

## Antitrust Compliance & California Realtors®



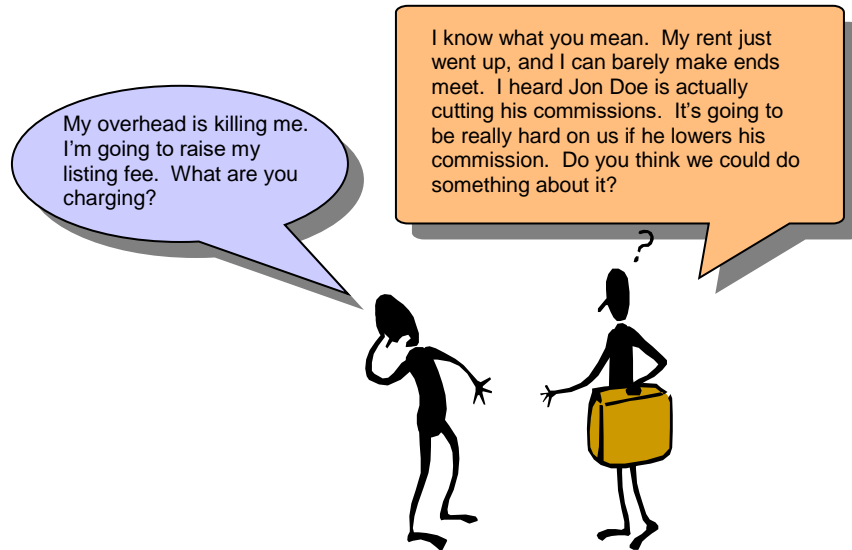
## Innocent Conduct Or Illegal Behavior?

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## INTRODUCTION

Ronny REALTOR® and Broker Bob talking at a local MLS meeting...



To someone unaware of antitrust laws, the casual conversation above would seem fairly innocent shoptalk between competitors. To those knowledgeable about antitrust laws, those seemingly innocent statements carry the seeds of disaster.

Not knowing the law as it applies to your business is dangerous. It could expose you, your business and your business associates to catastrophic legal and financial injury. While many laws are easy to identify, like theft or fraud, some laws, like those pertaining to antitrust, are more complex and harder to pinpoint, especially if you don't take the time to educate yourself.

Antitrust laws are an area professionals often neglect, but awareness and sensitivity to antitrust laws is essential for real estate professionals. Why? The answer is simple. Real estate and housing issues are areas of great interest to our government, and real estate professionals customarily operate in cooperation and competition with one another, a practice which presents a host of opportunities for antitrust violations, both intentional and unintentional. This means that the industry and its community of members often fall under zealous scrutiny. Anticompetitive behavior is more likely to be detected and prosecuted. What you don't know could lead to costly litigation and monumental consequences, including criminal penalties, harsh fines and massive triple damages. As such, real estate professionals must take the time to understand the law and avoid violating it.

In reality, it's not difficult to comply with antitrust laws. You simply need to be aware of the rules and take care to conduct your business lawfully.

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## I. AN OVERVIEW OF ANTITRUST LAWS<sup>1</sup>

**a. Key Antitrust Concepts: An Overview of the Law.** Essentially, antitrust laws are designed to safeguard competitive free enterprise by prohibiting actions that damage competition. The objectives are two-fold: (1) To assure consumers the low prices and high quality that flow from competition and (2) to assure a level playing field for the entrepreneurs who are vital to achieving competitive business markets. As such, antitrust legislation seeks to ensure that competition is not unreasonably restrained by prohibiting actions and agreements that would operate to hinder free trade.

**b. The Sherman Act.** Several laws combine to form the core of federal antitrust laws, but the Sherman Act stands as the cornerstone. Section 1 of the Sherman Act states:

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

Simply put the law makes it illegal for two or more people to carry out a plan that will restrain trade. It is important to note that two key components determine when antitrust laws has been violated: (1) there must be two or more people agreeing to act; and (2) the agreed upon action must restrain trade.

Let's take a closer look at the basics.

