ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1374

TITLE BARBARA BLUM, INDIVIDUALLY AND IN HER CAPACITY AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, Petitioner v. ELLEN STENSON, ETC.

PLACE Washington, D. C.

DATE January 11, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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BARBARA BLUM, INDIVIDUALLY AND :
IN HER CAPACITY AS COMMISSIONER :
OF NEW YORK STATE DEPARTMENT OF :
SOCIAL SERVICES, :
Petitioner, :
v. : No. 81-1374
ELLEN STENSON, ETC. :

- -x

Washington, D.C.

Wednesday, January 11, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

MELVYN R. LEVENTHAL, ESQ., Deputy First Assistant Attorney General of New York, New York, New York; on behalf of the Petitioner.

LEON SILVERMAN, ESQ., New York, New York; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Blum against Stenson.

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

ORAL ARGUMENT OF MELVYN R. LEVENTHAL, ESQ.,
ON BEHALF OF THE PETITIONER

MR. LEVENTHAL: Mr. Chief Justice, and may it please the Court, in this case the state of New York challenges a fee award entered against it under a fee shifting statute.

An award of approximately $150 an hour, consisting of a $100 base rate and a 50 percent multiplier, was granted three young attorneys with an average experience of two years when comparable attorneys working for major Wall Street firms were being billed to commercial clients at the rate of $70 an hour.

The question presented is whether $150 an hour for attorneys without any billing experience and working for non-profit organizations is reasonable, and more specifically, what standards and procedures should control the inquiry, and what standards and procedures were not followed by the District Court in this case.

The critical theme in our argument derives from the fact that we are proceeding under a fee

shifting statute. That is the one aspect of the case that permeates our argument. The state of New York did not enter the marketplace to hire an attorney. There was no competition among lawyers for our business. We didn't negotiate an hourly rate. We never reviewed their time records before the bill was submitted. We never monitored their work. We didn't develop a relationship of trust with plaintiff's counsel.

Two years after the litigation began, plaintiffs moved for an award of attorneys' fees, and the District Court has ordered us to pay every nickel requested by the plaintiffs. Because we are working under a fee shifting principle, the District Court has a duty to probe deeply into the fee application of plaintiff's counsel, and because we have a fee shifting statute, the standards and procedures that must be developed by this board must recognize that the state of New York is a captive payor.

If the state of New York had had a voice --

QUESTION: Mr. Leventhal, that is true of any fee shifting statute, isn't it? I mean, Section 1988 isn't the first statute that has ever been passed by a legislature saying that the losing party pays the winning party's attorney's fees.

MR. LEVENTHAL: That's correct. The principle

applies in every fee shifting statute. The difficult question presented is how should the hourly rate be calculated for attorneys without relevant billing experience, who don't have a normal billing rate, who work for profit and non-profit law firms.

There have been developed three approaches to this question in our judgment. The first is a fictional market approach adopted by the District Court in this case. It is almost a fanciful approach. Under it, the court asks for information on awards granted in other civil rights cases or in other cases that the court finds comparable.

When it does so, it doesn't ask whether there was any information, any evidence submitted in those case which establish what the market rate is, and in fact the court below, by way of illustration, relied upon Becker versus Blum, a case in which the District Court awarded $75 an hour for lawyers with less than two years' experience and $90 an hour for lawyers with more than two years' experience, without any evidence of what the market rate is.

And in fact, in that case, the only comment of the District Court was that the Legal Services Corporation should have asked for more, but there was no evidence in the case of what is in fact a market rate.

We therefore view it as entirely fictional.

The second approach --

QUESTION: Mr. Leventhal, did you raise your challenge to the use of market rates in calculating these fees in the lower court?

MR. LEVENTHAL: Your Honor, we raised in the lower court a claim that the fee award was exorbitant, and we argued in the Second Circuit for the first time that hourly rates should be based upon costs. But throughout this litigation we have argued for -- under different theories that whatever the rate granted to the plaintiff's counsel in this case, it was excessive.

QUESTION: May I ask, in the same vein, you mentioned at the outset that you never reviewed the time records because they weren't your client and the court should probe deeply into the time records. Did you not have an opportunity to have discovery on the time records? Did you take advantage of it?

MR. LEVENTHAL: Your Honor, it is our view that the plaintiffs have the burden of producing time records and of producing evidence of proper market rate, of an hourly rate that is appropriate. We did object, and in response the plaintiffs filed supplemental affidavits which we found inadequate.

QUESTION: Did you specifically object to the

-- Do you question the hours they spent, for example?

MR. LEVENTHAL: Excuse me, sir?

QUESTION: Did you raise any question about the integrity of the time records and the number of hours they claimed to have spent?

MR. LEVENTHAL: We claim that the number of hours they claimed were excessive. On Page 19 of our reply brief, we set forth --

QUESTION: I understand that, but did you deny that they actually spent the time they say they spent?

MR. LEVENTHAL: No, Your Honor, we did not.

QUESTION: So we can assume that the time records are genuine and not in dispute?

MR. LEVENTHAL: That's correct.

QUESTION: Well, Mr. Leventhal, I am confused. Were the time records themselves filed with the District Court?

MR. LEVENTHAL: What was filed with the District Court was an affidavit listing the hours expended by counsel. If you are talking about time records, contemporaneous time records --

QUESTION: Yes.

MR. LEVENTHAL: -- no, Your Honor.

QUESTION: No such records were filed by the plaintiffs in support of their application?

MR. LEVENTHAL: That's correct. They claimed that contemporaneous time records were available for a good number of the hours expended, and they conceded that for a good number of the hours expended there were no contemporaneous time records.

QUESTION: That was the substance of their affidavit?

MR. LEVENTHAL: Yes, Your Honor.

QUESTION: Was there any evidence put in with respect to how many hours a year a lawyer of this status and stature would have? In other words, can it be assumed that about 2,000 hours a year is the amount of time a two-year lawyer can put in?

MR. LEVENTHAL: Your Honor, that is one approximation. In the Lamb case, a Tenth Circuit decision recently entered, Ramos versus Lamb, the Tenth Circuit estimated 1,400 to 1,600 hours was the average expenditure of time in a year by a lawyer in a private firm.

QUESTION: Well, that is a lawyer who has the obligations of running the firm, besides taking care of the clients.

MR. LEVENTHAL: Yes, sir.

