UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No.: 17-24103-Civ-COOKE/GOODMAN

TIKD SERVICES LLC,

Plaintiff,

vs.

THE FLORIDA BAR, et al.,

Defendants
_____/

PLAINTIFF TIKD SERVICES, LLC'S MEMORANDUM OF LAW ON DISCOVERABILITY OF COMMUNICATIONS BETWEEN THE FLORIDA BAR AND FLORIDA LAWYERS CALLING THE BAR'S ETHICS HOTLINE

Plaintiff TIKD Services, LLC ("TIKD") submits this memorandum of law addressing the relevance and discoverability of communications between The Florida Bar ("the Bar") and Florida attorneys calling the Bar's Ethics Hotline, as requested by Magistrate Judge Goodman in post-hearing orders. [DE 214, DE 220.]

I. Introduction and summary.

Equating its own confidentiality rules with an evidentiary privilege, the Bar asks the Court to create this new privilege out of thin air. Meanwhile, the Bar hopes both to rest its antitrust defense on the purported propriety of its communications with lawyers who called the Ethics Hotline to ask about working with TIKD, and to shield those communications from disclosure. But the communications—anticompetitive acts that violated the Bar's own rules and are central to TIKD's Sherman Act claims here—are not privileged. And, even if they were, the Bar waived any such privilege when it disclosed the substance of those communications to a third party, and in the classic parlance, sought to wield both the sword and the shield.

None of this should be allowed; the communications should be released.

II. The Hotline calls are central to TIKD's antitrust claims.

The Court has asked the parties to brief whether "Plaintiff's request for the ethics hotline records and information seeks discovery permitted by Federal Rule of Civil Procedure 26(b)." [DE 214 at 3.] The answer is "yes," as shown by both sides' pleadings, briefing, and discovery in this case.

A. The Bar's Hotline calls with Florida lawyers are key anticompetitive acts on which TIKD's case is based.

The foundation of TIKD's antitrust claims is its allegation of unsupervised, anticompetitive acts by the Bar, and the Bar's handling of the Ethics Hotline inquiries about TIKD are central to those claims. Without citation to any authority, the Bar argues that the calls cannot be a core issue because they were not given sufficient prominence in the Complaint. But beginning with the Complaint and continuing throughout the pleadings, TIKD has maintained the Bar's responses to Florida lawyers who called the Ethics Hotline are key, relevant evidence of anticompetitive conduct that directly resulted in harm to TIKD.

For example, the Complaint alleged that attorneys quit working with TIKD because of responses provided by the Bar's Ethics Hotline. [DE 80 at ¶ 1, 65, 80.] TIKD reiterated, in response to the DOJ's Statement of Interest, that TIKD was challenging the Bar's Ethics Hotline answers on the grounds they were *unsupervised* and *unapproved* actions of the Florida Bar that injured TIKD. [DE 126 at 2.] In summary judgment briefing, TIKD further described how the Bar used the Ethics Hotline to stop lawyers from working with TIKD: UPL Counsel Jackie Needelman and the Ticket Clinic's Hollander agreed to direct lawyers calling the Bar about TIKD to call the Ethics Hotline, which would tell the lawyers not to work with TIKD. [DE 200 at 12-13 (summarizing how the Ticket Clinic and the Bar coordinated how to handle calls from lawyers about TIKD and evidence that many quit working with TIKD because of what the Bar communicated); DE 204 at ¶ 39] And, although the Bar has so far refused to release the substance of those Hotline calls, its protocol for responding to those inquiries was clearly established by the Bar's own Ethics Counsel, Elizabeth Tarbert, who told her Virginia counterpart that the Bar was telling inquiring lawyers that TIKD "may be engaging in UPL," that "[i]t looks like fee splitting" and that TIKD was providing financial assistance that violated the rules. [DE 204 at ¶ 103;

DE 226-3.] Tarbert, and thus the Bar, knew this advice to callers might discourage them from doing business with TIKD, even though the Florida Supreme Court had not then—and has not still—determined whether any of that was so. [DE 204 at ¶ 103.]

