BACKGROUND MATERIALS:
A PRIMER ON THE APPLICATION OF ANTITRUST LAW TO THE PROFESSIONS IN THE UNITED STATES

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These materials provide background on the application of the antitrust laws to the professions in United States. Over the past four decades the courts in the United States have made clear that law, medicine, engineering, and other professional services are governed by traditional, mainstream antitrust principles. In reaching this result, the courts have rejected arguments that markets for professional services operate differently from other markets and that the professions should be exempt from antitrust enforcement or subject to special rules. Because the professions are often subject to additional forms of governmental oversight, however, the application of traditional antitrust principles will sometimes be accepting of limited displacement of competition in furtherance of other objectives.

The professions have traditionally distinguished themselves from other trades, businesses, and occupations by a code of ethics under which the goal of professional activities is to serve the public, rather than merely to earn personal profit. Each member of the profession swears to uphold those ethics. The details of the ethical codes typically dictate the obligation of the professionals to the community and further dictate practices in the performance of their services; consequently the codes provide substantial public benefits. Insofar as the codes of ethics usually are promulgated by professional associations comprised primarily of competitors, however, the drafters have an incentive to include limitations on competition.

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[*] The views expressed in these materials are those of the speaker and do not necessarily represent the position of the Federal Trade Commission or of any individual Commissioner. The speaker is grateful to Thomas J. Klotz of the FTC's Office of General Counsel for preparing these materials.

Thus, there can be good reason to apply competition analysis to the collective actions by professionals. In the United States, anticompetitive restrictions involving professionals are typically subject to Section 1 of the Sherman Act,[1] which governs collective action in restraint of trade. Given the characteristics of the markets for professional services – with professional associations prescribing limits on the behavior of member-competitors – it should not be surprising that the federal antitrust enforcement agencies have a substantial history of intervention.

Part I of these materials describes the development of antitrust law as applied to the professions in the United States. Part II describes relevant limitations on U.S. antitrust enforcement, most notably the so-called state action doctrine. Part III provides examples of the Federal Trade Commission's efforts to foster competition among professionals. The Commission's actions include research and competition advocacy addressed to state and other regulators, in addition to law enforcement.

I. THE DEVELOPMENT OF ANTITRUST LAW AS APPLIED TO THE PROFESSIONS

The professions typically require extensive education, training, and mastery of specialized knowledge. The professions are also characterized by an underlying belief in the goal of providing services necessary to the community. To institutionalize this purpose, the professions typically establish codes of ethics that establish the professionals' obligations to the public and those who employ their services. These codes of ethics often become an extensive system of obligations and regulations that govern the conduct of the professional. Frequently, the codes are incorporated into the state or local government licensing and regulatory schemes for the occupation.

Deriving from these obligations and regulations, there was once a corresponding perception that competition is inconsistent with the practice of a profession. On this view, based on the codes of ethics, the goal of professional activities was to provide services necessary to the public; enhancing profit was not the principal goal. For instance, bar association codes of ethics restricted the ability of lawyers to advertise their services. The prevailing view within the legal profession was that it was unseemly for lawyers to advertise their services or to otherwise compete with other lawyers for business. Illustrative of the historical attitude of the organized bar was a 1959 passage by Harvard's distinguished law professor, Roscoe Pound:

> There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation and advocacy to the best of his ability. But competition with fellow members of the profession in any other way is forbidden.[2]

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[1] 15 U.S.C. § 1. In enforcement actions by the FTC against conduct that would violate Section 1, the matter is brought under Section 5 of the FTC Act, 15 U.S.C. § 45.

[2] ROSCOE POUND, JURISPRUDENCE 677 (1959).

The American Bar Association issued canons of professional ethics and formal opinions that codified these restrictions. In most states the public bodies that regulated the practice of law adopted the American Bar Association's restrictions as binding legal requirements. This combination of governmentally and privately imposed restrictions limited the ability of U.S. professionals to compete until the 1970s.

In 1975 the U.S. Supreme Court made clear that the antitrust laws apply to the "learned professions" in the United States. In *Goldfarb v. Virginia State Bar*,[3] the Court ruled that the Sherman Act applied to the legal profession and that minimum price lists created by a group of competitors – a state bar association establishing prices and enforcing it through its ethical code – were *per se* illegal under the antitrust laws. In *Goldfarb*, a husband and wife found that each lawyer that they contacted to provide a title examination for a home purchase quoted the same price for the service. The couple sued the lawyers and bar associations that had established a minimum fee schedule for services under the antitrust laws. Although the trial court found that the minimum fee schedule was price fixing, the appellate court ruled that there was a long judicial recognition of a limited exclusion from the scope of the antitrust laws for the learned professions, based on the special form of regulation imposed on the professions by the states and the incompatibility of certain aspects of competition with professional regulation. The Supreme Court, however, reversed and found that the professions were not exempt from the antitrust laws. The Court found that the "nature of an occupation, standing alone, does not provide sanctuary from the [antitrust laws], nor is the public-service aspect of professional practice controlling in determining whether [the law] includes professions." The Court noted that Congress intended the antitrust laws to apply as broadly as possible and that an antitrust exemption for the professions would be inconsistent with that intent.

The Court found in *Goldfarb* that the bar association's fee schedules were "a classic illustration of price fixing."[4] The Court found that the arguments distinguishing the professions from other trades and businesses "loses some of its force"[5] for a core antitrust offense such a price fixing. The Supreme Court reserved its judgment on other practices. "The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."[6] Since that time, and despite arguments that the markets for the professions operate differently from other markets, the Supreme Court has refused to create special exceptions for the professions.[7]

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[3] 421 U.S. 773 (1975).

[4] *Id.* at 783.

[5] *Id.* at 787.

[6] *Id.* at 788, n.17.

[7] *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 462 (1986) (rejecting argument that consumer access to information "will lead to unwise and dangerous choices"); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26-29 (1984) (rejecting argument that market imperfections and other factors should preclude application of *per se* rule against tying); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 348-49 (1982) (*per se* rule against price fixing applies to health care profession).

The Supreme Court next addressed the application of the antitrust laws[8] to the professions in *National Society of Professional Engineers v. United States*.[9] The professional society had adopted an ethical canon that prohibited its members from providing price information to a prospective client before the engineer was selected for the project. The rule effectively prohibited competitive bidding and prevented customers from selecting an engineer based on price. The society claimed that the ethical rule was necessary because competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering and thus would be dangerous to public safety and welfare.

The Supreme Court found that the ban on competitive bidding was anticompetitive and violated the Sherman Act. The Court did not condemn the practice as *per se* illegal, as it would have treated price fixing. Nonetheless, the Court found that the ban on competitive bidding was anticompetitive on its face, under the rule of reason, which examines the competitive effect of the agreement "by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[10] The Court found that the analysis under the Sherman Act "is confined to a consideration of impact on competitive conditions"[11] and "the competitive significance of the restraint."[12] The Court found that defenses and justifications based on factors unrelated to the effect on competition are irrelevant to the antitrust analysis.[13] When the Court considered the Society's rationale for the ban – protecting public safety by preserving the quality of engineering – Court determined that the claim that equated competition with safety hazards cut too broadly. In fact, the Supreme Court pointed out that competition produces lower prices, but also provides better goods and services, as measured by quality, service, safety, and durability.[14] Thus, the Court found that the claimed justification was inconsistent with theory and the facts of the market.

