

# Comments to Supreme Court Work Group to Review WSBA Structure on Structural Antitrust Issues – or the lack thereof

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## EXECUTIVE SUMMARY:

Does *N. Carolina Board of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015), change bar associations’ ability to use the “state action” antitrust exemption? No. Bar associations have been subject to the same antitrust analysis since *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780-793 (1975). Justice Kennedy’s *N. Carolina Dental* opinion applied the bar association exemption standards to other state regulatory boards. 135 S.Ct. at 1111, 1113, 1114-1115. Those long-settled bar association exemption standards are already in place and generally satisfied in Washington.

The materials for the June 26 meeting of the Work Group include a recent American Bar Association article by Mark Merritt, former President of the N. Carolina Bar and an experienced antitrust practitioner, which offers concrete steps to improve antitrust protection. Merritt’s recommended steps, however, are operational and managerial, not structural, and thus, fit into Chief Justice Fairhurst’s “no change” bucket. To paraphrase Merritt, the antitrust risk to bar associations is manageable and avoidable.

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<sup>1</sup> I am an experienced tax-exempt organization practitioner, which includes counseling on antitrust issues. I am also an experienced U.S. Supreme Court practitioner, having participated in some fashion in more than forty cases before that Court. In recent years, I have focused on First Amendment cases, especially the right of association. I analyzed these antitrust issues (as well as *Janus* and other First Amendment cases) for last year’s WSBA Addition of New Governors Work Group. I have been admitted to mandatory, integrated and voluntary bars.

## INTRODUCTION:

As state bar leaders, we would be making a mistake if fears about antitrust liability make us timid in enforcing the high ethical standards of our profession or in carrying out the regulatory mandates given to us by statute or our state supreme courts. The Sherman Act can be violated only when there is harm to competition, and it is unlikely that promulgating ethical rules or disciplining individual lawyers will affect competition in a manner that violates the Sherman Act. *See, FTC Staff Guidance*<sup>[2]</sup> at 6 (Setting out examples of state agency conduct that is not likely to raise antitrust concerns). Antitrust risk is a manageable risk and an avoidable risk, and I doubt that most state bars would make the kinds of mistakes that the Dental Board made.

Mark W. Merritt, “Lessons Learned from the *NC Dental Board* Decision by a [North Carolina] State Bar Officer and Antitrust Lawyer,” American Bar Association, 24 THE PROFESSIONAL LAWYER 1, June 14, 2017,

[https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-1/lessons\\_learned\\_the\\_nc\\_dental\\_board\\_decision\\_a\\_state\\_bar\\_officer\\_and\\_antitrust\\_lawyer/](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/lessons_learned_the_nc_dental_board_decision_a_state_bar_officer_and_antitrust_lawyer/)

It is common for even sophisticated lawyers to be wary about antitrust law, with its sweeping and vague statutes, aggressive administrative enforcement and private challenges, and armies of economists spouting incomprehensible notions supposedly determinative of fickle human nature. It’s an enormous playing field, but there are rules and umpires to guide those who want to comply. And, in the case of bar associations, those rules are of long standing, sweeping, and fairly clear. Ultimately, it is a matter of understanding and managing risk, something for which lawyers are well-suited. It does not require any structural changes in the WSBA, including adding public members to the BoG (which provides no protection under the applicable cases).

## STATE-ACTION ANTITRUST IMMUNITY:

*N. Carolina Dental* is touted by some as a major change in antitrust law,<sup>3</sup> but for bar associations, its analysis is neither novel nor different. The U.S. Supreme Court<sup>4</sup> applied (and found unsatisfied) the same analysis of the state-action exemption to bar associations’ unsupervised fee schedules in *Goldfarb* in 1975, and to insulate a bar association’s activities in administering the bar exam in *Hoover v. Ronwin* in 1984.<sup>5</sup> Justice Kennedy’s *N. Carolina Dental* opinion applied the pre-existing bar association exemption standards to other government agencies.

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<sup>2</sup> Staff of the Bureau of Competition, Fed’l Trade Comm’n, *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, Federal Trade Commission, Oct. 2015, [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), (“*FTC Staff Guidance*”).

<sup>3</sup> *See, e.g.*, Jarod Bona, “My Analysis of the Supreme Court’s *North Carolina State Board of Dental Examiners v. FTC* Decision,” *The Antitrust Attorney Blog*, March 14, 2015, <https://www.theantitrustattorney.com/my-analysis-of-the-supreme-courts-north-carolina-state-board-of-dental-examiners-v-ftc-decision/>, last accessed June 23, 2019.

<sup>4</sup> For clarity, the Supreme Court of the United States is referred herein as “U.S. Supreme Court,” and the Washington Supreme Court is referred to as the “Supreme Court.”

<sup>5</sup> 466 U.S. 558 (1984) (state-action immunity applied to bar association).

