

AGENDA ITEM

54-121 DECEMBER 2016

DATE: December 9, 2016

TO: Members, Board of Trustees

FROM: Robert G. Retana
Deputy General Counsel

SUBJECT: Antitrust Analysis of COPRAC Opinion

EXECUTIVE SUMMARY

The Committee on Professional Responsibility and Conduct ("COPRAC") prepared a formal opinion which addresses the following issue: "Under what circumstances is 'blogging' by an attorney a 'communication' subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions to the State Bar Act regulating attorney advertising?" The Board of Trustees has approved the opinion for publication subject to confirmation from the General Counsel's Office that it does not violate antitrust laws.

As set forth below, the opinion, which is advisory in nature, does not implicate antitrust laws.

BACKGROUND

COPRAC has issued an opinion on the topic of blogging by an attorney. Specifically, it pertains to when blogging by an attorney is a "communication" subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions of the State Bar Act regulating attorney advertising. The applicable rule is found in California Rules of Professional Conduct, Rule 1-400. The corresponding sections of the State Bar Act are Business and Professions Code Sections 6157-6159.2.

COPRAC is a standing committee of the State Bar Board of Trustees. The Committee's primary charge is the development and issuance of advisory ethics opinions to assist attorneys in understanding their professional responsibilities under the California Rules of Professional Conduct. COPRAC opinions are not binding, and the California Supreme Court is the ultimate arbiter of the Rules of Professional Conduct.

In December 2015, the Washington State Bar Association suspended the issuance of ethics opinions in the wake of the U.S. Supreme Court's decision in *N.C. State Bd. Of Dental Exam'rs*

v. FTC, 135 S. Ct. 1101, 1109 (2015) (“*Dental Examiners*”).¹ However, it resumed issuing ethics opinions in 2016.²

DISCUSSION

I. Elements of an Antitrust Claim

The Sherman Antitrust Act makes unlawful “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations” 15 U.S.C. § 1. In order to establish a claim under Section 1, a plaintiff must demonstrate: “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.” *Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1062 (9th Cir. 2001) (internal quotes omitted). Section 2 of the Sherman Act prohibits monopolization or any agreement to monopolize any market. The long-standing requirement for monopolization is both “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

“The Sherman Act . . . serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public’s welfare.” *Dental Examiners*, 135 S. Ct. 1101, 1109. Taken literally, the Sherman Act would make common forms of state regulation illegal. However, “nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. *Parker v. Brown*, 317 U.S. 341, 350-51, 63 S. Ct. 307, 313, 87 L. Ed. 315 (1943).

The State Bar of California is a constitutional entity established by the California Constitution, and expressly acknowledged as an integral part of the judicial function. See Cal. Const., Art. VI, § 9; Cal. Bus. & Prof. Code § 6001; *In re Rose*, 22 Cal.4th 430, 438 (2000). The State Bar’s core regulatory functions are all precatory to the actions of the California Supreme Court with respect to admissions and discipline. As explained by the United States Supreme Court in *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984): “When the conduct is that of the sovereign itself . . . the danger of unauthorized restraint does not arise. Where the conduct at issue is that of the state legislature or supreme court, we need not address the issue of active supervision.”

II. Restrictions on Attorney Advertising Pursuant to Rules of Professional Conduct Established by a State Supreme Court do not Violate Antitrust Laws

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), licensed attorneys and members of the Arizona State Bar who had been charged in a complaint filed by the Bar with violating the state Supreme Court’s restrictions on attorney advertising, which the Bar enforced, claimed that the rule restricting attorney advertising violated Sections 1 and 2 of the Sherman Act by limiting

¹ ABA/BNA Lawyers’ Manual on Professional Conduct, “Washington Bar Suspends Ethics Opinions, Cites Antitrust Fears,” Dec. 17, 2015, available at <https://www.bna.com/washington-bar-suspends-n57982065288/>.

² See, e.g., Washington State Bar Association Advisory Ethics Opinion 201601 (2016), available at <http://mcle.mywsba.org/IO/print.aspx?ID=1686>.

competition. *Id.* at 365. The U.S. Supreme Court held that the restriction on advertising was not subject to attack under the Sherman Act because the rule reflected an activity of the state acting as sovereign. *Id.* at 360-63. However, it struck down the advertising restrictions on First Amendment grounds. *Id.* at 383.

The Court concluded that:

Here, the appellant's claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. . . . Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the courts; the appellee acts as the agent of the court under its continuous supervision.

