Anti-Trust Me: The Justification for the Prohibition on Charging Unreasonably Low Attorneys’ Fees

Tim E Hogan

Available at: https://works.bepress.com/tim_hogan/1/
Comment

Anti-Trust Me: The Justification for the Prohibition on Charging Unreasonably Low Attorneys’ Fees

Timothy Hogan*

The Wisconsin Rules of Professional Conduct prohibit lawyers from charging unreasonably high attorneys fees. The rules do not prohibit lawyers from charging unreasonably low attorneys fees. There is a good reason for this: low attorneys’ fees provide clients with access to justice that they may be otherwise unable to afford. However, what happens when attorneys’ fees become so low that their sole purpose is to drive out the competition? Prior to 1979, the Wisconsin state bar, like many other state bars, published a minimum fee schedule that set forth specific fees below which lawyers were prohibited from charging. The justification for these schedules was that highly competitive behavior between lawyers risked turning the profession into a business, lowering the profession’s integrity. Responding to antitrust concerns, however, the United States Supreme Court soon abolished the use of minimum fee schedules in Goldfarb v. Virginia State Bar, holding that they violated the Sherman Act.

In order to protect the integrity of the legal profession, this paper suggests that the Wisconsin Supreme Court amend the Rules of Professional Conduct to prohibit lawyers from charging both unreasonably high and unreasonably low attorneys fees. Specifically, this paper lays out factors that courts should consider in order to determine whether an attorney’s fees are unreasonably low. Like the minimum fee schedules, this rule will protect the public interest by prohibiting lawyers from charging fees that will result in the rendition of inadequate legal services and the destruction of the integrity of the profession. However, unlike the minimum fee schedules, this rule provides attorneys with the independence to take into consideration the client’s individual financial circumstances in setting a specific rate. Particularly given the current economic situation facing the legal profession, this rule is essential to prevent the legal profession from becoming a race-to-the-bottom.

Introduction..............................................................................................................2

I. The Adoption and Abolition of Minimum Fee Schedules......................16
   A. The Adoption of the Minimum Fee Schedule in Wisconsin............17
   B. Criticism Regarding Minimum Fee Schedules............................20
   C. The Abolition of the Fee Schedule............................................22

II. The New Wisconsin Supreme Court Rule 20:1.5.................................25
   A. Impact on the Public Regarding the Perceived Quality of
      Service Rendered...........................................................................26
   B. Impact on the Actual Quality of Services Rendered....................28
   C. The Client’s Financial Condition...............................................30
   D. The Lawyer’s Own Valuation of Services Rendered...................31
   E. Sustainability of the Firm if the Fee is Customarily Charged........34
   F. The Fee Customarily Charged in the Locality for Similar
      Legal Services...............................................................................37
   G. The Nature and Length of the Relationship with the Client..........38
   H. The Time and Labor Required, the Novelty and Difficulty
      of the Questions Involved, and the Skill Requisite to Perform
      the Legal Services Properly...........................................................38

* JD anticipated, University of Wisconsin Law School, May 2011.
I. Impact on the Integrity of the Profession..................................................39
J. Considering Them All Together....................................................................41

III. Authority of the Wisconsin Supreme Court to Promulgate the New Rule.............................................................................................42
A. Isn’t This Just Price-Fixing Already Outlawed in Goldfarb?............43
B. The State Action Exemption.......................................................................46
   1. Establishing the State-Action Doctrine...........................................46
   2. The State-Action Doctrine as Applied to Rules of Professional Conduct.................................................................48
C. The New Rule is in the Public Interest....................................................51

Conclusion.............................................................................................................53

“Wisconsin lawyers have an enviable reputation and record for honoring the spirit and objectives of the Code of Professional Responsibility and the earlier canons of professional ethics.”¹

“The [legal] profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”²

INTRODUCTION

MegaFirm³ is a multi-national law firm with over 2,000 attorneys and over $1 billion in net revenue.⁴ Although providing a wide array of different practice areas, the firm caters primarily to medium and large businesses. Due to the sheer amount of legal representation that the firm provides, lawyers—particularly partners—working for MegaFirm gain invaluable experience in their practice

¹ Truman Q. McNulty, past president of the State Bar of Wisconsin, quoted in Keith Kapp, Ethics and Professional Responsibility ix (State Bar of Wisconsin CLE Books, 1986).


³ Any references to events, people, places, or entities in this illustration are purely fictitious and not intended to represent any actual event, person, place or entity. The author disclaims any likeness or similarities to actual events, people, places, or entities. Any such likeness or similarity is unintentional and purely coincidental.

areas. The lawyers also develop personal relationships with their clients. Within the firm, the hourly rates vary, with junior associates billing at $200 per hour and senior partners billing at $600 per hour. These rates are consistent with the rates charged by lawyers in other large law firms within the community. However, lawyers working for local small and medium sized law firms bill at the average rate of $100 per hour.

Facing client pressures regarding high billing rates, eight senior partners leave MegaFirm. Armed with a well of experience and a reputation for high-class legal services, the partners start the Boutique Law Firm, catering to individuals and small businesses. Because existing small and medium sized law firms represent most of the Boutique Law Firm’s potential clients, the partners must develop a way to compete in the market. Comforted by steep checkbooks, the partners lower their billing rate to $40 per hour in order to undercut the existing competition. Since the partners have a reputation for providing high-class legal

---

5 These statistics are also quite plausible, as they are based on the Laffey Matrix. For the most recent Laffey Matrix, as well as a discussion as to how it is computed, visit the United States Attorneys’ Office website, available at [http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_6.html](http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_6.html).

6 Either voluntarily, pursuing the business strategy that follows, or involuntarily, after being laid off.

7 This is a phenomenon that has increased in recent times, mainly due to the hard economic times and client pressures to lower fees. See Karen Sloan, *Rocky Economy Pushes Attorneys to Set Up Shop*, NAT'L L.J., Sep. 21, 2009 (discussing three partners leaving a Los Angeles law firm to start their own litigation boutique); Graeme W. Bush, *Boutiques Experiencing an Upside to the Downturn*, NAT'L L.J., Sep. 21, 2009 (“[P]artners with practices at large multinational firms who would not have given a moment’s thought to moving to a boutique environment now may be more open to the idea...[because] some partners see opportunities to better serve clients in a smaller boutique environment.”).

8 Although boutique law firms may have yet to engage in this sort of behavior on a wide scale, the opportunity and desire is readily apparent, particularly for attorneys that involuntarily leave large firms. These attorneys likely have large financial obligations (i.e., car payment, mortgage, perhaps lingering student loans), which make them desperate to retain clients. With large firm
services—and are now offering these same high-class services at a lower rate—clients begin leaving their current firms and bringing their legal needs to the Boutique Law Firm. Because they lack the financial resources to compete with the Boutique Law Firm’s rates, existing small and medium sized law firms must try to cut prices in other ways. In such a scenario, the legal community may soon fall victim to a situation in which existing law firms are pitted against one another in an attempt to provide the lowest possible rates for clients. Inevitably, many existing firms may be forced out of business, being unable to maintain a profitable enterprise.

After having captured the market for individual and small business clients, the Boutique Law Firm realizes that it cannot sustain itself if it continues to bill clients at $40 per hour. Rather than raise their rates for individuals and small backgrounds, these attorneys also have the temporary financial resources and marketability that many lawyers at small and medium sized law firms may lack.

9 See infra notes 39-45 and accompanying text.

10 See Joel Rose, Key Trends Affecting Competitiveness and Profitability, March 29, 2010, available at http://nysbar.com/blogs/Tipoftheweek/2010/03/key_trends_affecting_competiti_2.html (last visited Apr. 10, 2010) (“For midsize firms in particular...these firms will find the practice of law to be more competitive, concentrated and demanding, with greater emphasis on delivering high quality legal services faster and less expensively.”).

11 See id. (although midsize firms may see an upturn in growth and profitability in 2010 and beyond, these firms will continue to be affected by profit squeezes). If already thin profit margins are coupled with intense competition to lower prices, small and medium sized law firms are unlikely to remain in business.

12 Although Boutique’s long-term sustainability would be in jeopardy, their short-term viability may not be in such dire straits. See Sloan, supra note 6 (“Despite charging lower hourly rates, the partners are earning as much as they were at [the large firm]...because the boutique’s overhead costs are much lower.”). While the partners for the Boutique Law Firm are unlikely to earn their same salary at $40 per hour, this rate still generates a cash flow for the time being.
businesses, the partners set their eyes on their former firm’s clients. Because the Boutique Law Firm’s costs and overhead are so much lower than MegaFirm’s, the partners are able to charge $100 per hour and compete with the high rates MegaFirm’s lawyers charge. In addition to lower fees, some of MegaFirm’s clients may be attracted to the Boutique Law Firm due to their prior relationships with its partners and their knowledge of the quality of representation that the partners provide. Having captured at least some larger clients, the Boutique Law Firm has increased its income while simultaneously having developed a long-term sustainable business practice.

13 The Boutique Law Firm does this in order keep smaller and midsize law firms out of the market. If the Boutique Law Firm raises its rates for individual and small business clients, other firms are likely to take advantage of the opportunity to move back into the market.

14 See Emily Heller, Steady Business Puts Boutiques in the Bull’s Eye, NAT’L L.J., Sep. 21, 2009 (after developing a client base, a boutique law firm “can go after much bigger cases, offering billing rates at a fraction charged by big firms”). See also Mark Zimmett, Lessons From a Large-Firm Partner Who Set Up His Own Shop, AM. L.W., Apr. 9, 2007 (discussing how a small boutique law firm took on several large law firms in numerous cases, including: a $115 million international aerospace arbitration; four hedge fund cases; a six-year, forty-party state court lien law litigation; and a civil RICO case, resulting in a multimillion-dollar verdict).

15 Admittedly, there are many reasons why clients would move from MegaFirm to the Boutique Law Firm “beyond substantially lower overall costs.” Sloan, supra note 6 (in addition to lower rates, boutique law firms offer more flexibility to enter into alternative fee arrangements, greater efficiency, and client relationships with all attorneys within a firm rather than a few). However, price is arguably the biggest factor. See Bush, supra note 6 (“[F]or clients genuinely focused on working with outside counsel to reduce litigation costs, litigation boutiques are uniquely positioned to respond.”).

16 This is, of course, assuming that the clients had positive encounters with the partners. See Sloan, supra note 6 (responding to a question of whether CBS Television would leave a big firm and follow a former partner to the partner’s new boutique firm, the network’s executive vice president and general counsel responded, “We hire lawyers, not law firms.”).

17 My concern in this paper is not so much about the competitive behavior that would occur between the Boutique Law Firm and MegaFirm, as this sort of behavior routinely occurs in the practice of law. Moreover, I am not sure as to the extent a huge multi-national law firm would attempt to compete for the number of clients for which an eight-person boutique law firm could handle. I do not wish to limit all competitive behavior in the legal profession. Rather, my concern is on the effects caused by the Boutique Law Firm’s actions with regard to competing for individual and small business clients currently represented by existing small and medium sized
The Boutique Law Firm example is just one situation that presents the concerns with which this paper is concerned. There are other possible, though admittedly less plausible, ways in which the concerns of this paper will manifest. For example, deep in debt and facing a bleak job market, it is certainly possible that groups of third-year law students will hang out their own shingle, either separately or together. With low overhead and the desperation to gain experience, these recent graduates could charge fees lower than other firms with higher overhead. In another example, a large law firm that has the resources to do so may set up a small office in a small community. The branch office would be able to provide representation at a fraction of the cost for other local firms due to the firm’s high billing rates in other areas. In both situations, the firms charging the lower fees will cause other firms in the area to try and cut costs to keep their client base, resulting in a race to offer the lowest priced legal services.

