

***Is it Competition?? Or Antitrust??
for the
Greater Chattanooga Association
of REALTORS®***

by

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Icebreaker Exercise

The instructor will tell you how to set up groups. In your group, you should:

1. Introduce yourselves to each other if you do not already know each other.
2. In the chart below, mark the "YES" column if the situation could be a source of an antitrust violation and mark the "NO" column if it likely is not the source of an antitrust violation.

Situation	Yes	No
1. A REALTOR® Association Board of Directors meeting		
2. An MLS Committee/Board meeting		
3. A Professional Standards Hearing (Ethics or Arbitration)		
4. A REALTOR® Association awards dinner		
5. Agents in different companies talking together at an agent open house		
6. Agents in different companies who meet regularly to brainstorm marketing ideas.		
7. Discussions at a sales meeting in one company		
8. A REALTOR® Association's Membership Committee meeting		
9. A company's annual picnic (assume only company personnel/licensees)		
10. A franchise's regional convention		

Video Presentation

I. Elements of an Antitrust Violation

- A. A contract, combination or conspiracy
- B. Between/among competitors
- C. To unreasonably restrain trade.

II. “Per se” Restraints

- A. Means that no proof of unreasonableness of the restraint is required.
- B. Thus, proof of the combination or conspiracy between competitors proves the violation.
- C. Real estate per se restraints
 - 1. Price Fixing
 - 2. Group Boycotts

III. Relationships with

A. Customers and clients

1. Commission Rates
2. Other listing policies or buyer agency policies (Also per se)
3. Length of a listing
4. Type of listing accepted

B. Competitors

1. Boycotts - dealing only on changed terms
2. Commission splits - agents & public
3. Comparative advertising

C. Local board/association

1. Discussions at any type of meeting
2. Misuse of the Code of Ethics
3. Service on the Professional Standards Committee

D. Service providers and organizations

1. Key issue is boycotting.
2. Newspapers
3. Suppliers
4. Other media

ANTITRUST SCENARIOS

- T F 1. Jane, an agent with Jones Realty is having lunch with Sally, an agent with Sunset Realty. Jane says, "We're getting fed up with all of this commission cutting going on. In fact, we've decided to raise our commission rate to 8.5%." Sally says, "Boy, are you right on that." A few weeks later, Sunset Realty raises its commission rate to 8.5%. Jane, Jones Realty, Sally and Sunset Realty may all be liable for a possible violation of antitrust laws.
- T F 2. Sarah, the president of Serendipity Realty, is at a committee meeting of the REALTORS® Association. She makes a general statement to the committee members as follows: "I'm getting hammered with all of these new technology costs. I don't care what anyone else does, but we're going to start charging a \$250 transaction fee to all of our clients." Within 3 months of the meeting, three other brokers who were in attendance at that meeting began charging transaction fees of \$250 to sellers. All of the attendees at the meeting are liable for a possible violation of antitrust laws.
- T F 3. Bob, the broker of Smith Realty, holds his company sales meeting one Tuesday. At the meeting he says, "Folks, all of this new technology is costing all of us a lot more money than I expected. As of today, we will not charge less than 8% commission. Do you all agree?" All of the participants in the meeting indicate their agreement. All of the attendees at the meeting are liable for a possible violation of antitrust laws.

T F 4. Peter, an agent with ABC Realty is talking to Paul, an agent with XYZ Realty. Peter says, "You know that Sarah with Discount Realty really takes the cake. All she does is put properties in MLS and nothing else. You can't even get her to participate in the sale. I mean, I do all the work on one of her listings. It's just like working with a FSBO. I don't think we professional agents should be putting up with that and shouldn't show her listings. See how many she sells when a whole bunch of us stand up to her." Paul responds, "You bet, she is a pain." Peter, Paul, ABC Realty and XYZ Realty may all be liable for a possible violation of antitrust laws.

T F 5. Bob, the broker of Smith Realty, is again addressing his sales force. He says, "Sarah of Discount Realty has caused us a lot of grief on several transactions. Our new policy is that we do not cooperate with Sarah or Discount Realty. We do not let Sarah or Discount show our listings and we will not show any Discount listing. OK?" Everyone indicates their agreement. Bob and the agents of Smith Realty are liable for a possible violation of antitrust laws.

