

# HOW ETHICS CODES CAN LAND YOU IN ANTITRUST HOT WATER . . .

## AND OTHER ANTITRUST DANGER ZONES FOR ASSOCIATION MANAGEMENT

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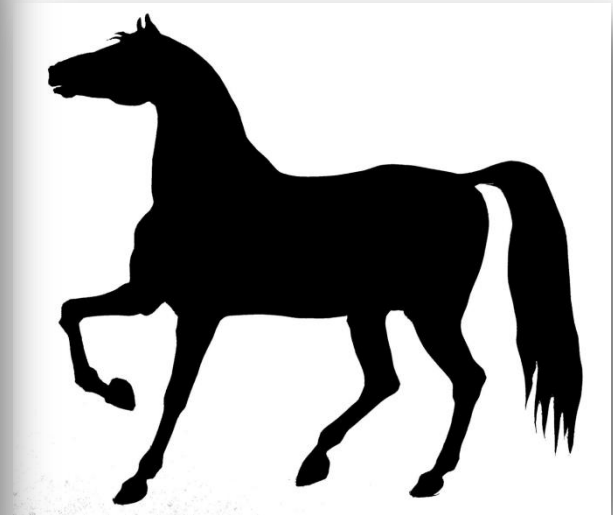
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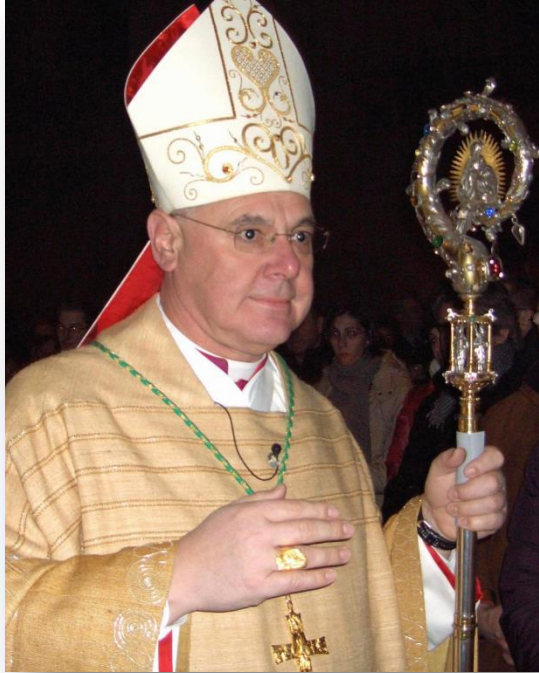
Washington Society of Association Executives Annual Meeting  
June 3, 2014

# QUESTION?

What do paralegals, music teachers and quarter horses have in common?



# THREE RELIGIOUS LEADERS MET IN A BAR ...



# OVERVIEW – ASSOCIATIONS' CONTRIBUTIONS TO SOCIETY

Trade and professional associations benefit society by promoting:

product and service quality

efficiency

lower prices

research and product development

expanded information for customers and consumers

the interests of their members



# OVERVIEW – ASSOCIATIONS' DARK SIDE

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But associations have violated the antitrust laws.

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Associations often comprised of competitors acting collectively.

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To realize  
goals,  
associations  
may need to:

restrict conduct harmful to members' interests  
or public confidence in members'  
products/services

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limit membership in association or its programs

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enforce standards that might harm certain companies or individuals

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# OVERVIEW – TODAY'S OBJECTIVES

Antitrust analysis – complex, fact specific, involving law, economics and public policy.

But with basic understanding of antitrust law, common sense and periodic advice from counsel, you can navigate through the minefield.

## Today's objectives

- understand antitrust danger zones for associations and their leadership
- identify conduct that should be avoided
- help you know when to seek advice



# OVERVIEW – TODAY'S TOPICS

Today  
we  
will  
cover

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Quick history of antitrust law

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Antitrust law basics

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Antitrust danger zones

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Real world examples

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Recent government actions against association ethics codes

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Best practices to avoid antitrust danger zones

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# A QUICK SPRINT THROUGH 6000 YEARS OF ANTITRUST HISTORY

As far back as the  
Sumerians,  
Babylonians,  
Romans and Greeks.

Civil War gave rise  
to anticompetitive  
economic  
conditions.

Early U.S. state laws  
- anticompetitive  
contracts  
unenforceable but  
not illegal.

U.S. enacts Sherman  
Act, first Federal law  
to outlaw  
monopolistic  
business practices.



