

## Understanding Antitrust

For more than a century, federal antitrust laws have existed as a way to promote competition and prevent monopolies in business. Because real estate brokers and salespeople frequently cooperate with one another in the sale of properties, they have numerous opportunities to engage in conduct that might be construed as violations of antitrust laws. Do you know the ins and outs of antitrust? Test your knowledge by taking this short quiz:

1. Two competitors in my market asked me to cooperate with them in setting a “standard” commission for the area. I refused, but subsequently started charging the same rate that my competitors suggested. Because I didn’t overtly agree to participate in price fixing, I am not part of a conspiracy. **True or False?**
2. Even though my salespeople are independent contractors, I may establish the commission rate for my company and require salespeople to charge that rate. **True or False?**
3. Brokers who agree not to cooperate with another company, such as by not showing that company’s listings, do not violate antitrust laws if they enter into that agreement because they consider the company’s aggressive “high-tech” marketing techniques to be unethical. **True or False?**
4. The best way to persuade sellers that they should enter into an exclusive-right-to-sell agreement with you is to tell them that MLS members have an “informal understanding” to show buyers exclusive-right-to-sell listings first. **True or False?**
5. My company benefits from MLS participation, but we don’t want to pay a cooperative commission split to real estate companies that offer only nominal compensation on their listings, which we think they include simply so that their listings are shown on REALTOR.com and other public real estate Web sites. But if we decide to offer them the same amount of compensation that they offer us, we’ll be breaking the law. **True or False?**
6. Antitrust price-fixing rules do not allow a real estate company to engage in a public advertising campaign that highlights the commission rate it charges to consumers. **True or False?**
7. Classified and display advertising rates in a local newspaper have increased substantially, which hurts all the real estate companies in town. Yet, no company is willing to stop advertising for fear of losing clients and customers to their competitors who continue to advertise at the high rates. To pressure the newspaper to reduce rates, which would benefit the companies and consumers, the real estate companies may agree that they will stop advertising unless and until the paper complies. **True or False?**
8. If one of my salespeople participates in a price-fixing discussion, my company can be held liable—even if I have no personal knowledge of the salesperson’s conduct. **True or False?**

***How did you do?***

## **Antitrust answers**

- 1. True.** But your actions are extremely risky. An offer to conspire on uniform competitive practices, followed by conduct consistent with the acceptance of that offer, is sufficient to violate antitrust laws and can be sufficient evidence to persuade a judge or jury that you participated in the conspiracy, even if you did not. Since you didn't agree to the conspiracy you are, technically, not a part of it. But since your actions are consistent with the agreement, a judge or jury still may conclude that you are a party to the agreement. The best way to avoid participation in an illegal conspiracy is to openly reject and repudiate any offer to conspire and to be sure that your subsequent conduct does not reflect participation.
- 2. True.** A broker may require salespeople working as independent contractors to abide by the company's commission rate without violating any antitrust laws. An illegal price-fixing agreement must be among different "economic actors," that is, parties who have their own economic interests and are not associated with the same company.
- 3. False.** It doesn't matter why competitors agree to engage in a "group boycott" of a particular company, it's an illegal boycott nevertheless. Competitors may choose to not cooperate with another company that they consider to be unethical—or for any reason whatsoever (but subject to their fiduciary and fairness duties to clients and customers)—as long as they do so acting on their own, unilaterally. If they choose to not cooperate with another company in agreement with other firms, they violate the antitrust laws.
- 4. False.** Stating that MLS members have an "informal understanding" about properties with exclusive-right-to-sell agreements could be understood by the seller to mean that there is an informal agreement—which would be an illegal conspiracy. An "informal understanding" is just as illegal as a written agreement that all parties sign. Participants in an antitrust conspiracy almost never put their agreement in writing, but that merely makes the existence of the agreement, and the parties to it, a bit harder to prove. It is an unlawful agreement nevertheless.
- 5. False.** A company may offer any other company any commission split it chooses, as long as it determines to do so on its own and advises the other company privately and in advance, such as by sending a letter to that company. A commission split that differs from what is offered in the MLS to all companies generally may be referred to as a "punitive split." However, as long as these commission splits are determined and offered unilaterally and not in agreement with other firms, antitrust laws do not prohibit them. This is true even if a number of companies decide to offer a certain company the same split that it offers to them, with the result that they all offer the same split to that company. As long as each company can demonstrate that it determined to offer a different split unilaterally and without discussion or agreement with other firms, it is not illegal under the antitrust laws.
- 6. False.** The prohibition on price fixing forbids agreements among competitors on prices, such as real estate listing commission rates, including commission splits. The law does not preclude a competitor who establishes its commission rate unilaterally and without agreement with other companies from advertising that commission rate. The law also allows that competitor to engage in competitive advertising, in which the company explicitly compares its stated commission rate to the rates publicly promoted or advertised by other firms, provided that the advertising was truthful and not misleading. In fact, the policy underlying antitrust laws—promotion of vigorous and healthy competition—would tend to favor and encourage such comparative advertising since it helps consumers easily compare and contrast prices offered by various companies.
- 7. False.** This is a classic example of a group boycott—an agreement among competitors to not do business with a particular third party. This group boycott has the anticompetitive effect of eliminating the opportunity for companies to try to attract clients and customers by advertising in the newspaper. The very fact that no company is willing to stop advertising unless all others agree to do so illustrates this anticompetitive effect. The firms are unwilling to lose the "competitive advantage" of advertising unless others agree to do the same. The fact that the agreement may have some beneficial effects for consumers—even if true—will not save this agreement from being unlawful.
- 8. True.** Just as ignorance of the law is no excuse, brokers' ignorance of their salespeople's conduct is no defense to an antitrust charge. A brokerage company will be held liable for the conduct of its salespeople whether or not the principal broker was personally aware of their conduct. To safeguard against antitrust violations, brokerages should adopt a written antitrust compliance program, distribute it to every employee and independent contractor, and review it with everyone twice a year.