Legal Fee Schedules: New York's Approach
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LEGAL FEE SCHEDULES: NEW YORK'S APPROACH

INTRODUCTION

The American Bar Association Committee on Professional Ethics in 1961 reported:

The establishment of suggested or recommended fee schedules by bar associations is a thoroughly laudable activity. The evils of fee cutting ought to be apparent to all members of the Bar. . . . When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient. . . . It is proper for the profession to combat such evils by suggested or recommended minimum fee schedules and other practices which have a tendency to discourage the rendering of service for inadequate compensation. . . . While . . . this Committee has consistently held that minimum fee schedules can only be suggested or recommended and cannot be made obligatory (Opinion 28), it is equally true that the habitual charging of fees less than those established in suggested or recommended minimum fee schedules, or the charging of such fees without proper justification, may be evidence of unethical conduct . . . .¹

In 1970 the committee refined its 1961 opinion:

[M]ere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action.²

And at the 1974 mid-year meeting, the American Bar Association resolved:

In order to avoid possible future dispute or litigation and
a) without the expression of any opinion upon questions of existing legal right or obligations, and
b) notwithstanding the most recent opinion issued by the Association's Committee on Ethics and Professional Responsibility with regard to ethical propriety of the voluntary con-

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¹ ABA Comm. on Professional Ethics, Opinions, No. 302 (1961).
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.\(^3\)

In a period of 13 years, the American Bar Association has progressed from actively supporting minimum fee schedules and approving sanctions against attorneys who disregard them to recommending the complete dissolution of these schedules. Since it has been estimated that a majority of attorneys in the United States consult local fee schedules when determining fees,\(^4\) the consequences of this latest recommendation will undoubtedly affect many in the legal profession.

The primary impetus behind the change has been the forceful action of the federal government, which has alleged that minimum fee schedules as used by the legal profession amount to price-fixing arrangements in violation of the antitrust laws. Within the last few years, the Antitrust Division of the Justice Department has announced several times\(^5\) that, in its opinion, legal minimum fee schedules "can be viewed as little more than classic cartel price fixing" and "[a]s such they are a *per se* violation of antitrust law."\(^6\) The Justice Department has pending a number of investigations of bar associations and it expects to take legal action against the use of minimum fee schedules.\(^7\) Moreover, a federal district court\(^8\) decision has suggested that fee schedules as used by county bar associations are price-fixing agreements in violation of the Sherman Antitrust Act.\(^9\) Possibly anticipating supervenient affirmative action by the Justice Department or definitive adjudication by the United States Supreme Court that fee schedules as used by the legal profession violate antitrust laws, the

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6. Id. at 1290.
7. Id. at 1298.
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American Bar Association has recommended the withdrawal of all such schedules.10

The issue also exists at the state level. Because the Supreme Court has not squarely ruled on the issue, the states at present have the authority to determine the legality of minimum fee schedules within the framework of appropriate state law.11 This Comment will examine the federal antitrust approach to fee schedules and compare it to the New York approach. It also will discuss the alternatives to minimum fee schedules which are available to state and county bar associations in order to implement the valid goals of the present fee system.

I. THE FEDERAL APPROACH

A. Fee Schedules as Price-Fixing Agreements

The federal approach, as reflected in the decisions of the Supreme Court, has focused on the antitrust problems inherent in the use of fee schedules. A major contention of opponents of minimum fee schedules is that they constitute price-fixing arrangements.12 Price-fixing agreements have been held by the Supreme Court to be per se violations of the Sherman Antitrust Act.13

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . 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 or unreasonable as fixed and without placing on the government in en-

10. See text accompanying note 3 supra.
11. The Justice Department has brought suit against the Oregon State Bar Association claiming that its use of a minimum fee schedule is an illegal restraint of trade. The suit has not yet been heard. United States v. Oregon State Bar Ass'n, Civil No. 74-362 (D. Ore. 1974). In Stafford v. Brennan, 498 S.W.2d 703 (Tex. Civ. App. 1973), the Texas Court of Civil Appeals ruled that a state statute which provided that the prices prescribed in the state bar minimum fee schedule were prima facie evidence of reasonableness, was not unconstitutional nor violative of the Sherman Antitrust Act.
forcing the Sherman Law the burden of ascertaining from day to
day whether it has become unreasonable through the mere variation
of economic conditions.  