QUESTION: There are studies extant, the American Bar and others, that lawyers at the lower

echelons in the law firm can put in 2,000 charged hours a year.

MR. LEVENTHAL: Indeed they can, Your Honor, and that is relevant --

QUESTION: That would mean at the rate they were allowed here these men would be paid at the rate of what? Over $400,000 a year, wouldn't it? Is it $150 plus the $75?

MR. LEVENTHAL: $150 an hour total, a $100 base rate and a 50 percent multiplier.

QUESTION: Oh, I see. It isn't $150 and then $75?

MR. LEVENTHAL: No, Your Honor, it is $100 plus 50 percent.

The second approach that has been used by the lower courts is a bona fide market rate approach, and in those cases there is a meaningful effort to obtain information on what is in fact a market rate for a given attorney.

The third approach, a cost basis --

QUESTION: Are you going to spell that out any more, Mr. Leventhal? How does one go about deciding what a market rate is for a particular attorney?

MR. LEVENTHAL: Your Honor, the courts have struggled with that. I am not saying that they have in

fact achieved any degree of certainty. All I am conceiing at this moment is that there is a meaningful effcrt to obtain such information. But we think that it has been largely speculative, and I will very briefly get to why I believe it is speculative.

QUESTION: Well, what is the going rate for civil liberties lawyers in New York?

MR. LEVENTHAL: Your Honor, I don't believe we've ever calculated that.

QUESTION: Well, what are you going to measure it by?

MR. LEVENTHAL: Your Honor, we think that a reasonable approach would entail paying an attorney for the value of his time based upon his counterpart at a private law firm plus a percentage of the non-profit organization's overhead attributable to that particular attorney. In that way, we recognize the value of the attorney in the marketplace. We are saying if that attorney had worked at a law firm, he would have obtained a certain annual salary. We will recognize that salary in our approach. We will add to it a percentage of the firm's overhead attributable to that attorney on an hourly basis.

QUESTION: I sure wish that was retroactive. Go ahead.

MR. LEVENTHAL: The critical deficiency in the market rate approach, even one that entails a meaningful effort to obtain solid information, is that the taxpayers of New York are not to be forced to pay two aspects of that market rate that produce windfalls to a non-profit lawyer. First, there is a profit component in a market rate. Based upon an appreciation of the risks a business assumed, to create a long relationship with clients, to develop a business over many years. The senior partners of a law firm demand a percentage of an hourly rate as their profit. We don't think the taxpayers ought to be forced to carry that part of the market rate.

Secondly, there is an overhead component in the market rate that we think results in windfalls, in excessive awards. The overhead component might be appropriate for a major Wall Street firm that has huge dollars at stake in a controversy, in a litigated matter, and is impelled by the demands of its client to provide unusual services.

We don't feel the taxpayers of New York when billed by the Legal Aid Society ought to have to pay those two aspects, those two elements of the market rate.

The approach we urge on the Court --

QUESTION: Incidentally, when fees are allowed, do they go to the Society or do they go to the Society's lawyers?

MR. LEVENTHAL: They go to the Society, Justice Blackmun.

QUESTION: No question about this?

MR. LEVENTHAL: There is no dispute.

The cost based approach that we urge upon the Court was articulated in large part by the Third Circuit in Rodriguez versus Taylor and recently adopted by Judge Friendly in a concurring opinion in New York Association of Retarded Children versus Kerry. That cost based approach is the one I described to you, Mr. Justice Marshall, entailing a component reflecting the value of the attorney plus some overhead.

It is not a complex computation. It is in touch with the reality of a non-profit organization. It achieves moderation, which we believe is required by the Congress under this fee shifting statute. We believe it will attract competent counsel, and at the same time protect against the windfall element in the market rate approach.

The calculation, to give you an easy example of it, if an attorney with two years' experience at the Legal Aid Society could have made $48,000 at a private

firm, and billed 1,600 hours a year -- I would use 2,000, Your Honor, but my notes show 1,600 -- that would produce a 30-hour rate for that attorney, and it would reflect the value of that attorney had he sold his services to a private firm.

If at the same time the non-profit organization had overhead of $5 million, and it employed 100 lawyers, then we could estimate the overhead per hour attributable to that lawyer as approximately $30 or $31 an hour, leading to an hourly rate of $60 or $61 an hour.

That approach has been recommended by Judge Friendly as appropriate under the statute.

The opposition's principal claim is that the --

QUESTION: There is no claim, I take it, that there is such an overhead with respect to the Society here.

MR. LEVENTHAL: That amount?

QUESTION: Yes.

MR. LEVENTHAL: No, Your Honor. It is a figure I am giving for my hypothetical.

QUESTION: This is the going rate, in other words.

MR. LEVENTHAL: No, it is entirely speculative. I have just pulled that $1 million or

whatever million we are talking about.

QUESTION: I see.

MR. LEVENTHAL: I am simply illustrating that it is an easy computation to make.

Now, the opposition's principal claim is that this cost based approach is too complicated and it is too intrusive. That is their principal argument. We insist that it is no more complicated and no more intrusive than the market rate. Market rates are not easy to calculate. They require knowledge of the financial structure of the law firm, who gets what profit in what amounts. A market rate would vary with the benefit to the client. The market rate would vary based upon the previous experience given to the firm by the client. The market rate would vary based upon the business the firm expected to obtain from the client, and the market rate would vary from client to client and from service to service.

That is a very intrusive series of variables. As the Copeland court recognized in its very brief discussion of this market rate, that inquiry could be very intrusive because it can require documentation, it could require what the court referred to as other submissions, and it can require a hearing, and a very complex hearing.

In a recent decision, this Ramos versus Lamb decision, the Tenth Circuit noted that the plaintiffs in that case sought a fee award of approximately $700,000, $700,000, $800,000. The experts produced in that case disagreed to the tune of $500,000 on what a reasonable market rate would be for those attorneys. So the notion that somehow a market rate is easy to calculate is only true when we take the fanciful approach of simply referring to other cases.

When you get down to trying to calculate it, it is very complicated. It is very intrusive.

QUESTION: Do you think your cost figures would be any more easy to calculate or to ascertain actually?

MR. LEVENTHAL: I think all we have to establish, Your Honor, is that they are not more difficult to ascertain. I am not certain. It seems to me that if they are not more difficult to ascertain than a market rate, and if our approach also eliminates windfalls, a critical objective of Congress, our approach is superior.

