OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1911

TITLE CHRISTOPHER L. LOWE, ET AL., Petitioners v. SECURITIES AND EXCHANGE COMMISSION

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IN THE SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER L. LOWE, ET AL., :

Petitioners :

v. : No. 83-1911

SECURITIES AND EXCHANGE :

COMMISSION :

- -x

Washington, D.C.

Monday, January 7, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 o'clock a.m.

APPEARANCES:

MICHAEL E. SCHOEMAN, ESQ., New York, N.Y.; on behalf of Petitioners.

REX E. LEE, ESQ., Solicitor General of the United States; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Lowe against the Securities and Exchange Commission. Mr. Schoeman, you may proceed whenever you're ready.

ORAL ARGUMENT OF MICHAEL E. SCHOEMAN, ESQ.

ON BEHALF OF THE PETITIONERS

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

The issue in this case is whether publishers of disinterested information and opinion about securities may be prohibited from publishing on the ground that they are not registered under the Investment Advisers Act as investment advisers. We say that Petitioners' right to publish on a matter of legitimate public interest is guaranteed by the First Amendment to the Constitution and that the Act as applied to publishers is an unconstitutional system of licensing of the financial press.

The facts are not in dispute. The Petitioners are publishers and that is their only activity. They publish newsletters that are distributed to subscribers by mail, and these publications contain information about the stock market, recommendations and opinions and facts about specific securities.

There is no evidence of any personal contact with any readers, no evidence of any personal advice or handling of clients' funds. There's no allegation of trading or ownership of securities. There's no allegation that any of the advice contained in the publications is fraudulent or misleading or untruthful.

The only ground on which Petitioners are to be enjoined is that they are not registered under the Act. At one point --

QUESTION: Mr. Schoeman, you did not petition on the basis of an argument raised below, which was that Mr. Lowe was exempt from the provisions of the Act; is that correct?

MR. SCHOEMAN: That's correct. We believe that, unfortunately, Capital Gains Research Bureau, in I think it's 375 U.S., resolved the question of whether an impersonal publisher is subject to the Act, and we felt that that was controlling.

QUESTION: I guess maybe that question might be open in this Court?

MR. SCHOEMAN: Well, it's --

QUESTION: I mean, if we decided the exemption question and determined that the Act didn't cover this type of publication or that it was exempt, then we wouldn't reach the constitutional issue, is that

correct?

MR. SCHOEMAN: That is correct.

QUESTION: Do we have an obligation, then, to consider that in an effort to avoid the constitutional issue?

MR. SCHOEMAN: Yes, I think the Court should do everything it can to avoid reaching the constitutional question.

QUESTION: And yet you didn't raise it. Are you satisfied that there is no exemption under the Act?

MR. SCHOEMAN: I don't think that the Petitioners necessarily feel that they can only exercise their rights if they publish on a regular basis. Petitioners have a right to publish a book, for example, containing the same information, and yet that doesn't come within the terms of the exception.

I would think the real problem with Capital Gains Research Bureau I think is that it misread the legislative history. I think when you read the legislative history, particularly the excerpt from the House report that we quote on page 7 of our brief, it is clear, to me at least, that what Congress was trying to regulate was the personalized services of investment advisers, because that's what they said.

And it's also true that in the SEC study on

which the Act is based there really was no consideration given to publications that distribute to you personally by mail.

QUESTION: Are we dealing here with regular publications, though?

MR. SCHOEMAN: Well, that's an unclear question, because Congress didn't really define what "regular" means.

QUESTION: Well, but I'm talking about the publications of Mr. Lowe.

MR. SCHOEMAN: Well, Mr. Lowe's publications are scheduled on a regular basis, but they haven't been published on a regular basis.

QUESTION: Like law reviews.

(Laughter.)

MR. SCHOEMAN: Yes, sir.

I would -- I think what Capital Gains failed to do is to interpret the statute in the light of the First Amendment problems that that case was creating, because it wasn't argued there, apparently.

QUESTION: But if you're bound by that case, you're client is covered?

MR. SCHOEMAN: That's right.

QUESTION: What if he had gone out door to door, office to office, in the typical way dealers would

engage in their activity of not only advising, but selling securities, after all of his licenses had been revoked? Could a court enjoin that activity?

MR. SCHOEMAN: If he went door to door selling his publication?

QUESTION: Well, usually they did it by telephone, but that he continued doing just what he had done as a dealer after his license had been revoked. Now, that includes a great deal of verbal activity, doesn't it?

MR. SCHOEMAN: Yes. If all he was doing was selling the publication --

QUESTION: No, not the publication. I'm talking about securities.

MR. SCHOEMAN: Ah, if he were selling securities.

QUESTION: I'm moving away. He's acting as a dealer, selling securities, advising people and selling securities, calling them on the phone, having conferences with them, just as any dealer does. And then his license is revoked and he continues, and the court enjoins him.

Can the court enjoin his First Amendment right, as you put it, to speak to these customers and potential customers?

MR. SCHOEMAN: I think that if his talking to the customers and giving them literature is still part of his effort to engage in the selling and buying of securities, then it's very much in the nature of promotional advertising, I think, in which he is promoting securities and his objective is to get people to make purchases through him.

