N C A R B

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NCARB and How It Relates to Architectural Professional Associations

ABOUT NCARB
The National Council of Architectural Registration Boards (NCARB) is a nonprofit corporation comprising the legally constituted architectural registration boards of the 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands as its members.

MISSION STATEMENT
The National Council of Architectural Registration Boards protects the public health, safety, and welfare by leading the regulation of the practice of architecture through the development and application of standards for licensure and credentialing of architects.

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The National Council of Architectural Registration Boards (NCARB), a nonprofit organization composed of 54 government architectural registration boards, believes it is desirable to set forth its position on the relationship between itself and the architectural professional associations. The professional associations, representing the interests of architects, are concerned with a broad range of issues affecting practice in the architectural profession. NCARB, as an organization of member state agencies, has the more limited mission of assisting its Member Boards in discharging their legislative mandates to protect the public interest. NCARB's interests are limited to those regulatory matters of education, experience, and examination, as requisites for registration, professional conduct, and other matters that its Member Boards are charged by state law with enforcing.

Public concern requires that all levels of government be more accountable for the performance of their duties. NCARB welcomes this concern and believes that part of its obligation in this regard is to explain the nature of its relationship with the architectural associations.

Two principal considerations, federal antitrust law and public credibility, bear on this relationship. Each has as a common foundation: the difference between the functions assigned to the regulatory agencies by the respective laws of the several states and the roles chosen for the professional associations by members of the regulated profession. NCARB member boards are responsible for protecting the public from incompetent or unscrupulous practitioners. NCARB serves its member boards by developing national standards in education, experience, and examination for the qualification of candidates for registration; by developing standards of professional conduct for maintaining registration once granted; and by facilitating interstate practice in accordance with these standards. Professional associations, such as the American Institute of Architects (AIA), strive to represent the interests of their membership.

This difference of essential purpose between these two organizations—that of regulating in accordance with legislatively mandated objectives on the one hand, and of serving members' professional goals on the other—suggests that the path of wisdom for each organization lies in maintaining its historic position of independence. Certainly those trade and professional organizations that have flourished most have done so where they were free from governmental domination and, thus, were in a position to speak without any trace of coercion to the issues affecting their members. Governmental regulators have most often attained the public's confidence when they have avoided any appearance of being beholden to the industries they regulate.

In the past, NCARB and the AIA have engaged in joint action or established joint committees in contemplation of some common action, when both organizations have recognized a shared problem. Typical joint ventures have included the establishment and maintenance of the National Architectural Accrediting Board (NAAB) and the development of the Intern Development Program (IDP). At the same time, however, NCARB has found it inappropriate for the two organizations to undertake jointly the revision of state registration laws or the establishment of rules of conduct or a license maintenance program for adoption by NCARB Member Boards. The distinctions between the joint undertakings that NCARB has accepted and those refused may prove instructive.

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Both NCARB and the AIA have legitimate and distinct concerns regarding the standards of architectural education—the business of NAAB. NCARB recognizes that without the solid financial support of the AIA, NAAB could hardly carry out its ambitious programs. On the other hand, if at any time NCARB perceives NAAB as conducting its affairs to enhance a parochial interest of the profession, thereby undermining the reliance NCARB places on "NAAB accreditation," NCARB would be compelled to find an alternative way of assuring its Member Boards that an architectural degree deserves credit. NCARB's support of NAAB does not, in any case, give the AIA a voice in the development of NCARB's standards of education for registration and certification.

The joint effort to develop the IDP was necessary if the program were to succeed because it required the cooperation of practicing architects around the country. The AIA could best mobilize that effort, but only NCARB sets the standards by which to evaluate and credit an intern's experience. This carefully structured, joint action has proven successful for both the profession and the public interest.

In contrast, NCARB considered that developing recommended rules of conduct for its Member Boards to discipline errant architects was its sole prerogative. Although the views of AIA, among others, were solicited in the formulation of those rules, giving the regulated profession the power to choose which rules were to be adopted or rejected would be self regulation, a notion the public rejected when state registration boards were established.

