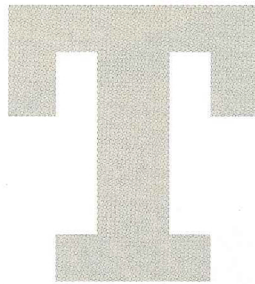


# Opinion

BY RICHARD P. MILLS, MD, MPH

## Antitrust Litigation: Could It Happen to You?



his month, I'm going to be like your mother, warning of hidden dangers: "Don't play so close to the street." "Don't take candy from strangers." In these litigious times, there are real and present dangers from anticompetitive behavior.

If the threat of treble damages doesn't get your attention,

then the cost in dollars, time and angst during a prolonged defense should. The worst news about inadvertent anticompetitive behavior among professionals is that naiveté is no excuse in court. The best news is that it can be avoided, with a modicum of awareness and vigilance.<sup>1</sup>

Where are the traps laid for the unwary? Let's look at some examples. Ophthalmologist Dr. X testifies in the legislature that he has never seen any harm done by optometrists treating glaucoma. Several colleagues are chatting about the sorry state of affairs, one of them suggests that Dr. X doesn't deserve any more referrals, and another agrees to contact Dr. X to pressure him to back down. Simple enough, but very risky. It's even inappropriate to suggest that Dr. X is unethical, since the Academy's code of ethics does not prohibit members from voicing their opinion to their government.

Here's another. The local academic eye department has partnered with a local optometric school to build and operate a surgicenter. It's a bad idea to call up the chairman and suggest that the institution is likely to lose the support of the ophthalmic community if it continues with the partnership.

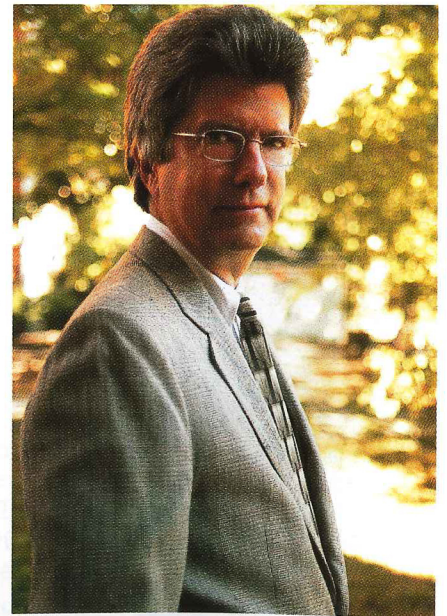
What about the local VA Hospital that is considering awarding "limited" surgical privileges to the staff optometrists? Is it all right for the volunteer ophthalmologists to refuse to provide services unless the facility limits performance of eye surgery to physicians? Since it's the government, doesn't the Noerr-Pennington Doctrine protect such a boycott? Unfortunately not. The protections of the Doctrine apply to lobbying legislative, regulatory, policy-making and judicial actions of government, but it doesn't protect anticompetitive activity just because the target is the government. But you can write letters to your elected representatives, either personally or as a group, about pending legislation such as the Veterans Eye Treatment Safety (VETS) Act, lobby your state medical board, and contribute generously to the Surgical Scope Fund.

There are plenty of gray areas in this field. For example, if you serve on a hospital committee that is considering whether to admit optometrists to the medical staff, it might be wise to consult the hospital's attorney (or your own) as to the extent that you should be involved in the process. The circumstances of the case are critical in determining the

answer. The risk is that, even though you voice your own opinion, it might be argued that you are really speaking as ophthalmology's representative, in collusion with your colleagues. The Academy's State Governmental Affairs office has developed a white paper on the subject "Considerations in evaluating whether optometrists should be granted hospital staff privileges" that is limited to factual material.

I suppose that I should finish with the disclaimer that this column doesn't constitute legal advice. Just a good, wholesome, motherly warning.

<sup>1</sup> Go to [www.aao.org/member](http://www.aao.org/member), "Policy Statements" and "Guidelines for the Avoidance of Inadvertent Anti-Competitive Conduct."



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