LEGAL BRIEFS

Setting Your Prices: What's Allowed and What Isn't

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What can you legally do to obtain information about the prices charged by your competitors for services and products? If you and some of your competitors agree to "standardize" prices charged by members of the group, have you violated the law?

A caller to the WVMA recently asked whether it is legal to call a competing clinic, as if the caller is a prospective client, to ask about the price for one or more services or products. There may be a range of opinions as to whether such a call is ethical, but, with some strong cautions, there's nothing illegal about such a call.

I'll illustrate the "cautions" by discussing the answer to the second question, because the answer is that such conduct does violate the law. Wisconsin and federal antitrust laws prohibit activities that restrict competition. A key factor in determining whether there is an antitrust violation is whether there is an "agreement" among competitors, and whether that agreement "unreasonably restrains competition". The existence of an agreement may be inferred from the circumstances. Establishing a violation does not require a showing of an express agreement.

Where competing veterinary practices agree to set prices, or to take other concerted actions, such as to divide-up markets on a geographic or client basis, such an agreement is automatically held to meet the standard of unreasonably restraining competition. This is the case because such conduct is almost always adverse to the interests of the clients. The existence of an agreement alone is a violation of the law, regardless of whether the parties act to effectuate the agreement, and without the need to show that any clients actually suffered harm.

The inference of anti-competitive conduct may be sufficient for a prosecutor to pursue an investigation and to charge a violation. For example, if a group of practice owners, attending a local veterinary association or WVMA meeting, perhaps while having lunch, have a discussion of the difficulty of maintaining or increasing prices in a down economy, and the members of the group subsequently adopt pricing which is very similar, a prosecutor, exercising hind-sight, may conclude that from the lunch gathering came an agreement to fix prices.

Today's rapid exchange of information over the Internet, LinkedIn, Twitter and e-mail listservs all present the opportunity to share information, or to make suggestions, that might be construed as anti-competitive. Unfortunately, electronic communications often tend to be more rushed and less thoughtful than other forms of communication. Be careful what you type. Also, anyone hosting a listserv, or other site that allows the sharing of information, must be careful to assure that the use of the site does not encourage the illegal sharing of competitive information.

It is not required that the agreement actually have a negative impact on the clients. Even if the agreement is considered neutral, or to result in a better price, for the clients, the existence of the agreement violates the law.

The penalties for anti-trust violations are very severe, including possible criminal sanctions of prison time and fines. Owners, officers, directors and employees of the practice, as well as the practice entity, may be subject to sanctions. Clients who feel they have been damaged may bring civil proceedings and recover three times their damages plus attorney fees.

The reason that the act of calling a competitor to check on prices, without the caller identifying that the call is from a competing clinic, is allowed, but that acting together with that competitor to set prices is not allowed, is that in the first instance there is no "agreement" between the competitors. In fact, the owner of the clinic receiving the call might well be upset that the competing clinic is obtaining this information to establish a competitive advantage.

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