---

18 Although some of the following situations are less plausible, they are not entirely impossible. As Thomas Edison once said, “Opportunity is missed by most people because it is dressed in overalls and looks like work.”

19 See Debra C. Weiss, Unable to Find Jobs, Law Grads Hang out a Shingle, A.B.A. J., Feb. 3, 2009 (discussing two recent law school grads, unable to find jobs, who got together and started their own firm).

20 See Milton C. Regan, Jr., Law Firms, Competition Penalties, and the Values of Professionalism, 13 GEO. J. LEGAL ETHICS 1, 9 (1999) (“The quest for clients has prompted numerous firms to establish offices both in various parts of this country and abroad, placing competitive pressure on markets that formerly were local or regional in nature.”)

21 I do not want to limit law firms providing genuine pro bono services. My concern is to limit firms from offering unreasonably low prices for the sole reason of competing for clients. See infra Part III.C.
Lawyers are prohibited from charging fees that are unreasonable, and there are several factors to consider in determining whether a fee is reasonable. These factors include: (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 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; and (8) whether the fee is fixed or contingent.

Although Rule 1.5 clearly prohibits unreasonable fees, the factors seem to suggest that only unreasonably high fees are prohibited. For example, if Lionel Hutz charges $40 per hour and Ben Matlock charges $300 per hour for complex-litigation services, the focus on the reasonableness of the fees will be on Matlock rather than Hutz. Each of the eight factors in Rule 1.5 would be considered to determine whether Matlock’s fee was reasonable under the circumstances. It may be that Matlock has twenty years of experience, a reputation for winning, and the

---

22 Wis. Rules, supra note 2, at SCR 20:1.5(a) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”). See id. at ABA cmt. [1] (“Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances.”). Notice how this rule does not differentiate between hourly billing and flat rates.

23 Wis. Rules, supra note 2, at SCR 20:1.5(a)(1)-(8).

24 See generally id.

25 I do not wish to suggest that Lionel Hutz would automatically be considered acting consistently with Rule 1.5. One would also have to analyze Hutz’s fees to make sure they are reasonable. My wish is merely to illustrate that the focus would tend to be on the lawyer charging the higher amount rather than the lawyer charging a lower amount than the customary fee.
ability to handle complex-litigation, whereas Hutz recently graduated law school and lacks a specialty in the area of complex litigation. Perhaps Matlock and the client have had a long-standing relationship with each other; Matlock’s representation of the client will preclude his representation of another attractive client; and the litigation will likely take longer than most other cases. Further suppose that the fee customarily charged in the locality is $200 per hour for the services. The question becomes whether Matlock’s fee is reasonable under the circumstances; that is, whether $300 per hour is unreasonably high. However, there is another question that can be raised, namely, whether Hutz’s fee is reasonable under the circumstances; that is, whether $40 per hour is unreasonably low.

The ABA has taken up the issue of the scope of Rule 1.5.26 According to the ABA Committee on Ethics and Professional Responsibility, the requirement that an attorney’s fee be reasonable “prohibits only unreasonably high fees; it does not restrict lawyers from charging less than normal fees or from charging no fee at all.”27 One reason for this conclusion was that the reasonable fee provision in Rule 1.5 replaced the disciplinary rule of the Model Code of Professional

26 The ABA Model Rule regarding attorneys fees is substantially similar to Wisconsin’s Rule—indeed, it is identical in paragraph (a). Compare ABA MODEL RULES OF PROF’L CONDUCT, R. 1.5(a) (1983) [hereinafter ABA MODEL RULES] with WIS. RULES, supra note 2, at SCR 20:1.5(a).

27 ABA Comm. on Ethics and Prof’l Responsibility, Informal Opinion 84-1509 (Oct. 20, 1984). The Restatement arrived at the same conclusion. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2000) (“A lawyer may not charge a fee larger than is reasonable in the circumstances...”). See also id. at cmt. a (section 34 does not prohibit lawyers to serve for low fees).
Responsibility that prohibited “illegal or clearly excessive” fees. Substituting “reasonable” for “clearly excessive” indicates that the drafters did not intend to change the prohibition of excessive fees to a minimum fee standard. Rather, the substitution was intended to impose a stricter standard on attorneys charging too much by making the test one of reasonableness. The Rule is designed to protect clients from being charged improper fees; it is not designed to protect attorneys from price competition. Furthermore, if Rule 1.5 prohibited certain low fees, this would be inconsistent with the mandate of Rule 6.1, which encourages lawyers to provide legal services to those unable to pay at a “substantially reduced fee.”

The ABA’s opinion regarding unreasonable attorneys fees would not prohibit the Boutique Law Firm from charging $40 per hour for legal services in an attempt to lure clients away from existing small and medium sized law firms. That the fee customarily charged in the locality is $100 per hour does not prevent the eight partners from charging, consistent with the Rules of Professional

28 ABA Informal Opinion 84-1509, supra note 27. See also ABA MODEL CODE OF PROF’L RESPONSIBILITY DR 2-106 (1980) [hereinafter ABA MODEL CODE].

29 ABA Informal Opinion 84-1509, supra note 27.

30 Id.

31 Id.

32 Id.

33 WIS. RULES, supra note 2, at SCR 20:6.1 (indicating that, in order to fulfill the professional responsibility to provide legal services to those unable to pay, a lawyer should provide services at a “substantially reduced fee”).

34 The ABA did note that the opinions rendered in individual jurisdictions would be controlling on the issue. ABA Informal Opinion 84-1509, supra note 27. However, the Wisconsin rule regarding attorneys’ fees would likely be interpreted the same way, since the Wisconsin rule is identical to the ABA’s Model Rule. See supra note 26.
Conduct, $40 per hour for the same services. However, the fact that the fee customarily charged in the locality is $100 per hour may prevent the partners from charging, consistent with the Rules of Professional Conduct, $300 per hour for the same legal services. Although other firms are deliberately driven out of business through the Boutique Law Firm’s billing practices, this seems to be of no consequence for the rules.

There are many good reasons for the ABA to have read Rule 1.5 so as to prohibit only unreasonably high fees. It is often in the public interest for lawyers to represent clients for low fees or even for no fee. Low fees provide access to justice for those who are otherwise unable to afford legal representation. A prohibition on low attorneys fees would stifle competition, thus preventing clients from obtaining similar legal services at a lower fee. Ultimately, competition produces not only lower fees, but also encourages better and more efficient services. In addition, prohibiting lawyers from setting their own fees, regardless

---

35 See ABA Informal Opinion 84-1509, supra note 27 (“[T]he rule does not proscribe a fee that is lower than the fee customarily charged.”).

36 Wis. Rules, supra note 2, at SCR 20:1.5.

37 Restatement, supra note 27, at cmt. a.

38 Wis. Rules, supra note 2, at SCR 20:6.1 (in fulfilling the professional responsibility to provide legal services to those unable to pay, a lawyer should provide legal services at “no fee or substantially reduced fee”).


of the reasons for setting low fees, takes away the independence of thought and action necessary to the existence of the profession.\footnote{ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 28 (May 5, 1930) (“The usefulness and capacity for service of the members of the profession must vary with their character, learning and experience, and to place the compensation of all of them on a labor union basis, irrespective of their ability or experience, would soon lessen the usefulness of the profession to the public.”).}

Despite the advantages of allowing attorneys to charge low fees, there are also many advantages in prohibiting attorneys from charging fees that are \emph{too low} (i.e., unreasonably low fees). When lawyers deliberately attempt to fee-cut other lawyers, the result could be a decrease in the demeanor of the profession, turning the profession into a business.\footnote{ABA Comm. on Ethics and Prof’l Responsibility, Informal Opinion 585 (August 16, 1962); Thomas D. Morgan, \textit{The Impact of Antitrust Law on the Legal Profession}, 67 \textit{Fordham L. Rev.} 415, 415 (1998) (“[Law] has ceased being a profession and has become a business.”). \textit{See also} ABA CANONS OF PROF’L ETHICS, Canon 12 (“In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.”); Harry A. Ackley, \textit{Let’s Throw Out the Hourly Basis for Fees}, 49 A.B.A. J. 76, 76 (1963) (the law becomes a business when attorneys obtain cases on a “cut-fee” basis).} Allowing attorneys to charge unreasonably low fees persuades attorneys to “render legal services for inadequate compensation and to lower the quality of service rendered.”\footnote{ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 190 (February 17, 1939). \textit{See also} ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 302 (November 27, 1961) (“The evils of fee cutting ought to be apparent to all members of the Bar.”).} In addition, when attorneys charge unreasonably low fees, the public perceives that the services being rendered are inadequate.\footnote{ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 190 (February 17, 1939). \textit{See also} ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 302 (November 27, 1961) (“The evils of fee cutting ought to be apparent to all members of the Bar.”).} The Wisconsin State Bar has gone so far as to opine that the habitual and notorious offering to perform legal services for less than another attorney is a “vicious form of ‘solicitation.’”\footnote{Wis. Comm. on Prof’l Ethics, Informal Opinion 8 (1956) (interpreting the ethical canon that stated, “Efforts, direct or indirect, in any way to encroach upon the business of other lawyers are unworthy of those who should be brethren at the bar.”). Wisconsin adopted the ABA’s Code of} Moreover, if law firms are able to
use their resources to drive out the competition—such as in the Boutique Law Firm hypothetical—this may lead to a “race-to-the-bottom” in the legal profession for which clients will ultimately suffer. For these reasons, Rule 1.5 should include a prohibition on charging unreasonably low fees.

Some people may argue that while the legal profession has business-like aspects, a race-to-the-bottom scenario will never come to fruition and, thus, this concern is ungrounded. Experience, however, begs to differ. There are well-documented cases involving other professions engaging in a race-to-the-bottom. Some of the better-known examples involve professional accountants and engineers. Indeed, there are even indications that the legal profession is not

---

Professional Responsibility, which included the ethical cannon to which this opinion refers, in December of 1969. See 43 Wis. 2d lxxv (1969). Wisconsin then repealed the Code of Professional Responsibility and recreated Supreme Court Rules Chapter 20 as Rules of Professional Conduct for Attorneys, substantially adopting the ABA Model Rules of Professional Conduct. See 139 Wis. 2d xv; Kapp, supra note 1, at 7. This is important because of the new language of the rules regarding solicitation of clients, SCR 20:7.1-7.3.

46 One author also provides an insight onto why there are not more such examples. In other professions, as with most occupations, non-compete clauses in employment contracts can be used; in the legal profession, however, non-compete clauses are per se unreasonable. Regan, supra note 20, at 3 (“Conventional companies, as well as firms that are comprised of persons such as physicians and accountants, are able...to enforce reasonable restrictions...on the ability of former employees or partners to compete with the firm after leaving it. By contrast, courts and bar committees overwhelmingly have held that law firm agreements containing provisions of this type are per se unenforceable because they violate the ethical prohibition on imposing any restriction upon a lawyer’s practice.”). Id. at 15 (“The absolute prohibition on non-competition clauses ‘sets lawyers apart from members of other professions,’ and deprives law firms of ‘what would have proven a potent weapon in a firm’s battle against partners who grab and leave.’”) (internal citations omitted).