The second major argument, and I frankly think of it as a subsidiary argument, is the legislative intent argument. Counsel insist that Congress intended to produce what we see as a windfall award.

QUESTION: You mean windfall in the sense that the non-profit organization in effect is being paid more than the commercial organization.

MR. LEVENTHAL: A windfall in that it is paid more than a reasonable hourly rate. In this case it was much more than the private firm.

QUESTION: Just because -- they just net more.

MR. LEVENTHAL: It is a windfall because when you look at the --

QUESTION: Suppose it is unquestioned that the award in this case was easily within the range that firms in New York charge. You would still have your case.

MR. LEVENTHAL: Yes, indeed, Justice White.

QUESTION: In the sense that the non-profit organization nets more.

MR. LEVENTHAL: Yes, Your Honor, exactly.

QUESTION: And so they are really paid more.

MR. LEVENTHAL: Yes, Your Honor, that's exactly --

QUESTION: And hence a windfall, right?

MR. LEVENTHAL: Yes, sir.

The key feature of the legislative history or the key holding of our Congress as the Court recognized last term was that competent counsel must be attracted

to these cases. The objective of the Congress was to assure access to the judicial process.

QUESTION: Let me just get one thought that Justice White's question prompted in my mind. Do you contend that the rate would be different if these were lawyers working for a large New York Wall Street firm and were allowed to work on this case on their own?

MR. LEVENTHAL: Your Honor, we think the fee award would have to be higher. We still think it would have to be moderate, but it would indeed be higher.

QUESTION: But you would apply a different standard to a private practitioner than to one working for a public interest organization?

MR. LEVENTHAL: We think the private practitioner is entitled to profit, while the non-profit organization ought not to be. We think that both inquiries, however, have to be guided by the notion of moderation.

QUESTION: And then, to take the converse for a moment, because there is some discussion about the problem the states have when they hire private counsel in antitrust cases and things like that, I take it the standard there would be the comparable market standard rather than the non-profit standard, because you want to be able to compete in the market for good lawyers.

MR. LEVENTHAL: The courts have held that, Your Honor.

QUESTION: Yes.

MR. LEVENTHAL: That's correct.

QUESTION: How does the contingency factor enter into this?

MR. LEVENTHAL: Your Honor, we think that the Court has held that a bonus for contingency is improper because it compensates counsel for the cases it has lost. Indeed, as the Court held last term, the notion of paying a lawyer for time expended when he loses, when the winning party has to pay the loser, as the Court said in the Sierra Club case, it suggests unfairness to the litigants, and it is inappropriate.

In fact, we think that the notion of a contingency adjustment is inconsistent with the critical holding last term that ordinarily an hourly rate times hours expended results in a reasonable hourly rate.

QUESTION: Well, Mr. Leventhal, even if your economics are unimpeachable, the real question is a statutory construction question in this case, and if it were just true and obvious that Congress had mandated a so-called market measure, you would be out of court, wouldn't you?

MR. LEVENTHAL: That's correct, but we don't

think --

QUESTION: So you are going to get to what Congress intended?

MR. LEVENTHAL: Yes, Your Honor. We think that the legislative history as a whole illustrates that Congress did not intend that market rate fees be awarded. In fact, all that Congress intended was that the judicial process be available to the plaintiffs, to civil rights plaintiffs. The objective of Congress was to eliminate barriers to plaintiffs obtaining redress from the judicial process. It did not require that counsel be paid the highest fees available in the market place. It did not --

QUESTION: Mr. Leventhal, if I could back up a minute, we've got two defendants. One is defended by Legal Aid, and the other is defended pro bono by a Wall Street firm, and they both try the case. One will get more money than the other?

MR. LEVENTHAL: One would be entitled to more, Your Honor. The attorney of the profit-making organization would --

QUESTION: He did no more work than the other one did.

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

QUESTION: And he had no more education, and

no more brains.

MR. LEVENTHAL: Your Honor, if he had different overhead, we feel that difference should be reflected in the fee award.

QUESTION: Let's just add a third to Justice Marshall's example. There are three firms representing three different -- three lawyers representing three different defendants in the same case. Two of them are from private firms. One of them is from a non-profit firm. But the overhead in one of the private firms is considerably different than the other. Would we have to go into the cost feature on every private firm, or --

MR. LEVENTHAL: No, Your Honor. I think --

QUESTION: Then what do you do? Just the market?

MR. LEVENTHAL: First of all, Justice White, I don't know that we have that many cases where there are three lawyers from three different firms.

QUESTION: I know, but you have different cases represented by different kinds of lawyers who are privately employed.

MR. LEVENTHAL: Your Honor, we think that the case could entail --

QUESTION: You don't suggest to me that the fees of all the firms, the smallest to the largest, are

the same?

MR. LEVENTHAL: No, Your Honor, they are not. They are very different.

QUESTION: Even though each one of them is justified cost-wise.

MR. LEVENTHAL: We think there can be three different fee awards, but we don't think the complicated calculation is required. We think that there can be estimates of hours -- of overhead, and estimates of profit margin.

QUESTION: Mr. Leventhal, in a couple of your responses to questions from the bench, you have said that you thought the private firm was entitled to make a profit. Now, one could draw from that the inference that they were going to pay dividends to its stockholders from some of that. Do you mean anything more than it was entitled to get its overhead?

MR. LEVENTHAL: I am saying it is entitled to get its overhead, which can be defined as including some amount of money to other partners of the law firm.

QUESTION: Or other associates.

MR. LEVENTHAL: Or other associates.

QUESTION: Because of the tradition of partners living off associates?

MR. LEVENTHAL: That's correct.

(General laughter.)

QUESTION: Well, is it not a fact of life recognized in New York and elsewhere that partners in big law firms make part of their profit by the work of the associates?

MR. LEVENTHAL: I think they often buy lawyers wholesale and sell them retail. Yes, Your Honor. And I think that we have to have several different rates to avoid windfalls. It just seems -- We do have to attract private counsel to these cases, and to attract them we --

QUESTION: Well, this word windfall, up until -- he didn't get anything, so any of it is a windfall.

MR. LEVENTHAL: Your Honor, under the statute it is a windfall.

QUESTION: Well, before the statute there was none.

MR. LEVENTHAL: That's correct, but --

QUESTION: So that now they get it. Somebody could call that a windfall.

