Michigan Realtors®
January, 2005

ANTITRUST PRIMER AND REMINDER

I. INTRODUCTION

A. Antitrust laws were designed to protect competition.

B. Antitrust laws prohibit conspiracies to fix prices, such as real estate commissions, or to fix other terms or conditions of the broker-client relationship.

C. Antitrust laws also prohibit group boycotts or concerted refusals to deal with another competitor or a supplier.

II. ANTITRUST CONCERNS WITHIN REAL ESTATE FIRMS

A. Traditional concerns:

1. Two or more firms agreeing on the commission rate to be charged sellers.

2. Statements by agents suggesting that all competitors in the marketplace follow the same pricing practices. Firms should caution agents that when discussing listing commissions with potential clients, they should avoid any suggestion that commission rates are not set independently.

3. Two or more firms agreeing on the split to be offered cooperating brokers. Firms must independently determine their cooperative compensation policies, just as they do with listing commissions.

B. More recent concerns:

1. Statements by agents that suggest "no one will deal with" a particular competitor.

2. Statements by agents suggesting that particular terms of a listing contract or other practice are followed by all competitors in the marketplace. Antitrust laws prohibit, for example, agreements among competitors as to the length of listings.

3. An agreement between two firms that each will not deal with another firm or that each will deal with another firm in a particular manner.

4. Discussions between two or more firms about another firm's business practices. A real estate firm is free to unilaterally choose not to offer compensation to a particular company or to lower the commission offered to that company. But if the firm does so after discussing his "problem" with that company with members of other firms – even casually – an inference may be drawn that this action was done pursuant to a conspiracy to boycott the other company.

5. An agreement between two firms that they will not deal with a particular service provider – e.g., mortgage company, warranty company, title company, etc. Many of these cases have involved sellers of real estate advertising. For example:

   a. An Iowa case involved a group of brokers who set up a real estate magazine. The shareholders of this magazine all agreed not to advertise in a competitor's real estate magazine and instructed their sales associates to do the same. (This case was resolved by the parties through settlement; the terms of which are unknown.)

   b. A newspaper in Virginia brought suit against several brokers alleging that they had unlawfully agreed not to advertise in the newspaper. (The case was eventually dismissed for lack of evidence of concerted activity.)

   c. The Attorney General in Oregon brought an action against several real estate firms and the Salem-area Association of REALTORS® asserting that the Board had facilitated an

agreement by the firms to restrict their advertising to certain publications. (A settlement was reached which involved a fine and antitrust education programs.)

III. ANTITRUST CONCERNS WITHIN ASSOCIATIONS

A. Actions by an Association or officers within the Association aimed at stopping a particular firm from conducting its business in a particular manner which some of the Association's members find objectionable.

B. Discussions at meetings of the Association about a particular firm or its practices.

1. A case from Des Moines, Iowa, illustrating the pitfalls of Associations getting into the middle of disputes between competitor firms. In that case, a firm with an approximately 75% market share decided not to offer cooperative compensation to a start-up firm that took many "office listings." At about the same time, the Association began enforcing a long-ignored policy that penalized firms for "office listings." The start-up firm sued both the large broker and the Association, alleging that the two had conspired against it. While the Association eventually prevailed – in large part because the start-up company had nonetheless prospered – the case was litigated all the way to the Iowa Supreme Court.

2. At a recent continuing education class sponsored by a local Association, the following question was asked:

> "There is one member of our Association – a solo practitioner whose office is over on Elm Street and who recently got divorced. Anyway, I know he lost his law license and I don't trust him – can I refuse to let him show my listing?"

This is exactly the type of discussion that should never take place during any type of meeting of Association members. It is likely that many of the members in attendance could identify the solo practitioner from the description given. If more than one firm later decided not to offer compensation to this licensee, the inference could be drawn that this was a concerted effort to boycott, in violation of antitrust laws.

C. Requests by officers/directors/members that the Board executive officer "do something" to stop a particular firm from conducting its business in a particular fashion.

1. Executive officers should not be put in the position of mediating disputes between competitors; particularly where the dispute involves the particular business practices of one of the firms. An

executive officer should never start a conversation with a member with language like:

> "Several members of the Association have called me and expressed concerns about the way your firm handles . . . ."
>
> "I know you are new around here, and therefore you might not know the way we do things around here . . . ."

2. Association leaders and executive officers should be sensitive to the possibility of misuse of the Code of Ethics. The Code may not be used to regulate or "outlaw" innovative or new business practices.

   a. Article 15, for example, provides that "REALTORS® should not knowingly or recklessly make false statements about competitors, their business or other business practices." This does not prevent REALTORS® from asserting that their firm is superior to all others (i.e., puffing). It is not a violation of Article 15, for example, if a firm advertises that the way it does business is superior to the way other firms in town do business.

b. Article 16 precludes REALTORS® from engaging in any practice or taking any action inconsistent with exclusive relationship agreements with other REALTORS®. It does not prohibit competition – even aggressive competition – to obtain clients. REALTORS® can, for example, solicit another REALTOR®'s prospective client or customer, regardless of the long-term nature of that relationship, and even if there was a prior exclusive agency relationship.

c. An example of how a problem could arise occurred recently when an officer of a local Association made the following telephone inquiry:

> "At the end of the last meeting of the Grievance Committee, several of the members were talking and they want the Association to institute an ethics complaint against "Firm X" because its advertisements falsely state that buyers' interests are not fully served unless they hire an exclusive buyer's agent . . . "

IV. ANTITRUST CONCERNS AMONG ASSOCIATIONS

A. One of the consequences of Boards of Choice is that local REALTOR® associations are now competitors.

1. Two or more Boards may not agree among themselves on the amount of dues or other charges.

2. Two or more Boards may not agree that they will not solicit one another's members.

3. If Boards jointly purchase a product in order to save money (for example, lockboxes), they may not agree on the re-sale price that each Board will charge their respective members.

B. Regional MLS's are made up of a group of competitors.

1. Sandicor decision out of California involved service agreements between the regional MLS and the shareholder Associations, pursuant to which the Associations provided support services to the MLS (e.g., enrollment, billing and collection services). The regional MLS required all of its member Associations to charge all MLS participants the same "user fee." The Associations collected the "user fee" and forwarded the money to the regional MLS, who would then return the "service fee" portion of the "user fee" to the respective Association. The regional MLS did not permit any Association to discount its "user

fee"; thus the "service fees" charged by all Associations were the same. The Ninth Circuit Court of Appeals has held that this was an illegal conspiracy to fix prices.

2. The Sandicor decision does not affect a regional MLS that delivers MLS services directly to the participants.

3. Likewise, the Sandicor decision does not affect a regional MLS that sells its services to the member Associations, who each in turn, resell the services to their respective members at prices determined by each Association.

C. The merger of two or more neighboring Associations may also raise antitrust considerations, particularly if it will result in higher dues payments for members of one or more of the constituent Associations. Mergers that result in lower dues and/or more member services are much more likely to withstand scrutiny.