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Don Morgan, Executive Director
Dauphin County Bar Association
213 North Front Street
Harrisburg, PA 17101

RE: Pennsylvania Association of Bar Executives
CONFIDENTIAL CLIENT COMMUNICATION SUBJECT TO ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

Dear Don:

You asked that we review several issues surrounding the Pennsylvania Association of Bar Executives ("PABE"), and in particular the application of the Sherman Antitrust Act, 15 U.S.C. Section 1 (2006) (the "Sherman Act") to PABE and the interaction among its members. You raised three specific questions, those being: (i) does the Sherman Act apply to non-profit organizations; (ii) does the Sherman Act apply to the county bar associations whose executives make up PABE (the "County Bar Associations"); and (iii) does the Sherman Act apply to the major sources of County Bar Association revenue? As to the first two questions, the Sherman Act applies to all nonprofit organizations, including County Bar Associations. As to the third question, the Sherman Act applies generally to all sources of Bar Association revenue. However, given the unique nature of the "market" in which Bar Associations offer their services we do not believe that the Sherman Act will have a major impact on the interactions among PABE members when it comes to these sources of revenue.

Specifically, the Sherman Act will not prohibit PABE members from sharing information regarding their fees for publishing legal notices. On the other hand, sharing information regarding dues structures may be a violation of the Sherman Act.

1. Does the Sherman Act Apply to Nonprofit Organizations?

The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. Section 1 (2006). The Supreme Court interprets the Sherman Act in an expansive matter. *See Goldfarb v. Virginia State Bar*, 421 U.S.C. 773, 787 (1975) (*citing United States v. South-Eastern Underwriters Assn.*,

322 U.S.C. 533, 553 (1944) ("language more comprehensive is difficult to conceive," and the Sherman Act "shows a carefully studied attempt to bring within the act *every person engaged in business* whose activities *might* restrain or monopolize commercial intercourse among the states") (Emphasis added). This language, then, makes virtually any organization's conduct subject to Sherman Act scrutiny.

It is well-settled that nonprofit entities fall under the purview of the Sherman Act. Nonprofit status does not guarantee that an entity will act in the best interest of consumers. *United States v. Brown University in Providence in the State of Rhode Island,* 5 F.3d 658 (3rd Cir. 1993) (*citing* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 232.2 at 275 (Supp. 1991). In addition to applying the Sherman Act to nonprofit universities in the immediately previously cited case, the Supreme Court has also applied the Sherman Act to the American Society of Mechanical Engineers and National Society of Professional Engineers. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* 456 U.S.C. 556, 576 (1982) ("it is beyond debate that nonprofit organizations can be held liable under antitrust laws."); *see also, National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and to a county bar association (*See, Goldfarb, supra.)* Indeed, the activities of professional organizations and trade associations are routinely scrutinized by antitrust enforcement agencies.

2. Does the Sherman Act Apply to Bar Associations?

In evaluating PABE members' conduct, it is really not a question as to whether the County Bar Associations or their main sources of revenue are subject to the Sherman Act. The Sherman Act is, as noted above, drafted to reach any commercial activity whether conducted by a nonprofit or a for profit entity, which would include County Bar Associations. Rather, the question is whether certain specific activities conducted by PABE's members constitute violations of the Sherman Act. In particular, whether sharing information regarding fees charged for publication of legal notices, and general information regarding the dues structure that each County Bar Association charges to its members and associate members, is a violation of the Sherman Act. These questions are complicated by the unique nature of County Bar Associations as associations of both commercial competitors and members of a learned profession regulated by the judicial branch of the state.

In *Goldfarb v. Virginia State Bar*, 421 U.S.C. 773 (1975), the Supreme Court determined that a mandatory schedule setting minimum fees to be charged for title examinations published by the Fairfax County Bar Association violated Section 1 of the Sherman Act. The Supreme Court overruled the lower court's finding that while the fee schedule was a substantial restraint on competition it was not a violation of the Sherman Act, as the practice of law is not "trade or commerce" under the Sherman Act. In reaching this conclusion the Court divided its inquiry into four steps, asking;

> did [the Fairfax County Bar Association] engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce? If so, are the activities exempt from the Sherman Act because they involve a "learned profession?" If not, are the activities "state action" within the meaning of *Parker v. Brown*, 317 U.S. 341, 63 S.CT. 307, 87 LED 315 (1943), and therefore exempt from the Sherman Act?

