

# **AGENDA ITEM**

**705 JULY 2017**

**DATE:** July 11, 2017

**TO:** Members, Board of Trustees

**FROM:** Robert G. Retana, Deputy General Counsel  
James J. Chang, Assistant General Counsel

**SUBJECT:** Antitrust Policy

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## **EXECUTIVE SUMMARY**

On September 8, 2016 the Supreme Court of California directed the State Bar to formulate a policy, to be presented to the Supreme Court for approval, that the State Bar must follow in identifying, analyzing, and bringing to the Court any proposed Board action that implicates antitrust concerns. The State Bar Office of General Counsel (“OGC”) has been monitoring closely the State Bar’s antitrust compliance in light of a recent decision by the U.S. Supreme Court clarifying the application of the antitrust laws to licensing bodies comprised of market participants. The proposed Antitrust Policy explains the application of antitrust law to the State Bar and establishes a procedure for review by OGC and the California Supreme Court of actions that potentially implicate antitrust concerns.

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## **BACKGROUND**

The Supreme Court of California has directed the State Bar to develop a policy for identifying, analyzing, and bringing to the Court any proposed State Bar actions that implicate antitrust concerns. The currently pending State Bar Fee Bill (SB 36) also requires that the “State Bar shall adhere to a Supreme Court-approved policy to identify and address any proposed decision of the board of trustees of the State Bar that raises antitrust concerns.” In the wake of the United States Supreme Court’s decision in *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015), there has been increased public focus on the application of antitrust laws to state regulatory boards such as the State Bar.

## **DISCUSSION**

The attached Antitrust Policy provides guidance to State Bar personnel and the public regarding the application of antitrust laws to the State Bar and requires the establishment of a procedure for review of any actions that may implicate antitrust concerns. The policy requires that any item raising antitrust concern be submitted to OGC for review. If OGC determines that the item implicates antitrust concerns, the State Bar will delay implementation until after the Supreme Court has reviewed the item. The Supreme Court retains the ultimate authority to review any

determination by OGC regarding antitrust issues, consistent with the Supreme Court's procedures.

#### **FISCAL/PERSONNEL IMPACT**

This policy has no significant fiscal or personnel impact. OGC has already been closely monitoring antitrust compliance of the State Bar, and will continue to do so pursuant to this policy. OGC attorneys are working to establish a procedure for review of antitrust concerns, in consultation with the Supreme Court.

#### **STAFF RECOMMENDATIONS**

Staff recommends that the Board of Trustees approve the following resolutions:

**RESOLVED**, that the Board of Trustees shall submit the attached proposed Antitrust Policy to the California Supreme Court for its review and approval;

**FURTHER RESOLVED**, that upon approval by the Court, OGC is directed to establish a procedure for review of antitrust concerns, consistent with the policy as approved by the Supreme Court.

#### **ATTACHMENTS**

1. Proposed Antitrust Policy

### **Antitrust Policy**

The State Bar must conform to the highest standards of conduct and always promote the principles of fair and open competition in all of its policies and actions in pursuit of its overarching public protection mission. Where the State Bar's actions have the effect of advancing the interests of attorneys without a clear benefit to the public, such actions must be scrutinized closely for potential antitrust violations. This antitrust policy is intended to assist in the identification and analysis of potential antitrust issues and the compliance with antitrust laws by all employees, entities and committees that comprise the State Bar. Given the State Bar's important public mission to enforce and uphold the law, the identification and analysis of any potential antitrust issue must be robust.

It is the responsibility of the State Bar Office of the General Counsel ("OGC") to monitor antitrust issues for the State Bar. If any person has a question as to whether a proposed or current State Bar course of action implicates antitrust concerns, the matter should be submitted to OGC. OGC will analyze the matter thoroughly and make a determination as to whether the action implicates antitrust concerns. OGC's determinations may be reviewed *de novo* by the California Supreme Court in accordance with the Supreme Court's procedures. Any action determined by OGC to implicate antitrust concerns will not be implemented unless the Supreme Court determines that the action may proceed.

Elizabeth Rindskopf Parker

Executive Director

## **The Role of the State Bar of California**

The California Supreme Court has the inherent authority to regulate the practice of law in this state. The State Bar of California is the administrative arm of the California Supreme Court for attorney licensing, regulation, and discipline. The State Bar acts under the authority and at the direction of the Supreme Court in these matters. The Supreme Court's authority over the State Bar includes the authority to review State Bar actions for antitrust issues and competition impacts. The Supreme Court, in the exercise of its inherent authority to regulate the practice of law, shall review any policy or action of the State Bar that it deems may implicate an antitrust issue and may conduct a *de novo* review and modify or reject any policy or action of the State Bar relating to the regulation of the practice of law.

## **Purpose of the Antitrust Laws**

Antitrust laws are designed to promote vigorous and fair competition in the marketplace of competitors 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. Unless otherwise lawfully mandated by the California Legislature or the California Supreme Court, the State Bar must take no action in violation of the antitrust laws.

## **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 acting in a legislative capacity), the State may enjoy immunity as a sovereign from the antitrust laws, notwithstanding any impact on competition.

The State Bar is a public licensing and regulatory board that acts under the authority lawfully delegated to it by the sovereign arms of the State, the Supreme Court and the Legislature. The United State Supreme Court has held that under certain circumstances, state licensing boards need to prove two elements before they may invoke the state action defense: first, the challenged restraint has been adopted pursuant to clearly articulated state policy; and second, the policy is being actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) ("*North Carolina Dental*"). See also "Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants," Federal Trade Commission ("FTC Guidance"), [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf).