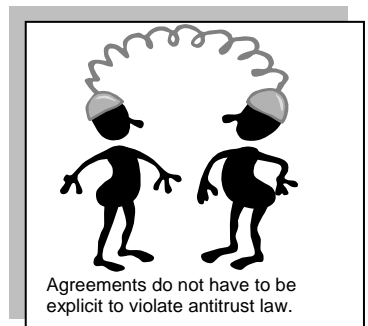
### i. Conspiracy – Two Or More People Agreeing To Take Action:

1. *Individual vs. Group Action:* In antitrust laws, it is important to distinguish between an individual or a single firm and a group of competitors. An otherwise legal activity may be illegal if competing firms agree (or give the appearance of agreeing) to conduct similar activities that might restrain trade. The law simply requires that two or more competing individuals or entities agree.

For example, Broker Bob might conduct an extensive business analysis of his costs and market conditions, and based upon his analysis decide that his business would be most cost efficient and profitable by setting his commissions at five percent. However, if Broker Bob were to attend a real estate seminar with Broker Tom, Broker Betty and several others and the brokers were to have a conversation expressing worry about profits/costs and agree to set commissions at a certain rate, there would be an antitrust violation.

It is important to know that most real estate firms are considered a single entity for purposes of antitrust laws, even when comprised of numerous sales licensees operating as independent contractors.

2. *Agreement to Act:* Too often professionals believe that an agreement must be explicit to be an antitrust violation, but for the purposes of antitrust laws no formal agreement is necessary. An agreement merely requires evidence of a commitment to a "common scheme designed to



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<sup>1</sup> This pamphlet is not an exhaustive statement of the law. Nor is it intended as a guide for you to act as your own lawyer. It is meant merely as a primer to sensitize real estate professionals about antitrust issues that arise in their day-to-day business activities; so that you can recognize potential issues and consult an attorney for additional guidance before acting.

achieve an unlawful objective.” As such an agreement will be anything that indicates that two or more people are in harmony about taking a course of action. This definition is important because it means an agreement may be inferred from a wink, a knowing nod, a raise of the eyebrows, listening to a conversation in silence, or responding to pressure to do “what is expected or customary.” Even casual or joking remarks by individuals attending an association function can create an inference of a common scheme.

Real estate professionals should avoid conduct that creates a suggestion of an agreement on any subject that might affect competition adversely or restrain trade.

For example Broker Bob and Broker Tom meet up at a REALTOR® convention. Broker Bob complains to Broker Tom that Discount Donna is advertising 2% commission rates. Broker Tom chimes that he refuses to do business with Discount Donna. Broker Bob nods his agreement and says that’s a good idea, when he returns home he refused to do business with Discount Donna.

Broker Bob and Broker Tom are in violation of antitrust laws.

ii. Restraints Upon Trade – What rules determine trade has been restrained? Once it is shown that two or more people or organizations are carrying out a common course of action, the only remaining issue is: does the agreed upon course of action restrain trade? Two methods exist for determining when trade has been restrained.

1. *Per se antitrust violations – the presumption of illegality:* Agreements to engage in certain types of behavior are considered to be so anticompetitive that the collaborative

behavior is automatically deemed a violation of antitrust laws. These types of collaborative actions are deemed *per se* illegal. That means that no defense, justification or excuse will be permitted. **A court will not care WHY the conduct occurred ONLY THAT THE CONDUCT HAPPENED.** In such instances the court’s only concern is did the person or organization, now a defendant in court, participate in the conspiracy.



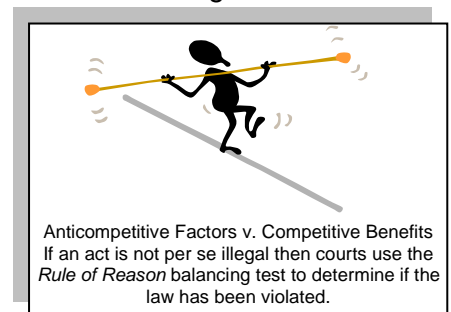
Potential *per se* antitrust violations abound for real estate professionals. For example, issues related to setting commissions, potential boycotts and market allocation, all discussed in further detail below, are ripe for

potential antitrust violations. That is why you should educate yourself about the law and institute preventative measures to ensure that you comply.

