

ANTI-TRUST GUIDE FOR NORTHWEST WALL AND CEILING BUREAU MEMBERS

Trade associations, although well recognized as valuable tools of American businessmen, are subject to dire scrutiny by both federal and state governments.

The single most significant law affecting trade associations is the Sherman Antitrust Act, which makes unlawful “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...” A trade association by its very nature is a combination, thus satisfying what would ordinarily be the most difficult element in providing an antitrust violation. Section 5 of the Federal Trade Commission Act is also applicable to trade associations, for it makes unlawful the same types of conduct that are prohibited by the Sherman Act. Furthermore, 42 states have enacted antitrust laws similar to the Sherman Act.

Between the state and federal laws, there is *no organization too small or too localized to escape* the possibility of a civil or criminal antitrust suit. The Federal government has brought civil or criminal actions against such small organizations as Maine Lobstermen, a Virginia audio-visual association, Bakersfield Plumbing Contractors, the Utah Pharmaceutical Association, local barbers associations, etc., etc., etc.

One may count on the government to bring approximately five civil and ten criminal cases a year against trade associations. It is thus imperative that every trade association member, regardless of the size of the association or the size comprising the membership, refrain from indulging in *any* activity which may be the basis of a federal or state antitrust action.

There are four main areas of antitrust concern for trade associations: price fixing, membership, standardization and certification, and industry self-regulation. The areas of greatest concern, for it is the area which individual members are most likely to violate and the area the government appears most concerned about, is price fixing. The government may infer a violation of the Sherman Act by the mere fact that all or most of the members of the trade association are doing the same thing with respect to prices. It is not required that there be an actual agreement, written or unwritten, to increase prices. Rather, price fixing is a very broad term which includes any concerted effort or action which has an effect on prices or on competition.

Accordingly, trade association members should refrain from any discussion which may provide the basis for an inference that the members agreed to take any action relating to prices, production, allocation of markets, or any other matter having a market effect. Informal gatherings following association meetings are looked upon with great suspicion by the government. The following topics, while not the only ones, are some of the main ones which should not be discussed at regular meetings or at these so-called “rump sessions”.

1. Do not discuss current or future prices (be very careful of discussions of past prices).
2. Do not discuss what is a fair profit level.
3. Do not discuss an increase or a decrease in price.
4. Do not discuss standardizing or stabilizing prices.
5. Do not discuss pricing procedures.
6. Do not discuss cash discounts.
7. Do not discuss credit terms.
8. Do not discuss controlling items.
9. Do not discuss allocating markets.

10. Do not complain to a competitor that his prices constitute unfair trade practices.
11. Do not discuss wage rate.
12. Do not discuss refusing to deal with a corporation because of its pricing or distribution practices.

Inasmuch as an association's antitrust violation can subject all association members to criminal and civil liability, members should be aware of the legal risks in the regard to membership policy and industry self-regulation. Membership policies should avoid:

1. Restrictions on dealing with non-members.
2. Exclusions from membership, especially if there is a business advantage in being a member.
3. Limitations on access to association information, unless the limitation is based upon protection of trade secrets.

Industry self-regulation, ordinarily manifested by a code of ethics must avoid:

1. Requiring refusal to deal with any member violating the association's code of ethics.
2. Arbitrary enforcement of the code.
3. Unreasonably severe penalties for violation of the code.
4. Regulations or policies which have price fixing implications, such as preventing the advertising of prices.

The penalties for violating federal or state antitrust laws are severe. Each individual and each corporation which is a member of the association may, respectively, be fined up to \$100,000 and \$1,000,000. Individuals and corporate officers may be imprisoned for up to three years. Additionally, there are civil penalties such as cease and desist orders, requiring government supervision of association members, restricting the association's activities and disbanding the association.

The greater likelihood of occurrence, and possibly the more severe penalty, may be civil suits brought by competitors or even consumers. Civil antitrust actions result in treble damage awards. Thus, if association members are held liable to a competitor for an antitrust violation which resulted in \$500,000 worth of lost business, the verdict may exceed \$1,500,000. Although not as frequently used, the Robinson-Patman Act, which prohibits price discrimination, may also result in sizable verdicts against trade association members. Discounts to trade association members not justified by cost savings will subject the members to treble damage awards for the harm caused by the discrimination.

The government's attitude toward trade associations requires trade association members, as well as trade associations themselves, to at all times conduct their business openly and avoid any semblance of activity which might lead to the belief that the association members had agreed, even informally, to something that could have an effect on prices or competition. Thus, it is important that local chapters or chapter members contact the national association for guidance if they have even the slightest qualms about the propriety of a proposed activity or discussion.