

UNITED STATES

Remarks

NO FOREIGN DISCIPLINE

by

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NEP  
COMMISSION

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FEDERAL TRADE

before the

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TRADE ASSOCIATION LAW AND PRACTICE

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ANTITRUST LAW COMMITTEE  
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...to be able to speak to you this afternoon.

...I had also been invited to speak at the symposium.

...I was initially invited to speak but the

...unable to do so. As some of you may recall, I delivered the

...luncheon address for this annual symposium last year.

...I thought perhaps that it was a compliment, but one

...of the members of my staff brought me quickly back to earth by

...suggesting that the invitation is merely a generous opportunity

...time. Because that process

...years -- even then with uncertain results -- I think I

...will stay with my first interpretation.

...about the antitrust. Today I'd like to talk with you

...the

...concern for associations and

...many of you represent

...the

concern product standards. But my comments also apply to codes

governing ethical conduct by members of professional and other

An example of a code of conduct that all of us

Organizations

...the Ninth Amendment doctrine 2/ mbc  
...  
...designed to regulate political activity...  
...that the First Amendment right to petition for a redress of

much influence on government decisionmakers that their actions

it focuses too much on the influence and impact of standard-setting organizations on government decisionmakers

to make wise purchase decisions must have information in order to

cases has been made available professional certification in many

or help and they rely on standard contracts too often need extra

standards within the industry

approval to the practice or product in question

use private standards for accreditation

Base

failure for a business or home failed via

enforcement, are most warranted

declared following oil price rise



is the phrase "tantamount to petitioning the  
organization is "tantamount to the standard-setting

get us very far. We may indeed see cases in which the conduct is  
so far removed from petitioning that it deserves no antitrust  
likely to pass that test. The whole point will be concerned is

Pennington doctrine, after all, is to protect of the Noerr-B  
conduct of a communication that otherwise would be  
subject to examination under the antitrust laws. The mo  
In my view, is whether the private  
organizations, for purposes of determining immunity, should be  
part of government. considered

about its history, the Noerr-Pennington doctrine has  
two members of the business not immunize communications between

officials. It thus immunizes only those actions directed toward governmental agencies or officials". 7/ Similarly, the Fifth Circuit in Mid-Texas v. AT&T said that "the doctrine has been applied only to situations involving direct actions made to

making." 8/

influence governmental decision

of government" 9/ So, are standard-setting organiza

and organizations may think not. Without doubt, standard setting

play an important role in governmental processes. Their view

almost unvarying adherence. But, as I indicated

may receive

fluence and impact are not the issue: authority and

before influ

accordance with use.

have desired their relationship with government and decisions

...agency decisions are subject to... examination by the me...

...such as the Freedom of Information Act... Government...

The principle is the same for all branches of government.

Government decisions are charged with the public interest...

...and in respect to... decisions.

...private organizations are not... standards...

...They are composed of individuals...

...private commercial... interests...

...standard or that private commercial... public interest...

ly inconsistent with the public interests are necessari

assumption underlying our antitrust laws interest. Indeed, the

the vying for commerce among members of is that competition --

y acting in their selfish economic the business communit

uld the best allocation of our economic interests -- "will vi

interests... while at the same time providing an environment

...the preservation of our democratic political and

As least two courts of appeals have recognized this point.

*Health Center v. Mohammad*, 974 F.2d 1151 (10th Cir. 1992). In *Deninist Women's*

were not petitioning of government, even though the peer group

group had great influence with the state Board of Medical

As: "the peer review group" was not government

the court explained:

...affords group

...affords group

...affords group

...affords group

government itself. Usually, the composition of such

leadership owes its allegiance -- indeed its fiduciary

responsibility -- to its membership, not the public as a whole

activities.

It may be interesting to consider some not-so-far-fetched

maintained by a committee of disgruntled members? Would the

ers? Would it have process when enforcing its code against violato

process examinations? If standard

adopted standards only practical way to influence legislatively ado

the private organization, what other individuals

status would government of outla

mandation in the event of non-compliance

influence the decisions of the organization have to comply with

nted a questions might border on the fanciful, but if I represent

governmental or industry standards, and the procedure of which is

government-approved product way to influence the content of some g

ment industry codes upon which they are based. But the gove

ical ex still retains the final authority to act and its impact

ill possible to lobby the difficult as it might seem, it is st

ins final authority to write a standard government body that reta

into the law.

... themselves are not government ...

... the Supreme Court ...

... Court ...

communications within it

Standard-setting groups of private industry

I make them available for

simply promulgate their codes and

government or whatever use which that govern

private industry chooses to make of them. This hybrid

influence on private industry as well as on the in

would be significant. If there were no private

professional associat

codes to judge their peers -- then it might seem more appr

appropriate



... brought by Mid-Texas Communications, Inc., and one in No. 17/... the courts held that Noerr... Seventh Circuit brought by MO...

... attention is not available just because conduct...  
... the fact that the code may also be enacted in...

... conduct, an impact that was not directly traceable to...  
... from enforcement by... promulgation of model codes, stan...

... professional associations, or influence on commercial contract...  
... specifications, the fact that the code may also be enacted in...

... to...  
... arbitrary immunity.

... their government. The people have a... between the citizens and...  
... and representative government...  
... no know those views. As the Court said in Noerr, "to a...

communications are governed by state law.

including the antitrust laws.

grant immunity to a private standard-setting organization. To

unnecessarily and inappropriately

to the public community of the

the business community of the