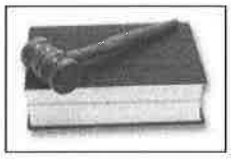
QUIZ: ANTITRUST



For more than a century, federal antitrust laws have existed as a way to promote competition and prevent monopolies in business. Because real estate brokers and salespeople frequently cooperate with one another in the sale of properties, they have numerous opportunities to engage in conduct that might be construed as violations of antitrust laws. Do you know the ins and outs of antitrust?

1. **Two competitors in my market asked me to cooperate with them in setting a "standard" commission for the area. I refused, but subsequently started charging the same rate that my competitors suggested. Because I didn't overtly agree to participate in price fixing, I am not part of a conspiracy.**
   - ○ True
   - ○ False

2. **Even though my salespeople are independent contractors, I may establish the commission rate for my company and require salespeople to charge that rate.**
   - ○ True
   - ○ False

3. **Brokers who agree not to cooperate with another company, such as by not showing that company's listings, do not violate antitrust laws if they enter into that agreement because they consider the company's aggressive "high-tech" marketing techniques to be unethical.**
   - ○ True
   - ○ False

4. **The best way to persuade sellers that they should enter into an exclusive-right-to-sell agreement with you is to tell them that MLS members have an "informal understanding" to show buyers exclusive-right-to-sell listings first.**
   - ○ True
   - ○ False

5. **My company benefits from MLS participation, but we don't want to pay a cooperative commission split to real estate companies that offer only nominal compensation on their listings, which we think they include simply so that their listings are shown on REALTOR.com and other public real estate Web sites. But if we decide to offer them the same amount of compensation that they offer us, we'll be breaking the law.**
   - ○ True
   - ○ False

6. **Antitrust price-fixing rules do not allow a real estate company to engage in a public advertising campaign that highlights the commission rate it charges to consumers.**
   - ○ True
   - ○ False

7. **Classified and display advertising rates in a local newspaper have increased substantially, which hurts all the real estate companies in town. Yet, no company is willing to stop advertising for fear of losing clients and customers to their competitors who continue to advertise at the high rates. To pressure the newspaper to reduce rates, which would benefit the companies and consumers, the real estate companies may agree that they will stop advertising unless and until the paper complies.**
   - ○ True
   - ○ False

8. **If one of my salespeople participates in a price-fixing discussion, my company can be held liable — even if I have no personal knowledge of the salesperson's conduct.**
   - ○ True
   - ○ False

Submit your quiz for scoring!

Policies: MLS Antitrust Compliance Policy

The purpose of multiple listing is the orderly correlation and dissemination of listing information to participants so they may better serve the buying and selling public. Boards and associations of REALTORS® and their multiple listing services shall not enact or enforce any rule which restricts, limits, or interferes with participants in their relations with each other, in their broker/client relationships, or in the conduct of their business in the following areas.

Boards and associations of REALTORS® and their MLSs shall not:

1. Fix, control, recommend, or suggest the commissions or fees charged for real estate brokerage services (Interpretation 14).
2. Fix, control, recommend, or suggest the cooperative compensation offered by listing brokers to potential cooperating brokers.
3. Base dues, fees, or charges on commissions, listed prices, or sales prices. Initial participation fees and charges should directly relate to the costs incurred in bringing services to new participants.
4. Modify, or attempt to modify, the terms of any listing agreement; this does not prohibit administrative corrections of property information necessary to ensure accuracy or consistency in MLS compilations.
5. Refuse to include any listing in an MLS compilation solely on the basis of the listed price.
6. Prohibit or discourage participants from taking exclusive agency listings or refusing to include any listing in an MLS compilation solely on the basis that the property is listed on an exclusive agency basis.
7. Prohibit or discourage participants from taking "office exclusive" listings; certification may be required from the seller or listing broker that the listing is being withheld from the MLS at the direction of the seller.
8. Give participants or subscribers blanket authority to deal with or negotiate with buyers or sellers exclusively represented by other participants (Interpretation 10).
9. Establish, or permit establishment of, any representational or contractual relationship between an MLS and sellers, buyers, landlords, or tenants.
10. Prohibit or discourage cooperation between participants and brokers that do not participate in the MLS.
11. Prohibit or discourage participants or subscribers from participating in political activities (Interpretation 15).
12. Interfere in or restrict participants in their relationships with their affiliated licensees (Interpretations 16 and 17).

