**ILLINOIS REALTORS®**

# *Antitrust Avoidance Manual*

The real estate industry over the years has become painfully aware of an area of the law which can have drastic effects on our day-to-day business and our ultimate economic livelihood. I speak of the pervasive ramifications of the state and federal antitrust laws. The impact of these laws affects every phase of the real estate industry; individually, our individual firm's business, firms' relationships with other firms, the individual firm's relationship with local associations of REALTORS®, our Illinois association and our national association.

Thus, it is extremely important that all of us be cognizant of the purpose and scope of antitrust laws. We need to be aware of such laws that are of particular concern to our industry and the method and procedures by which we in the real estate industry can conduct our business practices so as to comply with those laws.

Illinois REALTORS® is acutely aware of the time, expense and the disruption that can occur even though there is no apparent reasonable evidence to warrant such an investigation.

An antitrust investigation through grand jury hearings, even if no criminal indictments or civil suits follow, can be extremely detrimental to the normal course of association business and the business pursuits of our members. Accordingly, it is incumbent on our association members to know the essential areas of the antitrust law which may apply to our business pursuits, to understand such laws and to avoid actions or conduct that may expose our members and industry to antitrust investigations or lawsuits, criminal or civil.

Illinois REALTORS® and the National Association of REALTORS® have always been of the opinion that compliance with the antitrust law and policy is consistent with the aims of the real estate industry and the personal and financial success of its members. Accordingly, the Illinois REALTORS® has seen fit to have this manual prepared for study and practice by its members.

I urge you to study this manual and educate your staff and associates in all of the antitrust laws as they affect our industry. Please do this with the thought that, generally, people do not intentionally violate the law but do so in many cases due to lack of awareness of the fact that their course of conduct is in direct violation of the law. It is an unfortunate situation when a whole group of REALTORS® in a community become embroiled in an antitrust criminal or civil lawsuit because of the unintentional but illegal conduct of one or several people in their business profession.

Sincerely,

Jeffrey T. Baker
Chief Executive Officer

**Preface**

For many years, the National Association of REALTORS® (NAR), through mandatory policies such as the Membership Qualification Criteria for REALTOR® Membership, NAR's Multiple Listing Policy and recommended procedures in the NAR Code of Ethics and Arbitration Manual, has prescribed important guidelines for compliance with the antitrust laws.

NAR also has other tools available, including compliance guides and an antitrust quiz, which can be found at https://www.nar.realtor/competition-in-real-estate.

Illinois REALTORS®' purpose is to reinforce and re-emphasize the theme that in today's real estate brokerage market any REALTOR® or REALTOR-Associate® must be informed about and sensitive to antitrust laws as they apply to the marketing of real estate. The firm with which the individual is associated and the association of REALTORS® of which the individual is a member, also must be fully informed and follow procedures of strict compliance.

As has been noted by an authority on antitrust lawsuits:

"The best way to win antitrust lawsuits is to avoid them, and the best way to avoid them is to maintain a continuing and effective compliance program. This requires three related but separate kinds of activity. First, there must be an antitrust educational program for all executives and other employees who have authority to act for the firm. Second, when any sensitive question arises, there must be continuing consultation with lawyers sophisticated in antitrust law. Third, there must be the establishment and enforcement of protective policies."[1]

1. 24 Am Jur Trials, Section 128, Compliance Programs. Citing compliance reports to FTC. 55 Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices §860.

**Antitrust Laws in General**

The basic federal antitrust statutes are the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act.

**The Sherman Act** prohibits contracts, combinations, and conspiracies in restraint of trade. It also condemns monopolization and attempts and conspiracies to monopolize.

**The Clayton Act** prohibits various kinds of business conduct that have a tendency to lessen competition or monopolize trade. Among the practices made illegal by this statute are exclusive dealing arrangements, acquisitions and mergers which lessen competition and interlocking directorates.

**The Federal Trade Commission Act** bans unfair methods of competition and unfair or deceptive acts and practices.

**The Robinson-Patman Act** prohibits price discrimination where the effect is to lessen competition. In addition, most states have enacted statutes similar to the Sherman Act and Federal Trade Commission Act.