MR. LEVENTHAL: Yes, Your Honor, somebody might, but the fact is I am talking about the word "windfall" as it is used in the legislative history of this statute, and what the Congress intended windfall to mean after the statute was enacted.

QUESTION: Well, some Wall Street firms back

in the good old days had as many as 13 and 15 pro bono cases, and didn't get a single nickel out of them.

MR. LEVENTHAL: I think that illustrates our point, Your Honor, and to this day --

QUESTION: Does that illustrate what they are now getting? All of it is a windfall?

MR. LEVENTHAL: Your Honor, most Wall Street firms continue to take cases pro bono. One of the cases we cited, McCane, involved a case taken pro bono by a major firm in which it said to the District Court, pay us whatever you want. The fact is, the problem that the state of New York faces --

QUESTION: Well, before, they didn't say pay me whatever you want because they couldn't get paid.

MR. LEVENTHAL: Yes, Your Honor.

When we look at this private practitioner, it is of great concern to the state that we do look at his overhead, and that there be differences. The fact is, we have fee applications pending against the state of New York right now where attorneys have worked out of their homes, or attorneys have worked out of a one-room office with a telephone answering machine, and they are seeking fees that might be identical to a lawyer with substantially more overhead. It is relevant that their overhead is substantially less than other lawyers

working downtown.

We are also concerned that lawyers look to obtain their highest opportunity fee when they bill the state of New York. The fact is that lawyers don't operate that way. The fact is that lawyers charge different hourly rates at different times and for different clients, and we think it is unreasonable for an attorney to be seeking a fee based upon the highest fee he has ever recovered, or the highest hourly rate he has ever billed.

The critical arguments raised by the opposition are that Congress intended that the fee awards be in our judgment unreasonable, that the fee awards not be measured by neutral principles. They argue that rigidity is required. We think that is inappropriate.

Secondly, they don't argue that cost based rates are unreasonable. There is not a whisper in their brief that costs are irrelevant. They simply say that costs are too complicated and too intrusive, when in fact the evidence shows that they are no more complicated and no more intrusive than the alternative market rates.

I will reserve the balance of my time for rebuttal, sir.

CHIEF JUSTICE BURGER: Very well.

Mr. Silverman.

ORAL ARGUMENT OF LEON SILVERMAN, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. SILVERMAN: Mr. Chief Justice, may it please the Court, I would like before launching into my argument to have some general principles up front. One is the result of this lawsuit. In this case, 114,000 persons over a 35-month period were illegally deprived of their Medicaid benefits. If one makes a modest assumption that each of those persons who had been kicked off the roles illegally was off the roles for just one month, then -- and if you make the further assumption, which is mathematically computable by one of the appendixes in our lodgement, that the average monthly cost is $100 per person, then the class was deprived of $317,000 a month, or $3,500,000 a year, and the Society gained for its clients $3,500,000 a year for the indefinite future.

The fee here awarded was $117,000. Now, I am not suggesting that there be some mathematical relationship, but I recall Judge Wilke in the minority in Copeland saying that there $30,000 had been achieved and wasn't it terrible that there the attorneys were going to get a fee substantially in excess of the

$30,000 that the clients had realized. That consideration is not, I suggest, in this case.

To dispose of another matter which Justice O'Connor alluded to in her question, I would like to take the liberty of reading a short paragraph from the state's brief that was submitted to Judge Sweet, who is the District Court judge who set the fees. The state says, "The starting point in the determination of a fee award is calculation of the time the attorney has expended on the case multiplied by an hourly rate which is determined by the amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation. The result of this computation is the lodestar amount."

The state invited Judge Sweet to use that analysis.

QUESTION: I take it they have abandoned that notion in the Court of Appeals.

MR. SILVERMAN: Having been unsuccessful at least before Judge Sweet they have indeed abandoned it. I do not argue that that rises to the dignity of a waiver, but it surely, I think, is relevant to the question of Judge Sweet's exercise of discretion.

QUESTION: But the Court of Appeals

entertained that, didn't it?

MR. SILVERMAN: The Court of Appeals, well, entertained it. The Court of Appeals considered and rejected it.

QUESTION: Well, I know, but so it was there.

MR. SILVERMAN: It was before the Court of Appeals.

QUESTION: And they accepted it. They didn't say, awfully sorry, but you didn't present it below.

MR. SILVERMAN: No, they did not. I merely make mention of it to indicate that Judge Sweet in exercising his discretion did not, or at least I am arguing that that is a factor that goes into the judge's exercise of discretion, but let me go further and say that the state waived a hearing and waived cross examination on the number of hours that were worked in this case. They conceded the accuracy, although the time records were available and the attorneys who worked on the case were available for cross examination on the date of the hearing.

QUESTION: There is a certain element there of on whom is the burden of proof, isn't there, Mr. Silverman?

MR. SILVERMAN: Yes, sir.

QUESTION: If the state is obligated to

justify by a certain prima facie case the attorneys' fees which it has -- rather, if the plaintiffs are seeking to justify it, if they are obligated to come forth with a prima facie case, if they didn't, the fact that the defendants might have utterly devastated their showing even further by cross examination or by discovery doesn't make up for the lack of a prima facie case on the part of the party who has to show it.

MR. SILVERMAN: It surely would not, Your Honor, but let me suggest that a prima facie case was well made out here by the submission of affidavits, the digest of the time records, and the submission of memoranda which called the court's attention to what the Society felt were comparable cases submitted on the other side were the citation of other cases which the state thought were comparable. A prima facie case, I suggest, was made out. The question as to whether or not my friends on the other side could have examined to their hearts' delight with respect to duplication, excessive hours, they do not challenge that the number of hours were actually worked.

Now, I will try to get over one other -- what I think is a major point, but one which I do not intend to argue at length. The factual predicate upon which this Court is now being asked to change the traditional

and, I submit, Congressionally mandated method for the setting of fees under 1988, that factual predicate is absolutely non-existent. In our lodgement with the Court, in Appendix 3, we have tried to make a meticulous analysis of the cases that have arisen under 1988 which appear in the pocket parts, and we have tried fairly to chart them in a way that is meaningful for the Court.

It is my submission that that demonstrates, that factual determination from the way the courts have applied 1988 shows that they have been moderate and reasonable in amounts. They have exercised their discretion as the Congress intended them to, and they have done so reasonably by using the prevailing rates in the community approach.