As used in this policy, "rule" includes all rules, regulations, bylaws, policies, procedures, practices, guidelines, or other governance provisions, whether mandatory or not. "Multiple listing service" and "MLS" means multiple listing service committees of boards and associations of REALTORS® and separately-incorporated multiple listing services owned by one or more boards or associations of REALTORS®.

These policy prohibitions are subject to and limited by applicable statutes, ordinances, and governmental regulations, to agreements entered into by an MLS or board or association of REALTORS® and an agency of government, and to final decrees of courts or administrative agencies.

This policy does not prohibit boards or associations of REALTORS® or their MLSs from adopting rules or policies establishing the legitimate uses of MLS information, from prohibiting unauthorized uses of MLS information, or from establishing rules or policies necessary to prevent illegal collective action, including price-fixing and boycotts.

It is the duty and responsibility of all boards and associations of REALTORS® and MLSs owned by or controlled by boards or associations of REALTOS® to ensure that all bylaws, rules, regulations, and other governance provisions comply with all mandatory multiple listing policies of the National Association of REALTORS®. Boards and associations of REALTORS® failing to conform with these policies will be required to show cause why their charters should not be revoked.

The numbered references refer to the official interpretations of Article I, Section 2 of the bylaws of the National Association of REALTORS®. (Amended 11/04) **M**

ANTITRUST – SOURCE: WWW.NAR.REALTOR

The antitrust laws are designed and intended to protect competition and prevent monopolies. Awareness of and sensitivity to the antitrust laws is imperative for real estate brokers in today's marketplace. Real estate and housing issues are a vital concern of government at all levels. This means that the real estate brokerage business may be often under scrutiny, and any anti-competitive conduct is likely to be detected and prosecuted.

The nature of real estate practice makes real estate brokers particularly susceptible to antitrust challenges. Brokers vigorously compete to secure property listings to offer for sale, but they also regularly cooperate with one another, as subagents, buyers' agents or "facilitators," to identify ready, willing and able buyers for those listings. This dual tradition of competition and cooperation, which exists in few other professions, presents frequent opportunities for antitrust misconduct, whether intentional or inadvertent. In today's business environment, it is a prerequisite to survival that brokers be conscious of and abide by the requirements of antitrust law.

1. Federal Antitrust Law

Over 100 years ago Congress adopted the Sherman Act as the foundation of federal antitrust law. Virtually all federal antitrust litigation alleges one or more violations of the Sherman Act. Section 1 of the Sherman Act simply states that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade...is hereby declared illegal.

The literal language of the Sherman Act sets forth two basic elements of any Section 1 violation: There must be (1) a contract, combination, or conspiracy that (2) restrains trade.

The conspiracy element is satisfied whenever two or more persons or entities carry out a common scheme or plan. If adherence to a common scheme or plan can be shown, the only remaining issue is whether or not the effect of the scheme or plan is to restrain trade.

Shortly after the Sherman Act was passed the Supreme Court held that the Act did not literally prohibit every contract that restrained participants in the marketplace. If the Act were interpreted in that literal fashion it would outlaw all commercial contracts since every contract restrains the parties to some extent. Instead, the Supreme Court declared that the Sherman Act prohibits only those contracts or combinations that unreasonably restrain trade.

The Supreme Court subsequently also identified certain types of restraints deemed to be so inherently anti-competitive that their anti-competitive effects on trade are presumed without a need for the plaintiff to prove, or even introduce evidence of, the restraint's impact on the market. Such restraints are called per se offenses. In a case alleging a per se offense the defendant is not permitted to introduce evidence to show the reasonableness of the restraint because its unreasonable anti-competitive nature is presumed and conclusively established. Accordingly, in a per se case, the only issue to be addressed in determining whether a defendant violated the Sherman Act is if he actually participated in the conspiracy.

Restraints not characterized as per se violations are analyzed under the "Rule of Reason." The Rule of Reason is a "balancing test" that weighs the pro-competitive and anti-competitive aspects of a practice that may adversely affect competition in some way. Conduct challenged as unlawfully restraining competition may escape condemnation if the pro-competitive benefits outweigh the anti-competitive implications.