After *Professional Engineers* antitrust law in the United States has not analyzed markets for the professions differently from other markets. Courts focus on the competitive effect of the particular restraint on the market, and courts are unwilling to hear arguments that competition is harmful.

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[8] In 1977, in a case that did not directly include the antitrust laws, the Supreme Court ruled in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), that state prohibitions on non-deceptive advertisement by lawyers violated the right of free speech guaranteed by the U.S. Constitution. In doing so, the Court noted that non-truthful speech was not entitled to constitutional protection, and the states remained free to regulate deceptive communications by lawyers. Although it did not involve the antitrust laws, the decision helped to free lawyers to advertise and compete.

[9] 435 U.S. 679 (1978).

[10] *Id.* at 692.

[11] *Id.* at 690.

[12] *Id.* at 692.

[13] *Id.* at 696.

[14] *Id.* at 695.

On the other hand, the professional context of a particular restraint or agreement is not irrelevant for the antitrust analysis. Courts in the United States examine the factual circumstances of the market affected by a particular restraint. The factual circumstances of markets for professional services sometimes affect competition – and therefore the antitrust analysis – in those markets. The regulatory structure, the availability of information to consumers, and other market circumstances will determine the competitive significance of a restraint.

For example, the FTC's case against the California Dental Association challenged bans on various forms of price and non-price advertising.[15] The Association, while allowing advertising of specific prices for particular services, required extensive disclosures in any offer of discounted prices, which the Association justified as preventing deception. These requirements served to preclude offers of across-the-board fee discounts. The Association also banned other types of representations about price, including statements such as "reasonable fees." Applying a "quick look analysis," the Commission found that the Association's suppression of various categories of price and non-price advertising was not justified on grounds of deception. Although the court of appeals agreed, a narrowly divided Supreme Court was unwilling to sustain the Commission's decision.

In reaching its conclusion, the majority placed great emphasis on information disparities in professional services markets. In these markets, consumers lack reliable and accurate information about the price and quality of particular professionals. Without good information, consumers have more difficulty identifying and obtaining the goods and services they desire. But on a more fundamental level, consumers often are not in a position to assess what services they require. Thus, there is an asymmetry of information between the providers of professional services and consumers. Restraints on professionals that attempt to address the information problem will affect competitive conditions in the market and thus are relevant to the antitrust analysis. Although a quick look analysis would be appropriate in other circumstances "when the great likelihood of anticompetitive effects can be easily ascertained,"[16] the Association's advertising restrictions "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,"[17] and the Court therefore held that a more thorough inquiry was required before reaching a conclusion that the restrictions were anticompetitive.

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[15] California Dental Ass'n, 121 F.T.C. 190 (1996), *aff'd*, 128 F.3d 720 (9th Cir. 1997), *vacated and remanded*, 526 U.S. 726 (1999), *rev'd and remanded*, 224 F.3d 922 (9th Cir. 2000).

[16] 526 U.S. at 770.

[17] *Id.* at 771. The Court suggested, however, that "the fullest market analysis" or "plenary market examination" would not be required; a longer lingering look might suffice based on a flexible inquiry appropriate to the case. *Id*. at 779-81.

II. LIMITATIONS ON ANTITRUST ENFORCEMENT

Although the professions are not generally exempt from the antitrust laws, the application of two related bodies of legal doctrine may result in the avoidance of antitrust condemnation for anticompetitive restrictions on the professions. First, the federal courts have developed doctrines of deference to government decision making. In particular, the state action doctrine may allow some restrictions in professional and other markets to escape antitrust liability when a state regulatory scheme operates. Based on principles of federalism and state sovereignty, courts have found that the Sherman Act did not apply when the restraints were imposed by a state as an act of government. Second, there are instances when Congress has created economic or social policies or regulatory regimes that conflict with open competition. In limited circumstances, these regulatory schemes may contain explicit or implicit Congressionally-mandated statutory exemptions from the antitrust laws.

The State Action Doctrine

Under the state action doctrine, the Supreme Court has permitted state governments and certain private economic actors to show that the operation of a state regulatory scheme precludes imposing antitrust liability.[18] The doctrine dates back to the Supreme Court's 1943 opinion in *Parker v. Brown*, which held that in light of the states' status as sovereigns, and given basic principles of federalism, Congress would not have intended the Sherman Act to apply to the activities of states themselves.[19] The defense has also been interpreted in limited circumstances to immunize from antitrust scrutiny private firms' activities that are conducted pursuant to state authority. States may not, however, simply authorize private parties to violate the antitrust laws. Instead, a state must substitute its own control for that of the market.

The state action defense is available only if the party can demonstrate that its conduct satisfies the strict two-pronged standard that the Supreme Court set out in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*: "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'" and "the policy must be 'actively supervised' by the state itself."[20]

Under the first prong of *Midcal's* two-part test, it is necessary to show that the state had "clearly articulated and affirmatively expressed as state policy" the desire to replace competition with a regulatory scheme. State laws that set standards for licensure, define the scope of practice for many professions, and regulate various types of business and professional behavior may provide the basis for a showing that a state established such a policy. A recent Federal Trade Commission case involves restraints on practice

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[18] *See* Parker v. Brown, 317 U.S. 341 (1943).

[19] *Id.*

[20] 445 U.S. 97, 105 (1980) (*quoting* City of Lafayette v. Louisiana Power & Light, 435 U.S. 389, 410 (1978)).

by dental hygienists imposed by a state board of dentistry.[21] As is often the case, the nine-member South Carolina State Board of Dentistry is composed primarily of members of the regulated profession.

The Federal Trade Commission complaint alleges that the Board illegally restricted the ability of dental hygienists to provide preventive dental services, such as cleanings, fluoride, and sealants, in school settings. In order to address concerns that many schoolchildren were receiving no preventive dental services, the state legislature in 2000 eliminated a statutory requirement that a dentist examine each child before a hygienist may perform preventive care in schools. In 2001, the complaint states, the Board re-imposed the dentist examination requirement. The complaint charges that the Board's action unreasonably restrained competition in the provision of preventive dental care services and deprived thousands of economically disadvantaged schoolchildren of needed dental care and that the harmful effects on competition and consumers could not be justified. The Board sought to have the complaint dismissed on the ground that its actions are immune from the antitrust laws under the state action doctrine. The Commission denied the motion to dismiss. The Commission ruled that the Board had failed to show that its 2001 rule, issued after the legislature had amended state law to allow dental hygienists to provide preventive dental care to children without a dental pre-examination, was issued pursuant to a clearly articulated state policy. The Commission found that, on the contrary, the Board's actions appear to have contravened the clear legislative intent in the 2000 amendments to eliminate the pre-examination requirement, and thus the Commission found that the first requirement to apply the state action doctrine was not satisfied. The Board sought interlocutory review of the Commission's decision, which the court of appeals denied.[22] The Board is now seeking review by the Supreme Court.

Under the second prong of the *Midcal* test, it is necessary to demonstrate "active supervision" by state officials. The Supreme Court has made clear that the active supervision standard is a rigorous one. It is not enough that a state grants general authority for certain business conduct or that it approves private agreements with little review. As the Court held in *Midcal*, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[23] Rather, active supervision is designed to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State has effectively made [the challenged] conduct its own."[24]

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[21] South Carolina State Bd. of Dentistry, FTC Dkt. No. 9311, slip op. *available at* http://www.ftc.gov/os/adjpro/d9311/040728Comm'nopinion.pdf.

