

Source: ABA/BNA Lawyers' Manual on Professional Conduct: All Issues > 2017 > 12/13/2017 > Leading the News > Unauthorized Practice: Florida Bar in Antitrust Showdown With Legaltech Startup

33 Law. Man. Prof. Conduct 697

Unauthorized Practice

Florida Bar in Antitrust Showdown With Legaltech Startup



By Joan C. Rogers

Pending litigation in Florida federal court involving a legaltech startup shows the legal profession is going through a "watershed time period," a lawyer who's watching the case told Bloomberg Law.

The litigation features cutting-edge antitrust and unauthorized practice of law issues, along with a unique conflict-of-interest dispute between the Florida bar and a former president of the bar.

Legaltech company TIKD Services LLC allows people to upload their traffic tickets, pay a fixed price, and get a lawyer to fight the ticket. The company lodged an antitrust action against the Florida bar and a Florida law firm called the Ticket Clinic—and both are fighting back.

TIKD's complaint says the Florida bar has been conspiring with the Ticket Clinic to drive it out of business, partly by issuing an informal advisory ethics opinion that frowned on TIKD's business model (*TIKD Services LLC v. The Florida Bar*, S.D. Fla., complaint filed 11/8/17).

But the Florida Bar's motion to dismiss says it's immune from the suit on several grounds, and its response to TIKD's motion for a preliminary injunction says the bar hasn't done anything wrong.

Unlicensed Law Practice?

In an email to Bloomberg Law, Ticket Clinic founder Mark S. Gold said TIKD's suit is a desperate play to avoid being shut down for unauthorized law practice. "We are confident that the lawsuit has absolutely no merit," he said.

TIKD may be embroiled in a UPL proceeding soon.

"The Florida Bar Board of Governors, on Dec. 8, 2017, approved the recommendation of the Unlicensed Practice of Law (UPL) Committee to file litigation with the Supreme Court of Florida to determine whether the conduct of TIKD, a nonlawyer company, constitutes the unlicensed practice of law," the bar said by email Dec. 12 in response to an inquiry from Bloomberg Law.

The UPL committee's website says, "When the Board of Governors approves, based on a recommendation from the Standing committee, the Bar may initiate litigation seeking a civil injunction."

Bar Wants Former President Off Case

Meanwhile, the bar has moved to disqualify Ramón A. Abadin of Sedgwick LLP, Miami, from representing TIKD in the antitrust suit, because Abadin was president of the bar and allegedly learned relevant secrets during the bar's internal discussions about the U.S. Supreme Court's decision in *N.C. State Bd. of Dental Exam'rs v. FTC*.

That decision held that a state dental board was not immune as a state actor from antitrust liability, because the board was controlled by active market participants (i.e., practicing dentists) and was not subject to active oversight by the state. The case has left bar regulators uncertain as to how they can police the unauthorized practice of law without incurring antitrust liability.

The disqualification motion says Abadin was provided with privileged communications and advice about the

Snapshot

- Legaltech startup TIKD is pressing antitrust suit against Florida bar and "Ticket Clinic" law firm, saying bar has been conspiring with Ticket Clinic lawyers to drive it out of business
- Florida Bar says TIKD's counsel should be disqualified because he was bar president when the bar confidentially discussed U.S. Supreme Court antitrust case

specific antitrust issues now at stake in this action, and he had a fiduciary duty to maintain the confidentiality of that information.

The use or disclosure of those secrets will severely disadvantage the bar defendants and the public's confidence in the legal profession, the motion contends.

TIKD hasn't yet filed a response. However, Peter D. Kennedy, one of TIKD's lawyers, denounced the bar's motion to disqualify in comments provided to Bloomberg Law. "As TIKD's response will explain, the motion is baseless," Kennedy said.

Kennedy is a shareholder in Graves, Dougherty, Hearon & Moddy P.C., Austin, Tex. He and his firm should also be disqualified as co-counsel in the case, the motion says.