2. Antitrust Issues in Real Estate

A. Unlawful Per se Restraints

Two per se restraints have particular relevance to real estate brokers:
conspiracies to fix prices, such as real estate commission rates, or to fix other terms or conditions of the broker-client relationship;
group boycotts, or concerted refusals to deal, with another competitor or a supplier.

1. Price/Commission Fixing - Antitrust problems most frequently arise out of agreements – conspiracies – among competitors which have the purpose or effect of eliminating or restricting competition between the parties to the agreement. A common subject of such agreements is the price or fee each competitor charges its customers for its products or services. Real estate brokerage firms are no different, and in the real estate profession, that usually means commission rates. A commission is the charge to a seller for successfully procuring a ready, willing and able buyer for the seller's property on terms set forth in a listing agreement, or other such terms as the seller is willing to accept. Another form of commission is the charge to the buyer by a buyer's agent for assisting the buyer in locating and acquiring suitable property.

The antitrust prohibition on fixing commission rates means, simply, two or more real estate firms may not agree on the commission rate that each will charge. As noted earlier, price-fixing is a per se violation of the antitrust laws. Brokers must not agree with others on commission rates, and must take care to avoid even implying that they have discussed and/or reached agreement on fees. Salespeople must exercise similar caution to avoid the implication that the firm with which they are affiliated is part of a price-fixing conspiracy.

2. Fixing Commission Splits - A per se illegal price fixing conspiracy can involve not only the prices a firm charges customers or clients, but also the fees it pays for goods and services. In particular, listing brokers may not agree on the commission "split" to be paid to compensate cooperating brokers who produce a ready, willing and able buyer for a listed property. Conspiracies among competitors to fix the compensation paid to cooperating brokers may also be deemed per se illegal. For this reason, brokers must determine their cooperative compensation policies in the same unilateral and independent manner that they establish the commission or fees charged to clients. Listing and selling brokers may, of course, have occasion to discuss or negotiate the compensation they will pay to each other in connection with individual transactions. These negotiations, however, generally take place before an offer to purchase has been procured by the cooperating office, and in any event should never include a representative of a third office.

3. Agreements As To Other Listing TermsAntitrust law also condemns agreements among competitors regarding other terms or conditions of a listing agreement, such as the length of the listing, the type of listing accepted, or the marketing services to be provided by the listing broker, although such agreements may not be treated as per se violations. Any express or "understood" agreements as to the terms and conditions of listing agreements or other broker-client agreements raise serious antitrust concerns. The lawfulness of such agreements will in many cases be analyzed under the Rule of Reason, which balances the pro-competitive effects of the agreement, if any, against the anti-competitive consequences.

4. Boycotts - A practice that is in a sense directly at odds with cooperation is group boycotting. Like price-fixing, group boycotting is generally characterized as a per se violation of the antitrust laws, although certain boycott activities may be addressed under the Rule of Reason. A group boycott is a concerted refusal to deal with a particular party, such as when two or more businesses agree to refuse to deal with another competitor in order to force a change in a competitor's behavior or to attempt to drive the competitor out of business. As with price-fixing agreements, treatment of a group boycott as a per se violation of the antitrust laws results in the alleged conspirators being denied the opportunity to offer pro-competitive or other justifications for the conduct.

The typical group boycott allegation in the real estate brokerage business involves a claim that two or more real estate firms have agreed to refuse to cooperate, or to cooperate on less favorable terms, with a third firm. Often the target of the alleged boycott is a broker that employs a "discount," " alternative," or other non-traditional commission/compensation arrangement with clients. In some cases targets of alleged boycotts are real estate firms that offer non-traditional property marketing services. The purpose of the boycott, either explicitly or implicitly, is to eliminate the firm as a competitor in the market, or to cause the firm to abandon the discount or alternative marketing strategies. The antitrust laws are clearly make boycotts such as these per se illegal.