[22] South Carolina State Bd. of Dentistry v. FTC, No. 04-2006, 2006 WL 1134136 (4th Cir. May 1, 2006), *rehearing and rehearing en banc denied* (4th Cir. June 27, 2006).

[23] *Midcal*, 445 U.S. at 105-06.

[24] Patrick v. Burget, 486 U.S. 94, 106 (1988).

In order for state supervision to be adequate for state action purposes, state officials must engage in a "pointed re-examination" of the private conduct.[25] In this regard, the State must "have *and* exercise ultimate authority" over the challenged anticompetitive conduct.[26] To do so, state officials must exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[27] Thus, it is necessary to demonstrate that the state agency has ascertained the relevant facts, examined the substantive merits of the private action, assessed whether that private action comports with the underlying statutory criteria established by the state legislature, and squarely ruled on the merits of the private action in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice.

Although it did not involve the professions, the FTC recently examined the requirements of the second prong of the test for the state action doctrine in *Kentucky Household Goods Carriers Association*.[28] The Commission found that collective rate-making by the movers association was horizontal price fixing. Although the Kentucky statute authorizes the state's Transportation Cabinet to establish collective ratemaking, the statute expressly provides that the Transportation Cabinet is responsible for ensuring that every rate charged by carriers is "just and reasonable." The Commission found that the Kentucky Transportation Cabinet "has no formula or methodology for determining whether the Kentucky Association's collective rates comply with the statutory standards."[29] The Transportation Cabinet "does not even obtain data – including the cost and revenue data specified in the statute – that would enable it to assess the reasonableness of the Kentucky Association's rates . . . [and] lacks the procedural elements – such as public input, hearings, and written decisions – that courts have found to be important indicators of active state supervision."[30] Accordingly, the FTC found that the state agency had fallen far short of the active supervision required for the state action doctrine to provide a defense for the price-fixing.

Statutory and Implied Antitrust Immunity

Anticompetitive conduct may also avoid antitrust liability if Congress grants immunity. The Congressional grant of antitrust immunity could be explicit. For instance, in the late 1990s, there were proposals in Congress to offer antitrust immunity to

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[25] *Midcal*, 445 U.S. at 106. *Accord*, FTC v. Ticor Title Ins. Co., 504 U.S. 621, 634-35 (1992); Patrick v. Burget, 486 U.S. 94, 100-01 (1988).

[26] Patrick v. Burget, 486 U.S. at 101 (emphases added).

[27] *Ticor*, 504 U.S. at 634-35.

[28] FTC Dkt. No. 9309 (June 22, 2005), *available at* http://www.ftc.gov/os/adjpro/d9309/050622opinionoftheComm'n.pdf. An appellate court recently adopted the Commission's opinion and summarily affirmed in an unpublished decision. Kentucky Household Goods Carriers Ass'n v. FTC, No. 05-4042 (6th Cir. decision filed Aug. 22, 2006).

[29] *Id.* at 15.

[30] *Id.* at 16.

physicians negotiating with managed care organizations. The Commission opposed the legislation,[31] and the bills were not enacted into law.

Alternatively, Congress may create implied antitrust immunity by the creation of a regulatory system that is contrary to the antitrust laws. Implied immunity is rare. "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[32] Rather than find implied immunity, courts will reconcile the regulatory scheme with the antitrust laws and will find that antitrust immunity is implied only if it is necessary to make the regulatory scheme work. Despite the rare occurrence, the Supreme Court may soon consider the availability of implied antitrust immunity under the U.S. federal securities laws: the Court has invited the government's views on whether *certiorari* should be granted in *Billing v. Credit Suisse First Boston*,[33] which raises the issue.

III. ILLUSTRATIVE COMMISSION INTERVENTIONS IN PROFESSIONAL SERVICES

The types of legal issues that arise and most of the cases that the Commission has brought involving the professions cases generally involve similar types of conduct. Although the details of the restraint may differ to account for the particular profession, the Commission's cases frequently fall within three categories: restrictions on licensing and entry,[34] fee setting,[35] and restrictions on advertising.[36]

The FTC has consistently used four primary tools to carry out its mandate of ensuring that markets remain competitive. First, the Commission investigates and brings

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[31] *See, e.g.*, Prepared Statement of the Federal Trade Comm'n Before the H. Comm. on the Judiciary Concerning H.R. 1304, Quality Health-Care Coalition Act of 1999 (June 22, 1999), *available at* http://www.ftc.gov/os/1999/06/healthcaretestimony.htm; Prepared Statement of the Federal Trade Comm'n Before the H. Comm. on the Judiciary Concerning H.R 4277, Quality Health-care Coalition Act of 1998 (July 29, 1998), *available at* http://www.ftc.gov/os/1998/07/camptest.htm.

[32] National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 388 (1981) (internal quotation and citations omitted).

[33] No. 05-1157 (S.Ct.). The case is on appeal from a Second Circuit decision reported at 426 F.3d 130 (2d Cir. 2005), in which the court ruled that market manipulation by underwriters in initial public offerings is not within the scope of implied immunity from the antitrust laws.

[34] In addition to the cases described in the discussion of particular professions, see also *South Carolina State Bd. of Dentistry*, discussed at *supra* notes 21-22 and accompanying text.

[35] In addition to the cases described in the discussion of particular professions, see also American Inst. for Conservation of Historic and Artistic Works, FTC File No. 011 0244 (2002) (consent agreement settling challenge of institute's restrictions that deem it "unprofessional" for members to work at reduced rates or no charge), *available at* http://www.ftc.gov/os/2002/11/aiccmp.pdf.

[36] In addition to the cases described in the discussions of particular professions, see also National Acad. of Arbitrators, FTC File No. 011 0242 (2003) (consent agreement settled charges that academy restricted truthful advertising and solicitation by members), *available at* http://www.ftc.gov/os/2003/01/naacmp.pdf; *California Dental Ass'n*, discussed at *supra* notes 15-17 and accompanying text.

cases to enforce the antitrust laws against those who engage in anticompetitive conduct. Second, the Commission uses its expertise in competition law and economics to provide state and federal policy makers with analysis of the likely effects of proposed laws and regulations. Third, the Commission conducts research to increase its knowledge of issues affecting competition and consumers. Finally, drawing on experience from enforcement, advocacy, and research, the Commission seeks to educate the public through reports and speeches about important issues that affect competition and consumer welfare.

Health Care

The FTC has vigorously pursued violations of the U.S. antitrust laws' prohibitions on price fixing that bar professional medical associations from adopting fee schedules, recommending fees, or negotiating fees on behalf of their members. For more than 25 years, the Commission has challenged naked price fixing agreements and coercive boycotts by physicians and other providers who are dealing with health plans.[37] These price-fixing arrangements largely consist of otherwise competing physicians jointly setting their prices and collectively agreeing to withhold their services if health care payers do not meet their fee demands. Such conduct is considered to be *per se* unlawful because it harms competition and consumers – raising prices for health care services and health care insurance coverage, and reducing consumers' choices. Since 2000, the Commission has brought enforcement actions against more than thirty health care practice groups.[38]

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[37] *See, e.g.*, *Indiana Fed'n of Dentists*, *supra* note 7 (striking down association's effort to withhold X-rays from insurance companies).