As to the first inquiry, the Court found that the fee schedule did constitute price fixing. In *Goldfarb* the fee schedule published by the Fairfax County Bar Association set a floor which attorneys did not go below, eliminating the ability of consumers to find cheaper alternatives and essentially fixing a price below which no attorney would go. As the Court noted, this was a rather blatant form of price fixing which, in any other industry, would have been considered *per se* illegal price fixing without further analysis. The information sharing that PABE's members wish to engage in is a similar type of *per se* violation of the Sherman Act in that this type of information sharing can readily lead to fixing prices. Rather than engage in a lengthy analysis of whether the information sharing that PABE is proposing is a violation, we will assume for purposes of this discussion that it would be found to be so.

The next point of analysis was whether the activities of the Fairfax County Bar Association were activities in interstate commerce, or did they affect interstate commerce? In *Goldfarb* the Court found that the price fixing in question did affect interstate commerce. The Court noted that a significant portion of funds used for purchasing homes in Fairfax County originated outside of the Commonwealth of West Virginia, and that significant amounts of those loans were guaranteed by the Veteran's administration and the Department of Housing and Urban Development. The Court found that "[g]iven the substantial volume of commerce involved [footnote omitted] and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected." *Goldfarb* 95 S. Ct. at 2012. The Court based this conclusion on the fact that title searches are an integral part of any real estate transaction, and are a requirement by any lender to insure that its lien on the property is paramount. Because the title examination is an integral part of a larger transaction with significant interstate participation, the Court found that the price fixing in question had an effect on interstate commerce.

In the same way that title examination fees are subject to the Sherman Act as part of a larger interstate transaction, the legal notices published by the County Bar Associations can be seen as parts of larger transactions in interstate commerce. For instance, foreign corporations wishing to qualify to do business in Pennsylvania are required to publish legal notices of their intention to do so. As a necessary pre-condition to doing business in Pennsylvania, the legal notice could be seen as an integral part of the process of an out-of-state corporation engaging in interstate commercial transactions in Pennsylvania.

Membership in County Bar Associations is a fairly characterized as an intrastate transaction. While County Bar Associations may have some members who are residents of other states, all such members will be members of the Pennsylvania bar as well. Their membership in a County Bar Association is a function of that Pennsylvania bar membership, and relates solely to their practice within Pennsylvania. The member dues collected by the County Bar Associations whose executives are members of PABE are therefore very unlikely to affect interstate commerce.

Also, member dues in County Bar Associations are not entirely a commercial transaction. County Bar Associations, while they do offer "commercial" services such as malpractice insurance, mainly focus their activities on supporting the practice as a learned profession. The main benefit of paying dues to become a member of a county bar association is the ability to participate in the association's "programs of public service, profession development and personal interaction."[1] The goals of professional development and community service embodied by County Bar Associations underscore the noncommercial nature of the bulk of their activities.

This impacts more directly on the third step in the Court's analysis in *Goldfarb*, that is, whether the practice of law, as a learned profession, is not an activity that falls within the term "trade or commerce" as used in Section 1 of the Sherman Act. In *Goldfarb* the Court held that Congress intended no sweeping exemption of legal services from the reach of Section 1 of the Sherman Act. The Court noted that:

> Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is "commerce" in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect [footnote omitted] and Section 1 of the Sherman Act "[o]n its face...shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states" *United States v. South-Eastern Underwriters Assn., supra,* 322 U.S. at 553, 64 S. Ct, at 1174.

Goldfarb, 95 S. Ct. at 2013, 2014. The Court went on the note, however, that there are many aspects of the practice of law which are not within the definition of "trade or commerce" as used in the Sherman Act. In the footnote to the above quoted language omitted above, the Court noted:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint

[1] This language is taken from the Dauphin County bar Association's website

> violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed a as a violation of the Sherman Act in another context, be treated differently. We intimate no view on other situations than the one with which we are confronted today.
>
> *Goldfarb*, 96 S. Ct. at 2013, N.17.

