

All New Hampshire Bar members who use the New Hampshire Bar Association's forums should be aware of the following important policy, which appears in the policy manual for Sections:

...Messages should not be posted if they encourage or facilitate members to arrive at any agreement that either expressly or impliedly leads to price fixing, a boycott of another's business or other conduct intended to illegally restrict free trade. Messages that encourage or facilitate an agreement about the following subjects are inappropriate: fees, prices, discounts, or terms or conditions of sales; salaries; profits, profit margins or cost data; market shares, sales territories or markets; allocation of customers or territories; or selection, rejection or termination of customers or supplies; or potential violation of current antitrust laws.

It is extremely important to our profession and to our Association that the Bar Association's facilities not be used in a way which could be alleged to violate the anti-trust laws.

The United States Supreme Court has held that explicit agreements by groups of professionals, which have the effect of increasing the cost of a service, violate the anti-trust laws. See, e.g. *FTC v. Indiana Federation of Dentists*, 476 U.S. 477 (1986). The Supreme Court has been unsympathetic to claims that anti competitive conduct can be justified by other societal benefits. For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) the Court held that an ethical rule established by a society of engineers that prohibited competitive price information was an illegal restraint of trade, despite the engineers' claim that the limit on disclosure benefited clients. The Court has even held that price fixing arrangements that establish *maximum* prices for medical services are illegal, even though the agreements are intended to reduce prices, because such agreements could permit providers to sell their services to certain customers at fixed prices and could affect the market price of medical costs. *Arizona v. Maricopa Medical Society*, 457 U.S. 332 (1982).

There is simply no doubt that the antitrust laws apply to lawyers. Over 30 years ago in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Supreme Court held the use of minimum fee schedules by lawyers to be illegal, and rejected out of hand the claim that minimum fee schedules provided for a minimum level of competence among lawyers.

Obviously, lawyers, like other business people and professionals, will always talk about the economics of their practice. Inquiry into market rates is appropriate. Indeed, Judges need to survey the market in order to set rates in cases in which a fee shifting award is

made. Surveys on the economics of practice are available to Bar Members locally and nationally, and may be lawfully used. But direct competitors should not be talking directly to each other about the rates that they charge in cases. A risk of antitrust liability occurs when current price data is directly exchanged among competitors. Courts have reasoned that such a practice will generally result in stability and eventually a uniformity of prices that is forbidden. *Goldfarb* (supra) at 781-783.

For these reasons, the Bar Association's policies specifically forbid messages about fees, prices, discounts or financial terms and conditions regarding representation. The Bar Association asks that you comply with those guidelines, and help us steer clear of potential antitrust issues that could impair the future utility of the forums.

The NHBA forums are providing a great way for members to easily communicate with others in similar practice areas, and we are thrilled with the use they are getting. Thank you for your cooperation and assistance in helping us make sure that the forums continue to function as valuable tools to assist lawyers in their practice.