[38] New Century Health Quality Alliance, Inc., FTC File No. 051-0137 (consent agreement accepted for public comment, Aug. 24, 2006), *available at* http://www.ftc.gov/os/caselist/0510137/0510137.htm; Puerto Rico Ass'n of Endodontists Corp., FTC Dkt. No. C-4166 (Aug. 29, 2006), *available at* http://www.ftc.gov/os/caselist/0510170/0510170; Health Care Alliance of Laredo, FTC Dkt. No. C-4158 (March 28, 2006), *available at* http://www.ftc.gov/os/caselist/0410097/0410097.htm; Partners Health Network, Inc., FTC Dkt. No. C-4149 (Sept. 23, 2005), *available at* http://www.ftc.gov/os/caselist/0410100/0410100.htm; San Juan IPA, Inc., FTC Dkt No. C-4142 (July 5, 2005), *available at* http://www.ftc.gov/os/caselist/0310181/0310181.htm; New Millennium Orthopaedics, LLC, FTC Dkt. No. C-4140 (June 17, 2005), *available at* http://www.ftc.gov/os/caselist/0310087/0310087.htm; Evanston Northwestern Healthcare Corp. & ENH Med. Group, Inc., FTC Dkt. No. 9315, *available at* http://www.ftc.gov/os/adjpro/d9315/index.htm; Preferred Health Servs., Inc., FTC Dkt. No. C-4134 (Apr. 19, 2005), *available at* http://www.ftc.gov/os/caselist/0410099/0410099.htm; White Sands Health Care Sys., L.L.C., FTC Dkt. No. C-4130 (Jan. 14, 2005), *available at* http://www.ftc.gov/os/caselist/0310135/0310135.htm; Southeastern New Mexico Physicians IPA, Inc., FTC Dkt. No. 4113 (Aug.6, 2004), *available at* http://www.ftc.gov/os/caselist/0310134/0310134.htm; Piedmont Health Alliance, FTC Dkt. No. 9314 (Oct. 5, 2004), *available at* http://www.ftc.gov/os/adjpro/d9314/index.htm; Tenet Healthcare Corp. and Frye Regional Med. Ctr., Inc., FTC Dkt. No. C-4106 (Feb. 3, 2004), *available at* http://www.ftc.gov/os/caselist/0210119/0210119tenet.htm; Memorial Hermann Health Network Providers, FTC Dkt. No. C-4104 (Jan. 13, 2004), *available at* http://www.ftc.gov/os/caselist/0310001/0310001.htm; Surgical Specialists of Yakima, FTC Dkt. No. C-4101 (Nov. 18, 2003), *available at* http://www.ftc.gov/os/caselist/0210242.htm; North Texas Specialty Physicians, FTC Dkt. No. 9312, *available at* http://www.ftc.gov/os/adjpro/d9312/index.htm; South Georgia Health Partners, L.L.C., FTC Dkt. No. C-4100 (Nov. 4, 2003), *available at* http://www.ftc.gov/os/caselist/0110222.htm; Physician Network Consulting, L.L.C., FTC Dkt. No. C-4094 (Aug. 29, 2003), *available at* http://www.ftc.gov/os/caselist/0210178.htm; Maine Health Alliance, FTC Dkt. No. C-4095 (Aug. 29, 2003),

For instance, in August the Commission accepted for public comment a consent agreement involving two independent practice associations (IPAs) representing approximately 127 primary care physicians in the Kansas City area.[39] The consent agreement settles charges that the physicians refused to sell their medical services to certain health plans, except on jointly agreed-upon terms, including price terms, and that the physicians' action were intended to raise or maintain higher fees. Further, according to the Complaint, the physicians' agreement and refusal to deal regarding their individual medical services were not reasonably related to any productive cooperative activity among them, or the IPAs that acted on their behalf. Consequently, health plans faced higher prices from the IPAs. The Commission consent decree sought to remedy the circumstances by prohibiting respondents from, among other things, entering into or facilitating agreements among health care providers to negotiate collectively with payers on the providers' behalf.

At the same time, the Commission recognizes that not all joint conduct by physicians is improper. Physician network joint ventures can yield impressive efficiencies. Thus, the FTC, together with the Department of Justice, committed long ago to using a balancing test to evaluate those physician network joint ventures that involve significant potential for creating efficiencies through integration. Physician joint ventures involving price agreements can avoid summary condemnation and merit balancing analysis, if the physicians' integration is likely to produce significant efficiencies that benefit consumers and if any price agreements (or other agreements that

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available at http://www.ftc.gov/os/caselist/0210017.htm; Washington Univ. Physician Network, FTC Dkt. No. C-4093 (Sept. 3, 2003), *available at* http://www.ftc.gov/os/caselist/0210188.htm; California Pac. Med. Group, Inc., dba Brown & Toland Med. Group, FTC Dkt. No. 9306, *available at* http://www.ftc.gov/os/adjpro/d9306/index.htm; Carlsbad Physician Ass'n, FTC Dkt. No. C-4081 (June 20, 2003), *available at* http://www.ftc.gov/os/caselist/c4081.htm; SPA Health Org., FTC Dkt. No. C-4088 (July 25, 2003), *available at* http://www.ftc.gov/os/caselist/0110197.htm; Anesthesia Med. Group, Inc., FTC Dkt. No. C-4085 (July 15, 2003), *available at* http://www.ftc.gov/os/caselist/c4085.htm; Grossmont Anesthesia Servs. Med. Group, FTC Dkt.No. C-4086 (July 15, 2003), *available at* http://www.ftc.gov/os/caselist/0210006.htm; Professionals in Women's Care, FTC Dkt. No. C-4063 (Oct. 11, 2003), *available at* http://www.ftc.gov/os/caselist/c4063.htm; http://www.ftc.gov/os/caselist/0110175.htm; System Health Providers, FTC Dkt. No. C-4064 (Nov. 1, 2002), *available at* http://www.ftc.gov/os/caselist/c4064.htm; Obstetrics & Gynecology Med. Corp. of Napa Valley, FTC Dkt. No. C-4048 (May 17, 2002), *available at* http://www.ftc.gov/os/caselist/0110153.htm; Physicians Integrated Servs. of Denver, Inc., FTC Dkt. No. C-4054 (July 16, 2002), *available at* http://www.ftc.gov/os/caselist/0110173.htm; Aurora Associated Primary Care Physicians, L.L.C., FTC Dkt. No. C-4055 (July 16, 2002), *available at* http://www.ftc.gov/os/caselist/0110174.htm; Alaska Healthcare Network, Inc., FTC Dkt. No. C-4007(Apr. 28, 2001), *available at* http://www.ftc.gov/os/caselist/c4007.htm; Texas Surgeons, P.A., FTC Dkt. No. C-3944 (May 23, 2000), *available at* http://www.ftc.gov/os/caselist/c3944.htm; Colegio de Cirujanos Dentistas de Puerto Rico, FTC Dkt. No. C-3953 (June 16, 2000), *available at* http://www.ftc.gov/os/caselist/c3953.htm; Wisconsin Chiropractic Ass'n, FTC Dkt. No. C-3943 (May 23, 2000), *available at* http://www.ftc.gov/os/caselist/c3943.htm; Michael T. Berkley, D.C. and Mark A. Cassellius, D.C., FTC Dkt. No. C-3936 (Apr. 18, 2000), *available at* http://www.ftc.gov/os/caselist/c3936.htm.