47 See JIM COUSINS, AUSTIN MITCHELL & PREM SIKKA, Race to the Bottom: The Case of the Accountancy Firms (Association for Accountancy & Business Affairs, 2004).

48 See Stephen H. Ungar, Making Computer Professionals and Other Engineers Low-Priced Commodities, 23 TECH. AND SOC. MAG. 36, 36-40 (2004) (“Technical professionals are pitted against one another in a race to the bottom as jobs are parcelled out, on a global basis, to the low bidders.”).
immune from such a race. If lawyers and law firms are not currently engaging in a race-to-the-bottom, the possibility and opportunity surely exist, particularly given the current economic situation facing the legal community. Unless action is taken, it will only be a matter of time before the profession is replaced by a hollow core.

A recent network of affiliates, called My Community Legal Network, suggests that lawyers and firms are already engaged in a race-to-the-bottom. In a section entitled “About Us,” My Community Legal Network states:

Introduced in 2009, My Community Legal Network scoured through millions of legal and financial professionals looking for the most knowledgeable and sophisticated providers. Then we took the collective bargaining power that comes from millions of Americans and negotiated wholesale prices from these top professionals. We take these discounted rates and offer them directly to our members. There is no markup; only the best

49 Lynn M. LoPucki & Sara D. Kalin, The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a “Race to the Bottom”, 54 VAND. L. REV. 231, 255-72 (2001) (discussing the conduct of competition among courts for cases); Gerry Singsen, Competition in Personal Legal Services, 2 GEO. J. LEGAL ETHICS 21, 23 (1988-89) (“[C]ompetition is growing rapidly among personal legal services lawyers... Price competition is increasing as well. Newspaper ads routinely list specific fees...usually well below the going rate in the general practice bar.”); id. at 24 (“Each of these trends is a direct response to the relaxation of competitive restrictions.”). See also Lincoln Caplan, The Lawyers’ Race to the Bottom, N.Y. TIMES, A29 (Aug. 6, 1993) (“The current ethos among lawyers has led to a race to the bottom.”); Arthur Schaefer & Leland Swenson, Contrasting the Vision and the Reality: Core Ethical Values, Ethics Audit and Ethics Decision Models for Attorneys, 28 J. LEGAL PROF. 93, 96 (2003-04) (“Certainly the general society, along with many professions, appears to be heavily motivated by business considerations in light of the globalization of the American economy. The legal profession is not immune from these trends.”); id. at 97 (“[W]hat used to be a gentleman’s profession, relying upon a code of honor more stringent than the professional ethics, has degenerated into a hostile, backbiting environment, with particular emphasis on the bottom line.”).

50 See Caplan, supra note 49. See also Huck Gutman, The Age of India Cometh, THE STATESMAN, March 24, 2004 (“[T]he race to the bottom, unexpected as it may seem at the present moment, will likely in due course have an impact on the service-sector and professional jobs...”).

51 My Community Legal Network claims that its mission is “to help our community overcome today's turbulent economic times by negotiating wholesale prices from quality legal and financial professionals, offering our affiliates a rewarding business opportunity, and by giving back to the community through our charitable initiatives.” My Community Legal Network, http://www.mcln.com/home?loc=Irvine (last visited Dec. 28, 2009).
professionals at the best prices. My Community Legal Network currently only offers services in the United States but has plans to expand these services to Canada, Mexico, and South America by the end of 2010.\(^5\)

While the company boasts the best professionals at the best prices, the discounted rates being offered to clients will have the effect of underbidding and driving out other lawyers providing the same services but at higher rates.\(^5\)

Combined with the current economic crisis, the business model offered by My Community Legal Network will have the effect—if it has not done so already—of turning the profession into a business in order to attract more clients at lower prices.\(^5\) Lawyers and law firms across the country—and even the world—have been struggling to find a balance between maintaining competitive billing practices and limiting lay-offs.\(^5\) Outsourcing legal work has also become


\(^{54}\) As Richard Posner told a recent graduating law class, “the professional model in law is giving way to a business model; the current economic downturn has revealed that the transformative process is almost complete. The big corporate law firms, and the lawyers who work for them, are now profit maximizers…[W]hile law in its highest corporate reaches used to be a gentlemanly cartel, it is now a competitive industry.” Richard Posner, Convocation Address, The Transformation of the Legal Profession (June 12, 2009), available at http://www.law.uchicago.edu/alumni/magazine/fall09/ transformation. He did note, however, that “the more businesslike the law firm, the greater is the commitment to merit, and therefore the abler are the senior associates and junior partners…” Id. It is this author’s argument, however, that these positives do not outweigh the negatives, such as decreased lawyer motivation, inadequate services, less available options for potential clients, etc.

more common.\textsuperscript{56} In order to stay competitive under such a business model, lawyers and law firms will be forced to bill at lower rates or find innovative billing methods.\textsuperscript{57} Yet, in order to offer the lowest rates, lawyers and firms may begin to sacrifice the quality of their legal services—a consequence that is certainly detrimental to the public.\textsuperscript{58} If this occurs, the legal profession may lose its “professional” status, with people equating it more to a business than to a profession.\textsuperscript{59} Like a business, then, the legal profession would be more concerned with reeling in profits than servicing the public.\textsuperscript{60}

In order to maintain a balance between the competing interests involving low attorneys fees, the Wisconsin Supreme Court should promulgate a new Supreme Court Rule that prohibits the charging of unreasonably low attorneys fees, with the determination of reasonableness to be made considering several

\begin{footnotesize}
\begin{footnotes}

\textsuperscript{57} See ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 01-423 (Sep. 22, 2001) (“As business has become more international in scope, American business officials with to be represented by law firms capable of advising them concerning the laws of foreign countries. To meet these expectations, more U.S. law firms have sought to gain international expertise. Some of these firms have formed partnerships and similar affiliations with lawyers from other countries.”).

\textsuperscript{58} ABA Formal Opinion 190, supra note 43 (charging low fees persuades lawyers provide legal services for lower compensation, which tends to lower the quality of service provided). Another way law firms may try to keep costs down is by getting rid of higher paid attorneys, who typically happen to be more experienced. This would also lead to clients paying money for services being performed by less experienced attorneys, which would also result in lower quality of services to a client.

\textsuperscript{59} Ackley, supra note 42, at 76 (1963) (the law becomes a business when attorneys obtain cases on a “cut-fee” basis).

\textsuperscript{60} I can already hear the jokes. For example: A man phones a lawyer and asks, “How much would you charge for just answering three simple questions?” The lawyer replies, “A thousand dollars.” “A thousand dollars!” exclaims the man. “That’s very expensive isn’t it?” “It certainly is,” says the lawyer. “Now, what’s your third question?”
\end{footnotes}
\end{footnotesize}
factors.\textsuperscript{61} Part I of this comment provides the history of the adoption and abolition of minimum fee schedules for attorneys. Part II of this comment sets forth a possible new Supreme Court Rule and discusses how the new rule will address the competing interests.\textsuperscript{62} Part III of this comment will discuss the authority and the duty of the Wisconsin Supreme Court to do so. This comment concludes that a new rule will be in the public interest and will honor the spirit and objectives of Wisconsin’s professional ethics.\textsuperscript{63}

I. THE ADOPTION AND ABOLITION OF MINIMUM FEE SCHEDULES

The hourly rate is a recent phenomenon; historically, most lawyers charged a flat rate for specific legal services.\textsuperscript{64} Many younger lawyers, however, were discouraged from entering the legal profession due to a lack of knowledge concerning the appropriate rate for which to charge clients for specific services.\textsuperscript{65} In order to facilitate a growing profession and to keep pace with the increased cost of living, the Wisconsin state bar—as well as state bars across the country—devised a minimum fee schedule setting forth the minimum fees that lawyers should charge clients.\textsuperscript{66} Despite the benefits that the minimum fee schedules provided, critics from both inside and outside of the bar began to voice opposition

\textsuperscript{61} For a different alternative, see Miller & Weil, \textit{Let's Improve, Not Kill Fee Schedules}, 58 A.B.A. J. 31 (1972) (setting forth a system using “value units”).

\textsuperscript{62} Like the current rule, this rule will not differentiate between different manners in which fees are computed (i.e., per hour billing vs. flat rates). I think that my analysis applies forcefully to all billing techniques.

\textsuperscript{63} \textit{See supra} text accompanying note 1.

\textsuperscript{64} PHILIP S. HABERMANN, A \textbf{HISTORY OF THE ORGANIZED BAR IN WISCONSIN} 68 (1986).

\textsuperscript{65} \textit{Id}.

\textsuperscript{66} \textit{Id}.
to them. Growing criticism of the fee schedules also prompted the United States Department of Justice to become involved. Soon, the United States Supreme Court would hand down a decision that would forever abolish minimum fee schedules across the country. The Court held that the Virginia state bar’s minimum fee schedule constituted anticompetitive price fixing in violation of the Sherman Act. As a result of the decision, states across the country—if they had not done so already—began to eliminate the minimum fee schedule.

A. The Adoption of the Minimum Fee Schedule in Wisconsin

Lawyers in Wisconsin were inadequately compensated for over a hundred years following statehood. Historically, most legal services were billed for at flat rates and lawyers who became well off did so through side ventures. People who would otherwise be attracted to becoming lawyers were discouraged from doing so; lawyers already in the profession left the practice of law for more financially attractive fields. In the period from 1929 to 1951, the income of lawyers increased fifty-eight percent, while the income of dentists increased eighty-three percent and the income of physicians increased one hundred fifty-

---


68 HABERMANN, supra note 64, at 68-69.

69 See Goldfarb, supra note 39.

70 Id. at 791-92.

71 HABERMANN, supra note 64, at 68.

72 Id.

73 Lathrop v. Donohue, 10 Wis. 2d 230, 248 (1960).
seven percent. This economic “plight” caught the attention of both judges and the state bars. Part of the reason for the economic state of lawyers was the “haphazard system of charges for service.”

The Milwaukee bar association provided the impetus for Wisconsin’s statewide minimum fee schedule. In March 1844, a dozen lawyers signed a flyer entitled “Fee Bill of the Bar of Milwaukee County.” The flyer listed several charges and noted that all the prices stated therein were stated as the minimum price in all cases. In March 1858, the Milwaukee bar association formally adopted a fee schedule, replacing the informal flyer. Dane County’s bar association was quick to adopt its own fee schedule and, by the end of the century, most of Wisconsin’s local bar associations had some sort of fee schedule or bill. In June of 1928, Wisconsin’s Bar Bulletin summarized the fee schedules of various local bar associations as compiled by the Supreme Court Clerk. This summary led to the promulgation of the first statewide fee schedule, which was formally adopted by the Wisconsin bar in June of 1929. The fee schedule was

---

74 Id. These statistics were, according to the court, gathered by the economics of law practice committee of the American Bar Association.