Are there other possible legal areas that Bob and Smith may have concerns about?

Are you aware of any provisions of the Code of Ethics that might apply?

- T F 6. Ginny, an agent with ReMax Great Properties is talking to George, an agent with ReMax Small Properties. Ginny says, "Man, am I fed up with these referral fees being demanded by these relo companies. I think the REALTORS® should get together and just refuse to pay these exorbitant fees." George says, "You're right. Let's talk to the Association of REALTORS® and get them to do something about it and put a stop to this highway robbery." The Association of REALTORS® could be in violation of antitrust laws if they act on George's request.

BONUS Question: Even if the Association of REALTORS® takes no action, could Ginny and George and their companies have possible antitrust liability if they "get together" and refuse to accept referral fees of a specified amount or more?

- T F 7. Jenny, an agent with Jefferson Realty, says to Fred, another agent with Jefferson Realty, "I think open houses are just getting too dangerous. I think we should go to the Association of REALTORS® and have them make it a policy that open houses aren't allowed in our area." Fred says, "Sounds like a plan!" The Association of REALTORS® can ban open houses in its jurisdiction if it believes the health, safety and welfare of its members are at risk.

- T F 8. The Triangle Board of REALTORS® MLS Committee has received an application for membership (Board and MLS) from Service Realty. Service Realty is a “fee for service” real estate company that charges a flat fee of \$995 for an “office exclusive” listing (the listing is not in MLS). If the owner agrees to pay a cooperative commission of 2.5%, Service files the listing in the MLS with the cooperative commission of 2.5% offered to all types of cobrokers. The Board refuses admission to Service unless Service agrees to file all of its listings with the MLS and pay a cooperative commission. The Triangle Board may be liable for antitrust violations.
- T F 9. Following a threatened legal action by Service Realty based on the facts of #8, Service is admitted to the Board and MLS. Service files several listings with the MLS for an offered cooperative compensation of 2.5%. In the remarks of the MLS listings, Service states the following: “Contact owner for all showings and offer presentations. Owner will pay offered cooperative compensation directly to cooperating broker.” The MLS then passes a rule that a listing broker must accept and negotiate offers for owners or be subject to discipline. The Board and the MLS are liable for possible antitrust violations.

- T F 10. Jack, the broker for AcrossTown Realty, writes an offer for a buyer on a Service listing. The offer is accepted and closes. Upon closing, the owner refuses to pay the cooperative compensation of 2.5%. Jack files a request for arbitration against Service Realty and its REALTOR® principal. Service refuses to attend the arbitration and the Professional Standards Hearing Panel awards the 2.5% fee to Jack. Service refuses to pay the award and when Jack files an enforcement action in court against service to collect the fee, Service files a lawsuit against Jack and the Triangle Board and its MLS for antitrust violations, citing the MLS remarks on the listing that the owner, not Service, would pay the cooperative compensation. Jack, the Board and the MLS are liable for possible antitrust violations.
- T F 11. Jack, Charles and Jim (REALTORS® in different firms) are all members of the MLS Committee of the Triangle Board of REALTORS®. During the monthly MLS meeting, Charles says to the group, "Have you noticed how much Jones Realty is paying out on some of its listings? I mean, they are only offering 2.5% on most of their listings. It just really makes me mad that they won't give the normal 50/50 split. It makes me not want to show their listings – after all we should be getting the 50/50 split, right?" Jim replies, "I've noticed that too. It's not right when the listing broker tries to keep more for themselves. I don't show anything that doesn't have a 50/50." Jack nods his head and says, "You know, it's just taking unfair advantage when you don't pay out at 50/50." Jack, Charles, Jim, the Board and the MLS may be liable for possible antitrust violations.