Below we will discuss the *per se* antitrust violations as they relate to real estate professionals, but first you should be aware of the second method for determining when a violation of antitrust laws has occurred.

2. *The Rule of Reason – the balancing test:* Those collaborative actions that are not characterized as *per se* violations of antitrust laws are analyzed under a balancing test called the “*Rule of Reason*”.

The *Rule of Reason* test weighs the pro-competitive aspects of the course of action versus the anticompetitive aspects. If the court determines that anticompetitive factors outweigh the



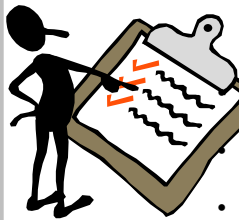
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competitive benefits then there has been a violation of antitrust laws.

The *Rule of Reason* test involves a complex analysis that varies in focus and detail depending on the circumstances of the case. There is no common list of factors or elements that would provide business people with a checklist for when a behavior might violate antitrust laws and when it would not. Generally a court may look to whether an agreed upon business practice has the effect of increasing prices, reducing the availability of goods/services, lowering quality or service, or significantly stifling innovation.

You can get a more detailed understanding of this test by taking a look on the Federal Trade Commission's website ([www.ftc.gov](http://www.ftc.gov)). You can download a copy of the Commission's brochure titled *Antitrust Guidelines for Collaborations Among Competitors*.

## Let's Review!



- What is the purpose behind antitrust laws? Antitrust laws are designed to protect free-market competition by assuring a level playing field for competitors.
- What is the law? Any time two or more people/entities make an agreement to unreasonably restrain trade they may be in violation of antitrust laws.
- How is an agreement found? An agreement is evidenced by anything that indicates two or more competitors are in harmony about taking a course of action.
- When has there been a restraint upon trade? Trade has been restrained if there is an automatic *per se* violation of antitrust laws or if under the *Rule of Reason* test the anticompetitive factors outweigh the competitive benefits of an agreed upon course of action.

**c. Antitrust Issues for REALTORS®.** The manner in which real estate practice operates makes real estate professionals particularly vulnerable to antitrust issues. Brokers and their agents regularly compete to secure property listings for resale but just as often work with competitors to identify buyers for those same listings. The tradition of competition and cooperation presents a multitude of opportunities for antitrust violations.

i. Price/Commission Fixing: One of the most common violations of antitrust laws is the agreement between competitors regarding the price or fee each individual or organization will charge customers for products or services. This is called price fixing, and price fixing is a *per se* violation of antitrust laws.

In the real estate profession, *per se* illegal price fixing usually means commission rates, but it can also include referral fee rates or pricing related to discounting, escrow or service charges, credit terms or any other fee as it relates to a real estate firm's services and product inventory.

1. Commission Rates: Competing brokers must not agree between or among themselves on commission rates that clients will charged. In fact, firms must take care to avoid even the implication that they have discussed or reached an agreement with other firms about service fees and rates.

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California law goes so far as to require that printed or form agreements that establish compensation to a real estate broker, as well as changes to those agreements that *increase* compensation, (usually a listing agreement) must contain the following language in bold face, 10 point type:

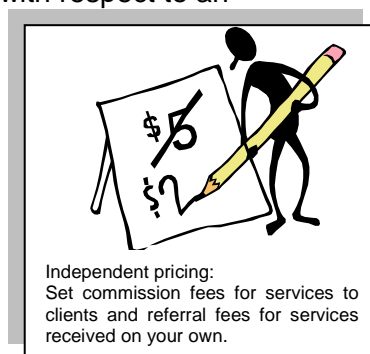
**“NOTICE: The amount or rate of commission is not fixed by law. They are set by each Broker individually and may be negotiable between Seller/Buyer and Broker.”**

This notice underscores the principle underlying antitrust laws. Each individual business must establish its prices independently.

