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Assessing the Risks of Competitive Intelligence Activities Under the Antitrust Laws

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Assessing The Risks of Competitive Intelligence Activities Under The Antitrust Laws

*Anthony J. Dennis**

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“[P]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices.” Adam Smith, *The Wealth of Nations*¹

“Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . , is declared to be illegal.” Sherman Antitrust Act, Section 1²

I. INTRODUCTION

Competitive intelligence (C.I.) gathering is an increasingly common activity in the business world.³ Leonard Fuld, a noted business author and corporate consultant, defined C.I. as “highly specific and timely information about a corporation.”⁴ Mr. Fuld’s comments regarding C.I. underscore the need for corporations to make continuous efforts to keep their C.I. data current:

Information that is out-of-date or too general is not competitor intelligence. Instead, it represents history and background data. Rapidly changing and detailed information on your competitor is a highly perishable commodity. Much like a container of milk, it has a short shelf-life. Once the information is allowed to sit around and not be used, its value declines rapidly.⁵

Some corporate managers would go so far as to consider C.I. a necessity, without which no company could long survive in today’s business world.⁶ With trade barriers falling worldwide, the business arena, at home and abroad, is increasingly competitive. For example, one’s competitors in the U.S.

1. ADAM SMITH, *THE WEALTH OF NATIONS* 144 (Edwin Cannan ed., 1976) (1776).

2. 15 U.S.C. § 1 (1988).

3. The competitor intelligence community has matured rapidly in recent years, forging its own professional identity in the business world and forming its own trade association, the Society of Competitive Intelligence Professionals (SCIP), in 1986. SCIP, *SOCIETY OF COMPETITIVE INTELLIGENCE PROFESSIONALS MEMBERSHIP BROCHURE*.

4. LEONARD M. FULD, *COMPETITOR INTELLIGENCE: HOW TO GET IT; HOW TO USE IT* 9 (1985) [hereinafter *COMPETITOR INTELLIGENCE*].

5. *Id.*

6. LEONARD M. FULD, *MONITORING THE COMPETITION: FIND OUT WHAT’S REALLY GOING ON OVER THERE* 1-3 (1988) [hereinafter *MONITORING THE COMPETITION*].

marketplace often include companies incorporated not just in other states but in other nations. American firms must rise to the challenge of this new worldwide economic contest by outperforming, or at the bare minimum matching, their foreign counterparts in service, price, quality, and a host of other variables that matter to customers. To accomplish this objective, U.S. businesses must gather meaningful data on the attributes of their competitors' services and products. Meaningful data might include a competitor's prices, means of manufacture, sales and delivery, operating costs, construction costs, payroll, salary structure, use of information technology and other automated processes, organizational structure, product or service attributes, repair and maintenance record, strategic plans for the future, and more.⁷ These and other items of information aid a company in competing with its rivals.

A. Competitive Intelligence and Its Variants

Competitive intelligence has several off-shoots and variations. Benchmarking, also known as "best practices," is a close relative of C.I. and involves "evaluating the products, services, and work processes of organizations that are recognized as representing best practices for the purpose of organizational improvement."⁸ The company or companies that are the subject of a benchmarking study may or may not include direct competitors of the company conducting the survey.⁹ Some companies outside of a benchmarking corporation's own product or service market may possess a reputation for excellence in an important area such as customer service or the warehousing and shipment of products. American Express is widely perceived as a "best practices" company in customer service. Consequently, many corporations that are not commercial competitors of American Express nevertheless benchmark American Express to repeat its success in this area. To cite another example, L.L. Bean is often mentioned by C.I. professionals and consultants as a "best practices" company in the areas of warehousing and shipment. These two examples illustrate that benchmarking may involve studying a direct competitor but that benchmarking and C.I. activities have as their ultimate goal the improvement and commercial success of the business conducting the study.¹⁰

7. See generally COMPETITOR INTELLIGENCE, *supra* note 4; MONITORING THE COMPETITION, *supra* note 6; Alexandra Biesada, *Benchmarking*, FIN. WORLD, Sept. 17, 1991, at 28.

8. MICHAEL J. SPENDOLINI, *THE BENCHMARKING BOOK* 9 (1992).

9. See Biesada note 7, at 28.

10. Benchmarking can be divided into several categories. Competitor benchmarking consists of researching the strengths and weaknesses of a competitor. Process benchmarking involves an analysis of how other companies, regardless of whether they are competitors, handle certain processes such as billing, processing orders, direct mailing, the shipment of goods, and so on. See Paul Taylor, *How to Keep Up with the Joneses: Why Companies are Turning to Bench-*

B. The Shadowy World of Corporate Sleuthing

Mention “competitive intelligence” and some people think of men and women in trenchcoats, wearing reflective sunglasses, peering through windows, and breaking into offices late at night to take clandestine photographs of a competitor’s files. This stereotype is completely inaccurate. C.I. is not another term for corporate espionage. In fact, C.I. does not countenance the misappropriation by theft, deception, or otherwise of proprietary information or trade secrets from other companies.¹¹ Rather, a large part of C.I. work involves time spent in libraries and government offices researching, among other items, a competitor’s businesses, financial performance, and operations.¹² C.I. also depends on the use of publicly available information such as shareholders’ reports, advertising and sales literature, press releases, news stories in the business or trade media, and published interviews of the chief executive officer or other senior officers of a competing company.¹³ These written, publicly available resources are supplemented by conversations with knowledgeable third parties, such as local marketing and sales people, customers, consultants, and employees.¹⁴ Information that cannot be derived from public sources often becomes a job assignment for a third-party consultant or the focus of a company-conducted survey. Ordinarily, the risk of an antitrust violation arises only when a corporation contacts its competitors directly for competitively sensitive information.¹⁵

marking to Measure their Performance, FIN. TIMES, Apr. 13, 1992, at 10. Internal benchmarking involves comparing and evaluating how different subsidiaries or departments within the company conducting the benchmarking study handle certain functions, tasks, or processes. See William B. Slowey, *Benchmarking: Boon or Buzz Word?*, ANTITRUST, Summer 1993, at 30, 31. For the purposes of this article, the author is most concerned with competitor benchmarking and other forms of competitor analysis; it is these types of activities that raise antitrust issues. Internal benchmarking involves corporate introspection and thus should not present antitrust problems. Process benchmarking may not involve an analysis of competitors. Of course, if competitors are studied, antitrust issues will be implicated; however, if competitors are not included in the study, these problems avoided. COMPETITOR INTELLIGENCE, *supra* note 4, at 17-18.

