

THE TOP THREE ASSOCIATION ANTITRUST RISKS - AND HOW TO AVOID THEM

You are enjoying yourself at the association's annual dinner when three of your former classmates come over to say hello. Quickly the conversation turns to ABC, the new health care organization that will offer a chiropractic cost-savings benefits administration program to payors in your state. Under the program, ABC provides a network of chiropractors and administers chiropractic benefits, including utilization management, credentialing and claims processing. All three of you discuss the problems the profession is facing, and one of your classmates complains about downward pricing pressure that comes from benefit organizations like ABC. One classmate says to no one in particular, "we don't have to cave to ABC; we don't have to participate in any provider network that they are affiliated with." The other classmate smiles and looks to you for a response. What do you do? If you are smart, you immediately excuse yourself from the discussion. Why? Because this is the type of conversation that could get you into trouble under the antitrust laws. In this scenario, the participants in the conversation did not reach a specific agreement. Yet, if members decide to opt-out of the new ABC programs, the conversation could be used as evidence that something fishy had occurred.

Does this mean you shouldn't talk to your competitors at professional association meetings? Of course not. That would not be practical, nor would it be useful to the association. It is important to understand, however, the antitrust risks inherent in association activities so that you know how to minimize them.

Why is Compliance with the Antitrust Laws Important?

Penalties for violations of the antitrust laws are severe –for the association and individual members. Under the U.S. antitrust laws, the association can be fined up to \$100 million. Courts or government antitrust agencies may impose permanent restrictions limiting association and member activity, including disbanding the association altogether. In addition, private lawsuits by patients or others who are able to show that they were harmed by the unlawful actions may recover damages in addition to government-imposed fines. Individual members also may face significant penalties for violating the antitrust laws. Because violations of the Sherman Antitrust Act are felonies, individuals can be imprisoned for up to ten years, fined up to \$1 million, or both, per violation.

Dealing with a government antitrust investigation or a private antitrust lawsuit is expensive, time-consuming, and distracting. An investigation or lawsuit can seriously damage the reputation of your professional association, its members, and individuals. It is important to emphasize that these penalties, damages, and distractions are avoidable by understanding in very basic terms what the antitrust laws require, and by consulting with legal counsel whenever you are in doubt.

Understanding the Antitrust Laws

The U.S. antitrust laws of principal concern to companies and individuals that participate in association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. These laws prohibit all “contracts, combinations, and conspiracies” that

unreasonably restrain trade. In addition, all U.S. states have adopted laws that are applied in a similar fashion to the federal law.

The antitrust laws apply only to "concerted" action or "agreements." This means that, for the most part, as long as a people are making independent business decisions, they should not have exposure under the antitrust laws. The antitrust problems arise under Section 1 of the Sherman Act when persons coordinate or agree on certain conduct. But it is not necessary for the agreement to be explicit; an agreement may be inferred from actions taken in parallel without an actual express verbal agreement, handshake or writing. It is important to remember that, like in the example above, comments made in an informal environment may be used as one type of circumstantial evidence of an agreement.

Three Antitrust Pitfalls for Associations

1. Limiting Competition

One of the most significant antitrust concerns for an association is that by meeting together, competitors will find ways to reduce competition between them by raising prices, decreasing services or boycotting or refusing to deal with particular organizations like ABC. Each of these activities are per se unlawful, which means that on its face the conduct is illegal without further inquiry as to the business justification for the conduct or the actual impact on competition. In addition, an association cannot use its code of ethics to impose restrictions on members' ability to compete, such as through prohibitions on advertising of prices, quality, or other factors.

2. Price Fixing

In order to have a price fixing violation, competitors must agree to control or stabilize prices or agree to the terms and conditions of sale. In most cases, price fixing agreements are not explicit, but are proven through circumstantial evidence such as remarks noted in meeting minutes, or comments written in e-mails or telephone logs. For example, assume you and your classmates talked about the downward pricing pressure that results from insurers working with benefit managers like ABC. Thereafter, you all resist attempts to reduce reimbursable fees.

To minimize the risk of price fixing, it is essential that competitors refrain from communicating about present or future prices, pricing policies, bids, discounts, credit or service charges, promotions, terms or conditions of sale, choice of customers or territorial markets. As a general rule, if you are concerned that your communications with competitors may touch upon any of these issues, you should refrain from further discussion and consult counsel immediately.

3. Information Exchanges

Fee and other practice data collected by association surveys should be historical only. Present and future pricing data, for example, could be used for illegal price fixing. The data should be collected by association staff or other independent third-party collectors, kept confidential and presented only in aggregated form with no individual members identified.

The Best Way to Avoid Antitrust Problems

The simplest way to avoid violating the antitrust laws is to simply not engage in any of these activities or discussions. If any such proposals surface during association meetings, the meeting chair should immediately end the discussion, remind the attendees of the antitrust issues, and contact legal counsel immediately. Following this advice above will go a long way in reducing antitrust risks to the association and its individual members.