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Notes and Comments

APPLYING THE SHERMAN ACT TO RESTRICTIVE PRACTICES OF THE LEGAL PROFESSION

For many years lawyers have apparently believed that the legal profession was exempt from the application of the Sherman Act. But those days of comfortable assurance are gone; bar association minimum fee schedules have been challenged under the Sherman Act by private parties and the United States. This is a welcome development to critics who have contended that illegal practices have long been carried on in the name of ethics.

In recent years, commentators have focused on minimum fee schedules and have almost uniformly condemned them as price fixing in violation of the Sherman Act; little has been written, however, about potential applications of the Sherman Act to other restrictive practices of the profession. This comment analyzes three practices which are possible objects of antitrust attack: minimum fee schedules (here termed "prescriptive" because they dictate what legal fees should be); informational schedules of average or actual fees (here termed "descriptive" because they report what legal fees actually are); and the rule against solicitation, one of the fundamental ethical tenets of the

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970).


See also United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952)(dictum): "This Court has recognized that forms of competition usual in the business world may be demoralizing to ethical standards of a profession . . . ."; Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); Coleman, Antitrust Exemptions: The Learned Professions, 33 A.B.A. AntiTrust J. 48 (1967).


profession, which prohibits actively seeking out clients.

The nature and administrative structure of each of these practices are examined to determine the economic effects on the price and availability of legal services; a comparison is made with the application of the Sherman Act to similar practices in other contexts. Additionally, the profession of law itself is analyzed to see if it has extraordinary or unusual characteristics which would indicate that application of the Sherman Act would be bad law or bad social policy.

I. THE LEGAL PROFESSION AND INTERSTATE COMMERCE

Before a restraint may be condemned under the Sherman Act, the jurisdictional requirement of interstate commerce must be satisfied. Therefore, the first issue which must be resolved is whether the practice of law has the requisite effect on interstate commerce.4

The Sherman Act prohibits only those restraints of "trade or commerce among the several states ..."5 The Sherman Act's use of constitutional language6 indicates that Congress intended for the Act's reach to be co-extensive with its constitutional power.7 However, recent cases suggest that the lower federal

4. "The interstate commerce requirement may be satisfied in two ways. First, the plaintiff may show that the activity which the defendant has restrained is 'in' commerce. Second, the plaintiff may show that the activity restrained, although essentially 'local', has an effect on interstate commerce." Page v. Work, 290 F.2d 323, 332 (9th Cir.), cert. denied, 368 U.S. 875 (1961). See also Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974).

Several recent cases have re-examined the relationship between the "in commerce" theory and the "effects commerce" theory. See Gulf Oil Corp. v. Copp Paving Co., 95 S.Ct. 392 (1974) (dictum). See also Hospital Building Co. v. Trustees of Rex Hosp., 511 F.2d 678 (4th Cir. 1975), holding that a North Carolina hospital's expansion plans did not have sufficient effect on interstate commerce to justify invoking the Sherman Act; United States v. Finis P. Ernest, Inc., No. 74-1276 (7th Cir. Jan. 29, 1975), where it was held that, if the alleged restraint is upon an activity "in commerce", no adverse effect on interstate commerce need be alleged or shown.

Thus, the bar's activities in restraining competition both within and without the profession itself may be brought within the Sherman Act's jurisdiction if it can be shown (1) that the restraint is upon an activity which is "in commerce" or (2) that the activity restrained "affects commerce" directly and substantially although it is itself local.


6. "Congress shall have power ... to regulate ... commerce ... among the several states." U.S. Const., art. I, § 8.


But see United States v. Yellow Cab Co., 332 U.S. 218, 232-33 (1947): "We do not mean to establish any absolute rule that local taxicab service to and from railroad stations
courts view the problem of jurisdiction under the Sherman Act more narrowly than the question of Congress' constitutional power. This distinction has been the source of much confusion in antitrust cases, and is especially important in the case of the legal profession, where essentially local services are rendered, and the connection with interstate commerce is indirect.

Goldfarb v. Virginia State Bar is the most recent example of the distinction which has evolved between the constitutional

is completely beyond the reach of federal power or even beyond the scope of the Sherman Act.” (emphasis added).

8. The source of the distinction is unclear. One commentator has suggested that the courts examine the interstate commerce question more closely in a private suit than in a suit by the United States. Elgin, The Commerce Element in Federal Antitrust Litigation, 25 Fed. Bar J. 282 (1965). In establishing his case, the private plaintiff must show that his injury affected interstate commerce, while the government may rely on the full extent of public injury from a restraint of trade. See, e.g., United States v. South Eastern Underwriters Ass’n, 322 U.S. 533 (1944) (effect of entire business of insurance on interstate commerce is relevant inquiry in government suit).

9. 497 F.2d 1 (4th Cir. 1974), rev’d, 355 F. Supp. 491 (E.D. Va. 1973), cert. granted, 95 S.Ct. 223 (1974). Goldfarb was a class action on behalf of all residents of Reston, in Fairfax County, Virginia, a suburb of Washington, D.C. The defendants were the Virginia State Bar, an integrated bar requiring the membership of all Virginia attorneys, the Fairfax County Bar Association, a private organization composed of voluntary members, and two other local bar associations from northern Virginia (who accepted consent decrees enjoining their minimum fee schedules prior to trial.) The Fairfax County Bar Association had published a minimum fee schedule in 1969 which, inter alia, set a minimum fee for title searches involved in real estate transactions. The Goldfarbs, who were buying a home in Reston, were unable to get their title searched for less than the minimum fee (1% of the purchase price of the property up to $50,000, and ½ of 1% above that amount).

The suit was brought under the Sherman Act for price fixing. The Fairfax County Bar Association was sued because of its promulgation of the minimum fee schedule setting the price of title searches, and the Virginia State Bar was cited for publishing, opinions on ethics indicating that there were circumstances under which attorneys who undercut their local fee schedules might be subject to disciplinary action by the State Bar. At trial, the district court concluded that the Fairfax County Bar Association was liable under the Sherman Act, rejecting its three basic defenses: (1) that the activity restrained, i.e., the sale of housing in Fairfax County, Virginia, did not directly and substantially affect commerce between the states; (2) that the Sherman Act does not apply to restraints on the practice of law and other "learned professions"; and (3) that the minimum fee schedule was a part of the state regulation of the legal profession, and thus not subject to Sherman Act attack, because the Sherman Act does not apply to state action. The state action doctrine, formulated in Parker v. Brown, 317 U.S. 541 (1943), was held applicable by the district court to the Virginia State Bar and they were consequently not liable. The Fairfax County Bar Association appealed their finding of liability, and the Goldfarbs the dismissal of the case against the Virginia State Bar.

The Court of Appeals for the Fourth Circuit affirmed the district court’s holding dismissing the case against the Virginia State Bar, but reversed as to the Fairfax County Bar Association, holding that (1) there exists a "learned profession" exemption from the Sherman Act which prevents antitrust attack on activities which restrain competition within the profession and (2) the effect of the minimum fee schedule on the housing market in Fairfax County did not affect interstate commerce sufficiently to invoke the Sherman Act. The result of the Fourth Circuit opinion was that there was no liability on the part of either defendant.
commerce clause and the Sherman Act commerce clause. In *Goldfarb*, the plaintiffs contended that the minimum fee schedule under attack increased the price of homes in Fairfax County, Virginia, which in turn affected interstate commerce because of the large percentage of interstate loans which financed home purchases in the County, and because of the large amount of interstate commuter traffic between Fairfax County and places of employment outside Virginia.\(^10\)

The Court of Appeals for the Fourth Circuit held that these factors were not sufficient to show the direct and substantial effect on interstate commerce necessary to invoke the Sherman Act. The fact that many residents of Fairfax County commuted to jobs outside Virginia was considered totally irrelevant to the question of interstate commerce.\(^11\) The remaining connection, the

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10. The district court expressly found that the minimum fee schedule affected the price of title examination which in turn affected the price of housing within Fairfax County. The local housing market was deemed to affect interstate commerce by the district court through three factors:

[1] A significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia. All or nearly all of the lenders making such loans require, as a condition of making the loan, that the title to the property involved be examined and that title insurance be furnished and paid for by the home buyer-mortgagor. This alone warrants the conclusion that interstate commerce is sufficiently affected to sustain jurisdiction under the Sherman Act.

[2] There is also uncontradicted evidence that a large percentage of persons who live in Fairfax County work outside of Virginia and [3] that significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia.

355 F. Supp. at 494.

11. The fact that a service may be utilized by one coincidentally engaged in interstate travel will not establish jurisdiction under the Sherman Act. This is true even where one crosses state lines for the sole purpose of purchasing the service. The interstate commerce which is allegedly affected by the fee schedule is the financing of home mortgages; the fact that the mortgagor commutes across state lines to his job is of no interest to the mortgagee or to this court.

497 F.2d at 16-17 (footnotes omitted).


interstate lending of money to finance home purchases, was held too remote and incidental an involvement with interstate commerce to invoke the Sherman Act.\textsuperscript{12}

The holding by the Fourth Circuit that the minimum fee schedule in question did not affect interstate commerce sufficiently to invoke the Sherman Act seems surprising in view of the expansive interpretation given the commerce clause in the last three decades; if the premise is accepted that the Sherman Act extends as far as Congress may constitutionally reach,\textsuperscript{13} one must conclude that Congress could regulate neither the sale of local housing nor the setting of legal fees. As noted, however, the courts have apparently drawn a distinction between Sherman Act jurisdiction and Congress' constitutional power under the Sherman Act.\textsuperscript{14}

In any case, the commerce result in \textit{Goldfarb} does not preclude the review of the restrictive practices of the legal profession under the Sherman Act. A minimum fee schedule which fixes the price of title examination for residential property admittedly has an indirect effect on interstate commerce; but if a minimum fee schedule fixed the price of incorporating a business engaged in interstate commerce, for example, a different question would be presented.\textsuperscript{15} Therefore, while \textit{Goldfarb} represents a setback for private challenges to the legality of minimum fee schedules, there is no reason to suppose that it raises an insuperable bar to challenge under the Sherman Act.

\section*{II. SELECTED RESTRAINTS OF THE LEGAL PROFESSION}

\subsection*{A. Prescriptive Fee Schedules}

Minimum (or prescriptive) fee schedules are in widespread

\textsuperscript{12} The court apparently considered several factors in concluding that the involvement of interstate home financing did not make all facets of the market subject to the Sherman Act. First, the nature of the activity "was basically local; the Fairfax County Bar Association's minimum fee schedule was considered a general local service" which did not intentionally or directly affect interstate commerce. Second, it was merely a "fortuitous circumstance" that the plaintiffs who used the title examination services provided by the members of the Fairfax County Bar Association sought to finance their homes with out of state lenders. Therefore, the impact of the minimum fee schedule on interstate commerce was "merely incidental." 497 F.2d at 17-18.

