous.

9           In fact, how ambiguous can best be seen, I think,  
10 by looking at something that AMA has brought to the Court's  
11 attention, although it's extra-record, in January of 1980  
12 they finally abolished the ban on solicitation entirely from  
13 their principles of ethics, July of 1980, and in January of  
14 1981 they issued a complete new edition of the opinions and  
15 reports which very clearly seems to be an effort to come  
16 into conformity with the law by providing that doctors can  
17 advertise as long as it's not misleading, or false, or  
18 deceptive, or oppressive.

19           QUESTION: Let me back up a little bit on  
20 something that seems to me very fundamental here, Mr.  
21 Shapiro. Do you think there is any authority in the state  
22 or the government or by statute that would limit the rights  
23 of a voluntary group of lawyers, doctors, dentists, or any  
24 other profession from announcing a set of standards that  
25 precluded advertising and solicitation?

1 MR. SHAPIRO: Yes, Your Honor. I think if there  
2 was a total --

3 QUESTION: A voluntary association that you can  
4 join or not join? I'm not talking about an integrated bar.

5 MR. SHAPIRO: Well, yes, I think so in this way.  
6 Certainly the voluntary association is not, of course,  
7 subject to the First Amendment itself, but the voluntary  
8 association if it's an association of entrepreneurs is  
9 subject to the requirement that it not suppress competition  
10 or restrain trade in violation of the antitrust laws.

11 QUESTION: Well, does the announcement -- you go  
12 into that very rapidly for me -- the announcement of a Ten  
13 Commandments by a lawyers' club or a doctors' society, you  
14 say that the First Amendment doesn't protect that?

15 MR. SHAPIRO: The announcement is certainly  
16 something that is within the First Amendment, but if those  
17 words are words that as implemented add up to a restraint of  
18 trade -- and that is what we have here, a conspiracy in  
19 restraint of trade -- through the application of these  
20 restrictions --

21 QUESTION: You're making that jump very fast. I'm  
22 trying to take you one step at a time.

23 MR. SHAPIRO: Yes, sir.

24 QUESTION: The announcement of ethical standards  
25 like the Ten Commandments you concede, I take it, that

1 that's protected by the First Amendment?

2 MR. SHAPIRO: The announcement of ethical  
3 standards would be within the First Amendment.

4 QUESTION: That here is the way we, the people who  
5 are announcing it, think the profession ought to be  
6 practiced.

7 MR. SHAPIRO: Goldfarb and Bates, although Bates,  
8 of course, involves a slightly different issue, but Goldfarb  
9 and Bates clearly indicate that one cannot under the guise  
10 of exercising First Amendment rights restrain trade.

11 Now, we have --

12 QUESTION: But Goldfarb had nothing to do with  
13 solicitation or advertising. Goldfarb was a straight price  
14 fixing, either a gentleman's agreement or a gentleman's  
15 agreement buttressed by the bar association practice.  
16 Everyone in the bar would charge the fixed price.

17 MR. SHAPIRO: Well, an agreement --

18 QUESTION: All the lawyers in Fairfax County  
19 exercise their First Amendment rights to quote a price for  
20 reading a title.

21 MR. SHAPIRO: Exactly. It brings us back to  
22 Professional Engineers, Your Honor, that restraints of trade  
23 --

24 QUESTION: But I'm just talking about the  
25 announcement of the code.

1           MR. SHAPIRO: Well, if the announcement of the  
2 code carries with it the effects of a restraint of trade,  
3 then using the Central Hudson analysis that unlawful speech  
4 or speech in aid of unlawful activity is not protected by  
5 the First Amendment, then we would have to say that the  
6 restraint of trade takes the conduct and the utterances  
7 outside the protection of the First Amendment.

8           Now, the First Amendment was invoked before the  
9 Commission by the Petitioners in this case and in the Second  
10 Circuit, but only in connection with challenges to the  
11 order. Moreover, and I think I come back to the Central  
12 Hudson analysis on this, restraints on competition are  
13 always affected through speech and writings. That speech,  
14 as I've said, is unlawful.