Applying this per se analysis, the courts have found violations where
a price list was used merely as a starting point in determining prices,  
where the members of the price-fixing groups were in no position to
to control the market, where current price information was exchanged
informally without adoption of a minimum price schedule, and
where the price list was not mandatory. In the last case, the Court
concluded:

An 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, no matter what end it was de-
signed to serve. . . And the fact that no penalties are imposed for
deviations from the price schedules is not material.

Although minimum fee schedules have been justified on the ground
that they are merely suggestive and are used only as a guide to fix
fees, the holdings summarized above suggest that even nonmanda-
tory fee schedules may be illegal.

This reasoning was followed by the Virginia district court in
Goldfarb v. Virginia State Bar which held that a county bar associ-
aion's minimum fee schedule was in violation of the Sherman Act.
Basing its opinion on Supreme Court precedents, the court stated that
"although attorneys can violate the proposed fee schedules, a defend-
ant's liability under the Sherman Act depends not on actual adher-
ance to the schedule but rather on the mere existence of an agree-
ment which restricts competition by price-fixing." The Fourth Cir-
cuit, in reversing the decision of the Virginia district court in the
Goldfarb case, held that minimum fee schedules as promulgated by

14. Id. at 397-98.
15. Plymouth Dealers Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960).
price fixing arrangement in this case did not involve a formal price list.
19. Id. at 489.
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County bar associations would fall under two exceptions to the Sherman Act: professional immunity and lack of federal jurisdiction. Despite the circuit court's reversal, it is the author's contention that Supreme Court precedents permit the conclusion that minimum fee schedules as used by county bar associations would not be excepted from the Sherman Act.

B. Professional Immunity

Whether the legal profession is immune from the mandate of the Sherman Act may be determined by an analysis of the scope of the terms "business" or "trade" as used in the Act. Although the Supreme Court has recognized that there are aspects of the professions which differentiate them from businesses and trades, dictum and other remarks of the Court indicate that it might view minimum fee schedules to be a commercial aspect of the legal profession, and, therefore within the purview of the Sherman Act.

In United States v. National Association of Real Estate Boards, the Department of Justice alleged that members of the Washington Real Estate Board combined to fix commission rates by adopting a nonmandatory rate schedule. The Real Estate Board maintained that it was not within the scope of the Sherman Act because it was a professional organization which required adherence to a code of ethics and which limited its members' activities to the provision of services. The Supreme Court did not accept this defense and found that the rate schedules were in violation of the Sherman Act. "The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade' . . . ."

23. In United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952), the government alleged that defendants conspired to restrain and monopolize the practice of medicine within the state of Oregon by providing prepaid medical care, a practice which allegedly diverted patients from independent practitioners. The Court disposed of the case on the grounds that the activity did not involve interstate commerce and thus was not within the scope of federal antitrust laws. Yet the Court said:

We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of the professions.

Id. at 336; accord, FTC v. Raladam, 283 U.S. 643 (1931).


25. Id. at 490.
In *American Medical Association v. United States*, the federal government alleged that the AMA conspired to prevent physicians from accepting employment under a government sponsored group health project. The AMA presented the defense that as a professional organization it was not within the Sherman Act. Although the Court refused to decide if a physician's practice of his profession constitutes trade under the Sherman Act, Justice Roberts, writing for the majority, asserted that it was "immaterial" whether the practice of medicine was called a business or trade when "the purpose and effect of [the AMA's] conspiracy was such obstruction and restraint of the business of Group Health."27

In another federal district court case, a state pharmaceutical association had distributed to its members price schedules for drugs. The lower court pronounced, and the Supreme Court affirmed, that the pharmacists were not immune simply because they were engaged in the practice of a learned profession.28

The Supreme Court appears to be developing an analysis wherein any commercial aspect of a profession, may be deemed a "trade" within the meaning of the Sherman Act. The Court has applied this analysis to restraints of trade in the real estate, medical, and pharmaceutical professions, and it is difficult to perceive a reason for not extending it to the legal profession.29