- T F 12. Carol, an agent with Best Realty, was on a listing call. Carol had quoted a commission rate of 7% to the owner. The owner said to Carol, "We really don't want to pay 7%. In fact, we've talked to Quality Realty and they told us their commission would only be 5%." Carol replied, "Well, before you list with Quality, you should know that because the 50/50 split on 5% is only 2.5%, other agents won't show those kinds of listings. You are better off with me because agents will show listings at 3.5%, but not at 2.5%." Carol and Best Realty may have possible liability for violations of the antitrust laws.
- T F 13. Quality Realty took out an ad in the local newspaper that said, "List with us for less! Save thousands of dollars! 5% total commission. Full Service!" Sarah, the president of the Green Hills Association of REALTORS® received several complaint calls about the ad. At her next board meeting, one of the directors made a motion to instruct the Grievance Committee to file an ethics complaint against Bart, Quality's broker-principal for a violation of Article 12 because Quality was not presenting a true picture in its advertising by claiming it was a full service broker. The motion passed and the Grievance Committee filed a complaint against Bart, and the complaint was forwarded to the Professional Standards Committee for a hearing. Bart refused to attend what he called a "witch-hunt." Bart was found in violation of the Code and was suspended from the Board and MLS for 1 year. The Board and its directors may be liable for possible violations of the antitrust laws.

ANTITRUST CASE STUDIES

In your groups, determine whether there are any antitrust violations in these two scenarios. If so, decide what type of violation exists.

CASE #1: The real estate market in your area has been rather slow for about a year. Brokerage profits have been squeezed because of declining volume and increased costs of doing business. Commission rates have been generally stable at approximately six percent for several years. In January, one of the three largest brokers raised its commission rate to seven percent.

At the local Board of REALTORS® annual membership meeting on June 1, the outgoing president of the Board, who operated a medium sized firm, encouraged her fellow members to “tough it out” during the slow market. She stated that because of market conditions, she was raising her commission rate to seven percent, effective the next day, but would lower the rate back to six percent when market conditions turned around. On July 1, the two other large firms increased their commission rates to seven percent.

Which, if any of the brokers mentioned can be found guilty of a violation of antitrust laws? What would the possible violation be? What could be the brokers' defenses?

CASE #2: The Special Courier Press Journal is the only daily newspaper in this city of 300,000 and also has a large, well-read website system for news that includes significant advertising. The paper tends to raise rates frequently, particularly for real estate and automotive ads both in print and on its website. After 6 rate increases in 3 years, the new president of the Board of REALTORS® decided to create a committee to study an all REALTOR® publication outside of the paper and an accompanying independent public facing website. After research, the committee recommended, and the board of directors adopted a program in which the Board would publish its own classified and "homes magazine" type publication in a tabloid format, to be printed and distributed by a local printer. In addition, it decided to create a public facing website (in conjunction with its MLS) showcasing listings of all brokers on very favorable terms. The Board's program was such that its rates were competitive with the daily newspaper for all advertisers, both print and online. However, the Board gave special, substantial discounts of up to 50% for advertisers who committed to advertise its listings exclusively in the Board's publications/website and not in the daily newspaper or on its website.

Many real estate companies took advantage of the 50% discount rates, advertised exclusively in the Board's publication and website and dropped out of the Special Courier Press Journal media methods.

Faced with a substantial decline in revenue and learning of the Board's rate program, the Special Courier Press Journal filed a lawsuit against the Board and the four largest real estate companies who switched to the Board publication/website and dropped the daily newspaper's advertising venues.

Who would you predict might win this lawsuit? If there are violations of antitrust law, who might be liable for the violations?

IV. Avoiding Antitrust Liability

1. Establish fees unilaterally, based on your own analysis of costs and profits.
2. Insure that your licensees convey the fact that services were priced independently.
3. Consult with your legal counsel before changing rates or fees.
4. Require antitrust education in your company.
5. Make independent decisions about cooperative fees to be paid.
6. Make independent decisions about cooperation with other firms, following the dictates of Article 3 of the Code and your fiduciary agency duties.
7. Walk away from any discussion among competitors about rates, fees, types of listings, listing policies or cooperation issues with other brokers.
8. Monitor your licensees conduct in this area and do continuing education at least annually.