The remainder of this policy document provides additional background to assist State Bar personnel in better understanding the application of the antitrust laws to actions of the State Bar.

## Guidance for Identifying Potential Antitrust Issues at the State Bar

### 1. Actions that have Anticompetitive Effects may Implicate the Antitrust Laws

- **Anticompetitive Effects** – The threshold inquiry in antitrust analysis is whether an action has an effect that could impact competition or be an unreasonable restraint of trade in the market for legal services. Unreasonable restraints on trade generally raise price, reduce output, diminish quality, limit choice, or create, maintain, or enhance market power. Anticompetitive practices can include price fixing, group boycotts, and exclusionary exclusive dealing contracts.
- If the proposed action does not affect competition or has only a *de minimus* impact, the antitrust laws are not implicated. Courts have held that individualized decisions on admissions or discipline do not impact overall competition in the market sufficiently to raise antitrust concerns. A number of the State Bar's public protection programs have no foreseeable impact on competition in the market for legal services (e.g. the Client Security Fund (compensation of victims), the Lawyers Assistance Program (counseling services for attorneys) and Judicial Nominee Evaluation (advisory role to the Governor)).

### 2. The Role of the California Supreme Court must be Analyzed

- **State Bar's Recommendatory Role to Final Decision Maker** – The California Supreme Court enjoys immunity from the antitrust laws when it acts in its sovereign legislative capacity, such as when it enacts the Rules of Professional Conduct. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977). Where the State Bar makes only recommendations to the California Supreme Court, and the Supreme Court makes the final decision after the opportunity for a *de novo* review of the recommendation, the actions are those of the State and may be immune from the antitrust laws, notwithstanding any impact on competition. *See, e.g.*, S232907, Supreme Court Order Approving Modifications to the California Bar Exam (Mar. 16, 2016).

The Supreme Court often exercises its inherent authority to modify or disapprove proposed rules recommended by the State Bar. *See, e.g.*, S239387, Supreme Court Order re Request for Approval of Amendments to Rule 5-110 and Rule 5-220 of the Rules of Professional Conduct of the State Bar of California (granting in part request for approval of recommended amendments to the Rules of Professional Conduct; denying in part and remanding to State Bar to develop further recommendations) (May 1, 2017).

### 3. Application of the Antitrust Laws to the State Bar

If an action has a potential anticompetitive effect, and is not an action of the Supreme Court acting as sovereign, closer analysis will be required. Under these circumstances antitrust immunity is available only if it is subject to *active state supervision* and pursuant to a *clearly articulated state policy*.

- **Active State Supervision** – The Federal Trade Commission has issued advisory guidelines stating that the following factors should be considered in determining whether the active supervision requirement is met:

(1) Whether the Supreme Court has obtained the information necessary for a proper evaluation of the action approved or recommended by the regulatory board.

(2) Whether the Supreme Court has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by Supreme Court or the state Legislature.

(3) Whether the Supreme Court has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

- **Clearly Articulated Policy** – When undertaking action that may be anti-competitive, the State Bar must also act pursuant to a clearly articulated policy of the Legislature or Supreme Court to displace competition.
- **Example:** A state bar could be in violation of the antitrust laws if it acts in an anti-competitive manner outside of a clearly articulated policy. In *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, the Virginia State Bar took action to enforce a minimum fee schedule for lawyers that had not been authorized by the Virginia Supreme Court. The Virginia Supreme Court had not supervised this anticompetitive action nor was there any clearly articulated statutory or court policy authorizing enforcement of the fee schedule. The U.S. Supreme Court held that the Virginia State Bar's actions constituted illegal price fixing and were not immune from the antitrust laws.
- **Detailed Statute or Rule of Court** – These active state supervision and clear articulation requirements are also met when the applicable statute or Rule of Court is so detailed and prescriptive as to remove the State Bar's discretion. The detailed

legislation itself articulates the policy and satisfies the supervision requirement. Cal. AG Opinion 15-402 at 9.

For example, the State Bar is required by law to place on inactive status attorneys who fail to comply with MCLE requirements. Cal. Bus. & Prof. Code § 6070 (a); Cal. Rule of Court 9.31(d). Although the State Bar's action to remove these attorneys from practice temporarily may impact competition, such actions are only a ministerial activity to enforce the statute and likely would not violate the antitrust laws.

4. State Bar Personnel Must Report Potential Antitrust Violations Immediately

- **Sensitive Topics** – Actions such as collusion among attorneys to fix prices, limit market entry, or otherwise limit competition, whether or not under the auspices of the State Bar, violate the antitrust laws. Meeting convened by the State Bar often involve groups of attorneys who may be considered competitors in the marketplace under the antitrust laws. Attorneys must refrain from discussing with each other matters relating to price or costs, such as prevailing hourly billing rates and associate or staff salaries. More significantly, the State Bar may not take actions that have an anticompetitive effect on the marketplace unless required by law.
- **Mandatory Reporting** – State Bar personnel are prohibited from engaging in any such activity and must report potential violations, including but not limited to potential violations caused by actions of the State Bar or the Board of Trustees, to the Office of General Counsel immediately. If OGC reviews a proposed action, program, or policy decision and opines that there is not a potential antitrust violation, OGC will still forward its analysis to the California Supreme Court, which may choose whether to review the proposed action, program, or policy decision, as it deems appropriate.

5. A Member of the Public May Report Potential Antitrust Violations to the State Bar, and all Such Reports may be Reviewed by the Supreme Court

Any individual may report a potential antitrust violation to the State Bar. The State Bar's determinations on reports of potential antitrust violations brought by members of the public may be reviewed by the Supreme Court in accordance with the Supreme Court's procedures.