



RE11RC07

The Most Exciting Topic
on the streets today...

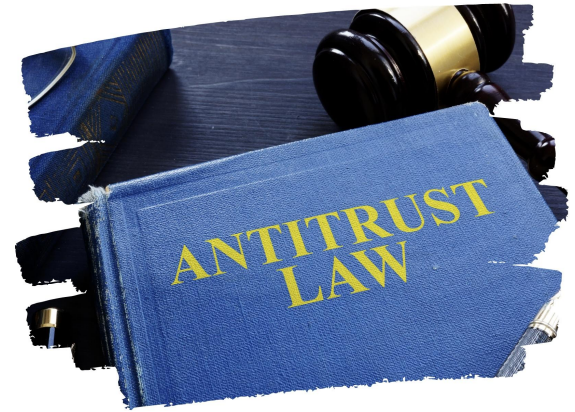
ANTITRUST!

With
Kate Lanagan MacGregor
508-728-3648



DEFINITION!

Laws relating to legislation preventing or controlling trusts or other monopolies, with the intention of promoting competition in business.



ANTITRUST DEFINITION INVESTOPEDIA

Who Enforces Antitrust Laws? —
Antitrust laws are the broad group of state and federal laws that are designed to make sure businesses are competing fairly.



ISSUES:

- ❑ Boycotting
- ❑ Steering
- ❑ Discrimination



WHY DO WE HAVE ANTITRUST LAWS ANYWAYS?!

PURPOSE OF ANTITRUST LAWS

- ❑ The purpose is to promote competition in the marketplace



Representative David Cicilline, a Rhode Island Democrat who is leading a House investigation of Apple and other tech giants, said in an interview with Bloomberg TV that Apple's 30% cut of sales is "highway robbery."



ANTITRUST LAWS

- ❑ Competition benefits consumers by keeping prices low and the quality of goods and services high



WHAT'S IN TODAY'S HEADLINES?



LAWSUIT IN THE NEWS



National Association of Realtors Lawsuit

WHAT DO WE SEE?



NAR FAQ's



**NATIONAL
ASSOCIATION OF
REALTORS®**

VOW AND IDX

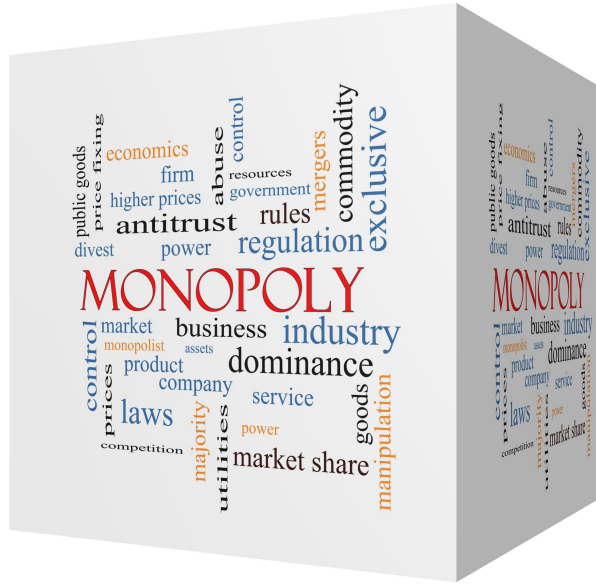
The ability of VOW websites to have access to MLS data.

VOW- Virtual Office Websites

IDX- Internet Data Exchange



HISTORY OF ANTITRUST LAW





SHERMAN ANTITRUST ACT OF 1890

- ❑ The first American Antitrust law that forbids “contracts combinations, conspiracies or agreements” in restraint of trade



SHERMAN ANTITRUST ACT OF 1890

- ❑ Prohibits monopolies or attempts to monopolize

CLAYTON ACT OF 1914

- ❑ Outlaws business mergers which result in a non-competitive atmosphere



CLAYTON ACT OF 1914

- ❑ Unlike Sherman Act which deals with current practices, the Clayton Act outlaws activities which may affect future restraint of trade

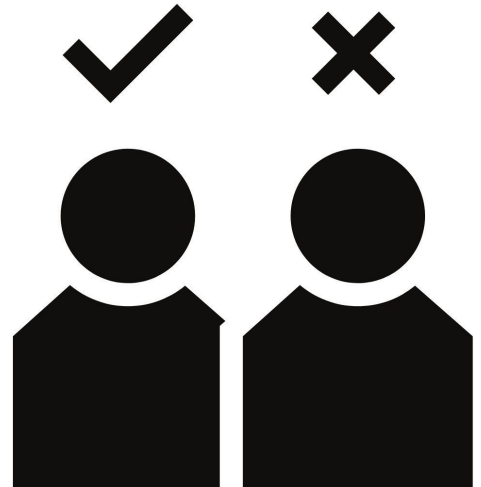


CHAT- WHAT CAN YOU IMAGINE?