Now, it is right, as Mr. Justice White suggested, that the point of this appeal is the legislative history, and I have -- I am willing to confront that because I welcome that analysis. This Court has recently made an analysis of 1988's legislative history.

QUESTION: Well, Mr. Silverman, unless you had really some support in the legislative history that would foreclose the kind of an approach that is suggested by your colleague on the other side, you might be in trouble.

MR. SILVERMAN: If Your Honor please, I do not think that the legislative history is fairly to be determined when the Congress has considered and rejected. I suggest --

QUESTION: All right. All I am saying, all I am suggesting is that you are at least helped considerably if you have some Congressional support. That is a different case than if Congress had said tc the courts, award these fees on any basis you think is just. Then you would have a tougher case, I suppose.

MR. SILVERMAN: Your Honor, I think that I have, if I --

QUESTION: But, of course, you --

MR. SILVERMAN: I may live to regret these words, but I think I have the easier case in demonstrating that the legislative history manifests the Congress's intention that fees should be awarded on the prevailing rate in the community test. It never considered the word "cost" anywhere in the legislative history, that is, the costs of the rendition of services.

QUESTION: By that you would mean that a law professor who takes a particular case just on appeal, for example, where it is easier to measure the time, has no significant overhead, can charge the same as Sullivan

and Cromwell or your firm or --

MR. SILVERMAN: No, sir. He may charge -- Law professors, I take it from reading the press, tend to be rather extravagant in their notions as to what the value of their services are.

(General laughter.)

MR. SILVERMAN: But the courts have yet to be heard from, and I suggest that the District Court in Massachusetts will award that professor an amount which is comparable to the prevailing rates in the community for a person with his undoubted talent, stature, years at the bar, and whatever other criteria the court uses to fix the touchstone of prevailing rates in the community.

QUESTION: Does the history say anything about this overhead business?

MR. SILVERMAN: Not a word, Your Honor. I find this to be such an interesting construct which my friend passes off as being the simplest of things to deal with. You make some mathematical computation as to how much a person of this age and weight in a legal services office makes at the private bar, and then you take all the overhead, and you kind of divide it, and that is a simple computation.

QUESTION: And you pay a Wall Street lawyer

with an office in Wall Street more than you pay a lawyer with offices on Madison Avenue.

MR. SILVERMAN: Well, I -- There are an infinite number -- You may have to pay the Wall Street lawyers different sums based on the following. It may be that Firm A is in the 19th year of a 20-year lease in one of the great buildings, and that may be productive of a $10 rental. I don't think it fair to say that you can rent if you are entering into a negotiation with a landlord for that space that rental of $10. You may be looking at a $50 rental. If this Court or the District Court or the Circuit Courts going to now have to make an examination into what the costs for every lawyer, law firm, civil rights organization, legal aid society, or --

QUESTION: Mr. Silverman, suppose -- Is your only objecting to the figuring in of the overhead factor the difficulty of getting the statistics? Supposing a court were presented with a stipulation that Lawyer A's -- that the standard rate in the area was $100 an hour, and that the standard percentage of net to gross, or say the standard ratio of overhead was 40 percent of gross, and then you also had in the stipulation that the particular lawyer seeking a fee had a ratio of overhead to gross of 15 percent. Now, if all that were stipulated, would you say that Lawyer B was entitled to

the same hourly rate to be awarded as Lawyer A?

MR. SILVERMAN: Well, Your Honor, the answer is, I don't think that the same -- that the lawyers -- Given the same case, and Lawyer A and Lawyer B having worked side by side, and the stipulations which Your Honor refers to are entered into, I should think that they would both get the same amount. If there were a different ratio for each of them, by my friend's theory, they would get different amounts. The stipulation is what really --

QUESTION: Yes, but in Justice Rehnquist's example, who would get hurt? Would the -- The only way you can keep anyone from getting hurt is to pay the one with the 15 percent overhead the same as the other fellow. I suppose he might get hurt if he was foolish enough to sign the stipulation.

(General laughter.)

MR. SILVERMAN: I have yet to hear of such stipulations. I would find it really rather fanciful that when law firms or attorneys are seeking fees, that they are going to stipulate themselves out of court. They may agree on a settlement of their law fee.

QUESTION: Of course, most of the firms -- I have asked a good many firms, what does it cost you a year for your first year associate, and they have an

answer right on the tip of their tongue --

MR. SILVERMAN: Your Honor -- Forgive me, Your Honor. I did not mean to interrupt. Of course the answer is on the tip of their tongue, but is the answer accurate? Let me put to Your Honor some very serious questions that law firms, and I don't care whether it is a professional corporation which -- in which the notion of profits is rather curious, or a partnership consisting of professional corporations and partners, or a major partnership, or a medium-sized partnership or a single practitioner, let me say that the question as to what goes into costs, if you want to be glib and answer a question that someone puts to you, you can come up with a figure, but if you do this in any mathematically precise way, let me put some questions that inevitably are going to come to the District Courts if this Court changes the way they are to approach these questions.

For example, how do you treat in the Legal Aid Society fundraising? Part of overhead or not? How do you treat in the private law firm business development expense? Some firms award them to partners. Some firms make partners use them on their own. I could sit, Your Honor, and in a day develop 100 such questions. I do not suggest that they are not answerable.

QUESTION: Mr. Silverman --

MR. SILVERMAN: They are answered because the standards for cost accounting are essentially arbitrary.

QUESTION: May I ask you a question?

MR. SILVERMAN: Certainly, sir.

QUESTION: I think it is relevant to what you are saying. Your basic position as I understand it is that the prevailing rate in the community is a lodestone, but is the prevailing rate with respect to the employment of associate lawyers identical in New York City? Of course it is not. It is very different in my city of Richmond. I can tell you that.

MR. SILVERMAN: Your Honor, they are not identical, but they are within ranges.

QUESTION: Oh, within range?

MR. SILVERMAN: Yes, and if I may suggest it, Your Honor, the way the courts have for -- I don't mean to be irreverent -- for donkeys' years dealt with this problem. This Court is not confronted for the first time with how you fix rates, lawyers' fees.

QUESTION: What is the prevailing rate --

MR. SILVERMAN: The courts have done this now for decades.

QUESTION: What is the prevailing rate for the Wall Street law firms for first year associates?

MR. SILVERMAN: Somewhere between $65 and $85

today.

QUESTION: First year?