75 Id.

76 HABERMANN, supra note 64, at 68.

77 Id.

78 Id.

79 Id.

80 Id.

81 Id.

82 Id.
revised over the years to keep up with the increased cost of living that had taken place following World War II.\textsuperscript{83}

The Wisconsin courts and the state bar recognized numerous advantages for the fee schedule. The Wisconsin Supreme Court recognized that “the quality of legal service which will be rendered to the public is likely to suffer if young men of ability are dissuaded from entering the profession because of the difficulty of securing an adequate financial reward to enable them to properly support themselves and their families.”\textsuperscript{84} The court then recognized that a minimum fee schedule tended to remedy that condition.\textsuperscript{85} A minimum fee schedule also served the public purpose by providing a guide on which to base legal charges that prevented overcharges as well as undercharges.\textsuperscript{86} The schedule was especially helpful to younger lawyers who were unable to adequately value their services.\textsuperscript{87} In addition to helping lawyers value their own services, the fee schedule provided judges with a guide with which to award reasonable attorneys’ fees in appropriate cases.\textsuperscript{88} Minimum fee schedules also serve as a guide to assist the public.\textsuperscript{89}

Perhaps the most often repeated justification for minimum fee schedules was that

\begin{itemize}
\item \textsuperscript{83} Lathrop, supra note 73, at 249.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id. See also HABERMANN, supra note 64, at 68 (minimum fee schedules raised lawyers’ incomes by 25% to 50% within three years).
\item \textsuperscript{86} Lathrop, supra note 73, at 249.
\item \textsuperscript{87} STATE BAR OF WISCONSIN, SCHEDULE OF MINIMUM FEES FOR ATTORNEYS AND RELATED MATERIALS 1 (1960).
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Arnould & Corley, supra note 67, 656 (1971) (minimum fee schedules assist the public “in determining what is considered a reasonable fee”).
\end{itemize}
it prevented “[t]he failure of lawyers to receive fair compensation for their services [that] tend[s], in the long run, to produce careless work.”

B. Criticism Regarding Minimum Fee Schedules

Despite the advantages, minimum fee schedules were not without controversy. The most often heard argument against minimum fee schedules is that they were a method of price fixing designed only to increase lawyers’ incomes. The fee schedules had the inherent tendency to eliminate or reduce the competition among lawyers, thus implicating antitrust laws. Moreover, many of the fees listed as the minimum in the fee schedule could have been seen as unreasonably high. The minimum fees for the same legal service varied across the states, a variation that could not be justified by different economic conditions among the states. Also, despite the justification that fee schedules raise the income of lawyers, statistics showed that “those relying primarily on the fee schedule actually have lower average incomes than those relying on most other methods of fee determination.”

---

90 State Bar of Wisconsin, supra note 87, at 1.

91 Arnould & Corley, supra note 67, at 656.

92 Id. See also Pietz & Nolden, supra note 67, at 1240 (“Because of the semi-compulsive character of the Wisconsin minimum fee schedule and the corresponding tendency to restrain competition, antitrust implications must be considered.”). But cf., Harvard Law Review Association, A Critical Analysis of Bar Association Minimum Fee Schedules, 85 Harv. L. Rev. 971 (1972) (suggesting that price-fixing in the legal profession may not be undesirable).

93 Arnould & Corley, supra note 67, at 657.

94 Id. at 658-59.

95 Id. at 661.
Due to growing fears that minimum fee schedules violated antitrust law, the state bar tried to emphasize the voluntariness of the schedule. In June of 1972, the state bar formally replaced the name of minimum fee schedule to “customary fee guide.”\(^96\) The Wisconsin Supreme Court recognized that the existence of the fee schedule did not relieve attorneys of the duty to serve the poor for a reduced fee or even no fee at all.\(^97\) When a client is unable to afford the minimum fee, a lawyer should not hesitate to charge a lesser fee or provide representation without cost; indeed, it is a lawyer’s duty to do so.\(^98\) Furthermore, even if an attorney based his or her fee upon the fee schedule, a lawyer’s fee was “always subject to the courts’ determination of reasonableness.”\(^99\)

Although the Wisconsin state bar attempted to emphasize the voluntariness of the minimum fee schedules, these attempts came too late to save the schedule. In 1972, the United States Department of Justice, antitrust division, opened a file on the Wisconsin State Bar.\(^100\) The Department notified the Executive Director of the bar that an antitrust suit would be commenced to discontinue the fee schedule.\(^101\) After notification, the Executive Committee ordered that the minimum fee schedule in Wisconsin be “abrogated and

\(^{96}\) Habermann, supra note 64, at 68.

\(^{97}\) Lathrop, supra note 73, at 249. See also State Bar of Wisconsin, supra note 87, at 4-5 (“An exception to charging less than the recommended minimum fee and one that the lawyer should be very cognizant of, involves the client who is genuinely financially unable to pay the attorney the minimum compensation to which he is entitled.”).

\(^{98}\) State Bar of Wisconsin, supra note 87, at 5.

\(^{99}\) Lathrop, supra note 73, at 249.

\(^{100}\) Habermann, supra note 64, at 68.

\(^{101}\) Id. at 68-69.
rescinded.” The fee schedule was subsequently discontinued and, upon being informed of the state bar’s actions, the Department closed its file.

Wisconsin formally discontinued endorsement of the fee schedule, but not everyone was convinced. The fee schedules were still present in most lawyers’ libraries and were most likely utilized. In December of 1967, Wisconsin Senator William Proxmire breathed life back into Wisconsin lawyers when he claimed, “I have been advised by the Attorney General of the U.S. that there is no possible antitrust action that can be taken against the State Bar Association.”

Little did Proxmire know, soon the United States Supreme Court would settle the matter once and for all.

C. The Abolition of the Fee Schedule

In Goldfarb v. Virginia State Bar, a husband and wife brought an action against the state and local bar associations alleging they violated the Sherman Act by promulgating and enforcing a minimum fee schedule. In 1971, the couple contracted to buy a home in Fairfax, Virginia, for which they were required to secure title insurance. Securing title insurance required title

---

102 Id. at 69.
103 Id.
104 Id.
105 Id.
106 Goldfarb, supra note 39.
107 15 U.S.C. § 1 (2009) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...is hereby declared to be illegal.”).
108 Goldfarb, supra note 39, at 775.
examination, a service that only lawyers could legally perform.\textsuperscript{109} When the couple contacted a lawyer, the lawyer quoted the fee located in the minimum fee schedule published by the local bar association, indicating that it was the lawyer’s policy to charge the fee therein.\textsuperscript{110} Not wanting to pay the minimum fee, the couple contacted several other attorneys, all of which indicated that they would charge no less than the minimum fee schedule.\textsuperscript{111} Because the couple was unable to locate a lawyer willing to charge less than the minimum fee schedule, they brought suit alleging that the operation of the minimum fee schedule constituted price fixing in violation of the Sherman Act.\textsuperscript{112}

The United States Supreme Court agreed with the Goldfarbs and held that the actions of the bar associations constituted anticompetitive price fixing in violation of the Sherman Act.\textsuperscript{113} In analyzing the issue, the Court noted that although the State Bar had never formally disciplined any lawyer to compel adherence to the minimum fee schedule, it did issue reports and ethical opinions condoning their use and establishing that they could not be ignored.\textsuperscript{114} Because of the threat of discipline to lawyers that charged less than the fee schedule, the

\begin{flushleft}
\textsuperscript{109} Id.
\end{flushleft}

\begin{flushleft}
\textsuperscript{110} Id. at 776.
\end{flushleft}

\begin{flushleft}
\textsuperscript{111} Id.
\end{flushleft}

\begin{flushleft}
\textsuperscript{112} Id. at 778.
\end{flushleft}

\begin{flushleft}
\textsuperscript{113} Id. at 791-92.
\end{flushleft}

\begin{flushleft}
\textsuperscript{114} Id. at 776-77. The Court pointed to the most recent ethical opinion stating that “evidence that an attorney \textit{habitually} charges less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such lawyer is guilty of misconduct...” \textit{Id.} at 777-78 (quoting Virginia State Bar Committee on Legal Ethics, Opinion 170 (May 28, 1971)). Compare the language of the Virginia State Bar Opinion to that of the Wisconsin Committee on Ethics, \textit{supra} note 45 and accompanying text.
\end{flushleft}
Court found that the fee schedules were not purely advisory; rather, the fee schedules, combined with threat of discipline constituted a rigid price floor.\textsuperscript{115} The attorneys did not attempt to set out an individualized fee for the Goldfarbs; instead, each lawyer adhered to the fee schedule.\textsuperscript{116} The fee schedules were enforced through the prospect of professional discipline and lawyers’ own desire to comply with professional norms.\textsuperscript{117} Lawyers’ motivation to conform to the fee schedules was “reinforced by the assurance that other lawyers would not compete by underbidding.”\textsuperscript{118} The result of these activities was a pricing system from which consumers could not realistically escape, thus constituting “a classic illustration of price fixing” that violated the Sherman Act.\textsuperscript{119}

Prior to their abolition in \textit{Goldfarb}, minimum fee schedules served a useful purpose. Because of them, the legal profession grew and “[t]he large numbers of new lawyers were being absorbed without difficulty.”\textsuperscript{120} Moreover, lawyers’ incomes were growing faster than before their adoption.\textsuperscript{121} Due to the antitrust implications the fee schedules spurred, however, the Supreme Court

\begin{footnotesize}
\begin{enumerate}
\item \textit{Goldfarb, supra} note 39, at 781.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 782.
\item \textit{Id.} at 783. \textit{See also id.} at 791-92 (“The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.”). For a more in-depth discussion of \textit{Goldfarb}, see Notes, \textit{The Antitrust Liability of Professional Associations after Goldfarb: Reformulating the Learned Professions Exemption in the Lower Courts}, 1977 DUKE L.J. 1047, 1048-52 (1977).
\item \textit{HABERMANN, supra} note 64, at 69.
\item \textit{Id.} at 68.
\end{enumerate}
\end{footnotesize}
rightly abolished them in *Goldfarb*. Yet, with a looming “race-to-the-bottom” in the legal profession, the benefits of such schedules should not be disregarded too quickly—neither, though, should their antitrust implications. What *is* needed in order to prevent the profession from turning to a business is not an updated version of the minimum fee schedule, but rather a change to Rule 1.5 of the Wisconsin Rules of Professional Conduct for Attorneys. This new rule would prohibit both unreasonably high and unreasonably low attorneys fees, thus providing the proverbial “best of both worlds.”

II. A NEW WISCONSIN SUPREME COURT RULE 20:1.5

In order to maintain a balance between the competing interests involving low attorneys fees, the Wisconsin Supreme Court should promulgate a new Supreme Court Rule that would prohibit attorneys from charging unreasonably low fees. Although the Rules currently prohibit an attorney generally from charging an unreasonable fee, as stated above, this rule would likely be interpreted to prohibit only unreasonably high fees. Thus, in order to prevent a “race-to-the-bottom” in the legal profession, the Wisconsin Supreme Court should amend Rule 20:1.5(a) into two different sections. The first would state explicitly that “[a] lawyer’s fee shall not be unreasonably high. The factors to be considered in determining whether a fee is unreasonably high include, but are not limited to, the following:” and then include the same factors as indicated in SCR

---

122 By that, I mean the new rule would secure the benefits of the minimum fee schedules while simultaneously avoiding the antitrust implications associated with them.

123 *See supra* notes 26-33 and accompanying text.
20:1.5(a)(1)-(8). The second section would state explicitly that “a lawyer’s fee shall not be unreasonably low. The factors to be considered in determining whether a fee is unreasonably low include, but are not limited to, the following:

and then include the factors that this section will lay out. The factors to be laid out are not to be exclusive, nor will each factor be relevant in each instance. In addition to setting out each factor, this section will also include reasons why each particular factor ought to be included in the new rule.