# WHAT LAWS ARE WE DEALING WITH?

Sherman Act

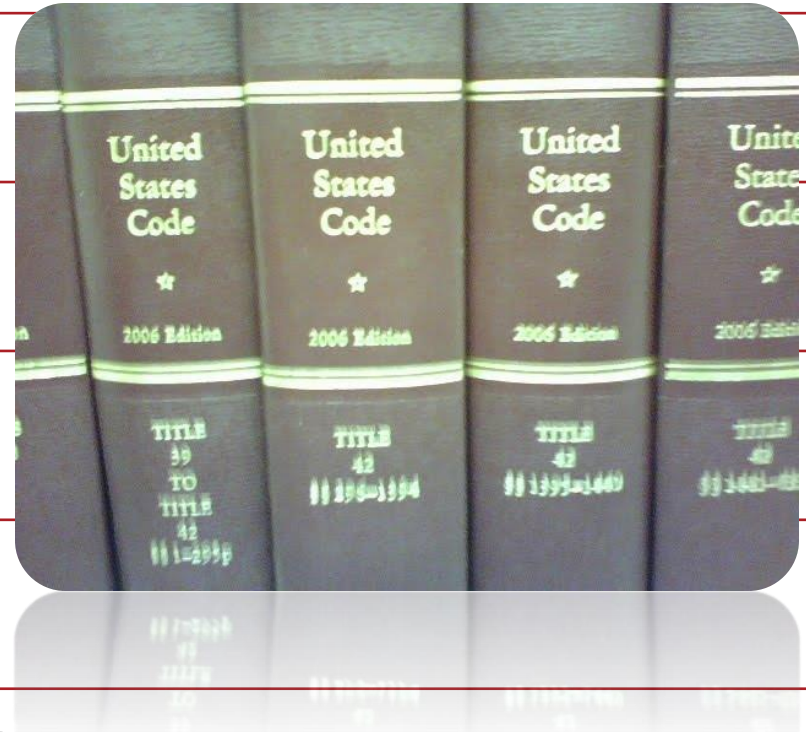
Clayton Act

FTC Act

Lanham Act

State antitrust and unfair competition laws

International antitrust laws

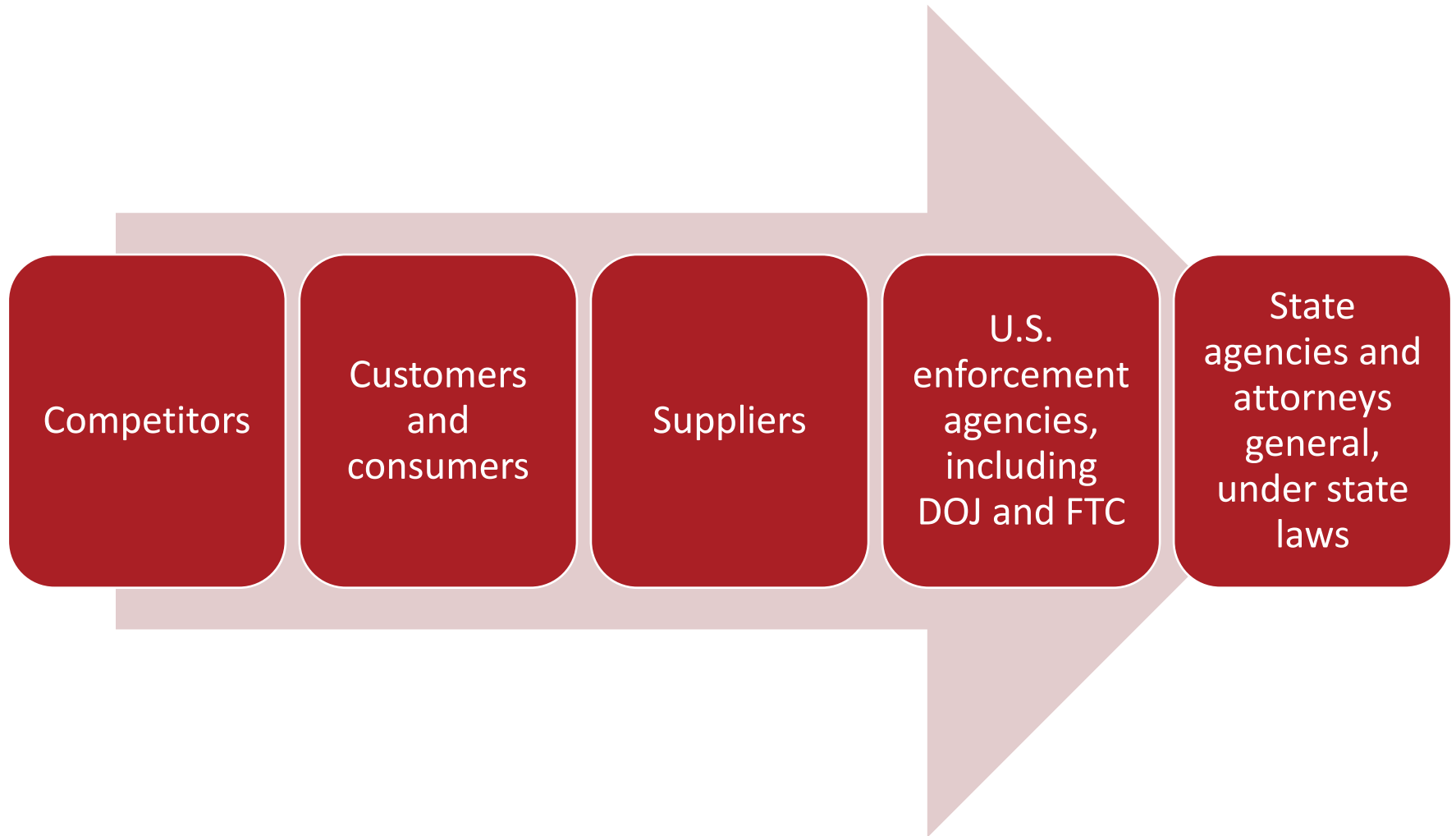


# TO WHOM DO THE ANTITRUST LAWS APPLY?

- Anyone engaged “in interstate commerce”, i.e., sale or provision of goods, commodities or services.
- Some statutory exemptions: e.g.:
  - Agricultural cooperatives
  - Labor unions
  - Some non-profit institutions
- Some common law exemptions: e.g., Major League Baseball.
- **Trade associations**, including non-profit associations, are **NOT** exempt.



# WHO MAY ASSERT ANTITRUST CLAIMS?



# WHAT ARE THE RISKS OF ANTITRUST VIOLATIONS?

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Civil litigation — class actions, treble and punitive damages, attorney fees

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Government investigations and prosecutions

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Civil/criminal fines up to **\$100,000,000** for corporations, **\$1,000,000** for individuals

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Injunctions

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Imprisonment – felony – up to **10 years**

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Loss of tax exempt status

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Debarment from federal and state contract awards

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# WHAT DO THE ANTITRUST LAWS PROHIBIT?

- Sherman § 2: Prohibits **monopolization**, attempted monopolization, and conspiracies and combinations to monopolize.
- Sherman § 1: Every **contract, combination . . . or conspiracy** that is an **unreasonable restraint of trade or commerce**, i.e., that *impairs competition*.
  - Agreements among competitors (implicit or explicit)