## Antitrust Laws Applicable to Association Activities

There are two federal statutes of principal concern to individuals and firms that take part in association activities: Section 1 of the Sherman Act and Section 5 of the FTC Act. These laws prohibit contracts, combinations and conspiracies in restraint of trade as well as violations of cease-and-desist orders.

The U.S. Supreme Court has said that not every contract in restraint of trade constitutes a violation; only those which unreasonably restrain trade are unlawful. So a court will look at all the facts and circumstances surrounding the conduct in question to determine if there has been unreasonable restraint of trade, which would be a violation of law.

Certain conduct, however, is conclusively presumed to be unreasonable and is therefore considered unlawful per se. This includes certain practices that clearly restrain competition and have no other redeeming benefits, examples include agreements to establish prices (price fixing), agreements to refuse to deal with third parties (boycotts) and agreements to allocate markets or limit production.

## Antitrust Enforcement

The Sherman Act is enforced by the U.S. Department of Justice and by private suits for treble damages by persons or firms injured by antitrust violations. Government suits may be either civil or criminal in nature. In the civil suit the government seeks an injunction to prohibit the offender from violating the law in the future. Criminal actions seek to impose fines or imprisonment.

The FTC Act is enforced by the Federal Trade Commission. The FTC issues cease and desist orders when a practice is found to violate the law. The violation of an FTC order may result in penalties of over $46,000/violation (as of January 2022) and increases each year adjusted for inflation. An association judged in violation of antitrust laws can be dissolved by court order.

A violation of the Sherman Act is a felony, punishable by jail sentences of up to ten (10) years. In addition, the fine for Sherman Act violations has been increased to a maximum of $100 million for corporations and up to $1 million for individuals.

The Antitrust Improvements Act of 1976 gave new authority to state attorneys general to file treble damage suits on behalf of citizens of the state who have allegedly been injured by an antitrust violation. A judgment for the government in a criminal action may be used as prima facie evidence of illegal activity in a private treble damage suit. This means an antitrust violation is subject to two separate actions, which could have a debilitating effect on any defendant.

## Illinois Antitrust Laws

The State of Illinois adopted an Antitrust Act in 1965 patterned after federal antitrust legislation. The state law, although quite similar in purpose, is somewhat more liberal in some areas.

The reason for adoption of a state law in addition to the federal law was to give the State of Illinois and its residents a remedy to prevent antitrust violations when the federal government declines or refuses to act to enforce violations of the federal law.

The Illinois Antitrust Act provides that violations of the Act can be Class 4 felonies punishable by fines up to $1 million for corporations and $100,000 for any other person. The fact that Illinois REALTORS® and many other local boards are incorporated will subject them to a fine as a corporation.

Violations can also lead to an injunction, divestiture of property and business units, or dissolution of corporate status in Illinois. The attorney general can also seek the dissolution of associations or terminate their right to do business in Illinois. The law is enforced by the Illinois Attorney General, the county state's attorneys and injured individuals may sue for treble damages, or an injunction, or both.

The Illinois law carries forth the basic prohibitions of the federal antitrust acts against price fixing, limitations on production and allocation of markets or customers by agreement or conspiracy which constitute "per se" violations and are punishable by criminal sanctions. As under federal law, these are violations of the Act regardless of the economic effect on the market.

Section 3 of the Illinois Antitrust Act further prohibits vertical agreements (such as agreements between buyers and sellers fixing the price for which the buyer must resell to third parties), boycotts, and certain types of mergers. However, under Section 3, prohibiting unreasonable restraints of trade or commerce, the contract, combination, or conspiracy must be shown to be unreasonable after examining the economic purposes and consequences of such agreement. Thus, under Illinois law, individuals, and companies, including those in the real estate industry, are subject to State sanctions, even if violations should go unnoticed or unpunished under federal law.

**Special Problems for Associations**

As a matter of law, local associations and their members stand in the same position under the antitrust laws as any other group of persons or firms. Thus, the legality of local association activities is judged by the same standards as are applied to other entities.