For example, Justice Kennedy cited *Goldfarb* numerous times for significant points.<sup>6</sup> In one of its most significant passages, addressing the need for active state supervision, Justice Kennedy used only bar association exemption precedent:

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had “joined in what is essentially a private anticompetitive activity” for “the benefit of its members.” 421 U.S. at 791, 792. This emphasis on the Bar’s private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U.S. at 791; see also *Hoover v. Ronwin*, 466 U.S. at 569 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361-362 (1977) (granting the Arizona Bar state-action immunity partly because its “rules are subject to pointed re-examination by the policymaker.”).  
135 S.Ct at 1114.

State bar associations may not violate federal antitrust laws. *Goldfarb*, 421 U.S. at 780-793 (minimum fee schedule not protected by “learned profession,” or state immunity exemptions from federal antitrust laws). A combination of administrative and judicial guidance, however, has created some broad exemptions from antitrust liability, several of which are directly and currently applicable to the WSBA even without any structural changes. Two of the more important exemptions for the WSBA are the broad state-action immunity (outlined in *Goldfarb*, *Hoover v. Ronwin*, and *N. Carolina Dental*), and the equally-powerful *Noerr-Pennington* doctrine, under which its members’ First Amendment rights immunize the WSBA’s attempts to influence government activities and enforcement.<sup>7</sup>

As the Federal Trade Commission Bureau of Competition’s Geoffrey Green, who helped to write the FTC’s Staff Guidance which explains administrative enforcement after *N. Carolina Dental*,<sup>8</sup> stressed in his May 29, 2019, presentation to the Structure Work Group, antitrust

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<sup>6</sup> 135 S.Ct at 1111 (“State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.”), 1113 (“*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.” and “Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, ...”), 1114, and 1115.

<sup>7</sup> Members of this Structure Work Group will immediately see that the members’ First Amendment rights at issue in the mandatory “funding” and “membership” concerns sparked by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) and *Fleck v. Wetch*, 139 S. Ct. 590 (2018) (*certiorari* granted on both “membership” and “funding/opt-in” questions, vacated, and remanded) are related to the members’ First Amendment protections from antitrust liability. Although *Fleck* is briefly discussed at n. 12 *infra* in the context of the Eighth Circuit’s discussion at its June 13 oral argument on remand of whether *Keller* is still controlling, the First Amendment questions are for another time, after Ms. Emily Chiang’s June 26 presentation to the Structure Work Group on First Amendment issues. Suffice it to say that the members’ First Amendment rights at issue are different to some degree (right to association vs. right to petition the government), but also easily reconciled, at least at the more clear “regulatory” side of the *Keller* spectrum of activities which may be paid for by mandatory dues.

<sup>8</sup>Staff of the Bureau of Competition, *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, Federal Trade Commission, Oct. 2015, [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) (“*FTC Staff Guidance*”).

enforcement is triggered ONLY by anticompetitive activity, not by an organization's structure. From his summary slide:<sup>9</sup>

- “Absence of exemption ≠ antitrust violation”
- The Supreme Court's legislative actions, even if blatantly anticompetitive, are “always (ipso facto) exempt from federal antitrust liability”
- The WSBA's “conduct ... is exempt where the Supreme Court is the real party in interest **OR** the *Midcal*<sup>[10]</sup> conditions are satisfied” (emphasis added).

As Mr. Green explained, in brief, counsel reviewing any WSBA activity for possible antitrust issues under the FTC's or the long-standing bar association cases' framework would look at a number of threshold questions:

### *Is there an anticompetitive activity?*

Simply existing as an organization with the potential to somehow violate the antitrust laws does not trigger antitrust scrutiny or enforcement. This is not an idle inquiry. There will always be some who claim that the mere fact that lawyers govern themselves is an antitrust violation.<sup>11</sup>

As Mr. Green's summary slide demonstrates, that is a fruitless claim: “Absence of exemption ≠ antitrust violation”. There is, in fact, no precise antitrust or anticompetitive issue involved in lawyers governing bar associations unless and until an anticompetitive activity is alleged.

In *N. Carolina Dental*, Justice Kennedy's opinion went to some lengths to point out that the presence of professionals on a regulatory board is welcome, rather than a concern:

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so – and, for reasons to be noted, it need not be so – there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling. ...

In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. ... State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea.

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<sup>9</sup> Geoffrey M. Green, “Antitrust Considerations for Regulating the Practice of Law,” presentation to Structure Work Group, May 29, 2019, [https://www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/washington-20190529public2-powerpoint.pdf?sfvrsn=1a6a02f1\\_0](https://www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/washington-20190529public2-powerpoint.pdf?sfvrsn=1a6a02f1_0), (“Green presentation”), slide 2.

