Court of Appeals of New York.
In re ESTATE of Julius FREEMAN, Deceased.
In the Matter of the Accounting of LINCOLN ROCHESTER TRUST COMPANY, as Executor of Julius Freeman, Deceased, Respondent,
v.
James A. FREEMAN, Appellant.FN*

FN* State Report Title: Matter of Freeman

March 27, 1974.

The Monroe County Surrogate's Court, Michael L. Rogers, S., fixed the amount for legal services and costs in proceeding to settle an executor's account. The Supreme Court, Appellate Division, 40 A.D.2d 397, 341 N.Y.S.2d 511, affirmed and objectant appealed. The Court of Appeals, Breitel, C.J., held that the law is a profession and not a business and therefore bar association minimum fee schedule does not come within Donnelly Act's prohibition of business arrangements restraining competition; that Surrogate's consideration of minimum fee schedule in fixing fee did not render determination improper where Surrogate made an independent determination of reasonableness of the fee allowed.

Affirmed.

Wachtler, J., filed a concurring opinion.

West Headnotes

[1] Antitrust and Trade Regulation 29T 575

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(E) Particular Industries or Businesses
29Tk575 k. In General. Most Cited Cases
(Formerly 265k12(17))

Donnelly Act's prohibition of agreement whereby competition in furnishing any “service” is or may be restrained applies to anticompetitive practices of service industries and does not apply to lawyers who provide legal services. General Business Law § 340.

[2] Antitrust and Trade Regulation 29T 575

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(E) Particular Industries or Businesses
29Tk575 k. In General. Most Cited Cases
(Formerly 265k12(17))

The practice of law is a profession and is not included within the terms “business or trade” as used in Donnelly Act's prohibition of agreements whereby competition in conduct of business, trade or commerce may be restrained. General Business Law § 340.

[3] Executors and Administrators 162 216(2)

162 Executors and Administrators
162VI Claims Against Estate
162VI(A) Liabilities of Estate
162k216 Services Rendered to Estate
162k216(2) k. Services of Attorneys. Most Cited Cases

Surrogate's consideration of bar association minimum fee schedule in fixing amount for legal services and costs in proceeding to settle an executor's account was not improper in view of surrogate's exercise of independent judgment. General Business Law § 340; Judiciary Law §§ 90, subd. 2, 480–487; Code of Professional Responsibility, Canon 2 (EC 2–18), Judiciary Law Appendix; Canons of Professional Ethics, Canon 12, Judiciary Law Appendix.

[4] Attorney and Client 45 140

45 Attorney and Client
45IV Compensation
45k139 Value of Services
45k140 k. In General. Most Cited Cases

Bar association minimum fee schedule may be used to determine the customary fee in the community, but only if it reflects an existing practice and not if its purpose or effect may be to impose minimum fees.

[5] Executors and Administrators 162 510(12)

162 Executors and Administrators
162XI Accounting and Settlement
162XI(E) Stating, Settling, Opening, and Review
162k510 Review
162k510(12) k. Proceedings and Determination in Appellate Court. Most Cited Cases

In absence of extrinsic evidence that bar association minimum fee schedule considered by surrogate in fixing fee for legal services and costs in proceeding to settle an executor's account in fact worked as a “price-control” device or was so intended, Court of Appeals could not overturn surrogate's findings and determination that the fees allowed were reasonable.

[6] Attorney and Client 45 32(7)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(7) k. Miscellaneous Particular Acts or Omissions. Most Cited Cases
(Formerly 45k32)

Unprofessional practices in use of minimum fee schedules would be cognizable in judicial supervision over the practice of law. N.Y. Ct. Rules, §§ 603.4, 691.4; Judiciary Law § 475.

***2 ***337 **481** Sanford Robert Shapiro and Warren B. Rosenbaum, Rochester, for appellant.

***3** Luther Ira Webster, Rochester, for respondent.

Michael J. Beyma, Elliott Horton and Alan Illig, Rochester, for Monroe County Bar Association, amicus curiae.

***5** BREITEL, Chief Judge.

Appellant objectant, in a proceeding to settle an executor's account, contests the amount of attorney's fees awarded for services rendered to the estate. Objectant, the son of decedent and sole beneficiary or his father's estate, appeals from an Appellate****482** Division order affirming the award, contending that the Surrogate was improperly influenced by the then existing Monroe County Bar Association minimum fee schedule. It is argued forcefully that, although the estate was considerable in value, there were no unusual difficulties and the large fee allowed was therefore unduly influenced by the schedule allowing a percentage based on the gross estate. It is urged, in particular, that the fee schedule effectively fixed the fee level for legal services in Monroe County and thus violated the State's antitrust law (Donnelly Act, General Business Law, s 340).