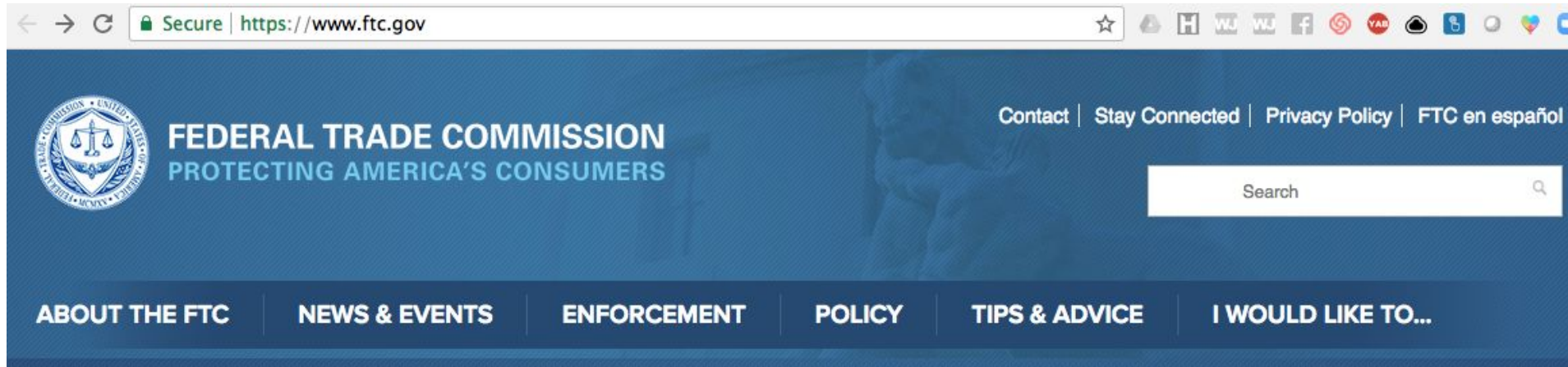
ROBINSON-PATMAN ACT OF 1936

- ❏ Forbids price discrimination among customers of the same class



FEDERAL TRADE COMMISSION ACT OF 1914

❏ Amended in 1930s and 1970s



- ❑ Allows the law to move against unfair or deceptive practices, or unfair competition without waiting for someone to actually be harmed by them
- ❑ Current and future



PARENS PATRIAE

- ❑ Attorneys General were given the full strength of Federal antitrust powers under “parens patriae”



MGL CHAPTER 93 SECTION 1-14A

- ❑ The purpose of the “Massachusetts Antitrust Act” is to encourage free and open competition in the interest of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth



QUIZ!

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.

T or F



MGL CHAPTER 93 SECTION 1-14A

- ❑ This act shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable

FOUR COMMON ANTITRUST REAL ESTATE VIOLATIONS

- ❑ All four are illegal under the “Per Se” rule and no defense of ignorance or lack of illegal intent will be accepted



FOUR COMMON ANTITRUST REAL ESTATE VIOLATIONS

- ❑ The law presumes that they are violations and condemns them automatically



PRICE FIXING

- ❑ An agreement, combination, or conspiracy involving at least two persons who are nominal competitors to fix, set or rig prices (or commissions or fees)



QUIZ!

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 Websites. But if we decide to offer them the same amount of compensation that they offer us, we'll be breaking the law. T or F



PRICE FIXING

- ❑ There is no such thing as a innocent discussion of commissions



QUIZ!

Two competitors in my market asked me to cooperate with them in settling 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. T or F?



QUIZ!

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.

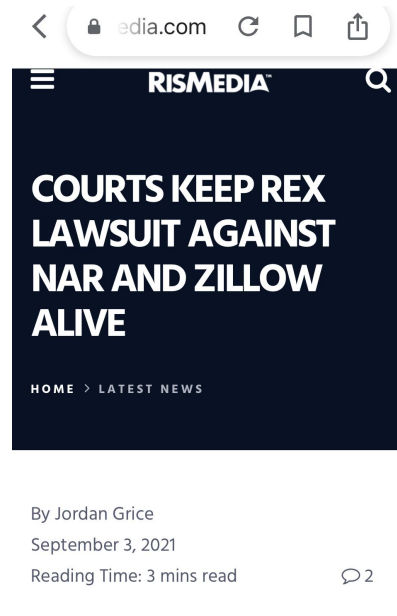
True

False



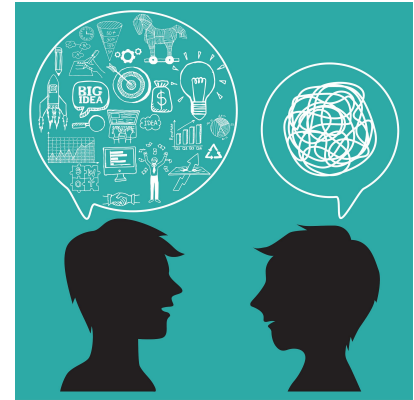
GROUP BOYCOTT

- ❏ Group Boycott (must prove)
individual refusals to deal are
illegal



BOYCOTT OR COERCION

- ❑ Violation of the law even if two or more businesses just agree to a boycott or some coercion of a third competitor