2. Commission Splits or Referral Fees: Commission Splits or Referral Fees involve the fees a real estate firm will pay for goods or services it receives instead of the fees it charges its client. It is a per se violation of antitrust laws for competing real estate firms to fix the compensation that will be paid to cooperating brokers for producing a buyer for a listing.

Listing and selling brokers may discuss or negotiate the compensation with respect to an individual transaction, but real estate professionals should avoid the implication that there is an agreement to “uniform” or “standardize” industry practice regarding how a commission will be split; such an agreement would be illegal.

From the above discussion, it becomes clear that real estate professionals should take care to independently establish pricing for their services and product inventory. In no event should a real estate professional discuss prices or pricing strategies with a competitor.



The only exception to this rule is the communication of a price in connection with a bona fide offer for services. For instance, a broker wishing to offer a competing broker a referral fee may discuss the price he will pay the competing broker for the referral. Likewise, two brokers may discuss a commission split or referral fee when negotiating how much one broker will pay the other for services rendered in a particular instance. Notice the exception applies to specific instances where competing brokers have or will render services and are now negotiating the terms upon which they will be paid or receive payment as related to a specific business transaction.

ii. Group Boycotts or Refusals to Deal: A group boycott is an agreement among competitors not to deal with another person or business or to collectively exert pressure upon a person or business to force a certain behavior (usually to increase price). The purpose of the boycott, either explicitly or implicitly, is to eliminate the firm as a market competitor or to cause the firm to abandon the discount or alternative marketing strategies. Like price fixing, group boycotts are characterized as *per se* violations of antitrust laws.

Again, there is a distinction between group and individual action. It is collective action that is prohibited by antitrust laws. Individual offices have the legal right to choose their clients and business associates, but decisions not to buy, sell or offer services to certain individuals/entities should not be made lightly. Aside from concerns about discrimination or other improper motives, real estate professionals have fiduciary responsibilities to their clients. Is refusing to deal with a competing firm in the best interest of the client? Have you discussed your decision with the client?

The most effective and obvious way to avoid antitrust liability for boycott activities is for each real estate firm to take care to deal with service providers and competing firms on an equal basis. Each firm should independently determine its business practices taking care to avoid conversation that gives the impression of a boycott in the making.

Let's revisit our earlier example. Broker Bob and Broker Tom meet up, but this time they're attending an MLS meeting. Broker Bob complains to Broker Tom, in a roomful of REALTORS® that Discount Donna is advertising 2% commission rates. Broker Tom chimes that he refuses to do business with Discount Donna. Broker Bob nods his agreement and says that's a good idea, when he returns home he refused to do business with Discount Donna. Broker Bob and Broker Tom's conversation is overheard by fifty other brokers. No one says anything, but sixteen other brokers return home and refuse to do business with Discount Donna.

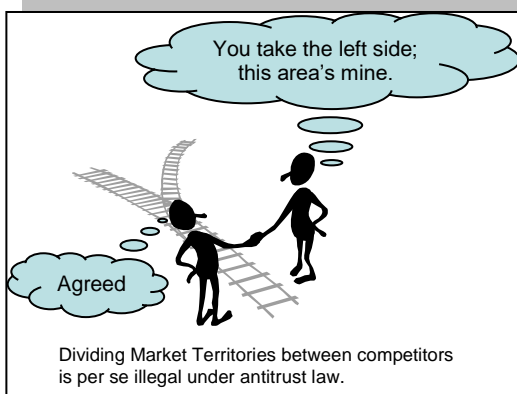
Broker Bob, Broker Tom as well as the brokers who appear to have implicitly agreed to follow the anticompetitive action could be implicated for violations of antitrust laws.

iii. Tying Arrangements: Tying generally involves a refusal to sell one product, the "tying product", unless a consumer purchases another product, the "tied product", from the same seller. Not all tying or product bundling arrangements are unlawful. The determination on when tying is unlawful is a complex factual and economic analysis hinging primarily upon whether the merchant has the market power or unique advantage to coerce the purchaser to accept the tied product.