The order should be affirmed. Although the Surrogate considered the minimum fee schedule, he made a sufficiently independent determination of the reasonableness of the fee allowed ***6** and, in doing so, *****338** was entitled to consider custom and practice in the community. Moreover, the law is a profession and not a business and therefore not subject to the Donnelly Act which prohibits business arrangements restraining competition. Whether all Bar Association minimum fee schedules are, however, unprofessional, it is not necessary to decide in this case or at this time; but they may violate professional standards if their purpose or effect would be to control the fee level for professional services, or would have the purpose or effect of preventing ‘fee competition’ in the rendering of legal services.

The gross estate aggregated some $329,000. Objectant was the sole beneficiary and eventually would receive the entire net estate. The fee allowed to the attorney for the estate was $13,250, which equalled almost precisely the amount that the then

minimum fee schedule established by the Monroe County Bar Association would have required or 'suggested' in decedents' estates. There is no contention by respondent attorney or the Amicus curiae Bar Association that the handling of the estate involved any but routine practice in a decedent's estate.

The pertinent provisions of the State's antitrust statute trace their origin to 1897 and 1933 (L.1897, ch. 383; L.1933, ch. 804, s 1; see, generally, New York State Bar Association Antitrust Section, Report of Special Committee to Study the New York Antitrust Laws, pp. 10a—20a (1957); Maroney, Antitrust in the Empire State: Regulation of Restrictive Business Practices in New York State, 19 Syracuse L.Rev. 819 (1968)). Presently, section 340 of the General Business Law declares void and illegal against public policy '(e)very contract, agreement, arrangement or combination whereby * * * (c)ompetion 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'.

[1] Objectant contends that, since the statute expressly includes the furnishing of service, lawyers who provide legal services are covered by the statute. The statutory reference to service was added in 1933, shortly after the decision in New York Clothing Mfrs.' Exch. v. Textile Finishers Assn. (238 app.div. 444, 265 N.Y.S. 105). it was there held that a price-fixing agreement among members of defendant association was not violative of ***7** section 340 because the statute, as then written, did not apply to services.

Although there was no cause and effect relationship between the decision and the legislation, the addition of the term 'service' was designed to prohibit anticompetitive practices of service industries. According to its draftsman, then Attorney-General Bennett, the 1933 amendment extended 'the protection of the law to all those businesses *****339** which sell, not a specific product or commodity, but a service such as laundering, dry cleaning, shoe repairing and numerous others' (Bennett, The Recent Amendments to the Donnelly Act, 5 N.Y. State Bar Assoc. Bulletin 384, 389 (1933)). The view expressed by the then Attorney-General indicates that the use of the word 'service' was confined to a commercial****483** or business setting. The term was therefore used with a limited purpose, and therefore limited sense. Hence, whether arrangements in the legal profession, which concededly involves services, violate the antitrust law does not turn on the word 'service'.

On this analysis, the issue, as it would be under Federal antitrust law, is whether the legal profession is a business or trade as that term is used in section 340 (see United States v. Real Estate Bds., 339 U.S. 485, 489, 491—492, 70 S.Ct. 711, 94 L.Ed. 1007 (1950)). Whatever the authority of Goldfarb v. Virginia State Bar (E.D.Va., 355 F.Supp. 491),[FN1] where the court held that minimum fee schedules violated the Sherman Act, the question now presented deals solely with the relationship of the State antitrust law to the statutory scheme for regulating the practice of law.

FN1 Revd. 497 F.2d 1 (Ct. of Appeals, 4th Cir.)

A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation. These qualities distinguish professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions,***8** whether civil or criminal. (See Pound, The Lawyer from Antiquity to Modern Times, pp. 4—10.) Interwoven with professional

standards, of course, is pursuit of the ideal and that the profession not be debased by lesser commercial standards (see Drinker, Legal Ethics, pp. 210—273). Departures from the ideal, few or many, should rarely, if ever, justify a lowering of the standards (cf. Ryan, Address to the Graduating Law Students of the University of Wisconsin, 1873, 19 Notre Dame Lawyer 117 135—140 (1943)).

Given this character of any profession, and certainly as that character is applied to the legal profession, professional associations justify their existence to the extent that they further the standards and the ideal (see, e.g., Botein, Six Decades of Achievement, 25 N.Y. County Lawyers' Assn. Bar Bulletin, p. 205 (1968); see, also, Pound, op. cit., Supra, pp. 10—20).

*****340** Bar Associations have, of course, been pre-eminent in pursuit of the professional ideal. As a consequence, they have been used under legislation and by the courts in the control of conduct in the profession (see, e.g., Matter of Bar Assn. of City of N.Y., 222 App.Div. 580, 227 N.Y.S. 1). Their role in the promulgation and interpretation of canons of ethics and in professional disciplinary machinery has been quite extensive (see, e.g., Association of the Bar of the City of New York and New York County Lawyers' Assn., Opinions of Committees on Professional Ethics (1956); 22 NYCRR 603.12, 691.12, 800.28, 1022.9).