Real estate firms or professionals may also be accused of boycotting service providers to the real estate firms. Such a group boycott may target a supplier or purchaser, rather than a competitor, of the brokers alleged to be the conspirators. Concerted refusals to deal will be treated as per se illegal whenever they involve the purposeful elimination or limitation of competition, regardless of the ultimate motive or objective of the alleged conspirators. Real estate brokers may, for instance, agree not to patronize a provider of goods or services necessary or beneficial to the practice of real estate brokerage. For example, an agreement among several real estate firms not to employ the services of a particular printer to produce marketing materials, or to refuse to purchase advertising in a certain publication, may be an unlawful boycott of this type. The most effective and obvious way to avoid antitrust liability for such boycott activities is for each firm to unilaterally and without consulting any other firm determine the service providers it will use and the terms and conditions of using such suppliers.

B. Participation in the Association of REALTORS®

1. Association Meetings

Trade associations are ripe grounds for antitrust conspiracies. By definition associations consist of groups of competitors gathered together to promote their common business interests. As discussed above competitors occasionally seek to achieve that objective by agreeing, directly or indirectly, to act in a concerted fashion to repel a perceived threat to the success of their firms, such as the innovative business practices of a new competitor. Trade association activities are common venues for hatching such unlawful conspiracies since by definition they involve collective action by the competitors who are members of the organization. A broker who participates in the affairs of an association of REALTORS® must always be alert to discussions at association meetings relating to commission rates, pricing structures, listing policies, or marketing practices of other brokers. A broker who finds

himself in the midst of such a discussion should immediately suggest that the topic is changed and, if unsuccessful, he should promptly leave the meeting. If minutes are being taken, he should insist that his departure be noted for the record.

2. Use and abuse of the NAR Code of Ethics - The U.S. Supreme Court has held that industry self-regulation through codes of ethics is a legitimate trade association function so long as the code can be shown to promote competition by improving industry performance or efficiency. At the same time, industry codes of ethics can be and have been used to condemn or inhibit the practices of particularly successful or creative competitors in order to resist the competitive threat posed by such competitors. It is quite clear, however, that the antitrust laws forbid use of industry codes of ethics to discourage or eliminate competition in any way.

The REALTORS® Code of Ethics is no exception. The Code does not regulate pricing, otherwise lawful listing policies, or truthful advertising, nor may the Code ever be used to regulate or "outlaw" innovative or new business practices that cannot be shown to have legitimate unethical implications. REALTORS® who initiate grievances for the purpose or with the effect of limiting the freedom of other competitors in regard to such practices are misusing the Code of Ethics. Associations that permit the Code to be applied in that way create substantial exposure to antitrust liability for the members, the staff and the associations themselves.

3. Penalties for Antitrust Violations - Both civil and criminal penalties may be imposed for antitrust violations. These penalties include in civil cases, liability for three times the plaintiff's actual damages and payment of the plaintiff's reasonable attorney fees and costs, and in criminal cases criminal penalties including fines and prison terms and court supervision of the defendant's business for as long as 10 years;

4. Avoiding Antitrust Problems

A. Perception and Reality

Real estate professionals can limit their exposure to claims of antitrust violations by avoiding the conduct described above as unlawful. In addition, however, real estate professionals should recognize that the outcome of courtroom trials in general, and antitrust trials in particular, does not necessarily depend upon the actual facts regarding the conduct alleged to violate the law. Rather, the outcome of trials depends entirely upon what the judge or jury believes, based on the evidence presented at trial, to have happened at the relevant time. Moreover, price fixing or other antitrust conspiracies are rarely created or proved by direct evidence of an agreement, such as a document signed by all parties to the conspiracy. Rather, antitrust conspiracies are most commonly proven by inferences drawn from the actions of competitors, such as private discussions about prices and subsequent uniformity of the prices charged by the participants to such discussions. For this reason, antitrust compliance programs are addressed as much to avoiding conduct that creates the appearance of a conspiracy as to avoiding conduct that actually consummates or advances that conspiracy.

1. Price-fixing. To avoid antitrust vulnerability for a price-fixing claim, such as two or more brokers or firms having agreed to charge the same commission rate, real estate firms should:
- establish their fees unilaterally without consultation or discussion with persons affiliated with other competing firms;
- ensure that when the company's brokers or salespeople discuss fees with actual or potential clients they use words that indicate to the listener that the services were priced independently, and that they judiciously avoid words suggesting otherwise.