The fees charged for public notices are, on their surface, very like the title examination fees in *Goldfarb.* This is a very "commercial" transaction as it is a sale of space in the bar association's publication for a straight fee. If one ignores the content of the notice itself, and the context in which it is printed, it is no different than any other advertisement placed in any other periodical. One could argue that the fact that this publication is sponsored by a County Bar Association does not change the essentially commercial nature of the transaction.

Dues payments are not necessarily in the same category. While there is an exchange of value for a fee, this transaction falls much more squarely in the noncommercial realm of the practice of law. Membership in the County Bar Association is an integral part of being a member of the profession of the practice of law. The County Bar Association provides support to the professional that is specifically geared to the professional aspects that are unique to the practice of law. These organizations are at the core of what makes the practice of law a "learned profession." As noted in the footnote to the Court's opinion in *Goldfarb*, cited above, the "public service aspect, and other features of the professions" which might take a transaction out of the commercial realm are in large measure implemented through the County Bar Associations.

In fact, it is for this reason that County Bar Associations are not in competition with each other. Each County Bar Association is organized around its specific courts, and the community of attorneys who practice before those courts. These communities are not interchangeable, as each derives a unique identity from the courts around which it is organized. One cannot substitute membership in the Cumberland County Bar Association for membership in the Dauphin County Bar Association, even though there is significant overlap in their membership. In the absence of competition the sharing of information about fees has no antitrust meaning, as it is not an attempt, nor can it lead to, price fixing among competitors, as there is no competition.

In the last step of its analysis the Court turned its attention to the effect of the so-called "Parker Doctrine" on the question. The "Parker Doctrine" derived from the case of

Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943) in which the Court held that anticompetitive behavior which "derived its authority and efficacy from the legislative command of the state" was not a violation of the Sherman Act because the Sherman Act regulates private practices and does not prohibit the state from imposing a restraint on commerce as an act of government. *Parker,* 63 S. Ct. at 313. In applying the Parker Doctrine, the " threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to prescribe is whether the activity is required by the state acting as sovereign. *Goldfarb*, 95 S. Ct. at 2014.

In regard the publication of public notices, the various County Bar Associations are not in competition with one another as the legislature of the Commonwealth of Pennsylvania has precluded competition among them by enacting Pa.R.C.P. 430 which mandates "if service of process by publication has been authorized...the publication shall be by advertising a notice of the action once in the legal publication, if any, *designated by the court*...and one newspaper of general circulation within the county" (emphasis added). For those counties in which the Bar Association publication is the publication of record for legal notices, the county court has enacted a local rule, pursuant to Pa.R.C.P. 239 designating the Bar Association Journal as the journal on record. The Pennsylvania constitution grants the Pennsylvania Supreme Court the power to implement such rules, clearly putting such action within the States sovereign right. PA. Const. Art. V, § 10. Further, public notices required for other filings are also mandated by the General Assembly. (See, e.g., 15 Pa.C.S.A. § 1103 defining "officially publish" under the Pennsylvania Business Corporation Law of 1988 as "publish in two newspapers .... one of which shall be the legal newspaper, if any, designated by the rules of court for the publication of legal notices ...").

Once sovereign action is established, the validity of the action is determined by a two-pronged test, wherein the challenged constraint (1) is "one clearly articulated and affirmatively expressed as state policy, " and (2) "actively supervised" by the state. *California Retail Liquor Dealer Associations v. Midcal Aluminum, Inc., 445 U.S. S. 97, 105 (1980).* In the current instance the first prong of this test is satisfied by the Commonwealth of Pennsylvania's general rule and the various local rules adopted by the county courts. What is less clear is whether this state continues any active supervision over the publication of legal notices. We are unaware of any activity undertaken by either the local county courts or the Pennsylvania Supreme Court in this regard, however, it is clear the Pa.R.C.P. 430 does completely displace competition amongst the County Bar Associations, as publication of notice for one county in another county's bar journal will have no legal effect under Pa.R.C.P. 430.