27. *Id.* at 528. It should be noted that the Court was dealing with section three of the Sherman Act, which is virtually the same as section one except that it applies to the District of Columbia.
29. See Comment, Minimum Fee Schedules As Price Fixing, 22 Am. U.L. Rev. 499 (1973); Note, The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities, 82 Yale L.J. 313 (1972). The circuit court in Goldfarb based its conclusion that the professions were immune from prosecution under the Sherman Act on two Supreme Court cases. In FTC v. Raladam, 283 U.S. 643 (1931), the Court stated that medical practitioners follow a "profession and not a trade." *Id.* at 653. Yet the circuit court in citing this case failed to mention the subsequent cases in which the Court declined to rule on the issue of whether the professions were under the purview of the Sherman Act, and wherein the Court declared that commercial aspects of the professions were subject to the mandate of the Sherman Act. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); *see* note 27 *supra* & accompanying text. The second Supreme Court case relied on by the Goldfarb court was Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), in which the Supreme Court ruled that a professional baseball club was not subject to the Sherman Act. Reliance on this case indicates the tenuous character of the circuit court's holding because the effect of this ruling has been weakened by subsequent Supreme Court decisions. Judge Craven noted in
C. The Issue of Federal Jurisdiction

Even if commercial aspects of the legal professions were held to be within the scope of the Sherman Act, the problem of establishing federal jurisdiction remains. The use of minimum fee schedules by the legal profession must affect or take place within interstate commerce. In the last half-century, the Supreme Court's interpretation of the commerce clause of the Constitution has expanded the authority of the federal government so that matters traditionally viewed as local concerns now fall within federal jurisdiction.30

In a case against a state pharmaceutical association, United States v. Utah Pharmaceutical Association,31 a federal court determined that the pharmacists' acts were within the scope of federal jurisdiction on the basis of the fact that many of the drugs used by the member pharmacists to fill prescriptions came from outside the state, thus affecting interstate commerce.32 The Supreme Court has held that although one particular contract may not be sufficient to invoke federal jurisdiction on the basis of interstate commerce, the result may be different if the "entire transaction" of which the one contract "is but a part" is considered.33

The district court ruling in the Goldfarb case34 suggests the minimum contact required by the courts to sustain federal jurisdiction in interstate commerce cases. Appellants in the case challenged the fee charged by an attorney in a real estate transaction. The fact that a substantial amount of financing for the real estate came from outside the state, warranted the conclusion that interstate commerce was sufficiently affected to sustain federal jurisdiction. Although the circuit court felt that this alone did not sufficiently affect interstate commerce, the Supreme Court refused to extend the "baseball umbrella cover to football." 497 F.2d at 24 (Craven, J., dissenting), citing Radovich v. National Football League, 352 U.S. 445 (1957). In Radovich, the Court refused to overrule the baseball case because it concluded "that more harm would be done in overruling Federal Baseball than in upholding a ruling which at best was of dubious validity." 352 U.S. at 450. For an interesting article on the "idiosyncratic life" of baseball's antitrust immunity, see Note, supra note 29.

33. United States v. Underwriters Ass'n, 322 U.S. 533, 549 (1943); see, e.g., United States v. Darby Lumber, 312 U.S. 100 (1941).
commerce, the acts of the legal profession as a whole, as well as law firms individually, cut across state lines in their daily activities and fall under the broad scope of the commerce clause. Moreover, although any one law firm may serve only intrastate clients, it is the state or county bar associations who promulgate the fee schedules; therefore, it is the cumulative interstate aspects of these organizations, as well as the single practitioner, which should, in large part, determine the federal jurisdiction issue.

The viability of the position that forty-nine state bar association minimum fee schedules do not affect interstate commerce is dubious. Fee schedules affect virtually all legal clients whose cumulative private and corporate affairs constitute the sum and substance of interstate commerce. To state that the purchase of legal advice and services does not affect interstate commerce is to deny potency to the concept. The fact that one client, attorney, or bar association is located in a single state is not dispositive.

Therefore, state and county bar associations, which act as representatives of their members, many of whom cross state lines in their activities, may be said to be involved in interstate activity.

II. THE NEW YORK APPROACH

While the foregoing analysis permits the conclusion that the Supreme Court could constitutionally find that minimum fee schedules as used by the legal profession violate section one of the Sherman

35. See Note, The Antitrust Division v. The Professions, 48 Notre Dame Law. 966 (1972). For a critical analysis of fee schedules, see Arnould & Corley, supra note 4. Some examples of interstate contacts by the legal profession are the use of the federal mails, handling devises of property where the property or the will itself is outside the state, and actions between citizens of two states, such as automobile accidents and divorce proceedings.


