Oral History of
ALAN MORRISON
Fifth Interview - February 2, 2008

MR. MARCUS: This is Dan Marcus interviewing Alan Morrison on Saturday, February 2nd, the eve of the Super Bowl 2008.

So Alan, I think last time we finished with the *Goldfarb* case and we should resume our discussion of the other professional cases.

MR. MORRISON: Well, let's go back a little bit. I think I mentioned to you, the first time we talked about the lawyer advertising, the *Virginia Board of Pharmacy* case.

I had decided that minimum fee schedules were certainly one, and the blanket prohibition on lawyer advertising and solicitation, was another very anticompetitive rule. The minimum fee schedules were done by the Bar itself. The lawyer advertising rules were rules of the court. From my work in *Goldfarb* and from other things, it was pretty clear to me that antitrust theory we pursued in the minimum fee schedules would not work because the state court had officially issued the rules and, therefore, under *Parker-Brown* they were—it was state action, they were actually supervising it and we had little or no chance, as it turned out rightly, to be the case when the case ultimately got to the Supreme Court from another place.

So we decided that there was a First Amendment challenge to be brought to the lawyer advertising rules. The challenge was essentially that it was denying the consumers access to information and we brought this first in the context of the *Virginia Board of Pharmacy* case. Virginia, like about thirty-something other states, had statutes that prohibited advertising of the price of prescription drugs. The statutes did not prohibit price competition in prescription drugs, but they prohibited advertising, which was well before the Internet and, as a practical matter, meant there was no competition. You couldn't find out what the price was. You could perhaps call around to every drug store in the county and figure it out, but there was no practical way to do it.

These were all laws that were enacted by legislators principally for the benefit of the local pharmacies. They were anticompetitive in exactly the way we saw the legal profession's rules being anticompetitive. I saw the lawyer advertising rules as being anticompetitive in several respects. One is it was almost impossible to find out anything about what lawyers were doing, what they specialized in, what they charged, anything about them because there was no advertising permitted at all.

I remember when I was in New York—which is where I actually got the ideas to do these First Amendment cases when I was in the U.S. attorney's office—because I had read this case called *Kleindienst v. Mandel* in which, I think I said before, the Supreme Court held that a Belgian Communist, who wanted to come to this country to speak before groups,

had no standing as an outsider, but that the people who wanted to hear him had standing. That seemed to me to be, first place, completely in line with what I wanted to do which was, I wasn't so much concerned about lawyers getting their information out so they could make more money, although I thought that that would happen as well. They would generate more interest, but that consumers could have access to the information. So it seemed to me to be the perfect combination because consumers are much more sympathetic as clients than lawyers are in the lawyer advertising context—especially with then-Chief Justice Warren Burger, who didn't think much of lawyer advertising in the end anyway. But that was further down the road.

So a group, affiliated group with ours, Citizen Action, was next door to us on P Street where our office then was. They had done some surveys and the FTC had done a big study about the price of prescription drugs in places where they are advertised as opposed to where they weren't advertised. We didn't think we needed a whole lot of evidence as to the competitive impact but we thought we had some anyway which was useful. We brought a case in Virginia before a three-judge district court. Those were the days when you challenged the constitutionality of a state statute before a three-judge district court and we filed in Richmond. Judge Merhige, who was a very activist judge, was involved. Judge Albert Bryan, Sr. was involved. His son, Albert Bryan, Jr., had been the judge in *Goldfarb* and Albert Bryan, Sr. got assigned to the panel. We brought this case—

MR. MARCUS: He was on the Fourth Circuit?

MR. MORRISON: He was the circuit judge assigned. He was the senior judge at the time and I don't remember who the third judge was. It was a district judge.

We brought this case and sure enough, we won!

MR. MARCUS: But was it on price advertising or substantive advertising? Services advertising?

MR. MORRISON: The only prohibition was on price.

MR. MARCUS: Oh, it was just on price.

MR. MORRISON: Just on price advertising.

MR. MARCUS: So it was really like *Virginia Pharmacy*.

MR. MORRISON: It was the *Virginia Board of Pharmacy* case. And we recognized—we brought the *Pharmacy* case and we brought it for first for several reasons. One is there are no pharmacists sitting on the Supreme Court. There are nine lawyers. The second thing was there was no possibility of any confusion because they were advertising a price which they were actually going to charge. So there was no possibility of, for example, in the lawyers' area saying we are charging a third. A third of what? Or routine divorce, what's a routine divorce? All of those kind of things. This was absolutely clear,

objective, verifiable information. Precisely the kind and the way the Federal Trade Commission routinely polices advertising in the rest of the marketplace. This was the marketplace.

The third reason was that price competition was perfectly legal, you just couldn't do it. So they couldn't claim that price competition would do anything.

MR. MARCUS: Can I interrupt just to ask, Alan, whether—maybe I'm a little slow this morning, but I take it the bringing of the case challenging the ban on pharmacy advertising of prescription drug prices was a conscious part of the broader strategy to go after lawyer advertising?

MR. MORRISON: Yes. We independently wanted to do the pharmacy case.

MR. MARCUS: You would have done it anyway.

MR. MORRISON: Anyway. But it was clearly done as a First Amendment case and there had been other challenges to rules about advertising, but they had all been on Fourteenth Amendment Due Process grounds. In fact, just as we were bringing this case, the Supreme Court had decided a case called *Snyder's Drugs v. North Dakota*—said that there were no substantive due process rights at all. I think we had that in the Complaint, but we tossed it. It was strictly a First Amendment case.

Then we had a very interesting procedural wrinkle in this case. One of my colleagues had been the principal lawyer. I worked, of course, with him on every case, Ray Bonner, and we won this case and after we won the case in the District Court, the state attorney general made a motion for reconsideration but did it way after the ten days were over. Under Rule 59(e), the ten days are absolutely jurisdictional. We pointed this out, the motion was denied and then they filed an appeal. So we were faced with kind of a hard choice. We had a really good opinion that we wanted to get up. They had not made much of a defense. The defense was that the statute was okay because they didn't want you to shop around because you might be taking different drugs, and the pharmacists were supposed to help you to be sure that you didn't take inconsistent drugs and that was plainly both over-inclusive and under-inclusive, and there was no evidence that that was really a reason and there were lots of better ways of doing that. And the pharmacist was supposed to ask you and so was your doctor. These were all prescription drugs, after all.

So by this time, actually, Ray had left to go out to the West Coast and work for Consumers Union out there. I was writing the opposition to the jurisdictional statement and I felt that I had an obligation to the Court to tell the Court that there was what I thought was a jurisdictional defect and still think was a jurisdictional defect. The Court paid no attention to it whatsoever. It noted probable jurisdiction.

I've got to continue with the story because you need to have some other parts of the story as we are working in with this. Our Health Group, headed by Dr. Sidney Wolfe, was very interested in the delivery of medical services. It decided that it wanted to produce a

directory of doctors that would have in it objective information about the doctor; where they went to medical school, are they board-certified, how long they've been practicing, do they speak languages other than English, do they take Medicare/Medicaid, what are their basic rates, what kind of assistance do they have, what kind of backup do they have, all kinds of objective things that we wanted to do—wanted to find out. So Sid and his group put together a survey, and they sent it out to Prince George's County Medical Society and the State Medical Society. I guess it was just Prince George's County, and they got back a letter from the State Medical Society saying that it would be unethical for doctors to cooperate with this because it would be advertising. We said, "Wait a second. They're not advertising, they're not paying us to do anything. We're doing it. We're controlling it. We have an interest in doing it." Nope, they said you couldn't do it.

While the *Virginia Pharmacy Board* case was proceeding, we brought in Maryland this doctors case. It got hung up in all kinds of procedural mishmash and, meanwhile, the *Pharmacy* case was going forward. *Goldfarb* is now in the Supreme Court. Meanwhile, there is an obscure abortion case that is up in the Court. It's a case called *Bigelow v. Virginia*. This is the example I always cite about why I read *U.S. Law Week.*

Bigelow was a case in which the defendant, Mr. Bigelow, ran a small newspaper, I think, in Charlottesville, Virginia. The newspaper, in 1972 or before, was advertising abortions that were legal in New York, but illegal in Virginia. The case went to the Supreme Court about the same time that *Roe v. Wade* went to the Court. It was held and after *Roe*, the petition was granted, vacated and remanded for further consideration in light of *Roe*. Defendant said well, *Roe*, this is all legal now, you can advertise. The State said, no, it was illegal at the time and you couldn't advertise.