I think that it then comes within the analysis of Bolger against Youngs Drug Products, for example, in which some of the material was informational and yet the objective of the material was to get people to use the product that was invclved there.

QUESTION: Well, what if your client in this case had given personal advice to a group of potential purchasers on a one to one basis, but it was not published, but it was nonetheless nothing that he intended to get any profit out of? He would not get any commissions for any stock that was sold.

MR. SCHOEMAN: Well, the Act itself requires that the activity be done for compensation.

QUESTION: Well, but I mean he would bill them, you know, a certain amount an hour and say, given your portfolio, I think you ought to pick up a few shares.

MR. SCHOEMAN: I think if an individual gives

a speech at a public meeting at which he is giving his own opinions, he is protected by the First Amendment. The distinction would be whether he solicited or obtained specific questions from people about their personal situations, because at that point he would then start rendering personalized advice to people.

QUESTION: But of course that's nonetheless speaking.

MR. SCHOEMAN: Yes, it is. And it's just a distinction it seems to me that's been drawn. Lawyers are regulated, even though many of them just give advice and perform no services in court, for example. And I think the basis of the distinction is that the lawyer is addressing only the specific interests of his client. He's talking just about his client's needs and he has entered into a dialogue with his client.

A publisher doesn't know what his client's needs are. He doesn't know who his readers are, except possibly by name where there's a subscription list. He's expressing his own views, and it's up to the readers and the public at large to determine whether that piece of advice fits their situation or does not.

QUESTION: I can see the factual difference, but why does that make a difference when you're interpreting the First Amendment?

MR. SCHOEMAN: Because the First Amendment I think is certainly concerned with public discussion. It also reaches private speech when that private speech is for compensation. We have a tradition in this country of regulation of these kinds of communications as professions, and I suppose that there could be all manner of professions.

But there has to be a line drawn between personalized communication to individual persons based on their needs and public discussion. Otherwise you would have what the Government is arguing for in this case, that all Congress needs to do is professionalize a subject matter and they can then license not only the personal relationship, but they can license public discussion.

And that's what this Act has done. It's an attempt by Congress to select a particular subject matter in which Congress has an interest and to say that only certain people are to be permitted to discuss that subject matter.

QUESTION: Would you agree that every disbarment or suspension of a lawyer from practice has some collision with the First Amendment propositions that you're advancing?

MR. SCHOEMAN: It doesn't have any collision

with the lawyer's or the disbarred lawyer's right to publish.

QUESTION: Well, to speak.

MR. SCHOEMAN: The thing that the lawyer -- the lawyer is not prevented, I think, from advising people if he doesn't hold himself out to be a lawyer or if he doesn't accept compensation. He can still speak, but there is a restriction on the lawyer's right --

QUESTION: I should have made my hypothetical, my question, a little more clearly. Doesn't the disbarment interfere with the lawyer's right to speak to clients for compensation and fees?

MR. SCHOEMAN: Yes, it does. But it does not --

QUESTION: And how do you distinguish that from this situation?

MR. SCHOEMAN: Because it does not interfere with that lawyer's or ex-lawyer's right to publish a law review article on how to comply with the takeover statute. I'm free to publish a law review article in California telling people how to do various things under the law, although I'm not a lawyer in California. I can't practice there, but I can publish there; and that's the distinction.

QUESTION: Do you think you would be free in

California to publish a newsletter to subscribers interpreting recent decisions say of the Supreme Court of California, or trends in California law, and collect from them on an individual basis for it?

MR. SCHOEMAN: Absolutely.

QUESTION: Well then, a disbarred lawyer in California could do the same thing?

MR. SCHOEMAN: Yes, sir. What he can't do is advise people based on their specific situations. He cannot evaluate whether Mr. X should have a will or shouldn't have a will, or should have an inter vivos trust or shouldn't.

But he can, like Mr. Dacey in New York County Lawyers against Dacey, publish a book which says people should have inter vivos trusts in order to avoid probate.

This question has come up. Every time it's come up in state supreme courts it's been decided on the basis of the distinction that I'm suggesting here. Personalized communication based on the individual situation of a client is subject to regulation, but publication to the public in general not based on the particular situation of readers --

QUESTION: Well, Mr. Schoeman, can a non-lawyer publish how-to-do-it forms telling people how

to tailor their own situation to, for instance, get their own divorce or probate their own will?

MR. SCHOEMAN: Certainly.

QUESTION: And furnish the forms and describe how you can do that for yourself?

MR. SCHOEMAN: Yes.

QUESTION: Even though you're not licensed?

MR. SCHOEMAN: Yes.

QUESTION: And the same with a medical practice?

MR. SCHOEMAN: Yes.

QUESTION: As a non-licensed physician, you can publish directions to people as to how to treat their illness?

MR. SCHOEMAN: That's right, because the legislature can't say that certain subjects are fit for public discussion and certain subjects are not. Whether I rely on Mr. Lowe's newsletter or someone else's newsletter or I rely on my broker or who I rely on, that's up to me. Congress cannot cut off public discussion.

It can, based on a long tradition of regulating of professions, limit and control to some extent the private rendering of advice to individuals based on their individual circumstances.