37. In response to the finding of interstate activity, those who support minimum fee schedules rely on the "state immunity doctrine." This doctrine was announced in Parker v. Brown, 317 U.S. 341 (1943), in which the Supreme Court held that state agents were immune from federal antitrust laws. The defense is questionably applied in the case of minimum fee schedules promulgated by county bar associations, because, although the associations' activities are normally sanctioned by state governments, the bar associations are their own enforcement agency, handling their own disciplinary actions. The Court has said that the mere approval of state government is not enough; the state must actively participate in the control of an agency in order for the doctrine to apply. See Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974).
Act, the New York courts have not followed the federal lead. Instead, the New York courts have taken three different approaches in examining fee schedules as promulgated by county bar associations.

In re Freeman is the only case in which the New York courts were squarely confronted with the question of the legality of a bar association's minimum fee schedule under state antitrust laws. The appellant in the case was named executor of his deceased father's estate. Following the proceeding to settle the estate, which was valued at $329,000, the surrogate awarded the appellant's attorney a fee of $13,250. Appellant appealed to the appellate division on the grounds that the surrogate, when making the award of the attorney's fee, was improperly influenced by the then existing Monroe County Bar Association minimum fee schedule. The evidence at trial demonstrated that the amount awarded the attorney was almost precisely the amount that the Monroe County Bar Association fee schedule suggested for decedents' estates. The evidence also indicated that the bar association's suggested fee was calculated on the basis of a certain percentage of the gross estate. Appellant particularly urged that the fee schedule effectively fixed the fee level for legal services in Monroe County and thus violated the state's antitrust law, the Donnelly Act.

The lower court and the New York Court of Appeals decisions in Freeman reflect the three approaches taken by the New York courts to the issue of the legality of minimum fee schedules.

A. The Legal Profession and its Use of Minimum Fee Schedules Does Not Fall Within the Purview of the Donnelly Act

Section 340 of the New York General Business Law, like the Sherman Act, is a broad and sweeping document, which declares void and illegal as against public policy: "Every contract, agreement, arrangement or combination whereby . . . [c]ompetition 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 . . . ."

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40. Id. § 340(1).
The court differentiated the legal profession from a "business" or "trade" by enumerating the characteristics of a profession:

It [a profession] is distinguished by the requirement 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 by 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, whether civil or criminal.41

The opinion noted that bar associations, which set minimum fee schedules, have been "preeminent" in the pursuit of these professional ideals, exemplified by the fact that they aid the legislature and the courts in the control of the conduct of the profession, and that they sponsor research, programs and proposals unrelated to the development of individual skills. Viewing the purposes and activities of the legal profession and the professional associations in this light, the court found that the legal profession is neither a "business" nor "trade."42

The court also focused on the legislative intent embodied in the

41. 34 N.Y.2d at 7, 311 N.E.2d at 483, 355 N.Y.S.2d at 339.

42. In the future, Freeman may be distinguished on its facts, since in deciding the case, the court of appeals did not need to consider the issue of whether the legal profession came within the purview of the Donnelly Act. It was well documented at trial that the use of the minimum fee schedule by the surrogate was only one factor in his determination of the awarded fee. The surrogate testified that he made an independent determination of the reasonableness of the fee by considering the custom and practice in the community. Prior New York cases had declared that fee schedules could be considered by courts in determining the reasonableness of an attorney's fee, but only if used in conjunction with other relevant evidence, such as the customary practice of the community and the amount of legal work involved. E.g., In re McCullough, 9 N.Y.2d 993, 176 N.E.2d 515, 218 N.Y.S.2d 66 (1961), aff'd 14 Misc. 2d 769, 185 N.Y.S.2d 993 (1958); In re Snell, 17 App. Div. 2d 490, 235 N.Y.S.2d 855 (3rd Dep't 1962). It had also been determined that primary reliance on a minimum fee schedule was per se unreasonable where direct testimony on services rendered was available. In re Martin, 21 App. Div. 2d 646, 16 N.Y.S.2d 594 (1st Dep't 1965). The factual situation in the instant case, however, involved a determination by the surrogate using all relevant evidence. Therefore, consideration of the Donnelly Act was unnecessary. Nonetheless, the court of appeals struck out into new territory to examine whether the legal profession and its use of fee schedules were within the scope of the Donnelly Act.
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term "services." The original statute did not encompass businesses dealing in services but was broadened by the New York legislature in 1933 to include them. Based on the fact that New York courts had only applied this term in the context of a business setting, and on a statement made by then Attorney General Bennett that "services" extended "the protection of the law to all those businesses which sell, not a specific product or commodity, but a service such as laundering, dry cleaning, shoe repairing and numerous others," the legislature, as interpreted by the Freeman court, did not intend to include the professions. The court limited the concept "services" to activities in a commercial or a business setting. Under this holding, the professions have complete immunity from prosecution under the Donnelly Act, and the promulgation of minimum fee schedules by state and county bar associations in New York remains secure.