<sup>10</sup> *California Liquor Dealers' Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

<sup>11</sup> See, e.g., May 4, 2015, form letter sent, in the wake of *N. Carolina Dental* decision, to every state Attorney General from three organizations (including, *inter alia*, the publisher of *Consumer Reports* magazine), claiming massive antitrust violations by all state regulatory bodies governed by market participants. <http://pdfserver.amlaw.com/nlj/licensing.pdf>.

*N. Carolina Dental*, 135 S.Ct. at 1115.

Indeed, to the U.S. Supreme Court, the presence of lawyers in a bar association is the very purpose of a bar association, and protected as such. “The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers.” *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990).<sup>12</sup>

And, as I discussed in my analysis for the Addition of New Governors Work Group last year,<sup>13</sup> academic research also indicates that regulation of lawyers by lawyers is necessary to protect the public from, among other things, economic harm cognizable under the antitrust statutes.

In addition, the highly legalized environment renders regulated entities dependent on the expertise of lawyers, and thus unable to act autonomously: “When a body of law becomes so complex, it may be rendered virtually incomprehensible in parts of the country where specialists are rare.”

Jodi L. Short, *The Paranoid Style in Regulatory Reform* (January 12, 2011). Georgetown Public Law Research Paper No. 11-10, available at <https://ssrn.com/abstract=1739015>, at 49, *citing*, Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 74 (2003). The particular antitrust implications of using nonlawyers to regulate lawyers are discussed *infra* under Possible Practical Actions, pp. 12-14.

To apply this “is there anticompetitive activity” inquiry to a WSBA proposed or challenged activity does not require any structural change. Presumably, the WSBA is already seeking competent antitrust counsel to review any questionable proposal, so may not require any operational change. A review of Mark Merritt’s proposed steps to manage the risk of antitrust liability, *see*, discussion, *infra*, indicates nothing that would require a structural change in the WSBA, only managerial and operational ones.

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<sup>12</sup> Note that in the June 13, 2019, U.S. Court of Appeals for the Eighth Circuit re-argument in *Fleck v. Wetch*, the continued vitality of *Keller* was the subject of extensive discussion between counsel and the bench, especially focused on the still-open “membership” question, as opposed to the “opt-out/opt-in” funding issue. The oral argument can be found at: <https://www.courtlistener.com/audio/64194/arnold-fleck-v-joe-wetch/>. *See, e.g.*, at 40:10 (The Court: “Does that [grant, vacate and remand on both the “opt-in” and membership issues], as I read *Keller*, *Lathrop*, and *Janus*, [that] *Keller* is not really controlling ... Now are they telling us to be the first ones to go there? ... They could have just vacated and remanded on the opt-in issue and denied cert on the other issue.”).

<sup>13</sup> My 51-page Report to the Addition of New Governors Work Group, which covered constitutional and legal “miscellaneous” issues related to the addition of new Governors to the BoG, seems not to be available on the WSBA ANGWG web page, probably because the page has not been updated since August 2018 and my report was delivered in September. It is likely available from the WSBA (Jean McElroy was WSBA staff on the Addition of New Governors Work Group) or I can provide it upon request. My ANGWG Report also discussed in detail the *Janus*, *Harris v. Quinn*, and *N. Carolina Dental* decisions in an extensive preliminary section dealing with constitutional threshold issues that were raised by proposals of, but not dealt with in, earlier WSBA reports, such as the Governance Task Force.



***Is the action actually a decision by, or on behalf of, a Washington state sovereign entity?***

“The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign.” *Goldfarb*, 421 U.S. at 790, citing *Parker v. Brown*, 317 U.S. 341, 350-352 (1943), and *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-707 (1962). Almost all of the WSBA regulatory actions which are most likely to generate antitrust concerns (such as restricting legal practice or disciplining lawyers over financial issues) are taken by the Supreme Court, and only by the Supreme Court; settled antitrust doctrine permits the WSBA, acting in a ministerial fashion, to function as an arm of the Supreme Court and thus protect itself through the state action doctrine.<sup>14</sup>

Federal antitrust law does not apply to sovereign state actions, including those of the Supreme Court when it is setting government policy (that is, acting in a legislative capacity, as in promulgating rules governing the WSBA and access to courts). The antitrust laws do not displace the legitimate public policy powers of a sovereign state and its delegated agents, unless and until Congress acts expressly to remove those powers (and is within its own authority to do so).

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.

*Parker v. Brown*, 317 U.S. 341, 350-351 (1943); *N. Carolina Dental*, 135 S.Ct. at 1109.

In *Parker*, the U.S. Supreme Court held that an anticompetitive marketing program which “derived its authority and its efficacy from the legislative command of the state” was not a violation of the Sherman Act because the Sherman Act was intended to regulate private practices, and not to prohibit a State from imposing a restraint as an act of government. 317 U.S. at 350-352. *Parker* cited an even older case, *Olsen v. Smith*, 195 U.S. 332, 344-345 (1904) (“no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law”).

