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Opinions of the Institute's Counsel and Special Counsel on Repeal of Rule 3.03: Competitive Bidding

American Institute of Certified Public Accountants. Counsel

American Institute of Certified Public Accountants. Special Counsel

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COMPETITIVE BIDDING

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Summary by Covington & Burling Of the Major Points of Their Opinion

The following is a summary prepared by Covington & Burling, the Institute's legal counsel, of its opinion of September 28, 1966, concerning the legality under the United States antitrust laws of Rule 3.03 of the Institute's Code of Professional Ethics. The full opinion appears on pages 12-25.

I.

1. Rule 3.03 is, in effect, an agreement among the members of the Institute that they will not engage in price competition.

2. Sections 1 and 3 of the Sherman Act prohibit all agreements among competitors restraining price competition.

3. Such agreements are illegal *per se,* that is to say, they cannot be justified on the ground that they are socially or economically desirable as, for example, by showing that price competition has undesirable consequences or leads to unethical practices.

4. Rule 3.03 constitutes a restraint on price competition that is illegal *per se* under the Sherman Act, unless for some reason the Sherman Act does not apply to agreements among accountants in the same way that it applies to agreements among those engaged in ordinary

commercial activities. This raises two questions: (1) does Rule 3.03 affect interstate trade or commerce, and (2) to what extent does the Sherman Act apply to a profession such as accounting?

II.

1. The Sherman Act applies only to agreements and combinations in restraint of "trade or commerce" among the states or with foreign nations (Sec. 1) or in the District of Columbia or the territories or between such jurisdictions and elsewhere (Sec. 3).

2. There is no reason to believe that the courts would hold that the accounting profession is generally local or intrastate in character or that Rule 3.03 would be without impact on interstate commerce.

3. We conclude that the Supreme Court is likely to hold that members of the professions are engaged in "trade," within the meaning of the Act, and therefore do not enjoy any general immunity from the application of the Act.

4. We also conclude that, although the Supreme Court might apply more lenient standards to the regulations of professional societies than it applies to ordinary commercial transactions and hold that some kinds of regulations of such societies designed to preserve professional ethical standards are permissible, the Court is unlikely to allow the members of professional societies to engage in price-fixing or to adopt rules of conduct that restrain price competition.

5. We therefore conclude it is highly probable that the courts would hold Rule 3.03 to be illegal.

III.

1. The possible legal consequences, if Rule 3.03 should be held to violate the Sherman Act, depend on the nature of the legal proceeding in which the violation is adjudicated.

(a) The Department of Justice could bring criminal proceedings, in which the penalties against each defendant could be a fine of up to $50,000, or imprisonment up to one year, or both, for each offense under each section of the Act.

(b) The Department could also bring a civil suit to enjoin the enforcement of Rule 3.03.

(c) The Department could also, in a civil suit, recover simple damages for any money damage suffered by the United States or one of its agencies that was caused by Rule 3.03.

(d) Private persons, and states, municipalities and agencies thereof, could also recover treble the damages suffered by them that were caused by Rule 3.03, and could also obtain injunctive relief against the enforcement of the Rule.

2. Among the situations which might cause the legality of Rule 3.03 to be raised in one or more of the above-described legal proceedings are attempted enforcement of the Rule against a member of the Institute and the inability of a governmental agency or public or private corporation to obtain competitive bids.

3. It is not possible to estimate the degree of risk that any such proceeding will be brought. Reliance may not safely be placed, however, on the fact that the Rule is of long standing and has yet to be challenged in such a proceeding.

IV.

1. What has been said above applies equally to similar rules that may be contained in the codes of ethics of state societies, to the extent that such rules affect the conduct of members who are engaged in interstate commerce.

2. The Institute's members will not, however, violate the Federal antitrust laws by obeying rules prohibiting competitive bidding promulgated by state boards of accountancy or similar official agencies, provided, first, that such rules are authorized by state law and issued in conformity with the legally prescribed procedures, and, second, that such rules are issued and enforced by an official agency that is established and controlled by the state.