For several reasons, however, local associations by their very nature, present special antitrust problems. One reason is that merely bringing competitors together in a local association creates the means by which collusive action can be taken in violation of antitrust laws. The Sherman Act prohibits "combinations ... in restraint of trade." Because a trade or professional association by its very nature is a combination of competitors, one element in a possible violation is already present; only the action to restrain trade remains to be shown.

A second special antitrust problem of local associations is that many of their most valuable programs deal with subjects sensitive to antitrust implications, such as price reporting, product standards, statistics, certification, and customer relations.

**Conspiracy in Restraint of Trade**

As noted above, Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. Simply defined, a conspiracy is an unlawful agreement. The "agreement" is very broadly defined: it can be oral or written, formal or informal, expressed or implied. A "gentlemen's agreement" to hold the line on prices is more than sufficient evidence of an unlawful conspiracy to fix prices.

Conspiracies are usually "proved" on the basis of circumstantial evidence, a course of business conduct from which a jury may infer that a conspiracy existed. Considered separately, the circumstances may be entirely innocent and lawful. When viewed in the aggregate, however, the circumstances may amount to conspiracy.

A typical set of circumstances from which a jury might infer the existence of a conspiracy is: a period of price instability in the industry, a meeting of competitors at which prices were discussed, increased prices by those participating in the discussion. Eliminate the price discussion and it's impossible to establish that a conspiracy existed. **That is why it is so important to avoid discussing prices at association meetings.**

**Basic Antitrust Rule for Association Members**

The basic principle to be followed in avoiding antitrust violations in connection with association activities is to see that no illegal agreements, expressed or implied, are reached or carried out through the association. You should also avoid conduct that may even give the appearance of an unlawful agreement. Your primary conduct should be positive to ensure full, free open competition in all business transactions.

**Areas of Particular Antitrust Concern**
Association activities that most often create antitrust problems for members fall into several categories.

**Pricing**. The most common antitrust violation is price fixing, an agreement to establish prices. Competitors should never discuss prices or discounts at an association meeting (or elsewhere). The association should never be involved in members' pricing practices, even on an advisory basis. Statistical programs involving past prices are permissible, but only under careful supervision of legal counsel. **Present or future prices should never be the subject of such programs.** An association should also be aware that exchanging other than historical price information with members or other associations will be subject to close scrutiny.

**Membership.** Membership qualifications should be reasonably drawn to include all members who share the common problems in the industry or profession the association was established to represent. The qualifications should be objective and should be included in the bylaws. Those who meet the qualifications should be admitted automatically to membership.

Normally, the only basis for expelling a member should be that the member is no longer in the industry or profession or that the member has not paid the association's dues. Counsel should be consulted if the association desires to expel the member for any other reason.

**Industry Self-Regulation**. All programs in which the association seeks in some way to establish rules for the industry should be reviewed by legal counsel. Codes of Ethics should be particularly scrutinized to ensure that they do not unreasonably restrict competition. Great care should be taken to avoid any conduct that might be construed as an agreement not to deal with competitors or suppliers in the industry.

**Standardization, Certificates and Statistical Programs**. Such programs are proper so long as they are not used to restrict competition or injure a competitor. There are specific rules governing the manner in which such programs may be conducted safely and within antitrust laws. Legal counsel should be consulted about those rules and the way they apply to the associations' programs.

**Mergers, Consolidations and Joint Ventures**

In the era of Board of Choice, and MLS of Choice, mergers, consolidations, or joint ventures are among concerns in these areas. For instance, you should be aware of price-fixing considerations. Price-fixing is per se illegal, which means a court will not even consider the reasonableness of the action taken. Two or more local associations should never agree on the level of dues, fees, or other charges to be assessed their members. Also, local associations should not agree with competing local associations to the recruitment or non-recruitment of potential members. Yet another concern may arise when two or more local associations merge and the dues for members from one of the previous associations are now higher after the merger or consolidation. In some circumstances, joint ventures may be considered among local associations where they could consolidate particular functions to pass on economic efficiencies to their members. Counsel should be consulted when considering a merger, consolidation, or joint venture to make sure antitrust issues are considered and problems avoided.

