

MEMORANDUM

To: Mary Fairhust, Chief Justice and Chair of the WSBA Bar Structure Work Group

From: Frederick P. Corbit¹ and Hayley Dean²

Date: May 13, 2019

Re: Application of *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), to the WSBA Structure

Introduction and Issue

As a result of recent United States Supreme Court cases, state bars across the country are reviewing the structure and activities of their organizations. In this vein, the Washington Supreme Court created the Washington State Bar Association (WSBA) Bar Structure Work Group “[t]o review and assess [the] WSBA structure in light of (1) recent case law with First Amendment and antitrust implications; (2) recent reorganizations by other state Bar associations and/or groups and their reasoning; and (3) the additional responsibilities of the WSBA due to its administration of Supreme Court appointed boards.”³ This memorandum will address whether one such case, *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015) (*North Carolina Board*), should prompt the Washington Supreme Court to make changes related to the WSBA in order to limit the WSBA’s exposure to antitrust claims.

Short Answer

The Sherman Anti-Trust Act is violated only when conduct harms competition. The United States Supreme Court in *North Carolina Board* held that state bars are not entitled to immunity from antitrust claims unless they are supervised by a state supreme court or legislature. Therefore, to limit exposure to antitrust claims, the Washington Supreme Court should consider reiterating that the power to regulate attorneys lies with the Court and that the WSBA Board of Governors (BOG) is an advisory board. Such a clarification is consistent with past pronouncements of the Washington Supreme Court. *See Wash. State Bar Ass’n v. State*, 125 Wn.2d 901, 909 (1995) (“The ultimate power to regulate court-related functions, including the administration of the [Washington State] Bar Association, belongs exclusively to [the Washington Supreme Court].”).⁴

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³ *Supreme Court Work Group to Review WSBA Structure*, WSBA, <https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/bar-structure-work-group> (last visited May 1, 2019).

⁴ *See also In re Application of Schatz*, 80 Wn.2d 604, 607 (1972) (“The legislature expressly recognized the primacy of the court in the area of admissions and disbarment when it made the

Background and Analysis

The Sherman Act, enacted in 1890, imposes constraints on anticompetitive activity. But when enacted, the Sherman Act did not include governmental acts. In 1942, the United States Supreme Court recognized when a state acts in its sovereign capacity, its acts are immune from antitrust liability. *Parker v. Brown*, 317 U.S. 341, 351-54 (1942). *Parker* stated a relatively broad exception to antitrust protections that the Supreme Court has clarified and narrowed over the years. In 1980, the United States Supreme Court held that a private actor who invokes the state action exemption must show the anticompetitive restraint is both “clearly articulated and affirmatively expressed as state policy” and the private actor is “actively supervised by the State.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

For almost a century, the legal profession remained free from federal antitrust liability. But in 1975, the United States Supreme Court rejected the claim that the Sherman Act was “never intended to include the learned professions.” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786 (1975). *Goldfarb* involved home purchasers who could not find an attorney to conduct a title search at a fee lower than the minimum amount published by the local Fairfax County Bar Association. *Id.* at 775-76. The Virginia Supreme Court had promulgated rules suggesting that fee schedules published by state and local bar associations would provide guidance on what was a reasonable fee for certain legal services. The Virginia State Bar, an administrative agent of the Virginia Supreme Court, condoned the Fairfax fee schedule by issuing ethical opinions suggesting failure to follow a published fee schedule raised a presumption of misconduct. The United States Supreme Court ruled the Virginia State Bar was not entitled to state action immunity because that bar failed to show its actions passed the *Midcal* test. Specifically, the enforcement of the Fairfax County Bar’s fee schedule was not an implementation of a “clearly articulated” state policy nor was the state of Virginia involved in overseeing or implementing the fee schedules. *Id.* at 790-91.