November 19, 1966

Text of the Opinion of Cahill, Gordon, Reindel & Ohl

We are informed that competitive bidding by accountants is not in the public interest. It is persuasively argued that any such form of solicitation on the basis of price would shortly erode and eventually undermine the high standards of professional service which must be maintained by the members of this profession if they are effectively to discharge their obligations to clients, to creditors and to the general public. Rule 3.03 of the Code of Ethics of the Institute, accordingly, states that:

> A member or associate shall not make a competitive bid for a professional engagement. Competitive bidding for public accounting services is not in the public interest, is a form of solicitation, and is unprofessional.

We have been furnished with certain written opinions analyzing the legality of this Rule under the Federal antitrust laws, and have been requested to set forth our conclusions with respect thereto. Without repeating at length the authorities there cited, accordingly, we will herein ask and answer three questions which we believed to be basic in our consideration of this Rule.

These three questions are:

(1) Is Rule 3.03 subject to the Federal antitrust laws?

(2) Does Rule 3.03 violate these laws?

(3) What, if anything, should be done about it?

QUESTION ONE

Question: Is Rule 3.03 subject to the Federal antitrust laws?

Answer: The basic statute in the field of antitrust law, namely the Sherman Act, applies to every agreement in restraint of interstate trade in this country. Rule 3.03 is obviously "interstate" in its application, because it is a regulation of an interstate association, it controls the operations of interstate as well as intrastate firms, and it affects the offer of services to interstate business corporations. The Rule also restrains "trade," in view of the fact that it prohibits a form of competition by self employed individuals and firms in the furnishing for profit of their services. In our opinion, accordingly, the Rule is subject to this antitrust legislation.

> The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade." (*United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950) at p. 490.)

Admittedly, no court has directly ruled that agreements between accountants—and thus Rule 3.03—are subject to the antitrust laws. These statutes, however, have in the past been applied generally to a wide variety of persons engaged in furnishing services, e.g., advertising, brokerage, cleaning, insurance, investment banking, licensing, and various forms of selling; they have been directed specifically to druggists and doctors; and they are being invoked currently in a new investigation involving orthodontists and in a pending proceeding against pathologists. Any assumption that accountants and Rule 3.03 are exempt from the antitrust laws would under these circumstances suggest the triumph of hope over experience.

QUESTION TWO

Question: Does Rule 3.03 violate these laws?

Answer: The courts have interpreted the antitrust laws, in proceedings brought under the Sherman Act, to prohibit those engaged in an interstate trade from entering into agreements to refrain from competitive bidding. Executives, small businessmen and even local plumbers have been individually fined and sentenced to jail for engaging in this form of competitive restraint. Rule 3.03, nevertheless, in express terms proscribes competitive bidding. In our opinion, therefore, the Rule is in violation of this antitrust legislation unless the

courts exonerate a practice by accountants for which they incarcerate and fine other defendants. This, we believe, is unlikely to occur.

> Any combination which tampers with price structures is engaged in an unlawful activity. (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) at p. 221.)

The courts have, of course, acknowledged that competition in price under certain circumstances may be against the public interest. But they have heretofore stressed that only a duly authorized regulatory body of a state or Federal government may safely be entrusted with the power to make this finding, and in the exercise thereof, to restrict such price competition. The chances are slim that our courts will permit any self-appointed organization of private persons, such as the Institute—however well intentioned—to assert the governmental prerogative of banning a form of competition in price. Indeed, the odds against the Institute's obtaining ultimate Supreme Court approval for any such assumption of governmental authority are so overwhelming that—while they might possibly appeal to the wagering—they should scarcely interest the accounting profession.

QUESTION THREE

Question: What, if anything, should be done about it?

Answer: Three courses of action with respect to Rule 3.03 would appear to be open to the Institute, in view of the answers herein given to the preceding questions. These alternatives may be roughly described as "retention," "repeal" and/or "replacement."

(1) *Retention:* The members of the Institute may elect to reaffirm their claim to some unique antitrust immunity for Rule 3.03 and may therefore vote to retain it. If this Rule is thereafter invoked by the Institute or by any of its members to justify a refusal to submit a competitive bid or to discipline a dissenting member who submits such a bid, however, such action will invite a petition by the enforcement agencies, by the adversely affected private persons, or by both, in which the courts will be requested to cut the tenuous thread currently holding the antitrust laws suspended over the Rule, and so to determine with finality whether or not they will sever that Rule. In falling, unfortunately, the antitrust sword may simultaneously impale the Institute and its members with injunctions, with treble damages and even with criminal penalties.