11. See COMPETITOR INTELLIGENCE, *supra* note 4, at 17 (offering the advice “Do not deliberately mislead to get an answer” and “Identify yourself and your company by name when interviewing over the telephone or in person.”); MONITORING THE COMPETITION, *supra* note 6 at 161 (“As in any business activity, stealing, trespassing, and bribery in the course of gathering intelligence are illegal.”). Fuld also lists the “10 Commandments Of Intelligence Gathering” which are other rules of ethical intelligence gathering. See MONITORING THE COMPETITION, *supra* note 6, at 167.

12. See generally COMPETITOR INTELLIGENCE, *supra* note 4, at 85-247.

13. *Id.* at 297-315.

14. *Id.* at 19-23.

15. See generally MONITORING THE COMPETITION, *supra* note 6, at 162.

In contrast to the way in which the vast majority of U.S. and many foreign companies operate and the way in which America's intelligence services¹⁶ operate, some foreign nations appear to condone outright spying on other companies.¹⁷ Some nations permit and even assist in the appropriation of trade secrets and other competitively sensitive information to further the commercial interests of their native industries.¹⁸ France, for example, apparently spies on non-French business people traveling or residing in France.¹⁹ French intelligence reportedly forwards the results of its espionage activities to French companies that compete with the foreign firms that have

16. America's two major intelligence agencies are the Central Intelligence Agency (CIA) and the National Security Agency (NSA). *See generally* David L. Boren, *The Intelligence Community: How Crucial?*, 71 FOREIGN AFFAIRS 53 (Summer 1992); Ernest L. May, *Intelligence: Backing Into The Future*, 71 FOREIGN AFFAIRS 63 (Summer 1992). The supersecret NSA is the "statutorily authorized collector of electronically transmitted information." John A. Nolan, III, *Government-Business Intelligence Linkages: An Idea Whose Time Has Still Not Come*, 5(3) COMPETITIVE INTELLIGENCE REVIEW 4, 5 (Fall 1994). The Federal Bureau of Investigation (FBI) operates domestically and is responsible for counterintelligence, i.e., protecting the United States and its citizenry against the unlawful activities of foreign intelligence agencies operating inside the United States. *See generally* Jonathan P. Binnie, *Counterintelligence in the 1990s: The Threat To Corporate America*, 5(3) COMPETITIVE INTELLIGENCE REVIEW 17 (Fall 1994).

Since the end of the Cold War many inside and outside the intelligence community have debated whether America's intelligence agencies should be redeployed to assist American companies in competing against foreign firms. *Id.* at 4, 6-7; *see* Jan Herring, *Intelligence to Enhance American Companies' Competitiveness: The Government's Role and Obligation*, 5(3) COMPETITIVE INTELLIGENCE REVIEW 12 (Fall 1994); Jeffery J. Roberts, *Competitive Intelligence: Fighting the Economic War With Cold War Ammunition*, 5(3) COMPETITIVE INTELLIGENCE REVIEW 28 (Fall 1994); Boren, *supra* at 58 ("[C]aution must be used in the area of economic intelligence. Spying on foreign companies to give a commercial advantage to a particular American company would clearly compromise U.S. values and the free market system."). So far, this has not occurred despite the fact that some other nations have used their intelligence agencies in this manner. Nolan, *supra*, at 5 ("Foreign competitors, often with the active support of their national intelligence services, have an advantage over American firms in collecting, analyzing, and disseminating business intelligence."); Herring, *supra*, at 13 ("[T]he French and Russian governments have used their national intelligence services for economic purposes . . .").

17. *See* Walter D. Barndt, Jr., *Linking Business, Government, and Academe for a Competitive Advantage*, 5(3) COMPETITIVE INTELLIGENCE REVIEW 22, 23 (Fall 1994) ("Our foreign competitors share information. The French, Israeli, and Japanese intelligence services share information with their national businesses that give them an edge."); Nolan, *supra* note 16, at 5 ("Foreign competitors, often with the active support of their national intelligence services, have an advantage over American firms in collecting, analyzing, and disseminating business intelligence."); Herring, *supra* note 16, at 17 ("To cap it off, Pierre Marion, the past head of the French Intelligence Service, has openly stated that in economic matters France is a competitor with the United States (and presumably with other Western democracies) and therefore uses its intelligence services to promote its economic interests.").

18. *See supra* note 17.

19. *See* Herring, *supra* note 16, at 13; Binnie, *supra* note 16, at 17.

been the targets of this government surveillance.²⁰ China and the formerly Communist nations of the East Bloc also were suspected of similar activities in the past. It is perhaps the agents of some of these governments that conjure the image of spies in trenchcoats gaining unauthorized access to confidential corporate information.

C. *Competitive Intelligence and Antitrust*

C.I. activities might raise antitrust issues depending on the kind of data collected, the manner in which the data are collected, and the way in which the C.I. data are presented.²¹ Often, the first impulse of a C.I. consultant when handed an assignment is to call people he might know at a competing company to discover the requested information. While, from a business perspective, direct contact with a competitor is the quickest, most efficient means of gathering information about the competing company, from an antitrust perspective this conduct is one of the most dangerous steps a business person can take. Oral or written contacts between competing companies or the exchange of competitively sensitive files or information between them might constitute circumstantial evidence of a contract, agreement, or conspiracy in restraint of trade in violation of the Sherman Antitrust Act and its state counterparts.²² For liability to arise under Section 1 of the Sherman Antitrust Act, there must be proof of an unlawful express or implied agreement between two or more parties.²³ This is the so-called concerted action requirement of Section 1.²⁴

C.I. activities that involve direct contacts or information exchanges between competitors are vulnerable to attack under the antitrust laws because

20. See Binnie, *supra* note 16, at 17.

21. See *infra* notes 121-44 and accompanying text.

22. C.I. activities might also run afoul of Section 5 of the Federal Trade Commission Act, which prohibits "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a) (1) (1988). Section 5 is generally acknowledged as having a broader reach than Section 1 of the Sherman Act. The Federal Trade Commission has identified the following factors as evidence of an unfair practice: (1) the practice violates public policy as "established by statutes, the common law, or otherwise;" (2) the practice "is immoral, unethical, oppressive, or unscrupulous;" or (3) it "causes substantial injury to consumers (or competitors or other businessmen)." FTC Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,203 n.8 (Dec. 17, 1980) (quoting Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964)).

23. See *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) ("It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can . . ."); JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 6.01 [2] (1994).