  - Associations can violate Section 1:
    - engaged in interstate commerce or activities affecting interstate commerce
- Have contact with profit making companies or individuals that can give rise to a “contract” or “conspiracy”.



# SOME BASIC CONCEPTS OF ANTITRUST ANALYSIS

Harm to  
competition

- Price increases
- Reduced output
- Reduced incentives to compete

Harm assessed in  
the “relevant  
market”

“Rule of reason”  
vs. “per se”  
analysis

$$\rho \left( \frac{\partial v}{\partial t} + v \cdot \nabla v \right) = -\nabla p + \nabla \cdot T + f$$

# EXAMPLES OF PROHIBITED GROUP CONDUCT



Price fixing

Market division - allocation of business, customers, territories

Improper communications - e.g., pricing data (future vs. past prices)

Group boycotts

Exclusion from access to essential resource

Exclusionary technical standards

Sham actions before courts or regulatory agencies



# EXAMPLES OF PERMISSIBLE JOINT CONDUCT

Not all group activities are deemed to be anticompetitive:

- joint ventures
- market surveys
- technical standards or codes
- joint purchasing or inventory management



# FOCUS ON TRADE ASSOCIATIONS – HISTORY

Trade associations have always been a subject of antitrust scrutiny.

*"One of the most important questions of trade policy at the present time relates to the practice of trade associations. [M]any of [their activities] are of great benefit not only to the branch of trade concerned therein, but also to the public. Nevertheless, their activities have sometimes involved them in practices which have been condemned by the courts as violations of the antitrust laws." FTC's First Annual Report, circa 1916.*

Early FTC case (1918): Newly-formed FTC ordered association of flag manufacturers to cease concerted efforts to raise prices of American flags sold in the U.S.

