

Antitrust Basics

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Antitrust law refers to several statutes designed to promote business competition. These laws **are not** designed to protect competitors (e.g. health care practitioners). The laws **are designed to protect consumers** under the theory that free and open competition will result in the best products and services at the lowest price. The laws target behavior that would reduce or prevent competition.

One of the most important things to remember about antitrust statutes is that the law punishes “agreements” among competitors. The law encourages independent decision-making. In most cases, a health care practitioner who makes independent decisions about what to charge and how to do business does not violate antitrust laws.

When a practitioner agrees with another competing practitioner about what to charge, and how to do business, they have probably broken the law. Notice that the practitioners must be competitors. If doctors have formed a partnership and share in the profits and losses, they can agree on the prices the clinic will charge – they are not competitors with each other. However, they could not agree on prices with other competing clinics.

Unlike other types of agreements like written contracts, antitrust law does not require proof that competitors signed a piece of paper setting prices. An agreement can be proven based upon circumstances alone. For example, an agreement can be shown where a group of competitors got together for dinner and suddenly the next day they all raised their prices or terminated contracts with a particular insurer. Thus, when competitors take the same action at approximately the same time under circumstances where this uniform action would not be expected, an inference of agreement can be found. That is why health care practitioners must be very careful when meeting with competitors and why certain topics like prices should be avoided.

As with other aspects of antitrust law, do not assume that words like “price fixing” have an obvious and common meaning. You engage in price fixing when you reach an explicit agreement with a competitor about action that affects price. For example, an agreement to limit service to create a scarcity that allows for price increases constitutes price fixing and is illegal. Similarly, agreeing to a base price, price range, and certain other terms and conditions that indirectly affect price constitute price fixing.

While price fixing is the mortal sin of antitrust law; the boycott is the twin sin. Without question, a **group boycott** to force a buyer to pay a higher price is a violation of antitrust law. Thus, competing health care practitioners who agree not to do business with an insurer until the insurer raises its payments for services

might as well start shopping for a good defense lawyer. Not only is the action illegal, a boycott is often easy to prove especially when the boycott involves a majority of a particular profession acting within a short period of time.

In fact, a single health care practitioner can get others in trouble simply by publishing a request urging a boycott of an insurer because of low prices. An inference can be drawn that afterward when a different practitioner stopped doing business with the insurer, the decision was based upon the request posted on a forum rather than an independent business decision. The request puts the practitioner in the uncomfortable position of showing that he or she had nothing to do with any conspiracy to boycott or fix prices.

Advice

Do not discuss prices with competing health care practitioners. If you talk prices with competitors you open yourself up to the suggestion that you were trying to agree on prices. The risk is not worth the discussion.

Do not agree with competing practitioners to stay out of each other's service areas. You can't agree to take the west side of town while your friend takes the east side so you won't compete against each other.

Do not agree with competing practitioners to do business only with those insurers or payers who accept your utilization review standards. Collective information sharing among competitors to improve health care quality is acceptable when properly conducted. You can never threaten a boycott to coerce compliance. Each competing practitioner must act independently. Loose talk leads to inferences of illegal agreements.

Feel free to join a professional association and to participate in activities that do not affect your competition with other members. Be careful when you meet as a group to avoid discussing subjects that could produce evidence of an "agreement" among competitors to fix prices or boycott. Associations are the perfect vehicle for promoting professionalism and quality of care but only when done properly.

Compete aggressively to improve and expand your business and profit. Only you can decide whether to accept the terms and conditions offered by payers for your services. Exercise your independent judgment to succeed.

Feel free to suggest prices to insurers and other. Remember that antitrust laws are aimed at agreements among competitors not independent action by individuals.