(2) *Repeal:* The members of the Institute may instead elect to repeal Rule 3.03 and thereafter may rely upon other rules of the Institute to insure the maintenance of the high standards of the profession. The American Bar Association has of course preferred to take this route and thereby avoid any direct confrontation with the antitrust laws. While a committee of the Bar Association in 1957 ventured an "opinion" adverse to competitive bidding by lawyers, it may be authoritatively asserted that any proposal to the Association suggesting the adoption of a legal Canon of Ethics comparable to Rule 3.03 would find little favor with the Section of Antitrust Law of that Association.

(3) *Replacement:* The members of the Institute, finally, may decide both to repeal Rule 3.03 and to petition the appropriate regulatory agencies of the several states to adopt comparable rulings incorporating the substance of this Rule. Fortunately, more than a majority of the states are reported to have regulations which presently ban competitive bidding by accountants, and the reasons which have induced the promulgation of these rulings should be equally appealing to the regulatory agencies of the remaining states. Certainly officials responsible for the maintenance of accounting standards should be more receptive to public policing of competitive bidding than judges—who are directed to insure price competition—would be to any private prohibition thereof. In short, it would seem to be preferable to ask state agencies to condone a restraint of price competition than to invite Federal courts to condemn it.

It is respectfully recommended, therefore, that the members of the Institute elect to repeal Rule 3.03 and to seek its replacement with comparable state regulations.

October 20, 1966

Text of the Covington & Burling Opinion

This letter is written to confirm our oral opinions heretofore given you concerning the legality under the United States antitrust laws of Rule 3.03 of the Code of Ethics of the Institute, which prohibits competitive bidding; the possible legal consequences if the rule is unlawful; whether our opinion as to the legality of Rule 3.03 would apply to similar rules that may be contained in codes of ethics adopted by state societies; and whether your members will necessarily violate the antitrust laws if they obey rules prohibiting competitive bidding promulgated by state boards of accountancy or similar official agencies.

The relevant statute is the Sherman Act, which, in Section 1, declares to be illegal "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," and, in Section 3, declares to be illegal similar contracts, combinations or conspiracies in restraint of trade or commerce "in any Territory of the United States or of the District of Columbia," or "between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations."*

I.

Rule 3.03 reads as follows:

> A member or associate shall not make a competitive bid for a professional engagement. Competitive bidding for public ac-

* The conduct prohibited by these Sections may also offend Section 2 of the Act, as an attempt to monopolize or a combination or conspiracy to monopolize.

counting services is not in the public interest, is a form of solicitation, and is unprofessional.

Whatever difficulties there may be in determining whether Rule 3.03 applies in particular situations, its general meaning is clear. It means that the members of the Institute are not to attempt to obtain clients by engaging in price competition. It is, in effect, an agreement among the members that they will not engage in price competition.

Among the restraints of trade covered by Sections 1 and 3 of the Sherman Act are all agreements among competitors relating to prices. With respect to this aspect of those Sections this prohibition is often described as directed against price-fixing, but it is not confined to agreements to fix particular prices or to fix a particular price level or to agreements on uniform prices. It applies broadly to all agreements among competitors that suppress or restrain price competition in any way. As exemplary of the broad scope of the prohibition, we refer to *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U.S. 150 (1940), *rehearing denied*, 310 U.S. 658 (1940), one of the leading cases holding that price-fixing agreements are unlawful and defining what is meant by price-fixing agreements. The Court in that case stated,

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. (310 U.S. at 221.)

In further elucidation the Court said:

> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. That price-fixing includes more than the mere establishment of uniform prices is clearly evident from the *Trenton Potteries* case itself, where this Court noted with approval *Swift & Co.* v. *United States*, 196 U.S. 375,

in which a decree was affirmed which restrained a combination from "raising or lowering prices or fixing uniform prices" at which meats will be sold. Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial. (310 U.S. at 222-3.)

Even the foregoing specific catalog of unlawful price-fixing arrangements is not, and was not meant to be, all-inclusive. Thus in *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553 (1936), for example, the Supreme Court held an arrangement unlawful even though it did not involve an agreement to charge a fixed price, or an agreement to raise or lower prices, or any formula related to market prices, or the like, but merely an agreement to adhere to publicly announced prices that the parties independently set themselves and were free to change at any time.