Id. at 361.

Similarly, in *Hoover v. Ronwin*, 466 U.S. 558 (1984), a challenge was brought to the Arizona State Bar's admissions function. The state Supreme Court delegated its plenary authority over admissions to a Committee on Examinations and Admissions. *Id.* at 561. The Committee was required to submit its grading formula and recommendations for admission to the Supreme Court, which made the final decision to grant or deny admission. *Id.* Under the Rules and Arizona case law, only the court had authority to grant or deny admission. Finally, a rejected applicant was entitled to seek individual review of an adverse recommendation of the Committee by filing a petition directly with the Court. *Id.* at 563. The Rules required the Committee to file a response to such a petition and called for a prompt and fair decision on the appellant's claim by the Arizona Supreme Court. *Id.* at 564.

A candidate who had been denied admission and whose petition for review had been denied by the Court alleged that the State Bar, members of the Committee, and others had conspired to restrain trade in violation of the Section 1 of the Sherman Act by "artificially reducing the number of competing attorneys in the State of Arizona." *Id.* at 565.

The U.S. Supreme Court began its analysis by stating that "when a state legislature adopts legislation, its actions constitute those of the State," and "ipso facto are exempt from the operation of the antitrust laws." *Id.* at 567-68. A state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. *Id.* "Therefore a decision of a state supreme court, active legislatively rather than judicially, is exempt from Sherman Act liability as state action." *Id.* The Supreme Court cited to *Bates, supra*, in rejecting the argument that the Committee's actions were not state action.

III. The Rules of Professional Conduct are Protected under Antitrust Laws by State Action Immunity

The Rules of Professional Conduct are developed as recommendations by the State Bar and are adopted by the California Supreme Court.³ The California Supreme Court has held that

³ Cal. Bus & Prof. Code § 6076 ("With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the State Bar."); Cal. Bus & Prof. Code § 6077 ("The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.").

the Bar's formulation of professional rules is precatory to the Court rather than a delegation of the Court's power to the Bar.⁴ The adoption by the California Supreme Court of the Rules of Professional Conduct, upon recommendation of the State Bar, is therefore protected under the antitrust laws by state action immunity.⁵ Because the Rules of Professional Conduct must be affirmatively adopted by the Court, in the Court's sole discretion, the State Bar's precatory advisory role in this area is qualitatively different from the powers of other agencies that have independent rulemaking authority and whose actions have been subject to heightened antitrust scrutiny in the wake of *the Dental Examiners* decision.⁶

Further support is found in *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir. 1978), an action filed against the Advisory Committee on Professional Ethics of the New Jersey Supreme Court. The Committee had issued an opinion prohibiting lawyers from listing themselves in local Yellow Pages advertising. *Id.* at 709. The Court recognized the case as different from *Bates* but reached the same result, stating ". . . although the defendants' action is not as clearly commanded as was the defendants' action in *Bates*, the state, acting as sovereign, did command the kind of action the defendants took. Therefore the defendants are entitled to the state antitrust exemption." *Id.* at 710-11.

Thus, enforcement of the rules by the State Bar is exempt from the operation of the antitrust laws because the rules reflect an activity of the state acting as sovereign. *Bates*, *supra*, 433 U.S. at 383. A legal challenge to Rule 1-400 itself, the enforcement of that rule, or the issuance of the COPRAC opinion related to that rule, alleging antitrust violations would be subject to the state action immunity defense.

IV. Advisory Opinions Do Not Violate Antitrust Laws Absent An Effort to Enforce

A trade association's speech does not constitute an antitrust violation absent some effort or mechanism to enforce a restriction on the availability of the product or service. As the Seventh Circuit explained in *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989), "[a]n organization's towering reputation does not reduce its freedom to speak out." There, the Academy had criticized radial keratotomy as "experimental" and called on the profession to use caution until more research was done. *Id.* at 398. The court rejected ophthalmologists' claim that this amounted to a restraint of trade because the communication did not constrain anyone to follow the advice. *Id.*

⁴ *Barton v. State Bar of Cal.*, 209 Cal. 677, 680 (1930) ("[T]here is no delegation of power. The Rules of Professional Conduct formulated by the Board of Governors of The State Bar, by the approval of the Supreme Court thereby became the rules of that court, and the power of the court to make reasonable rules and regulations is not open to question. This power is a power inherent in the courts and needs neither lengthy discussion nor extended citations of authorities to support it.").

⁵ See *Bates v. State Bar of Ariz.*, *supra*, 433 U.S. 350.