Other cases have involved challenges to group restraints on:

- price competition
- advertising
- solicitation of customers
- competitive bidding
- hiring
- standards and certification



# THE DOG ATE MY HOMEWORK, AND OTHER EXCUSES THAT MAY NOT GET ASSOCIATIONS OFF THE HOOK

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“We’re a non-profit.”

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“Those were the actions of member companies, not the association.”

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“We were just trying to encourage a more ethical intercourse among our members.”

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“We were trying to advance an important social or political value.”

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# ANTITRUST DANGER ZONES FOR TRADE AND PROFESSIONAL ASSOCIATIONS

Rules and bylaws

Membership  
decisions

Ethics codes

Information  
exchanges

Standard setting

Advertising

Trade shows



# BYLAWS AND RULES – NOT TO BE PUT IN A BOX AND FORGOTTEN

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Need to be carefully composed, with antitrust issues considered.

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Once adopted, they should not be ignored.

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Changes in, e.g., an association's focus, activities, and membership eligibility will be viewed in light of compliance with current bylaws and rules.



# MEMBERSHIP ADMISSION/EXPULSION



- Associations generally want more, not fewer, members.
- Denial of membership, or expulsion, may trigger antitrust scrutiny.
- But circumstances may allow them to **include** some competitors yet **exclude** others.
- Associations must tread carefully.
  - May be considered a group boycott
  - Is membership essential, or merely helpful, to the ability to compete?
  - Denial of membership must be administered in a manner that forecloses even the appearance of intent to limit competition by non-members.
- Largely political associations (lobbying) may be treated differently from commercial associations.



# REQUIRING MEMBERSHIP AS A CONDITION TO ACCESS A VALUABLE ASSOCIATION RESOURCE

Can be  
attacked  
on  
various  
grounds:

- Tying arrangements; e.g., multi-list real estate services
- Group boycott, in the form of a refusal to deal
- General conspiracy of members to exclude a competitor





# CODES OF ETHICS – THOU SHALT NOT...



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Codes of ethics are analyzed under the Rule of Reason.

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FTC/DOJ will scrutinize codes that directly or indirectly prevent members from competing against each other.

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Collegiality, or desire to achieve a social or political goal, generally will not excuse anticompetitive impact.

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# NOT MUSIC TO MTNA'S EARS!

Music Teachers National Ass'n – 20,000+ members, 500 state & local affiliates.

Codes of Ethics, “Commitment to Colleagues,” stated: “The teacher shall respect the integrity of other teachers’ studios and shall not. . .”

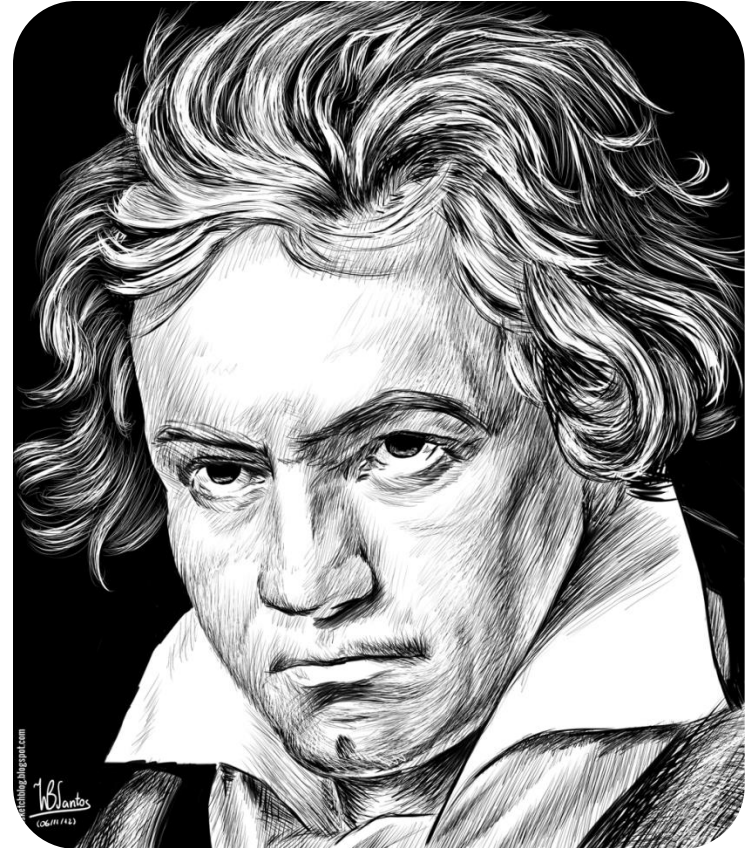
- charge music lesson fees lower than the average in the community
- offer free lessons or scholarships, or otherwise solicit clients from a rival
- advertise free scholarships or tuition

MTNA encouraged members to resolve disputes privately, and established a mechanism by which it could sanction Code violations.