24. See, e.g., *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984).

the contact itself might help prove an unlawful agreement.²⁵ Some activities are per se violations of the antitrust laws.²⁶ Conduct that does not fall within the per se category is analyzed under the rule of reason.²⁷

An antitrust attack against C.I. activity involving direct competitor contacts might take any number of forms. For example, Company A is conducting a study of the prices of its chief competitors' products. Company A polls its rivals directly by having its C.I. team call the sales and marketing units of the other companies to ask them about their prices and future price plans. Later the prices of Company A and all the rivals it contacted become virtually uniform. Is this phenomenon the result of a tacit or express conspiracy to fix prices? At the very least, this kind of observable price parallelism in the marketplace looks suspicious and might raise antitrust questions. Even if Company A conducted its survey without any intention to engage in price fixing, its method of information gathering might nonetheless embroil it in a prolonged antitrust investigation or lawsuit. Since price fixing is a per se offense, it is irrelevant that Company A lacked any subjective intent to engage in a price-fixing conspiracy. The direct competitor contacts that occurred and the subsequent convergence of prices in the marketplace might be sufficient to convince a judge or jury that the company did, in fact, enter an unlawful agreement to fix prices. Price fixing is merely one of the antitrust violations that might be alleged as the result of direct competitor contacts undertaken pursuant to a C.I. survey.

With the recent increase in C.I. activity, the legality of such activity under the antitrust laws is an issue that has assumed greater prominence. Legal counsel must be sensitive to the antitrust risks raised by C.I. activity conducted by their clients. Corporations must carefully consider the potential

25. Interstate Circuit, 306 U.S. 208, 226-27 (1939); *see also* United States v. Container Corp. of America, 393 U.S. 333, 335 (1969) (holding illegal an agreement to exchange price information).

26. In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), the Supreme Court explained the principle of per se offenses under the Sherman Act: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 5. Following *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), it appears that the Supreme Court will now analyze boycotts under a truncated rule of reason test, *id.* at 297, even though boycotts are still officially characterized as a per se offense. *Id.* at 293-94 (citations omitted). The Court stated that the per se standard should be applied only when the boycotting organization possesses "market power or exclusive access to an element essential to effective competition," thereby allowing the boycotting organization to exclude the boycotted party from engaging in competition. *Id.* at 296 (citations omitted).

27. Under this standard of review, the court will weigh a variety of factors including the party's intent, its market power, the competitive effect of the conduct, and the presence of pro-competitive benefits or justifications. *See, e.g.*, *National Soc'y of Professional Engineers*, 435 U.S. 679, 687-92 (1978).

antitrust risks of certain forms of intelligence gathering activities before acting. The Antitrust Division of the United States Justice Department has begun to examine closely C.I. and benchmarking activities under the federal antitrust laws. The federal government conducted investigations in Connecticut and Utah in 1993 regarding salary surveys.²⁸ In both states, hospitals and a trade association of human resource professionals periodically conducted surveys of nursing salaries and total compensation.²⁹ According to the Antitrust Division, the surveys in Utah had the purpose and effect of stabilizing nurses' salaries.³⁰ Although the investigation in Connecticut never culminated in a lawsuit,³¹ the Antitrust Division and the Utah Attorney General's Office charged eight Utah hospitals, a state hospital association, and the Utah Society for Healthcare Human Resources Administration with illegally conspiring to exchange wage information about registered nurses.³²

The Justice Department's action in Utah and statements made by federal antitrust officials over the last two years strongly suggest that federal antitrust enforcement authorities will closely monitor benchmarking and other competitive intelligence activity.³³ Thus, it is extremely important that lawyers and their corporate clients recognize the antitrust ground rules in the C.I. arena. Considering the federal government's increased scrutiny of this kind of activity, ignorance of the relationship between antitrust laws and C.I. can be quite costly.³⁴

In Part II of this Article, the author discusses early case law surrounding information exchanges between competitors to illuminate the legal foundation upon which recent case law and policy pronouncements are built. In Part III of this Article, the author discusses more recent developments including the federal government's new antitrust guidelines, which contain six "safe

28. The United States Justice Department conducted separate investigations in Connecticut and Utah in 1993 on the exchange of salary information among competing hospitals. The investigation in Connecticut never proceeded to trial. In Utah the private defendants settled a wage fixing complaint which the Justice Department filed against them. See Department of Justice Press Release (March 14, 1994) (on file with author) [hereinafter DOJ Press Release]. The Utah settlement, in the form of three consent decrees, was submitted to the United States District Court for the District of Utah for review and final approval. *Id.*

29. *Id.*

30. *Id.*

31. See Anthony J. Dennis, *Competitive Intelligence and Antitrust: Can Lightning Strike Twice?*, THE CONNECTICUT LAW TRIBUNE at 12 (Sept. 19, 1994) (hereinafter *Lightning*).

32. See DOJ Press Release, *supra* note 28; see also Anthony J. Dennis, *Competitive Intelligence: Some Guidance For Avoiding Antitrust Liability*, 1 HEALTH CARE ANTITRUST MANUAL 1 (Sept. 1994) (hereinafter *Antitrust Liability*).

33. See generally *Lightning*, *supra* note 31.

34. See Sherman Antitrust Act § 1, 15 U.S.C. § 1 (Supp. V 1993) (violation of § 1 is a felony punishable by up to three years imprisonment and a \$350,000 fine for individuals and a \$10 million fine for corporations).

harbors" from prosecution.³⁵ While these guidelines are directed toward the health care industry, they are plainly applicable to other industries as well³⁶ and can clarify the antitrust problems raised by C.I. activity.

Considering the above, the author in Part IV of the Article analyzes and discusses various methods for collecting and disseminating C.I. The author makes several recommendations for reducing antitrust risks. It is the author's hope that these recommendations as well as the analysis of case law and policy pronouncements will assist members of the bench and the bar in determining where lawful business activity ends and antitrust liability begins.

II. EARLY CASE LAW

A. Information Exchanges:

A Quartet of Supreme Court Cases from the 1920s

In the 1920s the United States Supreme Court heard four cases involving the exchange of competitively sensitive information among competitors. In all but one of the cases, the Supreme Court concluded that an antitrust violation had occurred. *American Column & Lumber Co. v. United States*³⁷ involved a group of hardwood manufacturers who exchanged very detailed sales and pricing information with one another through an unincorporated trade association.³⁸ The group called its information exchange program an "Open Competition Plan."³⁹ Members of the group supplemented their exchanges of detailed written reports concerning sales and pricing with regular meetings. They used these meetings to discuss further the state of sales, production levels, prices, and other competitively sensitive information within the hardwood industry.⁴⁰ The hardwood manufacturers attempted to defend these practices by asserting that they were substituting "Co-operative Competition" for "Cut-throat Competition" and that the association members met and exchanged information for the purpose of "improving the 'human relations' among the members."⁴¹

The Supreme Court, however, disregarded the seemingly benign justifications given in defense of the "Open Competition Plan."⁴² The Court

35. See U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in the Health Care Area*, (Sept. 15, 1993) (on file with author) [hereinafter *Statements of Antitrust Enforcement*].

36. See *Health Care Policy Statements Can Apply To Competition in All Industries*, Corp. Couns. Wkly. (BNA) 5 (Nov. 3, 1993).

37. 257 U.S. 377 (1921).