\textsuperscript{13} See note 7 supra.

\textsuperscript{14} See note 8 and accompanying text supra.

\textsuperscript{15} While the general nature of an activity as "local" or intrastate has some weight in deciding the commerce question, Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969), the legal profession "must take their victims' involvement in interstate commerce as they find them." Lehman v. Gulf Oil Corp., 464 F.2d 26, 36 (5th Cir. 1972). \textit{See also} Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 47 (5th Cir. 1974).
use today. They are published by state and local associations to assist lawyers in setting fees for their services.\textsuperscript{16} The schedules set forth recommended minimum fees; they are not obligatory, but the American Bar Association has rendered opinions stating that consistently charging below the minimum fee might be evidence of unethical conduct.\textsuperscript{17}

Prescriptive fee schedules contain a price list for various legal services, usually those which can readily be classified such as drafting simple wills, incorporating small businesses and billing rates. Typically, minimum fee schedules are prepared by a committee of the state or local bar association, which purports to set fees at a level which will ensure at least a fair return to the practitioner, taking overhead and other expenses into account.\textsuperscript{18} These fee schedules do not necessarily indicate what prevailing fees are, but rather what would be sufficient at least to cover expenses of an assumed nature and dimension.\textsuperscript{19}

\textsuperscript{16} As recently as 1971, thirty-four states had adopted minimum fee schedules; some were mandatory and some were adopted by the state bar associations for local bars to consider and adopt if they desired. Arnould and Corley, \textit{supra} note 3, at 656.

Since 1973, the use of minimum fee schedules has declined partly because of the challenges to their legality under the Sherman Act. \textit{See, e.g.}, Order of Court of Appeals of Kentucky, approving Kentucky Bar Association resolution abolishing Kentucky's minimum fee schedule. See also resolution of A.B.A. Board of Governors, adopted October 1973:

\textit{In order to avoid possible future dispute or litigation, and}
\begin{itemize}
  \item a) Without the expression of any opinion upon questions of existing legal right or obligation, and
  \item b) Notwithstanding the most recent opinion issued by this Association's Committee on Ethics and Professional Responsibility with regard to the ethical propriety of the voluntary consideration by lawyers of fees customarily charged for particular legal services in given localities;
\end{itemize}

The American Bar Association recommends that state and local bar associations that have not already done so, give serious consideration to withdrawal or cancellation of all schedules of fees, whether or not designated as "minimum" or "suggested" fee schedules.

Reprinted in \textit{Hearings of Legal Fees Before a Subcomm. of the Senate Comm. on the Judiciary}, 93d Cong., 1st Sess. 196 (1973) [hereinafter cited as \textit{Hearings on Legal Fees}].

\textsuperscript{17} \textit{See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 302 (1961); No. 323 (1970).}

\textsuperscript{18} "It is an economic fact that a lawyer must receive a fair and reasonable return for the legal services rendered if he is to practice his profession with a dignity and maintain high professional standards in the quality of his work." \textit{Foreword, Statewide Suggested Minimum Fee Schedule}, 1967 Md. St. B. J. 125.

\textsuperscript{19} The calculation of expenses is necessarily rather crude, because different areas of a state or even a county have different costs. In Maryland, the committee proposing a statewide suggested minimum fee schedule defended a single statewide determination of costs by asserting that rural attorneys' costs were not very much lower than urban costs: while office space and secretarial help are likely to be cheaper in rural areas, there is less likelihood that there will be a bar library nearby, meaning that the rural lawyer will have
There is little doubt that prescriptive fee schedules affect the price of legal services. One purpose is to create a floor under fees for legal services. This floor, admittedly above the level of costs, insures that the income of all lawyers who use the schedules will be above the "break-even" point. As a class, then, the legal profession will make higher profits than would be the case if there were no floor. In addition to the clear economic advantages of the prescriptive fee schedule, the organized bar has made them an ethical issue thus guaranteeing a high level of adherence.

An agreement among competitors which has the purpose or effect of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se", without any regard to its justification. Such activities are generally referred to as price fixing. The publication of a prescriptive fee schedule by a state or local bar association constitutes such an agreement among competing attorneys under the Sherman Act.

Price fixing was one of the earliest activities held to be a violation of the Sherman Act. The economic detriment inherent in price fixing is that prices are set by suppliers acting in concert rather than by the forces of supply and demand. Any activity labelled price fixing has been considered per se illegal, because the device is so detrimental to free competition that it can under


This machete approach to a delicate economic problem is clearly unsatisfactory. The desire for urban-rural uniformity in legal fees can only be explained as an attempt to minimize natural price differences.

20. See Critical Analysis, supra note 3, at 977-78.

21. In addition to the American Bar Association Opinions, supra note 17, attorneys frequently state that they fear undercutting the minimum fee because it is a violation of the ethical Rule Against Solicitation. See Brief for appellant at ____, Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974), reprinted in Hearings on Legal Fees, supra note 16, at 106.

22. See Critical Analysis, supra note 3, at 979.


24. 15 U.S.C. §§ 1-7 (1970). Section 1 is the primary focus of this comment. It states in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

An "agreement" between two or more persons is a requirement under section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). It implies concerted action to achieve a forbidden result, such as price fixing. Such action may be evidenced by a schedule of prices, as is the case with minimum fee schedules, and the forbidden result by either direct evidence of a purpose to use the schedule to actually fix prices, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), or by an economic advantage to be gained by adherence to a price schedule, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950).
no circumstances be considered a "reasonable" activity for competitors to engage in.\textsuperscript{25} The development of the per se rule against price fixing demonstrates that the courts will not accept "excuses"—i.e., defenses—for such blatantly anticompetitive behavior.\textsuperscript{26}

The per se rule condemning price fixing developed in situations involving the sale of commodities in a commercial setting; the applicability of such a rule to a personal service business was problematical. But in \textit{United States v. National Association of Real Estate Boards},\textsuperscript{27} the Sherman Act was applied to the personal services rendered by real estate brokers in the District of Columbia. The District's association of brokers promulgated a schedule of minimum brokerage commissions to be used by members. The Board's code of ethics provided that "[b]rokers should maintain the standard rates of commission and no business should be solicited at lower rates."\textsuperscript{28} The Court held that, absent


\textsuperscript{26} In \textit{United States v. Joint-Traffic Ass'n.}, 171 U.S. 505 (1898), a combine of rail carriers set prices at a level above what they could have gotten if they had competed. The defendants attempted to justify their conduct by the nature of their industry. If free competition were permitted, all the firms would eventually be driven out of business and the result would be monopolization of the railway industry. This defense against price fixing was rejected, because the theory of the railroads was conjecture and the effect on competition of the price fixing agreement was "direct and immediate." \textit{Id.} at 503. \textit{See also}, \textit{United States v. Trenton Potteries}, 273 U.S. 392 (1927) in which the defendants claimed that their conduct was not in violation of the Sherman Act because there was no evidence that the prices fixed by the combination were not reasonable. The Court rejected this defense because the Sherman Act was not directed toward the level of prices, but the mechanism which set them:

Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable . . . . \textit{[U]}niform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon.

The landmark case of \textit{United States v. Socony-Vacuum Oil Co.}, 310 U.S. 150 (1940) articulated the \textit{per se} rule against price fixing, holding that no excuse would be heard for activity among competitors that attempted to alter the price for a product that the free market would set.

In \textit{Socony}, a group of oil companies combined to purchase gasoline which had been produced in violation of state law and dumped on the market. Their purpose was to stabilize the price of gasoline by controlling the supply. There was no evidence of any agreement actually setting specific prices, but the Supreme Court held that any agreement with the purpose of altering the price was price fixing and therefore illegal \textit{per se}. Further, the Court held that the power to control prices was not a necessary element of the offense of price fixing. 310 U.S. at 224 n.59.


\textsuperscript{28} 339 U.S. at 488.
any statutory exemption from the Sherman Act, there was no reason to distinguish personal services from the sale of commodities; that the word "trade" in the Sherman Act included sales of services as well as goods; and that price fixing in the sale of services had exactly the same deleterious economic effects as in the earlier cases involving commodities:

[W]e would be contracting the scope of the concept of "trade," as used in the phrase "restraint of trade," in a precedent-breaking manner if we carved out an exemption for real estate brokers. . . . The competitive standards which the Act sought to preserve in the field of trade and commerce seem as relevant to the brokerage business as to other branches of commercial activity.

Real Estate Boards thus condemned a practice which is almost indistinguishable from prescriptive fee schedules. The agreement in Real Estate Boards was itself a schedule which established a floor under brokerage commissions. The Court held that this schedule was price fixing, and therefore proscribed under the Sherman Act.

The fact that there was no evidence that members had been sanctioned for violating the schedule was immaterial because "[s]ubtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." The mere existence

29. The district court had held that the Sherman Act did not apply to personal services because of section 6 of the Clayton Antitrust Act, 15 U.S.C. § 17 (1970), which stated: "The labor of a human being is not a commodity or article of commerce." This, the court held, exempted all personal labor from all the antitrust laws, including the Sherman Act. United States v. National Ass'n of Real Estate Bds., 84 F. Supp. 802, 803-04 (D.D.C. 1949). See also 63 HARV. L. REV. 712 (1950).

The Supreme Court reversed on this point, holding that the Clayton Act section was to be read as an entirety, and only operated to exempt labor unions from the antitrust statutes. 339 U.S. at 490.

30. The Court stated that the traditional meaning of the word "trade" was very broad, quoting from The Nymph, 18 F. Cas. 504, 505 (D. Me. 1834) (No. 10,388):

Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or the learned professions, it is constantly called a trade.

The Court disassociated itself from the reference to the "learned professions," saying that no opinion as to the Sherman Act's application was intended. Justice Jackson, however, dissented on the ground that Real Estate Bds. offered no distinction between real estate brokers and the learned professions. 339 U.S. at 494.

31. Id. at 492.

32. Any "agreement shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act . . . ." Id. at 489 (emphasis added).

33. Id. It is unclear from the Court's opinion whether adherence to a price schedule is necessary for a finding of price fixing. In the case of the legal profession, however, the
of an agreement is legally deemed to be price fixing if it purports to alter the competitively determined price.\(^\text{34}\)

This result—that a prescriptive fee schedule is indeed price fixing by its mere existence—was the conclusion reached by the district court in \textit{Goldfarb}. The prescriptive fee schedule\(^\text{35}\) which had been promulgated by the Fairfax County Bar Association made it impossible for the plaintiff to obtain a title examination for less than the fee set in the schedule. The plaintiff considered the fee excessive, especially because it was based, not on work performed, but on a percentage of the purchase price of the property which was being searched.\(^\text{36}\)

The district court held that the schedule did, indeed, unlawfully fix prices; adherence, however, was not required for such a finding: “A defendant’s liability under the Sherman Act depends not on actual adherence to the schedule but rather on the mere existence of an agreement which restricts competition by price-fixing.”\(^\text{37}\) Thus it is clear that while, in this case, there was evidence of adherence, it was not material.\(^\text{38}\)

Although the Fourth Circuit reversed the district court on the ultimate issue of the Fairfax County Bar’s liability, the actual restraint on price competition in title examinations was acknowledged by the appellate court.\(^\text{39}\) The prescriptive fee schedule which purports to influence the price of legal services necessarily has a similar effect. Thus, under a line of cases which extends almost to the enactment of the Sherman Act,\(^\text{40}\) the adoption of a prescriptive fee schedule by a bar association or other group of lawyers, is price fixing.

