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409 – When Business Competitors Collaborate: Ethical, Antitrust and Compliance Concerns

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Faculty Biographies

Teresa Davidson

Teresa D. Davidson is the vice president legal and general counsel for Volvo Financial Services Region the Americas headquartered in Greensboro, NC. She has responsibility for legal, regulatory, and compliance matters in North and South America and South Africa. During her tenure with Volvo, she has been CEO of Volvo's industrial bank and credit card operations in Utah and headed the team liquidating a captive insurance operation. She serves on the North America Public Affairs Council and is an executive sponsor of Volvo's North American Women's Professional Network.

Prior to joining Volvo Financial Services, Ms. Davidson was in private practice in Phoenix, AZ. Her practice emphasized equipment and corporate finance, securities, and banking matters. She served on the committee for the adoption UCC Article 2A in Arizona.

She currently serves as co-chair of the equipment issuer subforum of the American Securitization Forum, is the immediate past chair of the American Bar Association's section of business law uniform commercial code subcommittee on leasing, and is a fellow of the American College of Commercial Finance Lawyers. A former chair of the Legal Committee of Equipment Lease and Finance Association, she has also served as a chair of its Motor Vehicle Legal Subcommittee and the chair of the Accounting Legal Subcommittee. She is a member of the Association of Corporate Counsel, the North Carolina Bar Association, and the State Bar of Arizona.

She obtained a JD with honors from the University of Tennessee and a BA with distinction from the University of Virginia.

Shirley R. Edwards

Shirley R. Edwards is the associate counsel for West Marine Products, Inc, a large retail and wholesale boating supply company with stores throughout the United States, Canada and Puerto Rico. Her responsibilities include providing legal counsel to all business teams relating to product development, marketing, information technology and security, regulatory and environmental compliance, intellectual property protection, imports, and business relationships with suppliers, vendors and service providers.

Scott Rammell

P. Scott Rammell is vice president, general counsel and secretary for Tesoro Hawaii Corporation, a wholly owned subsidiary of Tesoro Corporation, a Fortune 100 company. He also serves as the antitrust corporate compliance officer. Among other

responsibilities, Mr. Rammell oversees world-wide company antitrust and anticorruption compliance programs, including FCPA. He also serves as corporate governance counsel and recently oversaw the creation and establishment of a new company listed on the NYSE (e.g. board/committee meetings, charters, governance, government filings, policies/procedures). Mr. Rammell is a director and officer of some Tesoro subsidiary companies and is either the secretary or assistant secretary for all subsidiary and affiliated companies of Tesoro.

He is a corporate trainer and speaker on corporate compliance topics. He is also an adjunct professor at BYU-I. He is a member of Society of Compliance and Ethics.

Recently Mr. Rammell was voted by his peers as "One of San Antonio's Best Lawyers in Governance and Compliance," July 2011, and 2012 Scene In SA Magazine and Business and Corporate Practice as well as Energy, Oil and Gas Practice in July, 2009.

Mr. Rammell received a BS (department valedictorian), master of health and hospital administration and JD from BYU.

David Simon

David Simon is the founder and president of WeComply, Inc. A trial and appellate lawyer for 14 years, he has since created hundreds of computer-based training courses for both lawyers and non-lawyers. In the 1990s, Mr. Simon developed the first web-based audio and video training courses to receive continuing-education accreditation. More recently, he developed the first designed-for-mobile compliance training for iPhones, iPads and other smartphones and tablets.

Since founding WeComply, Mr. Simon has been a frequent speaker on compliance and employee-training issues and has written articles for *ACC Docket*, *Directors Monthly*, *Metropolitan Corporate Counsel*, and numerous other publications.

--ANTITRUST ESSENTIALS-- WHEN COMPETITORS COLLABORATE

A Training Course in Action

What To Take Away From Today

- Keep your competitive advantage your trade secret.
- Know what makes you profitable and keep that stuff away from your competitor—how you determine your price, your market share, your sourcing, your product line, your inventory level, your warranty or discount programs, your seasons, your cost analysis.

HERE'S WHY

The antitrust laws PROHIBIT

Conduct that

Reduces competition by

Unfair means.

Today, we will get to know a little about four U.S. anti-competitive conduct laws and why we need to know about them:

1. **The Sherman Act**
2. **The Clayton Act**
3. **The Robinson—Patman Act**
4. **The Federal Trade Commission Act**

IGNORANCE OF THE LAW IS NO DEFENSE

Over half a billion dollars in fines have been imposed in each of the last four years.

In the first two months of FY 2012 alone, the Antitrust Division of the U.S. Dept. of Justice obtained $567 million in criminal fines.

- For an individual: prison & fines can be up to 10 years in prison and $1 million per violation
  - In 2010, an average sentence was 30 months,
  - 87% of the individuals who are convicted or plead guilty actually serve time*
- For a business entity
  - Fines can exceed $100 million
  - Restrictions on future business

* According to the US DOJ website in November 2011

THE SHERMAN ACT

The Sherman Act addresses conduct that is likely to reduce or limit the ability of competitors to compete.

Section 1 prohibits any agreement, express or implied, that has the effect of unreasonably reducing competition. This includes price fixing, allocating customers/markets with competitors, and other agreements with suppliers or customers.

Section 2 of the Sherman Act prohibits a company in a dominant position from abusing its economic strength. This refers to a "monopoly" and using that position in an unfair manner that unreasonably reduces competition.

A violation of the Sherman Act is a felony.

THE CLAYTON ACT

The Clayton Act also has a focus on pricing.

It prohibits

- *discriminatory pricing*

Robinson—Patman Act

Prohibits discrimination in price between purchasers in interstate commerce of commodities of like grade and quality which are likely to result in substantial injury to competition.

THE FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission Act created an administrative agency to regulate "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."

While technically not an antitrust law, it authorizes the Federal Trade Commission to regulate conduct similar to that regulated under the Sherman, Clayton and Robinson-Patman Acts.

RELATIONSHIPS WITH COMPETITORS

These antitrust laws are there to ensure that:

Each competitor independently makes its own commercial decisions about price, output, customers, geographic areas of activity and other related matters.

In other words, competitors should not agree or have any understandings or arrangements concerning:

- price,
- output or supply,
- markets or
- customers.

An agreement can take any form — it does not have to be formal or written.

RELATIONSHIPS WITH COMPETITORS (Cont'd)

Any understanding — spoken or unspoken — or even a nudge and wink, is enough to infer an agreement or **unlawful conspiracy**.

Responding to the pressures of a competitor, or doing what you know the competitor expects of you, can be enough to suggest an agreement.

An agreement may even be inferred from conduct, speech, statements to the press, or informal discussions in a social setting.

SCENE -1: The Armadillo in the Room

The SETTING: *The Armadillo Piano Bar and Grill. 8pm on a Monday night. The first day of the ACC Conference.*

Who's THERE: *Over 50 of the closest strangers you'll ever come to know, including our stars tonight: And they are:*

- ***Eve Union,***
- ***Joe Red,***
- ***June Yellow,***
- ***Charlie Blue.***

Eve Union is a new ACC Employee.

She's attending the ACC Annual Meeting for the first time. She's working hard but having a great time. Because she's new she's fully briefed on ACC meeting protocol and antitrust guidelines.

Joe Red is a pro at these events.

He's been to at least twelve in a row and comes mainly for the parties but attends all his registered day sessions. He rarely misses an opportunity to socialize with people he'd otherwise not associate under less friendlier terms—like during the holiday season when he knows it's his company or his competitor—just one winner…that's how it is in his book. A dog-eat-dog world out there, so this is his chance to bring it all back down to earth and remember we are all just people after all.

June Yellow hates hanging out in her room.

But she's got a lot of work on her plate right now. Since she doesn't get to meet people during the sessions, she really looks forward to a chance to just socialize over a friendly mojito or two or three. She rarely remembers what she talks about later but she assumes it's all just good humor. No harm no foul.

Charlie Blue doesn't like to attend the sessions.

But sees this as his opportunity to get the inside track on the latest industry developments especially the stuff that is most revealing at happy hour.

LET US BEGIN

[EVE WALKS UP TO Joe, Charlie and June]

Eve UNION: *Hi, I'm Eve. What's up?*

Joe RED: *Not much. Do you know Charlie and June?*

Charlie BLUE: *Hi Eve. Welcome! Is this your first time?*

Eve UNION: *Yes. I am really happy to be here.*

June YELLOW: *Hi Eve. Glad to meet you.*

[JUNE, CHARLIE AND JOE Resume CONVERSATION and EVE just LISTENS]

Charlie BLUE: *Hey Joe and June, we've been having a lot of difficulty with one of our Florida Distribution Centers due to labor concerns—it's creating some major inventory inconsistencies and impacting our bottom line.*

June YELLOW: *Oh Yeah? What kind of problems? Are you thinking of a work around. We had a similar problem last year. Aren't your DC employees under the same union?*

Joe RED: *You know, I've not seen that at our company for at least ten years, not since we modified our written inventory process – even with a labor dispute, we've built in work arounds to accommodate labor shortages—not a problem anymore.*

Charlie BLUE: *No No. You're not seeing my problem. We don't have time for a change in our inventory process. We've got an urgent need now. We think we have a solution, but we can't do it alone.*

Joe RED: *Yeah? What do you need my friend?*

Charlie BLUE: *Hey guys. This is going to happen to all of us one way or another so we might as well figure out a solution now.*

Eve UNION: *Hey. Uhhhh. Hey ….. do you guys want a second round? I can go get the drinks? What do you say…..*

***June YELLOW**: Not right now Eve, it's just getting interesting. What do you mean Charlie? We're listening.*

***Charlie BLUE**: Look…we're dropping three of our seven weekly truck routes in and out of Florida and maybe you guys ought to think about doing the same.*

***Eve UNION**: Uhhh….Hey guys…what about those drinks now. And did you watch that game last night…WOW! What a game!!!*

[EVE STANDS THERE IN SHOCK -- AT A LOSS FOR WORDS]

[CHARLIE, JUNE and JOE pay NO ATTENTION TO EVE and CONTINUE TO TALK AMONGST THEMSELVES]

END of SCENE 1.

AGREE or DISAGREE

What, if anything, should Eve do?

1. Remain silent and finish her drink as if nothing had happened. While this may be problematic, it does not concern her or the ACC.

2. Excuse herself.

3. Phone competition authorities directly to report the misconduct.

ANSWERS

See www.acc.com/aboutacc/Competition-Law-Guidelines.cfm

1. ***DISAGREE.*** While ACC was not actively engaged in these discussions, inaction could be costly to the organization. The fact that illegal discussions took place at an ACC event would be troubling enough – even more so if they took place in the presence of an ACC employee who didn't respond appropriately at the time.

2. ***AGREE.*** While it may be more difficult to stop a potentially illegal conversation at a restaurant than at a formal ACC session, it is important that we adhere to ACC's antitrust guidelines at all ACC events. These guidelines strictly prohibit discussions among competitors about pricing, market allocations, marketing plans, etc. – both in conference sessions and in social gatherings.

3. ***DISAGREE.*** Eve has no obligation to incriminate the three companies. But it is important that she adhere to ACC's antitrust guidelines at all ACC events. These guidelines strictly prohibit discussions among competitors about pricing, market allocations, marketing plans, etc. – both in conference sessions and in social gatherings.

RED FLAG – Trade Associations

REMEMBER: The most serious type of anti-competitive conduct is an agreement between competitors to set the price of something they both sell.

Even an agreement to set discounts, freight charges or payment terms — any element of price — can be considered price-fixing.

Bid-rigging can also be a form of price-fixing.

Price-fixing agreements are always ("per se") illegal and, under U.S. law, almost always criminal.

RED FLAG (cont'd)

Never discuss prices, price levels, price trends or pricing policies with competitors.

It is no defense that the conduct did not lead to high prices or other anticompetitive effects.

Prices can be inferred from cost information, so do not exchange past, present or future price or cost information with competitors.

Competitor discussions on business-sensitive topics (what may influence key decisions around price, cost, discounts, customers, territories, inventories, production, future product plans, profits or margins) can be illegal under antitrust laws.

RED FLAG (cont'd)

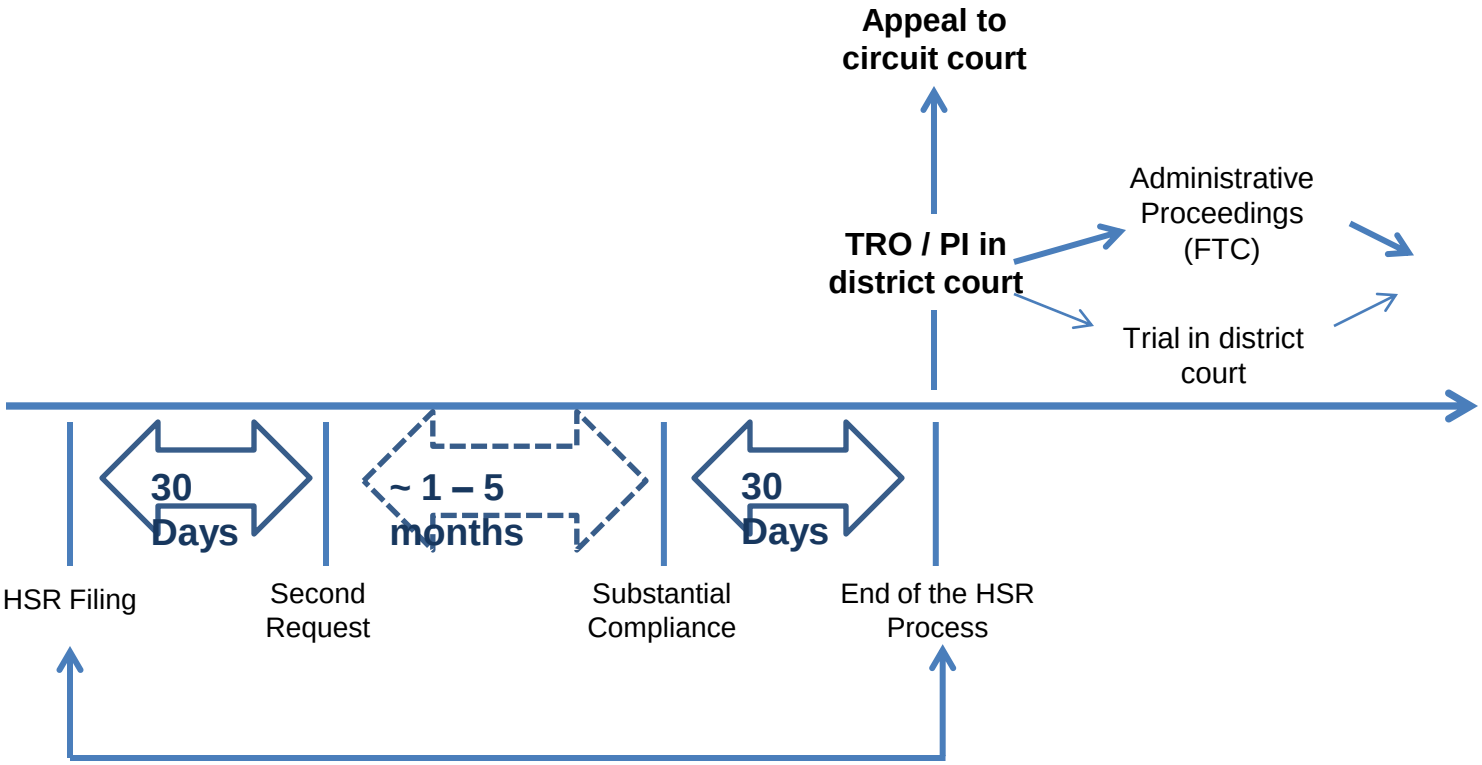
If there are situations where these matters are being discussed with competitors IN YOUR PRESENCE,

IT IS NOT ENOUGH TO MERELY REMAIN SILENT.

Antitrust Issues in Mergers & Acquisitions

- Antitrust Risk Assessment and Document Control
- Pre-Merger/Acquisition Notification (US and abroad)
  - Hart Scott Rodino Act
- Contract Drafting
- Gun Jumping and Information Exchange

Pre-Merger HSR Process



Waiting Period

* Closing prohibited before termination or expiration of the waiting period.
* Agency may terminate the waiting period at any time after filing.

What is "Gun-Jumping?"

- HSR waiting period is intended to maintain the competitive "status quo" while FTC investigates whether the proposed transaction may substantially reduce competition

- HSR Act prohibits improper pre-closing integration (known as "gun-jumping") from the time two companies agree to merge until the FTC completes its review of the transaction

- During the HSR Act waiting period, ***acquirer and target must continue to operate as two separate economic entities*** and cannot take any steps to transfer ownership of assets or control of business operations

- The companies may engage in integration planning activities and exchange certain information in order to plan post-merger integration, but appropriate precautions must be taken

Integration—What You Can Do

- Engage in essential and appropriate exchanges of information for the purpose of integration planning
  - Take precautions and follow protocols when sharing "competitively sensitive" information
- Integration ***planning*** is acceptable and encouraged. But decisions cannot be ***implemented*** until closing
- You can prepare for how the companies will be integrated on Day 1—but you should continue to operate as ***separate competitors*** and not actually integrate any decisions/operations until closing

Gun Jumping: What You Can't Do

- Until closing, both companies are independent competitors and must act accordingly
- You should avoid any actions or communications that could be seen as prematurely influencing or controlling [the other Company's] business
- Do not attempt to direct or influence [other company's] activities prior to closing
- You cannot be involved in [other company's] decisions regarding sales, solicitation of customers, marketing plans, and the like
- You cannot attend [other company's] business and customer
- meetings, and vice versa, without prior approval of
- counsel

Gun Jumping: What you Cannot Do

- Specific examples of prohibited activity include:
  - ***Do not*** attempt to control or influence business decisions
  - ***Do not*** consolidate the business or assets of the two companies.
  - ***Do not*** allocate customers
  - ***Do not*** jointly negotiate or sign agreements with customers.
  - ***Do not*** establish common price lists
  - ***Do not*** make end-of-life decisions on current products, or implement other output restrictions
  - ***Do not*** begin joint product development
  - ***Do not*** begin reselling the products of the other company
  - ***Do not*** agree with the other side to eliminate a marketing or promotional program
  - ***Do not*** establish new reporting relationships

General Rules: Information Sharing

- Until the acquisition/merger closes, target and acquirer must remain competitors and may only exchange information that is reasonably necessary for integration planning
  - Sharing of "competitively sensitive" information must be limited pre-closing
  - Typically only "Clean Team" members can participate in the sharing of competitively sensitive information

Document Control Guidance

- Every document created about the transaction may be reviewed by the FTC
- Be careful not to create unnecessary documents about the proposed combination
- In documents you do create, do not puff, brag, or exaggerate – merely state the facts and your best analysis. Avoid using words with legal connotations, such as: "dominate," "antitrust," "monopoly," and "market"
- Do not speculate, discuss, or commit to writings any matters regarding synergies, competition, or other antitrust-related aspects of the transaction, except as requested or approved by Legal
- Label any documents prepared to assist counsel as "Privileged and Confidential, Prepared at the Request of Counsel, Attorney-Client Communication," and provide a copy to legal counsel before circulating the document

RELATIONSHIPS WITH COMPETITORS – QUESTIONS

Question 1

Karen, XYZ Inc.'s chief operating officer, bumps into Allen, a former co-worker, who now works for a competitor. Allen brings up XYZ's relationships with its outside suppliers. Which of these topics may they discuss?

1. How much one supplier charges for a key ingredient in one of XYZ's products.
2. Who supplies XYZ with the key ingredient.
3. The possibility of joining together to get the same price from one supplier.

QUESTION #1 – ANSWERS

1. We disagree.

It is best to stay away from topics concerning profits, costs, conditions of sale, markets and the like. Although the supplier's price is not as dangerous a topic as XYZ's prices, the information does bear on the company's pricing because it relates to the company's profit margin.

2. We agree.

As long as the exchange is not systematic and continuous, it is unlikely to violate antitrust law. If, however, the topics discussed begin to have a more direct relationship to the prices XYZ charges and how it sets those prices, or involve potential agreements to boycott suppliers or customers or to allocate customers, markets and territories, they become very dangerous.

3. We disagree.

Price-fixing can occur among buyers as well as sellers. While legitimate joint-purchasing arrangements provide some integration of purchasing functions to achieve efficiencies and lower costs, an agreement between two competing purchasers to fix the price that each will pay a supplier for a product is not a legitimate joint-purchasing arrangement and is likely to be illegal price-fixing.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 2

Wanda is XYZ Inc.'s director of marketing. Maria, a former college classmate and now her counterpart at a competitor, calls Wanda for a lunch date. What business-related topics may Wanda and Maria discuss?

1. Anything but topics related to prices.

2. Any business-related topic, as long as neither of them even hints at any type of agreement between the two companies.

3. Personal office gossip .

QUESTION #2 – ANSWERS

1. We disagree.

Although discussions that touch on price and price-fixing are the most obvious and dangerous form of communication with a competitor, Wanda and XYZ can get in trouble if it appears that they're making even informal agreements in other areas, such as allocation of markets and customers or illegal boycotts of customers or competitors.

2. We disagree.

The mere discussion of topics related to price, bidding, boycotts or market allocation can be construed as evidence of an illegal conspiracy to restrain trade.

3. We agree.

Although saying nothing about their businesses may be the safest route, normal business gossip is not out-of-bounds. For example, they may talk about their co-workers and working conditions, but they should stay away from topics related to price, division of customers and markets, or boycotts. The mere discussion of such information can be construed as an illegal agreement.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 3

An oversupply of XYZ Inc.'s main product could cause prices to drop below production costs, which spells doom. At a meeting of producers, someone proposed that each producer find a "dancing partner" — a retailer with excess inventory — and buy back enough product to reduce the oversupply. Is this worth considering?

1. Yes, because it is intended to prevent below-cost pricing, which is prohibited by U.S. antitrust law.
2. Yes, as long as there is no written or oral contract among the producers.
3. No.

QUESTION #3 – ANSWERS

1. We disagree.

Although below-cost pricing is indeed illegal in some circumstances, an unlawful "combination" among manufacturers to stabilize or raise prices is not excused by prices dipping below production cost. An agreement between competitors to fix prices is illegal, no matter how reasonable the target prices.

2. We disagree.

In the context of antitrust laws, an unlawful "conspiracy" can exist with or without an express contract. In fact, even if no more meetings take place but several producers proceed with the buy-back, a court could conclude that a sufficient "meeting of the minds" has occurred for a conspiracy.

3. We agree.

Under the Sherman Act, an agreement for the purpose of "raising, depressing, fixing, pegging, or stabilizing the price" of goods in interstate or foreign commerce is illegal per se. A court could determine that the producers formed an illegal agreement simply by discussing price stabilization and despite the fact that the prices they are aiming for are perfectly reasonable.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 4

A car dealer learned that a local paper planned to publish an article explaining how to use wholesale price information to shop for cars. The dealer circulated a petition to other dealers threatening to withdraw their advertising if the paper published the article. Could this be an antitrust violation?

1. Yes, because it's a boycott.
2. Maybe, if it would hurt competition.
3. No, because the dealers don't have to sign the petition.

QUESTION #4 – ANSWERS

1. We disagree.

The petition proposes a boycott, but not all boycotts violate antitrust laws.

2. We agree.

The petition proposes a boycott, but not all boycotts violate antitrust laws. Whether this proposed boycott violates antitrust laws depends on its effect on competition.

3. We disagree.

There is more to consider here.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 5

Edna, an account manager at XYZ Inc., was approached by two competitors at a tradeshow. They complained that one of their suppliers, DEF Company, was engaging in unlawful tying, and they asked XYZ to join them in refusing to buy from DEF in the future. If Edna agreed, would this be an antitrust violation?

1. No, because DEF deserved to be cut off.
2. Probably not, because DEF is a supplier of XYZ and not a competitor.
3. Yes, it would be an illegal boycott.

QUESTION #5 – ANSWERS

1. We disagree.

This is not an excuse if XYZ's conduct would violate antitrust laws.

2. We disagree.

Antitrust problems can arise from dealings between a supplier and its customers.

3. We agree.

A company — acting alone — is free to choose its suppliers, but when done in concert with competitors, it raises antitrust issues.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 6

Ted, XYZ Inc.'s sales manager, is concerned that a retailer is offering such low prices that XYZ's products are getting a bad name. What should Ted do?

1. Distribute a minimum-resale-price policy to all retail customers that establishes XYZ's policy of not selling to discounters.
2. Nothing. Any attempt to affect pricing is too risky.
3. Discuss the issue with the retailer.

QUESTION #6 – ANSWERS

1. We agree.

Once XYZ has established such a policy, retailers can consider it when deciding whether to discount. Any other course of action by Ted is fraught with danger.

2. We disagree.

Although trying to coerce customers to change their prices is risky and may be deemed a violation of the antitrust laws, Ted has other options.

3. We disagree.

Discussing pricing with the retailer launches XYZ onto a slippery slope.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 7

XYZ Inc. sells its products directly and through retail outlets. A chain of retailers that it supplies, DEF Co., suggests an agreement by which it will sell XYZ's products only in the southern half of the state, and XYZ will sell them only in the northern half. Is there an antitrust problem with this proposal?

1. No, since the proposal comes from a customer.
2. Yes, especially since DEF is both a customer and competitor.
3. No, because the agreement does not involve pricing.

QUESTION #7 – ANSWERS

1. We disagree.

This is not the critical issue here.

2. We agree.

Agreements between suppliers and customers about territorial restrictions are not necessarily improper; they are judged on the effect of the agreements on the market. Because DEF is both a customer and a competitor of XYZ, any discussion about division of customers or territories is risky.

3. We disagree.

When dealing with customers, pricing is the most obvious issue but not the only one. Other questionable agreements include division of territories and customers, exclusive dealing, tying and reciprocal buying.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 8

Sharon, an XYZ Inc. executive, plans to propose to the company's retailers that they package two of its popular products with an unpopular product that few retailers sell. What is Sharon's best approach to avoid antitrust problems?

1. Drop the plan
2. Make all three products available to retailers separately at the same proportionate price.
3. Make all three products available to retailers separately

QUESTION #8 – ANSWERS

1. We disagree.

There is nothing wrong with packaging products together, as long as there is no coercion by the supplier.

2. We disagree.

XYZ need not price the products the same in the package as when sold individually. There is a better answer.

3. We agree.

This agreement could be considered an illegal tying arrangement if the customer was coerced into accepting goods it would not otherwise buy. By making the desirable products available independently, XYZ eliminates the likelihood of coercion. Note that XYZ does not have to price the products the same in the package as when sold individually.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 9

Leslie, an XYZ Inc. manager, meets with an industry-wide labor-relations working group. One of the members suggests that everyone should share lists of employee salaries. Under what conditions would this practice most likely be ***exempt*** *from antitrust enforcement?*

1. In response to industry-wide labor negotiations.
2. In response to a genuine labor conflict at one of the group member's businesses.
3. Under no conditions.

QUESTION #9 – ANSWERS

1. We agree.

Most activities relating to labor-management relations are exempt from antitrust enforcement, as long as they are genuinely related to the legitimate, common goals of the companies involved. Shared salary information is obviously germane to negotiations between a union and the members of the labor-management group as a whole. However, the exemption would disappear if the excuse for providing this data was a sham intended to cover up collusion.

2. We disagree.

The activities of a labor-relations working group are exempt, as long as they are legitimately connected to the joint interests of the group. However, a dispute between an individual member and its employees is not enough to excuse the sharing of sensitive information across the industry.

3. We disagree.

Information related to industry-wide labor negotiations may sometimes be shared.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 10

XYZ Inc. has a patented product that it intends to license to other manufacturers. XYZ plans to call a meeting of potential licensees to discuss the division of territories and customers. Would this meeting violate antitrust law?

1. No, because it involves intellectual property — the patent.
2. Maybe, depending on what is discussed at the meeting.
3. Yes.

QUESTION #10 – ANSWERS

1. We disagree.

The fact that intellectual property — a patent — is involved does not insulate XYZ from antitrust law.

2. We disagree.

A licensing scheme that is the product of an agreement among the licensees is highly problematic. There's a better answer.

3. We agree.

The fact that intellectual property — a patent — is involved does not insulate XYZ from antitrust law. A licensing scheme that is the product of an agreement among the licensees is highly problematic.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 11

XYZ Inc. has several large insurance companies as customers. The insurers sent XYZ a joint demand that XYZ provide them a "group discount" of 20%. They added that if XYZ didn't agree to their demand, they would all take their business elsewhere. Can they get away with this?

1. No, because the insurers are not engaging in insurance-related activities.

2. Yes, because insurance companies are exempt from antitrust laws.

3. No, because the insurance industry gets no special antitrust treatment.

QUESTION #11 – ANSWERS

1. We agree.

Federal law exempts insurance-company activities from antitrust enforcement if they are insurance-related and specifically exempted by state law. However, these threats are coercive, do not relate to the business of providing insurance, and are highly unlikely to be specifically exempted by state law.

2. We disagree.

Most activities of insurance companies are exempt from antitrust laws, but not all.

3. We disagree.

Federal law exempts insurance-company activities from antitrust enforcement if the activities are insurance-related and specifically exempted by state law.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 12

In which of the following situations do antitrust dangers lurk?

1. Company A suggests to a competitor, Company B, that B should sell only to large distributors while A sells only to small ones.

2. A trade association decides that its members should standardize credit and payment terms.

3. Company A begins pricing its chief product at its cost of producing it. Company B, a competitor, responds by cutting the price of its product to *below* cost.

4. All of the above.

QUESTION #12 – ANSWERS

1. *We disagree.*

2. *We disagree.*

3. *We disagree.*

4. *We agree.*

Any of these situations could raise serious antitrust issues in certain circumstances. Consult the Legal Department if you have questions about these or other issues raised in this program.

RELATIONSHIPS WITH COMPETITORS – QUESTIONS (Cont'd)

Question 13

You are new to the company and realize that your predecessor was regularly involved in price exchanges during meetings and email exchanges. Which of the following presents your best course of action?

1. Continue your predecessor's activities if it would be helpful for the company.
2. Stop immediately
3. Phone the authorities directly to report the conduct.

QUESTION #13 – ANSWERS

1. We disagree.

You must put an immediate end to any practice that amounts to price-fixing or any other cartel-like behavior.

2. We agree.

You must put an immediate end to any practice that amounts to price-fixing or any other cartel-like behavior.

3. We disagree.

There is no obligation to incriminate your company or colleague. The first things you should do are to put an immediate end to any practice that amounts to price-fixing or any other cartel-like behavior.

Relationship with Competitors (cont'd)

Question 15

You work for a wholesale supplier and one of your customers, a retailer, informs you that it can get a 15% discount from another supplier. Accordingly, your customer now wants out of its franchise agreement. You know your current prices are competitive with the 15% discount. What should you do?

1. Call the competitor supplier, who verifies the 15% discount.

2. Determined not to let competitor steal the retailer, cut your price to the retailer by 20%.

Question #15-Answers

1. *We disagree.*

You as a supplier should not be calling your competitor to check on prices. You need to find another **reasonable** way to check on prices.

2. *We disagree.*

If after checking, you as the supplier can verify the 15% discount, you may cut its price to retailer by 15%. Supplier has a "meeting competition" defense. But supplier has no easy defense for cutting the price 20%.

[Company Name]

FOR INTERNAL USE ONLY

ANTITRUST "RULES OF THE ROAD" FOR TRADE GROUP MEETINGS WITH COMPETITORS

Preface

Because the antitrust laws are primarily concerned with multi-firm activity ("contracts, combinations and conspiracies in restraint of trade"), especially between and among competitors, great care should be taken not only to avoid unlawful activity in dealings with competitors, but also to avoid even the *appearance* of impropriety in such situations.

"DON'T'S"

- **Don't** discuss:
  - your company's current or future prices, discount policies, costs (this discussion can be used to infer an agreement)
  - salaries of any personnel we employ
  - marketing plans or strategic planning decisions
  - intentions or opinions with regard to vendors or customers
  - any of our contracts with its vendors or customers
  - any bids submitted or prices charged by your company to actual or potential customers.

- **Don't** take any of your company's agreements with vendors or customers with you to meetings.

- **Don't** develop a price list or fee schedule with any competitor or share with any competitor.

- **Don't** develop a joint plan or strategy for dealing with vendors or customers

- Topics discussed at meetings need to be essential to the legitimate purposes of the meeting. Before sharing information at a meeting, ask yourself, "Is this essential for us to share this information in order to carry out the lawful purposes of the meeting?" If the answer is no, or if you are in doubt, **don't** talk about it.

"DO'S"

- **Do** have a written agenda for meetings, and do have an antitrust attorney review the agenda before it is distributed to the participants.
- **Do** stick to the agenda.
- **Do** keep detailed minutes of meetings and have an antitrust attorney review those minutes before distributing. If any other documents are created during or as a result of these meetings, have an attorney review them before distributing.
- If you plan to distribute documents or show overheads, etc. during meetings, **do** have attorney review them first.

Appropriate discussion items:

* government relations / lobbying efforts
* general discussions of economic conditions
* marketing approaches / techniques
* customer trends

Membership criteria: be cautious – do not relate to pricing or other competitive activity – employ objective criteria

The Attorney-Client Privilege and Corporate Training Sessions: Proactive Steps to Protect the Privilege

Adam C. Hilton*

To simultaneously distribute information to numerous employees, many companies utilize corporate training sessions. Training sessions cover a variety of topics and are conducted by e-learning, webinar, conference call and live face-to-face sessions. For many subjects, it may be important for the information to remain confidential. If these training sessions cover legal topics, are the communications protected by the attorney-client privilege? If the attorney-client privilege does apply to advice given during training sessions, what can be done to protect the privilege?

Few court decisions have involved the attorney-client privilege and corporate training sessions. In these few decisions, courts handle training sessions (and similar communications) in the same manner as other corporate communications.[1] Due to the large number of employees that may attend the training session the evaluation of the attorney-client privilege can be complicated. However, the evaluation still involves the general principles that govern the privilege.

Jurisdiction is important when discussing attorney-client privilege. The state law that provides the substantive law of the decision also governs the attorney-client privilege.[2] Attorney-client privilege varies greatly outside the United States. Attorney-client privilege does not exist in some European countries or may only exist for communications with external counsel.[3]

The attorney-client privilege is a relatively straight-forward concept. The client holds the privilege and the communications are confidential so long as 1) the holder of the privilege is actually a client or was seeking to become a client, 2) the person the holder communicated with is a member of the bar of a court and 3) the communication was for the purpose of securing legal advice.[4] The privilege shields certain communications between an attorney and client from disclosure, allowing for an open dialogue without the fear that what the client tells the attorney will be compromised. There are instances where the privilege does not apply and the privilege can be waived. Absent one of these exceptions, all client communications with their attorney during actual counsel are held confidentially.

This straight-forward relationship becomes much more complicated when the attorney is working in-house for an entity, such as a corporation. In this situation, the corporation or other legal entity (not individual employees) is the client. Therefore, the corporation holds the privilege, decides what should be protected, and when to waive the privilege[5].

In *Upjohn Co. v. United States,* the United States Supreme Court held that the attorney-client privilege could protect communications between any employees and counsel so long as certain criteria were met.[6] According to *Upjohn*, communications are privileged when (1) they are made at the direction of corporate superiors, (2) they concern matters within the scope of the employee's duties, (3) the information was not available from upper-level management and (4) the employees are aware that the communications involve legal advice.[7] Although some jurisdictions still follow the control group test, *Upjohn* is the majority rule and will be the focus of this discussion.

Corporate training sessions, like all other communications, can be privileged so long as the *Upjohn* requirements are met. The first element of the test ensures that the intent of the privilege remains. Without it, "every memorandum and conversation between a corporate employee and corporate counsel could be confidential, which would expand the privilege far beyond its bounds and unnecessarily frustrate the efforts of others to discover corporate activity."[8] In training scenarios, this element is easily met because corporate superiors are always aware of and promote the sessions. Usually corporate trainings programs are established at the direction and are under the supervision of senior corporate leadership.

When holding a corporate training session involving confidential information, the remaining elements of the *Upjohn* test raise two major concerns: (1) the type of information discussed (part three and four of the test) and (2) the people who are invited to the session (part two of the test). Either of these factors can weaken or break the shield that the attorney-client privilege provides.

The first major concern involves the type of information to be covered in the session. Only privileged communications can be protected. In an ordinary attorney and client relationship, most (if not all) communications during scheduled meetings are protected because the communications involve legal advice. Determining whether a communication is privileged becomes a more difficult task in the corporate setting. Again, the communication must involve legal advice, but this determination can become very hazy. In-house attorneys often wear several different hats, so the information they provide is scrutinized much more than advice from external counsel.[9] Only legal advice falls under the protected category, so any communications that are deemed to be business advice will not be privileged. When communications contain predominately business advice, the privilege may not apply.[10] Understanding and separating these roles should be of utmost importance to the attorney and the corporation when structuring the content of training programs.

Also, the underlying facts of the privileged communication are not necessarily protected.[11] Communicating a factual situation to an attorney does not protect the facts, instead only the communication is protected. Facts that can be obtained from a non-privileged source are not protected solely because they are communicated to an attorney.[12]

The second major concern involves the employees attending the session. Under the second prong of the *Upjohn* test, the communications must be related to the scope of the employee's duties. Therefore, the information given at the session must be information that directly relates to the duties and responsibilities of every attendee. If information is distributed to employees who have no substantive need, the privilege is lost.[13] Providing information broadly to every employee transforms that information from legal advice to business advice and general business advice is not protected.[14] As an example, all employees may need training on anti-competition issues arising from contact with competitors. However, it is unlikely that all employees need training on handling immigration issues.

So, a belief that simply having an attorney present at a training session creates an attorney-client privilege is false.[15] Similarly, the belief that any communication with an in-house attorney is privileged is also false. Merely involving an attorney in the communication does not cause the communication to be privileged.[16] Also, attaching a privilege disclaimer to information does not by itself create the privilege. Having an attorney give a presentation and state that the information is privileged does not create a privilege unless the communication passes the *Upjohn* test.

Even if all the precautions are taken and the communication is privileged, the attorney-client privilege can be lost. Remember, for a communication to be privileged it must be confidential. So, once a communication is no longer confidential, the privilege is "waived". Waiver must be at the forefront of the attorney's mind in any situation involving the attorney-client privilege. Once the privilege is waived it is lost and cannot be regained.

In the corporate setting, the right of waiver belongs to the corporation.[17] Since the entity acts through individuals, the responsibility for waiver is given to certain individuals. Employees who are "empowered to act on behalf of the corporation" are also given the right to waive the privilege.[18] Although this empowerment may be ambiguous, this generally includes officers and directors.[19] The general rule is that a lower-level employee can not formally waive the privilege. However, any disclosure of confidential information will certainly weaken the privilege. At least one court has held that if lower-level employee communications can create the privilege these employees also have the ability to waive the privilege.[20] When dealing with numerous individuals, the likelihood of waiver is dramatically higher. So, the importance of waiver should be discussed generally with employees and should be stressed during training sessions.

The attorney-client privilege can be very complicated in the in-house arena. Adding to this complication, training sessions involve confidential information and numerous employees. By keeping the elements of the privilege in mind and taking a few precautionary steps, an in-house attorney can ensure that confidential information is privileged and remains so.

The following proactive steps will help an in-house attorney ensure that training session communications are privileged.

- **Remember the basic principles of the attorney-client privilege.**

The communication must be made by an attorney acting as such to a client in confidence.[21] The attorney must be acting as an attorney, not in a business capacity and the communication must contain legal advice. When an attorney presents the training session, it is not automatically privileged!

- **Any communication that does not contain legal advice (including business advice) is not protected.**

It is crucial that legal advice and business advice are separate. Training sessions should not intertwine both types of advice. If there is a need for sessions involving business and legal advice on the same subject, separate the two topics. If the attorney presents the business advice, it is not privileged!

- **Do not forget who your client is.**

As an in-house counsel, you work for the company and the company is your client. Any matter discussed with an employee that does not relate to the company is not privileged because the employee is not your client. This is a very dangerous area because many (if not most) employees do not understand the relationship. If an employee begins to discuss a personal matter that might harm the company, they must be advised about the relationship. It is best to always stop the employee and suggest they discuss the matter with an attorney that does not have a relationship with the company.

- **Educate the company's employees about the attorney-client privilege.**

One of the most important corporate training sessions a company can give is the one that explains the attorney-client privilege to the employees. If the employees understand the privilege, the privilege will be much stronger. Employees can inadvertently waive or harm the privilege without knowing it. By explaining how the relationship works and how to protect privileged communications, employees and ultimately the company will benefit greatly.

- **Only invite employees whose duties and responsibilities involve the topic being covered.**

Open training sessions are likely to be unprivileged communications. In order to be privileged, the information provided must relate to the duties of each attendee. Conducting training sessions that allow open attendance can lead to court interpretation of duties and may lead to loss of privilege. The best way to guard against this is to be selective about who is invited. It is great to have open training sessions that include every employee. These sessions build relationships and harbor feelings of belonging. Just be sure these "open sessions" do not involve any legal matters that need privilege protection.

- **Educate employees about the danger of waiver.**

Waiver is detrimental to the privilege. So, be sure that those who can waive the privilege understand what that responsibility entails. Also, inform lower-level employees about waiver because even their disclosure of confidential information may cause the privilege to be waived.

- **Conduct your training sessions in areas that are secluded from the public and other employees.**

Most of this discussion has revolved around the attendees and topics of the training sessions, but the location of the session can be equally important. For instance, you have arranged for an important training session that will cover an important legal topic. You have decided what to discuss and who to include in order to protect the privilege. It would be a shame to waive the privilege by conducting the session in an area that others may hear or learn about the discussion. The training session should be guarded much like the information that is being discussed.

One unreported case, *Santers v. Teachers Ins & Annuity*, 2008 WL 821060, (E.D. Pa) appears to be the roadmap for maintaining the attorney client privilege in corporate training sessions. The Court upheld the privilege after a "careful and meticulous *in camera* review" stating that the defendant's

> in-house attorneys prepared the materials for the purposes of answering their clients' questions concerning how statutes and court decisions in the areas of bad faith, insurance litigation, and privacy affect the way the Standard handles claims. Standard's attorneys then presented these materials to Standard claims representatives during training sessions in a question and answer format. The contents of the materials, generally speaking, included explanations of basic legal concepts and direction concerning where claims representatives fit into the legal process when Standard is sued. The materials are thus communications from an attorney to a client that reflect communications from the client to the attorney for the purpose of securing an opinion of law.

In *Santers*, the court noted that the employees receive the training "were authorized to act on Standard's behalf because their primary responsibilities were to manage claims . . . . " For the purposes of Pennsylvania privilege law, the employees receiving the training were the clients.

While case law is limited, in the United States attorney client privilege can attach to corporate training sessions.

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[1] *See United States v. The Health Alliance of Greater Cincinnati*, 2009 WL 5033940 (S.D. Ohio) (allowing privilege protection to meeting minutes that "reflect[ed] communication with counsel"); *Southeastern Mechanical Servs. v. Brody*, 2009 WL 2602449 (M.D. Fla.) (allowing privilege protection to documents relating to training presentations); *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 WL 821060 (E.D. Pa.) (allowing privilege protection to documents relating to training presentations).

[2] *See Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 240 (D. Md. 2005).

[3] *See* Lisa Savitt and Felicia Nowels, *Attorney-Client Privilege For In-House Counsel Is Not Absolute In Foreign Jurisdictions*, THE METROPOLITAN CORPORATE COUNSEL, October 2007, at 18.

[4] *United States. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950).

[5] *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 348 (1986); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am*., 119 F.3d 210, 215 (2d Cir. 1997).
[6] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
[7] *Id.*
[8] *Indep. Petrochemical Corp. v. Aetna Cas. & Sur.*, 654 F.Supp. 1334, 1365 (D.D.C. 1986).
[9] Stephen M. Forte, *What the Attorney-Client Privilege Really Means*, TRUST THE LEADERS, Fall 2003.
[10] *Id.*; *De Espana v. Am. Bureau of Shipping*, 2005 WL 3455782 at *2 (S.D.N.Y. 2005)
[11] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Williams v. Sprint/United Mgmt. Co.*, 2006 WL 1867478 at *5 (D. Kan. 2006).
[12] Forte, *supra* note 8.
[13] *United Investors Life Ins. Co. v. Nationwide Life Ins. Co.*, 233 F.R.D. 483 (N.D.Miss. 2006).
[14] *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 514 (S.D.Cal. 2003).
[15] Christopher S. Ruhland, *3 Myths Of In-House Attorney-Client Privilege*, LAW360, May 3, 2010.
[16] *Id.; Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F.Supp. 491, 511 (D.N.H. 1996)
("documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made "primarily for legal advice.").
[17] *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am*., 119 F.3d at 215.
[18] *Commodity Futures Trading Com'n,* 471 U.S. at 348.
[19] *Id.*
[20] *See Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693 (E.D. Va. 1987).
[21] *See Upjohn Co.*, 449 U.S. at 383.