NCARB's insistence that it and its Member Boards alone set the standards for registration has been timely and wise. Increasingly, governors, state legislators, and antitrust enforcers are reviewing suspiciously close relationships between the regulated profession and its regulators.[1]

Federal antitrust law prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce,"[2] and it is well established that there is no exemption for "learned professions."[3] This general prohibition of concerted activity applies not only to explicit agreements, but also to implicit conspiracies that may be proved by "inferences that may be fairly drawn from the behavior of the alleged conspirators."[4] While courts will not infer a conspiracy to violate the antitrust laws based simply on a showing of regular contact between two independent organizations involved in the regulation or promotion of a profession on general matters

[1] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 793 (1975); *United States v. Texas State Bd. of Public Accountancy*, 464 F. Supp. 400, 403 (W.D. Tex. 1978), *aff'd as modified per curium*, 529 F.2d 919 (5th Cir.), cert. denied, 444 U.S. 925 (1979).

[2] 15 U.S.C. §1.

[3] *Goldfarb v. Virginia State Bar*, supra; *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695-96 (1978).

[4] *Michelman v. Clark-Schwebel Fiber Glass Corp*., 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976).

of mutual interest and concern, at the very least, such organizations run the risk of antitrust challenge when they consciously behave in a parallel manner.[5] Thus, the legal profession,[6] the dental profession,[7] the medical profession,[8] the optometry profession,[9] the engineering profession,[10] and the architectural profession[11] have all been subjects of antitrust litigation. This litigation ended practices by professional associations such as recommending minimum or maximum fees, prohibiting competitive bidding, prohibiting an architect from seeking a commission for which another architect has been selected, restricting the advertisement of fees or services, and discouraging nontraditional forms of providing professional services.

While these developments have been unsettling to many, even more upsetting has been the uncertainty in recent years as to whether NCARB's Member Boards were protected by the same traditional antitrust immunity that protects state action. While this issue has been largely resolved, a review of these challenges is instructive. The uncertainty began when an administrative agency of a state court system was told it had no right to discipline members who regularly charged less than recommended fees.[12] Long-standing restrictive practices of a regulated industry were found illegal notwithstanding the fact that the practice had been sanctioned and, in fact, compelled by the state utilities regulatory commissions.[13] Relying on these decisions, the Department of Justice successfully challenged a rule of the Texas State Board of Public Accountancy that restricted price competition among accountants by prohibiting competitive bids. In a decision affirmed *per curium* by the Court of Appeals for the Fifth Circuit, the United States District Court in Texas rejected the

[5] *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978); *Kreuzer v. American Academy of Periodontology,* 735 F.2d 1479, 1448 n.13 (D.C. Cir. 1984).

[6] *Goldfarb v. Virginia State Bar,* supra.

[7] *FTC v. Indiana Federation of Dentists*, 471 U.S. 447 (1985).

[8] *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982); *American Medical Assoc. v. United States,* 317 U.S. 519 (1943).

[9] Massachusetts Board of Optometry, FTC No. 9195, 5 Trade Reg. Rep. ¶22,555 (1988).

[10] *National Society of Professional Engineers v. United States,* supra.

[11] *United States v. American Institute of Architects,* D.D.C. No. 90-1567, July 7, 1990; *United States v. American Institute of Architects,* D.D.C. No. 992-72, May 17, 1972*; Mardirosian v. American Institute of Architects,* 474 F. Supp. 628 (D.D.C. 1979).

[12] *Goldfarb v. Virginia State Bar,* supra.

[13] *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

regulatory board's claim of immunity, holding that the state law creating the board did not mandate the anti-competitive practice in question.[14]

Following the lead of the Department of Justice, the Federal Trade Commission has, in the words of one Commission spokesman, "for some time . . . been focusing considerable attention on the adverse effects that state board regulations can have in those circumstances when they unduly restrict competition and consumer choice,"[15] and has filed complaints against state licensing boards.