\textbf{B. Descriptive Fee Schedules}

While prescriptive fee schedules are a relatively clear example of the traditionally illegal conduct labelled price fixing, there

\begin{thebibliography}{99}
\bibitem{34}Id.
\bibitem{35}The existence of sanctions for persistent failures to charge at least the minimum fee clearly indicates that the schedule was prescriptive. \textit{See Virginia State Bar, Opinions}, No. 98 (1960); No. 170 (1971). A schedule which only reflects existing fees would surely not be accompanied by formal sanctions.
\bibitem{36}355 F. Supp. at 497.
\bibitem{37}Id. at 494.
\bibitem{38}See note 24 and accompanying text \textit{supra}.
\bibitem{39}497 F.2d at 13.
\bibitem{40}See note 26 and accompanying text \textit{supra}.
\end{thebibliography}
are other fee schedules less easily classified. These are descriptive schedules, which indicate what lawyers in a given area actually charge for a service. The first inquiry must be the economic effect of this device on the profession’s fee structure. If lawyers have an economic incentive to lower fees in an attempt to gain new clients, the absence of ethical sanctions would leave them free to do so.41 The chief factor, then, is the competitive climate in which the descriptive, or informational, schedule operates. If the purpose of the schedule is to maintain prices by creating a schedule with the expectation of widespread adherence, then it is clearly illegal. Such a purpose may be inferred from the trend of prices in the industry at the time the schedule was promulgated.42 The chief danger of the device, if it is truly descriptive, is that it will be used to stabilize, rather than increase, prices.

Descriptive devices, whether within the legal profession or without, are simply exchanges of information between members of a group. Trade associations have traditionally compiled information and distributed it to members. Such activities are clearly concerted action among members within the meaning of the Sherman Act.43 The remaining issue is whether the concerted action is an unreasonable restraint of trade and thus violative of the Sherman Act. The resolution of this issue requires an analysis of the circumstances surrounding the exchange of information. The exchange of prices through a trade association has been held lawful where the information exchanged was not of a character that encouraged adherence to the stated prices, but where adherence to stated prices was intended or achieved, the Sherman Act was held to forbid the exchange.44

41. The presence of formal sanctions for violating the agreement is fatal to its validity under the Sherman Act, but the absence of sanctions does not mean the agreement is necessarily valid. It is not the presence of sanctions which makes a fee schedule price fixing, but the presence of any pressure to adhere to it. Formal sanctions, informal social pressures or economic advantage may supply the incentive. United States v. National Ass’n of Real Estate Bds., 339 U. S. 485, 491 (1950).
42. Where a decline in prices was slowed by concerted action of competitors exchanging price information the exchange was ruled unlawful under the Sherman Act. United States v. Container Corp., 393 U.S. 333 (1969). Similarly, where substantial price increases followed an exchange of price information, a violation of the Sherman Act was also established. American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).
44. Three Supreme Court cases form the basic pattern of data dissemination and price fixing. In American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), a
In the context of the legal profession, the pressure in favor of adherence primarily comes from formal or informal ethical requirements in charging for legal services. A truly descriptive fee schedule may be used as a device to preserve high fee levels which might otherwise decline; if so, it would be a clearly unreasonable restraint.

A price fixing challenge to a descriptive fee schedule published by a county bar association in New York was rejected in trade association distributed a detailed list of prices, inventories, sales and shipments of each member firm. The data was gathered from members on a voluntary basis, but any firm which failed to comply was not given a copy of the report. The association encouraged participation in the program, the obvious objective of which was to persuade all firms to limit production in order to increase the price. The Supreme Court held the plan to be an illegal restraint of trade and stated that the "fundamental purpose of the Plan was to procure harmonious individual action" in order to stabilize the price. The plan, in short, constituted price fixing. Id. at 409.

Cf. Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925), where a somewhat similar plan was upheld. The data received by the industry association was compiled and distributed in the aggregate, unlike the American Column case, where the results were reported on a firm-by-firm basis. Since none of the firms had the opportunity to find out which firms were cutting prices, there was no noneconomic incentive to make price or production decisions in accordance with the report because the other firms were unaware of individual deviations. There was also no economic reason to follow the report as a price fixing device, because prices were not on the decline at the time. Thus, the Court held the information program to be just that, and not a scheme to stabilize prices.

The American Column case was reaffirmed and its principles applied to an informal arrangement to distribute price information in United States v. Container Corp., 393 U.S. 333 (1969). In that case, there was serious overcapacity in the corrugated container industry and prices were declining. When a customer asked for a price, the manufacturer checked with the other firms to find out what the last price to that customer was. The Supreme Court, in a rather cryptic opinion, held that the arrangement was a violation of the Sherman Act, but did not say what kind of violation it was. The majority opinion cited United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), which would seem to indicate that the majority considered it price fixing. But Justice Fortas, concurring, said that he did not regard the majority opinion as declaring a per se violation on the facts before it. The singular economic situation in the industry, with sagging prices and overcapacity, may have been the source of Justice Fortas' belief that no per se violation was found in the case.

45. There is some question whether any schedule quoting a price for legal services can be "descriptive" unless it considers the multitude of factors which should enter into the calculation of a fee. A single prevailing fee for a simple will, for example, could not take into account the vast difference in efficiency between an experienced and inexperienced attorney. The only solution would be to have a multitude of fees for the same service, which would still be open to the objection that competency is not reflected in experience.

This comment assumes that there exists a satisfactory method for arriving at a descriptive fee schedule which would still be useful to practicing lawyers and the public. Perhaps a court faced with a challenge should consider the practical difficulties in formulating a descriptive schedule when deciding upon its legality. In the one case deciding the question, the court simply stated that the schedule under challenge reflected "customary fees", and did not pursue the issue. In re Freeman's Estate, 40 App. Div. 2d 397, 399, 341 N.Y.S. 2d 511, 515 (4th Dept. 1973), aff'd on other grounds, 34 N.Y. 2d 1, 311 N.E.2d 480 (1974).

In re Freeman’s Estate.⁴⁷ In that case, the sole beneficiary under Freeman’s will contested the award of attorneys’ fees to the lawyer who handled the estate, claiming they were unreasonably excessive. The Surrogate had calculated the award for attorneys’ fees by using the county bar association’s minimum fee schedule, and the heir claimed that the award was invalid because the schedule violated the New York antitrust law.⁴⁸

The Appellate Division held that the county bar association’s fee schedule was a “reasonable” restraint of trade and therefore not a violation of the state antitrust law. However, the court did not consider whether the price fixing label could properly be applied to this fee schedule since, under the New York law, there are no per se violations, and all restraints should be critically analyzed to determine their reasonableness.⁴⁹

The court then turned to the fee schedule itself. In order to show that the schedule illegally restrained trade, the petitioner had the burden of presenting some “empirical data” that the schedule had damaged the public or had been designed with such a purpose in mind.⁵⁰ Petitioner’s only evidence on this point was the “impressive array of formal sanctions” available against the attorney who charged less than the minimum fee indicated in the schedule.⁵¹ The court ruled that this was insufficient to show

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⁴⁸ The Donnelly Act, New York’s “little Sherman Act”, provides in pertinent part:

> Every contract, agreement, arrangement or combination whereby

> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained...

> . . . is hereby declared to be against public policy, illegal and void.


⁴⁹ 40 App. Div. 2d at 399, 341 N.Y.S.2d at 515. The Court of Appeals did not consider whether price fixing was illegal per se under the Donnelly Act. The Appellate Division’s consideration of this issue, and the economic analysis under it, is, however, still valid in view of the Court of Appeals decision, in which the same factors were used to determine if the fee schedule was a violation of professional ethics rather than state antitrust law. 34 N.Y.2d at —, 311 N.E.2d at 484-85.


> While minimum fee schedules can only be suggested or recommended and cannot be made obligatory . . . the habitual charging of the fees less than those established
actual damage to the public, because it had not been demonstrated that an attorney had been disciplined for violating the fee schedule, and, in fact, lawyers were free to charge whatever they liked for their services. In view of the voluntary nature of the fee schedule, the court determined that it was "in fact not a 'minimum' fee schedule but intended merely as a means of providing some guidance on the subject of reasonable fees by reflecting customary fees for routine work charged in the community."

The Appellate Division in Freeman's Estate concluded that the schedule was in fact descriptive and that no purpose to fix prices had been shown, but the further problem of effect was not considered. If, in actual practice, the schedule guided attorneys in the calculation of their fees in such a way as to stabilize them, the schedule fixed prices within the meaning of the Sherman Act. Such a situation would be present if there were an incentive on the part of attorneys to preserve existing fees, either because the free market price was declining, or a previous restraint of trade had maintained artificially high prices. In the latter situation, the descriptive schedule of fees, while accurately reflecting the "going rate", also preserves the artificially high fees which have prevailed over much of the nation due to the widespread use of prescriptive minimum fee schedules. The rates set through the use of an illegal restraint may not be preserved by any other means, or the means themselves constitute price fixing. As long as prevailing rates reflect the influence of impermissible restraints of trade, descriptive schedules will tend to preserve them, and therefore unlawfully fix prices. Beyond that, it seems fair to conclude that descriptive fee schedules are a reasonable device, especially when used by courts in setting legal fees.

C. The Rule Against Solicitation

The primary source of regulation of the legal profession is the ethical standards of conduct expressed in the American Bar Association Code of Professional Responsibility. The Code is binding in suggested or recommended minimum fee schedules, or the charging of such fees without proper justification, may be evidence of unethical conduct.

See also id., No. 323 (1970).

52. 40 App. Div. 2d at 400, 341 N.Y.S.2d at 515.
53. Id. (emphasis added).
55. The ABA Code has three types of pronouncements. The Canons are very generalized statements representing "axiomatic norms". The Ethical Considerations (ECs) are "aspirational in character", representing ideals of ethical conduct. The Disciplinary Rules (DRs) are minimum standards, the violation of which subjects a lawyer to...
on members of the ABA and on all attorneys in states which have adopted the Code.56 These ethical standards are expressed in nine canons which set standards governing the relationship of lawyers with other lawyers and laymen.

