

## **ANTITRUST ISSUES**

This is an overview of certain issues related to the liability of organizations such as the FICPA for violation of the antitrust laws. It is clear that actions of professional organizations could violate the federal antitrust laws and that such organizations can be held liable for violations committed by their members.

The liability of professional organizations was clearly established in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, L.Ed. 2d 300, 102 S.Ct. 1935 (1982). The Hydrolevel case stands mainly for the proposition that an organization, whether nonprofit or for profit, is liable for the acts of its agents performed with the apparent authority of its principals; it is not necessary that the organization ratify the acts of its agents nor that it derive a benefit from those acts to incur liability. Additionally, treble damages may be assessed for a violation of the antitrust laws as a way to deter prospective violations, even in the absence of a history of past wrongdoing.

Perhaps the main lesson to be derived from Hydrolevel is that an organization such as the FICPA must keep strict control over the anticompetitive activities of its representatives to prevent them from misusing their positions, whether for their own, their employer's, the organization's, or anyone else's benefit. The more influential the organization, the more capable of affecting competitiveness in its field, particularly if it is a standard-setting organization, the greater should its concern be.

Professional organizations have also been found to be in violation for setting minimum fees. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the plaintiffs filed suit after unsuccessfully trying to find a lawyer who would examine their title for less than the fee prescribed in the minimum-fee schedule published by the Fairfax County Bar Association. Speaking for the Court, Chief Justice Burger held that the schedule as well as its enforcement mechanisms constituted price fixing since the schedule prescribed a price floor. Id. at 781-83.

Based on a review of current case laws and commentary, the following are practices that should be avoided by FICPA in order to avoid even the appearance of price-fixing.

1. The FICPA must not publish a suggested price list or minimum fee schedule.
2. There should be no agreement by members of the FICPA formal or informal, to adhere to any price information published by the FICPA as a result of any surveys.
3. The FICPA must not privately publish a historical list of prices. All such information must be made available to the public through reasonable methods.

4. The FICPA must not publish a price list which includes amounts charged to specific clients.
5. The FICPA must not recommend or discuss percentage increases or decreases in price.
6. The FICPA should not encourage firms to make agreements to refrain from giving discounts, etc.
7. The FICPA should not recommend limitations on credit terms or other terms of sale.
8. There should be no discussions at FICPA meetings on current or future prices.
9. There should be no agreements within the FICPA on what rates will be paid for an expense item which is a significant component of costs. For example, this would include the salaries of staff accountants.
10. The results of any official fee or price survey should not be discussed at meetings.

The following steps should be taken by FICPA in order to avoid involvement in price-fixing litigation.

1. FICPA staff, officers, directors, and members periodically be advised by legal counsel on the antitrust prohibitions against price-fixing.
2. Participation in surveys should be voluntary.
3. Meeting announcements, agendas, minutes or reports which contain references to prices or price discussions should be reviewed in advance by counsel.
4. When in doubt of any activity or policy relating to fees, the advice of counsel should be sought.

Gathering price or fee information is not illegal if appropriate guidelines are strictly followed in their administration. The FICPA, however, can never be absolutely sure that its published information will not be misused. Participation in any price or fee fixing program should be grounds for immediate expulsion from the FICPA.