15           The government interest in suppressing it is  
16 substantial within the meaning of Central Hudson, and  
17 reasonable restrictions advance that substantial interest  
18 within the meaning of Central Hudson. If it's reasonably  
19 related to the violation, then I think remedial restraints  
20 on that speech are deemed to be no more extensive than  
21 necessary. You can't quite make a Central Hudson analysis  
22 if you're trying to deal with a remedy for unlawful  
23 conduct. That's our essential position on the First  
24 Amendment.

25           Now, there's much debate about what the Commission



1 did or said with respect to AMA's changes here. What the  
2 Commission did was to examine the changes very closely under  
3 the standards mentioned by Justice Rehnquist, the W.T. Grant  
4 standards. In fact, AMA's argued before this Court and  
5 before the Commission that we couldn't even do that, that we  
6 had to judge their liability on their post-complaint changes.

7 I know of no case that says that. The Oregon  
8 Medical Society, which my brother invokes, doesn't support  
9 it. The Commission examined the conduct alleged in the  
10 complaint, found a violation, and looked to see the  
11 relationship between that conduct and the post-complaint  
12 changes.

13 What it was concerned with was three questions,  
14 once it had found this nationwide conspiracy which the  
15 evidence showed had gone on with the continued enforcement  
16 of the old standards. It looked first to see whether the  
17 post-complaint changes by AMA would dissipate the effects of  
18 the conspiracy, because that, after all, is the first  
19 concern of any remedy in a conspiracy case.

20 The second question was whether the post-complaint  
21 changes reflected a clear and unambiguous abandonment of the  
22 conspiracy, not only by AMA but by the other members,  
23 because the conspiracy was between AMA and its federated  
24 affiliates.

25 And finally, the Commission had to consider

1 whether there was a cognizable danger of recurrence. This  
2 kind of analysis is essentially what I think is implied in  
3 two categories of cases: first, the line of cases  
4 reflected, for example, in FTC against Colgate concerning  
5 the Commission's remedial responsibilities and discretion;  
6 and secondly, the line of cases reflected in W.T. Grant and  
7 cases in that line.

8           The issues thus never went to AMA's post-complaint  
9 -- I mean the issue about AMA's post-complaint changes  
10 didn't go to its liability; they went rather to the  
11 appropriateness under the public interest of a remedy.

12           Now, the Commission examined at length that  
13 question. It found that AMA's changes simply did not meet  
14 these tests. The record, I think, can be examined. I won't  
15 take up the Court's time with details further.

16           QUESTION: In terms of liability is it the FTC's  
17 normal practice to say liability is to be determined as of  
18 the date of the filing of the complaint?

19           MR. SHAPIRO: That has been its general practice.

20           QUESTION: Like in antitrust cases.

21           MR. SHAPIRO: As in antitrust cases. Occasionally  
22 one allows evidence in up to the date of trial. But that  
23 second question --

24           QUESTION: Is a remedy question.

25           MR. SHAPIRO: -- Is remedy. And that's how the

1 FTC approached it here. It could very well have found that  
2 on a different showing of change the case might have not  
3 warranted a remedy.

4 I must say I would like to invite the Court's  
5 attention to one aspect of the Commission's order, because I  
6 think it's important. Section 4 of the Commission's order,  
7 which I think you'll find it about page 371 of Petitioner's  
8 appendix, Section 4 is designed to achieve compliance, and  
9 what it focuses on is a requirement that AMA change its  
10 ethical standards to comply with the order to get rid of the  
11 restrictions. All right. AMA says at least by July of --  
12 by January of 1981 it has done that.

13 It also requires that steps be taken to assure  
14 that the affiliates agree to obey the order. And finally,  
15 that AMA take steps to police the order and disaffiliate  
16 anyone who does not comply. That is really the concern of  
17 the Commission when it addresses the abandonment issue.

