



February 28, 2011

Antitrust for Trade Association Executives

GKG Law, P.C. Association Law
Educational Series

Steven John Fellman

1054 31st Street, N.W., Suite 200

Washington, D.C. 20007

Telephone: (202) 342-5294

Fax: (202) 342-5201

E-mail: sfellman@gkglaw.com

Why Worry?

- Violations of the antitrust laws can be a felony
- You can go to jail for up to 10 years
- Average sentence for antitrust defendants in FY 2009 was 30 months in jail
- Individuals can be fined up to \$1 million



Why Worry?

- DOJ collected over \$1 billion in antitrust fines in FY 2009
- Class action treble damage cases begin after government finishes
- Plaintiffs get three times actual damages over a four year period plus huge attorney fees.



Why Worry?

- Why worry, I don't sell anything. My members are the ones that should worry.
- Antitrust laws are conspiracy statutes
- Sitting in on a meeting and saying nothing may be enough to put you in jail
- Jury may imply guilt even though you did not say anything
- DOJ wins over 90% of criminal antitrust cases

What law says price fixing is illegal and when was it written?

- No law says price fixing is illegal
- Section 1 of the Sherman Act prohibits:
"...every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce"
- The Sherman Act was written in 1890
- The Court's have interpreted Section 1 to criminalize certain business practices
- Court's have added the "rule of reason."



What is the Rule of Reason?

- Courts have held that only "unreasonable" contracts, combinations or conspiracies violate the Sherman Act
- Courts have used the "rule of reason" to apply the Sherman Act to evolving economic conditions.
- But Courts have agreed that certain trade practices are so anticompetitive, that the rule of reason should not apply
- Such conduct is illegal "per se"
- People who are convicted of "per se" violations of the antitrust laws often end up in jail

What are "per se" violations?

- Price fixing-- almost any agreement affecting price
- Customer allocation
- Territorial allocation
- Bid rigging
- Some types of group boycotts or concerted refusals to deal.

How do you apply this theory to today's economy?

- Standard setting is essentially a group boycott
- Accreditation and Certification could be conspiracies to keep competitors out of the market
- Adoption of surcharges such as energy surcharges or environmental surcharges could be price fixing
- Negotiations within the health care system could be all types of per se violations

What is a Conspiracy?

- A agreement between two or more parties
- Does not have to be carried out to the end
- Can be inferred
- Arranging the meetings at which conspiracies occur may suffice
- Sitting at the meetings without saying anything makes you a party

New Antitrust Concerns

- Invitations to Collude
- Obstruction of Justice
- International Antitrust Enforcement
- State Antitrust Enforcement
- Social networks



How Does the Government Find Out?

- Customers complain
- Competitors complain
- Adversely affected parties complain

Why Does the Government Always Win

- No one wants to go to jail
- Individuals can't afford the costs of a defense
- The government makes "offers you can't refuse"
- Leniency program
- Grand jury is very scary

I am convinced. What should I do (1)?

- Define the major areas of antitrust exposure for your association
- Professional societies will differ from trade association
- Listen to the competitive concerns of members
- Review what is being discussed on the association's social networks

What should I do (2)?

- Look at the groups antitrust history
- Contractors and bid rigging
- Realtors and multiple listing
- Medical professions and advertising restrictions
- Textile rental companies and customer allocation



What should I do (3)?

- Prepare an Association Antitrust Compliance Policy
- Include a general discussion of the antitrust laws with specific examples of how they apply to the association
- Explain association's antitrust compliance procedures
- Get advice from antitrust counsel and have counsel talk to the Board

What should I do (4)?

- Send copies of the Antitrust Compliance Policy to all members
- Educate staff
- Develop a culture of antitrust compliance
- Adopt a policy that members that are convicted or plead guilty to antitrust violations will be suspended from membership

Prepare a list of simple Do's and Don'ts

- All meetings have minutes and agendas
- No rump sessions
- No discussions of pricing, discounts, price changes, service charges, etc.
- No discussion of what is a "fair price"
- No discussions of bids
- No discussion of whether to do business with a certain supplier
- Open standard setting and certification and accreditation
- Controlled information exchanges
- Involvement of counsel whenever antitrust questions arise

Promote your Antitrust Compliance Program

- In Bylaws
- At Membership Meetings, Committee Meetings and Board Meetings
- With staff and sister associations
- Wherever you go



Conduct a Periodic Antitrust Audit

- Check out the current competitive issues in the industry or profession
- Talk to your friends who will be honest with you
- Make sure that staff have their antennas out
- If you have a "gut feeling" that there may be a problem, call counsel

What if the Compliance Program doesn't work?

**THROW THE GLASS
AGAINST THE WALL !!!!!**

Remember, if someone has to go to jail, it
should be the association member
NOT YOU!

Closing Remarks



Steven John Fellman

1054 31st Street, N.W., Suite 200

Washington, D.C. 20007

Telephone: (202) 342-5294

Fax: (202) 342-5201

E-mail: sfellman@gkglaw.com

www.associationlawfirm.org