QUESTION: Do you think that Congress -- assuming that we agreed with your basic proposition that the First Amendment protects the circulation of the newsletter, in this circumstance he's been twice convicted of felonies, hasn't he?

MR. SCHOEMAN: Four times.

QUESTION: Four times. And they are felonies related somehow to the securities business?

MR. SCHOEMAN: Three of them involve worthless checks, one was tampering with physical evidence.

QUESTION: Well, wasn't the worthless checks conviction related to some -- he got $10,000 from some client to invest and --

MR. SCHOEMAN: That was a misdemeanor.

QUESTION: Oh, was that it? I see.

My question is this: Could the Commission have a regulation that says that, while we can't stop you from circulating this newsletter, we require that you include in the newsletter a statement that you've been convicted of these felonies?

MR. SCHOEMAN: I don't think they can do that.

QUESTION: Why not?

MR. SCHOEMAN: I think the chilling effect of that on scaring away readers and on scaring away Mr.

Lowe from publishing would be too severe. The Government charged that --

QUESTION: Have you any precedent to suggest that?

MR. SCHOEMAN: No, I do not.

QUESTION: Well, you mean you don't have a precedent in the securities field?

MR. SCHOEMAN: That's correct, that's correct.

QUESTION: Well, a disbarred lawyer is chilled from talking to clients for pay, isn't he?

MR. SCHOEMAN: He is prohibited. That's an outright prohibition. I wouldn't call that chilling. He's prohibited from doing it.

QUESTION: Well, it chills him from trying it again.

MR. SCHOEMAN: Yes, sir.

(Laughter.)

QUESTION: Well, how far does your position go? Taking Justice Brennan's line, suppose -- does the First Amendment protect false reports in these investment newsletters?

MR. SCHOEMAN: It protects untrue reports, yes.

QUESTION: To the same extent as it protects

other untrue --

MR. SCHOEMAN: That's correct.

QUESTION: So that just because this newsletter has several times contained or regularly contains false reports would be no basis for an injunction?

MR. SCHOEMAN: That's correct. In fact, there was no finding or even allegation that it ever contained any false information.

QUESTION: Well, I know, but that's not my question.

MR. SCHOEMAN: But that certainly is what the Court held in Near against Minnesota, that here was something that was regularly published and found to have regularly contained defamatory material, but nevertheless the publication of that newspaper could not be enjoined in the future.

The fact that someone commits a wrong in the past or several wrongs doesn't tell you what it is he's going to publish tomorrow.

QUESTION: May I ask a question that's prompted by Justice Brennan's question. Am I correct that the only administrative order was the one that cancelled his registration? There's no administrative order directing him not to publish these papers? It's

the result of separate litigation?

MR. SCHOEMAN: Yes, but may I qualify. The SEC's order revoked the registration of Lowe Management Corporation, which is one of the Petitioners, and it ordered that Mr. Lowe not be associated with any investmont adviser in the future.

QUESTION: And whc is the investment adviser that he is being associated with now?

MR. SCHOEMAN: Well, it's the other Petitioners.

QUESTION: The corporate entities?

MR. SCHOEMAN: Yes.

QUESTION: And so presumably, even if there had been no criminal violations of any kind, they could be enjoined from publishing these papers because they are acting as investment advisers and they're not registered, is that right?

MR. SCHOEMAN: As the statute apparently reads, for two of the corporate Petitioners they have never had any administrative action taken against them. They simply --

QUESTION: Had they ever qualified as investment advisers?

MR. SCHOEMAN: No, they never attempted to.

QUESTION: Well then, I'm not quite clear on

the relevance of the criminal proceeding. Is the case any different than if just some stranger who had never been an investment adviser started to publish these papers?

MR. SCHOEMAN: The relevance of the criminal proceeding is to demonstrate to the Court how we fit directly under the disqualifications of the statute.

QUESTION: But the net effect of all that is that they justify the revocation of your registration. And why is that legally any different than if you had never even applied for registration?

MR. SCHOEMAN: Legally it is not, since we didn't have to apply for registration.

QUESTION: If that's true, then is the criminal proceeding even relevant? I'm a little puzzled.

MR. SCHOEMAN: the criminal proceeding is relevant just to show that we fit within the statute, that's all, in terms of the disqualifications.

QUESTION: So you fit within it because you're not registered. Well, it might be that someone who just starts a newsletter without registering, it may be that he might be treated different constitutionally than someone who's been convicted of a crime after registration.

MR. SCHOEMAN: I don't --

QUESTION: I would think the Government's argument would equally fit the person who starts a newsletter without registration and he has no criminal record.

MR. SCHOEMAN: That is correct. That is correct, because this Act applies to all publishers except for those who have been exempted under the statute. And apparently there are some 500 of them who are registered.

QUESTION: Who are registered.

MR. SCHOEMAN: I'm sorry, Mr. Justice, I didn't hear you.

QUESTION: Or who are registered.

MR. SCHOEMAN: Yes.

It seems to us that this statute is an amalgam of the worst features that the Court has identified over the years in connection with First Amendment licensing. It's based on status, it's got a great degree of discretion. It's discriminatory and discriminating among different kinds of publications. It's a content-based regulation, singling out a particular subject.