Canon Two deals with the acquisition of clients and the manner of setting and collecting fees.57 The disciplinary rules under this canon prohibit the use of any communication of a "self-laudatory" nature which is designed to attract clients.58 All commercial advertising is strictly prohibited.59 The use of professional notices, change of address announcements, stationery, telephone listings and law lists are strictly controlled and only permitted for purposes of identification and not for solicitation.60 Unsolicited recommendation of oneself or a partner or associate is prohibited,61 as is any payment to anyone for a similar recommenda-

56. In Maryland, the ABA Code has been adopted by the Court of Appeals and therefore binds every lawyer in Maryland. See Md. R. 1230.

57. Canon 2 states: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."

58. A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

ABA Code, DR 2-101(A).

59. A lawyer shall not publicize himself, his partner or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

60. A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used in dignified form:

(1) A professional card . . . .
(2) A brief professional announcement card stating new or changed associations or addresses . . . .
(3) A sign on or near the door of the office . . . .
(4) A letterhead . . . .
(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory . . . .
(6) A listing in a reputable law list . . . .

Id., DR 2-102(A).

61. A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice
In substance, this series of prohibitions forms a Rule against solicitation which proscribes any positive effort designed to attract clients and requires the lawyer to wait for clients to come to him.

The effect of the Rule on the market for legal services is profound, because it eliminates advertising, normally a major avenue for consumer choice in our society. The less educated, less sophisticated and less affluent, usually remain generally uninformed of their legal rights, and the Rule against solicitation prevents attorneys from stimulating demand among that group.

The primary burden of the smaller demand falls on small practitioners who rely substantially on middle class demand, rather than members of large metropolitan firms. The latter can swell their business at country clubs and cocktail parties, using methods either outside Canon Two's prohibitions or beyond the scope of its enforceability. Moreover, their clients, usually corporations, almost invariably have a lively appreciation of the need for legal services.

Not all small practitioners are equally affected by the Rule; those who are new in practice are hurt the most by it, because it prevents them from establishing themselves in the community. Small practitioners who are well established see the Rule as an advantage and generally support it, at least partly because of its effectiveness as a barrier to new competition.

regarding employment of a lawyer.

Id., DR 2-103(A).

62. Except as permitted under DR 2-103(C) [dealing with lawyer referral services set by a bar association], a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client.

Id., DR 2-103(B). For standards for operation of an approved lawyer referral service, see ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 291 (1956).

63. Solicitation for its own sake and for the profit of the individual attorney is prohibited entirely, but certain documents are permitted to contain a lawyer's name and profession because the profession feels it is desirable even though they may incidentally amount to solicitation: political advertisements (DR 2-101(B)(1)); legal documents (DR 2-101(B)(4)); legal textbooks, treatises, and other legal publications (DR 2-101(B)(5)).

64. The unfairness of the Rule as applied to small practitioners has prompted proposals for a "double standard", with lawyers from large firms held to the present standard and small practitioners allowed to solicit to some extent. See Schuchman, Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code, 37 GEO. WASH. L. REV. 244 (1969) [hereinafter cited as Schuchman]. See also Comment, Legal Ethics and Professionalism, 79 YALE L.J. 1179 (1970).


66. Id. Similar economic motives are probably behind the opposition of small practitioners to neighborhood law offices set up by public interest law firms to serve the poor.
Demand for legal services is almost certainly lower than if there were no Rule. There are now few effective ways for a client to find a lawyer, even if he knows that he needs one.67

Artificially constricted demand among middle income consumers necessarily affects the level of legal fees. The client who desires legal advice has little opportunity to "shop" for the best price available for the service he desires. The economic incentive for lawyers to cut prices to attract more business vanishes because the consumer will never know how the prices of several attorneys compare. Thus, the Rule removes competitive pressures from the profession and allows prices to remain artificially high.68

In a normal commercial setting, an agreement between competitors to refrain from advertising prices has been struck down as price fixing. In United States v. Gasoline Retailers Association,69 a group of service station owners entered into an agreement with their employees' union which included a provision that the owners would not advertise the price of their gasoline. It was further agreed that no premiums would be used by the gas stations to attract customers. The admitted purpose of these agreements was to prevent the recurrence of gasoline price wars in the area.

In affirming a criminal conviction under the Sherman Act against the Retailers Association, the Court of Appeals for the Seventh Circuit noted that the intended effect was to remove the incentive for discount pricing by preventing the public from finding out about it. Therefore, the agreement was a clear attempt to set a floor under prices and, as such, constituted price fixing.70

The Rule against solicitation in the legal profession may be attacked on a similar theory. The ban on solicitation is an agreement to curtail competition71 among lawyers. As such, it clearly

See Comment, Neighborhood Law Offices: The New Wave in Legal Services for the Poor, 80 Harv. L. Rev. 805, 842-45 (1967). See also Schuchman, supra note 64, at 262-63.

67. The lawyer referral services permitted by the ABA Code are often nothing more than answering services for a group of lawyers. They are only a compendium of names; there is no qualitative evaluation involved. Thus, there is no real assistance in the intelligent selection of a lawyer.

68. The total lack of price competition in the offering of legal services presents an ideal climate for prescriptive fee schedules to operate, since whatever price may be set by the bar will remain stable. See part II A, supra.

69. 265 F.2d 688 (7th Cir. 1961).

70. Id. at 690.

71. Cf. United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953), where an agreement between investment bankers to keep up the price of newly issued securities was sustained, at least partially because of the economic necessity of the arrangement. The
restrains trade. The justification that professional ethics requires the imposition of such a restriction is not directed toward economic effects; rather, it concerns uniquely professional considerations and cannot alter the determination that the Rule is economically restrictive. Unless the bar can show that the business efficiency of the provision of legal services is enhanced by the Rule against solicitation, then as a preliminary matter it is an unreasonable restraint of trade in violation of the traditional dictates of the Sherman Act. The next question must be whether the unique considerations of professional ethics override the economic policy of the Sherman Act.

III. THE NATURE OF THE LEGAL PROFESSION AND THE POLICY OF THE SHERMAN ACT

The controversy over whether the Sherman Act should be applied to the ethical rules of the legal profession stems from the nature of the profession itself. Its "product" is not fungible services which can be easily interchanged; rather it is a professional service, tailored to the individual needs of each client. Furthermore, while similar in some ways to other professions, the practice of law differs in one important respect in that lawyers are "officers of the court." This means that they are under the jurisdiction of, and at least theoretically regulated by, the highest court of the state in which they practice. These distinctive fea-
tures suggest that two rationales are available to exclude professional ethics from the policy of the Sherman Act. First, legal ethics might be given professional immunity based on the nature of the professional services rendered and the ethical considerations involved. Alternatively, the profession might be exempted to the extent that it is deemed to be regulated by the state under the doctrine of *Parker v. Brown*.76

A. The Doctrine of Professional Immunity

For many years the legal profession has assumed that at least its ethical structure had the benefit of immunity from the antitrust laws.76 Lawyers relied on dicta in several Supreme Court cases which stated that professions were governed by ethical considerations not present in the commercial world.77 The justification of an exemption based on the professional immunity rationale has two aspects. First, there is "total" immunity, which would exclude professional ethics from any application of the Sherman Act. Secondly, there is partial immunity which would allow some ethical practices to be sustained if justifications uniquely professional outweigh detrimental economic effects.


77. See Goldfarb, in which the court of appeals based the learned-profession exemption on language in two Supreme Court cases:

Those cases hold that one engaged in the practice of a profession "follow[s] a profession and not a trade" and that such "personal effort, not related to production is not a subject of commerce."


Courts have largely avoided the question of professional immunity by holding that professionals whose activities restrained trade in non-professional pursuits were subject to the Sherman Act. See United States v. American Medical Ass'n, 317 U.S. 519 (1943) (doctors restrained sale of group health insurance); United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah), aff'd per curiam, 371 U.S. 24 (1962) (pharmacists restrained sale of prescription drugs).

Goldfarb followed these cases and held that the "professional immunity" doctrine exempted only those restraints within the profession from the antitrust laws. 497 F.2d at 15. Clearly, however, all such restraints affect the availability of legal services to the public. It is submitted that the distinction drawn by the courts is therefore inappropriate.
The Sherman Act declares that "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal . . . ." By combining the phrases "restraint of trade", a common law term of art, and "commerce among the several states", a jurisdictional phrase found in the Constitution, the "trade or commerce" requirement has emerged. Lawyers have argued that the profession's ethical structure should be immune since it is neither "trade" nor "commerce" within the meaning of the statute.

The legislative history of the Sherman Act indicates that the congressional purpose was to attack abuses of the competitive system wherever they occurred, and generally, the Act has been interpreted to give it wide application. Only in the case of professional baseball has the "trade or commerce" language been held not applicable by the Supreme Court, thus affording a basis for antitrust immunity, and the validity of extending the Court's reasoning to activities other than baseball is highly doubtful. In short, the cases supply no authority for the exemption of an entire profession from the Sherman Act regardless of the circumstances.

It has also been suggested that the statutory words "trade or commerce" and the statutory history limit application of the

79. The common law roots of the action of monopoly or restraint of trade are reviewed in United States v. Standard Oil Co., 221 U.S. 1, 55-60 (1911). The phrase "restraint of trade" was used to confer on federal courts the power to invoke the common law rule and to expand it. See 21 CONG. REC. 2156 (1889) (remarks of Senator Sherman).
81. See Non-Commercial Activities, supra note 77, at 321. See also Fee Schedules as Price-Fixing, supra note 3, at 450; Wisconsin Fee Schedule, supra note 3, at 1254.
82. See 21 CONG. REC. 2457 (1889) (remarks of Senator Sherman). See also Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940).
84. In Federal Base Ball Club v. National League, 259 U.S. 200 (1922), the Supreme Court held that major league baseball was not covered by the Sherman Act because the main event, the game, was local and interstate travel was only incidental. The Court stated that "personal effort, not related to production, is not an article of commerce." Id. at 209.

Thirty years later this issue was again raised in Toolson v. New York Yankees, 346 U.S. 566 (1953). By this time the commerce clause had been reinterpreted and construed broadly to extend to any activities which affected commerce, see United States v. Darby, 312 U.S. 100 (1941). But in Toolson the Court again refused to place baseball within the reach of the Sherman Act, because Congress had had the opportunity to overrule Federal Base Ball by legislation and had failed to do so. 346 U.S. at 357. This result was reaffirmed in Flood v. Kuhn, 407 U.S. 258 (1972). Thus, baseball's exemption stems from a combination of congressional inaction and stare decisis, not any reasoned analysis of the scope of the Sherman Act. See Non-Commercial Activities, supra note 77, at 323.
Sherman Act to commercial enterprises, or at least to agreements having a commercial purpose. Supporters of this reasoning would exclude professional ethics from antitrust liability because the restraints challenged are motivated by noncommercial concerns, even though they may economically benefit some individual lawyers.  