38. *Id.* at 391.

39. *Id.*

40. *Id.* at 394.

41. *Id.*

42. *American Column & Lumber*, 257 U.S. at 410 ("To call the activities of the defendants,

determined that the meetings and exchanges of detailed sales and price reports among the membership had the purpose and effect of fixing prices and controlling production.⁴³ In fact, the Court found that the members of the association had actually urged price increases and limits on hardwood production.⁴⁴ Recognizing the frequency of the information exchanges and the fact that future market conditions as well as current prices and production were discussed,⁴⁵ the Court ultimately concluded that the defendants had violated Section 1 of the Sherman Act.⁴⁶

In *United States v. American Linseed Oil Co.*⁴⁷ the United States Supreme Court again examined a formal system of regular information exchanges between competitors although the medium of the exchange was a “bureau” instead of an unincorporated trade association.⁴⁸ The competitors were manufacturers of linseed oil, cake, and meal.⁴⁹ The information exchange program again was labelled an “open competition” arrangement.⁵⁰ It required that subscribers submit information relating to sales, quotations, and offerings, as well as any other information requested by the bureau.⁵¹ Linseed companies that subscribed to this information exchange bureau also attended monthly meetings.⁵² As was the group in *American Lumber*, the bureau was a sham organization for the exchange of sensitive information among competitors that had the purpose and effect of stabilizing prices and limiting competition.⁵³

After *American Lumber* and *Linseed Oil*, the question remained open as to whether competitors could ever exchange information without violating

as they are proved in this record, an ‘Open Competition Plan’ of action is plainly a misleading misnomer.”).

43. The Court commented:

Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals This is not the conduct of competitors but is . . . clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide

Id. at 410.

44. The Court found that the evidence was “sufficient to convincingly show that one of the prime purposes of the meetings . . . was to induce members to cooperate in restricting production, thereby keeping the supply low and the prices high” *Id.* at 404. The Court further noted that the defendants actively sought higher prices. *Id.* at 404-05.

45. *Id.* at 398.

46. *American Column & Lumber*, 257 U.S. at 411-12.

47. 262 U.S. 371 (1923).

48. *Id.* at 380.

49. *Id.*

50. *Id.* at 388.

51. *Id.* at 381.

52. *American Linseed Oil Co.*, 262 U.S. at 384.

53. *See id.* at 389-90.

Section 1 of the Sherman Act. In *Maple Flooring Manufacturers Ass'n v. United States*⁵⁴ and *Cement Manufacturers Protective Ass'n v. United States*⁵⁵ the Supreme Court upheld certain information exchanges among competitors. In *Maple Flooring*, the Court determined that the information the parties exchanged involved only past transactions, not current bids or future market conditions.⁵⁶ The Court was satisfied that the information exchange was not a sham for carrying out a tacit conspiracy in restraint of trade.⁵⁷ Because the Court could find no concerted action to fix prices or limit competition, the defendants were exonerated.⁵⁸

In *Cement Manufacturers* the Court determined that the information exchanges between competing cement manufacturers were undertaken for the purpose of preventing fraud on the part of purchasers.⁵⁹ The defendants were concerned that some purchasers might manipulate the bidding system by declaring several low bids winners for a given project, while actually diverting some of the favorably priced cement to other projects.⁶⁰ The Court accepted this justification and allowed the defendants' conduct.⁶¹

*B. Competitor Information Exchanges:
Important Cases from the 1950s Through the 1970s*

The Supreme Court and the federal appellate bench further clarified the Supreme Court's early precedents in the information exchange area in four cases spanning the years 1956 to 1978.⁶² These decisions indicated that the mere exchange of commercially sensitive information between competitors was not, in itself, a per se violation of Section 1 of the Sherman Act. However, depending on the facts and circumstances, such information exchanges might constitute circumstantial evidence of an unlawful agreement between competitors to fix prices, limit production, or otherwise restrain trade.

The facts in *Morton Salt Co. v. United States*,⁶³ a 1956 decision, presented a poorly disguised program of price fixing among competitors in the salt industry. Representatives of Morton Salt Company and several other

54. 268 U.S. 563 (1925).

55. 268 U.S. 588 (1925).

56. *Maple Flooring*, 268 U.S. at 585-86.

57. *Id.* at 586.

58. *Id.*

59. *Cement Manufacturers*, 268 U.S. at 603-04.

60. *Id.*

61. *Id.* at 606.

62. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Citizens & S. Nat'l bank*, 422 U.S. 86 (1975); *United States v. Container Corp. of America*, 393 U.S. 333 (1969), *Morton Salt Co. v. United States*, 235 F.2d 573 (10th Cir. 1956).

63. 235 F.2d 573 (10th Cir. 1956).

companies, which collectively controlled more than ninety-five percent of the salt market in the relevant geographic area, interacted routinely to learn of one another's current and future prices.⁶⁴ The companies even checked their bid proposals against the bids of other companies before delivering the proposals to potential customers.⁶⁵ This extensive exchange of sensitive current and future price information coupled with observable price parallelism in the market convinced the Tenth Circuit Court of Appeals that a tacit agreement to fix prices existed among the defendants in violation of the federal antitrust laws.⁶⁶

In 1969 the Supreme Court found certain exchanges of price information among competing companies to be illegal in *United States v. Container Corp. of America*.⁶⁷ The defendants manufactured corrugated containers and were responsible for about ninety percent of the corrugated containers shipped from plants in the southeastern United States.⁶⁸ Upon the request of a competing company, each defendant would submit "the most recent price charged or quoted" and would receive the same information in return from the requesting company.⁶⁹

The Court found that "[t]he exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit."⁷⁰ Writing for the Court, Justice Douglas stated, "The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition. . . . Price is too critical, too

64. *Id.* at 575-77.

65. The court commented on a particularly egregious example of the defendants' anticompetitive conduct:

Another course of conduct indicating the conspiracy was Freed's requirement that his sales manager, Jensen, clear all bids through him personally before their submission. . . .

Admittedly the requirement that Jensen obtain Freed's approval on bids was instituted because of Jensen's conduct in attempting to gain business through bidding lower prices than competitors. . . .

. . . Jensen was [later] reprimanded by Freed for undercutting the competitor, and thereafter his authority was strictly limited.

This example of aversion to obtaining business by a lower price, no matter how minimal, and of the policy to obtain in advance the competitor's bid and studiously copying that bid exactly, is typical of the conduct of these competing companies as shown by the record. It seems wholly inconsistent with any conclusion but that a price conspiracy existed between them.

Id. at 578.

66. *Id.* at 578-80.

67. 393 U.S. 333 (1969).

68. *Id.* at 336.

69. *Id.* at 335.