The case goes back up to the Court. The Court grants *cert*. I see this immediately as an opportunity for us to file an *amicus* brief in the Supreme Court supporting Mr. Bigelow. His principal argument—he was represented by the ACLU in New York—was that he was exercising his right of free press and, although it was advertising, *New York Times v. Sullivan* said it was okay to advertise. This was all part of the free press. We wrote a brief which said all that's true, but the real interest is the interest in dissemination of information to consumers because we had *Virginia Board of Pharmacy* waiting to come up. In fact, it was going on at the time. That's the real interest here, and information about a lawful service cannot be suppressed consistent with the First Amendment.

MR. MARCUS: Because of the interest of consumers' access to information?

MR. MORRISON: Yes, in this case consumers could not be denied access to truthful information.

We filed the *amicus* brief in the case and the same day that *Goldfarb* was decided, *Bigelow* came down and Justice Blackmun wrote the opinion. I think it may have been eight to one. I think Rehnquist dissented, but I'm not positive. Anyway, it was a very strong—at least seven to two—saying our position exactly. This is a First Amendment case.

Meanwhile, *Virginia Board of Pharmacy* had been granted. The Court noted probable jurisdiction. The government filed its brief. We then filed our brief after *Bigelow* came down saying *Bigelow, Bigelow, Bigelow, Bigelow*. They filed a reply brief in which they say nothing about *Bigelow* at all.

MR. MARCUS: When you say the government, you mean…

MR. MORRISON: I mean, the State of Virginia.

MR. MARCUS: All right.

MR. MORRISON: The federal government was not involved.

MR. MARCUS: Although they might have been on your side.

MR. MORRISON: They weren't. Not yet. They came in on the lawyer advertising case, but not yet.

So the same day as *Goldfarb* came down, *Bigelow* came down. *Goldfarb* was a big story because it was lawyers, antitrust and it was the Washington, D.C., area. It was a big story all over. I said, "The *Bigelow* case, which was decided the same day, was a much more important case than *Goldfarb*."

Nobody paid any attention, you know? And it was. The ACLU didn't make the commercial speech kind of argument—that there was commercial speech. It didn't really come up in that context because it was litigated in a different way. Blackmun just assumed that commercial speech applied. *Virginia Board of Pharmacy* was the first case in which they actually directly confronted the commercial speech doctrine. Although it was plainly implicated in *Bigelow* it was not discussed because of the way the case came up procedurally.

I remember two things about the oral argument. The first was that Justice Blackmun said to Tony Troy who was, I think, then the deputy attorney general, later became the attorney general of Virginia, "What about the *Bigelow* case?" And he said, "Doesn't have anything to do with it. Nothing to do with it. That's an abortion case." Blackmun just sat there and nodded his head at him.

That was one thing I remember. The second thing I remember was about my argument, in the middle of the argument—there were two things that I was worried—two questions that I thought I was going to get and worried about. One was about cigarette advertising. At this time, the Congress had banned the advertising of cigarettes on television and radio.

And in the *Red Lion* series of cases, that had been upheld—in *Red Lion*, saying that the Congress had special authority over interstate commerce and the airwaves. Then another case came up afterwards, they had specifically upheld the cigarette ban.

MR. MARCUS: Well I think there was never a Supreme Court opinion. They affirmed—

MR. MORRISON: Affirmed a three-judge court, that's correct. So the first I was worried about was cigarettes and the question was, "If we uphold this, what is this going to do to the ban on cigarettes?" I was prepared to say you would have to make the same kind of analysis we would have here and that there was at least an argument that it would be unconstitutional. You would certainly have to consider the First Amendment implications and I wasn't prepared to say what the answer was, but I was certainly ready for that. I didn't get that question. That came up years later in other contexts.

The second question was, was this going to apply to lawyer advertising? And I was absolutely prepared for the answer to that question which was, "The same analysis would apply. The First Amendment would apply. The Court would have to look at the justifications given for the particular rules being challenged and, to the extent that the rules were the same as these rules here, the answer would be the same." I was prepared to say that.

I didn't get that question. I got a different question from Justice White. He said to me, "Well, Mr. Morrison, I suppose your next case is going to involve lawyer advertising." The courtroom broke out into laughter. And completely uncharacteristically for Justice White, he said, "That's okay. You don't have to answer that question." Because he thought he knew what the answer was. When he asked me the question that way, I was prepared to answer the question, "No, Justice White, our next case involves doctors," which was true and we had actually disclosed that at one point in our papers.

MR. MARCUS: Your Prince George's County case.

MR. MORRISON: Yes. Our next case involves doctors. But he made his point and everybody understood the point that the lawyers case was going to come up next.

MR. MARCUS: And that's why there was a footnote in the Supreme Court's decision in *Virginia Board of Pharmacy*. I shouldn't get ahead of your story.

MR. MORRISON: Yes, well anyway, we won the case. Justice Blackmun writes his opinion, says *Bigelow, Bigelow, Bigelow* and lots of other things—this is a silly rule and everything like that, and I think maybe Rehnquist dissented in that one, too. I don't remember for sure.

MR. MARCUS: Yes, I think so.

MR. MORRISON: I'm pretty sure he did. He dissented a lot—much more when he was an Associate Justice and many more concurring opinions than when he was the Chief. So it was a great day and we knew this—a lawyer advertising case—was going to happen.

We were perfectly prepared to have the doctors cases and there was another doctors directory case that was being brought. There was a lawyers directory case brought by

Consumers Union in Virginia. We thought those were better vehicles. Meanwhile, out in Arizona, Bates and O'Steen started advertising. They got slammed and they took their case to the Supreme Court. The Supreme Court agreed to hear that case. Actually, I think the State Bar lost that case—I think it was the State Bar against Bates and O'Steen. In any event, right on the heels of this, that case went to the Supreme Court and we had hoped for a little more time and reprieve, but it didn't happen that way.

We filed an *amicus* brief in the case as well as others. This time the solicitor general came in because Bates had claimed both an antitrust violation and a First Amendment violation and so the government came in and Dan Friedman came in and argued for the federal government and a lawyer in Arizona named Bill Canby, who later became a judge on the Ninth Circuit, argued and we did a moot court for him, much to his appreciation, I think. The case was argued and I learned a really interesting lesson from that case. The government came in and said no antitrust violation because of *Parker- Brown.* The state was regulating the advertising, the State Supreme Court had issued these rules and after *Goldfarb*, that was clearly right and it was clearly right before *Goldfarb*. The antitrust laws are not designed to get at state court ethical rules. But they came in and they said the First Amendment applied. They said *Virginia Board of Pharmacy* and it was anticompetitive. Dan Friedman, whom I'd seen argue many times and then saw in the Federal Circuit, was a wonderful advocate. But I must say he was quite uncomfortable arguing the pro-First Amendment side.

Because he's always—representing the federal government, he's almost always against the First Amendment. Not against it, but for a narrow interpretation.

It reminded me that sometimes having the best possible advocate, if he or she doesn't have their heart in it—

It was awkward. I remember seeing a similar thing—the football players hired Ken Starr after he left the solicitor general's office to argue on behalf of the players against the league and Ken did an okay job, but I didn't feel he had his heart in it the way he would have had if he'd been arguing the other side.

Somebody thought, "We ought to get the solicitor general, he knows all this stuff." There is something to be said for having the person with the passion on it.

Anyway, five to four, the opinion, again written by Blackmun, saying the state can't bar all lawyer advertising and that these were not narrowly-tailored, objective restrictions—the ones that they wanted to have—legal clinic, fixed fees and hours. Chief Justice Burger wrote in a passionate dissent saying, "It was the beginning of the end of the Universe," and, "The Bar will never be the same again." Of course, it wasn't the same again. It was actually better. Some things worse, but overall, better. I've often been asked, "What do you think about all this now?" And I say, "Look—I have two reactions. Do I like some of these ads I see on television? No. Do I think they are harmful? No. Do I think many people are offended? Sure. But there are people who pay attention to them

we know because people are spending real money for these ads and they wouldn't do it without it."