# WOULD BEETHOVEN HAVE COMPOSED A DIFFERENT FINALE?

- WSJ reported: MTNA had limited resources, never enforced the challenged provisions, had no role in local members' rules, and immediately agreed not to enforce them.
- Nonetheless, FTC filed complaint, forcing MTNA to respond to agency's massive document requests, nearly bankrupting the association in the process.
- FTC ultimately secured a consent decree, and announced the outcome of its enforcement action on . . . Beethoven's birthday!



# THE MTNA CONSENT DECREE

## MTNA consent decree requires it to:

- read statement at future national MTNA events warning members against talking about prices or recruitment
- send the statement to all 20,000+ members and post it on its website
- require its 500 affiliated regional affiliates to sign a compliance statement
- develop sweeping antitrust compliance program, including annual training of state affiliates' presidents and in-house antitrust compliance training for five years
- not affiliate with organizations that restrict student or job solicitations, advertising, or price competition, and require potential affiliates to certify compliance
- submit periodic reports to FTC
- appoint outside antitrust compliance officer
- comply with these requirements for **20 years!**



# ILLEGAL LEGAL ASSISTANTS

California Ass'n of Legal Support Professionals – 350 members who provide support services to the California legal profession

Code of Ethics prohibited members from:

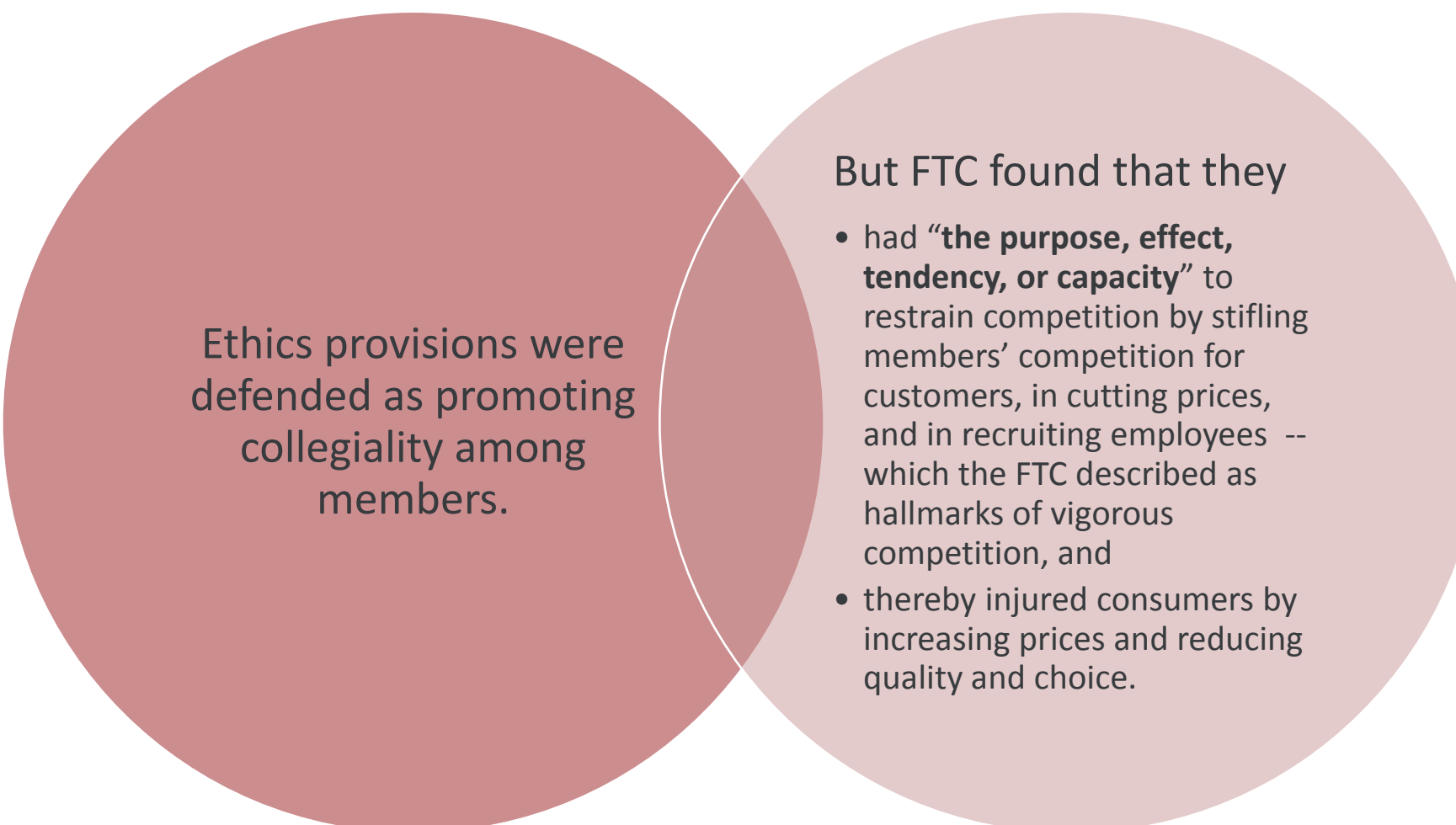
- offering discounted rates to rivals' clients
- engaging in certain comparative advertising or make disparaging statements about other members
- recruiting employees of competitors without first notifying the competitor