In the area of private education, this theory was accepted in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc.* In this case, the defendant was an accrediting agency which refused to accredit Marjorie Webster solely because the school was operated for profit. Marjorie Webster contended that the failure to accredit was a group boycott by all the member schools which violated the Sherman Act. The Court of Appeals for the District of Columbia Circuit declared, however, that the refusal of the Middle States Association to grant accreditation was not subject to Sherman Act scrutiny because there was no commercial motivation behind the refusal:

> [T]he proscriptions of the Sherman Act were "tailored . . . for the business world," not for the noncommercial aspects of the liberal arts and learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the professions, is not sufficient to warrant application of the antitrust laws.

Although the conclusion that setting educational standards through accreditation is a "noncommercial" aspect of education may be easily reached, the same is not true of the "ethical" restraints practiced by the legal profession. For example, prescriptive fee schedules are designed partially to serve ethical ends by insuring an adequate income for lawyers, the Rule against solicitation.


87. The accrediting agency was a non-profit corporation which had a uniform rule against accrediting any institution which operated for profit, as Marjorie Webster did. There was no evidence that the refusal to accredit Marjorie Webster was based on anything other than a genuine assumption that non-profit schools were of a better quality than those which operated for a profit.

88. Id. at 654.

tation could easily be found to have as one of its purposes the reduction of competition between lawyers. At best, therefore, the noncommercial motivation of the profession is mixed with commercial concerns, unlike the facts found in *Marjorie Webster*.

The question remains whether, in spite of partially commercial concerns, legal ethics should be held exempt from the Sherman Act. It is suggested that they should not. Total exclusion of legal ethics from the antitrust laws would, in effect, treat severe and direct restraints on competition as "noncommercial"; such an outcome would sacrifice the most basic purposes of the Sherman Act to tenuous arguments about adequate and competent services for clients without evaluating those arguments. It is submitted that each restraint should be evaluated on its merits. The ethical purpose should be weighed against the extent of the anticompetitive harms, and only those restraints clearly beneficial on balance allowed to stand. Those restraints which have anticompetitive effects without offsetting ethical benefits would be condemned; but those which are reasonably limited to serve a bona fide noneconomic purpose would be upheld. The proper analytical focus is thus not on the entire ethical structure of the profession as either "immune" or "not immune", but rather on each practice as it is challenged under the Sherman Act.

In applying this approach, consider first the possible analysis of a prescriptive fee schedule. It has the effect of fixing prices, and in almost any other setting such schedules would certainly be struck down without any opportunity for justification. Nevertheless, if there is a purely professional reason so compelling as to make prescriptive fee schedules indispensable for the continued regulation of legal ethics it should probably be given effect.

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565 (1970); *Critical Analysis*, *supra* note 3, at 977-80; *Fee Schedules as Price Fixing*, *supra* note 3, at 441.

90. See Part II, *supra*, for an economic analysis of the restraints most susceptible to Sherman Act attack.

91. This approach is a variation on the standard "Rule of Reason" analysis which is the standard for most Sherman Act cases. Under the standard rule of reason, the economic harms and benefits of a restraint are balanced, and the challenged restraint is upheld if its beneficial effects outweigh the harmful ones. See Standard Oil Co. v. United States, 221 U.S. 1, 55-60 (1911). *See also* Maple Flooring Institute v. United States, 268 U.S. 586 (1925); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 *Yale L.J.* 775 (1965).


93. It could forcefully be argued that the classic *per se* rule should apply and that
However, any such justification should be very convincing to sustain the validity of prescriptive fee schedules under a theory of limited professional immunity.

Several ethical justifications have been offered for prescriptive fee schedules: (1) that they act as a guide for the lawyer, thereby minimizing the likelihood that he will charge too little and be forced to cut corners in service; (2) that they lead to greater public awareness of fee levels, thereby preventing serious overcharging; and (3) that they are an effective means of enforcing the Rule against solicitation by preventing fee cutting.4

Considering each justification in turn, economic betterment of the bar is advanced by proponents of the prescriptive schedule as a means of ensuring that a fair return can be earned on a manageable number of cases handled in a competent way. This argument is insufficient, however; a finding of validity requires a further showing that increased income per case necessarily reduces the caseload of the individual lawyer. It is likely that some lawyers will still handle too many cases while charging the higher rates set forth in the prescriptive fee schedule. If they do not, it will be because they feel the responsibility to handle only as many cases as they can work on competently—a belief that would be present with or without the prescriptive fee schedule. To the extent that economic compulsion would force lawyers to choose between increasing their case load beyond acceptable levels and turning to other pursuits, the free market will determine how many lawyers enter the industry. In short, the existence of higher fees does not necessarily increase the quality of services, and the restraint therefore alters the free market result with no certain benefit at all.

Turning next to the argument that prescriptive fee schedules are useful informational devices, it is possible that a purely descriptive fee schedule would serve the purpose of informing the public, bench and bar of the current level of fees without seriously disrupting the operation of the market place.5 However, information about average fees would fully serve the purpose of prevent-


In exceptional circumstances, however, courts have been receptive to arguments which attempt to apply the rule of reason to restraints which can only be described as price-fixing. See Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); United States v. Chicago Bd. of Trade, 246 U.S. 231 (1918).

94. See Critical Analysis, supra note 3, at 981-92.

95. See notes 41-54 and accompanying text supra.
ing overcharging and imparting knowledge to the public of customary charges for services in the community. The descriptive schedule would be less restrictive and fully serve the bar's stated purpose.

Finally, it is argued that the Rule against solicitation is supported by the prescriptive fee schedule because price-cutting is a form of solicitation; by preventing price competition, a tool of solicitation is thereby removed. However, the Rule against solicitation wholly prevents the advertising of fees by the individual lawyer. While cutting fees might not be a direct violation of the Rule, the communication of these fees to the public is a violation. The only additional purpose served by the prescriptive fee schedule is to prevent any fee-cutting at all, and thus to insure that such information is never made available to anyone. This again is overprotective; the legitimate danger of solicitation is very slight when compared to the economic effect of forcing all fees to be at or above a minimum level. The ethical benefits of the Rule may thus be preserved without the serious detriment caused by prescriptive fee schedules.

The arguments in favor of preserving prescriptive fee schedules were advanced in Goldfarb. The district court did not consider individual justifications at length, but approached the professional immunity problem in much the same way as was suggested here. The court apparently conceded that there might, in some circumstances, be immunity for some practices having to do with professional ethics, but concluded that such a concept, whatever its extent, did not protect a prescriptive fee schedule.

The Court of Appeals for the Fourth Circuit applied a more

96. See notes 55-73 and accompanying text supra.
97. The district court questioned whether minimum fee schedules were "professional" at all:
   It seems to the Court that there is a basic inconsistency between the very position that professional services, not commodities, are here involved and the position that a minimum fee schedule is proper. The former properly contemplates differences in abilities, worth and energies expended of those rendering the services.
355 F. Supp. at 494.
98. Id. The court compared the effect of a prescriptive fee schedule on the legal profession and on the automobile industry, concluding in each case the "seller" would gain the same advantages of more easily setting prices and earning a profit adequate to allow further research and development or education.
   Yet in none of these instances would a member of the public have any better idea that the fee or price was reasonable after he had seen the schedule than he did before.
   Id.

The court did not expressly consider the arguments made by the bar that allegedly separated the legal profession from commercial pursuits; however, it is clear that the court
pervasive standard of immunity, and held that the schedule was not subject to antitrust attack at all insofar as it affected competition between lawyers. That court took the view that a "learned profession" exemption clearly existed and that the only remaining issue was its extent.\textsuperscript{99}

The court, per Boreman, J., stated that the basis of the "learned profession" exemption was the difference between commercial and professional behavior. In contrast to commercial pursuits, the legal profession has rejected "the maxim of \textit{caveat emptor} as a standard of conduct."\textsuperscript{100} The court held that the profession has a duty to provide legal services to those who cannot afford them, and is subject to ethical restrictions, "many of which are in direct contravention of" the principles of antitrust.\textsuperscript{101}

was unwilling to extend the blanket of antitrust immunity over all professional activities, and that the fee schedule under challenge was one of the least defensible aspects of the profession. While it is unfortunate that more analysis of the profession's arguments was not undertaken, Judge Bryan's conclusion seems correctly based on a theory of balancing interests. \textit{Id.} at 494, 495.

99. \textit{Goldfarb}, 497 F.2d at 13-14. In reversing the district court on the applicability of the Sherman Act to a bar association prescriptive fee schedule, the fourth circuit relied on dicta in two Supreme Court cases, \textit{F.T.C. v. Raladam Co.}, 283 U.S. 643 (1931), and Federal Base Ball Club, Inc. v. National League, 259 U.S. 200 (1922). Neither of these cases concerned learned professions directly.

In \textit{Raladam}, a drug company marketed a nostrum which claimed to cure obesity. The F.T.C. held that the claim was false, and an unfair method of competition in violation of § 5 of the F.T.C. Act, 15 U.S.C. § 45 (1970). The Supreme Court held that the Commission lacked jurisdiction because, \textit{inter alia}, there was no affirmative showing of the effect of the advertisement on competition in the sale of drugs. The American Medical Association asserted that the drug was dangerous, and the advertising was against the public interest. In response the Court stated:

Of course, medical practitioners . . . are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them.

283 U.S. at 653.

In \textit{Federal Base Ball}, the reference to "learned professions" was similarly oblique, since the issue there was whether professional baseball was in interstate commerce. See note 84 \textit{supra}.

In later cases, the Supreme Court has expressly refused to advance an opinion as to the status of the professions under the Sherman Act. United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952); United States v. National Ass'on of Real Estate Bds., 339 U.S. 485 (1950). In this light the value of the language in \textit{Raladam} and \textit{Federal Base Ball} is very questionable.

100. 497 F.2d at 14.

101. Unlike the mechanic or the butcher, a lawyer has a professional duty to provide his services at a reduced rate to those who need but cannot afford his services. Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers. In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to superimpose upon the profession the sanctions of the antitrust laws. . . .

\textit{Id.} (footnotes omitted).
After stating the basis for the exemption, the court went on to articulate the legal standard for its application:

[T]he promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the "learned profession" exemption.°

It is submitted that the standard developed by the court does not coincide with the reasons for the exemption as the court articulated them. Setting aside the possibility that the court's standard exempts conspiracies between individual lawyers, the "ethical" restraints challenged under the Sherman Act might restrain competition only within the profession and yet be unnecessary to any system of ethics established by the bar. Thus, it seems that the Fourth Circuit has adopted a standard of limited review of ethical restraints, wherein any restraint tied in with legal ethics by the bar will not be examined by a court unless it can be found to restrain trade outside of the profession.