In the real estate industry, courts have applied tying law to "list backs" where a sale of property is conditioned upon the agent obtaining the listing for a future sale. California courts have also found it unlawful for developers to refuse to sell a lot unless the builder/buyer agrees to use the developer's broker when the property is conveyed to the occupant. The courts have also applied tying law to a developer who allegedly required that homes be purchased through the developer's wholly-owned escrow company. It should be noted, however that in some instances an individual or entity may offer financial incentives to use additional services instead of mandating the purchase of a tied product. Such incentive offers are less likely to be an antitrust violation.

iv. Market Allocation: It is per se unlawful for competitors to agree to refrain from selling in specified territories, selling specified services/products or selling to specified customers or categories of customers. Such agreements restrict competition. Firms should be free to sell and list real property in any market area and to any customer they wish. However in some instances such as the sale of a business reasonable competitive restrictions on the seller are often permissible.

1. Division of Territory: It is clear that under antitrust laws competitors cannot agree to limit service areas. Firms must independently determine the market area for its services based on the merits of selling to that market territory rather than on the basis of a predetermined agreement with competing firms.



However, it should be noted that an individual office may assign sales associates to work specific territories. A practice typically called "farming". Since an individual firm, regardless of the number of sales associates, is usually considered one entity for the purposes of antitrust laws, it may devise methods to effectively cover its entire market



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territory. As such, typical farming practices are acceptable so long as the territory allocations are made within an individual firm and not between two different firms.

2. Division of Customers: It is per se illegal for competitors to divide or allocate the customers to whom they will sell. Firms should never agree with another firm to abstain from servicing the other real estate firm's former clients if approached by that client. This does not mean that a real estate professional should disregard an existing business relationship if a seller has an exclusive listing with another broker. No real estate professional should interfere with an existing contract or agency relationship by requesting a client or potential client breach a contract. REALTORS® should follow duties imposed by law as well as applicable MLS Rules and the REALTORS® Code of Ethics. Simply put they need only avoid entering agreements with competing individuals/entities to "refrain from doing business" with certain clients when there is no legal or ethical obligation to avoid doing business with those clients.

## II. POLICING THE LAW & PENALTIES VIOLATING THE LAW

### a. Who Can Sue for a Violation of Antitrust laws?

i. Federal Enforcement: The Antitrust Division of the U.S. Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC") are responsible for federal enforcement of antitrust laws. The DOJ initiates both civil and criminal enforcement proceedings. It may convene grand jury proceedings in addition to conducting investigations through the FBI or its own investigative division. The FTC enforces antitrust laws through civil complaints and administrative trial proceedings, and, while the FTC has extensive investigative powers, it cannot impose criminal sanctions for antitrust violations. The FTC can, however, levy substantial monetary penalties in addition to issuing orders to limit or prohibit offending business activities.

ii. State Enforcement: In addition to provisions of the Sherman Act, California has state antitrust laws. The State Attorney General and local District Attorneys enforce state antitrust laws through criminal and civil actions. Such criminal and civil proceedings can result from consumer complaints or investigations initiated by the District Attorney or the Attorney General.

iii. Private Enforcement: Federal and state law grant private parties the right to enforce antitrust laws. An individual or entity can sue in civil court seeking damages as well as injunctive relief prohibiting future violations of the law.

### b. What Penalties Could Be Imposed for a Violation of Antitrust laws?

i. Federal Criminal Penalties: A violation of the Sherman Act is a felony. If convicted of an antitrust violation an individual can be sentenced to up to ten years in prison. The law also imposes individual fines of up to \$1 million or twice the economic gain or loss for each violation. Corporations may be fined up to \$100 million for each count.

An individual director, officer, or agent of a corporation who is convicted of an antitrust violation may be punished by fines of \$5,000, one year in jail or both, even without actively participating in the prohibited conduct. Liability can result from passive acquiescence or ratification of illegal activities. Once put on notice that something is unlawful, an officer is charged with knowledge of everything that a reasonable inquiry would have revealed.