There seems no room for doubt that an arrangement under which the parties refuse to engage in competitive bidding is a price-fixing arrangement under the Act. See *Swift and Company* v. *United States,* 196 U.S. 375 (1905).

The courts have held not only that price agreements among competitors are illegal but that they are illegal *per se.* This means, among other things, that such an agreement cannot be legally justified on any ground. It cannot be justified, for example, on the ground that the prices charged are not unreasonable. It cannot be justified on the ground that in the absence of the agreement prices would be higher; even an agreement to maintain a maximum price is unlawful *per se. Kiefert-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951). It cannot be justified on the ground that it is designed to prevent price competition that would lead to undesirable social or economic consequences. As the Supreme Court has said,

Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy

would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended. (*E.g., United States* v. *Socony-Vacuum Oil Company, Inc.*, 310 U.S. 150, 221.)

In the same opinion, the Court said:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. (310 U.S. at 221-2.)

Perhaps as striking an example as any, of the fact that there can be no legal justification for any of the agreements or combinations that the Court has defined as illegal *per se*, is provided by *Fashion Originators' Guild of America, Inc., et al.* v. *Federal Trade Commission*, 312 U.S. 457 (1941), in which the Court held unlawful *per se* a commercial boycott, even though the boycott was initiated to prevent style piracy and the Court assumed that such piracy constituted a legal wrong against the parties to the boycott.

In summary, an agreement like the one in Rule 3.03, if made by persons engaged in any ordinary interstate commercial activity would be plainly unlawful *per se* under Section 1 of the Sherman Act, and would also be unlawful under Section 3 of the Sherman Act if carried on in the District of Columbia or any Territory of the United States or in commerce between the District of Columbia or any Territory or any other place. This would be equally true if the persons involved were engaged in supplying commercial services instead of a product. *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950).

II.

The preceding discussion leads us to the conclusion that the prohibition against price-fixing applies to Rule 3.03, unless for some reason the Sherman Act does not apply to agreements among accountants in

the same way that it applies to agreements among those engaged in ordinary commercial activities. This raises three questions that deserve discussion:

(a) The first is whether accounting services can ever be sufficiently interstate in character to be subject to the provisions of the Sherman Act. The application of Section 1 of the Act is limited to activities that restrain interstate commerce. It might be suggested that accounting is essentially a local activity, that accountants are not engaged in interstate commerce, and that, accordingly, the provisions of Section 1 of the Act do not apply to their activities.

In the past twenty years the courts have greatly expanded the concept of interstate commerce. Activities that historically were regarded as local or intrastate have been held to be interstate in character. For example, the Supreme Court has held that insurance, which for decades was held to be entirely local in character, is interstate commerce within the meaning of the Act. *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944). The scope of the operations of modern accounting firms and the nature of the practice in which many accountants are engaged, are such that there is no reason to believe that the courts would hold that the profession is generally and essentially local or intrastate in character. There are undoubtedly a substantial number of accountants whose practice is largely local and who do not use extensively the channels and instrumentalities of interstate commerce. But Rule 3.03 is not confined to accountants in that position; it applies generally to all accountants including those whose activities are undoubtedly interstate in character.

Moreover, the courts have held that the prohibitions of the Sherman Act apply to activities that occur entirely within a single state, if the effect of those activities is to restrain competition in interstate commerce.

Taking into account all of these circumstances, it is our view that the application of Section 1 of the Act to Rule 3.03 could not be defeated on the ground that the Rule does not operate on or affect interstate commerce within the meaning of the statute.

There is one additional comment that is relevant here. Section 3 of the Sherman Act may be violated by activities that are conducted entirely within the District of Columbia or one of the Territories of the United States and that have no impact on interstate commerce or commerce between the District of Columbia and a Territory and elsewhere. By its terms Rule 3.03 is applicable to accounting services performed in the District of Columbia or in the Territories. Any

attempt to apply the rule to such activities in accordance with its terms would be subject to Section 3 even though no interstate commerce was involved.

(b) The second question is whether the Sherman Act applies to the professions. By its terms the statute applies to activities that restrain "trade or commerce." It has sometimes been suggested that the practice of a profession, such as law, medicine or accounting, is not "trade or commerce" and that, accordingly, the Act does not apply to those engaged in a profession.