QUESTION: What would you say if the newsletter touted a bunch of stocks and it was shown

that it provoked buying and then the publisher made a profit off of it, off of the stock? He bought stocks and then sold them.

MR. SCHOEMAN: Well, I think in that case he could be subject to regulation, because --

QUESTION: But not for publication?

MR. SCHOEMAN: Not for publication.

QUESTION: But for manipulation.

MR. SCHOEMAN: Because it's the manipulation, because of his other activity. The speech in that situation I think would be deemed a subordinate part of his other activities.

QUESTION: Just like a broker-dealer.

MR. SCHOEMAN: That's correct.

But that's certainly not the case here. There's no indication of any such conduct.

It seems to me the Commission's argument basically puts no limit on Congressional power, and all that it comes down to is that Congress thought that there was a good reason for licensing people who talk about this subject.

I have no problem with them licensing people who talk for compensation on a personalized basis on this subject. But when they then try to extend that concept to public discussion in a newsletter distributed

impersonally, that's when they violate the prohibition on abridgment of the freedom of the press and freedom of speech.

QUESTION: Do you think it makes any difference whether they sell that publication or give it away?

MR. SCHOEMAN: I don't think it makes any difference, because the Court has on numerous indications indicated that the sale of a publication or the fact that a publication is distributed for profit doesn't take away the First Amendment rights of the publisher. And that's certainly throughout the United States. Almost everything that's published you have to pay for.

I do want to touch for a moment on this question of whether we're involved in commercial speech. I say we are not involved in commercial speech, that commercial speech essentially means advertising, and that the distinguishing characteristic of commercial speech is speech which is associated with the speaker's effort to sell his own product or services, and we do not fall at all within that category.

I ask the Court to reverse the decision of the court below. I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF RESPONDENT

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

The key to decision in this case is the perspective from which it is approached. The Petitioners would view it as a single dimensional case involving exclusively First Amendment issues. It's a perspective that would bring into play our historical aversion to prior restraints and a perspective which would draw no distinction between, on the one hand, the right of any person to publish to the world at large and, on the other hand, the right of a fiduciary to publish for the benefit of the very group to whom he or she owes the fiduciary obligation.

But it is a quite different case if it's considered for what it really is, and that is a professional discipline case, because prior restraints of the clearest kind have been upheld by this Court in cases like Barsky versus the Board of Regents and Ohralik versus the Ohio State Bar Association in order to assure that unworthy persons not serve in certain fiduciary capacities.

In this case the person affected is a five-time convicted criminal whose offenses have included stealing a client's funds and then falsifying the evidence in an attempt to convince the court that he had made restitution when in fact he had not, and that particular offense was a felony.

QUESTION: Mr. Solicitor General, this is the question I asked your adversary: Would it not be the same case if he had never committed a crime and had never applied for registration, just published precisely what he's published here?

MR. LEE: From our standpoint it would, because he's unregistered and the statute requires registration.

QUESTION: So really the criminal history is totally irrelevant?

MR. LEE: Well, except that -- except in this sense, Justice Stevens. Absent the criminal conduct, registration as a practical matter is virtually automatic following the 45-day period. You can look at the documents that surround the application and in the event there is no problem then registration becomes automatic.

QUESTION: But you could have an eccentric publisher who just doesn't believe in licensing the

press.

MR. LEE: And never apply.

QUESTION: And never apply.

MR. LEE: And never apply.

QUESTION: That would be the same case?

MR. LEE: That is correct, that is correct.

The starting point for analysis, I submit, is that the Petitioners have effectively conceded that this is a professional discipline case, because the remedy that --

QUESTION: Mr. Solicitor General, I take it that your case depends on that, doesn't it?

MR. LEE: Excuse me? Being viewed as a professional discipline case?

QUESTION: Yes.

MR. LEE: Yes, it does, Justice Blackmun.

QUESTION: And if you cannot achieve that your case is down the drain.

MR. LEE: Yes. But in effect, Justice Blackmun, we're over that hurdle, because both sides are treating it as a professional discipline case, the remedy for which Mr. Schoeman is contending is one that involves an oral -- excuse me -- a prior restraint of the clearest kind, because he agrees that because of the crimes committed by Mr. Lowe he can be enjoined from

giving in person investment advice.

So that the only real question in this case --

QUESTION: Either in writing or orally?

MR. LEE: That is correct. So that the only real question is one of line-drawing. Now, the Petitioners for their part contend that the line to be drawn between those whose speech is to be previously restrained and those whose speech is not to be previously restrained is a line between advice delivered on an individualized basis for compensation and published advice for compensation.

The line marked out by Congress is different. Congress extended the registration requirement to all investment advisers, including those who publish, but it excluded publishers of bona fide newspapers, magazines, or other financial or business publications of general and regular circulation.

And our case comes down to this: Since prior restraints are a constituent element of everybody's test and since therefore the only question is where the line is to be drawn, we submit that Congress, for whom the fashioning of dividing lines lies at the very core of its constitutional stewardship, was entitled to mark out its own boundary and was not constitutionally required

to pick the one preferred by Petitioners.