**Antitrust Avoidance Guidelines**

You can participate fully in association programs and activities, with little possibility of antitrust problems, by following a few simple guidelines:

• Attend meetings only when there are proper items of substance to be discussed that justify your attendance.

• In advance of every meeting, review the meeting notice or agenda. It should be specific, without broad topics such as "marketing practices" which might look suspicious from an antitrust standpoint.

• Adhere strictly to the stated agenda. In general, subjects not included on the agenda should not be considered at the meeting.

• If a member brings up for discussion at a meeting a subject of doubtful legality, he should be told immediately the subject is not a proper one for discussion. This, of course, is the legal counsel's responsibility; but in their absence, the board staff representative or any member present who is

aware of the legal implications of a discussion of the subject should attempt to halt the discussion. Should the discussion continue, despite protest, it would be wise to leave the meeting.

• Minutes of all meetings should be kept (usually by association staff); they must accurately report what actions, if any, were taken.

• Limitations should be placed on the authority of committees to take final action on behalf of the association.

• Secret or "rump" meetings held at the time of the scheduled meeting should be strictly avoided. Such meetings seldom, have any purpose other than to discuss illegal activities and, accordingly, they seriously jeopardize legitimate association activities and create a very substantial risk that those activities will be investigated. An association staff member should usually be present at all meetings.

• During meetings there should be no recommendations with respect to "sensitive" antitrust subjects, those relating to price, production, markets and the selection of customers or suppliers. Prices should not be discussed at all. In the less sensitive areas, such as standardization of activities, recommendations must be permissible.

• You and other members should not be in any way coerced into taking part in association activities. There should be no policing of the industry to see how individual members are conducting their business.

• In general, association legal counsel should attend all meetings of the association's board of directors and all other meetings where legally sensitive subjects might be discussed.

• If you have any doubt about the legality of any association program or subject of discussion, check with association staff and legal counsel. You may also wish to consult with your company's attorney.

• You should cooperate with association legal counsel in all matters, particularly when counsel has ruled adversely about a particular activity.

• Consult your local association legal counsel immediately when considering a merger, consolidation, or joint venture among local associations.

**A Positive Approach to Antitrust Avoidance**

REALTORS® have every reason to want to comply with antitrust laws. REALTORS® have continuously affirmed their belief in the free enterprise system, unfettered competition, and the preservation of our democratic institutions. The antitrust laws were enacted for such purposes.

The relationship between antitrust laws and economic freedom has been expressed by the courts and other authorities. The United States Supreme Court has noted that:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions."[2]

In yet another opinion the Court put it this way,

> "Antitrust laws in general, and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."[3]

REALTORS® should have renewed enthusiasm for carrying out an effective antitrust avoidance program and the foregoing statements of the underlying purposes and objectives of such laws provide the impetus to carry through on both NAR and Illinois REALTORS®'s efforts to ensure compliance by all REALTOR® organizations, REALTORS® and REALTOR Associates®.

2. *North Pacific Railway Co. v. United States,* 356 U.S. 1, 4 (1958)
3. *United States v. Topco Associates, Inc.* 405 U.S. 596, 610 (1972)

**Consequences and Costs of Failure to Comply**

If not persuaded by the positive approach to antitrust avoidance, alternative practical reasons must be considered. In other words, will an antitrust avoidance program to institute and maintain, be worth the effort and cost when compared to the possible adverse consequences of failure to adopt such a program? In order to arrive at a reasonable answer to this question, one must consider the possible consequences of the failure to adopt an affirmative antitrust avoidance program.

Those who choose to ignore the antitrust laws or fail to educate themselves about such laws and develop a sensitivity to antitrust issues risk very serious consequences and costs for themselves and those with whom they are associated and their fellow REALTORS®. These risks include:

**Criminal Prosecution**. The criminal penalties for violating antitrust laws are severe, and the present enforcement trend is to prosecute not only the association, corporation or firm involved, but also the officers, directors, staff and employees personally. A violation of the Sherman Act, for example, is a felony for which any corporation may be fined up to $100 million and an individual can be fined up to $1 million and imprisoned for up to ten years for each offense. The fines are not tax deductible, Also, if a taxpayer is indicted and subsequently pleads guilty or nolo

contendere or is convicted, payments or damages in civil treble-damage actions are only one-third deductible.