The same is true of the Supreme Court’s actions: “a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action.” *Hoover v. Ronwin*, 466 U.S. at 568 (bar exam administered by bar association still an action of the Arizona Supreme Court because of that court’s express policies and review). Note, again, that *Hoover v. Ronwin* was thirty years before that two-step analysis was offered in *N. Carolina Dental*.

The same immunity is triggered by the actions of agents to whom the state has delegated some of its powers. The “real party in interest” test looks to see if the anticompetitive action

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<sup>14</sup> The FTC is less flexible in applying that “ministerial” test than the courts, and Mr. Green’s presentation to the Structure Work Group reflected that different enforcement view by not embracing more flexible judicial review standards, particularly in *Hoover v. Ronwin*.

complained of is actually by a sovereign state entity. A state supreme court, for example, can delegate implementing power to another entity, including in some cases private entities, without losing state-action immunity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977). In *Bates*, the Arizona Bar enforced rules against attorney advertising, which were challenged on antitrust grounds. 433 U.S. at 372. The U.S. Supreme Court held:

[T]he appellants' 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 court; the [State Bar] acts as the agent of the court under its continuous supervision.

433 U.S. at 361. Again, almost forty years before *N. Carolina Dental*.

In *Hoover v. Ronwin*, another Arizona case, those exercising ministerial, non-discretionary power on behalf of a sovereign entity also enjoy the state-action immunity, but the limits of that ministerial definition are fairly broad. This is an extension of the real party in interest test to those who are acting on their own under clear direction from their supervising court. For example, in *Ronwin*, an unsuccessful applicant on the Arizona bar exam sued on antitrust grounds, claiming that the Arizona bar was manipulating the passing grades to artificially reduce the number of attorneys in practice. Even though the Arizona Bar drafted, administered, scored and reported the bar exam, the Bar was immune from the antitrust challenge because the Arizona Supreme Court had provided sufficient direction and review of the process.

The U.S. Supreme Court did not seem troubled by the fact that the Arizona Supreme Court did not know about the alleged anticompetitive nature of the particular bar exam:

This argument misconceives the basis of the state action doctrine. The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. "There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history." *Parker*, 317 U.S. at 351. The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of "the State acting as a sovereign." *Bates, supra*, at 433 U. S. at 360. The action at issue here, whether anticompetitive or not, clearly was that of the Arizona Supreme Court. ...

There is nothing in the state action doctrine, or in antitrust law, that permits us to question the motives for the sovereign action of the court.

*Hoover v. Ronwin*, 466 U.S. at 574, 576 n. 28.

Note again, that the Arizona Supreme Court could have decided to manipulate the bar exam to artificially limit the number of participants in a market – a clear anticompetitive action – and still not been liable for an antitrust violation; nor would its agent, the Arizona Bar. The level of supervision required of the Arizona Supreme Court was actually quite small and general, and the U.S. Supreme Court was not concerned with motives – anticompetitive or otherwise – for that action. The federal antitrust laws are not intended "to restrain state action." *Hoover v. Ronwin*, 466 U.S. at 574, quoting *Parker*, 317 U.S. at 351.

The FTC does recognize a “good faith implementation” defense as sufficient to invoke the state-action immunity. “The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. *See, 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6 (1987).” *FTC Staff Guidance*, at 6.<sup>15</sup>

Applying this step to proposed or challenged WSBA activity also should not require any structural change. Presumably, the WSBA already keeps sufficient records to demonstrate the state sovereign direction for its actions. Similarly, one hopes that the WSBA is maintaining sufficient records to show that its own actions are consistent with the state mandates. If it does not, then management should be instructed to begin keeping (and reconstructing if necessary) such records.

***If not an action by or on behalf of a sovereign state entity, was it in furtherance of a clearly articulated state policy and actively supervised by a sovereign state entity?***

Only once the prior two steps are unavailing does a reviewing court (or the FTC) begin to look at the actions of a private entity seeking to invoke state-action immunity. Of course, under the prior two steps, sovereign state actors and their agents are already immune. All that *N. Carolina Dental* did was examine whether state regulatory boards are more like agents of sovereign state agents or like private parties (or, put another way, like bar associations). The answer is: “it depends.” At different times, they could be both or either.

Bar associations often share characteristics of state agents and private entities; for example, they may be subject to state supervision, but also act outside their role as state agent. If, for example, a bar association were to promulgate a mandatory fee schedule or engage in similar “price leadership” (indirectly communicating pricing information), that could be an anticompetitive activity. If a state did that, the state would be immune, but if the bar association were doing so without either a clearly expressed state policy or adequate state supervision, it would have a difficult time showing that it was ministerially executing the policy of a sovereign state entity. That is what happened in *Goldfarb* in the 1970’s.