And that proposition is strengthened when we examine the line that Congress -- the decision that Congress made against the background of the problem that it faced. As this Court stated in SEC versus Capital Gains, the Investment Advisers Act of 1940 was the last in a series of acts designed to eliminate certain abuses in the securities industry which were found to have contributed to the stock market crash of 1929 and the Depression of the 1930's. That statement was made in the context of a case involving the precise form of investment advice that is involved here, namely an investment advisory letter.

The series of six statutes extending from 1933 to 1940 dealt with many phases of the securities industry, and concern over the practices of investment advisers surfaced early in the process. In 1934 a Senate report revealed widespread abuses by publishers of financial publications and, contrary to Petitioners' assertion, these included practices of publishers of investment advisory services, and those are set forth in footnotes 11 and 13 of our brief and in footnote 15 of this Court's Capital Gains opinion.

But even so, Congress did not act immediately. The 1940 Act was passed only after another

report, undertaken pursuant to the Public Utility Holding Company Act of 1935, confirmed the presence of the problem in the investment advisory profession.

Plainly, we ought not criticize Congress for proceeding slowly and carefully one step at a time. But ultimately, it concluded that national regulation of investment advisory publishers was necessary because of two types of injury that it found to have been caused by unscrupulous publishers in the absence of regulation. The first was harm to investors generally trading in the market; and the second was direct harm to the individual subscribers caused by the investment advice that they received.

Even so, the actual regulatory scheme selected by Congress was a fairly modest one. At the core of what it did was its determination that investment advisers are fiduciaries, and this also lies at the core of our case; that they occupy, as this Court stated in Capital Gains, "a relationship of trust and confidence with their clients." And necessarily, given the language of the Investment Advisers Act, "their clients" means those who subscribe to published investment advisory letters.

Congress did not impose either financial or educational qualifications on investment advisers, as it

had, for example, in the case of broker-dealers. Rather, it required only that they file, that they register, and it made the continuing entitlement to registration conditioned on the applicant not having engaged in certain specified misconduct relevant to that special fiduciary relationship.

In short, the central thrust of the statute was to maintain the integrity of the fiduciary channel, the channel of communication between the adviser and those who had specifically sought out and paid for his advice, by preventing criminals and other wrongdoers from having access to those channels.

QUESTION: I suppose that's no different generally than the decision of any state to regulate the lawyers practicing in it. Now, consistent with your view, I suppose a state could prohibit a disbarred lawyer or a non-lawyer, if the criminal history is irrelevant, from writing a newsletter for subscribers about recent developments in California law.

MR. LEE: I would draw the line at this point, Justice Rehnquist. My general principle, the governing principle, is that disbarred persons or otherwise unqualified persons may not have access to the special fiduciary channels.

Now let's take the disbarred lawyer, and I'll

refer to your example, your present example, and also the one that you posed to Mr. Schoeman. Here I think is the case in which the state can regulate. During the time that I was in practice in Arizona, I represented a number of trade association clients and also other groupings of clients. Because of those representations, from time to time when there would be general developments, either opinions of this Court, as for example in the agricultural labor context, I would send out letters to all of my clients telling them of general developments in the law.

Now, the reason that I did that was because of a previously established fiduciary relationship between me and them. There is little doubt in my mind that the day that I was disbarred from practice is the day that I could no longer do that because of this previously established fiduciary relationship.

Now, the harder case is the one that you posed to Mr. Schoeman, where I simply pick people out of the phone book without this previously established fiduciary channel.

QUESTION: Well, then under your analysis would it be different in this case if Mr. Lowe had had no previous financial dealings with the particular people who subscribed to his newsletter? He just sets

up shop and says: I know a lot about stocks, I'm publishing a newsletter, you can have it for 25 bucks a week.

MR. LEE: It would not, and here is the reason. The analogy between lawyers and investment advisers carries you to a certain point, but does not solve all the problems. The crucial, ultimate inquiry is, does a fiduciary relationship exist or not?

QUESTION: Well, it seems to me your answer with respect to lawyers is quite different from your answer with respect to securities.

MR. LEE: No, it is not, and here is the reason. The fiduciary relationship exists with respect to investment advisers because of Congress' express determination, made in the context of a publication that went out, of an investment advisory letter that went out to thousands of people, that there was a fiduciary relationship between the publisher of an investmen advisory letter and those who sought out and paid for that particular advice.

QUESTION: But a state legislature could make precisely that determination with respect to a disbarred lawyer or an unlicensed lawyer who simply solicited people for a newsletter, although he never advised them in any legal sense. And that would make that the same

case, unless there's a difference between securities brokers and lawyers.

MR. LEE: There is one difference between securities brokers and lawyers in my view. The state, if it made such a determination, I think it would lie within the authority of a state legislature to determine that there is a sufficient fiduciary relationship between a disbarred lawyer who is giving legal advice of the kind that you talk about and these general types. This is a situation in between, of course, where he simply publishes a book or is a syndicated columnist.

But where he publishes to subscribers, I think that that would lie within the prerogative of the state. But there is also -- this case is also distinguishable in this sense, and this relates to the difference between the way that lawyers do their work and the way that investment advisers do their work. In the case of investment advisers, they are capable of prescribing, if you will, or giving their advice on which people will rely all at once and doing so with a greater effect.

That is, typically for the lawyer the advice is one on one.