In determining its commission or fee structure, real estate firms must recognize and be conscious that antitrust conspiracies have been established without any direct evidence that alleged conspirators actually consulted with each other before making a competitive business decision, such as establishing a fee structure. In one infamous case a court found that an unlawful agreement had been reached when one competitor announced to others his intention to raise his commission rates and the other competitors adopted the same course of action within a short period of time. The court construed the announcement as an invitation to conspire and the subsequent action by the other competitors as acceptance of that invitation. An inference of conspiracy can be drawn even if the other competitors had each already decided independently to implement the particular policy, but had not already done so.

It is therefore imperative that brokers never discuss with or reveal to competitors their intentions concerning fees or other competitive business activities. Such actions will "taint" not only the subsequent decisions made by the broker who raised the subject, but also the decisions of all other competitors to whom the discussions or announcements were directed. Not only must brokers avoid any discussions that could imply that commissions or commission splits are the result of agreement or collusion, but they should also take positive steps to establish that their commission rates and splits are determined unilaterally. Such supporting documentation might include:

- spread sheets to show business reasons and justification for the amount of the fee or any increase;
- a memo to licensees explaining those reasons;
- discussions with counsel prior to adoption of any increase in the fees; and
- maintenance of correspondence and appointment logs that show that other firms were not consulted in connection with any fee increase(s).

Once pricing decisions are made, it is equally essential that the firm's salespeople present prices to clients in a manner that confirms that the fees were established independently. This means never responding to a question about fees by referring to the pricing policies of other competitors or to a policy of a local association of REALTORS® that supposedly prohibits or discourages price competition. Licensees should never use statements like:

YOU SAID WHAT?

An Antitrust Compliance Brochure

This brochure has been prepared by the Risk Management Committee of the National Association of REALTORS® to supplement the REALTOR® association's long standing antitrust compliance program. Its purpose is to assist members in applying these principles in their individual offices when confronting issues raised by the presence of new business models offered by competitors.

Real estate is and always has been a very competitive business. The multitude of firms that are active in the business in most markets, the entrepreneurial spirit that is a trademark of the sales people who make up the bulk of the industry, and the relative easy entry into the real estate business combine to insure competition. Over the years the real estate business has benefited from that aspect by seeing the different possible business models employed by competitors. Successful innovations take root and spread among the industry. Less successful ones fall by the wayside.

Our industry finds itself in another period where new business models are being introduced. That increases challenges and competition, just as new models have in the past. The law and our Code of Ethics serve to assure that consumers have the complete and accurate information they need to make their marketplace decisions. In the end, consumers decide which business methods will prevail and survive and which will fail. That, of course, is the heart of the REALTOR® association's antitrust compliance program.

One of the bedrock principles of antitrust compliance is that neither associations nor their members collectively set the price of services provided by real estate professionals. That is a decision that is made independently by each firm. The firm's sales associates must take care to present pricing policies to prospective clients in a manner that is consistent with the fact that the fees or prices are ***independently established***. This means they should never respond to a question about fees by suggesting that all competitors in the market follow the same pricing practices or to a policy of the local board or association of REALTORS® that supposedly prohibits or discourages price competition.

Never say things that could be understood to suggest a conspiracy or falsely disparage a competitor:	*Focus on the positive aspects of doing business with you and the services which distinguish your firm*:
• This is the rate every firm charges. • I'd like to lower the commission, but no one else in the MLS will show your house unless the commission is X%. • I have to charge you this rate because this is the rate the Board of REALTORS® set for all real estate agents. • Before you decide to list with XYZ Realty you should know that because they are "discount" brokers, members of the association won't show their listings.	• I have a marketing program that gets results. Let me explain my sixty day marketing plan and all it includes. • Our company has been in business for Y years and has serviced thousands of clients with the highest professionalism. We choose to charge X% and our clients have chosen to pay X% because of the service provided. • Yes, our company charges a commission of A% and company 2 charges a commission of B%, but at the same time you are comparing commission rates, Mr. Seller, be sure to compare services, in order to get an apples-to-apples analysis. • I appreciate your comments, my interest is in helping you meet your goals by getting you the best price, in the quickest amount of time, with the least amount of problems. Let me show you how I do it. • I am proud of my company's reputation for professionalism and getting things done. Let me show you some of our sales *(or whatever)* statistics that prove we do what we say.

Additionally, the obligations of a member of the REALTOR® association impose a higher standard with regard to the statements made about competitors. Article 15 of the REALTOR® Code of Ethics states,

> REALTORS® shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices.