MR. SILVERMAN: For first year lawyers.

QUESTION: Without clerking any --

MR. SILVERMAN: I beg your pardon, sir?

QUESTION: First year associates.

MR. SILVERMAN: First year associates. I have answered your question.

QUESTION: You said $65,000 to $80,000?

MR. SILVERMAN: Not -- I am sorry. I thought you meant the hourly rate.

QUESTION: No.

MR. SILVERMAN: Forgive me if I --

QUESTION: What is the -- I thought you said thousands. What is the hourly rate?

MR. SILVERMAN: The hourly rate is between $65 and about $80 to $85 an hour for a person out of law school, and let me hasten to add that if a person comes to a law firm having served as a law secretary or clerk for a member of the Supreme Court, he is not a first year associate, he comes in as a second or a third year associate, depending upon how much time he has clerked for various judges, and that rate is commensurately higher.

QUESTION: Are associate lawyers paid the same

in the various New York law offices?

MR. SILVERMAN: For the major firms, there tends to be a kind of standard.

QUESTION: Yes.

MR. SILVERMAN: Now, that standard sometimes gets out of whack because raises come into effect on January 1st or September 1st, and the associates are not terribly bashful about pointing out to the law firms when they feel that the law firms are falling behind --

(General laughter.)

MR. SILVERMAN: -- and law firms then generally respond to that, but if Your Honor please, the problem of setting fees by judges is something that has been known for decades. It is my friends on the other side who for the first time suggest that a cost analysis come up. I said --

QUESTION: Mr. Silverman, don't you acknowledge that there is a great difference in the problem of fixing fees now and let us say 50 years ago or 40 years ago in cases of this kind?

MR. SILVERMAN: Your Honor, I do not think that the process would differ. I do not consider it more difficult to use the prevailing market rate, which as I say now has a history of decades behind it than to go to a cost accounting system, and may I observe, Your

Honor, that when I said that the questions that one would have to answer are answerable, they are dogmatically answerable. There is no particular logical morality in cost accounting concepts, but it took an accounting standards board ten years to come up with this volume, which is cost accounting standards in connection with government contracts. My friends --

QUESTION: Well, that is a little more complicated than running a law firm, isn't it?

MR. SILVERMAN: The running of a law firm, Your Honor, since I am doing it for mine, I know of nothing more complicated.

(General laughter.)

MR. SILVERMAN: But in terms of accounting standards, since no law firm that I know of begins tc keep its records on any basis which would permit this kind of a computation, someone, Mr. Chief Justice, must determine the yea or the nay of a particular cost item. Now, if each District Court is going to do it for itself, I suggest the Circuit Courts are going to be very heavily involved, and I suggest that eventually this Court may sit and determine whether or not professional development expenses, recruitment expenses, what all are an item of cost.

QUESTION: Let me suggest a hypothetical that

might not be so complicated that it would need a CPA and a ten-year study to resolve. An associate is paid his rate, his salary is fixed at $25 an hour, and he is getting $50,000 more or less a year, somewhere around that, because this 1,400 hours is not the standard for associates as it is for partners now. Now, he is getting $25 an hour --

QUESTION: Partners are more, yes.

(General laughter.)

QUESTION: -- and he is charging -- and the firm is charging $50. Now, that is a profit, isn't it?

MR. SILVERMAN: Your Honor, it is a --

QUESTION: It is a perfectly legitimate profit. I am not suggesting anything is wrong with it.

MR. SILVERMAN: I don't want to be seen to be adopting words the implications of which I am not comfortable with. The word "profit" is --

QUESTION: Well, let's call it --

MR. SILVERMAN: It's a funny thing in a law firm.

QUESTION: Let's call it markup then. At any rate, here is a margin.

MR. SILVERMAN: More than you pay the young man for his salary.

QUESTION: Now, some of that is because the

firm is taking a certain measure of responsibility. That's a factor that's an intangible one, isn't it?

MR. SILVERMAN: Yes, sir.

QUESTION: But they can readily calculate what is the overhead factor to be assigned to that associate.

MR. SILVERMAN: I suggest --

QUESTION: They don't need a CPA for that either.

MR. SILVERMAN: Your Honor, I suggest that that is a most complicated problem.

QUESTION: Well, having done it myself, I --

MR. SILVERMAN: But you -- Forgive me.

QUESTION: -- I think it is not all that complicated.

MR. SILVERMAN: Your Honor, I heard, I read Judge Friendly say that's not complicated. I don't want to repeat the material in our brief which indicates that it is very simplistic to take all of your costs and spread them over the number of timekeepers, if you will, but are all of those costs legitimately part of costs? For example, the cost analysis my friend argues for, he can't mean and the state can't mean that whatever your costs are you may pass them along. Somebody is going to some day say, hey, that is not right. You can't have premises in which you are going to have an art

collection in which you are -- and that is part of cost -- in which you are going to pass on to the taxpayers of the state. What are you going to judge these unbridled costs against? And that word will be soon used. You would have to do it against prevailing market rates. Whatever system you have --

QUESTION: Mr. Silverman, may I ask one other question that you went by rather rapidly earlier? In the second circuit, as I read their just two-page order, they dealt with three issues, none of which was this issue. To what extent was this issue raised in the Second Circuit, if you could please tell me?

MR. SILVERMAN: The costs?

QUESTION: Yes. Did they argue --

MR. SILVERMAN: My friends raised it in argument. It was responded to, and it made little --

QUESTION: In oral argument, or was it in their briefs?

MR. SILVERMAN: In their briefs. I beg your pardon, Your Honor. I didn't --

QUESTION: Because it's -- They have a very conscientious panel and didn't even mention the issue, I see.

MR. SILVERMAN: Because it is -- if I may suggest it, it is bizarre, and I don't really know why

we are here. I can understand that a -- looking at the fees in this case, someone must have said, oh, my Lord, that really is rather high, and when my friends on the state side put their briefs in and indicated that this was well on the verge of bankrupting the various communities around the country, that is utter rubbish.

QUESTION: Well, you are here presumably because at least four Justices of this Court voted to grant certiorari.

MR. SILVERMAN: Your Honor, I believe that had the Justices of this Court seen our Appendix 3, and been persuaded as I urge that you be persuaded, that this does not manifest some hog wild approach to the public fisc. Let me point out to Your Honor 39 of the Attorneys General who are amici agree with the reasonable fees in the community. It is only New York state and Massachusetts among the states that are complaining about that. The 39 states do not find it difficult.