B. The Legal Profession Is Within the Donnelly Act but Minimum Fee Schedules As Used by Attorneys Are Not Violative of This Act

The second approach taken by the New York courts in determining the legality of fee schedules was exemplified by the appellate division opinion in Freeman. Unlike the court of appeals, the appellate division assumed that the legal profession was within the scope of the Donnelly Act. Yet, the court held that suggested minimum fee schedules are not an unreasonable restraint of trade and therefore do not violate the state antitrust law. The conclusion was based on the "rule of reason," the traditional test used by the New York courts when dealing with alleged price-fixing agreements.

Because the Donnelly Act is such a broad and sweeping document, the New York courts have had the opportunity to interpret it to include virtually any type of commercial agreement. Yet in the price-fixing area, the courts have construed the Act in a restrictive

44. Bennett, The Recent Amendments to the Donnelly Act, 5 N.Y.S.B. Ass'n Bull. 384, 389 (1933).
way and have applied the "rule of reason" test.\textsuperscript{47} The test was adopted in \textit{Barns v. Dairymen's League Co-Op Association, Inc.}\textsuperscript{48} Appellees in \textit{Barns} controlled approximately fifty percent of the milk market in the New York area. The appellees entered into a price-fixing agreement which the appellant contended was a per se violation of the Donnelly Act. Rejecting the concept that all price-fixing arrangements are per se violations of the Act,\textsuperscript{49} the court instead declared that the rule of reason was to be applied:

Before it [the court] will condemn, there must appear the elements of injury to the public, or monopolistic control of a particular article of commerce, or unreasonable interference with and damage to the business of an individual, or the doing of illegal or unconscionable acts, or specific intent to do injury to someone else, or in brief, at least some of those circumstances which would lead a court in good conscience to say that a given set of defendants were overstepping the bounds of reasonable ambition and fair play, and were becoming a nuisance to their fellow men.\textsuperscript{50}

Following this reasoning, the New York courts have not found every agreement which fixes prices or restrains trade to be violative of the Donnelly Act. "The criterion is whether the restraint is unreasonable."\textsuperscript{51}

Scrutinizing the nature of the Monroe County minimum fee schedule in light of this rule, the appellate division in \textit{Freeman} concluded that a suggested fee schedule did not amount to an unreasonable restraint of trade.

\[T\]he fee schedule is not obligatory on its members; they are free to make fee arrangements with clients on whatever basis agreed upon and disregard the schedule entirely if they so choose. So far as the Monroe County Bar Association is aware "no lawyer has ever been

\textsuperscript{47} The New York courts employ the "rule of reason" test in reviewing price-fixing arrangements, whereas the federal courts consider such agreements a per se violation of the Sherman Act. \textit{See} note 61 \textit{infra}.

\textsuperscript{48} 220 App. Div. 624, 222 N.Y.S. 294 (4th Dep't 1927).

\textsuperscript{49} The New York courts, before \textit{Barns}, used the per se rule for price-fixing agreements. \textit{E.g.}, \textit{People v. Sheldon}, 139 N.Y. 251, 34 N.E. 785 (1893); \textit{Hooker v. Vandewater}, 4 Deno 349 (Sup. Ct. 1847).

\textsuperscript{50} 220 App. Div. at 640, 222 N.Y.S. at 307.

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disciplined, coerced, pressured or threatened with sanctions of any kind for charging less than the suggested minimum Bar rate. Thus we conclude that the schedule is in fact not a "minimum fee" schedule but is 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 for similar legal services.

Analogous to the Monroe County fee schedule, minimum fee schedules used throughout the state of New York merely "suggest" or show what is "customary" and no formal disciplinary sanctions are available to punish an attorney who does not choose to follow them. Thus within this framework, even if the legal profession were assumed to be within the purview of the Donnelly Act, its use of minimum fee schedules would not be deemed to be an unreasonable restraint of trade.

