(3) Antitrust Primer and Reminder

I. INTRODUCTION

A. It has been over 10 years since MR last addressed this topic.
B. Nothing much has changed in the law – however, the dangers are probably greater due to the pace of change in the industry.
C. Antitrust laws prohibit conspiracies to fix prices, such as real estate commissions, or to fix other terms or conditions of the broker-client relationship.
D. Antitrust laws also prohibit group boycotts or concerted refusals to deal with a competitor, supplier or vendor.

II. ANTITRUST CONCERNS WITHIN REAL ESTATE FIRMS

A. Traditional Concerns:
   1. Two or more brokerage firms agreeing on the commission rate to be charged sellers.
   2. Statements by agents suggesting that all competitors in the marketplace follow the same pricing practices. Firms should caution agents that when discussing listing commissions with potential clients, they should avoid any suggestion that commission rates are not set independently by each firm.
   3. Two or more firms agreeing on the split to be offered cooperating brokers. Firms must independently determine their cooperative compensation policies, just as they do with listing commissions.

B. Additional Concerns:
   1. Statements by agents that suggest "no firms will deal with" a particular competitor who typically has a new business model or a non-traditional business model.
   2. Statements by agents suggesting that particular terms of a listing contract or other practice are followed by all competitors in the marketplace. Antitrust laws prohibit, for example, agreements among competitors as to the length of listings.
   3. An agreement between two firms that each will not deal with a third firm or that each will deal with a third firm in a particular manner, *e.g.*, with reduced offers of compensation through an MLS.
   4. Discussions between two or more firms about another firm's business practices particularly if the other firm is using a non-traditional business model. A real estate firm is free to unilaterally choose not to offer compensation to a particular firm or to lower the compensation offered to that firm. But if the real estate firm takes this action after discussing his "problem" with that firm with members of other firms – even casually – an inference may be drawn that this action was done pursuant to a conspiracy to boycott that firm.
   5. An agreement between two firms that they will not deal with a particular service provider – *e.g.*, mortgage company, warranty company, title

company, syndicator, real estate information services company, marketing service company, etc. Many of the cases have involved vendors of real estate advertising. For example:

a. An Iowa case involved a group of brokers who set up a real estate magazine. The shareholder-owners of this magazine all agreed not to advertise in a competitor's real estate magazine and instructed their sales associates to do the same. (This case was resolved by the parties through settlement; the terms of which are unknown.)

b. A newspaper in Virginia brought suit against several brokers alleging that they had unlawfully agreed not to advertise in the newspaper. (The case was eventually dismissed for lack of evidence of concerted activity.)

c. The Attorney General in Oregon brought an action against several real estate firms and the Salem-area Association of REALTORS® asserting that the local Association had facilitated an agreement by the firms to restrict their advertising to certain publications. (A settlement was reached which involved a fine and antitrust education programs.)

III. ANTITRUST CONCERNS WITHIN ASSOCIATIONS

A. Actions by an Association or officers within the Association aimed at stopping a particular firm from conducting its business in a particular manner which some of the Association's members find objectionable.

B. Discussions at meetings of the Association about a particular firm or its practices.

1. A case from Des Moines, Iowa, illustrates the pitfalls of Associations getting into the middle of disputes between competitor firms. In that case, a firm with approximately 75% market share decided not to offer cooperative compensation to a start-up firm that took many "office listings." At about the same time, the Association began enforcing a long-ignored policy that penalized firms for "office listings." The start-up firm sued both the large broker and the Association, alleging that the two had conspired against it. While the Association eventually prevailed – in large part because the start-up company had nonetheless prospered – the case was litigated all the way to the Iowa Supreme Court.

2. At a recent continuing education class sponsored by a local Association, the following question was asked:
"There is one member of our Association – a solo practitioner whose office is over on Elm Street and who recently got divorced. Anyway, I know he lost his law license and I don't trust him – can I refuse to let him show my listing?"

This is exactly the type of discussion that should never take place during any type of meeting of Association members. It is likely that many of the members in attendance could identify the solo practitioner from the description given. If more than one firm later decided not to offer

compensation to this licensee, the inference could be drawn that this was a concerted effort to boycott, in violation of antitrust laws.

C. Requests by officers/directors/members that an Association's executive officer "do something" to stop a particular firm from conducting its business in a particular fashion.