QUESTION: Well, Mr. Silverman, there may be another reason for granting cert, because there is another issue in your case.

MR. SILVERMAN: Yes, Your Honor. I am not privy to why this Court granted cert.

QUESTION: How about the 50 percent?

MR. SILVERMAN: I beg -- The bonus? The upward adjustment? I will direct myself to that if Your Honor please.

QUESTION: Well, I mean, that is an issue, isn't it?

MR. SILVERMAN: It surely is. But let me first --

QUESTION: And there is some -- there is disagreement around the country on that, isn't there?

MR. SILVERMAN: Your Honor, I do not consider that there is disagreement with respect to the upward adjustment of the lodestar. If you adopt what I think is the reasonable Congressionally mandated, judicially sanctioned, universally around the country theory that, A, private law firms and public interest law firms must be treated alike, that is clear in the legislative history, and that the prevailing rates in the community ought to determine the initial step in the lodestar, I am perfectly willing to adopt -- That sounds much more presumptuous than I mean for it to be. It is right to then say what is the permissible bounds or what are the criteria for determining an upward adjustment in the lodestar?

This Court, and I believe unanimously, in the Hensley case said that the first step is to determine

the lodestar, albeit not using that word, but going through that process, and I believe that Mr. Justice Powell for the entire Court said that's only the first step. Then you determine whether there should be an upward adjustment or a downward adjustment depending upon the exceptional nature of the factors in the particular case involved.

QUESTION: Well, it certainly just didn't depend on winning the lawsuit.

MR. SILVERMAN: Oh, I do not believe that that depends only upon winning the lawsuit, but in this case the judge held, having looked at comparable cases around the country, that an upward enhancement was justified, as I believe has been held by all of the courts around the country.

You see, if you use the word "bonus," you are using a nasty word, because bonus is sometimes defined as something in addition to a reasonable fee. But I prefer, as the courts have done, to use the word "upward adjustment" as a part of the reasonable fee, and if it becomes part of the reasonable fee, an upward adjustment is not, if I may say so, unreasonable.

QUESTION: It is part of the prevailing rates in the community.

MR. SILVERMAN: Precisely, Your Honor, and

that has been determined again in the legislative history to be permissible as not, and I repeat, not producing a windfall.

QUESTION: And the contingency is part of that factor, is it?

MR. SILVERMAN: Your Honor, contingency means various things to various people. Contingency as I understand it, that means an upward enhancement with respect to the risk factor, is whether or not the lawyer will be successful in that case. It isn't whether he is going to be paid for cases that he has lost. Here, the Legal Aid Society, and let me put it down to cases, the Legal Aid Society has a 1988 case. It is a responsible organization. I assure this Court that as a director of that organization, we do not run off filing cases willy-nilly. It is a mature and reflective process. We determined that this should be brought as a class action, and we determined to put a team together so that the case could be litigated, we think, expeditiously and successfully.

QUESTION: So you are not suggesting then that it would be proper to make an award based on what a contingency, a regular contingency fee lawyer might charge?

MR. SILVERMAN: Not on the basis that you are

going to pay him for unsuccessful cases.

QUESTION: Yes.

MR. SILVERMAN: But let me say what I do think the contingency in this case is, about which I have no doubt there may be some disagreement. A private practitioner, I don't care whether it's a law firm or whatever, makes a judgment that he is going to take a 1988 case, and he has a chance of losing it, in which case his time will be unpaid for, or that he will win it, in which case he will get some additional sum by reason of that risk factor. Not other cases.

The Legal Aid Society does if not the same thing, not substantially different.

QUESTION: Well, now, Mr. Silverman, you said the private practitioner if he wins will get some additional sum. Do you mean some additional sum over and above the fair hourly rate?

MR. SILVERMAN: No, sir, because that additional sum would be computed in the fair hourly rate.

QUESTION: Well, then, why did you use the word "additional?"

MR. SILVERMAN: I am sorry, Your Honor. I was trying to get a two-step analysis, and I am trying to adopt the analysis that Mr. Justice Powell went through

and all of the other cases that talk about the lodestar, and then a further consideration before a reasonable fee is determined.

QUESTION: But you do insist that he is entitled to an extra fee because he took a risk?

MR. SILVERMAN: Yes, he takes a risk in that lawsuit.

QUESTION: Well, everybody does.

QUESTION: What risk did he take?

MR. SILVERMAN: Sir?

QUESTION: Everybody takes a risk when he is in a lawsuit.

MR. SILVERMAN: Of course, but most people who have fee paying clients don't take a risk that they are not going to get paid.

QUESTION: Then you really are compensating for the contingency like a personal injury lawyer.

MR. SILVERMAN: Your Honor, I may be making more of this than need be made. I merely want to get away from the notion that when you take Case A you get an additional amount because you have lost Case B. That I do not consider to be, surely in light of this Court's instructions, a reasonable way to define contingency. However, when you take Case A and you are running the -- I am sorry, Your Honor.

CHIEF JUSTICE BURGER: Finish your sentence.

MR. SILVERMAN: If you are running the risk that you are not going to get paid as a private lawyer, the Legal Aid Society runs the risk that it will not be able to render services. That risk is the same, and I suggest has a much higher public purpose than merely putting money into a private practitioner's pocket. This means that our clients cannot get paid. That risk is what is compensated for in the risk adjustment, but I must add, that risk adjustment was not used by Judge Sweet for fixing the upward adjustment here. He chose not to use that as a factor. Therefore that discussion so far as this case is concerned I consider to be rather academic.

QUESTION: But interesting.

MR. SILVERMAN: Sir?

QUESTION: But interesting.

MR. SILVERMAN: Fascinating, Your Honor.

(General laughter.)

CHIEF JUSTICE BURGER: Mr. Leventhal.

ORAL ARGUMENT OF MELVYN R. LEVENTHAL, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. LEVENTHAL: Your Honor, may it please the Court, the present calculation of hourly rates and amounts of award are rough estimates in many, many

respects. When attorneys duplicate time, the courts have authorized downward adjustments for that duplication of rough percentages. When attorneys don't maintain contemporaneous time records, the Court has said there can be rough adjustments.