⁶ Cf. *Teladoc, Inc. v. Tex. Med. Bd.*, 2015 U.S. Dist. LEXIS 166754 at *21-29 (W.D. Tex. Dec. 14, 2015) (Texas Medical Board's enactment of regulations concerning practice of "tele-medicine" was not protected by state action immunity because the regulations were not subject to approval by the state legislature or supreme court; moreover, the Board failed to establish active supervision because it had not demonstrated that a state supervisor had reviewed the substance of the anticompetitive decision or that a state supervisor had the power to veto or modify decisions that do not accord with state policy).

The issue is whether the association or neutral party actually attempts to enforce some standard—whether it punishes or threatens to punish a market actor for deviating from the standard. *TYR Sports, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802 (C.D. Cal. 2010) (citing *Schachar* in granting motion for summary judgment filed by defendants against claims of antitrust liability). This distinction has been recognized by numerous other circuits in similar cases. See, e.g., *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132–33 (3d Cir. 2005) (finding no antitrust violation where trade association criticized plaintiff's products, but did not coerce or restrain market actors); *Int'l Healthcare Mgmt. v. Haw. Coal. For Health*, 332 F.3d 600, 606 (9th Cir. 2003) (finding no antitrust violation from comments made by professional association where it did not act to constrain anyone to follow its advice); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 373–74 (6th Cir. 2003) (finding that a professional association did not violate antitrust laws because, like *Schachar*, it lacked a mechanism to enforce standards); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 296 (5th Cir. 1988) (finding no antitrust violation where an influential trade association delayed certification of the plaintiff's product because association did not coerce customers). It is not enough to simply point out that an association has influence over the purchasing decisions of consumers: *Schachar*, *supra*, 870 F.2d at 399; *accord Consolidated Metal*, 846 F.2d at 296 (“Even if user reliance gives [the trade association] significant influence over the market, that influence may enhance, not reduce, competition and consumer welfare.”).

The State Bar does not enforce COPRAC opinions which are not binding and are only advisory in nature. Specifically, the State Bar's Board Book, Tab 5.1, Article 2, Section 7 provides:

Section 7 Effect of Opinions

All opinions issued by the committee express only the judgment of the committee and are advisory only. Each letter and formal opinion shall conclude with the following statement:

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

(Source: Board of Governors' Resolution, July 1979, December 2004.)

Thus, given that the COPRAC opinion is advisory in nature, and there is no effort on the part of COPRAC or the Board of Trustees to enforce it, the issuance of the opinion does not violate antitrust laws.

Any actions by the Office of the Chief Trial Counsel to enforce violations of Rules of Professional Conduct and/or the sections of the State Bar Act that pertain to advertising (Bus. & Prof. Code Sections 6157-6159.6) are based on those rules; OCTC is not enforcing the subject COPRAC opinion. Even if OCTC were to cite to the opinion, the opinion states on its face that it is advisory only and it is not binding on any court, tribunal or member of the State Bar.

Moreover, enforcement of those rules by OCTC is accomplished through the attorney discipline system. See Bus. & Prof. Code Section 6157.5 (c). Such enforcement is immune from antitrust laws because the rules being enforced reflect an activity of the state acting as sovereign. *Bates, supra*, 433 U.S. 350, 360-63. As noted above, the California Supreme Court has held that discipline of a California attorney by the Court, acting on the recommendation of the State Bar, is exempt from antitrust laws. *Lebbos v. The State Bar of California*, 53 Cal. 3d 37, 47 (1991). Thus, the citation of the COPRAC opinion would not amount to an enforcement of the opinion as the opinion has no legally binding effect; moreover, although the State Bar plays a part in the enforcement of these rules, as in *Bates*, its role is completely defined by the Court, and the bar acts as its agent under its continuous supervision, making any such disciplinary action exempt from Sherman Act liability.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None

BOARD COMMITTEE RECOMMENDATIONS

The State Bar Standing Committee on Professional Responsibility and Conduct recommends that the Board of Trustees approve the following resolution:

RESOLVED, following the publication for public comment and consideration of the comments received, review by the Office of the General Counsel, and upon the recommendation of the Standing Committee on Professional Responsibility, and the Board Committee on Regulation and Discipline Oversight, the Board of Trustees approves the publication of proposed Formal Opinion Interim No. 12-0006, in the form attached.

ATTACHMENT(S) LIST

- A.** Formal Opinion Interim No. 12-0006 (Attorney Blogging)