MR. MARCUS: People are getting legal services.

MR. MORRISON: And most importantly, they are able to get legal services that they need—

MR. MARCUS: At a reasonable price, maybe.

MR. MORRISON: And this is one of those cases where if the Bar had gone and done a lawyers directory with the kind of information that we wanted to do with the doctors directory and the Bar had done a service and controlled for all of this, the result might have been different. In the first place, people probably wouldn't have brought these lawsuits. In *Bates* and *O'Steen*, the lawyers were on the defensive there. That is, they got sued and they were subject to potential disciplinary proceedings. So they stuck their necks out. In the *Virginia Board of Pharmacy* case, we were a consumer group; they couldn't do anything to us. We had low risk. There was no risk at all. It's easy to be a plaintiff in that kind of a case. It is quite difficult to stick your neck out, with the lawyers. So that became the beginning of the changes in the lawyer advertising rules.

Two other things had been going on during this time as well. One, the ABA and the State Bars were getting concerned about prepaid legal services—in particular, group legal services, that is the ones that were referred to as "closed panel plans," which were the legal equivalent of HMOs. The reason that these were initially popular was because they did what HMOs did, except that they were consumer-driven as opposed to insurance-company-driven. They were often set up by labor unions and they effectively drove down the price of legal services by making it affordable, and it was a form of insurance. When I first heard about this, because it was part of our work on the legal profession, I went to work with a group whose principal purpose was to get these plans out and get more known about them and to remove barriers. There were two significant barriers that we worked to remove, and I worked with a group on it. And, under the Taft-Hartley Act, jointly negotiated labor management plans have only limited subjects of collective bargaining and medical plans were included but legal services plans were not, so we got Congress to change that.

Second, there were two problems with these plans from a tax perspective. One was that the people who wanted these plans wanted to make the contributions to them excluded from income, like medical insurance plans, which made them more attractive and cheaper in terms of benefits both for the employee and for the employer. The second and bigger problem was that in all likelihood the payments for legal services would be treated as income to the plan beneficiary so that you would have to pay tax on the payment with no money to pay for it. That was also true with the medical plans and they had fixed that for the medical plans. Those were very important things and we got a cooperative Congress to fix those in the early 1970s as a prelude to doing this.

Meanwhile, the ABA—was dominated in this regard by the General Practice section, and they were very much against it because they saw it, just as doctors saw prepaid medical, and HMOs, the lawyers saw this as potentially cutting into their business which it probably would have if they'd really gotten off the ground. To some extent they did get off the ground. The ABA had some rules, the effect of which was to—they did it this way: lawyers were forbidden from cooperating with plans that advertised the availability of group legal services and so while the Bar couldn't regulate the plans because they were not lawyers, they could say that it would be unethical for lawyers to cooperate with them. At that time, the ABA Rules were adopted either automatically or virtually automatically by most states in the Union.

Well these ethics rules that the ABA promulgated were seriously anticompetitive because they essentially said that lawyers couldn't cooperate with these plans and the plans couldn't get off the ground without lawyers.

MR. MARCUS: What was the ethical violation?

MR. MORRISON: Advertising.

MR. MARCUS: Advertising?

MR. MORRISON: Because they were—the plan was, theoretically, advertising. Not on behalf of the lawyers, but on behalf of the plan.

MR. MARCUS: Was there also an element of control of lawyers by non-lawyers, I vaguely remember, with some of this stuff?

MR. MORRISON: Yes, but those sort of things were taken care of. Everybody agreed that they couldn't control the lawyers' handling of individual cases. The question is could they do this?

We brought an antitrust case against the ABA about this time—this was in the mid-70s—it was the *Pre-Law Society of Middle Tennessee State University v. American Bar Association.* They ended up backing off and they ended up changing their rules. We never did get it litigated. They said, well we're only advisory, so we had to make it clear that they couldn't do it. About this time, the second thing that happened was State Bars started taking a look at the ethics rules more seriously and so the ABA's model rules were not automatically adopted, so that helped as well.

In any event, I think it was the FTC or maybe the Antitrust Division were also making noises about these things being anticompetitive. We were reasonably successful both on the legislative side and also on the litigation side. For a while these prepaid legal services plans got going and they have become more common but they have never become like medical plans and the principal reason was that starting in the late 1970s, labor unions, who were the principal proponents, went into a decline and they lost their bargaining position and members became more concerned about not losing wages and getting wage

increases in times of inflation. It just became less of a priority. As labor unions, particularly in the industrial sector, became less powerful, the movement never really moved ahead. I don't have the latest data on it, but it's not anywhere near what anybody thought it would be, probably for market reasons as much as anything else. There are some private plans. I think at one time some of the credit card companies had them. They were not, strictly speaking, the prepaid and closed panel plans, they were advice plans and discounted services and you could get lawyers if you were driving and got in a traffic matter in some other part of the country. They were useful but the movement never took off. In any event, we saw our job as eliminating the barriers, and we had eliminated the barriers. There is currently in the code nothing that in any way stands in the way of prepaid legal services.

The other related antitrust prong that we had going was during the time that I was litigating *Goldfarb*, I came to understand the process of buying and selling houses in Virginia. The reason that A. Burke Hertz and the rest were able to charge so much money for it was that there was an ethics opinion of the Virginia Bar which said that the examination of the title to real estate was a matter that only lawyers could do because they were stating a legal opinion as to the state of title and that, therefore, title examiners and title insurance companies could not do that on their own. They had to have a lawyer examine the title, and it would be unethical for lawyers to assist in any way in a house closing in which the title examination was done by a non-lawyer.

MR. MARCUS: And the theory was that the non-lawyer was engaged in the unauthorized practice of law.

MR. MORRISON: Unauthorized practice of law, yes. There was a company in Virginia called Surety Title that was trying to do title examinations without lawyers and the Bar started making noises and they came to me and so we brought an antitrust action against them.

During the course of this we discovered that there had been several impassioned meetings at which the Bar debated and issued these ethics opinions and it was a hundred percent clear from these that the sole motive was economics. Some guy got up and said, "If we let them do this, they'll be taking bread out of our mouths." Somebody else said, "What do you expect to do? We'll turn into a bunch of Legal Aid lawyers."

We brought this case—it was not the world's most sympathetic client. They were doing some stuff that didn't look so great. We ended up not winning—we lost the case, *cert.* was denied, Justice White dissented. But in the meantime, the Virginia Bar got wise—it may have been while the case was pending, I can't remember for sure; they proposed a new rule—actually it probably came from the Supreme Court. It had to come from the Supreme Court.

MR. MARCUS: The Virginia Supreme Court.

MR. MORRISON: The Virginia Supreme Court changed the rules on opinions on what constitutes the unauthorized practice of law. In the past, the State Bar could issue them without any approval by the Supreme Court of Virginia. They changed it so that the Bar could issue opinions saying that something was *not* the unauthorized practice of law and hence could be done, i.e., pro-competitive without the Supreme Court of Virginia, but if they had to do it the other way around and said it was a violation, they had to go to the Virginia Supreme Court, which was perfectly fine. A perfectly sensible rule. That is, there was no anticompetitive problem in saying that you could have more competition.

MR. MARCUS: That was your quasi-victory.

MR. MORRISON: Yeah. Well, it was clear that the case would never have been victorious without that. The FTC, as I recall, did some further things about that, but I don't recall seeing any other instances of State Bars issuing unauthorized practice of law opinions.

I have two or three other areas I want to talk about. One is unauthorized practice of law, and I want to talk about residence and other requirements for Bar admissions, and then policing attorneys' fees, principally in the plaintiffs' bar.

MR. MARCUS: Let's—why don't we do unauthorized practice of law.