This suggestion was made, for example, by way of dictum in 1922 in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200. That case involved the question whether the Sherman Act was applicable to professional athletic performances. The Court, in holding that baseball exhibitions were not commerce and that the Act was therefore not applicable, used language that can be read as indicating that at that time the Court believed that the practice of law was not "trade or commerce" in the statutory sense. 259 U.S. at 209.

Subsequently, the Court in another baseball case followed the opinion in *Federal Baseball*, but only "so far as it 'determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.'" *Toolson* v. *New York Yankees, Inc., et al.*, 346 U.S. 356, 357 (1953); *Radovich* v. *National Football League et al.*, 352 U.S. 445, 451 (1957). The Court did so, not because it believed *Federal Baseball* to have been correctly decided, but, as the Court explained, only because the baseball industry had made vast investments relying on the Court's earlier opinion, because Congress had seen fit to take no action in the premises, and because the Court believed that more harm than good would be done by overruling the earlier opinion. 352 U.S. at 450. Indeed, with respect to all other professional sports, the Court in a later opinion made clear that *Federal Baseball* is inapplicable to them and that they are subject to the antitrust laws. *E.g., Radovich* v. *National Football League et al., supra.*

Although the Supreme Court has held that the procurement of medical and hospital services is subject to the Sherman Act, *American Medical Association* v. *United States*, 317 U.S. 519 (1943), and although in that case and others the Court has had an opportunity to reaffirm its *Federal Baseball* dictum concerning the inapplicability of the Act to a learned profession, it has expressly avoided passing on the question of whether the practice of medicine, or similar professional activity, is trade or commerce within the meaning of the Act.

See, also, *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952); *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950).

Accordingly, it is correct to say that the Supreme Court has never passed on the question of whether the practice of law, medicine or accounting is "trade or commerce" within the meaning of the Sherman Act. That Court has applied the Sherman Act to a provision in a code of ethics adopted by an association of real estate brokers. *United States* v. *National Association of Real Estate Boards, supra.* The provision involved standard rates of commission and provided that no business should be solicited at lower rates. In its opinion in that case, the Supreme Court said that it was expressing no view on the question whether the Sherman Act applied to the professions. Accordingly, the decision can be regarded only as a holding by the Supreme Court that real estate brokers are not engaged in a profession.

However, twenty years ago the Court of Appeals for the District of Columbia, in a carefully written opinion, held that the practice of medicine is trade or commerce within the meaning of the Sherman Act. *United States* v. *American Medical Ass'n et al.,* 110 F.2d 703 (1940). The opinion elaborately documented the fact that both in the United States and in England the concept of "restraint of trade" was applied at common law to the professions, as well as to other callings and activities, and the opinion pointed out that the Supreme Court has on numerous occasions recognized the relevance of the common law to the construction of the Sherman Act. At a later stage of the proceedings in the *American Medical* case, in another carefully considered opinion written on behalf of a substantially different panel of judges, the Court of Appeals for the District of Columbia reaffirmed its previous opinion. *American Medical Ass'n* v. *United States,* 130 F.2d 233 (1942). And very recently the same Court, but with an entirely different panel of judges, tersely reaffirmed its *AMA* opinions. *Levin* v. *Joint Commission on Accreditation of Hospitals,* 354 F.2d 515 (1965).

There is one holding by a single district judge that is contrary to the decisions of the Court of Appeals for the District of Columbia that have been cited above. See *United States* v. *Oregon State Medical Society,* 95 F. Supp. 103 (1950). The opinion in that case did not discuss or analyze the decisions of the Court of Appeals for the District of Columbia or the authorities on which those decisions relied, and it is to be noted that the Supreme Court affirmed the decision of the District Court on other grounds without approving or adopting the holding that the practice of medicine is not trade or commerce within the meaning of the Sherman Act. See *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952).

Although state cases construing state antitrust laws are not controlling on the question with which we are here concerned, they are not entirely without relevance.

In *Group Health Cooperative* v. *King County Medical Soc., et al.*, 237 P.2d 737 (Wash. 1951), the Washington Supreme Court was concerned with the application of an antitrust provision of Washington's Constitution to the professions. The particular provision prohibits any person from combining or contracting with any other person "for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity." The Court held that the word "product" should be construed to include professional services. Its reason was stated as follows:

> As our constitutional provision bespeaks the common law, so it should be permitted to afford the same protection and serve the same broad public interest which is available at common law. Monopolies affecting price or production in essential service trades and professions can be as harmful to the public interest as monopolies in the sale or production of tangible goods. The constitutional provision was designed to safeguard this public interest from whatever direction it may be assailed. The language used must therefore be liberally construed with that end in view. (237 P.2d at 765.)