18 QUESTION: Excuse me. What page did you say that  
19 was?

20 MR. SHAPIRO: I was bringing the Court's attention  
21 to the Petitioner's appendix, the white, thick book.

22 QUESTION: 371?

23 MR. SHAPIRO: At 371, which dealt with the  
24 remedial provisions of the order.

25 QUESTION: Thank you.

1 MR. SHAPIRO: Now, I would like to spend the  
2 remainder of my time on the jurisdictional issue.

3 QUESTION: Before you go to that, let me see if I  
4 have a clear impression of what you're saying to us about  
5 the impact of Goldfarb and Bates. You say that Goldfarb and  
6 Bates, or either, or the two of them together would prohibit  
7 a group of lawyers from getting together and saying here is  
8 our code: it is unethical to solicit; it is unethical to  
9 advertise; and you can't be a member of this organization  
10 unless you take a pledge not to do that.

11 MR. SHAPIRO: Yes, Your Honor.

12 QUESTION: Standing alone.

13 MR. SHAPIRO: That is the Commission's finding  
14 here. An absolute ban by members of a profession, an  
15 entrepreneurial profession --

16 QUESTION: Not a profession. Members of a  
17 professional organization. The organization I'm talking  
18 about no one need join if he doesn't want to, but if he  
19 joins he must accept the pledge not to advertise. Would you  
20 say that's a violation of law?

21 MR. SHAPIRO: That would be a violation of law,  
22 because as in the Engineers case, it is a prohibition  
23 against engaging in competitive conduct.

24 QUESTION: But the Engineers case was a pledge, a  
25 binding pledge never to enter into competitive bidding.



1 MR. SHAPIRO: Yes.

2 QUESTION: And you think that's the same as a  
3 pledge not to advertise or solicit?

4 MR. SHAPIRO: I think that they're quite close in  
5 the sense that advertising is an offering of services, and  
6 you're sort of pledging I will never make certain public  
7 announcements of my availability.

8 The market aspects of a profession -- and that's  
9 all that the Commission is interested in, not the  
10 doctor-patient relationship obviously -- the market aspects  
11 of a profession, the commercial aspects of a profession are  
12 subject to the antitrust laws, as in Engineers; and that is  
13 what the Commission was addressing.

14 QUESTION: I don't understand your answer to the  
15 Chief Justice. If in this town, the District of Columbia,  
16 twenty lawyers get together and say we are banding together  
17 to be a very ethical group, and we're not going to do  
18 anything wrong, and that's our code, they can't do that?

19 MR. SHAPIRO: Well, a very small number --

20 QUESTION: My number is twenty.

21 MR. SHAPIRO: Twenty. I think that --

22 QUESTION: And if you push me, I'll take it to six.

23 MR. SHAPIRO: Well, the essence of the violation  
24 is the agreement not to advertise.

25 QUESTION: Well, that's an agreement.

1           MR. SHAPIRO: And that would be a violation within  
2 -- under the rule of reason, I might add, if someone can  
3 come up with justification, advertising in a professional  
4 context is always assessed under the rule of reason.

5           QUESTION: Could one lawyer say I'm a very ethical  
6 lawyer and not be ethical?

7           MR. SHAPIRO: Oh, yes. There's no agreement then,  
8 no agreement.

9           QUESTION: Then it will come down to two, wouldn't  
10 it?

11          MR. SHAPIRO: But two is -- if it involves an  
12 agreement --

13          QUESTION: Yeah.

14          MR. SHAPIRO: -- Not to advertise, it's an  
15 agreement not to compete, and an agreement not to compete is  
16 an agreement under restraint of trade.

17          QUESTION: The firm of Jones and Jones, Jones and  
18 his wife.

19          MR. SHAPIRO: Well, the firm is an integration of  
20 competitive functions.

21          QUESTION: I mean I don't see why you have to go  
22 so far on this.

23          MR. SHAPIRO: Your Honor?

24          QUESTION: I don't see why you have to go so far  
25 on it.

1 QUESTION: Well, you're not going any farther than  
2 a nationwide association.

3 MR. SHAPIRO: Well, actually I can't really go  
4 further than the Commission, which did involve a nationwide  
5 conspiracy.

6 Let me turn --

7 QUESTION: But you seemed at the moment, whether  
8 it's relevant or not, to be making an exception if a law  
9 firm having 250 lawyers tells every lawyer in that firm if  
10 you solicit or advertise, you're out. A violation of law?