3. Conclusion

We see little likelihood that PABE or its members would face enforcement action for violation of the Sherman Act for sharing information among its members regarding the fees

charged for membership in County Bar Associations or for the publication of legal notices. Competition among County Bar Associations in the publication of legal notices in Pennsylvania is completely displaced by the legislative action of the Pennsylvania General Assembly. While the Pennsylvania General Assembly has not similarly displaced competition in "market" for County Bar Association membership, we do not see membership in County Bar Associations as commercial activity within the scope of the Sherman Act. This is supported by the fact that all associate members of County Bar Associations are full members of other County Bar Associations. If the services offered by County Bar Associations were fungible services in competition with each other there would be no benefit in paying dues to two separate associations. We cannot say for certain, however, that there is no chance of enforcement action against PABE or its members for the actions they are considering. PABE may want to consider contacting the Antitrust Division of the Attorney General's Bureau of Consumer Protection to see if they, as regulators, view the situation as potentially troublesome.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Peter F. Kriete

PFK/dp*

Pro Bono Legal Opinion for the Pennsylvania Association of Bar Executives

Does the Sherman Antitrust Act apply to nonprofit organizations?
Does the Sherman Antitrust Act apply to county bar associations?
Does the Sherman Antitrust Act apply to the major bar association revenue sources?

Implicit in the enclosed memorandum for members of the Association of Legal Administrators is the fact that law firms compete against each other for business, as do lobstermen, plumbing contractors, and barbers, who are also mentioned. Accordingly, agreements on pricing made by such entities could potentially result in a negative impact upon competition - and constitute an unlawful restraint of trade.

However, unlike most professional associations, PABE members do not compete among themselves. Their two primary sources of funds include net proceeds from publishing legal notices in county law journals and dues paid for various categories of association membership.

Legal notices are required, by local rule of court, to be published in both a newspaper of general circulation in the county and a county legal periodical designated by the court. [See Dauphin County Court of Common Pleas Rule 430 (b)(1) *"The Dauphin County Reporter* is the designated legal periodical for Dauphin County."]

When a party files a divorce action, probates a will, forecloses on real estate, or files any legal action in Dauphin County requiring legal notice by publication, the fact that the fee for doing so might be less in Monroe County or Erie County is irrelevant - in order to comply with Local Rule 430, the notice must be published in *The Dauphin County Reporter.*

Likewise, an attorney who practices in Philadelphia is not interested in the fact that membership dues might be cheaper in Cumberland County or Westmoreland County - these associations are simply not competing for attorney membership dollars.

County bar associations do not appear to be engaged in the type of trade or commerce envisioned by the statute. Also, because legal notices cannot be "shopped" from county to county for more favorable prices, and membership is a matter of interest only to local attorneys, anti-competitive practices are simply not at issue.

Antitrust Guide
For Members of the Association of Legal Administrators

Professional associations such as the Association of Legal Administrators (ALA), although well recognized as valuable tools of American business, are subject to severe scrutiny by both federal and state governments.

The single most significant law affecting professional associations is the Sherman Antitrust Act, which makes unlawful "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce..."

A professional association by the very nature of the fact that it is made up of competitors is a combination, thus satisfying one of the elements in proving an antitrust violation. Section 5 of the Federal Trade Commission Act is also applicable to professional associations; it makes unlawful the same types of conduct that are prohibited by the Sherman Act. Furthermore, almost all states have enacted antitrust laws similar to the Sherman Act.

There is no organization too small or too localized to escape the possibility of a civil or criminal antitrust suit. The federal government has brought civil or criminal actions against such small organizations as Maine Lobstermen, a Virginia audio-visual association, Bakersfield Plumbing Contractors, the Utah Pharmaceuticals Association, and local barbers associations.

The government has brought approximately five civil and ten criminal cases a year against professional associations. It is thus imperative that every professional association member, regardless of the size of the association or the size of those comprising the membership, refrain from indulging in any activity which may be the basis of a federal or state antitrust action.

There are four main areas of antitrust concern for professional associations: price fixing, membership, standardization and certification, and industry self-regulation. The area of greatest concern, for it is the area where individual members are most likely to violate the law and the area where the government appears most concerned, is price fixing. The government may infer a violation of the Sherman Act by the mere fact that all or most of the members of the professional association are doing the same thing with respect to prices. It is not required that there be an actual agreement, written or unwritten, to increase prices. Rather, price fixing is a very broad term which includes any concerted effort or action which has an effect on prices or on competition.