Furthermore, although the identity of some callers and the substance of the calls is being withheld by the Bar, at least some lawyers have already stated that the Bar discouraged them working with TIKD. [DE 204 ¶¶ 104, 105] Such responses violated the Bar's own rules because there were pending ethics and UPL complaints and because the Bar lacked authority to advise callers not to work with TIKD, see [DE 200 at 12-13.] Accordingly, these responses are highly relevant to determining the merits of TIKD's antitrust claims.

B. The Bar is vigorously denying that its Hotline calls caused TIKD financial harm, while trying to keep them secret.

The Bar's own briefing confirms the centrality of the Ethics Hotline inquiries to the case. The Bar has repeatedly and forcefully denied that its responses to Hotline inquiries caused TIKD harm, while simultaneously trying to keep records of the contents of the inquiries secret. Indeed, to defend itself here, the Bar relies upon its own self-serving characterization of calls only it has heard. *See* [DE 189 at 6 ("[The Bar] undertook an appropriate investigation of TIKD … and provided advisory ethics opinions to attorneys requesting guidance as to their own contemplated conduct as TFB is required to do under the RRTFB."); *id.* at 15 ("TFB's responses to Ethics Hotline calls were entirely proper."); DE 211 at 7 ("[T]IKD's quantum of proof regarding this 'core allegation' is non-existent.")] The Bar flatly denies that it violated its own rules, but provides no details of its conduct, nor any explanation of how the conduct at issue is supervised or approved. *E.g.*, [DE 211 at 3 n.2 ("[T]he record evidence confirms TFB's UPL investigation of TIKD and its non-binding responses to request for informal ethics advice were required and authorized by law, pursuant to duties mandated by the FSC and RRTFB."); *id.* at 5-6.]

The totality of the pleadings (including the Bar's own[1]) and discovery in this case demonstrate that the Bar's responses to Ethics Hotline inquiries about TIKD are directly relevant to determination of TIKD's antitrust claims.

[1] In fact, the Bar even disputes how inquiring attorneys themselves have characterized the calls. Compare [DE 212 ¶ 101 ("[T]here is no evidence , admissible or otherwise, that TFB told lawyers

III. The Bar has waived any privilege it may have had by disclosing the substance of its Hotline answers and by claiming TIKD has "no evidence" that the Bar discouraged Florida lawyers from working with TIKD.

The Court has asked whether the Bar has waived the privilege it asserts. [Doc. 214 at 2.] Again the answer is a resounding "yes" for two reasons: (i) by disclosing the information publicly in an email and (ii) by claiming TIKD cannot prove facts contained in the documents the Bar is withholding.

A. The Bar waived any privilege when it disclosed its Hotline answers about TIKD to the Virginia State Bar.

In an email exchange with significant antitrust ramifications of its own, the Florida Bar's lead ethics counsel, Tarbert, and the State Bar of Virginia coordinated their responses to TIKD's market entry in their respective states by sharing how the Florida Bar was responding to all Ethics Hotline inquiries concerning TIKD. The Florida Bar summarized to the Virginia Bar that:

> Here is what we are telling lawyers who call [the Ethics Hotline] asking if they should be involved with TIKD:
>
> 1. The company may be engaging in UPL and if so, it would be unethical for the lawyer to participate under Rule 4-5.5. It is a legal question whether the company is engaged in UPL, so we can't answer that, but we do raise the issue.
> 2. It looks like there is fee splitting between TIKD and the participating lawyers based on how TIKD collects the money and lawyers are paid under Rule 4-5.4.
> 3. TIKD is offering a maximum price that the consumer pays, which means that TIKD is paying any fines or court costs assessed in the event the case is lost, which is financial assistance to a client that a lawyer cannot participate in under Rule4-1.8(e).
> 4. TIKD does not file ads so we have no way of knowing whether the ads comply (and even if they do, TIKD sates it is not a lawyer referral service, has not quarterly reported, or otherwise complied with the lawyer referral service rule).

[DE 226-3.]