70. *Id.* at 336.

sensitive a control to allow it to be used even in an informal manner to restrain competition."⁷¹

Justice Douglas' statement seems to suggest that the exchange of price information between competitors is *per se* unlawful. Following *Container Corp.*, some confusion on the subject developed within the judiciary⁷² and within the bar generally.⁷³

Subsequent court decisions have held that such activity does not constitute a *per se* offense. In *United States v. Citizens & Southern National Bank*,⁷⁴ a bank merger case that raised Clayton Act and Sherman Act issues, the Supreme Court stated that "the dissemination of price information is not itself a *per se* violation of the Sherman Act."⁷⁵ Three years later, the Court reiterated this conclusion in *United States v. United States Gypsum Co.*,⁷⁶ stating:

The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act.⁷⁷

In *United States Gypsum Co.* the Court addressed the legality of price information exchanges among members of the highly concentrated gypsum board industry.⁷⁸ Under the Robinson-Patman Act, sellers can defend their

71. *Id.* at 337-38. Justice Douglas appeared influenced by the oligopolistic nature of the corrugated container industry, which made it particularly susceptible to price stabilization. *Container Corp.*, 393 U.S. at 337. Douglas also noted that no "controlling circumstance" existed in this case that might justify the price exchanges. *Id.* at 335. Consequently, Douglas distinguished the case from *Cement Manufacturers*, in which the defendants avoided antitrust liability by asserting that they had exchanged price information to detect and prevent fraudulent conduct on the part of cement buyers. *Id.*

72. Justice Fortas, concurring in *Container Corp.*, stated, "I do not understand the Court's opinion to hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a *per se* violation of the Sherman Act." *Id.* at 338-39. The Third Circuit Court of Appeals arrived at the same conclusion in *United States v. United States Gypsum Co.*, 550 F.2d 115, 122-23 (3rd Cir. 1977), *aff'd*, 438 U.S. 422 (1978).

73. See Norman R. Prance, *Price Data Dissemination as a Per Se Violation of the Sherman Act*, 45 U. PITT. L. REV. 55, 67 (1983) (stating that, in addition to the courts, "[t]he commentators were also undecided on the meaning of Mr. Justice Douglas's opinion").

74. 422 U.S. 86 (1975).

75. *Id.* at 113 (citations omitted).

76. 438 U.S. 422 (1978).

77. *Id.* at 441 n.16 (citations omitted).

78. *Id.* at 426.

otherwise discriminatory sales practices by demonstrating that they were merely meeting the competition's prices.⁷⁹ The defendants argued that the information exchanges were merely their means of verifying one another's prices so that they could remain in compliance with the Robinson-Patman Act.⁸⁰ The Court found this contention unpersuasive and refused to hold that the Robinson-Patman Act shielded the information exchanges from scrutiny under the Sherman Act.⁸¹

By the end of the 1970s it was clear that while the federal bench would not view direct exchanges of sensitive information among competitors as illegal per se, the courts would critically evaluate whether such information exchanges were a sham for price fixing or other illegal activities. Defendants who exchanged current or future pricing information, especially pending bid proposals, stood the greatest risk of liability.⁸² Such exchanges generally have the greatest tendency to stabilize prices and are sometimes merely disguised price fixing. The frequency of exchanges between companies also is directly related to legal risk. Companies that repeatedly checked their competitors' pending bids or current prices were found guilty of coordinating their prices in violation of the federal antitrust laws.⁸³

III. RECENT LAW AND POLICY PRONOUNCEMENTS

More recent legal developments in the C.I. area affirm the direction and interpretations found in earlier court cases and provide a more elaborate road map for those wishing to conduct C.I. activities safely. A few examples illustrate this point.

A. Business Review Letters, Consent Decrees

In 1987 the United States Justice Department issued a business review letter to a group known as the St. Louis Area Business Health Coalition regarding its proposed survey of hospital costs.⁸⁴ The group consisted of thirty-four major Saint Louis area employers who wished to hold down medical costs under their group health coverage plans by gathering hospital cost data. The group specifically stated that hospital participation in the

79. 15 U.S.C. § 13(b) (1988).

80. *United States Gypsum Co.*, 438 U.S. at 453-59.

81. *Id.* at 458-59. *But cf.* *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925) (finding information exchanges to be justified when the purpose was to detect and prevent fraud by buyers).

82. *See Container Corp.*, 393 U.S. 333; *Morton Salt*, 235 F.2d 573.

83. *See Container Corp.*, 393 U.S. 333; *Morton Salt*, 235 F.2d 573.

84. *See* Department of Justice Business Review Letter to St. Louis Area Business Health Coalition, 1988 WL 252569 (D.O.J.) (Mar. 24, 1988) (on file with author).

survey would be entirely voluntary and that nonparticipating hospitals would not be punished. Furthermore, the results of the study would be available to the public so that the thirty-four participating employers would not gain a competitive advantage by conducting the survey. Finally, the group expressly stated that what each member did with the results was its own business. The group would not act collectively in negotiating contracts with the hospitals.⁸⁵ Based on these representations, the Antitrust Division of the Justice Department stated that it had no present intention of challenging the coalition.⁸⁶

This business review letter underscores the favorable treatment purchasing groups often receive under the antitrust laws. Any activity that will lower costs for consumers generally promotes competition.⁸⁷ In addition, federal antitrust enforcement authorities are acutely aware that health care costs are a major policy concern for federal and state governments, politicians, public policy planners, and consumers. Thus, any group survey of hospital cost information that has the potential of reducing health care costs stands a decent chance of being approved by the Justice Department and the Federal Trade Commission.⁸⁸

Significantly, the Saint Louis coalition reported that the coalition would merely collect data as a group, allowing each employer to act unilaterally in utilizing the data. Because members of the group would act unilaterally with respect to survey results, the coalition was not engaging in "concerted action" to fix prices in violation of Section 1 of the Sherman Antitrust Act.⁸⁹

In *United States v. Burgstiner*⁹⁰ the Justice Department and twenty-two obstetricians and gynecologists signed a consent decree settling criminal price-fixing charges against the physicians for exchanging current and future fee information. Under the consent decree, if the private parties ever integrated their operations into a bona fide joint venture, they could share confidential fee information.⁹¹ Also, the parties were permitted to exchange such information as was necessary to exercise their First Amendment rights before legislative, judicial, or administrative bodies.⁹² This consent decree again illustrates how dangerous it can be for competitors to exchange directly with one another

85. *Id.*

86. *Id.*

87. *Id.*

88. *See generally id.*

89. *See supra* notes 23-24 and accompanying text.

90. 1991-1 Trade Cas. (CCH) ¶ 69,422 (S.D. Ga. Apr. 29, 1991). *See also* FTC Letter to Utah Society of Oral and Maxillofacial Surgeons (Feb. 8, 1985) (on file with author) (proposal to exchange fee information raised antitrust concern because (i) the proposal contemplated dissemination of both ranges of fees and average fees and (ii) the market was concentrated.).