11 MR. SHAPIRO: No, because law firm partnerships --

12 QUESTION: A law firm is a voluntary association.

13 MR. SHAPIRO: It's not the voluntary association  
14 that's the essence of it; it's the integration of  
15 competitive functions to achieve a more competitive  
16 function. A law firm is --

17 QUESTION: Like a corporation?

18 MR. SHAPIRO: -- Like a corporation or like the  
19 musical copyright groups that combine and in effect enhance  
20 competition through their combination.

21 Now, I'd like to turn to the jurisdictional  
22 question very briefly. The Commission's holding on  
23 jurisdiction is relatively easily stated.

24 First, the Commission does not claim broad  
25 jurisdiction over nonprofit associations. It claims

1 jurisdiction over nonprofit associations made up of  
2 entrepreneurs when those associations are engaged in  
3 substantial part in operating for the profit of those  
4 entrepreneur members. That is the essence of the holding.

5           What the Commission has said is that if you look  
6 at AMA you will find that it is engaged in many praiseworthy  
7 noncommercial activities of all kinds, but you will also  
8 find that in many respects it functions like a trade  
9 association.

10           The findings of the Commission were that the bulk  
11 of AMA's members are engaged in the profit-motivated private  
12 practice of medicine, in the traditional practice of  
13 medicine, fee-for-service medicine. In short, doctors are  
14 in that aspect of their practice like any other  
15 entrepreneurs. They're entrepreneurs operating for their  
16 own account.

17           When you combine persons together into an  
18 association, the association may be a nonprofit organization  
19 like any other trade association, but if it's acting for the  
20 profit of those members in part, in substantial part, then  
21 we think that it fits within the definition of a corporation  
22 in the Federal Trade Commission.

23           QUESTION: Mr. Shapiro, I'm interested in your use  
24 of the word "entrepreneurial." What about an association of  
25 ministers, say the Southern Baptist Association?



1           MR. SHAPIRO: Such an association would not be an  
2 association of persons engaged in entrepreneurial functions,  
3 in for profit functions.

4           QUESTION: Why not?

5           MR. SHAPIRO: They don't operate for profit in the  
6 same -- I don't know the association.

7           QUESTION: But don't they have to make a living?

8           MR. SHAPIRO: Yes, they --

9           QUESTION: Aren't they interested in the  
10 contributions to the church?

11          MR. SHAPIRO: They may indeed be interested. In  
12 fact, there are many, many associations which are concerned  
13 with the economic interest of one --

14          QUESTION: But you would not include the ministers.

15          MR. SHAPIRO: I would not include the ministers.  
16 I would not --

17          QUESTION: What about the schoolteachers?

18          MR. SHAPIRO: Similarly. Schoolteachers are  
19 typically employees, and there's a difference. I could use  
20 a hypothetical --

21          QUESTION: What about the NEA?

22          MR. SHAPIRO: The National Education Association?

23          QUESTION: Yes, sir.

24          MR. SHAPIRO: I think --

25          QUESTION: That's not interested in elevating the

1 salaries of teachers?

2 MR. SHAPIRO: They are, and that brings me to my  
3 hypothetical. If you approach a union, which is a group of  
4 people combined together in economic interest but the union  
5 member is an employee, he is not an entrepreneur for  
6 profit. Congress chose that word "profit," and so it  
7 limited the FTC's jurisdiction to the type of organization  
8 which involves those people who are entrepreneurs for profit.

9 QUESTION: But, Mr. Shapiro, isn't the NEA  
10 interested in the profit of its members?

11 MR. SHAPIRO: In a very broad, nontechnical sense,  
12 yes. But the Commission has accepted --

13 QUESTION: How do you distinguish it? It is  
14 concerned with education, but it's also concerned with the  
15 profit of schoolteachers. Properly. I'm not criticizing  
16 that. But this is precisely what you say, as I understand  
17 you, is the situation of the AMA.

18 MR. SHAPIRO: No. I think I've drawn -- I've  
19 attempted; I haven't yet -- drawn a line between profit in  
20 the sense of somebody who is engaged in business to gain  
21 income over costs, revenue over costs, which all doctors  
22 have to do when they're operating their office practices and  
23 their fee-for-service practices, as distinguished from the  
24 employee or the schoolteacher --

25 QUESTION: You put the NEA in the category of a

1 union of employees.