In *Willis* v. *Santa Ana Community Hospital Association et al.*, 376 P.2d 568 (Cal. 1962), the California Supreme Court was concerned with whether a California antitrust statute, known as "the Cartwright Act," applies to the professions. The Cartwright Act makes unlawful any "trust," which is defined as "a combination of capital, skill or acts by two or more persons" for a number of purposes including the following: "(a) To create or carry out restrictions in trade or commerce. (b) To limit or reduce the production, or increase the price of merchandise or of any commodity. (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." The Court held that inasmuch as the language of the Act did not include the term "profession," the professions were not intended to be subject to it. The Court's reason for so holding was that in other contemporaneous antitrust legislation passed at the same time as the Cartwright Act,

> . . . the word "profession" was included among the terms describing the scope of the legislation, notwithstanding the fact that the words "trade" and "business" were also used. . . . The difference in terminology between this section and the Cartwright Act may

be viewed as indicating the act was not intended to apply to the professions. (376 P.2d at 570.)

The Court went on, however, to hold that as to matters not covered by the Cartwright Act the common law on restraints on trade applied, that at common law restraints on the practice of medicine were unlawful, and that, therefore, plaintiff had a common law action for being excluded from hospital privileges by the defendant hospital. The decision can, therefore, be regarded as holding that the practice of medicine is a trade within the meaning of the common law rules.

Our review of the decisions in the Federal courts discussed above, and of a number of other cases in which the Supreme Court has shown a disposition to give the Sherman Act broad application, leads us to conclude that it is likely that the Supreme Court would hold that the professions do not enjoy any general immunity from the application of the Sherman Act.

We see nothing in the two Texas cases to which our attention has been called that reflects adversely on the foregoing conclusion. The cases are *Cochran County* v. *West Audit Co. et al.*, 10 S.W.2d 229 (Tex. Civ. App., 1928), and *Stephens County* v. *J. N. McCannon, Inc.*, 52 S.W.2d 53 (Tex. Sup. Ct., 1932). These cases hold, respectively, that a Texas statute requiring the letting of certain contracts on competitive bids does not apply to a contract for accounting services or to a contract for architectural services. Neither case has any bearing whatever on the question of whether the Sherman Act is applicable to an agreement between professional persons not to engage in competitive bidding.

(c) The third question is whether the courts, without giving the professions any general immunity from the Sherman Act, might apply more lenient standards to the rules and regulations of professional societies than they apply to ordinary commercial activities and hold that rules designed to preserve professional ethical standards are permissible even though analogous rules might be unlawful in an ordinary commercial context. There is one passage that suggests this possibility in the opinion of the Supreme Court in the *Oregon State Medical* case, 343 U.S. at 336. It is our opinion, however, that the Supreme Court is not likely to adopt any rule of law that would permit the members of a professional association to engage in price-fixing agreements or combinations. The Supreme Court does not look with favor upon broad exemptions from the Sherman Act and certainly it does not look with favor on any relaxations of the prohibition against arrangements that restrict price competition. The Court might permit the members of a professional association to adopt certain kinds of

regulations designed to prevent unethical conduct, as, for example, a rule against advertising or actual solicitation. But any indulgence that the Court might show the professions in this respect would, we believe, be limited and would not be likely to extend so far as to allow the members of the associations to engage in price-fixing or to adopt rules of conduct that restrict price competition.

On the basis of this analysis we believe it necessary to conclude that, if the legality of Rule 3.03 should ever be challenged in a proceeding brought under the Sherman Act, it is highly probable that the Rule would be held to be unlawful.