MR. MORRISON: Yes, I just want to give you a preview. I was sitting in my office one day in about 1977 and I get a letter from Rosemary Furman of Jacksonville, Florida, and it says, "Re: Help." I always read my mail because there were all sorts of good things showing up in it. Rosemary Furman was a paralegal. She had been a legal secretary in Jacksonville, Florida, and she ran an independent service in which she was helping people who could not do the work themselves to prepare simple legal papers: divorce, adoption, name change, and other things. The State Bar of Florida was very unhappy. The State Bar of Florida, fast forward, has, even today, the most extensive effort to police the unauthorized practice of law of any state in the Union. They have a budget in excess of $1 million that they spend, by their own admission. No other state has virtually any enforcement mechanism. Many other states are principally concerned with people who are misrepresenting themselves as lawyers, people who are unlicensed in the state but licensed someplace else or have been disbarred and are practicing. We never had any problem with those. The problem we had was this. And the State Bar of Florida came after Rosemary Furman and they brought a proceeding against her. She had heard about my work and she wanted me to come down and represent her. The first thing she wanted me to do was to bring an action in the federal court on antitrust grounds to enjoin the enforcement. She was smart. She really knew what she was doing.

MR. MARCUS: Their enforcement action was before a state agency or in an injunction action in state court or what? Do you remember?

MR. MORRISON: Yes. The Bar has to seek an Order to Show Cause from the State Supreme Court.

MR. MARCUS: I see.

MR. MORRISON: The State Supreme Court issues an Order to Show Cause and they set the matter down for hearing before a circuit court judge in the county in which the unauthorized practice was alleged to have taken place. The State Bar has lawyers—they actually hire lawyers—or hire, they probably don't pay them. They don't pay them. They get lawyers in a firm there to prosecute the case on behalf of the State Bar. The remedies they were seeking were injunction and contempt of court.

There were lots of reasons why Rosemary was singled out, although they were going after other people at the same time as well. The first reason was that she was charging $50 for things that lawyers were charging $450 for. The second thing was that she hated lawyers generally and the organized Bar, in particular. She would denounce them as "scum" and "thieves" and everything else. She was very strong and very good on television and the Bar was going crazy. They just couldn't abide this. So she got me to come down. I wrote her back and I said to her, the case has already started, under Supreme Court precedent, you can't get an injunction against them. It's not a violation of the antitrust laws to begin with and, therefore, I declined to do it. I think actually they were threatening to do this. They hadn't done it yet. Well, maybe they had done it. Anyway, the point was I said I was not going to do that case because it would have been futile. I said if you want me to represent you in the state court proceeding, I'll do it, but I have to get local counsel. So I got local counsel, a guy who she had helped out with some things. He was basically a criminal defense lawyer. A lovely guy whom we've kept up with for many years, named Bill Sheppard. He helped out in this case. I went down there and I defended her.

The judge was extremely unfriendly; he issued an order saying, no, you can't do this. This is the practice of law. She kept saying, "Well what is the definition of the practice of law?" Of course, nobody was going to give her a definition. She was typing up papers, so therefore she was doing legal pleadings and she was telling people what to do, therefore she was giving advice. She was not going to court, but she was doing everything short of it. Although a lot of the stuff focused on the divorce papers, she was doing other things as well. It turned out that the Bar had trouble getting her clients—people who would be witnesses for her because all the people she served loved her. She was doing things—she knew what to do.

MR. MARCUS: She did good work.

MR. MORRISON: It was very good work. In fact, she did better work than a lot of lawyers who didn't know all the details, because she really did know everything about what she was doing. If she made a mistake, she didn't charge anybody anymore. She was also very active in the local women's center and she did a lot of work for battered women who were tossed out of their houses and left with children. I think that the judges could figure out which papers she typed because her typewriter had a distinct style and the people would come in pro se and they would ask—the judges would sometimes ask them, "Did you type these papers?" and they said, "No, Furman." They said, "No, I got it

done at the Northside Secretarial Service." At one point she had a couple women who were helping her out, but she was very good.

So we lost the case in the court and we took an appeal. Meanwhile, another case had come along in which we had nothing to do with, didn't even know it was going on—*Marilyn Brumbaugh*. Florida Supreme Court, same kind of situation—divorce preparation—and they said, "Well we realize that typing the papers is okay. That's okay. But, that's all the person can do. Anything else is the unauthorized practice of law." We said, "That can't be right. These people are all people who can't read and write. They don't know any legal proceedings. They can't fill out the forms. If they could fill out the forms, they could do them themselves; there is no requirement that these papers have to be typed. This is, in effect, virtually nothing." It was illegal for the clerks of the court to tell people how to fill out the forms because that would be giving legal advice also. We said it was a completely unworkable situation. We threw in for good measure, this also violates substantive due process and equal protection because, for many people who want a divorce, they cannot afford a divorce and if they cannot afford a divorce, the State maintains a monopoly over the divorce. Therefore, they cannot be divorced and under *Boddie v. Connecticut*—the Supreme Court had held that a $50 filing fee for a divorce is a violation of due process and equal protection for those who can't afford the filing fee.

But this was divorce and we said this is the same kind of barrier. These people have no ability to pay it. Unfortunately, the way the case was structured, we didn't really have the evidence as to particular plaintiffs who were adversely affected and for whom there was no other remedy, no Legal Aid, no pro bono lawyers, no nothing. We didn't have any of those plaintiffs, in part because we were on the defensive and the charges were with respect to people who, while middle class, they were not completely poor. So the issue was presented. The Florida Supreme Court didn't pay any attention to it, nor did they pay attention to our plea to narrow *Brumbaugh* (or broaden it, depending on which way you look at it) to make it more workable. They said *Brumbaugh* is the law and that's it. We filed a *cert.* petition and *cert.* was denied—not very surprisingly because we didn't have much in the way of a record. So she had this injunction against her. They hadn't held her in contempt and she purported to follow *Brumbaugh*, but she couldn't do it. She couldn't do it because it didn't work and because in her heart she knew it was wrong. She couldn't help these people. Sure enough, the Bar caught up with her. This time they brought a criminal contempt against her.

The criminal contempt could have put her in jail for an indefinite period of time, so we made a motion for a jury trial. That was denied. We tried this case before another unfriendly judge. This one was on television. It was my first experience with television. None of the witnesses for the other side had any complaints about her at all. The only problem they had was that the judges were hostile to the papers because Rosemary had done them. Well, big surprise. So if we had gotten a jury trial, we might have been able to do something. We didn't get a jury trial and the judge recommended the sentence of five months in prison.

She got scared. We went to the Florida Supreme Court, raised the jury trial issue, the argument about *Brumbaugh*, constitutional rights. They didn't pay any attention. We went to the Supreme Court and we got a stay from Justice Powell, but then *cert.* was denied. The only issue we took up was the jury trial issue. So Rosemary at this point was about to go to jail. Meanwhile, we had decided that about the time they went after Rosemary for the criminal contempt that we had to go on the offensive. So we took the *Boddie* case and put it in an offensive posture. We found, through Rosemary, a woman, poor, black, on welfare, with three children. Her husband had left her. She just wanted to get a divorce and get rid of him. Legal Aid at the time was taking only cases in which there was current abuse because they simply didn't have enough people to take more. Their budget had been seriously cut. We brought a class action on behalf of Serena Dunn against the Florida Bar and the Florida Supreme Court saying that, as applied to divorces, adoptions and name changes, over which the state maintained a monopoly, this was a violation of their due process and equal protection rights to prohibit the Rosemary Furmans of the world from providing advice and assistance and, at the same time, not have any pro bono services or anything else to do it. You could change—there are lots of things you could do. The one thing you can't do is to keep denying these people access to legal services.

MR. MARCUS: You brought this in federal court?

MR. MORRISON: Federal court. They made motions to dismiss and that was denied. We made a motion for class certification, a (b)(2) injunctive class. I had our client in court that day. I was getting—I had made my part of the argument and the lawyer for the other side was arguing about why we shouldn't get class certification. The judge said, "Would counsel please approach the bench?" So I go up to the bench and the judge says to me, "Mr. Morrison, please don't look around, but would you tell me is your client in the courtroom today?" I said, "Yes she is, your Honor." He said, "Well, you know, she has been sleeping through the entire proceeding." I said, "Yes, Your Honor, on the way over she told me that she had been up the night before with her small children and she's very tired and it was very difficult to get her to come today." He said, "All right. I appreciate that," and he said, "I wonder," he said, "Do you think it's possible you could get an additional class representative?" He said, "Being class representative is not a particularly onerous requirement, but there are some sort of minimal standards." I said to him, "I think we could do that, Judge." And, sure enough, we did so. Judge Howell Melton was perfectly prepared to do this.