Post-*Goldfarb*, the United States Supreme Court gave greater latitude to the bar’s alleged anticompetitive practices. In 1984, Edwin Ronwin failed the Arizona bar examination and sued the Arizona Supreme Court’s Committee on Examinations and Admissions under the Sherman Act. *Hoover v. Ronwin*, 466 U.S. 558, 564 (1984). The Committee—comprised of seven members of the state bar selected by the Arizona Supreme Court from a list supplied by the Arizona State Bar Association’s Board of Governors—had a similar decision-making structure to that in *Goldfarb*: the state supreme court delegated substantial authority to a branch of the bar association. Ronwin claimed the committee had “artificially reduc[ed] the numbers of competing

board’s powers subject to the approval of the Supreme Court under RCW 2.48.060. The language of the statute clearly lodges all ultimate authority in the Supreme Court. The Board of Governors, acting in this area, is an arm of the court, independent of legislative direction.”); *Wash. State Bar Ass’n*, 125 Wn.2d at 907-08 (“This court’s control over Bar Association functions is not limited to admissions and discipline of lawyers. The control extends to ancillary administrative functions as well.”); *see also* WSBA Bylaws Art. IV(A) (providing the BOG is subject to the plenary authority and supervision of the Washington Supreme Court).

attorneys in the State of Arizona” by setting passing scores with reference to the number of new attorneys the committee thought appropriate rather than “with reference . . . to some ‘suitable’ level of competence.” *Id.* at 565. The United States Supreme Court found the bar admission system did not violate the Sherman Act because the decision to admit or deny admission to the bar was an act of the state supreme court rather than a state agency or the bar association. *Id.* at 573. *Ronwin* led to a series of lower court opinions upholding American Bar Association (ABA) and state bar regulations based on state action immunity. *See, e.g., Lawline v. American Bar Ass’n*, 956 F.2d 1378 (7th Cir. 1992) (state action doctrine applied to rules adopted by the Supreme Court of Illinois restricting the unauthorized practice of law); *Massachusetts School of Law v. American Bar Ass’n*, 107 F.3d 1026 (3rd Cir. 1997) (state action doctrine applied where an unaccredited law school sued the ABA for not accrediting the school which allegedly resulted in the school being at a competitive disadvantage in recruiting students as graduates of unaccredited schools could not sit for the bar in most states because the states, not the ABA, had decided to allow only graduates of accredited schools to sit for the bar). Viewed together, these cases reflect the federal courts’ ability, but reluctance, to use antitrust law to set limits on lawyer regulation.

However, the Federal Trade Commission (FTC) did not share the federal courts’ reluctance to use antitrust laws to set limits on the regulations of professionals in the United States. In 2002, the FTC initiated a focused effort to restrain anticompetitive conduct related to professional associations. One of the targets of the FTC’s 2002 investigation was the North Carolina Board of Dental Examiners (“the Board”). Under the governing North Carolina statute, the Board was an “agency of the State” engaged in the “regulation of the practice of dentistry.” N.C. Gen. Stat. Ann. § 90-22 (2013). The Board was comprised of eight members: six practicing dentists, one dental hygienist, and one consumer representative appointed by the governor. *Id.* The Board was authorized to promulgate rules and regulations, subject to approval by the North Carolina Rules Review Commission, and it could bring lawsuits to enjoin the unauthorized practice of dentistry. *Id.* at §§ 90-48, 90-40.1.

The focus of the FTC’s inquiry was the Board’s investigation into complaints from dentists concerning teeth whitening services offered by non-dentists. The dentists complained teeth whitening by non-dentists constituted the unauthorized practice of dentistry, with most of the complaints “express[ing] a principal concern with the low prices charged by non-dentists” as opposed to “possible harm to consumers.” *North Carolina Board*, 135 S. Ct. at 1108. Despite only receiving a “[f]ew complaints” of public injury, the Board issued at least 47 cease and desist letters to non-dentists offering teeth whitening services. *Id.* The Board also persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists not to offer such services and requested mall operators to consider expelling businesses that offered teeth whitening. *Id.* The Board’s actions shut down many businesses. In response, the FTC filed a complaint against the Board, alleging the Board violated the Sherman Act. Eventually, in *North Carolina Board*, the United States Supreme Court decided the Board was not entitled to state action immunity.