The Supreme Court has stated that exemptions from the antitrust laws are to be disfavored, and should operate only to the extent necessary to effectuate the policy on which they are based.103 By extending the "learned profession" exemption to include all restraints which form a "part" of the ethical structure of the profession, and not only those necessary to preserve that structure, the Fourth Circuit opinion did not adhere to the principle articulated by the Supreme Court.104

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102. Id. at 15.  
103. In Silver v. New York Stock Exchange, 373 U.S. 341 (1963), the Supreme Court faced the problem of reconciling the antitrust laws with the Securities Exchange Act of 1934, 15 U.S.C. § 78 (1970). In giving effect to the antitrust laws, the Court held that the Exchange Act should be construed to impliedly repeal the Sherman Act "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." Id. at 357.  
Such a notion of necessity is even more important where the exemption is not inferred from another act of Congress, but from the words of the Sherman Act. Cf. In re Freeman's Estate, 34 N.Y.2d 1, 311 N.E.2d 413 (1974) (state regulation of legal profession through court rules as evidence of legislature's intent to exclude the profession from the state antitrust statute).  
104. Compare United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974), where the court held that there was no "learned profession" exemption from the Sherman Act, at least for price fixing activities such as prescriptive fee schedules. In rejecting the defendant's arguments against applying the Sherman Act to the legal profession, the court held that it was improper to evaluate the schedule simply as part of the regulation of legal ethics: "The fee schedule should be examined apart from the general regulatory scheme; such an examination would disclose little public benefit." Id. at 513.
Under the standard of limited review adopted by the Fourth Circuit, it seems clear that all restraints imposed by the bar in the name of ethics would be immune from Sherman Act liability. However, if the court considers the real necessity of a restraint to the ethical scheme, the results may well not be as uniform. There are clearly serious anticompetitive effects associated with prescriptive fee schedules, and it has been demonstrated that the countervailing benefits claimed by their proponents fall far short of justifying their continued existence.\textsuperscript{105} Prescriptive fee schedules should therefore be condemned under the Sherman Act.

Descriptive fee schedules, on the other hand, present a somewhat different problem, in that they are by definition only informational, and based on studies of actual legal fees. Being only informational, a purpose to fix prices is not easily proven, and the necessary economic effect may also be lacking. Thus, the descriptive fee schedule may not violate the Sherman Act at all.\textsuperscript{106} Assuming that the descriptive fee schedule preserves illegally determined prices,\textsuperscript{107} however, the question must again be faced of whether the ethical or noneconomic advantages of the descriptive fee schedule mandate its preservation.

As long as descriptive fee schedules are widely distributed to the public, the very definite need of prospective clients for information on prices and availability of legal services would be satisfied.\textsuperscript{108} With this information in hand, clients could effectively "shop" for the best price\textsuperscript{109} which would tend to prevent a uniform, rigid price structure. The public availability of information concerning fees would enhance the operation of the competitive market and is therefore desirable.\textsuperscript{110}

\begin{itemize}
\item \textsuperscript{105} See notes 92-96 and accompanying text supra.
\item \textsuperscript{106} See notes 41-54 and accompanying text supra.
\item \textsuperscript{107} Prices which have been set through the influence of price fixing devices such as prescriptive fee schedules may not lawfully be preserved by another device. United States v. Container Corp., 393 U.S. 333 (1969).
\item \textsuperscript{108} The advantages of descriptive fee schedules are set forth in Morgan, supra note 3, at 1406: "Limiting fee reporting to historical data or determining 'proper' fees through a disinterested panel would protect the public as the antitrust laws properly require, and yet would provide the kind of reasonable compromise that the situation demands."
\item \textsuperscript{109} Price shopping is regarded by some as an evil; however, this is true only if price shopping misleads the public in choosing legal services. If price reflects the quality of service offered, then, above a certain minimum level, clients may choose the quality of legal services desired. There is no reason that price shopping itself is inherently evil in the legal setting. See Critical Analysis, supra note 3, at 980.
\item \textsuperscript{110} "If citizens overestimate the cost of legal assistance . . . they might not seek it at all. Accurate information for reasoned decisions is important to them and should not be prohibited unthinking. . . . Presumably some sort of consensus on reasonableness would continue to be useful." Morgan, supra note 3 at 1405.
\end{itemize}
The ethical justifications for a descriptive fee schedule are not overwhelmingly clear, but the primary ethical purpose would appear to be the prevention of discount pricing and overcharging by lawyers. Discount pricing may not be prevented without running afoul of the Sherman Act's ban against price fixing; to the extent that the legal profession makes discount pricing ethically wrong, it is to prevent solicitation and shoddy service, and those ethical rationales can be sustained without resort to indirect methods such as fee schedules.

Overcharging, on the other hand, is a problem which the descriptive fee schedule can solve without unduly disrupting the competitive system of pricing legal services. In the hands of the public, the schedule would be a valuable tool to help clients and courts determine whether a given legal fee is unjustifiably high.

While the ultimate disposition of the descriptive fee schedule is unclear, there is some place in the ethical scheme of the legal profession for such a schedule. Properly drawn so that it does not prevent price competition, the schedule can operate to prevent overcharging of clients, a result beneficial both to the bar and the public. To the extent that inevitable competitive restraints are present, the notion of professional ethics should overcome them.

Lastly, the Rule against solicitation presents a more difficult analytic problem in balancing the economic effect against the need to preserve ethical standards. Unlike the other restraints discussed, both the restraining characteristics and the ethical justifications are serious and pervasive. There are clearly ethical purposes underlying the Rule. Nevertheless, there is a serious

111. United States v. Plymouth Dealers Ass'n of N. Calif., 286 F.2d 128 (9th Cir. 1961).
112. See notes 41-54 and accompanying text supra.
113. It should be noted that descriptive fee schedules are fraught with problems in their structure. A schedule which lists true average fees compiled by an empirical study is safely descriptive, but one which lists an average "range" of fees is clearly capable of being used as a prescriptive fee schedule.
This problem indicates that any descriptive schedule, for maximum public utility and minimum antitrust danger, be solely a list of average fees, and not contain any reference to an average range.
114. See, e.g., In re Freeman's Estate, 40 App. Div. 2d 397, 341 N.Y.S. 2d 511 (1973), aff'd on other grounds, 34 N.Y.2d 1, 311 N.E.2d 480 (1974) (fee schedule which only lists "customary fees" and does not attempt to enforce compliance does not violate New York antitrust statute).
115. The ethical justifications for the Rule have, however, provoked considerable criticism in recent years. See Comment, Controlling Lawyers by Bar Associations and Courts, 5 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 301 (1970); Comment, Advertising, Solicitation and the Duty to Make Legal Counsel Available, 81 YALE L.J. 1181 (1972); Advertising and Solicitation, supra note 65.
economic effect—i.e., interference with the normal flow of information in the marketplace, thereby impairing consumers’ ability to make a rational choice based on price and quality—resulting from the near-total ban on solicitation.\(^\text{116}\)

The primary justifications given for the Rule against solicitation concern the effect solicitation would have upon the public. First, the Rule prevents “stirring up litigation” by insuring that the initial contact is made by the client. Second, by preventing all advertising, deceptive claims of success and other misleading devices are prevented. Third, the professional character of law is maintained by the absence of commercialism in contact with the public.\(^\text{117}\)

The profession’s dislike of “stirring up litigation” probably has its roots in medieval fears that anyone who actually wanted to go to court to settle a dispute was able to insure the desired result.\(^\text{118}\) In more recent years, the fear of stirring up litigation has developed a more sophisticated theoretical basis. The courts exist to provide a peaceful means of settling disputes, and their mere availability to those who actively seek them is sufficient to achieve this result. Thus, stirring up litigation is unnecessary.

This rationale has undergone some erosion in recent years because of the pressure of public interest. In several areas of the law the public policy of the United States is to encourage litigation.\(^\text{119}\) Moreover, the ban on stirring up litigation disadvantages only those who are not fully aware of their legal rights. This problem has prompted the organized bar to allow solicitation by public interest groups who have a claim and need a plaintiff to prosecute it.\(^\text{120}\) While the fear of stirring up litigation still has present application in areas such as “ambulance chasing”,\(^\text{121}\) the

\(^{116}\) See Part II C supra. See also Schuchman, supra note 64, at 267.


\(^{118}\) See Chicago Comment, supra note 117, at 676; Radin, Maintenance by Champerty, 24 CALIF. L. REV. 48 (1935).


\(^{120}\) ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(B).

\(^{121}\) Even those who engage in such plainly unethical activities as ambulance chasing are not always severely punished. See In re Cohn, 10 Ill.2d 186, 139 N.E.2d 301 (1957) (reducing five year suspension from practice to censure).
force of this rationale is certainly weaker than it once was; no longer can it justify an ethical rule which bans all forms of solicitation. It especially fails to support a rule which primarily affects those who are unaware of their legal rights.122

The Rule is also defended on the ground that it prohibits deceptive advertising. It is claimed that unscrupulous lawyers would use hard sell methods to attract clients, make extravagant claims, and guarantee results; in short, that “this means of publicity, if permitted, will be abused.”123 However, those making this argument assume that the only way to prevent these abuses is to prevent solicitation altogether. In fact, it certainly seems possible to control deceptive advertising without proscribing all solicitation. A rule against deceptive advertising only should be considered as a workable substitute. While there may be some difficulty in deciding whether advertising is deceptive in an individual case, the question of whether certain conduct is solicitation is similarly difficult.124 It is submitted that there is no ethical need to “throw the baby out with the bath water” in this manner.

Supporters of the Rule additionally argue that the legal profession is not a business, but an arm of justice, and should not permit the solicitation of clients because it would give the impression that the practice of law is just like any other business.125 This is essentially self-delusion. The practice of law is entered into by almost all lawyers as a means of livelihood, just like any other business. While there may be a desire on the part of attorneys to maintain a certain level of dignity in dealing with the public, other businesses have similar desires. To the extent that gaudy

122. See notes 67-68 and accompanying text supra.
124. See, e.g., In re Connelly, 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963), holding that an article in Life mentioning a law firm by name and describing its activities was unethical advertising. The court distinguished between publicity which is “‘the normal by-product of able and effective service,’” and “‘augment[ing] by artificial stimulus the publicity normally resulting from what he does, seeing to it that his successes are broadcast and magnified. While in hypothetical cases it may often seem difficult to draw the line between what is right and what is not, actually, a lawyer soundly brought up in the law, who wholeheartedly accepts his professional status, will rarely have any difficulty in realizing the difference. . . .’ (Drinker, Legal Ethics [(1960) at 218-19]) . . . .”