2 MR. SHAPIRO: It comes closer to that than a guild  
3 or a trade association, which in some of its functions, not  
4 all, AMA approaches. And that brings me to the other limit  
5 on the Commission's jurisdiction here. The limitation is  
6 one which focuses on the commercial aspects, the  
7 entrepreneurial aspects of the membership; and it also  
8 focuses very closely on substantiality.

9 Obviously, there are all kinds of charitable  
10 organizations which have incidental commercial function --  
11 we have to concede that -- whether it's raising money  
12 through selling something or what have you. But if it's  
13 incidental, then as the Commission has said in its opinion,  
14 as the Eighth Circuit indicated in the Community Blood Bank  
15 case, which we think the Commission's opinion is consistent  
16 --

17 QUESTION: Well, what if the NEA ran a placement  
18 service for its members and charged a fee? I suppose it may  
19 be a different case then.

20 MR. SHAPIRO: It may be incidental. One of the  
21 problems --

22 QUESTION: Well, there may be a profitmaking  
23 operation even for it.

24 MR. SHAPIRO: It might be. And if it's a  
25 substantial activity that impacts on the marketplace

1 substantially --

2 QUESTION: Well, the employment agencies normally  
3 do.

4 MR. SHAPIRO: Then that activity, that aspect  
5 might bring, might come within it. It depends on  
6 substantiality. There are a whole range of indicia that  
7 have to be looked at. I mean it's not an automatic or  
8 simple test. The Commission's test has essentially been one  
9 of looking to a number of factors. It looks to the origin  
10 of the organization, it looks to its statement of purposes,  
11 it looks to the members' relationship to profit-motivated  
12 activities, it looks to publications, it looks to a whole  
13 range of functions. I --

14 QUESTION: What did the FTC conclude as to what  
15 the violation was?

16 MR. SHAPIRO: In this case?

17 QUESTION: Yes.

18 MR. SHAPIRO: The violation was twofold. One was  
19 a violation of the prohibition against totally banning  
20 advertising, and the other was a violation against  
21 restricting contract practice.

22 QUESTION: Yes, I know. But in terms of its  
23 charter, this is an unfair trade practice?

24 MR. SHAPIRO: Oh, yes. The FTC found an unfair  
25 trade practice -- well, no. I'm sorry. An unfair method of



1 competition.

2 QUESTION: Because it violated some antitrust law.

3 MR. SHAPIRO: It's twofold. There was an unfair  
4 method of competition finding based on the antitrust laws,  
5 and the Commission also found some consumer injury because  
6 the advertising cutoff cut off consumers from valuable  
7 information concerning --

8 QUESTION: And what business was that of the  
9 Federal Trade Commission in terms of the FTC Act, the  
10 Federal Trade Commission Act?

11 MR. SHAPIRO: It was unfair method of competition  
12 with respect to the suppression of advertising in the  
13 contract practice, and an unfair practice with respect to  
14 consumer injury in denying consumers access to needed  
15 information as to how to --

16 QUESTION: That's strictly a construct of the  
17 Federal Trade Commission.

18 MR. SHAPIRO: That's the way the Commission has  
19 construed its statute.

20 The record on jurisdiction is quite lengthy. I  
21 shall have to contradict my brother on his suggestion that  
22 the Commission said the budgetary analysis was proper. That  
23 was precisely what it rejected. What it said was you look  
24 to the actual activities of the association.

25 And a quick, short way of getting an idea of what

1 the AMA is about in its commercial aspects is at page, I  
2 think it's --

3 QUESTION: Are you in the white volume now?

4 MR. SHAPIRO: I'm in the white volume. I believe  
5 it's 75A. Well, I seem to have lost my way within the  
6 document. But it's a document which simply says "What's the  
7 AMA done for you lately?"