Another index of professionalism in the Bar, especially in modern times, is that the organized Bar both sponsors and fosters research, programs and proposals unrelated to the development of individual skills. Instead these activities are designed to extend the capacity of the Bar to serve the public; even beyond the likelihood of financial reward for such service (see, e.g., Association of the Bar of the City of New York, Mental Illness, Due Process and the Criminal Defendant (1968)).

[2] The history and purpose of the legal profession and the professional associations supports the view that the profession is not included within the terms 'business or trade' as used in section 340 of the General Business Law. The several provisions in the Judiciary Law regulating the conduct of members of the Bar suggest particularly close restrictions on the ***9** profession****484** (see, e.g., Judiciary Law, ss 480—487). Before that, by ancient tradition, rules of conduct were established for the profession (see, e.g., VI Holdsworth, History of English Law 433 (1924)). Today, specific statutes provide for broad judicial power and control over the profession (Judiciary Law, s 90, subd. 2; see Gair v. Peck, 6 N.Y.2d 97, 111, 188 N.Y.S.2d 491, 501, 160 N.E.2d 43, 51, app. dsmd. and cert. Den., 361 U.S. 734, 80 S.Ct. 401, 4 L.Ed.2d 380; People ex rel. Karlin v. Culkin, 248 N.Y. 465, 469, 471—472, 162 N.E. 487, 489—490).

Even a superficial examination of the regulatory system applicable to the Bar suggests that if the Legislature had intended to reach alleged economic restraints, like fee schedules, it would have done so either by specific statute, or by court rules and controls within the existing scheme for judicial oversight of the Bar. Judicial regulation would, as with contingent fees and the like, be much more expeditious, effective, and direct than the comparatively clumsy device of antitrust law enforcement.

Consequently, it is concluded that neither by virtue of the statutory language, the legislative history, or intent of the Legislature does the Donnelly Act apply to the legal profession.

*****341** It would be injudicious, however, to pass over the issues raised by the parties without considering whether standards of professional conduct, apart from antitrust law, were involved.

[3] Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the custom-

ary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved (see Matter of Potts, 213 App.Div. 59, 62, 209 N.Y.S. 655, 658, affd. 241 N.Y. 593, 150 N.E. 568; Code of Professional Responsibility EC 2—18, Judiciary Law Appendix; Canons of Professional Ethics, Canon 12, Judiciary Law Appendix; Ann., Attorney Compensation—Amount, 56 A.L.R.2d 13, 20—50; see, also, H. Cohen, History of the English Bar and Attornatus to 1450, p. 279 (1929)). Significant in the inclusion is the factor of the amount involved. It is in the light of these principles plus the exercise of an independent judgment by the Surrogate, an exercise of discretion affirmed by the Appellate Division, that an affirmance is indicated. It cannot***10** be said, as a matter of law, therefore, that the fee schedule violated professional standards or was improperly used by those vested with discretion.

[4][5] Although it is true that the Surrogate in fixing the fee in this case considered the Bar Association minimum fee schedule, that alone would not render his determination improper, even if it were improper for a court in fixing a reasonable fee to rely exclusively on an association fee schedule (see Matter of Levy, 19 A.D.2d 413, 416, 244 N.Y.S.2d 22; Matter of Snell, 17 A.D.2d 490, 494, 235 N.Y.S.2d 855; see, also, Matter of McCullough, 14 Misc.2d 769, 771, 185 N.Y.S.2d 993, 995, affd. 10 A.D.2d 634, 197 N.Y.S.2d 440, affd. 9 N.Y.2d 993, 218 N.Y.S.2d 66, 176 N.E.2d 515). The schedule may be used to determine the customary fee in the community, but only if it reflects an existing practice and not if its purpose or effect may be to impose minimum fees. The Surrogate indicated that he had made an independent determination, and the Appellate Division affirmed. This court then has findings before it, which it is powerless to overturn on this record, that the Surrogate made an independent determination and that the fees allowed were reasonable (Matter of Noll, 273 N.Y. 219, 225—226, 7 N.E.2d 108, 110). In the absence****485** of extrinsic evidence that the fee schedule in fact worked as a 'price-control' device or was so intended, this court may not, as it would with an issue of law, *****342** overturn the findings of fact or the conclusion to which they lead (see Cohen and Karger, Powers of the New York Court of Appeals, 590).