CALSPPro's Dispute Resolution Committee resolved alleged Code violations by encouraging members to resolve disputes privately and by imposing sanctions.

In response to FTC complaint, CALSPPro entered into consent decree similar to MTNA's.



# WHAT PARALEGALS AND MUSIC TEACHERS HAVE IN COMMON



Ethics provisions were defended as promoting collegiality among members.

But FTC found that they

- had “**the purpose, effect, tendency, or capacity**” to restrain competition by stifling members’ competition for customers, in cutting prices, and in recruiting employees -- which the FTC described as hallmarks of vigorous competition, and
- thereby injured consumers by increasing prices and reducing quality and choice.



# SMILE AND SHOW THOSE TEETH!

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North Carolina Board of Dental Examiners prohibited teeth whitening services by anyone but licensed dentists.

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Board composed largely of practicing dentists who compete in teeth-whitening market.

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Board members selected by practicing dentists based on candidates' statements of position on issues (including whitening).

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FTC held that Board conspired to restrain competition in the market, shutting out non-dentists from competing for teeth-whitening business.

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Appeals court affirmed; case is now before the U.S. Supreme Court.





# STANDARD SETTING, CERTIFICATION AND ACCREDITATION

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Many associations set standards, or issue certifications or accreditations.



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Can contribute to maintenance of high standards, safety, standardization, efficiency, innovation and other positive effects.

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Can be very valuable to those who meet the standards.

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But can be used to **exclude competitors** who depend on alternate standard, substitutability or interoperability.

# THE AMERICAN QUARTER HORSE CASE – A HORSE IS A HORSE, OF COURSE, OF COURSE, UNLESS. . .

The American Quarter Horse Association records pedigrees of quarter horses.



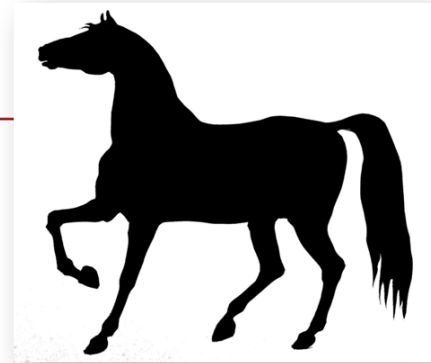
Plaintiffs alleged that:

- AQHA officers and rules committee members influenced decision to ban cloned horses from AQHA registry because they had financial incentive to block competition from cloned horses.
- AQHA seeking to monopolize the market for “high quality registered Quarter Horses” in the U.S.
- The registry restriction “precluded competition” from cloned horses and “established unnecessary and insurmountable barriers to entry into the market. . .”
- Cloned horses are “virtually worthless” without AQHA registration.

# AMERICAN QUARTER HORSE CASE

AQHA claimed registry restriction was designed to promote and preserve the breed's integrity and further AQHA's internal management.

But jury found registration necessary for horses to compete, and that exclusion was based on conspirators' economic interests apart from AQHA's.