This exchange with a member of the public waived any privilege the Bar might claim over the content of Ethics Hotline calls because such communications are a public record pursuant to Florida open records laws. *Cf.* Fla. Stat. § 119.01. Further, the release of

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not to do business with TIKD.")] with [DE 204 ¶ 104 (quoting Moffitt that the Bar advised him "not to take any cases for TIKD")].

privileged information to the public or unrelated third-party waives the privilege. *Pensacola Firefighters' Relief Pension Fund Bd. of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, No. 3:09CV53/MCR/MD, 2010 WL 11520021, at *2 (N.D. Fla. July 28, 2010) ("[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with an assertion of the privilege.").

This waiver makes the underlying information and documents discoverable as well. *Hurley v. Kent of Naples, Inc.*, No. 210CV334FTM29SPC, 2011 WL 13141481, at *1 (M.D. Fla. July 28, 2011) ("[D]isclosure of information to a third party waives the privilege not only to the disclosed data but also as to the details underlying that information."). TIKD is permitted to test the Bar's public description of its Ethics Hotline advice. The best, most probative evidence of what was communicated about TIKD via the Ethics Hotline are the contemporaneous records of the calls.

B. The Bar has waived any privilege by arguing that TIKD cannot prove the Bar's Hotline calls discouraged Florida lawyers from working with TIKD.

Additionally, as noted above, see *supra* II.B, the Bar is wielding its purported privilege as a sword and shield: claiming TIKD has "no evidence" of anticompetitive conduct [DE 112 ¶ 101], while simultaneously refusing to produce information and documents that would reveal such conduct.

A party "waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347. In other words, when a party goes beyond merely denying a plaintiff's allegations and places information protected by the privilege at issue "to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party." *Id.*

Because the Bar seeks to benefit from repeated assertions that TIKD cannot prove that the Bar's answers to Hotline inquiries discouraged attorneys from working with TIKD, see *supra* II.B., fairness requires disclosure of such communications.

IV. The Bar's Memorandum of Law fails to establish any privilege from discovery for its Hotline calls.

The Bar's privilege claim is governed by federal common law.[2] "[T]here has been a notable hostility on the part of the (federal) judiciary to ... new privileges. … Therefore, the rule in this Circuit is that a new privilege should only be recognized where there is a compelling justification." *Matter of Int'l Horizons, Inc.*, 689 F.2d 996, 1003–04 (11th Cir. 1982) (internal quotation marks and citations omitted).

The Bar does not claim that any ***existing*** federal privilege applies to its Hotline calls. Accordingly, it is the Bar's burden to show a "compelling interest" to recognize a ***new*** privilege. *Id.* The Bar has not met its burden. The Bar fails to cite any decision from any state, let alone the Supreme Court of any state, let alone any federal court, holding that state bar ethics hotline communications are privileged from discovery. Bar Memo, at 7 ("TFB has not found any applicable authority.").

The Bar offers the concession that it is "not aware of a decision addressing ... the application of a federal privilege to ethics confidentiality requirements under state law," Bar Memo, at 10. But at least one federal court has addressed this very issue, holding that a state ethics confidentiality requirement like the one upon which the Bar relies did not establish a new federal privilege. In *McClendon v. Illinois Dep't of Transp.*, the plaintiff filed a discrimination claim against the Illinois Department of Transportation and sought discovery of a state investigative file relating to the plaintiff's alleged violations of state ethics laws. *Id.* at 1166. The state investigative authority claimed that the file was "privileged" based on a state law confidentiality provision. *Id.* The court rejected this argument, holding that the plaintiff's "federally protected interest in non-discriminatory treatment outweighs [the agency's] asserted interest in the confidentiality of its investigative file." *Id.* at 1169.

[2] Without explanation, the Bar asserts that it is "important[ ]" that TIKD's lawsuit includes "state law issues." Bar Memo, at 10. The Bar is mistaken. "[O]nly federal law of privilege governs in a civil proceeding where the court's jurisdiction is based on a federal question even if the evidence is relevant to a pendent state law claim, which may be controlled by a contrary state law of privilege." *State Farm Mut. Auto. Ins. Co. v. Kugler*, 840 F. Supp. 2d 1323, 1329 (S.D. Fla. 2011).