In the last analysis, the present Rule against solicitation relies on “professional good faith and good taste.” Id. A narrower rule against deceptive, misleading or professionally demeaning advertising would similarly rely on integrity, and be not appreciably more difficult of administration.
125. See Chicago Comment, supra note 117, at 676.
advertising or hard sell techniques demean the legal profession in the eyes of the public, the ethical structure has a stake in preventing it, but no further. To the contrary, limited solicitation may well provide for better communication between the bar and the public, to the benefit of everyone.\textsuperscript{126}

The Rule against solicitation in its present form is a pervasive provision which severely restricts most forms of communication from lawyers to potential clients. As such, it is too broad to be justified by the present ethical structure of the profession, and should not be held exempt from the application of the Sherman Act.

In conclusion, the doctrine of "professional immunity" has a place in antitrust law to the extent that uniquely professional considerations conflict with Sherman Act principles. Under a test balancing these considerations, however, exacting scrutiny should be given to the restrictive devices to make sure they are the least restrictive method of achieving the ethical result desired. To hold that every device that is a part of an overall scheme of ethics escapes further Sherman Act scrutiny does not strike a proper balance. This was a basic error in the \textit{Goldfarb} decision.\textsuperscript{127}

\textbf{B. The State Action Exemption}

Sherman Act policy indicates that in addition to the professional immunity doctrine, there may be a second basis on which

\begin{footnotesize}
\textsuperscript{126} To the extent that lawyers have special duties "to make legal counsel available," ABA \textit{Code}, Canon 2, solicitation of some sort is required. For example, the ABA \textit{Code} lists eight factors which are desirable in calculating a fee:

\begin{enumerate}
  \item The time and labor required.
  \item The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
  \item The fee customarily charged in the locality.
  \item The amount involved and the results obtained.
  \item The time limitations imposed by the client.
  \item The nature and length of the professional relationship with the client.
  \item The experience, reputation, and ability of the lawyer or lawyers performing the services.
  \item Whether the fee is fixed or contingent.
\end{enumerate}

ABA \textit{Code}, DR 2-106(B). Most of the factors are designed to impress upon the lawyer that setting a fee is a personal matter. Typically, however, these factors are considered in any important business transaction. In short, the fee is subject to negotiation between attorney and client. The lack of any pre-contract contact places the client at a disadvantage in this negotiation. Limited solicitation would even matters and allow for true individual fee setting between attorney and client.

\textsuperscript{127} \textit{Goldfarb}, 497 F.2d at 13-15. The court recognized the need to strike a balance "between the necessities of professional regulation and the dictates of the antitrust laws." \textit{Id.} at 15. However, instead of analyzing the conflicting principles, the court accepted the Fairfax County Bar Association's assertion that its minimum fee schedule "has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the 'learned profession' exemption." \textit{Id.}
\end{footnotesize}
a total immunity for the ethical structure of the legal profession could rest, the state action exemption. This doctrine reasons that when a program or pattern of conduct is carried out under the authority or supervision of the state, it should be considered official state action and exempt from the application of the Sherman Act.

The leading case articulating the state action exemption is *Parker v. Brown.*128 In *Parker*, a challenge was raised against the California Agricultural Prorate Act129 which authorized programs for setting prices and marketing agricultural commodities. The avowed purposes of the Act were to conserve agricultural resources and to prevent excessive competition among farmers, thus stabilizing farm prices.130

The Supreme Court assumed that the program would be illegal if undertaken by private individuals, but then held that the Sherman Act was not applicable to states. The Sherman Act "makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."131 Absent an expression of intent to have the Act apply to states, the Court would not read it into the Act because "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."132 Thus, the *Parker* doctrine means, in effect, that any program found to be "state action" cannot successfully be challenged as violative of the Sherman Act.

*Parker* noted that states cannot exempt purely private conduct either by authorizing violations of the Sherman Act or by declaring such conduct to be lawful.133 However, the Court indicated that actions by private individuals or groups might be within the exemption if the primary impetus for their action comes from the state. In *Parker*, for example, although individual farmers initiated the prorate programs and participated in them,

130. There was an elaborate procedure for establishing a "prorate program" regulating the marketing of an agricultural product. First, ten growers of the crop requested that a program be instituted. Then, a program committee was established. Its recommendation in favor of each program was passed on by the state agricultural prorate commission and then had to be approved by 65% of the affected area's growers, who owned at least 51% of the land planted in that crop. After the program went into effect, unauthorized sales of the regulated commodity were criminally punished. Act of June 5, 1933, ch. 754, [1933] Calif. Acts 1969, 1971; 317 U.S. at 346.
131. 317 U.S. at 351.
132. Id. at 352.
the state controlled the administration of the programs, set criminal penalties for their violation, and protected against private gain from the program.\textsuperscript{134}

The state action doctrine distinguishes between protected action under the authority of the state and unprotected individual conduct.\textsuperscript{135} This distinction turns on the degree of state supervision over the individual activity. The cases cited by the district and circuit courts in \textit{Goldfarb} are instructive in analyzing the type of supervision necessary to invoke the state action doctrine.

In \textit{Allstate Insurance Co. v. Lanier},\textsuperscript{136} cited by the district court, a state statute which restricted competition in the setting of automobile insurance rates was upheld by the Fourth Circuit Court of Appeals. The North Carolina legislature had created a rating bureau, composed of all the writers of automobile insurance in the state,\textsuperscript{137} and the Commissioner of Insurance of North Carolina, who was the \textit{ex officio} chairman.\textsuperscript{138} The rating bureau was to determine premium rates for all automobile insurers in the state. The rates determined were not to become effective unless "approved by the Commissioner of Insurance and not subsequently disapproved."\textsuperscript{139} Under no circumstances were rates below those approved to be charged.\textsuperscript{140}

In \textit{Allstate}, five insurers sought a declaratory judgment that the rate-fixing scheme was contrary to the Sherman Act and therefore void. In upholding the scheme, the Fourth Circuit noted that rate setting involved a "governmental function",\textsuperscript{141} and specifically held that the rating bureau "was operated under the active supervision of the State. . . ."\textsuperscript{142} Thus it was clear that the \textit{Parker} exemption was controlling, despite the participation of private parties in the state scheme.\textsuperscript{143}

\textsuperscript{134} 317 U.S. at 352. See note 130 supra.

\textsuperscript{135} The state action doctrine presents an interesting anomaly with regard to the Supremacy Clause of U.S. \textit{Const.}, art. VI. The Sherman Act does not reach the actions of a state, but it does reach private conduct; however, private conduct under active state supervision is exempt where, if done voluntarily by private parties, it would not be. The active intervention by the state therefore serves to supplant the Sherman Act by "reverse Supremacy". State authorization (as opposed to supervision) of private activity does not exempt private conduct, and the Supremacy Clause operates in that case to supplant the state authorization. \textit{See generally} Comment, \textit{Antitrust Immunity: State Action Protection under Parker v. Brown}, Comment, 7 U.S.F. L. Rev. 453 (1973).

\textsuperscript{136} 361 F.2d 870 (4th Cir.), cert. denied, 385 U.S. 330 (1966).


\textsuperscript{141} 361 F.2d at 872 n.2.

\textsuperscript{142} \textit{Id.} at 872.

\textsuperscript{143} \textit{Allstate} was decided both on the basis of the \textit{Parker} exemption and the
The lack of active supervision was illustrated in *Asheville Tobacco Board of Trade, Inc. v. FTC*, where the regulation of a private group of warehousemen was successfully challenged under section 5 of the Federal Trade Commission Act. The Tobacco Board was composed of representatives of each of the warehouses which were engaged in the sale of tobacco in Asheville, and was authorized by statute to "make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction. . . ." One of the rules promulgated by the Tobacco Board allocated selling times among the various warehouses, and resulted in new entrants being unable to get as much selling time as their established counterparts. One of the new entrants filed a complaint with the FTC charging that the regulation on selling times was an unfair method of competition in violation of the Federal Trade Commission Act. The Tobacco Board appealed the FTC's finding of a violation, arguing *inter alia* that the Board was an "administrative agency of the State" and therefore not subject to the antitrust laws.

The Court of Appeals for the Fourth Circuit held that the state action defense was not available to the Tobacco Board because the promulgation of the regulations was not "adequately

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McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq. (1970), a statutory exemption from federal antitrust law applicable only to the business of insurance. The court did not use any different test in resolving both arguments in favor of non-liability under the Sherman Act.

The McCarran-Ferguson Act provides for state regulation of insurance as well as the antitrust exemption:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U.S.C. § 1012 (1970) (emphasis added).


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144. 263 F.2d 502 (4th Cir. 1959).
147. 263 F.2d at 508.
supervised by state officials"), in that the relevant state statute only authorized the creation of the Tobacco Board and did not supervise its activities in any way. While the court recognized that the state could regulate an industry by controlling it, and "may even permit persons subject to such control to participate in the regulation," private participation must be "adequately supervised by independent state officials" in order for the state action exemption to apply.

From *Asheville Tobacco Board* it is clear that statutory authorization for a private group to make regulations is insufficient to confer immunity from the antitrust laws under the *Parker* doctrine. However, *Washington Gas Light Co. v. Virginia Electric and Power Co.* (Vepco), demonstrates that a private corporation (not a state agency) can fit within the exemption. In Vepco, an electric utility instituted a plan which effectively resulted in free electrical hook-ups for new all-electric homes, resulting in damage to the Gas Light Company, a competing utility.

Vepco was subject to the regulation of the Virginia State Corporation Commission (SCC), which was required by statute to investigate "promotional allowances and practices of public utilities and . . . take such action as such investigation may indicate to be in the public interest." The SCC was also empowered to review and alter the rate schedules submitted to it by the utilities, which were required to file the schedules with the agency. On these facts, the court held that the SCC qualified under *Parker* as a state agency.

The court then determined that the SCC regulated Vepco sufficiently to bring the utility within the *Parker* doctrine. Although the SCC neither made an investigation nor expressly approved the rates at issue in the case, the court held that affirmative pronouncements were not necessary, "unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval." That the latter inference was correct in this case was clear to the court because the SCC had the authority to stop Vepco's rates from becoming effective and, at a later date, ac-

148. *Id.*
149. *Id.*
150. 438 F.2d 248 (4th Cir. 1971).
153. 438 F.2d at 251.
154. *Id.* at 252.
tually did so. Since Vepco's promotional rates were given tacit approval by the SCC, the Parker doctrine prevented liability under the antitrust laws.

It appears that some evidence of actual and active consideration of private activities by a state agency is necessary for the Parker exemption. The challenged restraint must be considered and approved by the state, expressly or impliedly, because the state cannot authorize private persons to violate the antitrust laws.

Goldfarb explored the application of these principles to the legal profession. The defendant Virginia State Bar was established pursuant to statute and court rules of the Virginia Su-

155. Id.

156. The court noted that the statutes governing the SCC provided a procedure for complaints by citizens against proposed rates. See Va. Code Ann. § 56-238 (1969). With this state-created avenue for challenging the rates, the court held that the plaintiff should have gone in the first instance to the SCC: "The antitrust laws are a poor substitute, we think, for plaintiff's failure to promptly protest to the SCC and to seek the administrative remedy ultimately shown to have been available and effective." Id. at 252. See also Norman's on the Waterfront v. Wheatley, 444 F.2d 1011 (3d Cir. 1971); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971).