AQHA held to have unlawfully monopolized U.S. market for high-quality registered Quarter Horses in violation of Sherman Act §§ 1 and 2, and Texas state law.

Although jury did not award damages, court granted injunction requiring AQHA to register plaintiffs' cloned horses.

# TRADE SHOWS

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Imagine: Police storm trade show, arrest corporate and association executives for criminal violations of Sherman Act. It happened at a marine hose industry conference.

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Trade shows create an opportunity for collaboration . . . or conspiracy.

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Attended by competitors; opportunities for all types of meetings.

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Appearances can be important: e.g., electrical manufacturing industry prosecution.

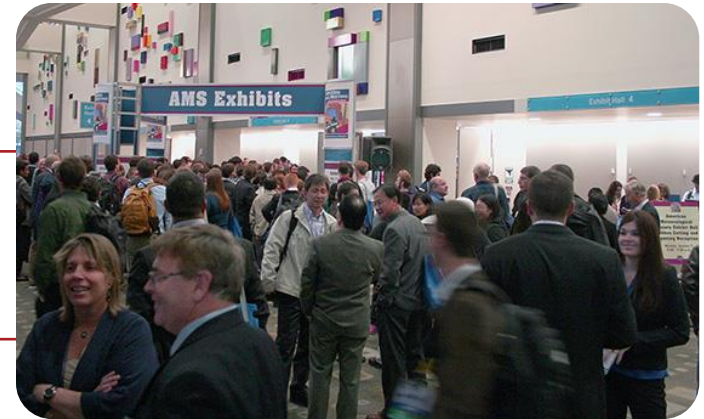
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Session title at Council of Independent Colleges conference -  
“*Collaborative Efforts on Student Aid and Admissions Policies...*” - led  
DOJ to investigate suspected collusion on financial aid offerings.

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DOJ ultimately closed the investigation, but not before targeted schools  
had to produce documents and information.

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# ADVERTISING, PRODUCT AND INDUSTRY PROMOTION

Some associations focus on industry promotions, e.g., “Drink milk” or “Beef, it’s what’s for dinner.”

In evaluating the success of such campaigns, associations must be careful to avoid exchanges of competitively sensitive information concerning, e.g., recent sales and production forecasts.



# INFORMATION SHARING

Associations facilitate sharing of information among industry participants – e.g., surveys, performance benchmarks, industry performance statistics

In one case, association's program for members' exchange of sales data, including types and quantities of products sold, purchasers' identities, and daily shipping reports was held to be unlawful.

Collection and sharing of information from and among competitors can raise antitrust concerns.

But in another case: FTC concluded that exchange of data among firms like Western Union, which managed electronic funds transfers, was permissible.





# LOBBYING

Joint lobbying by competitors - protected from antitrust liability under the *Noerr-Pennington Doctrine*, even where aimed at restricting competition.

- Based on First Amendment right to petition elected officials.

But right is not unlimited – “sham exception” denies protection to efforts that are mere sham to cover anticompetitive conduct, e.g., to coordinate actual business conduct.

Generally, associations may exclude non-members from such efforts – based on the First Amendment right of association.





# CURRENT ACTIVITY BY DOJ AND FTC

May 2014 – FTC cautions that it continues to maintain an active antitrust enforcement focus on trade association activity.

Release apparently not the result of a specific enforcement action but instead designed to communicate continued interest in trade association activity.

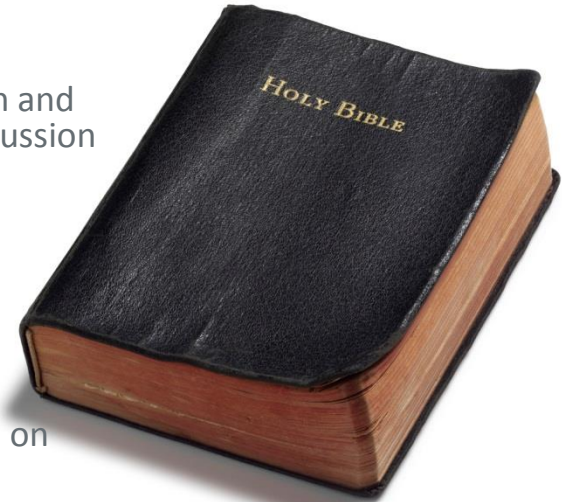


While acknowledging associations can benefit the public, FTC cautioned that they are uniquely positioned to facilitate coordination among members to restrain competition and harm consumers and, therefore, will continue to invite antitrust scrutiny.