It should be observed that the present treatment of minimum fee schedules is against a backdrop in which the fees are fixed not by lawyer and client but by the court. When there is direct control by the court, so long as it reaches an independent determination of what is reasonable, questions as to professional propriety, as discussed later, in setting the fees are absent. The situation would undoubtedly be different where the fee schedules relate to fees fixed by agreement between lawyer and client. In such instances, although there is residual control by the courts over excessive fees, that residual control may be too feeble in preventing fee schedules from having a great effect on the fees charged and which under traditional rules courts would not overturn (see 3 N.Y.Jur., Attorney and Client, ss 92—98).

In this context it is useful to compare direct court control over fees in tort cases involving infant plaintiffs, court control in the First and Second Departments over maximum fees ***11** in personal injury cases generally (see 22 NYCRR 603.4, 691.4), setting of fees in lawyers' clients cases under section 475 of the Judiciary Law, counsel fees in stockholders' derivative actions and class actions, and other examples which might come to mind. All of these would seem to be situations in which the direct control of fees by the court preclude issues of professional impropriety so long as the court exercises independent judgment and uses fee schedules in the guarded way mentioned earlier.

Were evidence present, or if it appeared unequivocally from the schedule itself, that a price-fixing arrangement were involved, there would undoubtedly be a serious issue whether unprofessional practices were present. This would be so because concerted conduct to produce as a primary purpose a certain minimum financial reward would be unprofessional and because the minimums would not

necessarily be keyed to what the courts or the profession should regard as reasonable (compare Arnould & Corley, Fee Schedules Should be Abolished, 57 A.B.A.J. 655 (1971) with Miller & Weil, Let's Improve, Not Kill Fee Schedules, 58 A.B.A.J. 31 (1972)). It is notable that earlier Monroe County Bar Association schedules, since abolished,[FN2] had language that strained the limits of mere suggestion. But whatever the language, if it were only a disguise for a coercive purpose, the same serious issue would be raised.

> FN2 In response to an inquiry by the Antitrust Division of the United States Department of Justice, the Monroe County Bar Association abolished and abandoned its Bar fee schedules. The American Bar Association has recommended that local and State Bar Associations ‘give serious consideration to withdrawal or cancellation of all schedules of fees' (American Bar Association, House of Delegates Mid-Year Meeting, Houston, Texas, Feb. 4—5, 1974, p. 12).

*****343** [6] Assuming that unprofessional practices were involved in the use of minimum fee schedules, such practices would, of course, be cognizable in judicial supervision, particularly in the Appellate Divisions, over the practice of law. Rarely, if ever, would such an issue be presentable, as mentioned earlier, in litigation between client and lawyer with respect to fees based on voluntary agreement (see 3 N.Y.Jur., Attorney and Client, ss 92—98).

It is interesting that neither respondent nor Amicus curiae have, in their submissions, established need for the minimum fee schedule, or that similar needs have existed generally, or ***12** to explain why in other parts of the State the use of minimum fee schedules does not seem to be correlated with population, urbanization, or other social factors which might explain either the use or nonuse of minimum fee schedules. ****486** Quite unpersuasive would be the argument that fee schedules are an indirect way of discouraging solicitation. If fee schedules are otherwise objectionable then the methods are too indirect and too strong for an ill that is otherwise curable (see Note, A Critical Analysis of Bar Association Minimum Fee Schedules, 85 Harvard L.Rev. 971, 988 (1972); Note, Wisconsin Minimum Fee Schedule: A Problem of Antitrust, 1968 Wis.L.Rev. 1237, 1256).

Fortunately, this case does not require that the issue be faced frontally. If it did, it would have been useful to have had available the kind of empirical data which would bear on the use, need, and effect of minimum fee schedules and the effect of their absence.

Accordingly, the order of the Appellate Division should be affirmed, with costs to the parties payable out of the estate.

WACHTLER, Judge (concurring).

I agree with the majority that the record reveals that the Surrogate did not rely on the minimum fee schedule in setting the attorney's fee in this case. However, I do not think it is wise to reach out in this case in order to decide that the minimum fee schedule would be exempt from the scope of the applicable antitrust laws. I do not believe, as does the majority, that the courts' regulation of ‘professional conduct’ which involves matters of ethical concern, should be interpreted as an implicit attempt to narrow the scope of an antitrust statute aimed at economic regulation.

The issue of whether the legal profession in general or Bar Associations in particular constitute a business, trade, or furnishing of services within the meaning of the antitrust laws is a question which I feel should be left for a case where the issue is posed more directly. (See, e.g., Goldfarb v. Virginia State Bar, E.D.Va., 355 F.Supp. 491.)

*****344** JASEN, GABRIELLI, JONES, SAMUEL RABIN and STEVENS, JJ., concur with BREITEL, C.J.

WACHTLER, J., concurs in a separate opinion.

Order affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the estate.

N.Y. 1974.
In re Freeman's Estate
34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336, 1974-1 Trade Cases P 75,085

END OF DOCUMENT