Much of the uncertainty created by these events has been dispelled by the Supreme Court's decision in *Southern Motor Carriers Rate Conference v. United States*,[16] in which the Court rejected an antitrust challenge to the process by which rates were set governing motor common carriers in four southeastern states. The Court held that although the rate-making was not compelled by the state legislatures, the process was adequately supervised by the state Public Service Commissions, pursuant to a clearly articulated legislative policy, and so enjoyed state action immunity. The Court reaffirmed without hesitation the state agency's capacity to immunize anticompetitive activities and the breadth of the agency's legislative mandate. This laid to rest many of the doubts raised by earlier decisions about the status of state instrumentalities. This principle has been followed in subsequent cases.[17]

But the logic of *Southern Motor Carriers* and its progeny also suggests something else. State agencies are entitled to state action immunity by the nature and scope of their authority, but they must remain independent of private interests to perform the active supervision that is the source of both their immunity and immunizing authority. In *Southern Motor Carriers*, the Court stated that it would not give immunity to private anti-competitive arrangements when the involvement of state regulators approving the arrangements was superficial.[18] The purpose of this inquiry is to "simply require that decisions to displace the free market be made overtly by public officials subject to public accountability, rather than secretly in the course of a conspiracy involving representatives of a private guild accountable to the public indirectly if at all."[19] These considerations suggest that concerted action between NCARB Member Boards and AIA chapters might well invite antitrust litigation against one or both organizations or their members.

[14] *United States v. Texas State Board of Public Accountancy,* supra; see also, *Massachusetts Board of Optometry,* supra.

[15] Winslow, W. T. "Professional Regulation in the 1980s: Preserving Competition and Consumer Choice," Speech at Fourth Annual Conference of the National Clearinghouse on Licensure, Enforcement, and Regulation, September 5, 1984.

[16] *Southern Motor Carriers Rate Conference v. United States* 471 U.S. 48 (1985).

[17] *Haas v. Oregon State Bar,* 883 F. 2d 1453 (9th Cir. 1989); *Zapata Gulf Marine v. P.R. Maritime Shipping,* 682 F. Supp. 1345 (E.D. La. 1988). *See also Charley's Taxi Radio Dispatch v. SIDA of Hawaii,* 810 F. 2d 889, 875 (9th Cir. 1987).

[18] *See also, Federal Trade Commission v. Ticor Title Ins. Co.,* 112 S.Ct. 2169, 2176-78 (1992).

[19] *Hoover v. Ronwin,* 466 U.S. 558, 599 (1984) (Stevens, J., dissenting).

While the immunity of NCARB's individual Member Boards depends on the independent existence of such boards as regulatory agencies, preserving the national organization's protection against antitrust challenge raises even more complex and rarely addressed issues. One source of NCARB's protection is the state action immunity of its Member Boards: to the extent that the policy of the organization is set solely by entities in themselves immune from antitrust liability,[20] the organization's activities should partake of this immunity. Alternatively, to the extent that NCARB is an entity that merely advises state sovereigns that have ultimate authority on all regulation of the profession, NCARB must enjoy the same immunity from federal antitrust law that sovereigns enjoy.[21] But this rationale would be weakened if NCARB policy were to be set in part by professional associations lacking the immunity of state boards.

Furthermore, NCARB involvement with the AIA would weaken a second line of defense against antitrust challenge. As noted above, the key statutory element of an antitrust claim is a showing of "concerted action": contract, combination, or conspiracy.[22] In the past, NCARB has been able to demonstrate that, apart from the question of immunity, its organizational contacts with the AIA or other professional organizations have not risen to the level of "concerted action,"[23] or, if consciously parallel behavior was pursued, that no anticompetitive purpose was either intentionally or coincidentally advanced. Cases involving professional associations, however, have inquired closely into the nature of contacts between such associations,[24]

[20] *Cf. City of Columbia v. Omni Outdoor Advertising, Inc.,* 111 S. Ct. 1344, 1350-51 (1991).

[21] *See Hoover v. Ronwin,* 466 U.S. 558, 580 (1984).

[22] *See, e.g., FTC v. Superior Court Trial Lawyers,* supra; *United States v. Texas State Board of Public Accountancy,* supra; *Goldfarb v. Virginia State Bar,* supra; *Cantor v. Detroit Edison Co.,* supra; *see also, City of Lafayette Louisiana v. Louisiana Power & Light Co.,* 435 v.s. 389 (1978); *Asheville Tobacco Board of Trade v. FTC,* 263 F. 2d 502 (4th Cir. 1959); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962).