Referencing past actions against CALSPro and MTNA, FTC reminded: “If you are a member of a trade association . . . remember that there are no special antitrust rules for trade associations.”

# BEST PRACTICES TO AVOID ANTITRUST RISK: *COMPLIANCE POLICY AND PROGRAM*

- Have an antitrust compliance policy and program reflecting a risk-based assessment of the association's business and the functions it performs.
  - E.g., standard-setting organizations should provide guidance on admission and exclusion of participants, disclosure of intellectual policy, and ex ante discussion of royalties.
  - Consider association's bylaws, articles of incorporation and rules.
  - Provide guidance on issues that association or members have had prior difficulties.
  - Focus on both association management and on members who participate on committees that have decision-making authority.
- Once policy is adopted:
  - Distribute appropriate version of policy to all employees.
  - Have procedure for obtaining advice from association management or counsel.
    - Reinforce policy through periodic communications and training.
    - Make high-level executives responsible for policy implementation.
  - Consistently enforce policy through appropriate disciplinary mechanisms.



# BEST PRACTICES TO AVOID ANTITRUST RISK: *DOCUMENT POLICY*

- Expect documents to be misinterpreted against you, and quoted out of context.
- Do not create unnecessary documents.
- Establish a document retention policy
- Remember that emails, tweets, e-bulletin boards and social network postings, are “documents” that may be discoverable in litigation and agency investigations.
- Have sensitive documents reviewed by counsel



# BEST PRACTICES TO AVOID ANTITRUST RISK: *MEETING POLICY*



Meetings should not be a forum for illegal activity.

Closed meetings (e.g., committees) should follow prescribed agenda.

Meetings on sensitive topics: counsel should review agenda, possibly attend meeting, and meeting should be prefaced with reminder on antitrust compliance.

Written minutes should be kept of meetings, and in some cases reviewed by counsel.

Meeting chairs should have knowledge and authority to terminate meeting if discussions migrate to improper topic.

Discourage attendees from having “off the record” discussions of prohibited topics during meeting breaks or post-meeting gatherings.

# BEST PRACTICES TO AVOID ANTITRUST RISK: *INFORMATION SHARING*

- Consider DOJ/FTC “antitrust safety zones” – info collection and sharing practices that the agencies have concluded are unlikely to raise antitrust concerns and will not be challenged absent extraordinary circumstances.
- Involve counsel in formulating surveys and vetting them for antitrust concerns.
- Keep submitted data confidential
- Raw data should be reviewed only by a third party data manager, e.g., an outside accountant, who will mask competitively sensitive data, including especially price data, to prevent disclosure of negotiated rates/prices, which could signal price levels.
- Collect lagged data – at least 3 months old, contains no current or future price or cost data.
- Collect and present data from sufficiently large number of respondents so that company-specific information price, cost and other data can’t be “backed out” or “reverse engineered”.
  - “Rule of 5” (at least 5 providers for every data point and no individual provider's data represents more than 25% on a weighted basis of that statistic).
- Beware of informal information exchanges.



# BEST PRACTICES TO AVOID ANTITRUST RISK: *WHEN IN DOUBT, ASK!*

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Ask your counsel.

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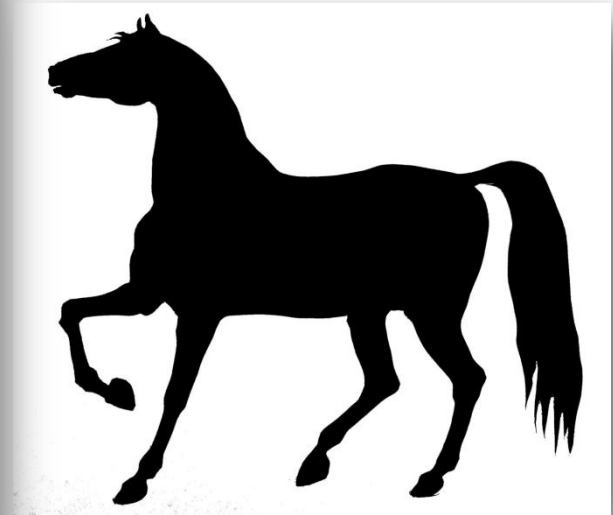
Submit a request for an  
advisory ruling from DOJ or  
FTC.





# QUESTION?

What do paralegals, music teachers and quarter horses have in common?





# Questions?

## Thank You!

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