

Antitrust and Your Relations With The Board

A. Participation In Board Meetings

A broker who participates in the affairs of an association of REALTORS® should be alert to discussions at an association meeting relating to commission levels, pricing structures or marketing practices of other brokers. Brokers who find themselves in the midst of such discussions should immediately suggest that the topic be changed, and if unsuccessful, should promptly leave the meeting. If minutes of the meeting are being taken, they should insist that their departure be noted for the record.

B. Use and Abuse of The REALTORS® Code of Ethics

The United States 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. Codes of ethics may not be used, under any circumstances, to discourage or eliminate competition by, for example, prohibiting or restricting creative, innovative or "alternative" business practices, no matter how "undignified", "aggressive" or "nontraditional" such competitive practices may appear to be.

The REALTORS® Code of Ethics is no exception. The Code of Ethics, as interpreted and applied through the official Standards of Practice and Case Interpretations, has withstood analysis by federal and state antitrust enforcement agencies and competent private antitrust attorneys. Various Articles also have withstood legal challenges in several states.

The REALTORS® Code of Ethics can nevertheless be misused and abused. REALTORS® cannot insulate themselves from antitrust charges by invoking the grievance or arbitration facilities of a local association. The REALTORS® Code of Ethics does not regulate the pricing, listing policies, or otherwise truthful advertising, of a REALTOR®. Thus, the Code is not violated by REALTORS® who:

1. Charge "discount" or "flat fee" commissions;
2. Engage in "comparative," but otherwise truthful, advertising;
3. Act in the capacity of "buyer's brokers", "transaction brokers" or facilitators";
4. Offer "variable" commissions depending upon whether the property is sold cooperatively or "in-house";
5. Accept "open" or "exclusive agency" listings; or
6. Employ general "mass media" advertising campaigns that reach persons whose properties are already listed with other REALTORS®.

REALTORS® who pursue grievances seeking to prohibit these types of practices or discipline REALTORS® who employ them are misusing the Code of Ethics, and are exposing themselves and their association to antitrust liability.



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C. Service on a Association's Professional Standards Committee

A REALTOR® who serves on a professional standards committee must constantly be aware of the sensitivity of their position. It is classic human nature for a person who is the recipient of an adverse finding by a grievance or arbitration panel to conclude that the panel was not interested in the merits of the case, but rather was engaged in a competitive vendetta. A professional standards committee member must therefore be exceedingly careful that no aspect of a grievance or arbitration proceeding gives even the appearance of prejudice or unfairness.

D. Relations With Other Service Providers and Organizations

Allegations of group boycott are the most common antitrust claims to be asserted against real estate brokers. A group boycott is per se illegal if the purpose of boycotters is to deny a business access to goods or services necessary for it to compete in the marketplace. Real estate brokers can become the targets of boycott allegations if two or more brokers agree to refuse to cooperate with a third broker, or to cooperate only on unfavorable terms or conditions.

Another type of per se illegal group boycott is targeted at a supplier or purchaser, rather than a competitor of the alleged conspirators. Concerted refusals to deal with suppliers or purchasers will be treated as per se illegal whenever they involve the purposeful elimination of competition, regardless of the ultimate motive or objective of the alleged conspirators. As a result, real estate brokers may not employ group boycotts as a weapon against the providers of other goods or services necessary or useful in the practice of real estate brokerage.

E. Newspapers And "Homes" Magazines

A specific example of a temptation common for brokers to engage in a group boycott occurs when brokers become frustrated with the advertising rates or other practices of a local newspaper. This frustration can lead to a suggestion that brokers should collectively agree to reduce their advertising, or refuse to advertise altogether, unless and until the newspaper lowers its advertising prices or changes its policies. Such a suggestion, if implemented, would constitute a per se illegal group boycott.

As an alternative to a concerted refusal to deal with a newspaper, some brokers and/or associations of REALTORS® acted to have instead acted to create of alternative advertising vehicle, such as "homes magazines" or guides. These are publications that contain advertisements for individually listed properties and, in some cases firm advertisements. The creation of these alternative media, whether through a local board of REALTORS® or through an outside publisher, is procompetitive conduct that the antitrust laws encourage.

Rather than organizing a boycott of an alleged monopolist, purchasers of the allegedly monopolized product have joined together to offer a competitive alternative. It is important to understand, however, that a joint venture to create a "homes magazine" guide cannot include an agreement among the brokers in the venture, or the board members, that they will only advertise in the homes guide and not in the local newspaper. Such an agreement is a functional equivalent of an agreement to boycott the newspaper and





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could be per se illegal. All those entitled to advertise in the alternative publication must retain their freedom to advertise wherever else they may find it beneficial to do so.

F. "Codes Of Mutual Understanding" With Other Industry Groups

In their day-to-day business affairs, real estate brokers regularly deal with persons in other sectors of the real estate industry, or in real estate related businesses such as appraising, mortgage lending, the practice of law, or insurance. Often an association of REALTORS® will create formal liaisons with associations representing these other businesses, such as a local home builders or bar association to discuss problems or issues of common concern. These liaisons, whether formal or informal, sometimes include attempts by the two industry groups to establish "codes of mutual understanding" or other agreements setting forth generally accepted business practices that the two industries should observe when dealing with one another.

While these agreements or codes may well be an efficient way of reconciling differences between the two industries, they also present potentially serious antitrust risks. This is especially true if the codes address such matters as pricing or compensation practices, advertising, or any other matters that deal with competition between or among persons in the two industries. If such agreements are negotiated, either formally through an association of REALTORS® and its other industry counterpart, or informally between major firms in the two industries, these agreements should be reviewed by competent antitrust counsel before they are implemented.

Conclusion

In their day-to-day business decisions concerning the fees they charge to clients or the compensation they pay to cooperating offices, real estate brokers must be absolutely certain that these decisions are the result of independent business judgments about market conditions facing the firm. Consultations with competitors about these decisions can result in otherwise reasonable actions being held to be per se illegal, or even felonies.

An antitrust compliance program is essential for every real estate brokerage firm. The written program should be straightforward and understandable by the firm's salespeople, and kept current as laws and their interpretations change. Furthermore, the importance of adherence to the policy by the firm's salespeople should be communicated from the highest levels of the company. Salespeople cannot be expected to take seriously a policy that senior management does not consider a priority.

Finally, antitrust compliance is not simply a means to avoid treble damage liability and costly and protracted litigation. Universal antitrust compliance insures the ability of all competitors to succeed to the extent their skill, industry and foresight will permit. Once the firm's salespeople understand the "rules of the road" they are free to focus their energies on the legitimate pursuit of additional listings, sales, and income for themselves and the firm.

Dangerous Words and Phrases





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The following are examples of words or phrases occasionally used by salespeople that would permit a judge or jury to infer that real estate brokers are engaged in an illegal conspiracy:

1. "I'd like to lower the commission rate, but the board has a rule ..."
2. "This is the rate that everyone charges."
3. "The MLS will not accept less than a 120-day listing."
4. "Before you list with XYZ Realty, you should know that nobody works on their listings."
5. "If John Doe was really professional (or ethical), he would have joined the board."
6. "The board requires all REALTORS® to make their salespeople join."
7. "The best way to deal with John Doe is to boycott him."
8. "If you valued your services as a professional, you wouldn't cut your commission."
9. "No board member will accept a listing for less than ninety days."
10. "Let him stay in his own market. This is our territory."
11. "If he was really a professional, he wouldn't use part-timers."