Similarly, the Bar's confidentiality assertion does not outweigh the Sherman Act's protection of private parties like TIKD from anticompetitive restraints of trade.[3] The Bar claims that, unless this Court creates a new federal privilege protecting Hotline calls, "attorneys would be chilled" from calling the Hotline. Bar Memo, at 11. The court rejected a similar argument in *McClendon v. Illinois Dep't of Transp*, pointing out that the "assertion that confidentiality … promotes the search for truth is open for debate." 64 F. Supp. 3d at 1169. The argument is even less persuasive here, where the Bar, in violation of its own rules, issued ethics opinions to TIKD's competitors whose intention was not to inquire as to their own professional responsibility, but rather to obtain ethics opinions that would help drive TIKD out of business. [DE 204 at ¶¶ 110, 115.] That the Bar wants to shield these anticompetitive communications from disclosure is telling, but it does not establish a "compelling interest" for creating a new privilege. *See F.T.C. v. Illinois State Bar Ass'n*, 711 F. Supp. 445, 446 (N.D. Ill. 1989) (holding that state bar's communications with attorneys requesting advisory opinions were not privileged and were relevant to bar's "motives" for issuing the opinions).

The Bar claims that *F.T.C. v. Illinois State Bar Association* is distinguishable because the Illinois Bar Association is a "private voluntary" bar association. Bar Memo, at 17. This argument does not change the fact that *no court* has ever held that a state bar—voluntary or otherwise—can withhold ethics-related communications to attorneys based on a federal privilege. Further, the Bar's distinction is not meaningful. In *McClendon*, it did not matter that the alleged "ethics" privilege was advanced by a state agency based on a state confidentiality statute. Just as the court in *F.T.C. v. Illinois State Bar Association* rejected the bar's "chilling effect" argument, 711 F. Supp. at 446, the court in *McClendon* equally rejected the argument that "encourag[ing] truthful and complete disclosure to state officials" was grounds to create a new federal privilege over ethics-related communications, 64 F. Supp.

[3] The Bar's lofty opinion of its own confidentiality rules does not stop purporting to trump the Sherman Act. In response to the hypothetical proposed by the Court, the Bar states it would not provide Ethics Hotline records in response even to a lawful subpoena in a ***murder*** investigation because "there is no [Bar] rule that permits such disclosure." [DE 226 at 8.] While this position says much about the Bar's own view of its prerogatives, it offers no rationale—let alone any legal support—for the result the Bar describes for the hypothetical, or that it seeks before this Court.

3d at 1169 (quoting *E.E.O.C. v. Illinois Dept. of Employment Sec.*, 995 F.2d 106, 108 (7th Cir. 1993)). As for the Bar's argument that the "chilling effect" on Florida attorneys would be greater than it would for Illinois attorneys, such speculation falls well short of carrying its burden to show a "compelling interest" for a new federal privilege.[4]

V. At most, the Bar has a conditional right of confidentiality in the attorneys' names that can be addressed through the Court's Protective Order.

To the extent the Bar has shown any legitimate interest in the confidentiality of the Ethics Hotline records, the Bar's own rules show this interest is limited to the identity of the attorneys' names. *See* [DE 122 at 6 n.11 (explaining that an advisory opinion becomes public record after any identifying elements are removed); *id.* at 6 (public statement identifying inquirer waives confidentiality).] Accordingly, even if the Court found a federal privilege existed, and had not been waived, the Bar's alleged interest could be protected by redaction of inquiring attorney names from Ethics Hotline records.

VI. Conclusion.

The Bar asks this Court to create a new privilege, then to ignore that the Bar has waived that privilege. The Bar seeks to rest its defense on the propriety of Hotline calls, while concealing the content of those calls. The Bar wants to be permitted to wield a sword in the form of its limited and self-serving disclosures, while sheltering behind a shield of its own confidentiality decree. The Court should not permit any of this.

Respectfully submitted,

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[4] Just like the Florida Bar, the Illinois Bar provides ethics opinions via an Ethics Hotline, and it advises attorneys that inquiries are "strictly confidential." *See* Illinois State Bar Association, Ethics, available at https://www.isba.org/ethics; Illinois State Bar Association, Request for Advisory Opinion on Professional Ethics, available at https://www.isba.org/ethics/requestadvisoryopinion.

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