A. Impact on the Public Regarding the Perceived Quality of Services Rendered

Accurate or not, clients often equate the quality of the legal services they are obtaining to the amount of the legal fees they are paying. Clients believe that if two lawyers are offering the same legal services at wildly different rates—for example, $200 per hour versus $10 per hour—the lawyer charging the higher rate is rendering better services. Particularly in the legal context, where consumers are often unable to evaluate the product ahead of time, potential clients

124 See Wis. Rules, supra note 2, at SCR 20:1.5(a).

125 See id. at ABA cmt. [1].

126 Given the numerous different ways in which the harms of a race-to-the-bottom could manifest and the disastrous effects it would have, see Introduction infra, it should be pointed out that amending the Wisconsin Rules of Professional Conduct would be a quick, easy, and cost effective solution to the problem. Even if the legal profession is not currently engaged in such behavior, this solution is an easy preemptive strike in preventing the consequences that would follow if the profession were to engage in such behavior.

127 As a common saying goes, “Good lawyers aren’t cheap, and cheap lawyers aren’t good.”

128 In other words, consumers use price as a heuristic to judge its quality. See Dhruv Grewal ET. AL., The Moderating Effect of the Service Context on the Relationship Between Price and Post-Consumption Perceptions of Service Quality, 12 J. BUS. & PSYCH. 579, 580-81 (2000) (examining the results of several empirical studies, the findings “clearly support the conclusion that there is a positive price-perceived product quality relationship”). See also Daniel L. Sherrell & Abhijit Biswas, The Role of Price in Consumer Quality Judgments for Professional Services, 1 J. CUSTOMER SERV. MARKET. & MGMT. 45, 46-56 (1995) (finding support for the proposition that consumers believe in a price-quality relationship for professional services).
may be more willing to use price as a way to judge quality.\footnote{Grewal, \textit{supra} note 128, at 581-82 (“[P]revious research suggesting that consumers are more likely to make use of price information when they lack the expertise to evaluate the product...bears directly on the price-perceived quality relationship for services.”).} While it may not accurately reflect the reality of the profession, clients may associate lower fees with lower quality, believing that the lower fee is only obtainable through less work and preparation. Thus, when lawyers charge unreasonably low fees, the public perception of those services is that they are being rendered by inadequate lawyers.\footnote{ABA Informal Opinion 585, \textit{supra} note 42.} Thus, the first factor that should be included in the new SCR 20:1.5 prohibiting unreasonably low attorneys’ fees is the impact on the client regarding the perceived quality of services rendered.

The need for this factor is evident throughout the preamble to the Rules of Professional Conduct.\footnote{\textit{See} \textit{Wis. Rules, supra} note 2, at SCR Ch. 20, pmbl. [1] (stating that a lawyer has a “special responsibility for the quality of justice”); \textit{id.} at [6] (“[A] lawyer should seek improvement of...the quality of service rendered by the legal profession.”); \textit{id.} at [12] (“The profession has a responsibility to assure that its regulations are conceived in the public interest...”).} Because of the vital role they play in the justice system, lawyers ought to further the public’s confidence that they are rendering adequate legal services that fit the needs of each particular client. However, the public’s confidence in the ability of lawyers to provide adequate legal services is undermined when lawyers charge fees that are too low. If lawyers are uninhibited in charging low fees and are consistently trying to undercut one another in order to attract clientele, the public perception of the quality of their legal services will be consistently undercut as well.
In order to ensure that a lawyer’s fee is not so low as to destroy the public’s confidence, courts need to look at the impact that such a fee will have on the public regarding the quality of services rendered. If a fee charged in a particular circumstance\(^\text{132}\) tends to make clients perceive an inadequacy in the legal services being rendered, such a fee would be unreasonable under this rule. By including this factor in the determination of a reasonable attorney’s fee, the Wisconsin Supreme Court would ensure that the new rule remains consistent with the command that it be conceived in the public interest.\(^\text{133}\)

**B. Impact on the Actual Quality of Services Rendered**

In addition to having an effect on the public’s perception of the quality of legal services rendered, the amount of a particular fee will have an effect on the actual quality of services rendered. One of the justifications for minimum fee schedules was that it prevented lawyers from not receiving fair compensation for their legal services, which tended to produce inadequate output.\(^\text{134}\) If lawyers have to make a living off of the fees that they charge, there are two options when lawyers charge a low fee: lawyers may look for more efficient ways to provide legal representation, or, more likely the option for many lawyers charging low fees, they may provide sub-par services. While lawyers do have an ethical

\(^{132}\) The reasonableness of a particular fee cannot be determined in isolation. Rather, the reasonableness of a lawyer’s fee is determined considering all of the circumstances. See Wis. Rules, supra note 2, at SCR 20:1.5, ABA cmt. [1].

\(^{133}\) Wis. Rules, supra note 2, at SCR Ch. 20, pmbl. [12].

\(^{134}\) State Bar of Wisconsin, supra note 87, at 1 (“The failure of lawyers to receive fair compensation for their services tend[s], in the long run, to produce careless work.”).
obligation to provide competent legal services in all representation, providing services for unreasonably low fees will make lawyers provide services at the minimum level of competency required to avoid being disciplined. If a lawyer charges a fee that is too low, the lawyer loses the motivation to provide more than the minimum competency as required by SCR 20:1.1.

Because unreasonably low fees can cause lawyers to lose their motivation to provide more than the bare minimum, courts ought to examine the reasonableness of a fee in light of the impact the fee will have on the actual quality of the services rendered. While courts would look to whether the lawyer provided services consistent with SCR 20:1.1, the rules provide only minimum standards. It would certainly be in the public’s interest to have a rule that encourages lawyers to provide more than the basic level of competency. The loss of motivation to provide higher standards of competency threatens the quality of the services rendered. The Wisconsin Supreme Court, by passing a new SCR

135 Wis. Rules, supra note 2, at SCR 20:1.1 (“A lawyer shall provide competent representation to a client.”).

136 I believe a movie quote accurately sums up the situation in a similar context:
“Peter Gibbons: The thing is, Bob, it’s not that I’m lazy, it’s that I just don’t care.
Bob Porter: Don’t...don’t care?
Peter Gibbons: It’s a problem of motivation, all right? Now, if I work my ass off...I don’t see another dime, so where’s the motivation?
...
Peter Gibbons: [M]y only real motivation is not to be hassled, that and the fear of losing my job. But you know, Bob, that will make someone work just hard enough not to get fired.”
Office Space (20th Century Fox 1999) (emphasis added).

137 And we ought to encourage lawyers to provide more than just the bare minimum. Again, a movie quote is appropriate here:
“Stan: Well, fifteen is the minimum, okay?... Now, its up to you whether or not you want to do just the bare minimum...If you think the bare minimum is enough, then okay. But some people chose...more, and we encourage that...”
...
“Stan: What do you think of a person who only does the bare minimum?”
Office Space (20th Century Fox 1999).
20:1.5 with this factor in mind, would provide a way in which courts and the
Office of Lawyer Regulation could ensure that lawyers maintain motivation to
provide competent services higher than that which is required by the rules as they
now stand. Moreover, lawyers will be assured that they will receive adequate
compensation for their services and will have the motivation to provide more than
the minimum competency required.

C. The Client’s Financial Condition

One of the most often repeated criticisms of the minimum fee schedules—
and of the legal profession in general—is that many people are denied legal
services because they are unable to afford the fee.\textsuperscript{138} With regard to the minimum
fee schedules, this criticism is more grounded: by setting a minimum fee beneath
which a lawyer may be disciplined by charging, lawyers often would not
represent clients who could not afford the minimum fee.\textsuperscript{139} This same criticism
can also be levied against any rule that attempts to prohibit unreasonably low
attorneys fees. With such a rule, many people may be denied legal services if
lawyers are hesitant to offer services at a fee for which they would be subject to
professional discipline. Considering the client’s individual financial condition,
then, is one way in which courts can reduce this hesitation.\textsuperscript{140}

It is often in the public interest for lawyers to represent clients for low fees
or even no fee at all, since low fees provide access to justice for those who are

\textsuperscript{138} Supra Part I.B.

\textsuperscript{139} This was essentially the claim the Goldfarbs made. Goldfarb, supra note 39, at 775-78.

\textsuperscript{140} In the Goldfarb case, the Supreme Court noted that no attorney that the Goldfarbs contacted
attempted to set out an individualized fee based on their financial condition. Id. at 781.
otherwise unable to afford legal representation.\textsuperscript{141} Indeed, the Rules already explicitly require that lawyers provide services to people unable to pay.\textsuperscript{142} The rules as they now exist, however, do not contemplate situations in which layers and firms charge all clients, regardless of their ability to pay, a fee that is only designed to undercut the competition. While lawyers and firms have an ethical obligation to provide legal services for no fee or a substantially reduced fee to those otherwise unable to afford legal representation, under the current rules lawyers and firms are able to charge substantially reduced fees to all clients. However, SCR 20:6.1 was surely intended to apply only to those with limited financial means, not to provide an excuse to charge low fees in order to undercut the competition.\textsuperscript{143} By considering the financial status of the client in determining which fees are unreasonably low, courts could ensure that lawyers and firms are not attempting to undercut one another while simultaneously ensuring access to representation to those who would otherwise be unable to afford it.

\textit{D. The Lawyer’s Own Valuation of Services Rendered}

One of the more pervasive elements throughout the Rules of Professional Conduct is the professional independence that lawyers are required to have.\textsuperscript{144}

\textsuperscript{141} \textit{RESTATEMENT, supra} note 27, at cmt. a.

\textsuperscript{142} \textit{WIS. RULES, supra} note 2, at SCR 20:6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay.”). Section (b) of this rule obligates lawyers, in fulfilling this responsibility, to provide legal services “at no fee or substantially reduced fee.” \textit{Id.} at SCR 20:6.1(b).

\textsuperscript{143} \textit{See STATE BAR OF WISCONSIN, supra} note 87, at 4-5 (“An exception to charging less...involves the client who is \textit{genuinely financially unable to pay...}” (emphs. added).

\textsuperscript{144} \textit{See WIS. RULES, supra} note 2, at SCR Ch. 20, pmbl. [11] (“An independent legal profession is an important force in preserving government under law...”); \textit{id.} at SCR 20:1.8(f) (“A lawyer shall not accept compensation for representing a client from one other than the client unless...there is no
Indeed, one of the criticisms of minimum fee schedules is that, by prohibiting lawyers from setting their own fees, they took away the independence of thought and action necessary to the existence of the profession.145 The ABA commented on the fee schedules, saying that they “place[d] the compensation of [lawyers] on a labor union basis, irrespective of their ability or experience, [which] lessen[ed] the usefulness of the profession to the public.”146 It is likely this reason that one of the factors to consider under the current rule is the “experience, reputation, and ability of the lawyer or lawyers performing the services.”147

Having courts consider the lawyer’s own valuation of his or her services is a way to preserve that lawyer’s professional independence. Unlike the minimum fee schedules that prescribed a set fee for particular services regardless of the lawyer’s expertise or ability, this new rule would take into account each lawyer’s own judgment of the value of his or her services. In the Boutique Law Firm hypothetical, if the eight partners genuinely valued their own services at less than the amount customarily charged,148 this factor would take that valuation into account in determining the reasonableness of the fee. However, if, as is likely, the lawyers valued their own services at or near the fee customarily charged, the fact that they charge much lower fees would give rise to an inference that the fee is...