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ii. Federal Civil Penalties:

1. Injunctions & Cease and Desist Orders: The DOJ and the FTC may negotiate or litigate consent decrees, consent orders and/or cease and desist orders. These orders may prohibit an organization's future activities by limiting its future behavior in light of its unlawful practices. Failure to comply with a FTC order may result in significant monetary penalties. Moreover, violation of the DOJ's decrees is considered contempt of court punishable by civil and criminal penalties.



2. Dissolution: In extreme situations the government may seek to dissolve or disband a business entity.

3. Treble (Triple) Damages: Individuals or organizations injured by violations of the Sherman Act who prevail in a civil lawsuit are entitled to receive three times the amount of their actual damages as well as attorney's fees and costs.

iii. California Antitrust Penalties: Violations of California antitrust laws expose defendants to potential civil and criminal liabilities similar to the penalties imposed by federal law.

1. Criminal Penalties: A violation of the Cartwright Act. Corporations may be fined up to \$1 million or twice the economic gain or loss for each count. If convicted an individual can be sentenced up to three years in prison and fined up to \$250,000 or twice the economic gain or loss.

2. Civil Penalties:

a. Injunctions & Cease and Desist Orders: The Attorney General or District Attorney may litigate prohibitory injunctions or mandatory injunctions as may be reasonably necessary to restore and preserve fair competition. These statutory injunctive powers may be used to prohibit an organization's activities in light of its unlawful practices. Failure to comply with an injunctive order may result in a penalty of up to \$6,000 per day.

b. Dissolution & Revocation of Licenses: In extreme situations the government may seek to dissolve or disband a business entity or revoke its license to do business in the state.

c. Civil Penalties: California unfair competition laws also impose fines of up to \$2,500 for each violation, plus additional penalties for cases involving senior citizens or disabled persons

d. Treble (Triple) Damages: The Attorney General or District Attorney as well as those individuals or organizations injured by a violation of antitrust laws who prevail in a civil lawsuit are entitled to receive three times the amount of their actual damages as well as attorney's fees and costs.

iv. The federal and state penalties for antitrust violations can be astronomical, but the cost of defending a suit can be just as damaging, especially for unintentional mistakes that could have been avoided. Civil and Criminal prosecution can last for years and litigations cost can reach into the millions. Insurance carriers may elect not to cover the costs an antitrust lawsuit,

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and in cases when antitrust litigation is covered by insurance, coverage may be limited. What you don't know could lead to costly litigation and financial disaster.

### **III. AVOIDING ANTITRUST VIOLATIONS: COMPLIANCE FOR THE REAL ESTATE PROFESSIONAL**

The nature of the real estate business, with its constant interaction between industry competitors, makes it alarmingly easy to violate antitrust laws. As such every broker is affected by the law, whether or not he/she is aware of it. Awareness is vital, and brokers who do not implement strict office policies to assure compliance with antitrust laws place themselves at risk.

It is impossible to cover every potential antitrust problem. However, below we have provided an example of an office policy designed to prevent antitrust problems. These policies are simply guidelines to assist real estate professionals begin to define the safety margins within this complex area of law. We suggest you use these suggestions to embark on an education and awareness program for the licensees in your company.

#### **Antitrust Compliance Suggestions**

Help prevent antitrust problems. Increase awareness in your office by:

1. Have every office member read and acknowledge receipt of a copy of the office policy dealing with antitrust compliance, such as the sample policy attached as Appendix B.
2. Have every office member read this pamphlet
3. Give every office member a copy of NAR's pamphlet "Antitrust Compliance Guide for REALTORS® and REALTOR-ASSOCIATES®" or have them visit NAR's legal site to read its write-up on antitrust.
4. Include antitrust training as part of every new salesperson and broker's training.
5. Include REALTOR® ethics training as part of every new salesperson and broker's training.
6. Establish a relationship with competent legal counsel, and seek legal advice before you take action whenever you are unsure of what the law requires.