QUESTION: Mr. Solicitor General, along that line, could the legislature of a state pass a law that

no disbarred lawyer can publish a paper?

MR. LEE: Absolutely not, Justice Marshall.

QUESTION: You're getting awful close.

MR. LEE: The difference is this --

QUESTION: Couldn't a lawyer publish an article, a column in the newspaper?

MR. LEE: Clearly he could, clearly he could.

QUESTION: Could he give legal advice in that column?

MR. LEE: I think that he could. The difference is this: The persons who purchase that newspaper are purchasing a collection, are purchasing it for a collection of reasons. In that newspaper is advice on food, on travel, on who should be number one in the football polls, and also perhaps is an article by a lawyer.

QUESTION: Well, suppose it's only legal news.

MR. LEE: If it is only legal news, that becomes a much harder case.

QUESTION: You mean that the legislature could pass a law saying that a disbarred lawyer may not participate in any transmission of legal advice by newspaper?

MR. LEE: That statute I think would be

unconstitutional. The hardest, the hardest is the other hypothetical that you just asked, where the legislature -- and this gets very close to Justice Rehnquist's hypothetical -- where the legislature passes a law saying that it is a violation of what we perceive to be a fiduciary relationship between disbarred lawyers and anyone within the state with regard to the --

QUESTION: Well, you can't have a fiduciary relationship between a disbarred lawyer and the general public, no way.

MR. LEE: Well, regardless of whether you call it a fiduciary relationship, position, or a relationship of special trust and confidence, I think the hardest case is whether the legislature could say that a disbarred lawyer may not publish a -- may not publish a newsletter that deals exclusively with legal advice, which will be subscribed to expressly for the purpose of obtaining legal advice.

That is a harder case than is the case where he just publishes one column which is a part of a column in a newspaper. And it is a much harder case than is this case, and the reason is that Congress, as a result of what can only fairly be described as the greatest financial calamity that our nation has ever undergone, concluded that a contributing cause to that was the

practices of unscrupulous persons acting as investment advisers.

QUESTION: Well, General Lee, if the purpose that Congress has in mind is to protect the public from unscrupulous advisers in the financial field, why isn't that interest fully served by simply requiring full disclosure of the background of this publisher?

MR. LEE: For the same reason, Justice O'Connor, that the public interest is not fully served by requiring that I as a disbarred lawyer, before I exercise speech in the way that I'm exercising it right now, in representing a client, in doing legal work, disclose to that client and to the public at large that I'm a crook.

QUESTION: Well, no, in the context of the publication of investment advice newsletters, not the person to person selling of securities.

MR. LEE: Well --

QUESTION: As applied to the publications we have here, which are, after all, apparently available for the purchase of anyone who wants to subscribe, whether they were formerly clients or not.

MR. LEE: Well, but the point is that they become clients when they do subscribe. They are not clients simply when they purchase it as a part of a

newspaper. They are asking Mr. Lowe for his specific advice as to how they should invest their money. And the point, the crucial point to decision in this case, is that that is the fiduciary relationship that Congress identified.

Now, to come more directly to your question, that's always a question of how far you need to go, is disclosure sufficient or is a more effective remedy needed under the circumstances.

QUESTION: Well, isn't that the test we've employed for commercial speech, which you argue this is? Don't we look at that very thing?

MR. LEE: Certainly not in the professional discipline context. Take the Capital Gains Research case itself. If the Petitioners were correct, then the result in the Capital Gains case would have had to have been different, and the reason is as follows.

The position for which the Petitioners contend is summarized in their reply brief: "The power to license professionals" --

QUESTION: What page, please?

MR. LEE: Excuse me?

QUESTION: Page 2. I'm sorry.

"The power to license professionals extends only to persons who render personal service or advice

and cannct under the First Amendment include persons who merely publish."

Now, if that statement is correct that under the First Amendment Government is powerless to regulate those who merely publish, as opposed to those who give in person advice, then Government would have been powerless to do exactly what it did in the Capital Gains case, namely to require the disclosures that were required in that case.

And the reason is that, while there is the difference that in this instance what the Government has done is prohibit publication and in Capital Gains it required publication, this Court has made it very clear in cases like the West Virginia flag salute case and the New Hampshire license plate case -- this is a direct quote frcm the license plate case -- that "The First Amendment includes both the right to speak freely and the right to refrain from speaking at all."

So that the line that Congress drew, we submit, is an appropriate one and is a constitutional one, that there is a difference between the effectiveness of requiring Lowe simply to disclose what he has dcne in the past and to prohibit him from publishing at all. That was the effect, that was the precise effect of what happened in Capital Gains.

QUESTION: Mr. Lee, you may be right about Capital Gains, but I'm not sure that your colleague on the other side would agree with you that the result would be different in Capital Gains. I thought he said that if an investment -- if a publisher of this information, of this newsletter, touted stock and then bought in and then sold out when the price went up, that that could be -- that the Commission could stop that.

MR. LEE: Yes, but he would also -- I don't want to put words in his mouth, but I do --

QUESTION: Suppose he doesn't agree with you, then, because Capital Gains could easily have come out the same way under that view?

MR. LEE: Well, there are many things with which Mr. Schoeman and I disagree in this case.

QUESTION: Yes, yes.

