

Antitrust Dos and Don'ts Among Friends

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Smart business people survey the marketplace constantly and benchmark against the competition. They may enter into joint ventures with competitors with complementary strengths. They also participate in trade associations. These are all important tools to ensure that a business stays competitive.

However, in any interaction with competitors, the concerns of the antitrust laws must be kept in mind and addressed. The antitrust laws prohibit contracts, combinations, conspiracies, and other agreements in restraint of trade, as well as monopolization and attempted monopolization. Therefore, interacting with competitors and participating in a trade association can provide the opportunity for an antitrust violation. An unlawful agreement or conspiracy can exist without any writing. An agreement may be oral or written, formal or informal, express or implied. Even casual conversations or "off the record" remarks can provide the basis for an antitrust claim.

Here are some basic dos and don'ts to minimize antitrust exposure when dealing with competitors or trade associations:

- Do exchange best practices, trends and aggregated historical data. Do discuss methods and concepts that have worked and that haven't worked, and why. Do exchange analytic tools that have been useful in the business. Of course, do not expose trade secrets.
- Do NOT exchange current data or future plans in the areas of pricing, terms or conditions of sale, choice of customers, territorial markets, allocation of customers or territories, upcoming bids, production quotas, capacity levels, or costs, because doing so could be construed or interpreted as a collusive signal or activity.
- Do NOT discuss any business's costs, inventories, production capacities, profits, profit margins, market studies or surveys, market shares, or business plans and strategies.
- Do NOT discuss the nature, extent, and cost of any services to be provided or acquired, including minimum rates, working periods, additional reimbursable charges (e.g. travel expenses and cancellation fees), or controlling when or how services are performed.

- Do NOT discuss what the industry should be collectively doing in the future, because each business must make its own market decisions independently, based on knowledge of market facts and trends, and its individual circumstances. Do make every output-related decision (pricing, volume, etc.) independently, in light of costs and market conditions and competitive prices.
- Do NOT try to reach any type of consensus on what the industry, or any individual business, should do in the future, especially as to costs, rates or prices, classes of customers, or geographic areas or areas of business to be active in.
- Do NOT discuss allocating certain markets to one business or another, or excluding one business or another from a market.

This list is intended to highlight areas that should be monitored carefully for antitrust sensitivity. Consult counsel when in doubt or any of the sensitive areas of price, costs, outputs and customers are involved. Violations of the Sherman Act may be subject to penalties for individuals of up to \$1 million and 10 years' imprisonment and for corporations of up to \$100 million.