---

145 ABA Formal Opinion 28, supra note 41.

146 Id.

147 Wis. Rules, supra note 2, at SCR 20:1.5(a)(7).

148 Which is highly unlikely, given the fact that they were recently partners in a multinational law firm.
being charged for anticompetitive or unprofessional reasons. Also, if a lawyer values his or her own services at a higher rate than he or she is charging a client, there are also concerns that the quality of services rendered will suffer.\footnote{149}

This factor also addresses another criticism of the minimum fee schedules, namely, the fact that they tended to stifle competition in the marketplace.\footnote{150} This factor allows different lawyers, who will inevitably have different levels of skill and expertise, to charge different amounts for their services. Unlike the minimum fee schedules, under which a client could not obtain representation for less than the amount set by the schedule,\footnote{151} this factor allows clients to obtain representation for less than the amount charged by other lawyers if there is a lawyer capable of providing services at that rate. This factor encourages competition by forcing lawyers to find cheaper and more efficient ways of providing service in order to bring down the actual cost of providing such services rather than bringing down the apparent cost.\footnote{152} Lawyers still must evaluate how much clients should pay for the rendition of legal services, but unless a lawyer is

\footnote{149} See supra Part II.B. Again, the concern would be that the lawyer perceives receiving inadequate compensation for his or her representation, causing the lawyer to lose the motivation to provide higher quality services.

\footnote{150} Nat’l Soc’y of Prof’l Eng’rs, supra note 40, 493 U.S. at 695 (“[A]ll elements of bargain...are favorably affected by the free opportunity to select among alternative offers.”).

\footnote{151} Indeed, this was a fact highlighted by the Supreme Court. Goldfarb, supra note 39, 421 U.S. at 776-78.

\footnote{152} Consider the concern that charging lower rates tends to decrease the quality of service rather than encourage more efficient techniques. This factor does not play into the same concern because allowing lawyers to charge the rate at which they value their own services, lawyers are encouraged to provide the same services as other lawyers but in a more efficient way and, thus, at a cheaper price to the client.
able to provide those services in a more efficient way, he or she would be forced to charge the rate at which he or she values those inefficient services.

E. Sustainability of the Firm if the Fee is Customarily Charged

One of the reasons for establishing the minimum fee schedules is that it guaranteed young lawyers a profitable enterprise in which to enter.\textsuperscript{153} Prior to their adoption, lawyers made very little money in providing legal services and people were discouraged from entering the profession.\textsuperscript{154} Yet, one of the reasons for abolishing them was that they stifled competition and were merely a way to raise the income of lawyers.\textsuperscript{155} This factor addresses these concerns.

By considering the sustainability of a law firm if a particular fee is customarily charged, this factor ensures that it is truly the market that will control the cost of legal representation. If the free market would truly regulate the price of legal services, there is some rate beneath which services could not be rendered—the rate would be that which a lawyer could charge while still retaining some profit. No lawyer or law firm would realistically charge a particular rate consistently if charging that rate would not make a profit. That is, a lawyer that wants to continue providing legal services would need to charge a rate that would allow the lawyer to sustain his or her practice; consistently charging below that rate would quickly usher in the end of that lawyer’s practice. If a law firm charges such a rate, and the law firm would be unable to sustain itself if that law firm

\textsuperscript{153} See supra Part I.A.

\textsuperscript{154} Id.

\textsuperscript{155} Supra notes 91-92 and accompanying text.
consistently charged the same rate for all services, this gives rise to an inference that the law firm is merely charging the rate in order to drive out the competition.

Competition is still encouraged under this factor because lawyers and firms will look for more efficient ways of providing representation in order to charge a fee that they could customarily charge all of their clients.\textsuperscript{156} Rather than merely cut their fees to drive out the competition, lawyers and firms will be forced to look for ways to cut their rates while still retaining a profit. Requiring lawyers and firms to charge sustainable rates would require them to find ways in which they can still make a profit at lower rates. Rather than eliminate the competition through unfair practices, lawyers and firms would be spurring competition in ways that ultimately serve the public good: offering the same legal services at less expensive rates. Because other professionals know that another lawyer’s lower rates are the result of efficiency rather than a backup of additional resources, inefficient lawyers and firms would be forced either to go out of business or find better ways of doing it.\textsuperscript{157}

This factor also achieves what the minimum fee schedules failed to do, namely, securing a profitable enterprise in which to enter. Despite the schedules’ purpose of increasing lawyers’ incomes, one criticism from within the bar was that lawyers using the minimum fee schedules actually had lower average

\textsuperscript{156} As Herbert Hoover once said, “Competition is not only the basis of protection to the consumer, but is the incentive to progress.”

\textsuperscript{157} Essentially, this is what the public should want from competition. Instead of focusing on just the cheapest price, clients should want the cheapest price for the most efficient services. This would ultimately make the profession as a whole better while simultaneously driving down the prices.
incomes than lawyers using other methods of charging fees.\textsuperscript{158} Considering the level of sustainability in determining a fee’s unreasonableness, lawyers entering the profession can rest assured that other lawyers and firms cannot deliberately set a fee for the sole purpose of driving them out of business. Rather, younger lawyers will realize that the fee at which other professionals are providing representation represents the rate at which a lawyer can provide services while securing a sustainable practice. This will encourage, rather than discourage, people to enter the profession, knowing that they will be able to sustain a profitable practice at a reasonable rate.

Some people may argue that it is a non-issue to argue that people may be discouraged from entering the profession,\textsuperscript{159} and therefore it is unnecessary to have a factor that would ensure the viability of a legal practice. However, the sheer number of layoffs occurring across the profession cannot be ignored.\textsuperscript{160} As a result of the economic crisis facing both the general public and the legal profession in particular, many people pursuing J.D. degrees do not necessarily use

\begin{footnotesize}
\footnotesize{158} Arnould & Corley, supra note 67, at 661.

\footnotesize{159} For example, as the legal profession faces economic downtown, law school matriculation ironically increases. See Emma Carew, More Applying to Law School in Poor Economy, MINN. DAILY, March 14, 2009, \textit{available at} \url{http://www.mndaily.com/2009/04/14/more-applying-law-school-poor-economy} (finding that the University of Minnesota Law School saw a thirty percent increase in applicants since 2008).

\footnotesize{160} Although most people are aware of the layoffs occurring at law firms across the nation, some numbers are particularly discouraging for young lawyers. For example, a layoff of ten percent of associates would only result in a mere three percent of savings for a law firm that makes $100 million in revenue. Leigh Jones, \textit{Just How Much do Law Firm Layoffs Save?}, NAT’L L.J., Feb. 2009, \textit{available at} \url{http://www.law.com/jsp/article.jsp?id=1202428094047}. Between January 1, 2008 and January 31, 2010, over 14,000 people have been laid off from major law firms, including over 5,000 lawyers. The Layoff Tracker, \url{http://lawshucks.com/layoff-tracker/} (last visited Feb. 13, 2010). One author notes, however, that the number of layoffs is decreasing. Erin Geiger Smith, Firm Layoffs in January ’10 88% Fewer than in January ’09, BUS. INSIDER L. REV., Feb. 2, 2010, \textit{available at} \url{http://www.businessinsider.com/firm-layoffs-in-january-2010-90-fewer-than-in-january-2009-2010-2}.}
\end{footnotesize}
them to become lawyers.\textsuperscript{161} If individuals are discouraged from entering the profession, or are unable to find a job once they enter, the profession itself will suffer. Ensuring an attractive career in the legal field is important because of the benefits a richly diverse legal community will provide. At a recent summit regarding diversity in the legal profession, the president of the ABA stated that the profession “will achieve its greatest potential when it draws on all these differences of humankind, and serves the needs of all.”\textsuperscript{162} For the legal profession, which is integral to developing public policy, to lose diverse viewpoints would be “a terrible mistake.”\textsuperscript{163} In order to maintain a vibrant and diverse profession that will serve the public interest, individuals must feel comfortable knowing that entering the legal profession is not career suicide. Prohibiting lawyers from charging lower than sustainable fees is key to maintaining such a profession.

\textit{F. The Fee Customarily Charged in the Locality for Similar Legal Services}

In order to determine, under the current rule, whether a particular fee is unreasonably high, one factor to consider is the fee customarily charged in the locality for similar legal services.\textsuperscript{164} Consider the Boutique Law Firm hypothetical in reverse. Assume that the customary fee in a given community is $40 per hour and that a law firm begins to charge $100 per hour. The fact that the


\textsuperscript{163} \textit{Id.} (quoting U.S. Representative G.K. Butterfield).

\textsuperscript{164} \textit{Wis. Rules, supra} note 2, at SCR 20:1.5(a)(3).
fee to be charged is so much higher than the fee customarily charged in the locality for similar legal services is evidence that $100 per hour may be unreasonably high. Yet, the same logic should also apply for the facts of the hypothetical. The fact that the fee to be charged is so much lower than the fee customarily charged in the locality for similar legal services is evidence that $40 per hour may be unreasonably low.

G. The Nature and Length of the Relationship with the Client

Lawyers may often wish to represent one client at a fee significantly less than that which they charge other clients. Perhaps the client is a family member or just a consistent client. Whatever the reason, there are times when most lawyers would agree it is acceptable to charge a client a fee much less than the customary charge. It should not be unreasonable for a lawyer to charge his or her mom the same legal services at a discounted rate. Thus, in determining whether a particular fee is unreasonably low, one must look to the nature and length of the relationship with the client.165

H. The Time and Labor Required, The Novelty and Difficulty of the Questions Involved, and The Skill Requisite to Perform the Legal Services Properly

Not all legal issues are created equally, and it would be unreasonable for all types of legal issues to be resolved for the same fee. Some legal issues, such as drafting a simple motion, require less time and labor than other legal issues, such as defending a patent infringement lawsuit. Some legal issues are new and

165 The current rule also recognizes this factor. Wis. Rules, supra note 2, at SCR 20:1.5(a)(6). Indeed, the rationale behind this factor is likely that a lawyer would not charge a long-standing client an unreasonably high fee.
complex, requiring much more research and creativity than other legal issues that merely require a simple review of the recent case law. Because of the different time and labor required to represent a client, the different degrees of novelty and difficulty of a particular legal issues, and the varying required levels of skill to perform different legal services properly, these issues must be taken into account in determining whether a fee is unreasonably low.  

While many of the other factors are considered when the legal services rendered are the same, this factor is considered when the legal services being rendered are different. In the Boutique Law Firm hypothetical, if the firm provided the same legal services as other firms in the community, then the other factors would be the primary focus. However, if the firm is offering different services, this factor should be the primary focus. For example, in isolation, $40 per hour may seem unreasonably low. But perhaps the firm is offering the filing of income tax returns for $40 per hour while no other firm in the community offers that service. Considering that filing a tax return involves much less time and skill than, say, drafting a will, the much lower fee does not appear to be unreasonable.