Jail sentences and probation, which by now are common, can be great personal tragedies. It is not a pleasant trip through the typical arrest, fingerprinting, photographic and bail processes. Furthermore, convicted felons incur many civil disadvantages with respect to voting, holding of public office and the like.

The emphasis today in the Justice Department is on stronger and more frequent criminal enforcement. Nolo contendere pleas are usually opposed by the government, and the larger fines and sentences are being sought.

**Private Treble Damage Suits**. Antitrust laws also provide for civil penalties. Section 4 of the Clayton Act allows private persons or businesses injured by an act forbidden by the Sherman Act, the Clayton Act, and in some circumstances, the FTC Act, to recover three times the amount of their damages, plus attorney's fees, prejudgment interest, and all costs of litigation. The potentially enormous size of these judgments, particularly in a class action suit, can spell disaster for all real estate brokerage firms and associations of REALTORS® which are involved.

**Injunctions.** The government and injured persons or businesses may also obtain injunctions against further antitrust violations. This can include enjoining members from exchanging price or sale terms information. The severe requirements of these injunctions will handicap any brokerage business or association of REALTORS®. The government could even seek dissolution of the association.

**Consent Decrees**. To avoid the shocking expense of defending antitrust suits, some defendants elect to "settle out of court" by agreeing to consent decrees. However, these consent decrees can severely restrict an association's operations or a company's business and, in some instances, the result is that the officers, directors and staff of a defendant from day-to-day carry on the operations under peril of contempt of court citations, or threats of severe civil monetary penalties. Conduct and practices which have not been adjudicated to be unlawful are often prohibited in consent decrees.

**Time**. Antitrust litigation usually requires years of preparation before trial and many months of appeals. From the filing of suit to settlement or judgment, on the average may take from four to five years. Not only may the defendant association or real estate firm in antitrust case face years of uncertainty, but the valuable time of REALTORS®, REALTOR® Associates and other personnel almost certainly will be spent in long hours of preparing testimony, giving depositions, producing documents, tabulating statistics and performing other necessary preparations for trial. It is almost impossible for association executives and REALTORS® in antitrust cases to appreciate the time lost and the expense involved until they actually experience serious antitrust litigation.

**High Cost of Antitrust Litigation**. The cost of defending antitrust suits, civil or criminal, are astonishing. It is not at all unusual in criminal antitrust cases for the cost of litigation to exceed the fines imposed. Even defendants confident of acquittal are faced with the prospect of spending shocking amounts of money and countless days of employee time and effort in establishing their

innocence. So called "simple" antitrust cases usually cost thousands of dollars to defend. It is, therefore, imperative that association executive staff and employees and REALTORS® and REALTOR Associates® involved in the real estate brokerage business not only comply with the antitrust laws, but also avoid even the suspicion of any violations.

**Adverse Publicity**. Whether the antitrust case is civil or criminal, once the suit is filed, damages to the reputation and public image of both the local association as well as the individual defendants and especially the image of REALTOR® as an ethical and responsible businessperson are incalculable. Even if the government's prosecution or a private plaintiff's treble damage suit against a REALTOR® Association or a real estate business operating under the name of REALTOR® is without merit and the cases are eventually won by the defendants, the bad publicity lingers on.

**Internal Strife and Tension.** No matter how well organized and managed a local association or REALTOR® firm may be, once an antitrust investigation is launched or an antitrust suit is filed, internal strife and tension among the staff and employees is unavoidable. Personnel will be kept busy assisting in matters involving the investigation or in preparing for litigation, and some inevitably will seek to disassociate themselves from others whom they perceive to have contributed to the charge. The loss of work efficiency and production resulting from these conflicts is expensive and can be ruinous to any association or REALTOR®'s business.

**Continuous Antitrust Avoidance Program Essential**

Any illusions that adoption of high-sounding resolutions of commitments to the antitrust laws, an annual speech by an association executive or legal counsel, or showing a film once a year on the subject constitutes an effective or meaningful antitrust avoidance program can be dangerous. While each of these may be a part of an effective program, they are not sufficient in themselves and may very well be construed as "window-dressing" or "for show" only.