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. ... The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and, in that posture, cannot claim it is beyond the reach of the Sherman Act.”

*Goldfarb*, 421 U.S. at 791 (citation omitted). In other words, when acting on its own, without being an agent of the state, a bar association can be liable for antitrust violations. And it should

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<sup>15</sup> But the *FTC Staff Guidance* does not seem to endorse the extension of the ministerial doctrine to the same extent the U.S. Supreme Court did in *Hoover v. Ronwin*. Mr. Green’s slide asserted the FTC staff believes that bar associations must meet the *Midcal* conditions. Green presentation, *supra*, slides 2, 8. But that actual affirmative association does not appear in the *FTC Staff Guide*, which only mentions bar associations as raising “concerns” in *Goldfarb* and *Bates*, cases already decided by the U.S. Supreme Court prior to *Midcal*. In practical terms, however, the distinction is meaningless, because the standards set in *Goldfarb* and *Midcal* are the same. It is in *Hoover v. Ronwin* where the U.S. Supreme Court gave more flexibility to bar associations under the ministerial test.



be. Which is why competent antitrust counsel always challenges the exchange of pricing information – even indirectly – in an association; it can be done, but must be done with due consideration of the antitrust aspects and strict compliance with any governmental guidance.

The “state-action” immunity is, in fact, available to some private parties engaging in anticompetitive activity. In *Midcal*, as in *Goldfarb*, state-action immunity was available, but only if the private parties could meet two conditions: their conduct was (1) taken pursuant to a “clearly articulated and affirmatively expressed . . . state policy” and (2) “‘actively supervised’ by the State itself.” *Midcal*, 445 U.S. at 105, quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion). That is the same analysis as under *Goldfarb*. 421 U.S. at 780-793.

In *Goldfarb*, the U.S. Supreme Court spent thirteen pages examining both state policy articulation and state supervision of a bar association accused of anticompetitive activity. The U.S. Supreme Court first found that the fee schedule was not required by clearly articulated state law:

it cannot fairly be said that the State of Virginia, through its Supreme Court Rules, required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules, they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities.

421 U.S. at 790. Thus, there was no articulation at all of a state policy to provide mandatory minimum fee schedules – a blatantly anticompetitive act. In the absence of such a policy clearly articulated by the state, the U.S. Supreme Court would not derive one *sua sponte*.

In addition, the promulgation of the fee schedule was not reviewed or approved by the state: “Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions.” 421 U.S. at 791. Thus, the Virginia State Bar was not able to use the state-action exemption from antitrust liability.

In *N. Carolina Dental* forty years later, the state policy was conceded as clearly articulated, but both sides agreed that state supervision was lacking. 135 S.Ct. at 1116. That is why the state agency in *N. Carolina Dental* lost the case: it could not satisfy the *Midcal* conditions. If it had been a bar association, it could not have satisfied the *Goldfarb* conditions, which are the same as in *Midcal*.

Applying this step to proposed or challenged WSBA activity also should not require any structural change. WSBA is in a much stronger position than the Virginia Bar in *Goldfarb* or the Arizona Bar in *Bates*. It is much more like the Arizona Bar in *Hoover v. Ronwin*. The Supreme Court already has in place a clearly articulated state policy, consisting of both statutes and extensive court rules. It also has in place veto power under its “plenary” authority, and has recently asserted that authority several times.

### **1) Clearly-Articulated Washington State Policy:**

Washington's state policy is clearly stated by the State Bar Act and the Court's Rules, both of which were enacted in a legislative capacity. The recent furor over House Bill 1788 reflected the Legislature's recognition that the Supreme Court is entitled to legislate some aspects of state policy, which the Supreme Court has done at some length in GR 12 and other rules. *See, e.g.* "Rules relevant to the legal or regulatory relationship between the Washington Supreme Court and the Washington State Bar Association," [https://www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/history---court-rules-and-wsba-w-apr-updated-3-25-19.pdf?sfvrsn=536503f1\\_3](https://www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/history---court-rules-and-wsba-w-apr-updated-3-25-19.pdf?sfvrsn=536503f1_3).

This step of the analysis only looks at whether the state has acted to affect competition, not at whether the policy is wise. *Hoover v. Ronwin*, 466 U.S. at 576 n. 28.

GR 12.2, authorizing and prohibiting certain activities, is a comprehensive set of public policy rules enacted by the Supreme Court in part to direct WSBA compliance with anticompetitive actions. Though most of the General Rules' provisions have nothing to do with competition, some do. For example, 12.2(b)(4) provides for the WSBA to administer examinations, which are similar to Arizona's in *Hoover v. Ronwin*. Compliance with such rules is non-discretionary and does not give rise to antitrust liability. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6 (1987); *FTC Staff Guidance*, at 6.