The Court in *North Carolina Board* found state agencies or boards are not automatically entitled to immunity when such agencies or boards are “nonsovereign” actors. *Id.* Under *North Carolina Board*, when “a controlling number of decisionmakers” on a board are “active market participants in the occupation the board regulates,” the board will not enjoy antitrust immunity

unless both *Midcal* requirements are met: anticompetitive restraint is clearly articulated and affirmatively expressed as state policy and the private actor is actively supervised by the State. *Id.* The *North Carolina Board* Court explained the need for supervision turns not on the “formal designation given by States to regulators but on the risk that active participants will pursue private interests in restraining trade.” *Id.* at 1114. To qualify as active supervision, the *North Carolina Board* Court provided four criteria that must be present in order to establish sufficient state oversight: (1) the state must review the substance of the challenged conduct, not just the procedures followed to produce it, (2) the state must be vested with the power to modify particular decisions, (3) the “mere potential” of state supervision is not enough, and (4) the state may not itself be an active market participant. *Id.* at 1116-17 (internal quotations omitted). Because the Board had not received “active supervision” from the state related to its efforts to preempt non-dentists from providing teeth whitening services, the Board could not claim state action immunity. *Id.* at 1117.

In 2017, relying on *North Carolina Board*, TIKD Services sued the Florida Bar, alleging the Florida Bar violated the Sherman Act.⁵ Complaint for Damages and Injunctive Relief, *TIKD Servs. LLC v. The Florida Bar, et al*, No. 1:17-cv-24103-MGC (S.D. Fla. 2017), ECF No. 1. TIKD Services developed an app called TIKD in which drivers who received tickets upload their tickets, pay TIKD a fixed price, receive a lawyer through the app to defend the tickets, and get a guarantee from TIKD that the tickets will cost no more money. The Florida Bar, whose Board of Governors is comprised of 52 elected members of the bar in good standing, launched an investigation to determine whether TIKD was engaged in the unauthorized practice of law. In the complaint, TIKD alleged the Florida Bar issued an informal opinion giving the impression that working with TIKD violated ethics rules. The Florida Bar successfully moved to dismiss the case, arguing it was immune from antitrust liability under the state action doctrine because it is specifically authorized to investigate the unlicensed practice of law as a branch of the Florida Supreme Court and an agency of the state. TIKD Services appealed, and the Eleventh Circuit recently granted the parties’ joint motion to dismiss, Entry of Dismissal, *TIKD Servs. LLC v. The Florida Bar, et al*, Case No. 18-15346-FF (11th Cir. 2019).

With the dismissal of *TIKD Services LLC v. The Florida Bar*, the impact of *North Carolina Board* on state bar associations’ conduct is not yet clear. Nonetheless, in Washington the risk of a successful antitrust claim against the WSBA can be minimized if the Washington Supreme Court implements WSBA policies that comply with the *Midcal* requirements: clear articulation of state policy and active state supervision. In case law, these two requirements are often discussed together, with active supervision by the state serving as a check and balance on an agency’s actions, thus ensuring the agency is acting in accordance with state policy.

⁵ A few months after commencement of the federal case, the Florida Bar filed a complaint against TIKD Services in state court alleging TIKD Services engaged in the unlicensed practice of law. See Report of Referee and Recommended Judgment, *The Florida Bar v. TIKD Services LLC and Christopher Riley*, No. SC2018-149 (Fla. 2018). That case did not involve violations of the Sherman Act. The appointed referee recommended the Supreme Court of Florida dismiss all claims against TIKD Services with prejudice. As of May 13, 2019, the case had not been dismissed.

Washington state policy is reflected in the General Rules promulgated by the Washington Supreme Court. GR 12.1(a) provides the following purposes of the WSBA: (1) promote the independence of the judiciary and the legal profession, (2) promote an effective legal system, accessible to all, (3) provide services to its members and the public, (4) foster and maintain high standards of competence, professionalism, and ethics among its members, (5) foster collegiality among its members and goodwill between the legal profession and the public, (6) promote diversity and equality in the courts and the legal profession, (7) administer admission, regulation, and discipline of its members in a manner that protects the public and respects the rights of the applicant or member, (8) administer programs of legal education, (9) promote understanding of and respect for our legal system and the law, (10) operate a well-managed and financially sound association, with a positive work environment for its employees, and (11) serve as a statewide voice to the public and to the branches of government on matters relating to these purposes and the activities of the association and the legal profession.