91. *Id.* at 65,713.

92. *Id.*

current or future price/fee information. Such data exchanges present the risk of investigation and subsequent lawsuits that may result in liability.

More recently, the federal government indicated its reluctance to bless a competitive fee survey that had the potential of facilitating collusion among its participants.⁹³ In a business review letter issued to the South Suburban Bar Association, a bar association consisting of lawyers located on the south side and southern suburbs of Chicago,⁹⁴ the U.S. Justice Department "decline[d] to state its current enforcement intentions" regarding the group's proposed competitive survey of legal fees.⁹⁵ Although the bar association itself would collect information on members' legal fees, the Justice Department found that there were no "procedural safeguards" to ensure that specific fee information charged by particular lawyers would not be discovered by the membership.⁹⁶ Without such a safeguard, the bar association could not prevent its survey from being used by Association members to agree explicitly or implicitly on various fees or billing rates in the south-suburban Chicago metropolitan area.⁹⁷ The Justice Department also noted that bar association members appeared to constitute a majority of the attorneys in the relevant geographic market; the group's geographic concentration enhanced the danger that the survey might facilitate price fixing.⁹⁸

On March 14, 1994, the Justice Department filed three proposed consent decrees with the United States District Court for the District of Utah settling price fixing charges against a human resources trade association, a state hospital association, and eight Utah hospitals, all of which had been charged with illegal price fixing by the Department and the Utah Attorney General's office.⁹⁹ The defendants in the case had conducted a survey of nurses' salaries for several years and had also met and telephoned one another to learn of current and prospective nurses' wages. The federal and state authorities viewed these exchanges as the means by which the participants conspired to fix nurses' entry level compensation.¹⁰⁰ The proposed settlement decrees prohibit the defendants from engaging in this activity.¹⁰¹ The consent decrees also would require the institution of "comprehensive antitrust compliance programs and" submission of "annual written certifications regarding

93. See Department of Justice Business Review Letter to South Suburban Bar Ass'n, 1993 WL 483451 (D.O.J.) (Nov. 15, 1993) (on file with author) (hereinafter Suburban Bar Letter).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Suburban Bar Letter, *supra* note 93.

99. See DOJ Press Release, *supra* note 28. The three identical decrees, if approved, would settle the suit against all the defendants. *Id.*

100. *Id.*

101. *Id.*

decree compliance throughout the 5 year term of the decrees.”¹⁰² The Utah Attorney General simultaneously undertook steps to settle its case.¹⁰³

The Utah investigation and proposed consent decrees illustrate that the Justice Department not only is aware that C.I. activities regarding salaries and total compensation take place but that such activities, if not properly undertaken, can have anticompetitive consequences. In the wake of the Utah investigation, human resource professionals need to exercise particular care in gathering wage and compensation information.

*B. Joint Statement of Antitrust Enforcement Policy
in the Health Care Area*

On September 15, 1993, the United States Department of Justice and the Federal Trade Commission jointly issued six “Statements of Antitrust Enforcement Policy” for health care organizations.¹⁰⁴ While acknowledging that “[a]ntitrust analysis is inherently fact-intensive,” the two federal agencies desired through the joint issuance of their antitrust guidelines to reduce uncertainty by “describ[ing] the circumstances under which the Agencies will not challenge conduct as violative of the antitrust laws as a matter of prosecutorial discretion.”¹⁰⁵

The six policy statements address the following areas: “(1) hospital mergers[,] (2) hospital joint ventures involving high-technology or other expensive medical equipment[,] (3) physicians’ provision of information to purchasers of health care services[,] (4) hospital participation in exchanges of price and cost information[,] (5) joint purchasing arrangements among health care providers[,] and (6) physician network joint ventures.”¹⁰⁶

In setting forth some rules of prosecutorial discretion, the two agencies did not wish to “imply that conduct falling outside the [six enumerated] safety zones is likely to be challenged by the Agencies.”¹⁰⁷ Rather, “[t]he

102. *Id.*

103. DOJ Press Release, *supra* note 28.

104. See *Statements of Antitrust Enforcement*, *supra* note 35. For a critique of the six policy statements, see Thomas L. Greaney, *A Critique: The Department of Justice/FTC Health Care Policy Statements*, ANTITRUST, Spring 1994, at 20. “The agencies’ eagerness to reassure the health care industry seems to have overshadowed the ostensible goal of providing detailed guidance and generated some problematic generalizations. On the positive side, there are several useful descriptions and clarifications of interpretative principles . . .” *Id.* at 24. As this Article was going through the editing process, the U.S. Department of Justice and the Federal Trade Commission issued nine policy statements that supplemented their original pronouncement. See *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, (Sept. 27, 1994) (on file with author) [hereinafter *Analytical Principles*].

105. See *Statements of Antitrust Enforcement*, *supra* note 35, at 1-2.

106. *Id.* at 1.

107. *Id.* at 2.

statements set forth an outline of the analysis the Agencies will use to review conduct which falls outside the antitrust safety zones.”¹⁰⁸

Because both federal antitrust enforcement agencies jointly issued the guidelines and because the guidelines provide a road map for understanding federal antitrust investigations and prosecutions, the private bar generally greeted the six antitrust guidelines with enthusiasm. While on their face the guidelines apply only to those within the health care industry, the guidelines might be applied to practices in other industries as well. Significantly, the Federal Trade Commission’s acting director of the Bureau of Competition, Mary Lou Steptoe, stated that the antitrust policy statements can be applied to competition issues faced by any trade group or association.¹⁰⁹ Ms. Steptoe then proceeded to mention information sharing and exchanges by name.¹¹⁰ Even before Ms. Steptoe’s announcement, members of the bar found the guidelines helpful in providing meaningful antitrust advice and direction to non-health care clients.

In analyzing C.I. activities under the antitrust laws, statement four of the antitrust guidelines concerning information exchanges between competing hospitals is particularly helpful.¹¹¹ However, as is indicated above, this policy statement can be applied to information exchanges between any type of competitor, regardless of industry. Statement four provides a helpful road map for safely conducting C.I. surveys and information exchanges. The federal agencies began policy statement four by acknowledging that “such surveys can have significant benefits for . . . consumers.”¹¹² For example, “[p]urchasers . . . can use price survey information to make more informed decisions when buying . . . services.”¹¹³ For their part, the surveying companies can use the information they glean to price more competitively.¹¹⁴ The agencies proceeded to state, however, that “[w]ithout appropriate safeguards, . . . information exchanges among [competitors] . . . may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of . . . services.”¹¹⁵

108. *Id.* This policy document also set forth an expedited business review procedure that the Department of Justice is pledged to follow and an expedited advisory opinion procedure that the Federal Trade Commission is pledged to follow. The document provides for a 90-day review period starting from the time “all necessary information is received.” *Id.* (emphasis omitted).