We took a bunch of discovery and they made a motion for summary judgment. It was denied. All set to go to trial and we were literally on the eve of trial and the State Bar with the State Supreme Court issued a bunch of new rules which promulgated a series of forms that were useful. They loosened up on what the clerks could do. While it wasn't anywhere near what we wanted and while Rosemary still would have had trouble complying, it was impossible to go to trial on this basis. So we declared victory. We then sought attorneys' fees. The judge who was assigned to the case, who had been very sympathetic to us and, I'm sure would have given us attorneys' fees, but, for reasons that I never understood, except he had a backlog, stepped aside and a visiting judge who

knew nothing about the case, from Missouri, came down and he handled the fee application. He said we weren't entitled to fees because we did not state a claim to begin with even though the trial judge had said twice we were upheld. We went to the Fifth Circuit and they declined to overrule. We got no fees for having done a really lot of work. It was very, very, frustrating. Meanwhile, the State Bar rules on unauthorized practice got a little better and they've gotten better in the meantime and there has been a little less enforcement.

I know this is still going on because there is another paralegal who has written to me from time to time asking me to help her out, and I've just said there is not much I can do. It is a terrible, terrible area, the unauthorized practice of law. It is the area which I felt that I had the least success in litigation. These were all state court claims, state court. We were never able to get the *Boddie* case back into court again in any other situation because Florida was really the only place that was really tough on this.

MR. MARCUS: I think in other places there have been some more reforms, like California.

MR. MORRISON: Or if they are not formal reforms, they just sort of leave them alone, let them be. Nobody says that it is legal, but nobody comes after them and the lawyers are not complaining.

MR. MARCUS: I think the Internet has made some *de facto* changes, too, with people putting out these forms.

MR. MORRISON: Yes, well, the form books. You can't stop that and not only that, but computer programs, too.

MR. MARCUS: What happened to Rosemary? Did she have to go to jail?

MR. MORRISON: No. She didn't go to jail. We—in Florida the governor has a right to clemency. I got down on my hands and knees, not quite literally, pleaded with the governor.

MR. MARCUS: Who was the governor? Do you remember?

MR. MORRISON: Graham, I think was the name.

MR. MARCUS: Oh, Bob Graham, yeah.

MR. MORRISON: This was in the early '80s and I said she has agreed to close her business and she's going to move out-of-state. They said if she closes her business within thirty days, we will withdraw the judgment of guilty. She really did not want to go to jail. She was a woman probably in her mid-fifties at the time and the notion of spending six months in jail—maybe it was only four months in jail—was just more than she could tolerate, and rightly so. There were a lot of people unhappy and the governor did the

politically right thing when we made the offer to do that. I didn't think she would get clemency because the Bar painted her as having willfully violated the rule, and in one sense she did.

MR. MARCUS: But she couldn't help it.

MR. MORRISON: She couldn't help it. She was doing what she thought was the right thing to do and she was—at one point she was on *60 Minutes* with this and she was all over the papers all over the country and the Bar just got a terrible black eye as a result of all of this. People today still remember, oh, the lawyers and Rosemary. In fact, she died a few years ago. I had lost touch with her—I thought she was still in upstate New York where I'd been in touch with her. She was not there. She had moved back to Florida. I think she had some family there and she passed away a couple years ago. A lawyer, whom she had helped out, named Eddie Farah, had become quite prosperous doing personal injury cases, and he commissioned somebody to put together a film about her. It was a documentary. It's a really lovely thing and they had it at the Legal Aid Society, and somebody who was from the Florida Bar was supposed to come at the time to sort of let bygones be bygones, but they cancelled and they didn't show up. I went down there and gave a talk on her behalf.

MR. MARCUS: That's nice.

MR. MORRISON: It was a nice thing to do.

The unauthorized practice issue continued to bedevil me and we had one other context in which we tried and didn't much succeed and that was bankruptcy. Bankruptcy is another area where we really could have done something important. The bankruptcy cases were situations in which the bankruptcy rules, or at least the customs, essentially required that lawyers fill out the petitions for individuals. We're not talking about corporate reorganizations, we're talking about individual bankruptcies, either the equivalent of a reorganization or a straight bankruptcy. Lawyers were being used to fill out papers, and there were real barriers. The bankruptcy judges, the U.S. Trustees, nobody seemed to understand that this was a bad idea. The thing that was most frustrating is that the credit card companies didn't understand that this was money being siphoned away from them. Because the lawyers got paid first as expenses of the administration, so they spent $500 off the top when somebody could have done it for $150 and that would have been $350 more for creditors. Never could get any traction on it, and I probably didn't work as hard on it as I might have. But every time I tried with the rules people or other people, nobody seemed interested enough to do anything about it. That was another area where unauthorized practice was bad.

Third area, immigration. That's sort of been one that has developed over the years that there are people helping other people fill out immigration forms now. We had one case in North Carolina where a group was doing that and the North Carolina Bar threatened them. They came to us and we wrote a letter saying, "This is a federal agency and the

state courts have no authority to regulate that." There was a case involving the Patent Office out of Florida many years ago in which it said that was preempted.

The federal agencies were perfectly happy to have whoever was doing the immigration stuff do it, and they backed off. We never had to bring a lawsuit about it. Interestingly, the best agency for unauthorized practice, and the model, is the Internal Revenue Service. The Internal Revenue Service has a series of gradations—if you are a lawyer you can do everything; if you are an accountant you can do other things, but an accountant can also pass the exam and represent people in the Tax Court. They have tax preparers and other people who get various statuses, depending upon what they can show. Our argument always was the way to deal with an unauthorized practice is not to say it is either lawyers or lay people, it is to have limited licenses for different people to do different kinds of things. Most of them do not want to be general practitioners.

MR. MARCUS: They don't want to litigate cases, right.

MR. MORRISON: No, no. Although in some cases they may want to. The other thing that always drove me crazy was the rules that mom & pop grocery store corporations had to have an outside lawyer. They couldn't represent themselves even in bankruptcy, even though probably a lawyer had incorporated them and not bothered to tell them that, by the way, every time you want to do something from now on, you have to have a lawyer. That always annoyed me enormously.

MR. MARCUS: What do you think is the reason for the difficulty in this area? Is it the problem that courts worry about the slippery slope and the difficulty of drawing lines between what you really need a lawyer for and what you don't?

MR. MORRISON: I think there are two sets of reasons. One is that there is no obviously applicable federal handle and, therefore, just as there wouldn't have been—if you didn't have a federal handle over advertising or minimum fee schedules, you wouldn't have got—

MR. MARCUS: Like the First Amendment, right?

MR. MORRISON: Yes. Well, somebody said to me, "Well it was a First Amendment violation." Rosemary would say to me, "All I'm doing is speaking." I said, "I understand you're saying that, Rosemary, but nobody's going to—you're practicing law. Maybe they'll get you because you took money."

Of course, I always used to say when I teach this stuff, I would say, "Does it matter that the people are taking money?" The answer is yes and no. It matters because it shows you what's going on but, no it doesn't because if the purpose is to protect the individual from bad advice, it shouldn't make any difference whether they are paying for it or not. Viscerally, of course, it always seemed to matter. Rosemary would have done these things for nothing.

So that's the first set of reasons. The reason on the other side is that there are the twin perils of protectionism and paternalism. There is a protectionist aspect to it. Some—even though people say they can't afford it, if they really, really, really want it, they'll scrape the money together and they'll be able to pay the lawyers. Second, there is this paternalistic attitude that lawyers—we lawyers know what is good for you and you really do need (as I used to put it) to drive a Cadillac even though you can get there on your bicycle. And that's the big issue. You have to go first class.

MR. MARCUS: Do you think the increased availability of free legal services for really poor people, even though it's inadequate, played a role in the attitudes of courts?