Half-hearted attempts at an antitrust avoidance program actually are dangerous in that they may very well be construed by antitrust enforcers as an attempt at concealment or cover-up of unlawful antitrust activity.

To be effective, antitrust avoidance programs must be continuous, on-going, and in-depth, year after year so that every member of the Illinois REALTORS® is thoroughly educated and sensitized to the point that he or she knows and follows the basics of antitrust compliance and such compliance can be documented.

In view of the drastic consequences of failing to comply with the dictates of Federal and State antitrust laws, the entire real estate industry is well advised to acquaint itself with its obligations under the antitrust laws and implement a continuing program to assure compliance.

**Suggested Guidelines for Antitrust Avoidance**

In antitrust cases, whether criminal prosecutions or civil treble damage suits, proof against the defendant is most likely to come from the defendant or his associates. Thus, an antitrust avoidance

program must not only avoid actual violations of antitrust laws, but also avoid creating or permitting the creation of files, records, documents, statements, or conversations which might create an appearance of violation.

It is impossible, of course, to formulate a set of guidelines to cover all situations at all times, but insofar as the principles of antitrust avoidance can be stated in specific rules, REALTORS® and REALTOR-Associates® would be well advised to remember the following:

*Do not discuss your business with competitors*. At any time, in any place, or under any circumstances, do not have any personal, telephone or e-mail or social media posts or conversations with competitors concerning commissions, fees, charges or any other business practices of your real estate business or those of the firm with which you are associated. This applies at social gatherings, on the golf course, while hunting, in the bar, cocktail parties, association functions and at all times and in all places including on social media platforms. At association meetings, confine discussions to topics of association business directly involved in the purpose of the organization and the meeting.

*Written communication must be clear and explicit*. When you discuss a real estate transaction or the superiority of your business practices over your business competitors, talk only to your broker or associates in the firm with which you are associated. Regardless of how carefully you may phrase your letter, email or memorandum, things look much different in writing than they sound when spoken between knowledgeable people.

Of course, financial and economic data sometimes must be written, but in many instances, any information relevant to business or legal relations can be communicated by talking, and talking only to those who have legitimate justification for receiving the information you are transmitting. More than one antitrust defendant has had his letter, correspondence, emails, memoranda, and written notes admitted in evidence against him for purposes for which the writer never intended. It is amazing how differently what you wrote sounds when it is read back to you in the grand jury room or during trial.

*Do not talk unless you know who you're talking to and what you're talking about*. In any business, complete candor among trusted business associates is necessary. It is not necessary, however, to tell everyone your business. Inform only those who need to know such matters as how and in what manner commission or fee contracts were negotiated, how much business you're doing, what business prospects are, how many and which properties you have sold, and anything else which might be of interest to someone investigating your business for a reason you know nothing about.

If you receive a telephone call from anyone who refuses to identify himself or who begins what amounts to a probing cross examination about your business practices, terminate the conversation as quickly and courteously as possible. In this day of ever improved recording devices for both telephone use and miniature recording devices easily concealed in a room or on the person of an investigator, it is well to make it a rule in discussing business matters to speak as if you were being recorded. The chances are better than you think they are!

Remember cellular telephone calls are transmitted over the open air and thus are subject to being intercepted or overheard. A third party may intentionally be privy to those conversations. Be aware that new technology provides for listening ability almost anywhere at any time. You could be showing a home that is equipped with audio recording capabilities.

*Do not deceive yourself or let anyone else deceive you into believing that any transgression of the antitrust laws has little risk involved*. The federal government possesses extensive investigatory powers, such as grand juries and civil investigative demands, as well as ingenious and dedicated investigators. Also, in private litigation, parties have litigation discovery tools to examine corporate or firm records and documents and to compel testimony. Even though an antitrust violator may not keep records, its competitors or the injured parties may. In this technologically advanced age, it is difficult to restrict distribution. Unexpected records such as telephone bills, expense accounts, a secretary's notes, engagement calendars or a forgotten written report may be uncovered. Also, your computer's hard drive or the server for your social media communications may be the source of potential information even when you think the information has been erased. If prosecuted or sued for antitrust violations, you may be faced with surprise witnesses such as former associates and employees and plea bargainers. Also, an alleged co-conspirator may take advantage of the antitrust division's leniency program and confess, thus perhaps avoiding indictment, a jail sentence and fines and keeping the tax deductibility of civil damage payments.