"It's no 'secret' the Florida Bar supported the losing side in *Dental Examiners*; I wrote LegalZoom's amicus brief for the other side," Kennedy said. "It's no secret bar associations are liable for their unsupervised anticompetitive actions after *Dental Examiners*. And it's no secret the rules governing the Florida Bar haven't changed and the Bar's UPL activities remain unsupervised," he said.

'Extraordinary' First Move

Chris Riley, founder and CEO of TIKD, also slammed the bar's efforts to disqualify TIKD's counsel in an email to Bloomberg Law.

"This is an extraordinary and ironic first move for The Florida Bar to take. Think about it—the very institution charged with ensuring access to legal services is asking a federal judge to take away all of my legal representation," Riley said.

"They seem to be doing everything they can to draw attention away from their own anti-consumer behavior, but in doing so have demonstrated exactly how unreasonable they have become as an organization, even to the point they're willing to attack their own principles," Riley said.

'Not Rocket Science'

In an email to Bloomberg Law, Mark Gold said Riley and TIKD are violating Fla. Stat. §454.23, which makes it a third degree felony to practice law in Florida without being licensed or authorized to do so.

"This is not rocket science," Gold said. "You cannot collect a legal fee, unless you are a lawyer."

Gold said that in his opinion, lawyers who accept cases from TIKD are subject to discipline for violating bar rules, especially the prohibition against splitting legal fees with a nonlawyer.

"No matter how Riley (admittedly NOT a lawyer) spins this, he is collecting a fee for ticket representation, and splitting that fee with the lawyer," Gold said.

Gold said that lawyers have to submit ads to the Florida bar for approval, but TIKD and Riley don't. "Thus they can, and do, make outrageous and false statements, with impunity," he said.

Gold also said that the TIKD model violates the rule against paying a client's fine. He cited Florida Rule of Professional 4-1.8(e), which forbids a lawyer to provide financial assistance to a client in connection with pending or contemplated litigation.

"So TIKD's entire model is based on major violations of bar rules," Gold said.

'Watershed Time Period'

The legal wrangling in Florida highlights the need to level the playing field between old and new ways of accessing legal services, while still protecting consumers, Brian S. Faughnan, who has blogged about the case in his column Faughnan on Ethics, told Bloomberg Law.

"To me, I think what is going on in Florida is another example proving that we are living through a watershed time period for our profession, Faughnan said. He practices in the Memphis office of Lewis Thomason.

"People with legal needs are readily pursuing alternative approaches to getting those needs met and are working with companies that can make guarantees that lawyers can't ethically make," Faughnan said.

"Something's got to give," Faughnan said. "Ideally our profession will seriously examine revising our rules to make it easier for lawyers to share fees or give value for referrals but simultaneously bless those practices only if the lawyer deals with companies that agree to be bound by the ethics rules in their dealings with

customers.”

Ticket Clinic Suit

In a lawsuit filed earlier this year, Ticket Clinic said TIKD is illegally operating a law firm run by nonlawyers and splitting legal fees with nonlawyers, while deceiving consumers along the way.

However, Ticket Clinic voluntarily dismissed the case without prejudice in August.

Gold told Bloomberg Law the action was dismissed without prejudice by agreement with TIKD pending the outcome of the Florida Bar UPL investigation, up to eight months.

TIKD's antitrust complaint says it agreed to the dismissal in order to buy peace until the Florida Bar completed its UPL investigation. But instead, “The Ticket Clinic and the Florida Bar actually accelerated their campaign to put TIKD out of business,” the complaint says.

TIKD Allegations

TIKD's complaint and motion for preliminary injunction alleges that the Florida Bar and Ticket Clinic violated the Sherman Antitrust Act, 15 U.S.C. §§1 and 2, as well as Florida antitrust law. The complaint seeks damages of more than \$11.4 million, based on lost revenue and increased costs of \$3.8 million plus treble damages.