To actively ensure the WSBA remains squarely within this affirmatively expressed state policy, the Washington Supreme Court should continue with procedures that make it clear the BOG is an advisory board and that the Court is supervising the board. One supervisory action the Court could take involves amending the bylaws related to the WSBA Executive Director. The responsibility for the administration and execution of the WSBA's regulatory functions mandated by the Court largely rests with the Executive Director. Currently the BOG selects the Executive Director with only limited oversight by the Court. WSBA Bylaws Art. IV(A)(2)(b). Preserving the administrative independence of the Executive Director, as well as protecting the integrity of the WSBA's regulatory functions, is vital to reducing antitrust risk. The WSBA bylaws seemingly recognize the importance of the Executive Director; however, the bylaws limit the ability of the Court to veto the dismissal of the Executive Director. The Court may veto the dismissal only when it "is based on the Executive Director's refusal to accede to a BOG directive to disregard or violate a Court order or rule." WSBA Bylaws Art. IV(B)(7)(b). In administering the WSBA, the Court should have the authority to veto the dismissal of the Executive Director, regardless of the reason for the dismissal.⁶ For similar reasons, the Court should maintain veto control over the termination of the WSBA's Chief Disciplinary Counsel and have authority over the WSBA budget.⁷ By taking a more active role in the retention of the Executive Director and the Chief Disciplinary Counsel and a more active role in the review of the WSBA budget, the Washington Supreme Court will help ensure the WSBA is acting in accordance with a clearly articulated state policy that serves the public interest.

Additionally, the Washington Supreme Court should consider taking an active role when the BOG amends the WSBA bylaws. Approval of bylaw changes would ensure orderly and thoughtful consideration of proposed changes. In many states, review of bylaw amendments and

⁶ In 2012, the WSBA's Board of Governors approved a Governance Task Force, which provided the Washington Supreme Court with several recommendations to address issues within the WSBA. Suggestions recommended by the Governance Task Force are consistent with the recommendations in this memorandum.

⁷ For example, without the authority to approve or veto the budget, the BOG could control the Chief Disciplinary Counsel by approving a budget that is insufficient to hire a staff to handle attorney discipline.

promulgation of rules is required by a higher authority. For example, in North Carolina, any rule enacted by the state bar must be reviewed and approved by the North Carolina Supreme Court, which is clearly a sovereign state actor. *See North Carolina Board*, 135 S. Ct. at 1110 (noting that decisions of a state supreme court “acting legislatively rather than judicially” are *ipso facto* immune from antitrust laws) and 1114 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-62 (1977), as an example of state action immunity being granted partly because the Arizona State Bar’s rules were “subject to pointed re-examination by the policymaker”). Accordingly, by actively reviewing proposed bylaw changes, the Washington Supreme Court will reduce exposure to antitrust liability.

In taking an active supervisory role, the Washington Supreme Court should also create records that justify regulatory actions taken by the WSBA. A state bar should identify and substantiate the consumer harm it is attempting to address and establish a record that an appropriate investigation of those harms has occurred. That investigatory record should be memorialized in internal documentation to serve as the needed proof that actions were taken in the public interest. Creating such a record will require meetings between the Court and the BOG.

Finally, as GR 12.1(a) shows, the WSBA is charged with the protection of the public. For example, member services are permitted under GR 12.1(a)(3) not because they serve the interests of the membership but because they promote a more competent and skilled body of legal professionals to the benefit of the public. As already discussed, having an independent Executive Director and Chief Disciplinary Counsel serves that goal. Another way in which the Washington Supreme Court can ensure the public is served is by appointing at least two public members to the BOG to advise the Court on matters of importance to the public and to appoint a Limited License Legal Technician (LLLT) to the BOG since LLLTs are now members of the WSBA.

Conclusion

The Sherman Act is violated when conduct harms competition. Antitrust risk exists for actions of the WSBA if (1) those actions fail to demonstrate the implementation of a “clearly articulated and affirmatively expressed” state policy and (2) the WSBA is not “actively supervised” by the Washington Supreme Court. As long as the Washington Supreme Court exercises its power to actively supervise the BOG in order to implement the policies set forth in GR 12.1(a), antitrust risk is minimized.