MR. MORRISON: Probably not very much because there is—in these situations, most of the people couldn't afford it—or couldn't get it. And of course, we've cut back so much on free legal services in recent years, that you couldn't get it. The other thing that was always odd was that they'd say, "Well, it's perfectly all right. You can come in and be *pro se*. But we can't have these outsiders coming in and messing up our court system." I always would say, "Look, Rosemary Furman doesn't mess up your court system. She makes it more efficient. She does it properly."

MR. MARCUS: You don't want these people *pro se*.

MR. MORRISON: You don't want these *pro se*, yes. The judges just didn't like it and so we never could make much progress. And there were no clear lines to be drawn as a matter of law. We've had to make movement as a matter of policy and they've recognized that, yeah, it's better to have a lawyer in some cases, but if you can't afford a lawyer it's better to have somebody than nobody—or having yourself do it. In some cases it's literally impossible. People can't read and write and they certainly can't understand these forms or figure out what to do. We would say to them, "Is giving legal advice telling them which courthouse they have to file in, how many copies they have to file, how many days they have to do it? Is that legal advice?" The answer was, "Yes, yes. You are applying the facts to the law." That always seemed to me completely unsatisfactory. And then what we had to worry about was, are there situations in which we want people to have a lawyer because we are too concerned about the quality of it. Just like medicine. Perfectly prepared to have people give you free advice about whether you should take cold medicine or take chicken soup and go to bed, but not to do surgery. So we were disappointed with that. Meanwhile, while this was going on, the lawyer advertising continued on for a number of years. Indeed, my old office has got a case now involving New York State—it's still going on today.

MR. MARCUS: I'm sure that's an area where a lot of progress has been made.

MR. MORRISON: Yes, yes. One of the first things—the year after *Bates* was decided, *Bates and O'Steen* was decided—two cases came up quite accidentally—cases which we never would have wanted to have brought up then—either one of them. Certainly the second one. One was from South Carolina and a lawyer affiliated with the ACLU there had been asked to go to a meeting at which she discussed the state's threats to

involuntarily sterilize women who were on welfare. She talked to the women about it and then subsequently made a written offer to represent women pro bono in their suits against the state for insisting upon, I think it was sterilization, but I'm not sure. I've forgotten the details. In any event, it was some clear civil liberties kind of issue against the state—for nothing. And the South Carolina Bar said she had engaged in solicitation. That case was extremely favorable. The facts could not have been better. It was a nonprofit organization, no funds, and so forth. Clearly a major public policy issue.

The other case involved a lawyer named Ohralik from Ohio. Mr. Ohralik was a bad guy. Mr. Ohralik found out that a young woman had been in an automobile accident and she was riding in a car with another woman who was driving it. The woman that Ohralik wanted to represent was very badly injured, she was in the hospital. The driver of the car was not badly injured. Ohralik went to the hospital, found out about it and solicited her in the hospital while she was in her bed of pain. She was probably on drugs at the time. He tape recorded the solicitation so he would have proof that she had said yes. Even when she later changed her mind, he said it's a binding contract. He was going to sue the other woman who was the driver even though they had an insurance policy that was perfectly prepared to pay up and he was taking a third. He was the worst of the worst. They got him on a solicitation charge that was under a rule that was extraordinarily broad. That is, it prevented any solicitation of any kind whatsoever. These two cases were granted at the same time and they were argued the very next term after *Bates*. We had to figure out what to do.

We filed an *amicus* brief in which we said that the rules were over broad and that a narrowly tailored rule surely would have been permissible to get Mr. Ohralik, but that in any event, Ms. Smith—she was originally Smith and then it was—she changed, she got married and it was Primus. I'll never forget—the briefs were filed under Smith and the case was decided under Primus.

During the oral argument, which did not go well for Mr. Ohralik, the Ohio state lawyer was there and Justice Marshall said to him—he was talking about hovering over her in the hospital and Marshall said to him, "And where was the insurance company at this time?" You know how he could go. He said, "Well, there was no evidence that the insurance companies…well I know what's going on in these cases." The Court unanimously said they could discipline Mr. Ohralik for it. They said clearly in these kind of circumstances they could discipline him.

I believe Justice Powell wrote both opinions, but he said in *Primus*, she was exercising her First Amendment rights at a nonprofit organization under *NAACP v. Button* and other kinds of cases; she was privileged to do that and she was protected by the First Amendment in doing this. So that immediately gave us at Public Citizen, of course, an endorsement to engage in all this solicitation which we were sort of engaging in anyway, but we felt fully protected after that. There was an argument made that she might get attorneys' fees and nobody thought that that was a particular problem because it was going to come from the defendant and it was not going to come from clients. So *Primus*

turned out to be a very important solicitation case on that side. *Ohralik* was in the other direction.

MR. MARCUS: I don't think *Ohralik* really hurt the development of the law in this area.

MR. MORRISON: No, no. It just meant that they didn't have to conform their rules to a narrow tailoring. They could have broad rules. It turns out that a lot of the rules were narrowly tailored anyway.

Anyway, so then there were written solicitation cases, some of which we were involved in in one way or another. That was held to be all right—that written solicitations, even though they went to specific people, those were held to be all right. The Court has sort of gone through a back and forth, much more stringent rules about television than about other things.

MR. MARCUS: In-person solicitation. They still allow some bans on classic ambulance chasing.

MR. MORRISON: Thirty days. Florida has a rule, thirty days. That was upheld.

MR. MARCUS: That has a funny name, that case. I can't remember it.

MR. MORRISON: *Went For It*.

MR. MARCUS: *Went For It*, yes. Another unfortunate name.

MR. MORRISON: Quite so. We had a case involving in-person solicitation by accountants and we won that case. Dave Vladeck won that case in the Supreme Court. We said, "Look, the line is not between in-person solicitation and other solicitation. The question is, in general, the nature of the solicitation and how intrusive it was." There continue to be efforts every once in a while—as I said, New York State had some rules about they didn't like certain things in their advertisements. Committees in the Bar and in New York State, I think the judges are obsessed with this thing. People don't like to see these advertisements and they think we've got to do something about it.

MR. MARCUS: I think it is still the same kind of thing. I think what keeps the opposition going is the same kind of obsession that Burger had—that it's going to destroy the dignity and reputation of the profession.

MR. MORRISON: Of the people who don't advertise.

MR. MARCUS: It's the bad guys are going to drag down our reputation.

MR. MORRISON: Yeah. Now, of course, everybody advertises.

MR. MARCUS: Oh, the big firms advertise now, yeah.

MR. MORRISON: One of the things with the New York State rule is it might have shut down their Web sites, so the big firms in New York State—that's clearly advertising. We do this, we do that. This is a list of our clients and all sorts of other stuff.

I remember sitting a couple years ago, being in the San Jose airport and seeing this enormous poster as I was standing in the security line, which is a very good place to have advertisements, for a big patent firm. I think it was Fish & Neave, standing right there in front of me. I said to myself, "This couldn't have happened." And when I tell my students when I teach Ethics that there was a time when lawyer advertising was forbidden, they look like I was from the Stone Age. Of course it *was* the Stone Age.

MR. MARCUS: It was completely forbidden, that's right.

MR. MORRISON: We also understood that solicitation was always done. It was just done at the clubs and at social events and it was perfectly all right to do it as long as the right people did it. Those people didn't do it. That was clear hypocrisy and everybody understood it.

Lawyer advertising has changed radically and, of course, with it has come a whole set of commercial speech doctrines including I've said, say a big push to help tobacco being able to advertise and disseminate information in ways that seems to me to be unnecessary and inappropriate. That's the price you pay for setting a precedent in this area.

Let's go to the next topic. This is residence requirements for bar admission. This idea came to me when I was taking the bar exam in New York. It turned out that you had to be a resident of New York State to take the exam. I also knew that lots of the partners lived in New Jersey and Connecticut. Then I subsequently learned that you could leave the state almost immediately. Most people didn't, but you certainly could leave the state almost immediately. I instinctively understood, even before I went to work for Ralph, that this was another anticompetitive practice. The reason that was there is because the Bar didn't want people poaching in on their practice. These were rules that were promulgated by the state courts, so we couldn't use antitrust against them, although they were plainly anticompetitive. There was no First Amendment problem. Before we got into this there had been a bunch of durational residence requirement cases originally arising out of welfare payments. But durational residence requirement cases for Bar admissions, where you had to come and live in—North Carolina was one that was a case—and other cases for six months or a year before you were eligible to take the bar exam. Meanwhile, you're a lawyer, you can't be employed. What are you going to do? Maybe some places would employ you, but lots of places wouldn't. Those durational residence requirements were equal protection cases and—

MR. MARCUS: Right to travel.