The National Association's Professional Standards Committee has said the Article logically flows from the REALTOR®'s duty established in Article 12 "to present a true picture in ... representations." This includes comparisons with competitors, and comments or opinions offered about other real estates professionals. While the Article is not intended to limit or inhibit the free flow of the commercial and comparative information that is often of value to potential users of the many and varied services that REALTORS® provide, it does require a good faith effort to ensure that statements and representation are truthful and accurate.

The path to managing this risk is really consistent with the philosophy of the REALTOR® organization. By focusing on the positive and presenting it honestly, the potential risks posed by the antitrust laws will be minimized and you will not only have avoided that legal and ethical liability, but you will probably elevate yourself and your firm in the eyes of the most important audience, the people who are going to be selecting you to represent them in the sale or purchase of their home.

Excerpts from Antitrust and Real Estate for REALTORS® and REALTOR-ASSOCIATE®s (5th ed.) and *Professionalism in Real Estate (2003).*

Additional Resources:

Avoiding Antitrust Risk (a *REALTOR Magazine* Toolkit)
http://www.realtor.org/rmotoolkits.nsf/pages/brokerrisk17?OpenDocument
Antitrust and the Real Estate Brokerage Firm (*The Letter of The Law*)
http://www.realtor.org/LetterLw.nsf/pages/0802antitrust?OpenDocument
Please note: Both of the foregoing articles are in the members-only section of Realtor.org
REALTOR® Code of Ethics
http://www.realtor.org/mempolweb.nsf/pages/code?opendocument

REALTOR®
THE BUSINESS TOOL FOR REAL ESTATE PROFESSIONALS

BACK NEXT

Risk management
Avoiding Antitrust Risk

4 Antitrust Traps to Avoid

Although the subject of avoiding possible antitrust violations covers many areas, a few of the most sensitive antitrust concerns include

1. Price/term fixing. In most businesses, including real estate, many competitors may charge similar prices for the same services. This isn't illegal as long as each competitor sets prices independently. An antitrust violation occurs when you discuss and actually agree to charge the same prices or offer exactly the same terms as one or more of your competitors.

Avoid problems by: Establishing your company's fees, commission splits, and listing terms independently and without any discussion with competitors. Even informal conversations where you have no intention of actually setting prices could be misinterpreted as the basis of a price-fixing agreement.

2. Territorial assignments. Agreements between competitors to divide the market geographically, by price range, type of property, or some other segmentation are considered anticompetitive because they conspire to establish dominance in a particular market. This isn't the same as an individual company's practice of specializing in certain properties such as historic buildings or custom-built housing.

Avoid problems by: Documenting your decisions to focus on certain property types with marketing and demographic studies.

3. Boycotts. Boycotts occur when a group of businesses agree not to do business with a particular party. A typical group boycott allegation in the real estate brokerage business involves a claim that two or

more brokerages have agreed to refuse to cooperate, or to cooperate on less favorable terms, with a third brokerage company. The intent is to eliminate that company as a competitor or to force it to abandon certain practices. Another form of boycott would occur if several companies collectively determined not to use a particular service provider, such as a certain newspaper.

Avoid problems by: Making decisions on whether to do business with other real estate companies or service providers based on your company's own judgments, goals, and experiences.

5. Association meetings. Associations are groups of competitors who come together to promote their common business interests. As such, they are vulnerable to allegations that agreements by members to use identical business practices are illegal conspiracies.

Avoid problems by: Remaining alert to discussions at meetings relating to commission rates, pricing structures, listing policies, or marketing practices of other brokers.

Portions adapted from *Real Estate Brokerage*, 5th edition, Cyr, Sobeck, and McAdams, Dearborn Financial Publishing, 1999

TIP: Any business or marketing plan that's principal goal is to adversely affect a competitor could be considered a violation of antitrust law. —*Jodi Tuttle, "What You Don't Know About Antitrust Can Ruin You," Indiana* REALTOR®, May 2001

Phrases That Signal Anti-Trust >

Find It At RealtorMag

Print Magazine

- Current Issue of Magazine
- Past Issues
- Send a Letter to the Editor
- Reprints
- How to Advertise
- Editorial Calendar