I. Impact on the Integrity of the Profession

Although the Supreme Court abolished the minimum fee schedules in Goldfarb, the Court did recognize that the integrity of the bar is a proper concern for the state. The Court held that, in some instances, the state “may decide that ‘forms of competition usual in the business world may be demoralizing to the

---

166 For the same reasons, the current rule also recognizes this factor in determining whether a fee is unreasonably high. Wis. Rules, supra note 2, at SCR 20:1.5(a)(1).
ethical standards of a profession.”¹⁶⁷ When it comes to regulating the bar, the states have an increased interest because lawyers’ primary function is to administer justice and they are officers of the courts.¹⁶⁸ Although the Court found that the minimum fee schedules fell within the scope of the Sherman Act, the Court did not intend to diminish the authority of the state to regulate the profession.¹⁶⁹ This factor takes into account the way fees may impact the integrity of the profession.

The Wisconsin Supreme Court must consider the effect allowing certain fees will have on the integrity of the legal profession. When lawyers deliberately charge low fees in order to underbid other lawyers, the result is a decrease in the demeanor of the profession by turning it into a business.¹⁷⁰ This factor allows courts to consider all of the surrounding circumstances to determine its effect on the profession. If a low fee is otherwise reasonable under these factors, it may be unreasonable if it has the effect of pitting lawyers against each other in a competitive billing race. While competition among lawyers may be beneficial, such as when it spurs creativity and efficiency, it ceases to be beneficial when the purpose of fee cutting is simply to drive out the competition. Intentionally driving

¹⁶⁷ Goldfarb, supra note 39, 421 U.S. at 792 (quoting United States v. Oregon State Med. Soc’y, 343 U.S. 326, 336 (1952)).


¹⁶⁹ Id. at 793.

¹⁷⁰ See ABA Informal Opinion 585, supra note 42. See also ABA CANONS, supra note 42, at Canon 12 (“[T]he profession is a branch of the administration of justice and not a mere money-getting trade.”); Ackley, supra note 42, at 76 (the law becomes a business when attorneys obtain cases on a cut-fee basis).
out the competition may be proper in business, but lawyers are part of a connected profession.\textsuperscript{171} While the goal in business is simply to make money, lawyers “play a vital role in the preservation of society.”\textsuperscript{172} In order to preserve this vital role, the Wisconsin Supreme Court must ensure that the profession does not turn into a mere business.\textsuperscript{173} Thus, the impact on the legal profession should appropriately be considered in determining the reasonableness of a fee.

\textit{J. Considering Them All Together}

The foregoing factors do not exist in isolation; that is, together, all of them must be considered in the circumstances of each particular challenged fee.\textsuperscript{174} The factors laid out do not constitute an exhaustive list, but rather they incorporate many of the reasons for and against the minimum fee schedules and attempt to balance the benefits with the disadvantages. Perhaps not all of the factors will be relevant in each instance, but they interact and supplement one another in a manner that meaningfully addresses the concerns raised by the minimum fee schedules. No one factor is more important than the other. The ultimate

\textsuperscript{171} ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 151 (Feb. 15, 1936) (“Business transactions are frankly impersonal and commercial in character. On the other hand, the professional relationship between an attorney and his client is highly personal, involving an intimate appreciation of each individual client’s particular problem. Practices which overlook the personal element in the attorney’s relationship with his client and which \textit{tend toward an undue commercial emphasis} are to be condemned.”).

\textsuperscript{172} Wis. Rules, supra note 2, at SCR Ch. 20, pmbl. [13].

\textsuperscript{173} ABA Formal Opinion 302, supra note 43 (“[N]o lawyer should be put in the position of bidding competitively for clients [and] [i]t is proper for the profession to combat such evils…”).

\textsuperscript{174} See Wis. Rules, supra note 2, at SCR 20:1.5, ABA cmt. [1] (the fees charged must be reasonable \textit{under the circumstances}) (emphasis added).
conclusion as to whether a particular fee is reasonable, and the weighing of the different factors, rests where it always has: the courts.\textsuperscript{175}

Just as reasonable minds may differ as to whether a particular fee is unreasonably high, reasonable minds may differ as to whether a particular fee is unreasonably low. One person may place more emphasis on the client’s financial status and deem a fee unreasonably low because the client is able to pay the customary rate.\textsuperscript{176} Another person may find that the impact on the legal profession as a whole is the most important factor and find that a particular fee is unreasonably low because it turns the profession into a business, even though the firm may be sustainable on a fee that low and the public does not perceive any inadequacy in the services being rendered. These factors are mainly meant to address the clearly anticompetitive behaviors clearly occurring in the Boutique Law Firm hypothetical. Instances of such behavior have negative consequences for the profession and the public that regulation is essential.

III. AUTHORITY OF THE WISCONSIN SUPREME COURT TO PROMULGATE THE NEW RULE

This section is meant to preemptively address the main arguments that may be made against this proposed rule change. First, critics might try to argue that this new rule is merely a price-fixing scheme like that which was abolished in \textit{Goldfarb}. Second, critics might argue that while it may not be price-fixing per se,
it is still anticompetitive behavior that the Wisconsin Supreme Court is prohibited from passing. Third, critics may also argue that the new rule is really just a pretext to protect the self-interest of the profession rather than to further the public interest. Each argument will be considered in turn.

A. Isn’t This Just Price Fixing Already Outlawed in Goldfarb?

The most prevalent argument against the promulgation of this new rule is that it is disguised price-fixing like that prohibited by Goldfarb.177 In Goldfarb, the Court described the minimum fee schedules as a “fixed, rigid price floor.”178 When the clients in that case were searching for lawyers, each lawyer adhered to the fee schedules and none inquired into additional information in order to set an individualized, client-specific fee.179 The schedules set fixed prices to be charged for specific legal issues, regardless of the client seeking those services.180 Quoting the Court of Appeals, the Supreme Court held that the schedule “act[ed] as a substantial restraint upon competition among attorneys.”181 Because the petitioners could not find another attorney to offer the same services for less than the minimum fee, the schedules set forth “a pricing system that consumers could not realistically escape.”182 Thus, the Virginia state bar’s actions constituted a

177 Marina Lao, The Rule of Reason and Horizontal Restraints Involving Professionals, 68 ANTITRUST L.J. 499 (2000) (“[A] professional association rule may be no more than a simple agreement to fix prices, as was the case in Goldfarb...”).

178 Goldfarb, supra note 39, 421 U.S. at 781.

179 Id.

180 Id.

181 Id. at 782.

182 Id. at 783.
“classic illustration of price fixing.” A rule setting forth several factors to consider in prohibiting unreasonably low attorneys fees would not constitute a scheme of price-fixing prohibited by Goldfarb.

The most glaring difference between minimum fee schedules and this proposed rule is that this new rule does not set forth any specific rate for any particular legal service. Unlike the fee schedules, which set forth a specific rate, the new rule does not actually set forth any particular fee. Rather, like the current rule, the proposed rule would allow lawyers to personalize the fee to be charged to each client. The role of the rule would be to discipline lawyers that charge unreasonably low fees, not to discipline lawyers if they charge below a particular set fee. The proposed rule does not actually fix prices, but rather fixes the ways in which to determine whether a particular fee is unreasonably low. For example, if the minimum fee schedules set forth $200 as the minimum fee for title assurance, any lawyer would be subject to discipline for charging less than $200. However, under the proposed rule, a lawyer may charge less than $200 if the foregoing factors are met.

183 Id.

184 For example, $200 for title assurance. To see the latest version of how much the schedules set forth for particular legal services, see STATE BAR OF WISCONSIN, supra note 87, at 1-28.

185 See Goldfarb, supra note 39, 421 U.S. at 782-83 (in regards to minimum fee schedules, lawyers could be disciplined for charging less than the fee set forth as the minimum).

186 Black’s Law Dictionary defines price fixing as “[t]he artificial setting or maintenance of prices at a certain level, contrary to the workings of the free market.” Black’s Law Dictionary (8th ed. 2004). While this new rule may be contrary to the workings of a completely free market, the proposed rule is not price fixing, as it does not attempt to maintain or set prices at a certain level. Lawyers’ fees can, and should, fluctuate based on the importance of each factor of the rule.

187 See Goldfarb, supra note 39, 421 U.S. at 791-92 (“[D]eviation from...minimum fees may lead to disciplinary action.”).
Unlike the minimum fee schedules, the proposed rule does not act as a restraint on competition in the legal profession. Because the proposed rule allows for individualized computation of fees, clients are able to shop around in order to find the lowest prices. For example, the client may be able to find a lawyer or firm that has more efficient ways to provide representation, resulting in a lower cost to the client. In fact, the new rule would actually encourage competition. If a client cannot afford a particular rate, lawyers and firms could either lower their rates for the particular client or would try to find more efficient ways of providing services. Indeed, the only competitive behavior that the new rule would proscribe is the undercutting of another lawyer’s fee with the intent of driving that lawyer out of business; the proposed rule encourages lawyers and firms to focus on the individual client. This benefits the client without turning the profession into too much of a business.

188 In Goldfarb, the Court highlighted the fact that the petitioners could not attain legal services because they could not afford the minimum fee. Id. at 775-76. However, under the proposed rule, a lawyer could charge a low fee if the client were unable to afford the customary rate charged for those services. See supra Part II.C.

189 Supra Part II.E.

190 Supra Part II.C.

191 Supra Part II.E.

192 The proposed rule would not deprive clients of the advantages that they would derive from fee competition. See Goldfarb, supra note 39, 421 U.S. at 785 (this is what fee schedules did) (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 501 (1940)). Rather, the proposed rule allows fee competition while simultaneously protecting clients from the harmful results of over-competitive fee bidding.
B. The State Action Exemption

While the proposed rule is not price fixing as such, some may argue that it is still anticompetitive in nature and should therefore be prohibited by the Sherman Act. Although the proposed rule may limit some types of competitive bidding, it does not bar competition altogether. Nevertheless, even if the proposed rule were challenged on antitrust grounds, the Wisconsin Supreme Court would be able to take advantage of the state-action doctrine.

1. Establishing the State-Action Doctrine

The Supreme Court carved out an exemption to the Sherman Act that provides certain state-actions immunity from violations in *Parker v. Brown*. In that case, the California legislature passed a law that authorized the establishment of programs for marketing agricultural commodities, which restricted competition among raisin growers and maintained prices for raisins. The statute prohibited certain raisins from being sold at less than the prevailing market rate for raisins of the same variety and grade on the date of their sale. The purpose of the statute

---

193 *See* James K. Carroll, *Minimum Fee Schedules: An Antitrust Problem*, 48 TUL. L. REV. 682, 684 (fixed prices exist “if the prices paid or charged are to be at a certain level or on ascending or descending scales or if they are to be uniform) (discussing *United States v. Trenton Potteries*, 273 U.S. 392 (1927)).

194 *See Nat’l Soc’y of Prof’l Eng’rs, supra* note 40, 435 U.S. at 692 (“While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”)

195 Compare this proposed rule to that in National Society of Professional Engineers. *Id.* In that case, the Court found that the agreement operated as a complete ban on competitive bidding, “imped[ing] the ordinary give and take of the marketplace and substantially depriv[ing] the customer the ability to utilize and compare prices in selecting engineering services.” *Id.* at 692-93.


197 *Id.* at 346.

198 *Id.* at 348.
was “to conserve the agricultural wealth of the state and to prevent economic
waste in the marketing of agricultural products.”\textsuperscript{199} Despite a challenge of the law
on Sherman Act grounds,\textsuperscript{200} the Court found no violation.