MR. MORRISON: Right to travel and equal protection. All of them said no good for these lengthy requirements, but the implicit assumption of all of them was—and you always know when you see words like this—that a "simple" residence requirement or a

"mere" residence requirement—those were okay. That was the underlying presumption of them. We knew that discrimination based on residence alone was going to be a very tough row to hoe. Fortunately, there was another clause in the Constitution which I didn't know much about but I learned a good deal about, called the Privileges and Immunities Clause in Article Four, Section Three. It has a long, not lengthy, but venerable history of being used to prevent precisely this kind of discrimination against out-of-staters. The idea was we were going to bring one of these cases. Before we had a chance to bring a case, I got a call from a lawyer here in Washington named Vickie Golden, who was then working for the federal government. I think maybe the Federal Trade Commission, but I'm not sure. She lived in the District and she wanted to take the Maryland Bar because she wanted to go into private practice and be able practice in two jurisdictions. Of course, in the District, being able to practice in multi-jurisdictions is a big plus, especially if you are dealing with commercial or individual clients who may have business and other matters in one, two or three jurisdictions. She used to live in Maryland at one point, then moved into the District. She had a husband and two children and she didn't want to move to Maryland. Best of all, she lived on a street off Western Avenue. She lived about a hundred yards from the District line—from the Maryland line. So not one of these Alaska kind of things. She asked us to represent her. She had filed the complaint and she served a bunch of interrogatories on the State Bar. We agreed immediately to undertake to represent her. The Bar made a motion to dismiss. We opposed it saying, among other things, that there were facts that they had tried to sneak in, saying that the residency requirement didn't serve any purpose and that this was necessary. They had two reasons: this was necessary to insure that the Bar could continue to supervise people and it was also necessary in order to do character checks on people. We got an affidavit from somebody on the D.C. Character Committee saying, "We admit people from all over the country. We don't have any problem. They have the burden of proof." We said we don't need a trial. It will be summary judgment, we have limited discovery. We wanted to depose the head of the Character Committee who would supposedly know about all these things and get some other records about a few things. Judge Frank Thompson in Baltimore ruled against us. He said, "No, this is a perfectly valid rule." We rather expected we were going to lose at the District Court level. After all, this judge got to be a federal judge by coming up through the state court system, and these were his friends and they all had written all the rules. We knew they were there for economic protections and purposes.

The complaint had originally four causes of action, one of which we dropped. She said, "I was a former resident and now I'm back and I shouldn't be discriminated against." We tossed that one out. Equal protection we sort of kept in there, but only because it was there. We had two others. One was the Commerce Clause. We said it's a violation of the Commerce Clause because it is a burden on interstate commerce. The main reason we put this in was because we wanted to focus on the fact that this injured clients. This was our same theory as in the advertising and in the minimum fee case, that these are about client protection. Somebody's got a problem in interstate commerce; we ought to be able to deal with this. This is a perfect example of where it is and, of course, the fact that she lived five hundred feet from the border was nice, but we always knew that was evidence

of how irrational the rule was but we would always have to say, of course, if she lived in Alaska, she could do it. She probably wouldn't want to do it if she lived in Alaska.

Of course, the big thing was all she wanted to do was to take the bar exam.

So we lost the case and we took an appeal. Meanwhile, somebody in New York was challenging the New York requirement. He had lived in New York and then moved to New Jersey and wanted to get admitted in New York. He filed a case *pro se* and he had done all the right things and now he asked us to argue the case. My colleague, John Sims and I, went—he wrote the brief and we went up and argued the case in the New York Court of Appeals in Albany and lo and behold, we won, seven to nothing.

MR. MARCUS: On Commerce Clause grounds or Privileges and Immunities?

MR. MORRISON: Privileges and Immunities.

MR. MARCUS: And had he had that in there already?

MR. MORRISON: Yes. But you know, there were a lot of cases. There had been a fairly recent case involving hunting licenses. There were a whole bunch of old fishing licenses cases. A hunting license was not held to be fundamental, the game licenses, but the right to engage in fishing was. In some of these cases they imposed massive amount of taxes on people who want to do things. There was a case in New Hampshire about income taxes where they taxed out-of-staters more heavily. There were lots of really good cases.

MR. MARCUS: And those were decided on Article Four, Section Three?

MR. MORRISON: Yes. There were a whole series of cases, all of which were extremely helpful to us on these grounds. The Commerce Clause never ended up getting decided in any of these cases. Anyway, the case that ultimately went to the Supreme Court came from New Hampshire. Kathryn Piper was a resident of Vermont, lived there with her husband. They also lived very close to the border. Her husband was also a lawyer. They decided that they did not want to practice together and, in general, it would be better if she practiced in New Hampshire and he practiced in Vermont.

She was willing to take the bar exam. The First Circuit had ruled in her favor and New Hampshire took the case to the Supreme Court. The lawyer who was handling the case—we filed an *amicus* brief and the lawyer who was handling the case got us to help out. We went to the oral argument and during the oral argument—I often give this story as a reason why you don't want to have outsiders argue cases—the lawyer was asked by Justice Rehnquist, "Well now, you're a New Hampshire lawyer. When you want to know what the New Hampshire Supreme Court did, how do you find out?" He said, well there are two rules services—something of course which I wouldn't begin to know or even thought to ask him. Two opinion services; one you get it once a month and the other one once a week. Rehnquist said, "No, no. Suppose you want to know what they did yesterday? How do you find that out? Wouldn't you read the newspapers?" He looks him

straight in the eye—the lawyer looks at Rehnquist straight in the eye and said, "I would never read the Manchester newspapers for *anything*." Which completely floored Rehnquist. He did not get his vote, because he voted against it anyway.

It's a great lesson in the importance of local knowledge and local ability. If I had known everything and thought everything, I would never have said it as an outsider in the way that this guy could say it. It just was a great example. We won that case and there were a series of other cases. There was a case in Virginia which my colleague, Con Hitchcock, argued and won, in which Virginia said you can be admitted on motion, but you have to be a resident to be admitted on motion and if you are not a resident, you have to take the bar exam. The Supreme Court had no trouble saying, "You can't do that. It doesn't have anything to do with it."

Then we had another case out of the Fifth Circuit in which the Federal District Court in New Orleans for the Eastern District of Louisiana had a rule that said you had to either live or have an office in the State of Louisiana, not just the District, in order to be admitted to the Bar. You also had to be a member of the Louisiana Bar, which our client was. He lived in Mississippi. He was a member of the State Bar of Louisiana, the State Bar of Mississippi, the Federal District Court in Mississippi. He couldn't get into the Louisiana Federal Bar because he didn't have an office there. He lived in Pascagoula which was about ninety miles away—which was closer than a whole bunch of places in the State of Louisiana where, if he had lived or worked there, he could have qualified. Indeed, he could have lived in Texas and had an office in western Louisiana. The Privileges and Immunities Clause literally applies only to the states so we made a reverse incorporation argument.

Like *Bolling v. Sharpe.* We also made an equal protection argument and we made a supervisory jurisdiction argument—that the federal courts could supervise—the federal Courts of Appeals first and then the Supreme Court should supervise. We lost in the Fifth Circuit and we filed a *cert.* petition. It was less than ten pages and the question presented was, "May a federal District Court have a residence requirement rule for admission to its Bar that would be unconstitutional if applied to the state court sitting across the street?" And the petition was granted and we won the case on supervisory authority. Justice Brennan said, "You can't do this. It's completely irrational." We won that case because it was so irrational. The rule was really terrible. Everybody understood exactly what this was about—protectionism. We thought long and hard, but have never figured out a way to challenge the requirement that you be a member of the local Bar to be admitted to the federal District Court. We have never found a good way to challenge that rule. It still persists. It's less of a problem because the residence requirement is no longer there so people can actually become admitted. There has been a fair amount of increase in ability to get admitted to multiple bars aside from the residence requirement with one exception. I'll talk about in a few moments. In most cases, you want to have a local lawyer anyway. You need a local lawyer just to be there for other things and because they tell you things that you need to know.