[39] New Century Health Quality Alliance, Inc., Prime Care of Northeast Kansas, L.L.C., FTC File No. 051-0137, *available at* http://www.ftc.gov/os/caselist/0510137/0510137.htm.

would otherwise be *per se* illegal) are reasonably necessary to realize those efficiencies. Thus, with appropriate safeguards, professional associations can undertake various activities to provide information about prices to members, consumers, and third party payers.

To help allay physicians' and other health care providers' concerns about potential antitrust issues regarding collaborative activity and to encourage the development of potentially pro-competitive and lawful arrangements, the Commission has undertaken a broad effort to inform and educate participants in the health care area. For example, the FTC and the Department of Justice jointly developed and published Statements of Antitrust Enforcement Policy in Health Care.[40] The Statements are intended to explain the agencies' analysis of several common types of collaborative activity among health care providers. The Statements provide some clear rules of thumb, including "antitrust safety zones" for certain types of arrangements, as well as a description of how the agencies analyze conduct that does not fall within a safety zone.

The Commission staff also provides considerable detailed guidance about potentially pro-competitive forms of physician integration. For example, over the years staff have issued numerous advisory opinions concerning physician networks. In one notable instance, staff issued a favorable advisory opinion to MedSouth in Denver,[41] a multi-specialty physician initiative involving "clinical integration" among the participants. This year, the staff issued another lengthy advisory opinion with detailed guidance about how such arrangements are analyzed,[42] and currently is considering other requests for guidance regarding multi-provider arrangements involving clinical integration or other forms of collaboration.

In 2003, the Commission and the Department of Justice conducted 27 days of joint hearings that broadly examined the state of the health care marketplace in the United States and the role of competition, antitrust, and consumer protection in providing for high-quality, cost-effective health care. The hearings gathered testimony from approximately 250 panelists, including representatives of various provider groups, insurers, employers, lawyers, patient advocates, and leading scholars on subjects ranging from antitrust and economics to health care quality and informed consent. The hearings resulted in a report, *Improving Health Care: A Dose of Competition*,[43] which addressed

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[40] U.S. Dep't of Justice & Federal Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (1996), *available at* http://www.ftc.gov/reports/hlth3s.htm.

[41] Letter from Jeffrey W. Brennan, Assistant Dir., Bureau of Competition, to John J. Miles, Ober, Kaler, Grimes & Shriver (Feb. 19, 2002) (staff advisory opinion regarding MedSouth, Inc.), *available at* http://www.ftc.gov/bc/adops/medsouth.htm.

[42] Letter from David R. Pender, Acting Assistant Dir., Bureau of Competition, to Clifton E. Johnson and William H. Thompson, Hall Render, Killian, Heath & Lyman (March 28, 2006) (staff advisory opinion letter regarding Suburban Health Organization, Inc.), *available at* http://www.ftc.gov/os/2006/03/SuburbanHealthOrganizationStaffAdvisoryOpinion03282006.pdf.

[43] U.S. Dep't of Justice & Federal Trade Comm'n, Improving Health Care: A Dose of Competition (2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

the current role of competition in health care and described how antitrust enforcement has worked and should work to protect existing and potential competition in health care.

Eye Care Services

The Commission has engaged in a wide variety of activities concerning the eye care industry. With regard to law enforcement, the FTC investigates and brings law enforcement actions for violations of the antitrust laws. For instance, the FTC brought an administrative case against a state licensing board composed of practicing optometrists, charging that the Board unlawfully restricted advertising of truthful, non-deceptive information about the price and availability of eye care services. After a trial, the Commission ruled that the Board's ban on such affiliation advertising unlawfully impeded entry by retail optical stores and raised prices for eye care. The FTC prohibited the Board from restricting certain types of advertising and required it to repeal its prohibitions against advertising affiliations between optometrists and optical retailers.[44]

In addition, the Commission has brought enforcement actions to address unfair or deceptive acts and practices under its consumer protection authority. For example, the Commission entered into consent agreements with two of the largest sellers of LASIK eye surgery services to resolve complaint allegations that they made the unsubstantiated claims that LASIK surgery would eliminate the need for glasses for life, and that LASIK surgery poses significantly less risk to the ocular health of patients than wearing contact lenses or eye glasses.[45]

The Commission promulgated the Ophthalmic Practice Rules (Eyeglass Rule) in 1978 to increase competition and consumer choice in the sale of eyeglasses.[46] The Eyeglass Rule requires eye care professionals to provide patients automatically, at no extra cost, with a copy of their eyeglass prescriptions after completion of an eye examination. The FTC promulgated this Rule because it found that many consumers were deterred from comparison shopping for eyeglasses because they did not receive copies of their prescriptions. The Commission has brought cases to address violations of the Eyeglass Rule.

In 2003, Congress enacted the Fairness to Contact Lens Consumers Act[47] (FCLCA) to increase competition in the sale of contact lenses, similar to what the Eyeglass Rule had done with respect to the sale of eyeglasses. Among other things, under the FCLCA, eye care professionals must provide patients with a copy of their contact lens prescriptions immediately upon completion of a contact lens fitting and provide or verify contact lens prescriptions to sellers of contact lenses. To implement the

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[44] Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988).

[45] LCA-Vision, Inc. d/b/a LasikPlus, FTC Docket C-4083 (July 8, 2003); Laser Vision Institute, LLC, FTC Docket No. C-4084 (July 8, 2003).

[46] 16 C.F.R. Part 456.

[47] 15 U.S.C. §§ 7601-7610.

FCLCA, the FTC issued its Contact Lens Rule,[48] which tracks the Act's provisions. The FTC staff has issued warning letters to individual companies to alert them that they may be in violation of the Rule. In 2004, FTC staff sent warning letters to eye care practitioners who allegedly were not releasing contact lens prescriptions as the Rule requires.[49] In 2005, staff sent a warning letter to a leading contact lens seller that may have violated the Rule by not providing eye care professionals with a reasonable opportunity to communicate with the seller regarding verification requests.[50] Finally, in 2006, the FTC staff sent 18 warning letters to online sellers of cosmetic or colored contact lenses, most of whom allegedly falsely claimed that cosmetic contact lenses are non-prescription or do not require a prescription.[51]

When warning letters fail, the FTC will undertake a law enforcement action against those who violate the Rule. For example, in August, the Department of Justice, at the request of the FTC, filed a complaint and settlement agreement against the operators of three Web sites – www.lensworld.com, www.contactmania.com, and www.contactlensworld.com – that sell contact lenses directly to consumers.[52] The FTC's complaint alleged that the defendants violated the Contact Lens Rule by selling contact lenses to consumers without first obtaining their prescriptions or verifying the prescriptions with their prescribing practitioners. The consent decree required the defendants to pay civil penalties and, among other things, prohibits them from violating the Rule in the future.

In addition to its law enforcement role, the Commission has long studied the effects of state-imposed restrictions in the optical goods industry and advocated policies that would benefit competition.[53] In October 2002 the Commission held a public workshop to evaluate possible anticompetitive barriers to e-commerce,[54] and in March 2004 the Commission staff issued a report analyzing potential barriers to Internet commerce in contact lenses (Contact Lens Report).[55] The Contact Lens Report expressed concern that state laws and regulations may limit competition in contact lenses. For

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[48] 16 C.F.R. Part 315.

[49] *See* Federal Trade Comm'n, The Contact Lens Rule and the Eyeglass Rule (Oct. 22, 2004), *available at* http://www.ftc.gov/opa/2004/10/contactlens.htm.