8 QUESTION: You're right. 75A.

9 MR. SHAPIRO: And I won't go through it step by  
10 step, but I think that a quick glance at it will enumerate  
11 listings ranging from things AMA has done to enhance the  
12 productivity of practice to things AMA has done to cut down  
13 the competition of competing Health Maintenance  
14 Organizations. And these are the kinds of indicia that the  
15 Commission went through very carefully and at great length.

16 QUESTION: What is the date of that, "What has the  
17 AMA done for you lately?"

18 MR. SHAPIRO: I believe that was 1975. There is,  
19 however, a 1976 statement made in December 1976 --

20 QUESTION: Well, if you had the '81 they would  
21 probably say what we've done for you lately is to repeal our  
22 advertising restrictions.

23 MR. SHAPIRO: Well, they have moved on that  
24 certainly, and we welcome what they have done as of '81.  
25 The problem is what's happening out with the rest of the

1 country. If the old standards are still continuing --

2 QUESTION: Well, why is that the business of --  
3 why would you insist that the AMA take responsibility for  
4 what's going on in the states?

5 MR. SHAPIRO: Well, in answer --

6 QUESTION: Rather than focusing under a W.T. Grant  
7 standard on the AMA itself, which I take it the FTC did.

8 MR. SHAPIRO: We did focus on it, but we do have a  
9 remedial responsibility. Now, if the local affiliates are  
10 as independent in ethical matters as AMA claims, not only is  
11 our uncontested finding of conspiracy wrong, but then it's  
12 merely a matter of -- then its mere publication of modified  
13 statements won't dissolve the conspiracy.

14 On the other hand, if the affiliates can be  
15 expected to adhere to AMA's published statements, then AMA  
16 shouldn't be denying responsibility for correcting the  
17 effects of the conspiracy.

18 Thank you, Your Honor.

19 CHIEF JUSTICE BURGER: Do you have anything  
20 further, Mr. Minow? You have about five minutes remaining.

21 ORAL ARGUMENT OF NEWTON N. MINOW, ESQ.,

22 ON BEHALF OF THE PETITIONERS -- REBUTTAL

23 MR. MINOW: Mr. Chief Justice, and may it please  
24 the Court:

25 In answer to what my colleague, Mr. Shapiro, just

1 said, I would quote Judge Mansfield: the FTC wants to press  
2 for a pound of flesh. This argument has been over for years  
3 and years and years. They want some kind of an order.

4 QUESTION: Well, people can certainly differ over  
5 whether an injunction or a cease and desist order is  
6 appropriate after the illegality has presumably terminated.

7 MR. MINOW: Only, Justice White, if there is some  
8 risk or cognizable danger --

9 QUESTION: But people can differ over whether that  
10 risk is present.

11 MR. MINOW: But in light of Goldfarb --

12 QUESTION: Witness the split in the court below.

13 MR. MINOW: Yes, but in light of  
14 Goldfarb/Bates/Professional Engineers, the likelihood that  
15 the AMA is going to go back to its pre-Goldfarb standards is  
16 nonexistent. The world fundamentally changed. The law  
17 changed, and the AMA responded.

18 Counsel for the FTC never said, never defended in  
19 all this --

20 QUESTION: Well, do you contest except on  
21 jurisdictional grounds their conclusion on liability as of  
22 1975?

23 MR. MINOW: As for our pre-Goldfarb standards?

24 QUESTION: As of 1975, the date of filing the  
25 complaint. Do you challenge that other than on



1 jurisdictional grounds?

2 MR. MINOW: I would challenge it because prior to  
3 the filing of the complaint, the record will show, prior to  
4 the filing of the complaint the AMA had authorized a  
5 revision of its guidelines, but they were not satisfied to  
6 wait two months until we got it out.

7 QUESTION: Well, nevertheless, they filed the  
8 complaint. As of the date of the complaint do you challenge  
9 the finding of liability?

10 MR. MINOW: Yes, we do, because we would say that  
11 the guidelines we had at that time met the law at that time;  
12 that the law changed and as quickly as we could in a  
13 membership organization with hundreds of thousands of people  
14 going through the process spelled out by its procedures and  
15 constitution, as quickly as anybody humanly could, before  
16 any other profession did it we responded. So I would say  
17 yes, we were all right under that standard.