It is not readily apparent, however, whether these specific directions are comprehensive enough to allow reviewing courts to determine that they satisfy the "clearly articulated" standard. For example, the Arizona Supreme Court's rules on admission examinations, upheld in *Ronwin*, were more detailed than GR 12.2. 466 U.S. at 576-77. But the Supreme Court also has separate Admission and Practice Rules which do provide additional detail, and in combination with the General Rules, should provide sufficient detail to clearly articulate what standards the Supreme Court expects the WSBA to apply.<sup>16</sup> In addition, all decisions on bar admission are ultimately the Supreme Court's and not the WSBA's.

Thus, if the WSBA's activities (that is, those activities which are not clearly or arguably reasonably ministerial) are within the spirit of GR 12.2 and similar rules, it is likely to satisfy *Goldfarb* first-prong review.

### **2) Active Supervision:**

The Supreme Court must "actively supervise" other activities of the WSBA to ensure that its anticompetitive activities are consistent with state policy. The WSBA Bylaws Art. IV(A) provide that the WSBA is subject to the supervision of the Supreme Court.

In Washington, the Supreme Court exercises sufficient control over most, if not all, functions of the WSBA to qualify as a state supervisor. *See, e.g., Application of Schatz*, 80 Wash.2d 604, 607, 497 P.2d 153, 155 (1972); *State ex rel. Schwab v. State Bar Ass'n.*, 80 Wash.2d 266, 493 P.2d 1237 (1971); *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966); *Campbell v. Washington State Bar Ass'n.*, 263 F.Supp. 991 (W.D.Wash.1967). The Supreme

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<sup>16</sup> In the unlikely event that an antitrust review of the Uniform Bar Exam, used by Washington, finds some concerns, the APRs should also be reviewed.

Court Justices periodically meet with the WSBA leadership and receive reports from the WSBA, as Chief Justice Fairhurst has noted during meetings of the Structure Work Group. Even the September 2018 Order of the Court creating this Structure Work Group and stopping all WSBA work on its own Bylaws demonstrates the Supreme Court’s active supervision of the WSBA.

To the extent that WSBA adheres to state policy and the Supreme Court exercises a review power over potentially-anticompetitive actions, the WSBA will be able to use the two *Goldberg/Midcal* factors (clearly articulated state policy and active supervision) to defend any of the likely competition-related actions undertaken by the WSBA.

### ***NOERR-PENNINGTON ANTITRUST IMMUNITY***

#### ***The First Amendment Trumps Antitrust Statutes:***

The Structure Work Group’s discussion of antitrust exemption has focused on *N. Carolina Dental* and the state-action exemption; as noted above, this exemption has long been available to bar associations. Yet there is an equally powerful additional antitrust exemption available to the WSBA, which was mentioned in passing by the FTC’s Geoffrey Green: the *Noerr-Pennington* antitrust immunity for collective action in support of the right to petition the government. Even though this was Mr. Green’s last slide, it is very important and should not be overlooked by the WSBA, as it represents the traditional first defense for many associational antitrust issues.<sup>17</sup>

The essence of the *Noerr-Pennington* doctrine is also one of the main activities of bar associations, particularly mandatory bar associations: the First Amendment-protected rights to petition the government and speak. The previous discussion of antitrust-related activity, for example, was about how bar associations like the WSBA rely, in part, on their ability to work with the Supreme Court to urge the Supreme Court to restrain trade.

For example, when the WSBA investigates a possible RPC violation and reports to the Supreme Court, it would be petitioning the government. Even independently of its current relationship with the Supreme Court, such a WSBA action should be documented and officially filed with all necessary due process protections. Assuming that it is done in that fashion, could such “petitioning” be considered a violation of antitrust laws? Not if it is genuine, rather than a sham.<sup>18</sup>

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

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<sup>17</sup> Green presentation, Slide 17.

<sup>18</sup> *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1960) (“*Noerr*”); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (“*Pennington*”).

Noerr, 365 U. S. at 137.<sup>19</sup>

This same First Amendment-protected right also applies to the courts. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972) (“We conclude that it would be destructive of rights of association and of petition to hold that group with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.”). Even using multiple lawsuits or petitions to the regulating courts does not strip the concerted anticompetitive activity of its constitutional protection from mere statutory antitrust law, unless the suits are a sham.<sup>20</sup>

Thus, and consistent to the greatest degree possible with then-current U.S. Supreme Court guidance as to permissible activities paid for by mandatory bar dues, if WSBA intends to take an action which might be construed as anticompetitive, it should do so by express petition to a state sovereign actor. In other words, legitimately suing for competitive advantage is the safest course in antitrust terms, rather than undertaking unilateral action.