MR. LEE: But I am simply saying that the thrust of the position that is taken in the reply brief, that the power of Government to regulate professionals is limited to the face to face in person context, simply will not wash, because that's exactly what happened in Capital Gains, this Court did uphold it.

Now, I'll grant you that the Court did not pass in the precise First Amendment issue in that case because they didn't have to. But the point is that the

result would have been -- the result would have had to have been otherwise.

And in Ohralik, Ohralik was clearly prohibited, not just required to disclose, but was clearly prohibited from engaging in speech. Dr. Barsky, if you will, when he was disqualified from practicing medicine for six months was disqualified from engaging in speech.

In short, once you get over the threshold that this case is a prior restraint case because it involves professional discipline, then we submit that Congress was constitutionally entitled to draw the line at the place that Congress in fact drew it.

Many of the arguments that are advanced by the Petitioners and their amici are addressed to cases other than this one. They are arguments that are designed to make this case more difficult than it is. There is a rather clean dividing line. Fortunately, it is a line that has been marked out by Congress. It is that Government is entitled to maintain the integrity of the channels of communication between the fiduciary and those persons whom the fiduciary serves; and in the event that there is a communication occurring within that channel, then Congress can control it.

Now, there are differences in that respect

between the kinds of fiduciary relationships between a lawyer and his client and between an investment adviser and his clients, but there again the significance of the Capital Gains case is its determination, is its approval of Congress' determination, that that was and is a fiduciary relationship.

QUESTION: Mr. Solicitor General, let me go back for a moment, because I'm still wrestling with this in my mind, to the hypothetical about your mailing list of the trade association, is what prompted the question.

Supposing you had a law review published by law students who were not admitted to the bar, just writing on recent developments in tax law, and people who were interested in tax law began to subscribe to it. Could the state prohibit the publication of that?

MR. LEE: It could.

QUESTION: You say it could?

MR. LEE: Justice Stevens, that is right at the very edge of --

(Laughter.)

MR. LEE: -- of what is permissible and what is not permissible.

QUESTION: It seems to me it has the same fiduciary definition --

MR. LEE: No, it does not.

QUESTION: -- that your concept does.

MR. LEE: No, it does not have the same fiduciary relationship, because there is nothing to establish a fiduciary relationship between law students or even lawyers and a person who has never sought out that person's advice. That's the way a fiduciary relationship comes into existence in our profession.

QUESTION: Well, supposing you had a group of business school students who got interested in the stock market and they started to publish a counterpart to a law review on investments in utility stocks or trends in the gold market or something like that and they publicize it, and either with the sponsorship of the school or just independently to make some money. I suppose they -- how do you compare that with the --

MR. LEE: If you had -- I think it would depend on two things.

QUESTION: And why is one a fiduciary and the other not? I guess that's my question.

MR. LEE: For two reasons. One is that you do have in this instance perhaps the most careful and extensive determination that Congress could have made, extending over a period of seven years in which it examined the causes of a financial calamity that

occurred in this country, and it reached the conclusion that -- that conclusion has been affirmed by this Court -- that there was under those circumstances a fiduciary relationship.

Now, the reason that I hesitate in applying that analogy to other circumstances is that I think you'd have to have, in order to justify applying that to another context, you'd have to have something like that kind of history, supported by something like that kind of Congressional determination, in the overall context of the general rule that in making those kinds of determinations, and particularly drawing those dividing lines, that Congress and legislatures in general are entitled to great deference.

Now, let me just say in that regard, any way you decide this case you're going to have to make some very tough dividing lines, and you're going to have some tough hypotheticals that are going to be on the one side or on the other. And I would simply submit that in approaching that overall very important, and in this case frankly very difficult task, that the Court should find it helpful to rely on a couple of general mooring places.

QUESTION: What was your other reason? Are you going to get to that? You said for two reasons.

MR. LEE: Well, the one is -- the one is that Congress has made that determination; and the second is that there was an unusually good Congressional record, an unusually good factual record supporting what Congress had done. And I think probably both of these are required.

Now, one of these foundation stones is the general proposition that in marking out dividing lines Congress is entitled to broad discretion.

The other is that if you look at what's involved on both sides of this case, from the standpoint of avoiding inhibitions on speech I have never been able to understand how it is that First Amendment values are really advanced by protecting written published advice over in person advice, which is more likely to be oral. Both are speech, and I'm unaware of anything in this Court's jurisprudence suggesting that written speech enjoys a preference over oral.

And from the standpoint of Congress' objective, which was to prevent repetition of the kinds of conduct that led to one of the greatest financial crises in our nation's history, if any distinction between these two is to be drawn it would not favor the protection of the criminally convicted defrauder to influence large numbers of people rather than just a

few.

If Lowe can be subjected to Government regulation when he recommends securities to one client, as Mr. Schoeman says that he can, then we submit that he may also be subjected to regulation when he sends these recommendations by publication to 100 clients or 1,000 or 3,000.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Schoeman.

REBUTTAL ARGUMENT OF MICHAEL E. SCHOEMAN, ESQ.,
ON BEHALF OF PETITIONERS

MR. SCHOEMAN: I think the Solicitor General listed two reasons as to why investment advisers and regulation of publications containing investment advice are different from the legal situation. One was that Congress made the determination.