157. Other theories on the rationale behind the Parker exemption have been advanced by the court and commentators besides the "active supervision and approval" test. The Ninth Circuit apparently is moving toward a very strict test under which even action specifically approved by a state agency may be challenged under the Sherman Act. See United States v. Pacific Southwest Airlines, 358 F. Supp. 1224 (C.D. Calif. 1973) (merger approved by state agency pursuant to statute requiring such approval still subject to antitrust attack); International Tel. & Tel. v. General Tel. & Elec., 351 F. Supp. 1153, 1203 n.129 (D. Hawaii 1972) (criticizing Vepco as "an unwarranted hyperextension of Parker").


158. The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association
preme Court, while the Fairfax County Bar Association was a private group of attorneys not created by any instrumentality of the state, but affiliated with the Virginia State Bar.

The district court and Fourth Circuit both held that the Virginia State Bar was sufficiently regulated by the state to come within the *Parker* exemption, but that the Fairfax County Bar Association did not. The result reached as to the Fairfax County Bar Association seems sound. The prior cases indicate unequivocally that some meaningful state supervision of an activity is required under *Parker*. This was totally lacking in the case of the Fairfax County Bar, which was free to publish its minimum fee schedule without prior approval from the State Bar or the Virginia Supreme Court. The fact that the members of the Fairfax County Bar Association were all members of the Virginia State Bar and, as such, were regulated by the Supreme Court of Virginia did not alter this conclusion.

The Virginia State Bar was placed within the exemption by both courts, because the mechanism for disciplining violations of fee schedules was created within the scope of the statutory authority of the State of Virginia. The Court of Appeals for the

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160. 355 F. Supp. at 496; 497 F.2d at 12.

161. The district court noted that the Virginia State Bar had an exceedingly "minor role" in the setting of minimum fees, since the ethical opinions written by it were never used to discipline any Virginia lawyer for violating a minimum fee schedule. It was thus clear to the court that, in publishing opinions, the State Bar was within its statutory and rule-created authority. 355 F. Supp. at 495-96. See notes 158-59 *supra*. The court limited this holding somewhat by suggesting that, if the State Bar itself should adopt a minimum fee schedule, it would be outside its authority and thus subject to the Sherman Act. 355 F. Supp. at 496 n.4.

On appeal, the fourth circuit held that the full range of ethical activities, including the promulgation of fee schedules if desired, was within the authority of the State Bar. 497 F.2d at 11. In doing so, the court relied on a stipulation to that effect which was not accepted by the trial court, because it was a question of law. 355 F. Supp. at 492 n.2. *See* 497 F.2d at 20-21 (Craven, J., concurring and dissenting).

*Cf.* United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974), where the Oregon State Bar, another integrated bar established by statute, was denied *Parker* immunity. The court, in disapproving the reasoning in *Goldfarb*, noted that the stipulation concerning statutory authority did not exist in the Oregon case. In addition, the court adopted a stricter *Parker* test which denied *Parker* immunity because "the fee schedules published and distributed by [the Oregon State Bar] were neither debated in public hearings nor approved by a disinterested state commission. In short, there is not the substantial state direction and involvement required to meet the legislative mandate requirements and to elevate these Oregon State Bar activities to the plateau of 'state action' immunity." *Id.* at 511.
Fourth Circuit first held that the State Bar could not claim *Parker* immunity on the grounds that it was a state agency, because it is composed solely of those who are regulated, i.e., the lawyers of Virginia.\(^{162}\) The remaining issue was whether the State Bar was “adequately supervised by independent State officials”, i.e., the Supreme Court of Virginia, and thus could claim that its activities were exempt from the Sherman Act.\(^{163}\) In holding that such supervision existed, the court noted that, although the opinions on ethics and the fee schedule reports were not expressly approved by the Virginia court, silence should not be construed as “failure to adequately supervise”, following the *Vepco* case: “The Virginia Court has the authority to regulate and supervise the State Bar; we will not infer abandonment of that authority because of claimed inactivity.”\(^{164}\)

It seems clear that a prescriptive fee schedule adopted by the Virginia State Bar itself would pass the *Parker* test as framed by the Fourth Circuit, as its adoption by the State Bar would stand on the same legal footing as the ethical opinions which it published.\(^{165}\) But either result rests on dubious policy. While the ABA Code of Professional Responsibility was explicitly adopted

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162. 497 F.2d at 11 n.31.
163. Id. at 11.
164. Id.
165. Under Virginia law, the State Supreme Court has the authority to “prescribe, adopt, promulgate and amend rules and regulations:


   In addition, the Supreme Court of Virginia has, pursuant to statutory authority, established the Virginia State Bar and empowered it to write the opinions which tied in undercutting local minimum fee schedules with ethics. See Va. Code Ann. § 54-49 (1974 Repl. Vol.).

   The fourth circuit held in *Goldfarb* that the opinions written by the Virginia State Bar were a part of the general ethical scheme of regulation in the state. Further, the court found specific authority in DR 2-106 for the promulgation of a minimum fee schedule. That DR generally concerns excessive fees, but indicates eight factors for determining a reasonable fee, one of which is “the fee customarily charged in the locality for similar legal services.” DR 2-106(B)(3). This language was held to encompass the publication of fee schedules as a means of determining reasonable fees. 497 F.2d at 10 n.30.

   In *United States v. Oregon State Bar*, in which the state bar had actually published a minimum fee schedule, the identical language in the Oregon Code of Professional Responsibility was rejected as authority for the schedule’s promulgation. The Oregon Code of Professional Responsibility was adopted pursuant to statutory authority similar to Virginia’s, by the Oregon Supreme Court. The district court held, however, that the prohibition on “clearly excessive” fees in DR 2-106 could not be interpreted as authority to set a floor under legal fees through the use of a minimum fee schedule. 385 F. Supp. at 511-12.
by the Supreme Court of Virginia, the opinions concerning enforcement of local minimum fee schedules were not. The implied-approval-by-silence rationale should not apply here because there is no specialized administrative or judicial scheme to support the inference of the supreme court's consideration and approval of actions by the State Bar. Moreover, there is no express method for an aggrieved party to complain to the state supreme court; such a procedure in *Vepco* supported the inference that the regulatory agency was awaiting a complaint before acting. In the case of ethical opinions, it is much more realistic to infer that the state supreme court had never made a determination. The Fourth Circuit's reliance on the "implied approval" rationale of *Vepco* therefore seems misplaced, and express approval by the state supreme court of the activities of the Virginia State Bar should have been required. Absent the implied-approval-by-silence rationale, the opinions on ethics which supplied the formal sanctions for violating the locally adopted fee schedules were neither compelled by the state nor subject to active state supervision. A genuinely independent guardian of the public interest was thus not present, and the *Parker* exemption should have been denied.

The various activities undertaken by bar associations should be tested under this principle to determine whether their method of adoption can legitimately clothe them with *Parker* immunity. Of the restraints examined in this comment, the only one which clearly falls within the exemption under this test is the Rule against solicitation contained in the ABA Code of Professional Responsibility. The adoption of the ABA Code as a rule of court by the highest court of a state certainly amounts to the "active

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166. An argument which has sometimes been made in favor of applying the *Parker* doctrine draws an analogy with the administrative law notion of primary jurisdiction. The argument suggests that a federal court should defer to the state bar association or the state supreme court for analysis of an ethical device with antitrust implications. *See Wisconsin Fee Schedule, supra* note 3, at 1250-51. In the federal government, the doctrine has been used extensively to allow administrative agencies to decide an antitrust case before a federal district court. *See JAFFE AND NATHANSON, ADMINISTRATIVE LAW* 669-72 (1968).

In Communication Brokers v. Chesapeake & Pot. Tel. Co., 370 F. Supp. 967 (W.D. Va. 1974), it was held that the analogy was apt, and that the plaintiff would have to complain to the Virginia SCC before bringing its antitrust claim in federal court. The import of this decision seems to be that a plaintiff must attempt to resolve his case on state law grounds before bringing a federal suit under the Sherman Act. Certainly this reasoning can have no application in the case of the legal profession, where no formalized scheme exists for testing the legality under state law of the ethical restraints imposed by the bar. *Cf. Business Aides, Inc. v. Chesapeake & Pot. Tel. Co.*, 480 F.2d 754 (4th Cir. 1973).
supervision" by independent state officials required by the Parker rationale.167

The profession could conceivably preserve fee schedules, including the prescriptive variety, by similarly submitting them to the highest court of each state for approval, but this would subject the profession to active regulation by the state. This approach is undesirable for several reasons; the public will see the state judiciary approving of a device which will have the effect of increasing the income of lawyers, and will surmise, rightly or wrongly, that an alliance has been forged for such a purpose. Moreover, a trend toward active supervision of fees can only lead to active supervision over services themselves. The potential danger is that active regulation by the state will erode the attitude of independent responsibility on the part of individual attorneys. While it is perhaps desirable to insure that a lawyer consider the proper factors in setting a fee, the application of these factors to a particular case should not be governed by a prescriptive schedule of fees which lessens the individual responsibility of the lawyer.

IV. CONCLUSION

It is apparent that serious conflicts exist between the public interest in competition in the delivery of legal services and the restraints present in the ethical structure of the profession. Any argument by the organized bar for total immunity from the antitrust laws is essentially one for not permitting any public resolution of these conflicts. This position is untenable.

In the area of professional ethics, some conflicts will likely be resolved in favor of ethical rules and against the policy of free competition underlying the Sherman Act. The "partial" immunity from the Sherman Act strikes the proper balance, requiring ethical justification for each rule challenged on antitrust grounds. Special consideration for the necessity of some ethical rules should be given, because professional ethics too are part of the public interest. "Partial" immunity makes this comparison and weighs ethical behavior against the need for greater competition in the profession.

The public interest also is served by the state action exemption, which allows states freedom of action to pursue their own policies as long as the resultant economic effects are actively

167. Judicial action should have the same weight as legislative action under the Parker doctrine. Both are embodiments of the power of the state. 355 F. Supp at 495. See also New Mexico v. American Petrofina, 501 F.2d 363 (9th Cir. 1974) (semble).
controlled by the state. Thus, the organized bar can probably choose those restraints which are considered necessary to the ethical structure of the profession and immunize them from antitrust attack by obtaining the approval of independent state officials. The profession itself must either remain subject to the Sherman Act or become subject to active state regulation. There is no middle ground. As long as the profession is unwilling to become more formally regulated from without, the Sherman Act should remain a powerful weapon to protect the public interest in competition within the legal profession.