

ANTITRUST POLICY FOR STAFF

This Policy was approved at a regular meeting of the Board of Directors of the New York County Lawyers Association on February 7, 2005.

Background

NYCLA in many of its activities is subject to antitrust law. The principal purpose of antitrust law is to maintain a free enterprise system by prohibiting business activities that unreasonably restrain trade or lessen competition. The laws are based on the proposition that the public benefits by getting the highest quality products at the lowest prices through vigorous competition. As a professional association of attorneys, NYCLA is committed to obeying the letter and spirit of those laws and avoiding even the appearance of impropriety.

Although the goals of the antitrust laws are clear, the laws themselves are broad and their application is sometimes complex. The following Compliance Guidelines have been prepared to help NYCLA employees understand the antitrust laws and to provide guidance for day-to-day business conduct. Even the most experienced employee should become familiar with this document.

Compliance Policy:

It is the obligation of each employee to comply with this policy. In addition, it is the responsibility of each person with supervisory responsibilities to ensure that his or her subordinates are familiar with and comply with this policy. Any employee found to have participated knowingly in a possible antitrust violation or to have failed to adhere to these Guidelines will be subject to dismissal or other disciplinary action.

Consequences of Violations of the Antitrust Laws:

The importance of antitrust compliance cannot be overemphasized. A violation of the antitrust laws can be a serious crime. Criminal violations are felonies. Criminal violations may result in substantial fines and penalties, both for NYCLA and for employees who authorize or participate in improper conduct. Individuals may be imprisoned as well as fined.

Civil antitrust litigation and investigations are notoriously burdensome, expensive and time-consuming for all concerned, even if the outcome ultimately is favorable; having to defend would produce expenses and distractions that NYCLA is in no position to absorb. If NYCLA were ultimately found liable in civil litigation for an antitrust violation, the amount of actual damages sustained by the plaintiff would be automatically trebled, a result that could prove ruinous to NYCLA. Even if no substantial damages were awarded, NYCLA might be enjoined from conduct in a way that would place undesirable restraints on its activities and add burdens and expenses of monitoring compliance. (NYCLA was in the past subject to a U.S. Department of Justice antitrust consent decree).

Finally, the reputation of NYCLA in the legal community and among the public at large may be seriously affected through the adverse publicity that normally accompanies antitrust litigation.

COMPLIANCE GUIDELINES

The Guidelines that follow are intended to make employees aware of those areas that involve antitrust risk so that employees will recognize and avoid danger areas. The Guidelines are not intended to make employees antitrust experts.

Because it is important to avoid even the appearance of impropriety in the antitrust area, these guidelines provide somewhat more cautious advice than the law may actually require. It is always important to avoid not only potential antitrust violations but also any behavior that could be construed or interpreted as improper. Antitrust litigation is frequently decided on the basis of circumstantial evidence.

Any employee who has questions about the application of the antitrust laws or these Guidelines to past, present or future conduct should always consult with Counsel to NYCLA before taking action.

Relations with Competitors:

The antitrust laws with which NYCLA is chiefly concerned apply to concerted action or “agreements” between competitors. Generally stated, any agreement or understanding which, in the eyes of the law, unreasonably or unduly restrains trade is illegal. The law distinguishes such joint or collective action from action taken unilaterally and independently of competitors. An illegal agreement can be found, however, without a written agreement; a handshake or even express words indicating agreement. For example, if two competitors discuss prices, and later adopt prices that are similar, a conspiracy to fix prices may sometimes be inferred by the courts even though the competitors never explicitly “agreed” to do anything.

When an agreement is deemed to have been reached with competitors on a forbidden subject such as prices, the agreement is treated as per se illegal, which means that it cannot be justified or explained by good intentions, difficult circumstances or offsetting benefits that may be achieved. Comments made in a social environment – at a reception or during a bar association or professional group dinner or holiday event, for example – may be used as proof of concerted action, even though the competitors’ subsequent actions actually were taken independently for sound business reasons. Because of the harshness of the per se rule and the risk of concerted agreement being found after the fact, the safest practice is to avoid any discussions with competitors about prices, costs, dues or membership fees, or details about future plans.

The per se illegal category of agreements includes:

1. **Price Fixing.** Arrangements with competitors to fix or influence the prices at which they sell to third parties are among the most serious of all antitrust violations. Similarly, any arrangement to fix the prices that competitors will pay for supplies is illegal. It does not matter whether the aim is to fix maximum or minimum prices, or whether there is an agreement on a specific price or a pricing system.