MR. MARCUS: About the judge—

MR. MORRISON: The judge and the practices and it's not the end of the world. It is a bad rule, unnecessary.

MR. MARCUS: It doesn't exist in the Courts of Appeals anymore.

MR. MORRISON: No, no. The Courts of Appeals are completely open—you can be admitted anyplace.

Then we had another case for Ron Goldfarb. No relation to Lew Goldfarb. Ron had a practice in Washington, D.C. He lived in Virginia and as he got along in his practice he decided that he wanted to open an office in Virginia. At that point, the rule was you could waive into Virginia if you were admitted in a place that would have reciprocity but you had to promise to practice full-time in Virginia. He said he wasn't going to give up his practice in Washington. He would have an office in Virginia. He would go there on a regular basis, but he would not swear to be full-time.

We said this is plainly unconstitutional. There is no rational basis at all and we referred to it as the "full-time victimization rule." You don't have to prove that you know anything about Virginia law as long as you promise to victimize Virginians on a full-time basis. But if you want to do it on a part-time basis, then it was illegal. We had Commerce Clause and other grounds and all of our usual suspects. We lost in the Fourth Circuit and Justice White voted to grant *cert.* but nobody else—maybe one other person did, but we didn't get *cert.* granted. The "full-time victimization rule" is still there.

The last thing came up just two years ago. No, just a little over a year ago when I was out at Stanford, a lawyer came to me and he had taken the bar exam in Ohio and Indiana, practiced in both places. He'd moved to California and had to take the bar exam there because California makes everybody take the bar exam. He then moved to North Carolina and wanted to get waived in there. North Carolina had a rule—I'm simplifying the case just slightly, but the point becomes clear—that said you had to practice in a jurisdiction which had reciprocity with North Carolina in four out of the previous six years. Indiana and Ohio both had reciprocity with North Carolina.

MR. MARCUS: But California did not—they hate everybody.

MR. MORRISON: California did not, because it didn't have reciprocity with anybody. And so he had been there. Unfortunately, that was his tainted Bar admission and they wouldn't admit him. The trial judge, Judge Boyle, said, "This is completely crazy," and admitted him.

MR. MARCUS: This is the Judge Boyle whose nomination to the Fourth Circuit has been stalled for twenty years or so.

MR. MORRISON: Close. He admitted him. They took an appeal and they won in the Fourth Circuit. The guy came to me (his name was Morrison, actually) and asked me if I would represent him. I agreed to do so.

MR. MARCUS: For *cert*?

MR. MORRISON: For *cert*. Unfortunately, he had not raised the best issue, which was the Commerce Clause issue. There are a series of cases, in which the Court has said that you cannot use reciprocity as a justification for restrictions that burden interstate commerce. The fact that somebody else does or doesn't do it to you is not a legal justification. The issue had not squarely been raised. The Commerce Clause was sort of in there and sort of not in there. The Fourth Circuit didn't address it and it was a real stretch. I took the petition because I hate these reciprocity rules. I think they are misguided and they are anti-consumer and they are anti-lawyer mobility. I thought that this rule was doubly goofy that you had to have reciprocity to begin with and then you had this sort of strained version of reciprocity that sort of undermined everything. If he had done his life differently and reversed the order—been in California first and then the other two states, he could have been admitted. We said that's completely irrational. I though maybe the Court would be interested in this, but they weren't. *Cert.* was denied and so the reciprocity restrictions still apply.

It matters in a bunch of states where the reciprocity is significant—although the big problem is California, Oregon—Oregon has limited reciprocity, Arizona, Florida—

So I would say we substantially—not perfectly succeeded—substantially succeeded in this, and the legal profession is better for it and clients are better off for it.

MR. MARCUS: Yeah, I certainly think the achievements on the legal advertising side, particularly have had—

MR. MORRISON: And the other thing about the minimum fee schedule case, was that it became clear that the Bar couldn't do all sorts of things that it would have done without going to the courts in terms of their restrictions.

MR. MARCUS: Why do you think—there doesn't seem to be a lot of fee advertising—of price advertising by lawyers, though. Am I wrong? And why is that, do you think?

MR. MORRISON: The difficulty is that most lawyer services are on a contingency percentage fee or hourly basis or they are done by the job but a simple divorce with both parties consenting may be one price. If there are children, it's another price.

MR. MARCUS: So it's complicated.

MR. MORRISON: It's very complicated to do it in an advertisement. A little of my hunch is some assessment is made as to how much the lawyer thinks the people can afford to pay. Prices go up and down to some extent. Advertising locks you into a price. Sometimes you get a sense that although they say there are no problems, there are going to be problems. For all of those reasons I think that, in some cases, yes, simple incorporation, deeds, yes they could be advertised. People probably don't go to them for

that. There is a lot more advertising about the type of services, that is what you do. You couldn't be able to say before, "I do immigration."

MR. MARCUS: I understand that. Well big TV advertisers, a lot of them are contingent fee and I suppose there the dilemma is it's not attractive to say I charge thirty-three percent of your award. It is attractive to say, "You pay nothing unless you win." But even that is complicated because you have to pay expenses and so on. It is tricky.

MR. MORRISON: It's tricky.

MR. MARCUS: And maybe it is misleading saying you pay nothing unless you win unless you reveal that if you do win you owe me twenty-five percent or whatever it is.

MR. MORRISON: Yes and we had a case involving the Dalkon Shield that I argued in the Supreme Court. Mr. Zauderer was a personal injury/product liability lawyer and he was doing Dalkon Shield cases. The Dalkon Shield was a very bad device; it had lots of problems with it. It had been taken off the market, but there were a lot of women who were injured by it. He took out an ad with a picture of a Dalkon Shield IUD and said, "Did you use this device and were you injured?" It turns out that the picture was really important because many women did not know that they used a Dalkon Shield or they didn't remember the name. They would remember what it looked like but they didn't know its name. The doctor had given it to them and inserted it. They didn't know. A lot of them didn't know that they had any claims and he got a huge number of claims. The Bar went after him. There was a prohibition on pictures. He lost in the Ohio Supreme Court, then came to me, and I represented him in the U.S. Supreme Court. We won that part. The other part of the case was that they said if you said that there were no fees charged, you had to disclose that the person was liable for costs if they lost. At that point, of course, the rule in most states was that, in theory, the client was liable for costs. Everybody understood that no lawyer ever went on and collected the costs from the client, but the fiction was still there. Now the rules have changed in many jurisdictions so that the lawyer can agree to absorb all the costs instead of having a charade. In some places it has not formally changed, but it is, in fact, the same thing. They got him on that, and they gave him a mild reprimand. They upheld that and ended up with a mild reprimand.

That has made it more complicated and states have put in some requirements that if you say anything about fees, you've got to say this and that. We said it was too burdensome and the Court, I think, kind of in a split decision said, "Well, you can make them do that." They didn't think it was all that bad and they probably don't like these personal injury ads anyway. You can still say what you want to say. I remember when I was doing the *cert.* petition, I couldn't figure out what the question presented was going to be. We had five options and what I did was I had a little office pool. One of the questions was, "Is it unconstitutional to include this picture in an advertisement?" We decided ultimately to go with something else, but review was granted in any event.

And so we had that and we had some other lawyer advertising cases but that got me back to thinking about the requirements about what lawyers have to say. I think if you look at Web sites of most law firms, they clearly would have violated all the rules and, you know, in a way the Internet has made advertising much more useful because you could put so much more in there than having to try to do it in thirty seconds or in a Yellow Pages ad. I never mentioned this, but I remember reading in New York when I was—I used to read the *Law Journal* in those days, occasionally. I remember seeing ads in there that said, "Dominican or Nevada divorce available." And then it would say, "For lawyers only." Because it was okay to advertise to other lawyers, but not to advertise to the lay public. That's how they got around that. Of course, if somebody responded, I'm sure they represented them.