[23] *Bank Building & Equipment Corp. of America v. National Council of Architectural Registration Boards,* D.D.C. No. 74-896, January 13, 1975; *Salvo v. American Institute of Architects and National Council of Architectural Registration Boards,* D.D.C. No. 567-73, June 28, 1973.

[24] *Kreuzer v. American Academy of Periodontology, 7*35 F. 2d 1479 (D.C. Cir. 1984); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia,* 624 F. 2d 476 (4th Cir. 1980); *United States Dental Institute v. American Association of Orthodontists,* 396 F. Supp. 565 (N.D. Ill. 1975). See *United States v. American Bar Association,* 934 F. Supp. 435 (D.D.C. 1996). In its Competitive Impact Statement for the consent decree, the Justice Department alleged that the ABA had allowed its accreditation process "to be captured by those with a direct interest in its outcome." 60 Federal Register 39421 (August 2, 1995).

suggesting that NCARB might be found to have "agreed" with professional associations if responsibility for its policy formation becomes blurred in joint undertakings with such associations.[25]

Apart from the antitrust implications of joint action by the regulators and the regulated, joining even in the most worthy common endeavors only can call into question the credibility of NCARB and thus damage its success in establishing uniform procedures and standards among its Member Boards. As a result of its efforts, many state registration statutes now expressly recognize the NCARB Certificate and authorize adoption of NCARB's standards. Most state boards have, by regulation, adopted as their own rules the NCARB standards for education, experience, and examination. Such widespread acceptance of NCARB standards has occurred because there is a well-founded belief that these standards represent the best judgment of an informed consensus of state regulatory agencies concerning the appropriate standards for registration. This acceptance may be jeopardized if state agencies, overseeing the performance of state boards, come to believe that such standards are a product of a joint effort of NCARB and the regulated profession.

This concern over the credibility of NCARB policy-making processes is by no means idle; it recognizes the close scrutiny now being directed by governors, legislators, and consumer advocates at all regulation and licensing activities. Many states have enacted so-called "sunset laws." While these take many different forms, each mandates a periodic review of the performance of various regulatory agencies, typically including state architectural registration boards. The "sunset" provision strengthens the performance review since agencies are automatically terminated at fixed times unless the state legislature chooses to renew their lives. The language of the statutes, together with the reviews now complete, suggest that demonstrated protection of the public interest rather than championing the economic interests of the regulated profession will be counted heavily in an agency's favor.

Joint endeavors between the regulator and the regulated threaten the credibility of NCARB and its Member Boards in still another way. In recent years, the public has grown increasingly sensitive to conflicts of interest. Part of this concern is directed to apparent conflicts of interest in professional regulation. Adding public or consumer members to regulatory boards has been one measure often adopted to address this concern, and NCARB supports this approach. At the same time, it believes that the public interest can only be met through the continued service on boards of dedicated, capable professional practitioners. The best assurance that this will continue to be the case is for NCARB, in formulating its organizational policy, to avoid both the appearance and the reality of serving interests other than those of the public. Here, too, the path of wisdom is curbed by considerations of law, for the United States Supreme Court has explicitly warned against the dangers that arise when public agencies seek to advance private interests.[26]

[25] *See, Machovek v. Council for the National Register of the Health Service Providers in Psychology, Inc.,* 616 F. Supp. 258 (E.D. Va. 1985).

[26] *Goldfarb v. Virginia State Bar,* 421 U.S. at 791, citing *Gibson v. Berryhill*, 411 U.S. 564, 578-179 (1973).

To summarize, NCARB reiterates its commitment to the following principles, which shall govern its policy-making:

1. NCARB may solicit and consider the views of all interested organizations and groups in the formulation of NCARB policy.
2. NCARB policies, including recommended guidelines and standards, shall be formulated exclusively by NCARB committees and personnel solely responsible in such capacities to the governance structure established for NCARB by its Member Boards.