C. The Use of Minimum Fee Schedules and Standards of Professional Conduct

The court of appeals in its second test determined whether the use of the schedules was unprofessional. The court distinguished between the use of minimum fee schedules by the courts as a factor in deciding the reasonableness of an attorney's fee, and the use of the schedules by attorneys as a standard for setting fees. In light of the particular facts before the court, its opinion was restricted to the narrow issues of whether the use of a fee schedule by the surrogate court in determining the reasonableness of an attorney's fee in a decedents' estate violated professional standards.

Under New York law the surrogate court has the authority to determine the reasonableness of attorneys' fees in cases involving decedents' estates. Moreover, under the case law interpreting this statutory power, the surrogate may use local bar associations' minimum fee schedules as one factor in his determination. Other factors which may be considered by the surrogate include time spent, difficulties involved in the particular case, exigencies of the case, the professional standing of the counsel, and the results obtained.

52. 40 App. Div. 2d at 400, 341 N.Y.S.2d at 515.
54. See note 42 supra.
In *Freeman*, the court concluded that the use of minimum fee schedules was not unprofessional, provided that the surrogate used statutory as well as conventional guidelines in establishing the reasonableness of the fee. Therefore, in situations where schedules are used by a court as one factor in establishing the reasonableness of a fee, the highest court of New York has held that minimum fee schedules are not only professional, but relevant and useful.

The court distinguished the use of fee schedules by the legal profession to set the initial fees, and warned that if it appeared "unequivocally" that a price-fixing arrangement were involved in the use of minimum fee schedules, a serious issue of unprofessional practices would arise. In strongly phrased dictum the court stated that it would find unprofessional a minimum fee schedule which had as its primary purpose the setting of certain minimum financial compensation to lawyers. Thus, notwithstanding the fact that the legal profession did not come within the purview of the Donnelly Act, it was suggested that the courts could hold the use of legal fee schedules to be a violation of professional standards which could invoke disciplinary action.

As members of the New York Bar, attorneys are deemed officers of the New York Supreme Court, and the appellate division has "exclusive jurisdiction" to determine whether professional misconduct has occurred and to prescribe punishment for the offender. Based on this power, the court of appeals could effectively prohibit minimum fee schedules by holding that their use constitutes unprofessional behavior.

III. THE NEW YORK APPROACH IN RELATION TO THE FEDERAL APPROACH

The approaches taken by the New York courts have been diametrically opposed to that of the federal courts. In *Freeman*, while the court of appeals recognized that its conclusion was directly con-

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56. N.Y. JUDICIARY LAW § 474 (McKinney 1968).
57. 34 N.Y.2d at 11, 311 N.E. 2d at 485, 355 N.Y.S.2d at 342.
59. For a better understanding of the standards used to determine unprofessional practices of fee setting within New York, see ABA CANONS OF PROFESSIONAL ETHICS No. 12. The status of the Canons in New York is ambiguous, having been adopted by resolution, but not formally enacted into law.
trary to the ruling of the federal district court in the Goldfarb case, it maintained that contrary federal decisions were not authoritative where the case involved the construction of a state statute. The New York courts have consistently supported this distinction in order to justify the "rule of reason" approach as compared to the per se approach taken by the federal courts in price-fixing cases. The courts have asserted that although there exists federal law to the contrary on price-fixing practices, where there is no constitutional prohibition to the state's practices, the "enforcement of the federal antitrust laws should in general be in the federal courts only." By insisting that federal court cases may be deemed a "persuasive force" and yet "as precedent" they are "valueless," the particular autonomy of the New York courts has been thus far sustained.

However firmly the New York courts may strive for such autonomy, the recent trends in the federal arena indicate that, given the proper case, the United States Supreme Court could rule that fee schedules utilized by the legal profession constitute a violation of the Sherman Act. The investigations and statements made by the Antitrust Division of the Justice Department, the current opinion of the American Bar Association, and the holdings of Supreme Court