1. Executive officers should not be put in the position of mediating disputes between competitors where the dispute involves the particular business practices of one of the firms. An executive officer should never start a conversation with a member with language like:
"Several members of the Association have called me and expressed concerns about the way your firm handles . . . ."

"I know you are new around here, and therefore you might not know the way we do things around here . . . ."

2. Association leaders and executive officers should be sensitive to the possibility of misuse of the Code of Ethics. The Code may not be used to regulate or "outlaw" innovative or new business practices.
   a. Article 15, for example, provides that "REALTORS® should not knowingly or recklessly make false statements about competitors, their business or other business practices." This does not prevent Realtors® from asserting that their firm is superior to all others (*i.e.*, puffing). It is not a violation of Article 15, for example, if a firm advertises that the way it does business is superior to the way other firms in town do business.
   b. Article 16 precludes Realtors® from engaging in any practice or taking any action inconsistent with exclusive relationship agreements with other Realtors®. It does not prohibit competition – even aggressive competition – to obtain clients. Realtors® can, for example, solicit another Realtor®'s prospective or former client or customer, regardless of the long-term nature of that relationship, and even if there was a prior exclusive agency relationship.
   c. An example of how a problem could arise occurred recently when an officer of a local Association made the following telephone inquiry:
   "At the end of the last meeting of the Grievance Committee, several of the members were talking and they want the Association to institute an ethics complaint against 'Firm X' because its advertisements falsely state that buyers' interests are not fully served unless they hire an exclusive buyer's agent . . ."

D. An Association enters into a tying arrangement which is an agreement between the Association or its MLS to sell one product (MLS services), but only on the condition that the buyer (MLS participant) also purchase a different product or service.

1. There have traditionally been four (4) elements which must be proven in order to establish an illegal tying arrangement under the antitrust laws:
    a. There must be two separate products or services;
    b. There must be a sale or an agreement to sell one product or service on the condition that the buyer purchase another product or service;
    c. The seller must have sufficient economic power with respect to the tying product to restrain free competition in the market for the tying product; and
    d. The tying arrangement must affect a "not insubstantial" amount of commerce.
2. Several federal circuit courts of appeals (including the 6th Circuit Court of Appeals) have added a fifth element which must be proven in order to establish an illegal tying arrangement. The seller of the tying product must have an economic interest in the tied product. To illustrate: Assume MLS "X" conditions participation in the MLS on a participant owning a 1965 red Chevy Impala. Assuming MLS "X" is the only MLS available to Realtors® in the area, it would be contended that there were two separate products with a requirement that a Realtor® purchase a second product in order to obtain the first (MLS services). MLS "X" would not be liable for an illegal tying arrangement if it had no economic interest in the tied product, *i.e.*, the 1965 red Chevy Impala. In other words, it received no economic benefit from the MLS participant's acquisition of the cars.

IV. ANTITRUST CONCERNS AMONG ASSOCIATIONS

A. One of the consequences of boards of choice is that local Realtor® Associations are now competitors.
    1. Two or more local Associations may not agree among themselves on the amount of dues or other charges.
    2. Two or more local Associations may not agree that they will not solicit one another's members.
    3. If two local Associations jointly purchase a product in order to save money (for example, lockboxes), they may not agree on the re-sale price that each Association will charge their respective members.

B. Regional MLSs are also made up of a group of competitors.
    1. *Sandicor* decision out of California involved service agreements between the regional MLS and the shareholder Associations, pursuant to which the Associations provided support services to the MLS (*e.g.*, enrollment, billing and collection services). The regional MLS required all of its member Associations to charge all MLS participants the same "user fee." The Associations collected the "user fee" and forwarded the money to the regional MLS, who would then return the "service fee" portion of the "user fee" to the respective Association. The regional MLS did not permit

any Association to discount its "user fee"; thus the "service fees" charged by all Associations were the same. The Ninth Circuit Court of Appeals held that this was an illegal conspiracy to fix prices.

2. The *Sandicor* decision does not affect a regional MLS that delivers MLS services directly to the participants.
3. Likewise, the *Sandicor* decision does not affect a regional MLS that sells its services to the member Associations, who each in turn, resell the services to their respective members at prices determined by each Association.

C. The merger of two or more neighboring Associations may also raise antitrust considerations, particularly if it will result in higher dues payments for members of one or more of the constituent Associations. Mergers that result in lower dues and/or more member services are much more likely to withstand scrutiny.