[50] *See* Federal Trade Comm'n, Announced Actions for October 14, 2005 (Oct. 14, 2005) (announcing results of test shop to follow up on warning letters), *available at* http://www.ftc.gov/opa/2005/10/fyi0575.htm.

[51] *See* Federal Trade Comm'n, FTC Staff Sends Warning Letters to Marketers of Cosmetic Contact Lenses (June 30, 2006), *available at* http://www.ftc.gov/opa/2006/06/fyi0643.htm.

[52] United States v. Walsh Optical, Inc., Civ. No. 06-3591 (D.N.J. Aug. 30, 2006) (consent decree entered).

[53] FTC Bureau of Economics Staff Report, The Effects of Restrictions on Advertising and Commercial Practice in the Profession: The Case of Optometry (1980).

[54] 67 Fed. Reg. 48,472 (2002).

[55] FTC Staff Report, Possible Barriers to E-Commerce: Contact Lenses (Mar. 29, 2004), *available at* http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf.

example, the Contact Lens Report noted that licensing requirements may insulate in-state sellers from out-of-state competition or insulate eye care practitioners from non-practitioner sellers. Further, as noted in the report, staff found that health concerns do not appear to justify the costs imposed by these requirements.[56]

The FTC staff also has provided comments to state agencies and legislatures regarding the effects of restrictions on the sale of replacement contact lenses. For example, in March 2002 the Commission staff filed a comment before the Connecticut Board of Examiners for Opticians in a declaratory ruling proceeding on the interpretation and applicability of various statues and regulations concerning the sale of contact lenses.[57] In that comment, Commission staff concluded that out-of-state sellers should not be subject to state licensing requirements because the possible benefit consumers might receive from increased state protection did not outweigh the likely negative effect from decreased competition. Ultimately, the Connecticut Board of Examiners decided that state law did not require out-of-state sellers to obtain a license to sell contact lenses to consumers.[58]

Legal Services

The Commission has brought cases designed to increase competition for legal services. One case challenged an association of private lawyers who collectively agreed to withhold acceptance of appointments to represent indigent criminal defendants in the District of Columbia until the District government agreed to increase the compensation for such appointments.[59] The lawyers contested the FTC's claims on the grounds that the group boycott was necessary to ensure higher quality representation of criminal defendants than the low level of compensation permitted. The Supreme Court ruled that such justifications cannot authorize such an anticompetitive agreement between competitors.

In 2004 the Commission accepted a consent agreement for similar behavior by a group of attorneys representing indigent clients in Clark County, Washington.[60] The attorneys formed a "consortium" through which they collectively demanded higher fees from the county for defending homicide, attempted homicide, persistent offender, and death penalty cases. Lawyers in the group refused to accept certain new cases until their

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[56] *Id.* at 3.

[57] *See* FTC Staff Comment Before Connecticut Bd. of Exam'rs for Opticians (Mar. 27, 2002), *available at* http://www.ftc.gov/be/v020007.htm; *see also* Letter from Maureen K. Ohlhausen, Acting Dir., Office of Policy Planning, to Ark. State Rep. Doug Matayo (Oct. 4, 2004) (commenting on legislative proposal that likely would have conflicted with the FCLCA's release and verification requirements), *available at* http://www.ftc.gov/os/2004/10/041008matayocomment.pdf.

[58] Connecticut Bd. of Exam'rs for Opticians, In re Petition for Declaratory Ruling Concerning Sales of Contact Lenses, Declaratory Ruling Memorandum of Decision (June 24, 2003).

[59] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

[60] Lewis, Sowder, Wear & Yoseph, FTC File No. 031-0155 (2004), *available at* http://www.ftc.gov/opa/2004/06/clarkcounty.htm.

demands for increased fees were met. Under the terms of the consent agreement, the attorneys are enjoined from engaging in similar conduct in the future.

Much of the Commission's activities regarding the legal profession is competition advocacy. During the past few years, U.S. competition authorities have encouraged numerous states to adopt pro-competitive professional regulations. There are many services traditionally performed by lawyers that do not always require legal training and may be performed by non-lawyers at lower cost to consumers. Consequently, the FTC has urged state regulators of the legal profession to exclude those services from the definition of the practice of law. For example, the Commission, with the Department of Justice, encouraged the Georgia bar to reject a proposal that would prevent non-lawyers from competing with lawyers to handle real estate closings.[61] The agencies argued that the proposal could prevent competition from out-of-state and Internet lenders and force consumers and businesses to pay more.[62] The agencies have made similar arguments to North Carolina,[63] Rhode Island,[64] Indiana,[65] Massachusetts,[66] Kansas,[67] New York,[68] and the American Bar Association.[69]

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[61] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Standing Comm. on Unlicensed Practice of Law, State Bar of Ga. (Mar. 20, 2003), *available at* http://www.ftc.gov/be/v030007.htm. The Georgia State Bar ultimately adopted the proposed opinion, concluding that the preparation and facilitation of the execution of deeds of conveyance on behalf of another by anyone other than a duly licensed attorney constitutes the unlicensed practice of law. The matter is now before the Georgia Supreme Court on direct review. On July 28, 2003, the Commission and the Department filed a joint *amicus* brief in that action raising the same objections set forth in the agencies' letter to the State Bar. *See* On Review of UPL Advisory Opinion No. 2003-2, Brief *Amici Curiae* of the United States and the Federal Trade Comm'n (July 28, 2003), *available at* http://www.ftc.gov/os/2003/07/georgiabrief.pdf.

[62] The U.S. Department of Justice successfully asserted such a position in recent litigation before the Supreme Court of Kentucky. *See* Countrywide Home Loans, Inc. v. Ky. Bar Ass'n, No. 2000-SC-0206-KB, 2003 WL 21990261 (Ky. Aug. 21, 2003) (holding that a proposed unauthorized practice of law opinion had the potential to restrain competition and rejecting a proposed opinion that would have prevented laypeople from competing with lawyers to close real estate transactions).

[63] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to President of N.C. State Bar re: Proposed N.C. State Bar Opinions Concerning Non-Attorneys' Involvement in Real Estate Transactions (July 11, 2002), *available at* http://www.ftc.gov/os/2002/07/non-attorneyinvolvment.pdf; Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Ethics Comm. of N.C. State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001), *available at* http://www.ftc.gov/be/v020006.htm. The North Carolina Bar ultimately revised its rules to eliminate the requirement that attorneys be physically present at the closing, and the bar also opted to permit non-lawyers to witness signatures on documents and receive and disburse funds.

[64] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to R.I. House of Reps. re: Proposed Restrictions on Competition From Non-Attorneys in Real Estate Closing Activities (Mar. 28, 2003), *available at* http://www.ftc.gov/be/v020013.htm; Letter from Federal Trade Comm'n & U.S. Dep't of Justice to R.I. House of Reps. re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002), *available at* http://www.ftc.gov/be/v020013.pdf. The Rhode Island legislature declined to enact a bill in the 2003 session and is currently considering a similar measure.

[65] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Ind. State Bar Ass'n Unauthorized Practice of Law Comm. re: Proposed Amendment to Ind. Supreme Court Admissions & Discipline Rule 24 (Oct. 1, 2003), *available at* http://www.ftc.gov/os/2003/10/uplindiana.htm.

