

LEGALLY SPEAKING

by Bob Dunlevey

ANTI-TRUST ANTICS

Federal and state anti-trust laws have been around a long time and are intended to promote open and fair competition in business. You need to know a little about these laws so you don't find yourself in an awkward position – "jail." Trade and professional associations are quite vulnerable to claims of illegal restraint of trade even though they are customarily non-profit organizations. The reason for this is that associations are normally comprised of competitors, or potential competitors, and association activities provide an excellent opportunity for them to reach tacit or explicit agreements on a variety of business practices, some of which are illegal. Concerted action which raises prices or lowers the quantity or quality of available goods is always suspect. Here are some of the "basics" about anti-trust regulations which will help you avoid penalties of up to \$1 million for individuals and \$100 million for business organizations and up to ten years in jail. The stakes are high!

Associations and their members are given broad opportunities to engage in joint action such as lobbying, but they must avoid activities which reduce competition among themselves or hold their suppliers or customers to some type of reduced competition. The leaders of the association need to be vigilant to ensure that illegal conduct does not occur. At gatherings of members, we all need to be careful not to say or do something which could be considered an unlawful conspiratorial agreement. For example, at a dinner meeting, one owner of a business told another that he took pricing seriously and planned on implementing a price increase in the near future. The second owner expressed a similar sentiment and prices were actually increased by these competitors at relatively the same time. The FTC sued both companies. Another

potential violation can occur when one manager of a company speaks with a competing manager and urges the reduction in production in order to increase demand and, in fact, that reduction actually occurs.

Not only the individual members can be held liable, but also the association can be held responsible for the discussions its members have. In a recent consent decree, the National Association of Music Merchants was charged by the FTC with allowing its meetings to serve as a forum for rivals to disseminate or exchange competitively sensitive information. Competing retailers of musical instruments discussed strategies for raising retail prices, margins, minimum advertised price policies, and other related items. The association had sponsored the meetings and set the agenda to assist in discussions. Interestingly, there was no evidence that the discussions, in fact, led to unlawful collusion. This recent consent decree illustrates that anti-trust considerations in association activities remain alive and well and must be respected by the members and officers of any association. But remember, the discussion doesn't have to come during the actual meeting. Conversations at the bar before or after an event (or on the golf course) can be equally as lethal.

Some of the types of activities which are automatic violations include agreements fixing prices, boycotts of competitors, suppliers, or others (joint refusal to deal), agreements allocating markets, and agreements where a company dominating a market ties the purchase of one product to the requirement to purchase another. Unlawful pricing agreements can include arrangements on discounts, formulas for establishing pricing, credit terms, warranties, surcharges, mark-ups, understandings regarding advertising restrictions, the limitation of output or production, and an agreement not to engage in competitive bidding.

Here are some tips for reducing the risks of anti-trust violations:

- Avoid agreements or understandings related to pricing or advertising
- Avoid agreements or understandings that result in a boycott of products or services
- Avoid agreements or understandings allocating markets among competing companies
- Do not try to prevent your supplier from selling to your competitor
- Adopt an anti-trust compliance policy to assist your company in compliance
- Ensure that your association has an anti-trust policy and that the Board members, officers and committee persons are well trained
- Utilize membership eligibility and expulsion criteria which are objective
- Follow a well prepared agenda at each meeting which has been scrutinized in advance for anti-trust concerns
- Collect and disseminate member survey information through a third party with anonymous participation and aggregated dissemination of the information

Many associations conduct annual training sessions for their officers, directors and trustees. These “good governance” training sessions include discussions regarding the responsibilities and liabilities of association directors and officers, anti-trust considerations, and association membership issues. Good governance dictates that your company, along with your association, remains ever vigilant to avoid anti-trust antics. Alert your association staff to any perceived anti-trust violations promptly.

For further information regarding association anti-trust matters or for information regarding good governance training sessions for your company and the associations with which you are affiliated, contact Bob Dunlevey at Dunlevey, Mahan & Furry (937) 223-6003.