*Do not use such terms as "Please Destroy When Read", "For Your Eyes Only", "No Copies", or similar terms and phrases.* Experience has demonstrated that even if no copies are made, the original of such documents eventually end up in somebody's file. Even when marked "personal and confidential", the document is usually retained by the recipient and eventually filed. Electronic records are on a server somewhere and are thus almost impossible to completely erase. When an antitrust investigation is under way or documents are produced on a civil investigative demand or in private antitrust litigation, such terms and phrases are red flags for the investigator or opposing legal counsel.

*Do not at any time use any of the words and phrases which are considered dangerous*. Since such statements are so dangerous, they need to be emphasized here along with some other similar words and phrases:

- ✓ "We would like to charge a lower commission, but the association has a rule."
- ✓ "This is the rate that all REALTORS® charge."
- ✓ "The MLS will not accept a listing for less than 120 days."
- ✓ "Before you list with XYZ Realty, you should know that nobody is going to work on their listings."
- ✓ "If John Doe is really professional (or ethical) he would have joined the association."
- ✓ "The board requires that all REALTORS® force their sales people to join."
- ✓ "The best way to deal with John Doe is to boycott him." or "We don't worry about John Doe; we just don't show his listings."
- ✓ "If you valued your services as a professional, you wouldn't cut your commissions."
- ✓ "If X is going to cut his commissions, we'll just pay him less on splits."
- ✓ "No association member will accept a listing for less than 90 days."

- ✓ "Let him stay in his own part of town, this is our territory."
- ✓ "If he was really a professional, he wouldn't use part-timers."
- ✓ "X is the going rate in this area."
- ✓ "We have to charge that commission since our rates are set by the Illinois Department of Financial and Professional Regulation."
- ✓ "The standard commission in this area is X."
- ✓ "When I see that guy's signs, I just drive the prospect down another street."
- ✓ "We've all agreed that any commission below X is unfair."
- ✓ "Something has got to be done about that company; nobody can charge such a low commission and make a living."
- ✓ "That price-cutter has no business being a member of the association."
- ✓ "You will not get a lower commission from a REALTOR®."

*If in doubt, consult*. No avoidance program or manual can spell out all of the answers to questions which may arise. Situations are bound to arise which create doubt. If you do have doubts about the legal wisdom of any association or business practice, procedure or activity, consult your association executive officer, the broker under whose license you work or legal counsel knowledgeable about antitrust matters.

*Without clearance: Don't Do It*. If neither the association executive officer, an executive officer of your firm nor legal counsel will give clearance to a proposed business deal or activity with antitrust implications – **don't do it**.

**Conclusion**

Effective antitrust avoidance is a responsibility of management. If officers, directors, association executives, real estate firm executives, staff level employees and leaders of the industry do not take seriously the necessity for continuing to emphasize and re-emphasize antitrust avoidance programs, policies, practices and procedures the message will never get to the membership.

Under the Illinois REALTORS® policy, antitrust avoidance is not a choice, it is a command. The risks are too high for any real estate broker to remain part of an organization which fails to enforce its antitrust avoidance program. Lawyers can help with designing avoidance guidelines or advising on antitrust avoidance matters when they arise, but in the final analysis it will be the Illinois REALTORS® and local associations of REALTORS® Executive Officers, MLS Committees, Professional Standard Committees, Arbitration and Membership Committees who will have to act as the first line of defense against the costs and consequences inherent in failure of antitrust avoidance.

However, it remains the responsibility of every member of the Illinois REALTORS® to support and implement this Antitrust Avoidance Program and demonstrate that REALTORS® are true to that which they profess to believe, the free enterprise system is the best ever devised to secure our economic and personal freedom.

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