The Commission has also had an active campaign of competition advocacy against restrictions on various types of legal advertising, which reduce competition for legal services and limit the availability of information to consumers. The FTC view has been that while deceptive advertising by lawyers should be prohibited, restrictions on advertising should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information. Thus, earlier this month, Commission staff argued against proposed amendments to the rules on attorney advertising in New York.[70] The proposed restrictions would prohibit certain quality descriptions, comparative claims, illustrations, and the appearance of persons other than the lawyer. Commission staff also argued against proposed advertising guidelines in New Jersey that would limit the use by lawyers or law firms of endorsements or testimonials from clients.[71] The Commission staff made arguments to the Alabama Supreme Court that were similar to the letters to New York and New Jersey.[72] The Commission staff position is consistent with arguments that the

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[66] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Task Force to Define the Practice of Law in Mass. re: Draft Proposed Definition of the Practice of Law in Mass. (Dec. 16, 2004), *available at* http://www.ftc.gov/os/2004/12/041216massuplltr.pdf; Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Rep. Paul Kujawski re: bill authorizing non-attorneys to perform certain real estate settlement services (Oct. 6, 2004), *available at* http://www.ftc.gov/os/2004/10/041008kujawskicomment.pdf.

[67] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Jerry Alderman, Executive Dir., Kan. Bar Ass'n, re: Comments on Kan. Bar Ass'n's Proposed Definition of the Practice of Law (Feb. 4, 2005), *available at* http://www.ftc.gov/be/v050002.pdf.

[68] *See* Comments of Federal Trade Comm'n & U.S. Dep't of Justice to Hon. Helene E. Weinstein re: N.Y. A.B. A05596 to Establish that Certain Services Related to Real Estate Transactions May Be Provided Only by Attorneys (June 21, 2006), *available at* http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf.

[69] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to ABA re: Proposed Model Definition of the Practice of Law (Dec. 20, 2002), *available at* http://www.ftc.gov/opa/2002/12/lettertoaba.htm. The ABA ultimately decided not to adopt a uniform model definition of the practice of law, but instead recommended that every state and territory adopt its own definition. *See* ABA Task Force on the Model Definition of the Practice of Law, Recommendation as Adopted (Aug. 11, 2003), *available at* http://www.abanet.org/cpr/model-def/recomm.pdf. In the Report that accompanied the Recommendation, the Task Force noted that each jurisdiction should use a balancing test to determine who may provide legal services, and that – in addition to taking into account such key considerations as minimum qualifications, competence, and accountability – the balancing test should take into account both access to justice and the preservation of individual choice. *See* Report of the ABA Task Force on the Model Definition of the Practice of Law at 5 (Aug. 2003), *available at* http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf.

[70] *See* Letter from Federal Trade Comm'n to Michael Colodner, Counsel, Office of Court Admin. re: Proposed Restrictions to Attorney Advertising (Sept. 14, 2006), *available at* http://www.ftc.gov/os/2006/09/V060020-image.pdf.

[71] *See* Letter from Federal Trade Comm'n to Comm. on Attorney Advertising, Supreme Court of New Jersey re: Proposed Attorney Advertising Guideline 4 (March 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf.

[72] *See* Letter from Federal Trade Comm'n to Robert G. Esdale, Clerk of the Court, Supreme Court of Ala. re: Proposed Revisions to Ala. Rules of Professional Conduct Entitled Information About Legal Services (Sept. 30, 2002) (hereinafter Esdale Letter), *available at* http://www.ftc.gov/be/v020023.pdf.

Commission made to the to the ABA Commission on Advertising, in which the FTC argued against guidelines respecting dignity in advertising because such guidelines, no matter how they might be worded, would reduce consumer access to truthful, non-deceptive information without providing a countervailing benefit.[73] Commission staff have also opposed proposed limitations on attorneys participating in on-line attorney referral programs where attorneys provide solicitation information to potential clients that indicate a need for particular legal services.[74]

Real Estate

Since the 1980s, the Commission has actively investigated and challenged anticompetitive practices in the real estate industry, including efforts by private associations of brokers to disadvantage and limit competition from brokers who use non-traditional listing agreements.[75] Recently, as alternative limited service brokerage models have grown in prominence, the FTC also has become aware of actions through multiple listing services (MLSs), industry trade associations, and state regulatory and legislative bodies that are likely to make it more difficult for these limited-service business models to compete against traditional brokers. In July the Commission charged the Austin Board of Realtors ("ABOR"), an association of real estate brokers in the Austin, Texas, metropolitan area, with violating Section 5 of the FTC Act.[76] The FTC's complaint alleged that ABOR's rules effectively prevented consumers with non-traditional lower-cost real estate listing agreements from marketing their listings on

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[73] *See* Submission of FTC Staff to ABA Comm'n on Advertising (June 24, 1994), *available as attachment to* Esdale Letter, *supra* note 72.

[74] *See* Letter from Federal Trade Comm'n to Professional Ethics Comm. of the Texas State Bar (May 26, 2006), *available at* http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf; Letter from Federal Trade Comm'n to Michael Colodner, Counsel, Office of Court Admin. re: Proposed Restrictions to Attorney Advertising (Sept. 14, 2006), *available at* http://www.ftc.gov/os/2006/09/V060020-image.pdf.

[75] *See* Austin Bd. of Realtors, File No. 0510219 (July 13, 2006), *available at* http://www.ftc.gov/os/caselist/0510219/0510219.htm; United Real Estate Brokers of Rockland, Ltd., Docket No. C-3461, 116 F.T.C. 972 (1993), *available at* http://www.ftc.gov/bc/realestate/cases/UnitedRealEstateBrokersofRocklandLtd116FTC972.pdf; American Industrial Real Estate Ass'n, Docket No. C-3449, 116 F.T.C. 704 (1993), *available at* http://www.ftc.gov/bc/realestate/cases/AmericanIndustrialRealEstateAssociationetal116FTC704.pdf; Puget Sound Multiple Listing Ass'n, Docket No. C-3300, 113 F.T.C. 733 (1990), *available at* http://www.ftc.gov/bc/realestate/cases/PugetSoundMultipleListingAssociation113FTC733.pdf; Bellingham-Whatcom County Multiple Listing Bureau, Docket No. C-3299 (F.T.C., Aug. 2, 1990), *available at* http://www.ftc.gov/bc/realestate/cases/Bellingham-WhatcomCountyMultipleListingBureau113FTC724.pdf; Metro MLS, Inc., Docket No. C-3286, 115 F.T.C. 305 (1990), *available at* http://www.ftc.gov/bc/realestate/cases/MetroMLS113FTC305.pdf; Multiple Listing Service of the Greater Michigan City Area, Inc., Docket No. C-3163, 106 F.T.C. 95 (1985), *available at* http://www.ftc.gov/bc/realestate/cases/MultipleListingServiceoftheGreaterMichiganCityAreaInc106FTC95.pdf; Orange County Bd. of Realtors, Inc., Docket No. C-3162, 106 F.T.C. 88 (1985), *available at* http://www.ftc.gov/bc/realestate/cases/OrangeCountyBoardofRealtorsIncetal106FTC88.pdf.

[76] *See* Austin Bd. of Realtors, File No. 0510219 (July 13, 2006), *available at* http://www.ftc.gov/os/caselist/0510219/0510219.htm.

important public Web sites. These rules discouraged Austin MLS members from entering into such agency listings with their clients and thus impeded one way of providing unbundled brokerage services to consumers. The Commission's consent order with ABOR, which settled the charges, prohibits ABOR from adopting or enforcing any policy to deny, restrict, or interfere with the ability of its members to enter into non-traditional listing arrangements.