109. See *Health Care Policy Statements Can Apply To Competition In All Industries*, *supra* note 36.

110. *Id.*

111. *Statements of Antitrust Enforcement*, *supra* note 35, at 22-25.

112. *Id.* at 22.

113. *Id.*

114. *Id.*

115. *Id.*

The agencies set forth the conditions under which they “will not challenge, absent extraordinary circumstances” C.I. surveys.¹¹⁶ According to statement four, surveys must have all of the following characteristics to avoid being challenged by the federal government:

- (1) the survey is managed by a third party (*e.g.*, a purchaser, government agency, health care consultant, academic institution, or trade association);
- (2) the information provided by survey participants is based on data more than 3 months old; and
- (3) there are at least five hospitals reporting data upon which each disseminated statistic is based, no individual hospital’s data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular hospital.¹¹⁷

Again, given the applicability of the six antitrust statements to other industries, the word “hospital” might be read broadly to mean any company participating in a C.I. survey.

Statement four contains additional helpful information and advice. The agencies state that “[e]xchanges of future prices for hospital services or future compensation of employees are very likely to be considered anticompetitive.”¹¹⁸ Thus, the exchange of future-oriented competitively sensitive information is dangerous. Such exchanges should be actively discouraged because they might lead to coordination among competitors on price or other commercially sensitive variables, in violation of the antitrust laws. The overall goal of statement four is to balance a “competitor’s individual interest in obtaining information useful in adjusting the prices it charges or the wages it pays in response to changing market conditions against the risk that the exchange of such information may permit [competitors] to communicate with each other regarding a mutually acceptable level of prices for a [competitor’s] services or compensation for employees.”¹¹⁹

116. *Statements of Antitrust Enforcement*, *supra* note 35, at 23. The author interprets the phrase “absent extraordinary circumstances” as merely a method by which federal agencies sometimes preserve their freedom of action. The author believes that it would be extremely rare for the federal government to find such circumstances present.

117. *Id.* The Department of Justice and the Federal Trade Commission reiterated these criteria in statements five and six of their September 1994 policy pronouncement. See *Analytical Principles*, *supra* note 104. Statement five deals with providers’ collective provision of fee-related information to purchasers of health care services. Statement six addresses provider participation in exchanges of price and cost information. *Id.*

118. *Id.* at 24.

119. *Id.*

IV. RECOMMENDATIONS FOR REDUCING ANTITRUST RISK

Broadly speaking, antitrust risk in the C.I. area is a function of three major factors: (1) the method to be used for gathering competitive intelligence, (2) the kind of intelligence to be collected, and (3) the manner in which the collected information will be reported or displayed.

A. C.I. Gathering Methods

1. Direct Competitor Contacts

As was previously discussed, an employee's first impulse when handed a C.I. assignment is often to grab the phone and call a competitor directly for information. This presents the greatest antitrust risk because the direct contact between the two competitors might create evidence of concerted action in furtherance of an antitrust violation.¹²⁰ While the parties who spoke to one another might have had no subjective intent to break the antitrust laws, *per se* violations like price fixing, boycotts and market allocations do not require any requisite state of mind. Furthermore, even though the parties might not have discussed anything competitively sensitive, a prosecutor or plaintiff might use the phone record or letter exchange in an attempt to prove that some form of tacit conspiracy or unlawful subterfuge occurred. For example, the competitors might have merely discussed the color of carpet they preferred in their offices, the existence of employee health facilities on-site, or the company cafeteria's hours of operation. A lawyer challenging this competitor interaction might assert that the parties also discussed product pricing or pending bids while on the phone. Phone conversations leave no written records other than the phone bills proving that the conversations took place. It is practically impossible to prove that employees at two competing companies limited their telephone conversation to a discussion of the employee cafeteria or office decor. Thus, unnecessary communication between business personnel at competing companies should be actively discouraged. The same holds true for on-site visits. Face-to-face visits present even more opportunities for employees to "talk shop" and intentionally or unintentionally discuss competitively sensitive subjects. Because of the potential for antitrust violations, these visits should be discouraged as well.

C.I. questions presented in letter format present less antitrust risk since there is a record of what questions were asked. This assumes, of course, that the questions themselves do not present a significant antitrust risk. Nonethe-

120. See *supra* notes 23-25 and accompanying text.

less, a party conducting a C.I. survey cannot control the amount or type of information that a company will return in response to each question. Open-ended questions specifically designed to elicit the maximum amount of information from other companies are potentially dangerous because these questions might prompt companies with no legal counsel or less sophisticated legal counsel to give the requesting company the proverbial "kitchen sink" in response. This information might include extremely sensitive competitive information such as product prices, future business plans, new product rollouts, or the terms of pending or imminent bids. Possession of this information might be dangerous for the receiving company. Accordingly, legal counsel should advise their business clients to ask questions that are focused and avoid open-ended, vague, or extremely general questions that might inadvertently elicit overly sensitive information.

With oral and written surveys, direct interaction with competitors presents the greatest antitrust risk¹²¹ and should be avoided whenever possible. Direct competitor contacts should be used only as a last resort.

2. *Third-Party Noncompetitors*

Gathering information from third-party noncompetitors does not present significant antitrust risk and should be used whenever possible. Only after exhausting such resources should riskier methods be considered. There is a plethora of third-party resources available.

a. *State and Federal Filings*

Many companies are required by law to make various state and federal filings that often are available to the public. These filings and reports are good resources when constructing a profile of competing companies.¹²² For example, publicly held corporations operating under the aegis of the federal securities laws must file quarterly Form 10-Q reports and annual Form 10-K reports with the Securities and Exchange Commission (SEC).¹²³ These reports are publicly available. Furthermore, depending on the industry and the companies involved, state agencies might also possess valuable information about particular companies. Insurance companies, for example, are regulated primarily by state law. They must make periodic filings with the insurance departments of the states in which they operate. These filings typically are

121. The cases, business review letters, and consent decrees discussed in Part II of this Article demonstrate this point. See *supra* notes 22-103 and accompanying text.