Accordingly, professional association members should refrain from any discussion which may provide the basis for an inference that the members agreed to take action relating to prices, production, allocation of markets, or any other matter having a market effect. The following topics, while not the only ones, are some of the main ones which should not be discussed at regular meetings or member gatherings:

1. Do not discuss current or future billing rates, fees, disbursement charges or other items that could be construed as "price." Further, be very careful of discussions of past billing rates, fees or prices.

2. Do not discuss what is a fair profit, billing rate or wage level.

3. Do not discuss an increase or decrease in price, fees or wages, or disbursement charges. In this regard, remember that interest charges are considered an item of price.

4. Do not discuss standardizing or stabilizing prices, fees or wages, or disbursement charges.

5. Do not discuss current billing or fee procedures.

6. Do not discuss the imposition of credit terms or the amount thereof.

7. Do not complain to a competitor that his billing rates, fees or wages constitute unfair trade practices. In this context, another law firm (or even a corporate legal department) may be considered a competitor.

8. Do not discuss refusing to deal with anyone because of his pricing or fees.

Do not conduct surveys (under the auspices of ALA or informally) relating to fees, wages or other economic matters without prior review by antitrust legal counsel. Any survey should have the following characteristics: a) participation is voluntary and open to non-members, b) data should be of past transactions, c) data should be collected by an independent third party, such as an accounting firm, d) confidentiality of each participant's data should be preserved, and e) data should be presented only in a composite form to conceal data of any single participant. If these criteria are met, an association can collect and disseminate data on a wide range of matters, including such things as past salaries, vacation policies, types of office equipment used, etc.

However, care must be taken to ensure that the purpose of any survey is to permit each firm to assess its own performance. If a survey is used for the purpose of or has the effect of raising or stabilizing fees, wages, disbursements, credit policies and the like, it will create serious antitrust problems.

Within this same legal framework applicable to surveys, an association can make presentations or circulate articles regarding such educational matters as establishing sound office procedures, etc., provided it is clear that the matters are educational, and not a basis for law firm uniformity or agreement.

Inasmuch as association antitrust violations can subject all association members to criminal and civil liability, members should be aware of the legal risks in regard to membership policy and industry self-regulation. Fair and objective membership requirement policies should be established. Membership policies should avoid:

1. Restrictions on dealing with non-members.

2. Exclusions from membership, especially if there is a business advantage in being a member.

3. Limitations on access to association information, unless the limitation is based upon protection of trade secrets.

The Association of Legal Administrators has a code of ethics, which sets forth parameters of ethical conduct. However, to ensure that the Code of Ethics does not create any antitrust problems, ALA must continue to ensure that its Code does not have arbitrary enforcement procedures or penalties.

The penalties for violating federal or state antitrust laws are severe. The maximum criminal penalty for violating the Sherman Act was increased in 2004 from $350,000 to $1,000,000 for an individual and from $10,000,000 to $100,000,000 for a corporation. Pursuant to the Sentencing Reform Act, alternative maximum fines could be increased to twice the pecuniary gain of an offender or twice the loss to another person.

Individuals and corporate officers who are found guilty of bid rigging, price fixing or market allocation will virtually always be sentenced to jail pursuant to the Sentencing Guidelines; community service cannot be used to avoid imprisonment. The minimum recommended sentence is four months; the maximum is three years.

Additionally, there are civil penalties such as injunctions or cease and desist orders which could result in government supervision of association members, restricting the association's activities or disbanding the association.

Civil suits may be brought by consumers or competitors. Civil antitrust actions result in treble damage awards and attorneys' fees. Thus, if association members are held liable to a competitor for antitrust violations which resulted in $500,000 worth of lost business, the verdict may exceed $1,500,000.

The government's attitude toward professional associations requires professional association members, as well as professional associations themselves, to at all times conduct their business openly and avoid any semblance of activity which might lead to the belief that the association members had agreed, even informally, to something that could have an effect on prices, fees or competition. Thus, it is important that members contact the association headquarters or legal counsel for guidance if they have even the slightest qualms about the propriety of a proposed activity or discussion.