The Commission's advocacy program has addressed issues related to real estate transactions, such as laws that restrict non-attorneys from performing certain aspects of real estate closings.[77] Over the past two years, several state legislatures and real estate commissions – at the urging of state Realtor® associations – have considered or adopted minimum service requirements, which would have the effect of forcing consumers to purchase a state-mandated bundle of real estate brokerage services. Because these measures are likely to harm consumers, the FTC and DOJ have been active in advocating against them. In 2005, the Agencies sent letters to the Texas Real Estate Commission, the Alabama Senate, Missouri Governor Blunt, and Michigan state Senator Alan Sanborn providing analysis of the likely competitive effects of proposed minimum service laws. The agencies concluded that by effectively eliminating many of the most popular packages offered by limited-service brokers, these minimum-service laws would reduce competition among traditional brokerage models and limited service models. Further, the agencies noted the dearth of evidence that such laws are necessary to protect consumers; throughout the Commission's advocacy efforts staff were never presented with evidence of actual consumer harm from a limited-service brokerage model.

In 1983 the FTC released a comprehensive report on the real estate brokerage industry reflecting years of enforcement activity and industry research.[78] More recently, in an effort to further educate the Commission and the public about the substantial changes occurring in the real estate brokerage marketplace, and given consumers' strong interests in competitive real estate brokerage service markets, the FTC and DOJ held a workshop addressing competition policy and the real estate industry in October 2005. This workshop provided a forum to discuss current issues in real estate competition and

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[77] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Mass. State Rep. Paul Kujawski (Oct. 6, 2004); Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Standing Comm. on Unlicensed Practice of Law, State Bar of Ga. (Mar. 20, 2003); Letters from Federal Trade Comm'n & U.S. Dep't of Justice to Speaker of the R.I. House of Reps. and to President of R.I. Sen. (June 30, 2003 and Mar. 28, 2003); Letter from Federal Trade Comm'n & U.S. Dep't of Justice to President of N.C. State Bar (July 11, 2002); Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Speaker of R.I. House of Reps. (Mar. 29, 2002); Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Ethics Comm. of N.C. State Bar (Dec. 14, 2001); Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Supreme Court of Va. (Jan. 3, 1997); Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Va. State Bar (Sept. 20, 1996). These letters can be found at http://www.ftc.gov/be/advofile.htm. *See also* Brief *Amicus Curiae* of the United States and the Federal Trade Comm'n in Lorrie McMahon v. Advanced Title Services Co. of W. Va., 607 S.E.2d 519 (W. Va. 2004) (filed May 25, 2004), *available at* http://www.ftc.gov/be/V040017.pdf; Brief *Amicus Curiae* of the Federal Trade Comm'n and the United States in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), *available at* http://www.ftc.gov/os/2003/07/georgiabrief.pdf.

[78] *See* FTC Staff Report, The Residential Real Estate Brokerage Industry (1983), *available at* http://www.ftc.gov/bc/realestate/workshop/index.htm.

to assess how they affect consumers. The FTC and DOJ have indicated that they plan to issue a joint report this fall setting forth the findings with regard to the state of competition in the real estate brokerage industry. The report will be based on the agencies' review of the testimony provided at the workshop, the numerous public comments filed with the agencies, and other information and industry analyses.

Funeral Services

In an extensive study begun in the 1970s, the FTC found that the funeral market was characterized by a virtual absence of price information. Given the stressful time in which consumers typically purchased funerals, the absence of such information made the exercise of consumer choice especially difficult. Regulatory barriers included state law provisions allowing only licensed funeral directors to sell caskets – generally the single most expensive component of a funeral. This requirement had little bearing on the ability or qualifications of a person to sell caskets and inhibited others from entering the market. This and other regulatory barriers were adopted on the basis of purported consumer protection justifications. For example, the industry asserted that consumers could suffer from fraud or other abuses if they bought caskets from independent sources. The industry also argued that licensing in general promotes health and safety because proper disposal of human remains affects the environment and the public. Restricting casket sales to licensed funeral directors, however, did little or nothing to fulfill these purposes.

In response, the Commission determined that consumers would benefit from a regulation that would require more price transparency in the funeral industry. As a result, the agency promulgated the Funeral Rule, which was designed to reduce barriers to consumers' ability to choose between competing providers.[79]

The FTC has also brought enforcement actions against state entities for their regulations on funeral advertising. For instance, in 2004 the FTC investigated and settled a case against the Virginia funeral regulatory authority, which had issued a regulation prohibiting funeral directors from advertising discounts for pre-need funeral services.[80] The regulation, which was written by industry members but enforced by the state, deprived consumers of the benefits of price competition and allegedly resulted in some consumers paying higher prices for funeral services than they would have otherwise. The settlement resulted in the board's agreeing not to restrict truthful price advertising or to enforce any rule that would have that effect.

The FTC has also engaged in advocacy campaigns against state funeral regulations that decreased competition without benefiting consumers. For example, the FTC filed an amicus curiae brief in a federal lawsuit brought by a group of funeral

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[79] The Funeral Rule became effective in 1982 and was amended in 1994. *See* 16 C.F.R. Part 453.

[80] Va. Bd. of Funeral Dirs. and Embalmers, FTC File No. 041-0014, Analysis of Proposed Consent Order to Aid Public Comment, *available at* http://www.ftc.gov/os/caselist/0410014/040816anal0410014.pdf.

directors against the Oklahoma funeral regulatory agency, which required sellers of funeral goods to be licensed funeral directors. The FTC argued that the Oklahoma licensing scheme limited consumer choice of funeral merchandise providers, which in turn insulated the funeral service industry from competition that could lower prices.[81] Other FTC advocacy efforts have focused on broadening the types of business structures within which funeral providers may operate (e.g., permitting funeral homes to be owned by corporations and limited liability companies) in order to reduce barriers to market entry.[82]

CONCLUSION

In general, the professions in the United States are governed by the same antitrust principles that apply to other goods and services. The courts have rejected arguments that markets for professional services operate differently from other markets and that the professions should be exempt from antitrust enforcement or subject to special rules. Thus, anticompetitive restrictions involving professionals in the United States are typically subject to Section 1 of the Sherman Act, which governs collective action in restraint of trade. The federal antitrust enforcement agencies have an extensive history of both competition advocacy and law enforcement in the markets for professional services, which often present issues arising from limits prescribed by professional associations on the behavior of their member-competitors. Because the professions are often subject to additional forms of governmental oversight, however, the application of traditional antitrust principles will sometimes be accepting of limited displacement of competition in furtherance of other objectives.

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[81] *See* Memorandum of Law of Amicus Curiae, Powers v. Harris, Case No. CIV-01-445-F, at 15 (W.D. Okla. 2002).

[82] *E.g.*, Letter from Susan Creighton, Dir., Bureau of Competition, FTC to Joanne C. Benson, Md. House of Delegates (Apr. 2, 2004), *available at* http://www.ftc.gov/os/2004/04/0404mdfuneralhomes.pdf. *See also* Mich. Proposal Regarding Funeral Industry Portends Benefits – But Also Some Costs – For Consumers (Dec. 18, 1991), *available at* http://www.ftc.gov/opa/predawn/F93/michiganf5.htm.