In arriving at the opinion expressed above on the legality of Rule 3.03 we considered the fact that in 1957 the Ethics Committee of the American Bar Association issued an opinion that competitive bidding was unethical under the Canons of Ethics of the Association forbidding solicitation or advertising (Opinion 292). We do not regard this opinion as authoritative on the legal question now under consideration. The American Bar Association has no canon of ethics directed against competitive bidding, and the opinion represents simply the opinion of those persons who happened to be members of the Ethics Committee at that time on the interpretation and application of the Canons that forbid solicitation or advertising. There is no indication in the opinion that the members of the Committee considered the possible application of the Sherman Act to the particular interpretation of the Canons that they were adopting. In this connection it should be observed that the Ethics Committee of the American Bar Association has said in a number of its opinions that it does not pass on questions of law. We seriously doubt whether the Ethics Committee of the American Bar Association today would issue a similar opinion, particularly if the members were required to consider the significance of the opinion in relation to the possible application of the Sherman Act. Our doubt is supported by the present position of the American Bar Association on the question of minimum fee schedules. The June 1966 issue of *Legal Economic News,* which is published by the Standing Committee on Economics of Law Practice of the American Bar Association, discusses the policy of the Association on minimum fee schedules. The policy is not to endorse *mandatory* minimum fee schedules but to regard all fee schedules as *advisory* only. The matter of minimum fee schedules, relating as it does to charges for professional services, is so closely akin to competitive bidding that it is reasonable to regard the Bar Association's policy on the question of minimum fee schedules as throwing light upon the attitude of the Bar Association toward any absolute and unqualified rule with respect to the practices of its members concerning pricing for services.

In any case we should like to emphasize that the opinion that we

have expressed on the legality of Rule 3.03 does not rest on any assumption that the status of the legal profession under the Sherman Act differs in any significant respect from the status of the accounting profession.

III.

The possible legal consequences, should the question of the legality of Rule 3.03 be raised and adversely decided in a legal proceeding, would depend upon the kind of legal proceeding in which the decision was made.

The Antitrust Division of the Department of Justice can bring criminal proceedings to punish violations of the Act. These proceedings are usually initiated by an indictment returned by a grand jury. The Institute itself could be the defendant in such a proceeding. A member of its Council or any of its officers or agents, who had authorized, ordered or done anything to enforce, to apply or to interpret Rule 3.03 might also be a defendant. Any defendant found guilty in a criminal proceeding may be fined not more than $50,000 or imprisoned for not more than one year, or both. These penalties may be imposed for each offense under each section of the statute. Thus, in a case that involved violation of both Section 1 and Section 3 a fine in excess of $50,000 could be imposed.

The Antitrust Division could, in addition to a criminal suit, also bring a civil suit to enjoin the enforcement of Rule 3.03. To win a suit of that kind the Antitrust Division would merely have to convince the court that Rule 3.03 was unlawful. It would not have to prove any injury or money damage to anyone. If the Antitrust Division should win that suit, the court not only could enjoin the Institute and its members from enforcing the Rule but could also affirmatively require the Institute to abolish the Rule.

The Antitrust Division can also sue to recover simple damages in any case in which the enforcing of the Rule has inflicted money damage upon the United States or any of its agencies. In a case of that kind the Antitrust Division would have to prove the United States or one of its agencies had actually suffered money damage that was caused by Rule 3.03.

Private persons are also entitled to sue under the antitrust laws. A private person is entitled to sue and recover treble damages, plus a reasonable attorney's fee, for any injury inflicted upon it by a violation of the antitrust laws. To succeed in a suit of this kind a private person would have to prove that in fact he had suffered money dam-

age because of the effects of enforcement of Rule 3.03. A private person can also sue for injunctive relief. This means that a private person could sue the Institute, the members of its Trial Board or others to prevent them from enforcing Rule 3.03 against him.

As long as Rule 3.03 remains in the Code of Ethics there is a risk that something may occur that would cause someone to challenge the legality of the Rule by one or more of the various forms of legal proceedings that have been described. This might happen, for example, if the Institute should enforce the Rule against some individual member, either by expelling him from the Institute or by suspending his membership. If that should happen, the individual might complain to the Department of Justice and be successful in instigating action by the Antitrust Division. The individual might also seek to avail himself of the private remedies described above.

The challenge to the legality of the Rule might be instituted by someone who is aggrieved because he could not obtain competitive bids for accounting services. This might happen, for example, in the case of a municipal agency or corporation which was unable to obtain competitive bids because members of the Institute were complying with the Rule. The agency or corporation might institute legal proceedings on its own as a private person or it might complain to the Department of Justice and thus instigate the Antitrust Division to start proceedings. The same thing could happen in the case of a Federal agency of some kind which had been thwarted in its attempt to get competitive bids. While the Federal agency probably could not sue independently, it could certainly complain to the Antitrust Division and it must be assumed that its complaint would get very serious attention.