Last term, in Hensley, this Court authorized a 30 percent adjustment for failure to maintain contemporaneous time records. No precision was required. Last term the Court said that when a party does not prevail on all claims there can be a downward adjustment of the hourly rate and the award. No one talked about precision in figuring out exactly, mathematically, or with cost accounting the extent to which a claimant, an attorney lost or won a case.

This Court expressly held that the downward adjustment was fully at the option of the District Court. We have had downward adjustment authorized for inefficiency, without mathematical precision. We have no mathematical precision in the market rate. Yet when the state of New York asks for protection from windfalls, we are presented with an argument that we need cost accounting. That is not a fair approach to the case.

QUESTION: I suppose if the city had won its case -- Is it the city or the state?

MR. LEVENTHAL: The state.

QUESTION: The state. If the state had won its case and the judge had thought the suit was wholly frivolous, I suppose the state could have collected some attorneys' fees.

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

QUESTION: How would you like to cost justify that?

MR. LEVENTHAL: Your Honor, the fact is that the courts have held that we are under those circumstances required to look at the ability of the Legal Aid Society to pay.

QUESTION: I know, but on your theory you would have to cost justify.

MR. LEVENTHAL: I think we can estimate it.

(General laughter.)

MR. LEVENTHAL: Your Honor, in the last -- in the Willowbrook case Judge Newman, speaking for the court, talked about a breakpoint, a way of accommodating costs without a rough calculation. He said that we can estimate a $75 hourly rate as including costs that might be appropriate for a smaller firm or for a non-profit organization.

Let me add, too, that when Mr. Silverman said that the rates for a first year associate are $65 to

$85, that is not a market rate. That is his rate. The market is huge. There are firms with two lawyers in it, with three lawyers in it, with 50 lawyers in it, with 100 lawyers. Have we ever tried to calculate a market rate based upon the entire spectrum of the marketplace? No court has ever tried that. But if you want to get a true market rate, that is what is required. How would we calculate that?

Let me go to this question of the contingency adjustment. It might very well be that the underlying hourly rate should include some element for contingency that is far different from increasing an award by 50 percent because of a contingency. Perhaps the hourly rate might reflect some consideration of contingency. There are other parts of the upward adjustment made by the District Court that are more obviously inappropriate.

The court said that there was an upward adjustment because of complexity. Last term the Court said that those upward adjustments are often subsumed in the underlying award. This is an excellent example of that. This Court granted an hourly rate, saying the case was complex. He allowed a number of hours expended on the grounds that it was complex, and then he tripled it, forced the state to pay a third time for complexity, by saying that there is an upward adjustment for

complexity. Three times complexity was included in the hourly rate and the total award.

QUESTION: May I ask one other question about the proceedings in the lower court? Did you take a position in either the District Court or the Court of Appeals as to what the correct hourly rate should have been?

MR. LEVENTHAL: No, Your Honor.

QUESTION: You just said this was too high?

MR. LEVENTHAL: We said it was too high and that the plaintiffs have the burden of establishing what the market rate is.

QUESTION: Right. So you really don't have a position on what -- you say he is wrong on what the hourly rate is, but you don't tell us what is right.

QUESTION: But you are telling us how to figure it.

MR. LEVENTHAL: Yes, sir.

QUESTION: You tell us how to figure it, I know, by this cost accounting.

MR. LEVENTHAL: And we are saying at bottom that it is improper to bill the state of New York for a non-profit organization for the time, for that part of the award that goes to pay a profit to a partner in a firm and that goes to pay the fancy overhead of a major

firm.

QUESTION: Under your approach have you figured what this fee should have been?

MR. LEVENTHAL: No, Your Honor, we have not, but in the Willowbrook case, we have found acceptable an hourly rate of $75 an hour, the breakpoint rate. We have not pursued that further, and expect to pay approximately $700,000 to the Civil Liberties Union and the Legal Aid Society within a few weeks.

QUESTION: Well, Mr. Leventhal, I still don't understand how you could fail under your approach to insisting on cost accounting for fees when no non-profit organization is involved, but just private lawyers, individual lawyers or individual lawyers attached tc law firms, because I would think, as you say, there are just hundreds of law firms, two-man, three-man.

MR. LEVENTHAL: That's correct.

QUESTION: Wouldn't you have to do that with every fee award to a private organization? You would have to figure that lawyer's costs.

MR. LEVENTHAL: Your Honor, if we can adjust --

QUESTION: Wouldn't you? Wouldn't you?

MR. LEVENTHAL: No, Your Honor.

QUESTION: What would you do then? You would

just go to the prevailing market rate?

MR. LEVENTHAL: Your Honor, we would --

QUESTION: Would you or not?

MR. LEVENTHAL: We would not go to a prevailing market rate.

QUESTION: What would you do?

MR. LEVENTHAL: We would --

QUESTION: Not cost, not prevailing market. What would you do?

MR. LEVENTHAL: We would estimate it, Your Honor.

QUESTION: Estimate on what basis?

MR. LEVENTHAL: On the basis of the total costs, the total overhead of the law firm.

QUESTION: So you would do a cost accounting based on each individual law firm.

MR. LEVENTHAL: Well, cost accounting, if you mean a complex --

QUESTION: Well, I mean, you would do an estimate on each, and your estimate might be one thing for one law firm and another for another.

MR. LEVENTHAL: Yes, Your Honor. It would vary based upon that. The Court --

QUESTION: Which law firm would you compare in this case?

MR. LEVENTHAL: To the Legal Aid Society?

QUESTION: Yes.

MR. LEVENTHAL: At the very least, a very small law firm with low overhead. That is the critical point.

QUESTION: A law firm with no overhead?

MR. LEVENTHAL: Low overhead. Low overhead.

QUESTION: Low. Which one?

MR. LEVENTHAL: A small one.

QUESTION: You don't have any in mind, though, do you?

MR. LEVENTHAL: No, Your Honor, but we think that --

QUESTION: You could find one.

QUESTION: At this late -- How long has this case been pending?

MR. LEVENTHAL: Two years.

QUESTION: And you haven't come up with one yet?

(General laughter.)

MR. LEVENTHAL: The point is, Your Honor, that the plaintiffs haven't come up with an hourly rate either, a market rate.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

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

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:

#81-1374-BARBARA BLUM, INDIVIDUALLY AND IN HER CAPACITY AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES. Petitioner v. ELLEN STENSON, ETC.

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

BY Pirre Hammond

(REPORTER)