The complaint also seeks injunctive relief prohibiting the bar and its officers from continuing their alleged anticompetitive acts, and requiring the bar to retract its staff opinion.

The complaint says the Florida Bar tried to deter competition by issuing a staff opinion that addressed a program very similar to TIKD and said participation in the program “raises ethical concerns about fee splitting with a nonlawyer, solicitation, indirect attorney client relationships, the unlicensed practice of law and financial assistance to clients.”

Ticket Clinic lawyers obtained a copy of the opinion and used it as proof that the bar believed TIKD's business was illegal, and Ticket Clinic lawyers filed baseless ethics complaints against lawyers who represented TIKD customers as an anticompetitive weapon, the complaint says.

The Florida Bar's reinforcement of the Ticket Clinic's anticompetitive message exceeded the bar's authority to investigate and prosecute alleged UPL, the complaint says.

Resources

- ▶TIKD complaint
- ▶Florida Bar Staff Op. 37603
- ▶Motion to disqualify
- ▶Bar's motion to dismiss
- ▶Bar's response in opposition to motion for preliminary injunction
- ▶Ticket Clinic complaint

Bar's Responses

TIKD's antitrust complaint names as defendants The Florida Bar, the president of the bar, and three lawyers who work for the bar, along with Mark Gold, Gold & Associates P.A., doing business as the Ticket Clinic, and four other lawyers who are employed by the Ticket Clinic.

The bar defendants have filed a motion to dismiss saying the complaint doesn't state a viable claim under the antitrust laws, and that the bar defendants are immune under the Eleventh Amendment, the state action doctrine, Florida antitrust statute, and the *Noerr-Pennington* doctrine, which grants immunity from statutory liability for conduct involving exercise of the First Amendment right to petition the government.

Moreover, the court should abstain from hearing the claims against the bar defendants, and the individual bar defendants are immune from civil liability for all acts in the course of their duties, the motion says.

The bar defendants also filed a response opposing TIKD's motion for a preliminary injunction. TIKD is trying to disrupt the Florida Supreme Court's regulatory process for investigating UPL and the court's long-established rules governing the bar's UPL investigations and ethics advice to bar members, the response says.

Motion Disqualify

The bar's motion to disqualify says Abadin was president-elect of the Florida bar when *Dental Examiners* was decided by the U.S. Supreme Court on Feb. 25, 2015, and he went on to serve as president from June 2015 to June 2016.

During that time Abadin was privy to confidential legal advice the bar received through internal legal counsel and outside antitrust counsel on antitrust issues raised by the *Dental Examiners* case, the motion says. TIKD's

complaint directly places at issue the Florida bar's response to *Dental Examiners*, it says.

"For a recent Bar president to not only review confidential information and advice provided to him while acting in his capacity as an officer and fiduciary of The Florida Bar but then to represent an adverse party shortly thereafter against the Bar using such confidential information requires withdrawal or disqualification of Mr. Abadin, TIKD's other current counsel, and any prospective counsel granted access to this confidential information," the motion says.

The motion invokes Florida Rule of Professional Conduct 4-1.9, which addresses former-client conflicts of interests and restricts disclosure and adverse use of a former client's confidences. The rule applies to Abadin even though he didn't serve as counsel to the Florida bar, the motion says.

Also, Abadin is a material witness to the facts giving rise to the action, the motion says.

Holland & Knight and Pillsbury Winthrop Shaw Pittman LLP are representing the bar defendants.

To contact the reporter on this story: Joan C. Rogers in Washington at jrogers@bloomberglaw.com

To contact the editor responsible for this story: S. Ethan Bowers at sbowers@bloomberglaw.com

For More Information

Complaint is at <http://src.bna.com/uGb>.

Motion to disqualify is at <http://src.bna.com/uGf>.

Contact us at <http://www.bna.com/contact-us/> or call 1-800-372-1033

ISSN 1545-9845

Copyright © 2017, The Bureau of National Affairs, Inc. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy.