# Promoting The Language Of Fair Competition

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The antitrust laws are designed to promote vigorous but fair competition. It often is relatively easy to identify whether competition is vigorous in any particular market. Experts can look at price series, bids, production levels and transaction-level evidence of competition for key customers. If the conduct at issue does not fall squarely within some clearly designated category of either per se lawful or unlawful conduct, however, distinguishing between what is fair and unfair competition is a much more difficult task. Inevitably, the government or trier of fact will examine the intent of those implicated in the alleged wrongdoing by focusing on the words they used when describing their own conduct rather than on the justifications later provided by their counsel. In a close case, therefore, the language of the participants in the alleged wrongdoing will play an important, and sometimes dispositive, role in the outcome.

In its prosecution of Microsoft, alleging that the company had unlawfully attempted to use its monopoly in computer operating systems to squelch competition in the Internet browser market, the U.S. government made extensive use of colorful memos and emails authored by Bill Gates to show Microsoft's intent to monopolize. Among other things, Gates had described Microsoft's primary competitor in the browser market as an "adversary," characterized the competitor's threat as an effort to "commoditize" the operating system market, cajoled computer manufacturers not to "cooperate" with its competitor, and discussed a "direct attack" on the competitor's revenue base. Although Microsoft's counsel attempted at trial to explain the company's conduct as vigorous competition, reading the district court's findings of fact, it is hard to avoid the conclusion that the Court's ultimate finding of liability was strongly influenced by the words used by Mr. Gates to describe his company's competitive plans and goals.

As the Microsoft case illustrates, the language used by those implicated in wrongdoing may play a crucial role in determining whether conduct is deemed to violate the antitrust laws - at least in close cases. With the increased attention of the Federal Rules of Civil Procedure and litigants on the discovery of electronic data, inside counsel can reasonably expect communications to surface that might suggest the corporation acted with an anti-competitive motive. It is therefore more important than ever for counsel to stress in compliance and sales training seminars the need for employees to express themselves in the language of vigorous but fair competition and to refrain from communicating at all with competitors about prices, customers, business plans or markets.

In its primer entitled "*Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What to Look For*," the Department of Justice's Antitrust Division identifies the types of suspicious statements and behavior that have triggered successful criminal antitrust prosecutions under Section 1 of the Sherman Act. They include comments by salespersons referring to industry-wide price schedules, indicating advance (non-public) knowledge of competitors' pricing, suggesting that a particular customer or contract "belongs" to a supplier, or characterizing a bid as a "courtesy" or as "complimentary." As the Microsoft and other successful monopolization cases brought under Section 2 of the Sherman Act and Section 7 of the Clayton Act demonstrate, regulators and litigants looking to make a case against a company for abusing its market power will search for statements by the company's employees suggesting (1) there was no business rationale for the company's conduct other than raising rivals' costs or driving competitors out of business, (2) a desire to reduce price competition, raise prices or lessen competitors' output in the relevant market, or (3) a plan to compete with rivals on some basis other than the quality or price of the product or service offered.

Teaching company employees to avoid this sort of language when describing their business plans and activities is not easy. First, inside counsel must avoid inhibiting the company's competitiveness by inadvertently sending employees the message that it would be better not to compete vigorously for customers' business or market share in order to eliminate antitrust risk altogether. Courts have made clear that there is nothing unlawful about a desire to "beat the competition" or to "become the market's leading supplier." Second, many employees simply are not educated about the adverse consequences of expressing their desire to compete in an overly aggressive manner. They need to be told that an injudicious choice of words when describing a competitor or a competitor's product to a customer can be actionable and that no communication with a competitor is likely to be in the company's best interest, no matter its content or whether the communication is documented. Other employees will not understand that their words can be twisted and given meanings that were not intended and, when juxtaposed with events in the marketplace, be read as anticompetitive in nature. Educating employees about the antitrust laws and sensitizing them to the importance language can play in antitrust cases, accordingly, are key to an effective compliance program.

Having employees attend one session of antitrust training is unlikely to change the behavior of everyone in the company in a way that will substantially reduce any antitrust exposure a company faces. Inside counsel thus must find ways to periodically audit employee's internal and external communications about competitors and the marketplace more generally to insure that anticompetitive language does not creep back into employees' vernaculars after antitrust training is completed. In our experience, there is no better tool for teaching lessons in language than actual communications generated by the company that either led to problems for the company or, in counsel's judgment, put the company at risk of a claim of unfair competition. Actual communications from high-profile cases can also be useful in training company employees on what not to say or how to best articulate their motives and plans. Counsel should use these communications to highlight the need for continued vigilance and care to insure that employees use language that reflects the company's desire to compete in a lawful manner.

Finally, counsel should be advised of and included in company discussions about how to respond to competitive threats facing the business, whether they are potential joint ventures, new competitors making inroads to the company's customers, or new products on the market, so that the company's competitive response to such challenges is vigorous but fair. Bringing counsel in at the ground floor to evaluate the antitrust risks associated with a business strategy and to help shape and control the company's message will, in the long run, help the company stay out of trouble. It should also save counsel from the types of surprises that arise when documents with harmful language are only discovered in a later internal investigation or litigation and counsel is left to explain why the document does not really mean what it appears to say.

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