Agreements or understandings by or between competitors that indirectly affect prices may also be considered unlawful. These could include:

- a. Understandings regarding other terms of sale or purchase to be offered, such as credit terms or shipping charges;
- b. Arrangements among competitors to limit service, because a likely consequence would be an increase in price;
- c. Agreements among competitors to appoint a common exclusive sales or purchasing agent, because this could permit a single agent to determine prices for otherwise competitive services; and
- d. Understandings among competitors that affect the amount or placement of competitive bids.

Any exchange of information with or among competitors regarding price, costs or pricing practices is itself risky. Indeed, enforcement authorities now claim that the concept of price fixing embraces conduct called “signaling,” which involves no direct contact between the competitors.

In many price-fixing cases, the jury is asked to infer an agreement to fix prices from a pattern or general conversations among competitors about “the state of the market,” “the need for responsible pricing,” the impact of “discounting,” and similar topics bearing some relationship to price.

NYCLA prices for membership and services must be determined independently, in light of NYCLA’s costs, market conditions and NYCLA’s own financial condition and overall plans and objectives. While competitive prices are a legitimate consideration, such competitive prices should always be obtained only from information previously disseminated to members or users by a competitor or publicly announced by the competitor.

2. **Allocation of Markets or Services.** Competitors may not agree to divide markets by geographic areas, product lines, customers, rotation of times or seasons when services are made available, etc. Arrangements to “rig” bids, for example, are illegal whether they involve fixing bid prices or simply rotation of companies to bid or not bid on individual projects. Similarly, an agreement by CLE providers to allocate types of courses offered or rotate certain courses among providers from year to year could eliminate consumer choice and be illegal. Competitors should also not agree to limit the volume or types of services they provide.
3. **Group Boycotts.** The antitrust laws generally do not interfere with the right of a business unilaterally to select the customers or suppliers with whom it will do business. However, an agreement of competitors not to do business with a customer or supplier, to do business only on certain terms, or otherwise to act together to punish or “send a message” to a competitor or potential competitor may be illegal.

In dealing with competitors or potential competitors, NYCLA employees and representatives must conform to these rules:

- ALWAYS exercise independent judgment when setting terms and prices for services; avoid even the appearance of collusion or agreement with competitors by avoiding any discussion of these matters.
- ALWAYS make all pricing decisions independently of competitors.
- NEVER enter into any discussion with competitors concerning the following subjects:
 - prices or discounts
 - terms or conditions of sale (including credit terms)
 - costs or profit margins
 - bids or intention to bid
 - allocation of territories, customers or services, or times in which services will be offered
 - limitation of types or scope of service
 - exchange of business plans or other confidential information.
- NEVER remain at meetings with competitors (including professional meetings or social gatherings, however informal) at which prices or any of the foregoing subjects are discussed. Make your leaving as conspicuous as possible and report the incident immediately to Counsel to NYCLA.
- ALWAYS confine the discussion at trade association or professional meetings to topics directly involved in the purpose of the meeting and which are on a written meeting agenda.
- NEVER obtain information about a competitor's business (particularly price lists or other pricing information) from the competitor itself other than what may be available on public websites or in publicly available documents.
- NEVER discuss NYCLA's prices, future plans or other competitive information with a competitor.
- ALWAYS document the source of information obtained about competitors; for example, name the source of competitive information in an email or document in which the information is discussed or on a document you have received because it is publicly available.

Guidelines on Documents and E-mail:

The treatment of documents and e-mail is important because under modern discovery procedures, all business-related documents, including electronic documents, other than limited categories of privileged materials, are subject to inspection and copying by governmental and private litigants. Note that the documents subject to production are “business related” documents and not just “company forms” or “corporate files.” This may require the production of “personal” files, handwritten notes, diaries, appointment books, or any other written materials maintained in connection with work, including computer-transmitted messages.

Sometimes, due to ambiguity, or even exaggeration, interoffice memoranda and e-mails may convey the erroneous impression that there has been contact with competitors with respect to prices or other matters of antitrust sensitivity. All such notes should be written clearly and carefully to avoid misinterpretation. The following are guidelines to keep in mind when writing or reading correspondence and memoranda:

- Do not use words suggestive of guilty or surreptitious behavior, such as “please destroy after reading.”
- Do not overstate the significance of an expected competitive position or action: “we’ll own the market” or “this will cripple the competition.” Express what is meant in terms of its quality or utility to members and prospective members: “we’ll have the most highly sought and well regarded program” or “the value of our programs to members and attorneys will be unmatched.”
- Do not speculate on the legality of business conduct.
- Do not describe as undesirable or objectionable the competitive activities of competitors or others. Customers or members are lost, not “stolen”; price-cutting is not “unethical”; and persons who charge higher or lower prices than NYCLA are not “bandits” or “mavericks.”
- Do use the newspaper test: how would you feel if language in the document or e-mail appeared on the front page of the *New York Post* or *New York Times*?