## POSSIBLE PRACTICAL ACTIONS

### ***Would Adding Public Members Add Additional Antitrust Protection:***

The Structure Work Group is considering a proposed structural change intended to protect the WSBA’s ability to access the state-action exemption: increasing public membership on the BoG.<sup>21</sup> This is a highly-controversial step, as demonstrated by last year’s Addition of New Governors Work Group. While there may be other good reasons to do so or not,<sup>22</sup> adding public members to the BoG would not increase antitrust protection for WSBA.

In antitrust terms, the presence of a “controlling number” of market participants on a regulatory body’s Board may be sufficient to trigger review of non-sovereign actions. A “controlling number” was not defined in *N. Carolina Dental*, but observers (including the FTC) believe it is likely to be a sufficient number of persons to block action. *See, e.g., FTC Staff*

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<sup>19</sup> *See, e.g.,* Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990). Available at:

[https://repository.uchastings.edu/hastings\\_law\\_journal/vol41/iss4/3](https://repository.uchastings.edu/hastings_law_journal/vol41/iss4/3)

<sup>20</sup> *See, e.g.,* cases collected in Brief of Antitrust Scholars in *Puerto Rico Telephone Co. v. San Juan Cable, LLC*, No. 17-1215, *pet. den.* April 23, 2018, [https://www.supremecourt.gov/DocketPDF/17/17-1215/41992/20180402165111076\\_17-1215acAntitrustScholars.pdf](https://www.supremecourt.gov/DocketPDF/17/17-1215/41992/20180402165111076_17-1215acAntitrustScholars.pdf).

<sup>21</sup> *See, e.g.,* Frederick P. Corbit and Hayley Dean, MEMORANDUM to Mary Fairhurst, Chief Justice and Chair of the WSBA Bar Structure Work Group, Re: Application of *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), to the WSBA Structure, May 13, 2019, 5-6, <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Workgroup%20on%20WSBA%20Structure/WSBA%20Antitrust%20Memo.pdf>, last accessed, June 23, 2019. At least the recommendation for public BoG members was echoed in a June 19, 2019, statement by Work Group member Esperanza Borboa, <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Workgroup%20on%20WSBA%20Structure/Race%20Equity%20Inclusion%20and%20Access%20to%20Justice.pdf>, at 1.

<sup>22</sup> The WSBA, as noted above, convened the Addition of New Governors Work Group last year to evaluate recent bylaws changes changing the composition of the BoG, including adding public members to the BoG. The work of that ANGWG was halted by the Supreme Court’s September 2018 Order instituting, *inter alia*, this Structure Work Group. The WSBA BoG has not officially considered the ANGWG’s reports.

*Guidance*, at 8 (“Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (e.g., through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.”). That is a very loose “control” standard, encompassing even situations in which no market participant is actually on the applicable board, but simply influences the board.

Thus, adding even a majority of non-market participants would not provide exemption if the FTC or a reviewing court found that the non-market participants would defer to market participants or did not have the information or background to understand the economic and legal ramifications of the decision on which they were voting.<sup>23</sup> *FTC Staff Guidance*, at 8-9, Examples 6 and 7.

There is publicly-available evidence supporting the assertion that public members may be overwhelmed on regulatory boards. Intimidation of public board members is a well-recognized concern: “Public members may be intimidated by industry/occupation/profession members’ experience in the field.” Barbara Smith, “Role of A Person on the Governing Body of a Regulatory Entity,” Council on Licensure, Enforcement and Regulation, 1999, 6, <https://www.clearhq.org/resources/Role.htm> .

And lay Governors are likely subject to “informational capture” by WSBA managers and leadership that negates their possible antitrust benefits. For several years, Kobi Kastiel, Research Director for the Project on Controlling Shareholders at the Harvard Law School Program on Corporate Governance, and Prof. Yaron Nili of the University of Wisconsin Law School, have reviewed “Captured Boards.”<sup>24</sup> “While academic literature has focused on the impact director independence may have on the board’s advisory role and company performance, little attention has been given to the impact of the current independent board structure on the board’s ability to effectively carry out its monitoring role—the main goal for which director independence was sought.”<sup>25</sup>

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<sup>23</sup> As shown in my report for the Addition of New Governors Work Group on academic studies of laypersons on regulatory boards governing highly technical professions, this is a major concern in highly technical areas of regulation. *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wash.2d 443, 447 (1981); *WSBA v. Great Western Union Federal Sav. & Loan Ass’n*, 91 Wash.2d 48, 60 (1978).