### **IV. CONCLUSION**

Antitrust laws are in place to protect free market competition. Associations between competitors, like those to which real estate professionals belong, are forums where antitrust transgressions can easily occur, intentionally or unintentionally. Care must be taken to avoid policies, programs, dialogues or pursuits that could be seen as having the intention or result of restraining trade - the very thing antitrust laws are designed and vigorously used to prevent.

The penalties, fines and damages combined with the associated legal costs can be disastrous. REALTORS® who do not take the time to educate themselves run significant risks. The good news is that it is really not difficult to comply with antitrust laws. It doesn't take extensive documentation or large sums of money. It merely takes the effort to become familiar with the issues so that you can avoid conduct that would put you in danger of violating the law. Ultimately, your risk depends on you.

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## APPENDIX A

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### You said what? – Dangerous Words and Phrases



1. Everyone charges this rate.
2. The Board/Association says we have to charge X.
3. I'd like to lower the commission, but no one else in the MLS will show your house unless the commission is X%.
4. The best way to handle Broker X is to not do business with him.
5. Why is Broker X advertising here? This is our territory.
6. You shouldn't sign with Broker X, nobody does business with him.
7. Let's not deal with Broker X; he's not a professional he hires part-timers.
8. Let's agree to always split commissions like this...
9. I bet they'd drop their discount program, if we refused to business with them.

#### Summary of preventative measures:

- Never make derogatory remarks about a competitor. Compete by showing how good your services are.
- Never discuss or use the Board/Association of REALTORS®, MLS meetings, or other broker meetings or real estate professional gatherings to discuss "dealing with" or "boycotting" alternative service brokers or any real estate service provider.
- Never have discussions regarding commission splits or payment of referral fees unless discussing a particular transaction with the other broker involved in the transaction.
- Never discuss your firm's commission rate or referral fee structure with real estate professionals outside your firm, unless discussing an on-going transaction that you are mutually working to complete.
- Never imply or suggest that commissions are set by a group of brokers or the Board/Association of REALTORS®.

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## APPENDIX B

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### Sample Antitrust Compliance Policies

#### ANTITRUST COMPLIANCE POLICIES & PROCEDURES

OF \_\_\_\_\_  
(NAME OF FIRM)

1. Our firm is committed to abiding by all applicable antitrust laws. These policies are implemented as part of an antitrust prevention program to avoid even borderline activities.
2. The commission rates of our firm are based upon the cost of the services we provide, the value of these services to our clients and competitive market conditions. Our commission rates are not determined by agreement with or recommendation/suggestion from any person not a party to a contract for services with our firm, such as a listing or buyer-broker agreement.
3. Salespersons affiliated with this firm shall not participate in any discussion with any person affiliated with or employed by any other real estate firm concerning the commission rates charged by this firm, or any other real estate firm in our community. Commissions should only be discussed with individuals within the office or with the client in the course of discussing or negotiating a listing or buyer-broker agreement.
4. When soliciting a seller or buyer or negotiating a listing or buyer-broker agreement, no salesperson affiliated with this firm shall make any reference implying the industry has agreed to set a "prevailing" commission level in the community, the "going rate", or any other words or phrases that suggest that commission rates are uniform or standardized within our market area by agreement.
5. The amount of compensation offered to cooperating offices by this firm is determined by the level of service we negotiate with a cooperating firm. Licensees may not discuss the total commission of the listing with competitors, only the amount the amount he or she is to offer or receive.
6. Listing presentations shall focus exclusively upon the level of service and professionalism provided by this office, the results we have achieved for our clients and the value the client can expect to receive for the fees we charge. Potential clients should be invited and encouraged to compare the value of our services to those of any other real estate firm in our marketing area. Likewise, any salesperson who is invited by a potential client to compare our services with those of any other real estate firm should do so by emphasizing the nature and quality of services we provide.
7. Whenever a salesperson is unsure about the proper way to respond to the concerns of an actual or potential client or if the salesperson has been present during an unauthorized discussion of fees, he or she should contact the principal broker or sales manager immediately.

I have read and agree to abide by the antitrust compliance policies and procedures set forth above.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
(Signature of Salesperson)

Print Name: \_\_\_\_\_

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