

Antitrust Policy

It is the policy of the State Bar of California to comply with all laws, including antitrust laws, which preserve fair, honest and vigorous competition. This policy is designed to give the State Bar a general understanding of the antitrust laws to help you recognize potential antitrust issues so that timely legal advice can be obtained. The Antitrust Policy is intended to assist in the identification and analysis of antitrust issues and the compliance with antitrust laws by all employees, entities and committees that comprise the State Bar.

The application of antitrust laws to the State Bar is unique because the State Bar is *sui generis* and therefore not in the same class as California state agencies within the executive branch that have final authority over licensing matters. The State Bar serves as an administrative arm of the Supreme Court, which retains power and control over all aspects of admissions and discipline. Actions by the Supreme Court, acting as sovereign, are generally immune from antitrust liability. Moreover, actions taken by the State Bar that affect the license of one individual, e.g., for violating professional standards, have virtually no effect on a large market and therefore would likely not violate antitrust laws.

It is the responsibility of the State Bar Office of General Counsel (“OGC”) to monitor antitrust issues for the State Bar. If any employee or other person affiliated with the State Bar has any question as to the legality of a proposed or current course of action, the matter should be referred to the Deputy General Counsel, Robert Retana at robert.retana@calbar.ca.gov. OGC will analyze thoroughly programs or policy decisions that may implicate antitrust concerns. If OGC identifies potential antitrust issues, it will bring them to the attention of the Board of Trustees for its consideration and resolution. If any action, program or policy decision is proposed or approved by the Board that implicates legitimate antitrust issues, the Board shall submit any such proposed action, program or policy decision to the California Supreme Court for its consideration and approval prior to implementation.

Elizabeth Rindskopf Parker

Executive Director

Purpose of the Antitrust Laws

Antitrust laws are designed to promote vigorous and fair competition and to provide consumers with the best combination of price and quality. The antitrust laws are set forth in the Sherman Act, Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act, among other statutes. These laws prohibit anti-competitive activities, including price-fixing, attempts to monopolize, and other unreasonable restraints on trade.

State Action Doctrine

Although focused on private conduct, antitrust laws may apply to public entities under certain circumstances. When the action complained of is that of a sovereign body of the State (such as the State Legislature or State Supreme Court), the State enjoys immunity from the antitrust laws, notwithstanding any impact on competition. The United State Supreme Court, however, recently clarified that when the State delegates its authority to a licensing board comprised of market participants, the board must demonstrate that its activities are actively supervised by the state in order to enjoy state action immunity. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (“*North Carolina Dental*”).

Application to the State Bar of California

While the *North Carolina Dental* case has renewed interest in the application of the antitrust laws to the State Bar of California, the State Bar’s role and structure are fundamentally different than the licensing board at issue in that case. The California Supreme Court retains ultimate authority over attorney admissions and discipline and the State Bar’s role is only recommendatory to the Court. The Court and the Legislature also maintain active supervision over the Bar’s activities.

This guide is intended to educate you about the application of the antitrust laws to the State Bar of California and to assist you in identifying potential issues.

How to spot potential antitrust issues:

1. A program or policy has regulatory effect that could affect competition
 - **Regulatory Effects** – The threshold inquiry in antitrust analysis is whether a practice or program has a regulatory effect that could impact competition in the market for legal services. If the proposed program or policy does not affect competition, the antitrust laws are not implicated.
 - **Examples** – Many of the State Bar’s public protection programs have no foreseeable impact on competition in the market for legal services. Examples of State Bar activities that do not affect competition include the Client Security Fund (compensation of victims) and Judicial Nominee Evaluation (advisory role to the Governor).
2. The role of the Supreme Court (Admissions, Discipline, Rules of Professional Conduct)
 - **State Action Immunity** – If a program has a regulatory effect that could impact competition in the market for legal services, additional inquiry is necessary to determine whether the actions are immune from the antitrust laws as “state action.”
 - **State Bar’s Recommendatory Role** – Where the State Bar’s functions are only recommendatory to the California Supreme Court, the actions are those of the State and are likely exempt from the antitrust laws, notwithstanding any impact on competition.
 - **Supreme Court Sovereignty** – The California Supreme Court holds ultimate authority over attorney admissions, discipline, and regulation of disciplinary standards through the Rules of Professional Conduct. In these areas, the State Bar’s actions are generally only recommendatory to the Supreme Court, and are likely exempt from the antitrust laws as state action.
3. A program or policy pursuant to a clearly articulated state policy and subject to active state supervision
 - **Active State Supervision** – If a program or policy has a potential anticompetitive effect, and is not merely recommendatory to the Supreme Court, the action will still enjoy antitrust immunity if it is pursuant to a clearly articulated state policy and

subject to active state supervision, such as court approval or the availability of review of an action or decision by the courts.

- **Detailed Legislation or Rule of Court** – Where the statute or Rule of Court prescribing an action of the Bar is sufficiently detailed so that the Bar’s function is largely ministerial, both prongs of this requirement will be met. Such detailed legislation itself satisfies the supervision requirement.
 - **Examples** – Examples of State Bar programs that involve limited discretion pursuant to clearly articulated policy and subject to active state supervision include interim disciplinary measures (e.g. involuntary inactive status of disciplined attorneys pending Supreme Court review of State Bar Court discipline recommendation) and special admissions (e.g. State Bar’s grant of *pro hac vice* or registered in-house counsel status pursuant to Cal. Rules of Court).
4. Trade association type activities require special awareness to avoid antitrust problems
- **Sensitive Topics** – Collusion among attorneys to fix prices or otherwise limit competition, whether or not under the auspices of the Bar, may violate antitrust laws and is expressly counseled against. Meeting of competitors should avoid discussions of billing rates and any matters related to prices such as associate or staff salaries.
 - **Application to the State Bar Sections** – The Sections of the State Bar of California do not currently publish fee schedules, discuss rates, or otherwise collude in violation of the antitrust laws. Nonetheless, the State Bar is mindful of the risks attendant to trade associations and reiterates its guidance that all Bar employees and volunteers refrain from engaging in any activity that could be viewed as anti-competitive.
 - **Sunshine Laws** – Bagley-Keene requirements help to prevent any such discussions to the extent they require that activities and discussions are open to the public and the preparation and publication of agendas for every meeting.

Most State Bar programs have no impact on competition for legal services. Of those activities that could be viewed as having potential competitive effect, most are either recommendatory to the Supreme Court or based on clearly articulated state policy and active state supervision, such that antitrust laws are not implicated. Nevertheless, it is important to keep in mind the demands of antitrust law and their application to the State Bar of California. Should you become aware of any activities that could implicate antitrust concerns, please contact OGC for advice.