That of course is exactly what the First Amendment prohibits Congress from doing. Congress may not abridge freedom of speech or freedom of the press. It's not for Congress to draw the line. The line is drawn by the Constitution.

Secondly, the Solicitor General said there is an unusually good record, and I think he is intimating that the Depression was caused in some way by financial publications. There's an exceptionally poor record on

that, for that proposition. There's almost nothing in the legislative history of the 1940 Act that in any way relates to these publishers.

They were included, apparently, without very much attention being paid to it. None of them testified. There's no record of what any of them were doing. They were not covered by the SEC survey. There may be circumstances, conceivably, in which, for reasons of national security or some other great crisis, you have to have more regulation of publications in some regard. But that certainly is not this case.

What the Petitioners are doing is simply publishing and talking about a subject which is a matter of legitimate public interest. It's a subject that's widely discussed, without licensing I may add, in newspapers and magazines and on television and radio. You may not always be able to find out what the President of the United States has said on any given day, but you can always find out the trading price of IBM stock.

It is a subject that's widely discussed, and there's no reason why Mr. Lowe cannot participate along with everybody else in the public discussion --

QUESTION: May I ask you --

MR. SCHOEMAN: -- of this topic.

QUESTION: -- a question on that, that subject. Supposing that the revocation of his registration had been based on publishing misleading information in these very publications and touting stock and then profiting from it himself and that sort of thing, so that he'd misused these publications.

MR. SCHOEMAN: I really don't think that would make a difference.

QUESTION: That was going to be my question. You'd say even then they could not require that he cease publishing these papers?

MR. SCHOEMAN: The fact that --

QUESTION: Disassociate himself from them for the future?

MR. SCHOEMAN: Yes, sir. The fact that in, I believe it was, Vance against Universal Amusement Company, Universal Amusement Company had shown a pornographic movie, that's no basis on which to shut down the movie house. Simply the fact that Mr. Near published repeatedly this defamatory material, that's no ground on which to shut down his activity in the future.

The fact of past misconduct has no necessary relationship to the contents of a future publication.

QUESTION: So you do agree that Capital Gains

would have to come out differently if you win this case?

MR. SCHOEMAN: No. In Capital Gains, all they did was, as I read it, was require disclosure of his trading activity.

QUESTION: Yes.

MR. SCHOEMAN: He was allowed to continue to publish.

QUESTION: So Capital Gains would come out the same way, even if you win?

MR. SCHOEMAN: Yes, yes.

QUESTION: And you concede that -- you concede that they could require this disclosure if the activity he engaged in was the activity in Capital Gains?

MR. SCHOEMAN: Yes, I think so, although I would think that the Court might want to add some First Amendment consideration to that subject. But I would not be troubled with that result.

QUESTION: What precise disclosure is that? Past criminal --

MR. SCHOEMAN: Well, if a person is actually committing a fraud through the use of his publication, as was the case in Capital Gain, he could be required in some way to disclose that he is committing that fraud, because speech is not his only activity. Fraud is his

activity.

QUESTION: Well then, he in the publication would have to say, I'm committing a fraud by publishing this?

MR. SCHOEMAN: No, he would have to describe, as he was required to in Capital Gain, that the publisher has purchased securities discussed in this publication and may be selling them if the price goes up.

QUESTION: How about -- but you say he could not be required to say whether or not he is a registered investment adviser under the Act?

MR. SCHOEMAN: No, I'm not -- I think that the state can adopt regulations that say, if you want to call yourself a lawyer you better be one, if you want to call yourself a registered investment adviser --

QUESTION: Could you require him to say whether he ever was and why he isn't now?

MR. SCHOEMAN: Well, then I think you start getting into the chilling effect.

QUESTION: Well, I know you start, but are we there or not?

MR. SCHOEMAN: No, I don't think you're there.

QUESTION: So you could require him to say, I

was an investment adviser but I no longer am?

MR. SCHOEMAN: I think the chilling effect would prohibit that, because it would lead him not to publish and it would tend to have people not read the publication.

What's important is is the publication a valid thing to be read, is it something that people ought to read or at least ought to have available, or should they be pushed away from it by chilling effects? And I distinguish between the case where a man is committing a a fraud -- that you could require a disclosure about -- and the case where a man is not committing a fraud.

QUESTION: Well, even if there's no fraud, would you agree he could be compelled to disclose his financial interest in all the securities that he discusses in his publication, his recent trading in the securities?

MR. SCHOEMAN: Yes, I'm not troubled by that.

QUESTION: Without any necessary fraud?

MR. SCHOEMAN: Although, although that's a hard question, because he may not be engaged in fraudulent activity. He may simply be a rich man who owns a lot of stock.

QUESTION: Well, I'm assuming he's not in my question. I'm assuming he's not.

MR. SCHOEMAN: I think there'd have to be some kind of rule that would allow us to determine the likelihood of a fraud actually being committed. The mere fact that I may own some IBM stock shouldn't necessarily require me to list that on my publication. The question is whether I'm engaging in a fraudulent activity, and not what securities I may happen to own, certainly.

Thank you.

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

(Whereupon, at 11:03 a.m., argument in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)