In determining that the California law did not violate the Sherman Act, the
Court noted that nothing in the legislative history of the Sherman Act indicated
that it was intended to apply to state actions. The Court started with two
assumptions: first, that the California law would violate the Sherman Act if it was
“organized and made effective solely by virtue of a contract, combination or
conspiracy of private persons, individual or corporate;”\textsuperscript{201} second, under the
Commerce Clause, Congress could “prohibit a state from maintaining a
stabilization program like the present because of its effect on interstate
commerce.”\textsuperscript{202} However, the Sherman Act does not explicitly mention states and,
thus, Congress did not intend it to restrain state action.\textsuperscript{203} The Court did note that
a state would be prohibited under the Act from becoming a participant in a private
agreement or combination to restrain trade.\textsuperscript{204} Yet, in this case, the state, acting as
sovereign, passed the law “as an act of government which the Sherman Act did
not undertake to prohibit.”\textsuperscript{205}

\begin{flushright}
\textsuperscript{199} Id. at 346.
\textsuperscript{200} Id. at 348-49.
\textsuperscript{201} Id. at 350.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 351.
\textsuperscript{204} Id. at 351-52.
\textsuperscript{205} Id. at 352 (citing Olsen v. Smith, 195 U.S. 332, 344-45 (1904)).
\end{flushright}
2. The State-Action Doctrine as Applied to Rules of Professional Conduct

The Supreme Court discussed the state-action doctrine in Goldfarb, but held that it was inapplicable. In that case, the Virginia state bar argued that, in issuing the minimum fee schedules at issue, it was merely “implementing the fee provisions of the [state’s] ethical codes and, thus, should qualify for immunity under the state-action doctrine. The Court disagreed, however, and found that the Virginia legislature authorized the Virginia Supreme Court to regulate the practice of law in the first place. Rather than give the authority to the state bar, it was the Virginia Supreme Court that had adopted the state’s ethical codes, which dealt in part with fees. Moreover, the Virginia Supreme Court did not authorize the minimum fee schedules; indeed, it actually encouraged lawyers not to be controlled by them. While the ethical code mentioned advisory fee schedules, the court did not direct the state bar to supply them. Although the state bar’s fee schedules complemented the objective of the ethical code, the state action doctrine requires more than the anticompetitive conduct being prompted by state action. The state action doctrine requires that the challenged

\[206\] Goldfarb, supra note 39, 421 U.S. at 790.
\[207\] Id. at 789.
\[208\] Id.
\[209\] Id.
\[210\] Id.
\[211\] Id. at 790.
\[212\] Id. at 791.
anticompetitive activities be “compelled by direction of the state acting as a sovereign.” 213

According to the Court in Goldfarb, the fact that the Virginia state bar is a state agency given some limited authority by the state 214 was not enough for the state action doctrine to apply. 215 The state bar voluntarily—that is, without being compelled to do so by the Virginia Supreme Court—joined in a private anticompetitive behavior by instituting disciplinary action on lawyers that deviated from the minimum fee schedules. 216 This behavior created a rigid price-fixing scheme from which clients could not get away from. 217 By engaging in such behavior, the state bar could not claim that it was entitled to immunity from a Sherman Act violation. 218

In another case involving rules of professional conduct, the Supreme Court held that professional disciplinary rules may be immune from violating the Sherman Act under the state-action doctrine. 219 In that case, the Arizona Supreme

213 Id.

214 The Virginia Supreme Court granted the state bar the authority to issue ethical opinions; however, there was no indication on the record that suggested the court approved of the opinions. Id.

215 Id. (“The fact that the state bar is a state agency for some limited purpose does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”) (citing Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973)).

216 Id. at 791-92.

217 Id. at 792.

218 Id. One author tried arguing that minimum fee schedules should be exempt from antitrust liability. See Paul R. Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown, 75 COLUM. L. REV. 328 (1975). This article, however, was published before Goldfarb.

Court promulgated a disciplinary rule that restricted attorney advertising. The appellants, two lawyers that were members of the Arizona bar, advertised their legal services in a way that violated the disciplinary rule. After being disciplined, the appellants brought suit alleging that the rule violated the Sherman Act because the rule had the tendency to limit competition. The Court disagreed, and found that the state action doctrine as expressed in *Parker* barred the claim.

In holding that the state disciplinary rule did not violate the Sherman Act, the Court distinguished the facts of the case from those involved in *Goldfarb*. Unlike in *Goldfarb*, where the Virginia Supreme Court did not require the promulgation of minimum fee schedules, in this case the disciplinary rule was “the affirmative command of the Arizona Supreme Court.” Because the Arizona Supreme Court had the ultimate authority over the practice of law in the state, the disciplinary rule was compelled by the state acting as sovereign. Thus, the disciplinary rule was immune from Sherman Act liability under the state action doctrine. While the state bar played a role in the enforcement of the rules, the Arizona Supreme Court completely defines this role.

---

220 Id. at 353.
221 Id. at 355.
222 Id. at 356.
223 Id. at 359.
224 Id. at 359-60.
225 Id. at 360.
226 The Court also noted that, in *Goldfarb*, it concluded that “in holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no
Based on the cases applying *Parker* to rules regulating the legal profession, it is clear that the proposed rule would secure immunity from the Sherman Act under the state action doctrine. Unlike the minimum fee schedules prohibited by *Goldfarb*, the proposed rule would be promulgated by the Wisconsin Supreme Court. Although the Wisconsin state bar would be charged with enforcing the rule, the bar’s role in enforcing the disciplinary rules is defined by the Wisconsin Supreme Court. The proposed rule would still be the affirmative command of the Wisconsin Supreme Court and, thus, exempt from Sherman Act liability.

C. The New Rule is in the Public Interest

Critics of this proposed rule change may also object that it is merely a pretext protecting the self-interest of the profession. Remember that one of the criticisms of the minimum fee schedules was that they were designed to increase lawyers’ incomes. If the rule is only in the private interest of the profession, the

---

227 Id. at 361. For two more cases that found rules of professional conduct exempt from Sherman Act liability, see *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005).

228 WIS. RULES, supra note 2, at SCR Ch. 20, pmbl. [10] (“[U]ltimate authority over the legal profession is vested...in the courts.”).

229 WIS. RULES, supra note 2, at SCR 10.01(2) (the state bar is an arm of the Wisconsin Supreme Court charged with assisting the court in promoting the public’s interest in “maintaining the high standards of conduct in the legal profession...by aiding [the court] in the efficient administration of justice.”). For an in-depth discussion of the relationship between the state bar and the Wisconsin Supreme Court, see *Kaap*, supra note 1, at § 1.34-.42. See also, NATHANIEL CADE JR. ET AL., PRACTICAL LEGAL ETHICS IN WISCONSIN: ISSUES AND ANSWERS 2-7 (2002).

230 Arnould & Corley, supra note 67, at 656. See also *Goldfarb*, supra note 39, 421 U.S. at 787 n.16 (“The reason for adopting the fee schedule does not appear to have been wholly altruistic.”).
argument is that the rule should not be promulgated. The Ninth Circuit adopted this argument in striking down an ethical rule. Interpreting two of the Supreme Court’s decisions, the Ninth Circuit held that “to survive a Sherman Act challenge, a particular practice, rule, or regulation of a profession...must serve the purpose for which the profession exists, viz. the public.” That is, a rule, even if promulgated by the state, must contribute directly to improving service to the public. Rules that only suppress competition fail to survive a Sherman Act challenge. Only a rule that serves the public harmonizes the ends that both professions and the Sherman Act serve.

Considering the MegaFirm hypothetical, it is clear that this rule would be in the public interest. Rather than merely attempting to raise lawyers’ incomes, the proposed rule would prevent over-competitive behavior that turns the profession into a business. If lawyers and firms with substantial resources can move into a community and bid exceedingly low only in order to drive out the competition, the public will suffer. In the short term, while the rates being charged...

---

231 See Wis. Rules, supra note 2, at SCR Ch. 20, pmbl. [12] (“The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”).

232 Boddicker v. Arizona State Dental Ass’n, 549 F.2d 626 (9th Cir. 1977).

233 Id. at 632.

234 Id.

235 Id. (emphasis added).

236 Id. See also Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7, 10 (1966) (“The legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.”).

237 See supra Part II.I.
are intentionally lower than would allow a lawyer to profit, the perceived quality—as well as the actual quality—of legal services may suffer. Even if the quality of services does not suffer, clients may not even end up saving any money. Moreover, with the legal profession focusing more on driving out the competition than providing zealous representation to their clients, the integrity of the profession will decrease. In the long run, potential clients will actually suffer from a lack of choice. If a small community results in only having one or two firms, and each charges $100 for the services, then potential clients will likely be forced to pay that amount or forego representation. However, if law firms were prohibited from charging fees that are clearly only intended to drive out the competition, communities would retain a competitive marketplace.

**CONCLUSION**

Although minimum fee schedules had an important place in history, the Supreme Court appropriately held them to be a violation of the Sherman Act.

---

238 *Supra* Part II.A-B.

239 Everybody has heard of instances in which lawyers have billed clients for hours the lawyer has not spent working on the client’s legal issue. These instances may increase if lawyers begin charging fees that are unreasonably low. If a lawyer, who has a customary billing rate of $100 per hour, charges a client $10 per hour, that lawyer may be tempted to bill the client for 10 hours of work when the lawyer only actually works one hour just to make the same amount of money.

240 *Supra* Part II.I.

241 See Nat’l Soc’y of Prof’l Eng’rs, *supra* note 40, 435 U.S. at 695 (“[A]ll elements of a bargain...are favorably affected by the free opportunity to select among alternative offers.”). If a firm like MegaFirm controls the market in a community, potential clients lose the ability to select from alternative offers.

242 Consider Parts I and III together. It would be interesting to see how the Court would decide a case in which a state supreme court promulgated a minimum fee schedule. Remember, the *Goldfarb* case held that the minimum fee schedules were prohibited by the Sherman Act because they were promulgated by the local bar rather than the Virginia Supreme Court. *Goldfarb, supra* note 39, 421 U.S. at 791-92. Thus, the state action doctrine did not apply. *Id.* at 789-92. If the
Prior to their establishment, lawyers tended to have minimum incomes and many potentially competent lawyers were discouraged from entering the profession. Yet, precisely because they tended to raise lawyers’ incomes by creating a rigid price floor, one could not realistically claim they could escape antitrust concerns. Indeed, lawyers were disciplined if they attempted to charge a fee that was less than the minimum prescribed for particular services. However, there are legitimate concerns associated with lawyers charging fees designed to deliberately undercut the competition. When lawyers focus more on their fees rather than the quality of the services they offer to clients, the profession becomes too much like a business. Although business may benefit from overly competitive practices, the legal profession suffers.

In order to prevent the legal profession from becoming a business, the Wisconsin Supreme Court should exercise its authority over the legal profession. While the minimum fee schedules prevented lawyers from making individualized determinations of a client’s fee, this concern is limited by the proposed rule. The rule allows for an individualized determination of each client’s circumstances, allows for fair competition, and still allows lawyers to charge below a particular rate so long as it is in the interest of the public and the profession. The court must prevent the profession from becoming a mere money-grabbing activity and limiting unfair competitive practices that destroys the integrity of the profession and hurts the public. The proposed rule would honor the spirit and objectives of

---

Virginia Supreme Court had ordered the establishment of the fee schedules, the case may have been decided differently.
the Rules of Professional Responsibility and the earlier canons of professional ethics for Wisconsin attorneys.