18 Never today did the FTC say that our '76 standards  
19 were wrong. Never did they point out why they were wrong.  
20 And it's nonsense to say there was a conspiracy.

21 The brief if you read it -- you know, the dentists  
22 entered into an agreement with the FTC that said whatever  
23 happens to the doctors will also happen to the dentists.  
24 That shows how interested the FTC is in the particular facts  
25 about associations or differences between the professions.

1 But the dentists say it's ridiculous to say there was a  
2 conspiracy going on pre-Goldfarb. Accountants, lawyers,  
3 doctors, dentists -- everybody had a different view of where  
4 the profession stood with respect to the antitrust laws.

5 This Court decided Goldfarb. We immediately --

6 QUESTION: Mr. Minow, I hate to go back to the  
7 contract medicine, but it was clear that that aspect of the  
8 profession was always subject to antitrust laws, wasn't it?

9 MR. MINOW: That's right, Justice Stevens. And as  
10 I say, that stuff was long gone.

11 QUESTION: Do you take issue with finding 146 with  
12 respect to the opinions and reports that were unfair and  
13 unethical as of 1971?

14 MR. MINOW: I regard -- if there's any part of the  
15 case that's gone and moot, I'd say that's it because that's  
16 --

17 QUESTION: But would you not agree that that  
18 described illegal conduct?

19 MR. MINOW: I don't know that I'd characterize it  
20 as illegal because it was nonexistent at the time. The fact  
21 was that for a period of 40 years all those practices had  
22 been abandoned. More than half the doctors --

23 QUESTION: Well, this is quoted in a 1971 report.  
24 Finding 146 on page 228A of the appendix. "The 1971 AMA  
25 judicial counsel's opinions and reports provide the

1 following with respect to contract medicine: A) When the  
2 compensation received is inadequate based on the usual fees  
3 paid for the same kind of service and class of people in the  
4 same community."

5 That was in effect at that time, was it not?

6 MR. MINOW: Yes. It was all pre-Goldfarb, Justice  
7 Stevens.

8 QUESTION: Well, but when a reasonable degree of  
9 free choice of physicians is denied those cared for in a  
10 community where other competent physicians are readily  
11 available, this relates to the contract.

12 MR. MINOW: I understand, but I repeat, these are  
13 all pre-Goldfarb.

14 QUESTION: And you think it was perfectly clear --  
15 it was fair to assume pre-Goldfarb that these were not  
16 subject to the antitrust laws at all. The contract --

17 MR. MINOW: I think the law --

18 QUESTION: The contractual arrangement aspect of  
19 the case.

20 MR. MINOW: I think lawyers could differ on it,  
21 but certainly there had never been any holding by this Court  
22 until Goldfarb, as the Court went out of its way in its  
23 opinion to say this is the first time we've ever held that  
24 the learned professions are subject to the antitrust laws in  
25 Goldfarb. And I think there could be --

1 QUESTION: Well, what about the Oregon State  
2 Medical Society case?

3 MR. MINOW: The Oregon State Medical Society case,  
4 you will recall, ended up without any -- this Court upheld a  
5 dismissal.

6 QUESTION: Yes, but there was an understanding  
7 that the Society was subject to the antitrust laws. No  
8 remedy was necessary because they had abandoned the practice.

9 MR. MINOW: And believe me, if there had been any  
10 conduct by the AMA post either the decision against the AMA  
11 in the '30s or post-Oregon, believe me, we would have heard  
12 about it from the Department of Justice. All this stuff was  
13 a dead letter and gone. They were never enforced. There's  
14 never been any action by the AMA enforcing one of those  
15 rules at any time. They were ignored, they were forgotten,  
16 and they were never enforced.

17 Mr. Chief Justice, thank you.

18 CHIEF JUSTICE BURGER: Thank you, gentlemen.

19 The case is submitted.

20 (Whereupon, at 1:56 p.m., the case in the  
21 above-entitled matter was submitted.)

22

23

24

25



CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

American Medical Association Et Al., Petitioners v. Federal Trade Commission. No. 80-1690

---

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Anne Connelly

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

902 JAN 13 PM 1 19