60. See notes 21-22 supra & accompanying text.
61. It is interesting to note that in cases dealing with price-fixing arrangements the New York courts, realizing their approach is contrary to that of the federal courts, have occasionally assumed a defensive position. In Leader Theatre Corp. v. Randforce Amusement Corp., 186 Misc. 280, 58 N.Y.S.2d 304 (Sup. Ct. 1945), an agreement between the defendants and Twentieth Century Fox Film Corporation gave the defendants the right of "first run" of motion pictures within a particular area. It was alleged that this right was in violation of the state antitrust law. The court's analysis rested on the preeminence of state legislation over federal legislation. The court concluded that until that time when a federal agency acts on this matter, New York's holding would remain conclusive. Accord, Marsich v. Eastman Kodak Co., 244 App. Div. 295, 279 N.Y.S. 140 (2d Dep't 1935). Contra, Kates v. Lefkowitz, 28 Misc. 2d 210, 216 N.Y.S.2d 1014 (Sup. Ct. 1961); People v. Marsiello, 177 Misc. 608, 51 N.Y.S.2d 512 (Sup. Ct. 1941), aff'd mem., 271 App. Div. 375, 66 N.Y.S.2d 451 (1st Dep't 1946). In the latter two cases the courts stressed the importance of relying on federal law.
64. See notes 5-7 supra & accompanying text. It should be noted that the Monroe County Bar Association abolished its fee schedule following an inquiry by the Antitrust Division of the Justice Department. In re Freeman, 34 N.Y.2d 1, 11, 311 N.E.2d 480, 485, 355 N.Y.S.2d 336, 342 (1974).
65. See note 3 supra & accompanying text.
cases, together affirm this contention. The application of the doctrine of "pre-emption" would precipitate the demise of New York's ruling, for a state law contrary to a Supreme Court holding is unconstitutional.

IV. ALTERNATIVES TO MINIMUM FEE SCHEDULES

Fee schedules have a number of highly commendable purposes. These include suggesting to newly practicing attorneys reasonable fee standards, acquainting lawyers with the usual charge for a standard service in order that they may earn a minimum livelihood, giving the client a basis on which to evaluate the reasonableness of a fee charged to him, guiding the courts in setting fees, raising the quality of services rendered, and avoiding solicitation by attorneys. Alternative means of accomplishing the goals of fee schedules have been suggested which do not incorporate devices which may conflict with the Sherman Act.

One such alternative is the "unit system," whereby legal services are rated by the local bar association according to the number of "unit values" they entail (each single value having the same measurement). The number of units granted a particular service is determined on the criteria of the amount of time normally involved, the difficulty of the problem, and the nature of the work. Each unit of service is then assigned a dollar value by the participating attorney, based on his own evaluation of a fair hourly rate and his position within the legal profession. Because the individual lawyer is the sole judge of the value of his services, this system apparently has no price-fixing elements in it. Yet by assigning value in terms of units for a particular service, the attorney can evaluate the comparative amount of work

66. See notes 12-37 supra & accompanying text.
70. Some proponents have suggested that the bar itself attach a dollar value to each unit, but the end result would be the same as a fee schedule expressed in unit terms.
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which will generally be involved in the service he is performing and thus will be aided in determining a dollar value for his services.

A second alternative is simply that each state bar association take a survey of prices charged for particular legal services by practicing attorneys throughout the state. The bar can then publish the results of the survey in the form of a range of fees charged throughout the state for each specific legal service. This type of "non-specific price survey" has been approved by the Supreme Court as a "legitimate price dissemination tool."\(^7\)

Proponents of a third alternative denounce the need for any kind of fee schedule or price disseminating device. They contend that an attorney should rely mainly on the factors set out in the American Bar Association Code of Professional Responsibility:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount of time involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.\(^2\)

Proponents of this system state that these guidelines are adequate for setting reasonable fees, while at the same time allowing the attorney absolute freedom in setting a fee that he feels appropriate.

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\(^2\) ABA Code of Professional Responsibility EC 2-18, DR 2-106 (1971). If the third factor listed in this section of the Code were interpreted to mean reliance on a county bar association minimum fee schedule, the proponents of this method no doubt would eliminate it.
Conclusion

Within the context of New York antitrust law, the continued use of minimum fee schedules by the legal profession seems substantially secure. The prevailing holding of the New York courts is that the legal profession is outside the scope of the Donnelly Act. Implied in this holding is the idea that members of the profession do not come under the authority of the legislature, but are subject to control by the state courts, whose jurisdiction is based on the issue of unprofessional conduct. However, if the courts of New York hold that the legal profession is within the scope of the Donnelly Act, the courts could find by applying the "rule of reason" test that fee schedules are not unreasonable restraints of trade.

The Goldfarb case, though, is now filed for certiorari before the Supreme Court.\(^73\) The possibility of a Supreme Court decision that legal fees schedules are illegal forces attorneys to look for other alternatives. The three suggested alternatives discussed in this Comment would accomplish the goal of enhancing the purposes of fee schedules without having a price-fixing element.

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