It is not possible to predict with certainty that any of these things will happen or to estimate in precise terms the risk that they will occur. It should not be assumed, however, that they will not occur merely because Rule 3.03 has been in the Code of Ethics for many years and has never been attacked as a violation of the antitrust laws. There have been a number of instance in which practices of long standing whose legality has generally been assumed have been successfully attacked under the antitrust laws. One well-known example is the successful suit that the Antitrust Division brought against insurance companies even though the courts had held for many years that the business of insurance was not interstate commerce. *United States* v. *South-Eastern Underwriters Association, supra.*

In this connection it should be noted that the Antitrust Division has not hesitated to bring criminal or civil proceedings against professional organizations on the ground that their activities have violated

the antitrust laws. It brought the criminal proceeding against the American Medical Association and the Medical Association of the District of Columbia, and the civil proceeding against the Oregon State Medical Society which resulted in the decisions that have been discussed earlier in this opinion. In July of this year the Antitrust Division filed a civil complaint in the United States District Court for the Northern District of Illinois against The College of American Pathologists. The complaint charged the defendants with fixing prices for conducting and reporting bioanalytical tests made by medical laboratories. It also charged that the defendants had combined to restrict the performance of these services to medical laboratories owned or operated by pathologists. There is some reason to believe that this case may involve the legality of rules of professional conduct adopted by The College of American Pathologists.

IV.

What has been said so far about the legality of Rule 3.03 also applies to similar rules that may be contained in codes of ethics adopted by state societies. Insofar as the rules of state societies operate only on intrastate activities and have no effect on interstate commerce they are not subject to the Federal antitrust laws. But to the extent that those rules affect the conduct of members who are engaged in interstate commerce, as many members of state societies undoubtedly are, the rules of law that have been discussed above would apply.

In many states, boards of accountancy or other state agencies have adopted rules of professional conduct that prohibit competitive bidding. We understand that there are thirty-seven states in which a state agency has promulgated a rule of this kind.

In 1943 the Supreme Court held in a case arising in California that state action, or official action directed by a state, that results in restraint of trade is not prohibited by the Sherman Act. *Parker* v. *Brown*, 317 U.S. 341. Under the general principle announced by the Supreme Court in that case and cognate cases, a rule against competitive bidding issued by a state board should not be subject to attack as a violation of the Sherman Act. It follows that members of the Institute who comply with the state regulation prohibiting the making of competitive bids could not be successfully prosecuted by the Antitrust Division or sued by a private litigant under the antitrust laws.

For this principle to apply, two conditions must be satisfied. First, state regulation must be in conformity with state law. This means that the state agency that issues the rule must have authority under

state law to promulgate a rule prohibiting competitive bidding. It also means that a state agency must issue a rule against competitive bidding in conformity with any procedures the state law requires a state agency to follow. (For example, if state law requires that rules of professional conduct be issued only after notice and a public hearing, then the state agency must have complied with that requirement.)

Second, the state board or other agency that issues a rule must be an agency which is established and controlled by the state so that it is clear that the action of the agency is state action and not simply action taken by a private group. This point may be amplified in this way: A state law might authorize accountants or members of other professions to issue regulations covering their professional conduct. The decisions indicate, however, that this kind of permissive legislation does not authorize an association of private persons to issue rules of professional conduct that violate the antitrust laws. In addition to *Parker* v. *Brown, supra,* see also *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission,* 263 F.2d 502 (4th Cir. 1959); *Continental Ore Co.* v. *Union Carbide & Carbon Co.,* 370 U.S. 690 (1962) (discussion of action taken by defendant under permissive Canadian statute). Rules of professional conduct are not immune from application of the antitrust laws unless they are issued, commanded and enforced by an official agency that is established and controlled by the state. To reach a final opinion as to the situation in a particular state, it would be necessary to make a detailed and careful review of the statutes in that state to determine whether its statutes authorize the state board to issue the regulation in question. It would also be necessary to make a careful and detailed review of the state statutes that govern the procedures and practices of the state board to determine whether the board was a true agency of the state and whether its action was official state action. We have not attempted to make that kind of detailed review and the present discussion is designed merely to indicate the standards that should be applied in making such a review.

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