122. See COMPETITOR INTELLIGENCE, *supra* note 4, at 85-135.

123. See generally LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION (1988 & Supp. 1993).

available to the public. State chartered banks must also make periodic filings with state banking departments, and hospitals often must file information with state health departments or hospital commissions. While it is not the most exciting research, review of these filings may reveal important commercial information.

b. Library Research

A good corporate library will maintain enough literature on competing companies to satisfy many of the questions C.I. professionals might have about other companies.¹²⁴ Trade publications and the financial press can provide valuable information about the companies being surveyed.¹²⁵ Sometimes, research will reveal important articles or interviews that give insight into the thinking and strategy of competitors. This is frequently true when chief executives or senior officers of a company give interviews to popular business magazines or newspapers.¹²⁶ Business leaders generally love to talk about their strategic plans, future goals and “vision” for their company.¹²⁷ This kind of interview can be very revealing and can give competitors a good sense of how a company will behave in the marketplace.

c. Consultants

Consultants are third-party noncompetitors. Therefore, they provide a safe means of gathering information.¹²⁸ Reputable consultants will sign contracts with a clause protecting the confidentiality of information tendered.¹²⁹ They will also display data in an aggregated form which does not attribute any particular data points to specific companies.¹³⁰ This is commonly called “blinding” the data or presenting it in an “anonymous” format even though survey participants might be listed in an appendix.¹³¹

124. See COMPETITOR INTELLIGENCE, *supra* note 4, at 24-27; see MONITORING THE COMPETITION, *supra* note 6, at 123-36.

125. Leonard Fuld provides a list of business and trade association publishers and their addresses that might be profitably mined for ideas. See COMPETITOR INTELLIGENCE, *supra* note 4, at 425-58.

126. See *id.* at 298-300.

127. See *id.*

128. The Federal Trade Commission and Justice Department joint policy statements encourage parties to use consultants or other third party noncompetitors to gather C.I. See *Statements of Antitrust Enforcement Policy*, *supra* note 35.

129. See *Lightning*, *supra* note 31, at 7.

130. See *id.*, at 14.

131. *Id.*

B. Kind of Competitive Intelligence Collected

1. Some Subjects More Sensitive Than Others

Common sense prevails in this area. Some highly sensitive subjects include the following: prices, customer lists, salaries or compensation, pending bid situations, markets that competitors intend to enter or exit, new products that will be introduced soon, budgets, available capital, acquisition or divestiture plans, and strategic plans. Nonetheless, if this data is gathered and reported properly, these questions may be posed to competitors.

By contrast, questions concerning office decor, employee health clubs, and parking facilities are inherently less sensitive. However, even these benign-sounding questions can become fraught with danger if they are followed by questions concerning the price paid for the services. If the company conducting the survey asks these questions, then sets salaries or contracts with a particular vendor in light of that information, the company might risk being accused of price fixing. These examples illustrate that even apparently harmless questions should be reviewed carefully before they are posed to other corporations.

2. Historic vs. Current or Future-Oriented Information

In terms of the freshness of information collected, guidelines recently issued by the Federal Trade Commission and the Department of Justice indicate that collected data should be "more than 3 months old."¹³² The author believes that this admonition applies particularly to sensitive items such as pricing and salary information but would likely have little or no applicability to the more benign questions discussed above. As a general rule, the collection of historic data presents less antitrust risk than the collection of current or future-oriented information.¹³³ C.I. professionals will, of course, want to obtain current or future-oriented C.I. whenever possible. Thus, a tension exists between the legal safeguards of collecting solely historic data and the C.I. advantages of obtaining current or future-oriented information.¹³⁴

132. See *Statements of Antitrust Enforcement*, *supra* note 35, at 23.

133. See *supra* notes 37-83 and accompanying text.

134. The author does not mean to suggest that business clients may never pursue current or future-oriented C.I. If such information can be found in the public domain or is available from third-party noncompetitors, then clients may obtain such information without much antitrust risk. Nonetheless, regardless of the manner in which it was obtained, current or future-oriented C.I. carries an inherent legal risk that may immerse the receiving company in an antitrust investigation or lawsuit.

C. *Method of Displaying Collected Data*

Statement four of the FTC-Department of Justice joint statement provides guidance regarding the means by which competitive data can be safely displayed.¹³⁵ That statement clearly indicates that competitive information should be “sufficiently aggregated” so that participants cannot attribute the prices charged, compensation paid, or other competitive information to any particular survey participant.¹³⁶ In order to meet effectively statement four’s guidelines, at least five companies must participate in the survey.¹³⁷ It is clear from the statement that company names should not be linked in the final report to particular items of data; at most, the report can merely list the names of the participants separately.¹³⁸

D. *Other Factors*

1. *Frequency of C.I. Surveys or Information Exchanges*

Several other factors affect the antitrust risk associated with C.I. activity. The frequency of C.I. exchanges affects antitrust risk because frequent surveys among competitors allow for greater coordination in the market among them. Regardless of whether companies are actually using frequent C.I. surveys to coordinate their market conduct, the frequency of such surveys might give the false appearance that tacit collusion is taking place.¹³⁹ Appearances alone might lead to a government investigation or the filing of a lawsuit.

2. *Number of Participants*

The number of companies participating in a given C.I. survey also affects antitrust risk. If a large number of companies from a particular industry participate in a survey there is a greater chance of collusion or coordination among them.¹⁴⁰ Furthermore, even if the parties unilaterally decide how to use the C.I. information,¹⁴¹ the fact that an entire industry has participated

135. STATEMENTS OF ANTITRUST ENFORCEMENT, *supra* note 35, at 23.

136. *See id.*

137. *See id.*

138. *See id.*

139. *Id.*

140. STATEMENTS OF ANTITRUST ENFORCEMENT, *supra* note 35, at 23; *see also* MONITORING THE COMPETITION, *supra* note 4, at 18.

141. A standard *quid pro quo* among companies participating in C.I. surveys is that participation entitles companies to receive the final report. Thus, presenting the collected data on an aggregated and anonymous basis minimizes antitrust risk.

in the survey might give the appearance of collusion and lead to an antitrust investigation or lawsuit.¹⁴²

3. Market Concentration

A highly concentrated market containing few competitors presents the risk that any action those competitors take together might appear or actually be unlawful.¹⁴³ Thus, participation in a C.I. survey by most corporations in a concentrated market, regardless of the benign nature of the questions or the manner in which data are collected and displayed, might place participating companies at risk of running afoul of the antitrust laws.¹⁴⁴

V. CONCLUSION

The author expects more legal action in the competitive intelligence field. Corporate America is making widespread use of competitive intelligence information and will probably continue to gather C.I. in the years ahead. At the same time, federal and state antitrust enforcement agencies are becoming increasingly aware of these activities and their potential for abuse. The Department of Justice's proposed settlement decrees in Utah and its issuance of guidelines with the Federal Trade Commission illustrate this fact.

The author has explained the state of the law in competitive intelligence and set forth recommendations for reducing potential antitrust risks associated with C.I. activities in the hope that legal violations can be minimized.

142. See MONITORING THE COMPETITION, *supra* note 4, at 18; see also *Lightning*, *supra* note 31, at 14.

143. See MONITORING THE COMPETITION, *supra* note 4, at 18; see also *Lightning*, *supra* note 31, at 14.

144. See *supra* notes 76-81 and accompanying text.