It is the duty of the court “to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar.” *Great Western*, at 60. Even the simplest of conveyances may involve issues of taxation, estate planning, future interests, water rights, equitable conversion, covenants, equitable servitudes, easements, statute of frauds and contract law. As stated in *Washington State Bar Ass’n v. Washington Ass’n of Realtors*, 41 Wash.2d 697, 712 (1952) (Donworth, J., concurring), “there is no such thing as a simple legal instrument in the hands of a layman.” Even escrow agents who may be well trained in certain aspects of conveyancing could face complexities that are beyond the scope of that escrow agent’s knowledge. Additionally, the agent could fail to identify and address obscure issues.

*Bennion*, 96 Wash.2d at 447.

<sup>24</sup> See, generally, Nili and Kastiel, “Captured Boards:” *The Rise of “Super Directors” and the Case for a Board Suite* (September 15, 2016), WISC. L. REV., 19 (2017); Univ. of Wisconsin Legal Studies Research Paper No. 1392. Available at SSRN: <https://ssrn.com/abstract=2839416>.

<sup>25</sup> *Id.*

Specifically, independent board members suffer from what we term as “informational capture”. As part-time employees who often sit on multiple boards, independent directors lack the time, adequate resources, and the industry-specific knowledge to obtain, digest and analyze properly the extensive and complex information that modern boards are tasked with evaluating. Consequently, these directors are too dependent on that information which management chooses to provide or conceal, as well as on the manner management presents it to them.<sup>[26]</sup>

In short, under current antitrust interpretations, adding even a majority of public members to the BoG would likely not provide additional antitrust exemption.

### **MARK MERRITT’S PRACTICAL PROPOSALS**

The materials available for the June 26 Structure Work Group meeting include a “lessons learned” article from the American Bar Association’s *The Professional Lawyer* publication by Mark Merritt, former President of the North Carolina Bar Association, and an experienced antitrust lawyer.<sup>27</sup> The lessons Merritt learned from *N. Carolina Dental* are:

1. Know and Respect Your Statutory and Regulatory Authority and Limits
2. Use Rulemaking
3. Make a Record that Justifies the Regulatory Action
4. When in Doubt, Sue
5. Ethical Behavior is Important; Setting a Tone at the Top

All good lessons for the WSBA and the Structure Work Group. I will not repeat the article; it is short and to the point for readers, like members of the Structure Work Group, who are already thinking about these issues. It echoes, in specific points, the general legal analysis presented *supra*.

The main message is that antitrust protection is a process familiar to lawyers: risk assessment and management. It may not require structural changes that will increase antitrust protection, nor are any practical WSBA structural changes appropriate at this juncture. Instead, good management and operational practices will provide sufficient protection for normal bar association processes to provide good service to Washington and its people without inappropriate antitrust exposure.

Although I quoted Merritt’s conclusion earlier in this memorandum,<sup>28</sup> his penultimate paragraph is also both intriguing and likely accurate, especially his assessment that: “One can only wonder if the juxtaposition of the discussion of ethics and other immunities is not both an exhortation and a reminder that regulators who act ethically and in good faith may have immunity from damages under the Eleventh Amendment if they are later found to violate the

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<sup>26</sup> *Id.*

<sup>27</sup> Mark W. Merritt, “Lessons Learned from the *NC Dental Board* Decision by a [North Carolina] State Bar Officer and Antitrust Lawyer,” American Bar Association, 24 THE PROFESSIONAL LAWYER 1, June 14, 2017, [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-1/lessons\\_learned\\_the\\_nc\\_dental\\_board\\_decision\\_a\\_state\\_bar\\_officer\\_and\\_antitrust\\_lawyer/](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/lessons_learned_the_nc_dental_board_decision_a_state_bar_officer_and_antitrust_lawyer/)

<sup>28</sup> *Supra*, at 2.



antitrust laws.” This is good counsel; this is the way the U.S. Supreme Court often communicates, and it is perspicacious for Merritt to highlight it. The FTC staff, not always the most flexible of interpreters, agrees, citing U.S. Supreme Court guidance to justify flexibility for “good faith implementation”. *FTC Staff Guidance*, at 6, quoting, *324 Liquor Corp. v. Duffy*, 479 U.S. at 344 n. 6.

Act ethically and in good faith, bar leaders, and the courts will take notice; do not, and courts will also notice. Wasn’t that also the U.S. Supreme Court’s lesson in *Janus*, *Harris v. Quinn*, and *Fleck*? (But that is for another time.)

### **CONCLUSION:**

Antitrust issues fit into Chief Justice Fairhurst’s “no change” bucket, since there are no structural changes needed. Good management and operational awareness, plus review by appropriate antitrust counsel, should handle the risks in virtually every case applicable to WSBA.

Thank you for your efforts on behalf of the people of the State of Washington and for the legal profession as a whole.

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**PLEASE NOTE:** This memorandum is not legal advice and I am not legal counsel to the WSBA, the Supreme Court or any person involved in the Structure Work Group. This memorandum is solely for the general information of the Structure Work Group and may not be used for any other purpose by anyone.