- ❑ Even a group boycott of someone perceived to be “unethical” is a problem



CODE OF ETHICS VIOLATION

- ❑ Violation of the Realtor Code of Ethics should be filed as a grievance, not discussed among competitors



ARTICLE



3

REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker





ARTICLE



16

**REALTORS® shall not engage in
any practice or take any action
inconsistent with exclusive
representation or exclusive
brokerage relationship
agreements that other
REALTORS® have with clients**

CONSIDERATION TO DETERMINING VIOLATION:

- ❑ A conspiracy to boycott exist



CONSIDERATION TO DETERMINING VIOLATION:

- ❑ Participated in the boycott



CONSIDERATION TO DETERMINING VIOLATION:

- ❑ Conspiracy had a sufficient nexus with interstate commerce



CONSIDERATION TO DETERMINING VIOLATION:

- ❑ Conspiracy injured the plaintiff

VS



CONSIDERATION TO DETERMINING VIOLATION:

- ❑ The approximately amount of damage



DIVIDING THE MARKET

- ❑ Allocation of customers among two or more competitors, whether the division is based on geography, product lines, astrological sign or other criterion



TYING ARRANGING

- ❑ Dominance in the market that forces consumers into purchasing a “tied” product in order to obtain the “tying” product



5 ELEMENTS OF A 'PER SE' TYING CLAIM

- ❑ Two separate and distinct products, a “tying” and a “tied” product



5 ELEMENTS OF A PER SE TYING CLAIM

- ❑ The buyer being forced to buy the tied product to get the tying product



5 ELEMENTS OF A PER SE TYING CLAIM

- ❑ The seller possessing sufficient economic power in the tying market to coerce buyer acceptance of the tied product



5 ELEMENTS OF A PER SE TYING CLAIM

- ❑ Involvement of a 'not insubstantial' amount of interstate commerce in the market of the tied product:



5 ELEMENTS OF A PER SE TYING CLAIM

- ❑ The tying company has an economic interest in the tied product (anti-competitive effect in tied market)



DISCUSSION

Which are most prevalent? Damaging?



THREE ELEMENTS TO ANTITRUST VIOLATIONS

Combination or Conspiracy

- ❑ Existence of concerted action by knowing participant



THREE ELEMENTS TO ANTITRUST VIOLATIONS

- ❑ An overt action



THREE ELEMENTS TO ANTITRUST VIOLATIONS

In Restraint of Trade

- ❑ Limits ability to do business



THREE ELEMENTS TO ANTITRUST VIOLATIONS

Which is Unreasonable?

- ❑ Causing damage to injured party



ANTITRUST LAWS ARE ADMINISTERED BY:

1. Federal Trade Commission
2. Department of Justice
3. State Attorney General

VIOLATIONS

Per Se

- ❑ Illegal on the face - anti competitive effect need not exist, only an agreement is needed



VIOLATIONS

Per Se

- ❑ Example would be a verbal or written agreement between two competitors to fix prices and/or divide the market



VIOLATIONS

Per Se

- ❑ For this, one does not have to establish an anti-competitive effect, just the agreement itself is enough to determine a violation.



VIOLATIONS

Per Se

- ❑ Per se rules require the court to make broad generalizations about the social utility of particular commercial practices



VIOLATIONS

Per Se

- ❑ Agreement to boycott competition

VIOLATIONS

Per Se

- ❑ Agreement to fix prices



QUIZ!

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

False



VIOLATIONS

Per Se

- ❑ Tying one product to another



VIOLATIONS

Rules of Reason

- ❑ requires the fact finder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint of trade



VIOLATIONS

Rules of Reason

- ❑ Cannot be overly subjective which would exclude otherwise qualified

VIOLATIONS

Rules of Reason

- ❑ Only a court may declare an action illegal under the Rule of Reason
 - ❑ customer/client



VIOLATIONS

Rules of Reason

- ❑ Establishing commission rate



QUIZ!

Even though my salespeople are independent contractors, I may establish the commission rate for my company and require salespeople to charge that rate.

True

False



VIOLATIONS

Rules of Reason

- ❑ Other listing policies



VIOLATIONS

Rules of Reason

- ❑ Length of listing

VIOLATIONS

Rules of Reason

- ❑ Type of listing
- ❑ competitors



VIOLATIONS

Rules of Reason

❑ Commission splits



VIOLATIONS

Rules of Reason

❑ Boycotts



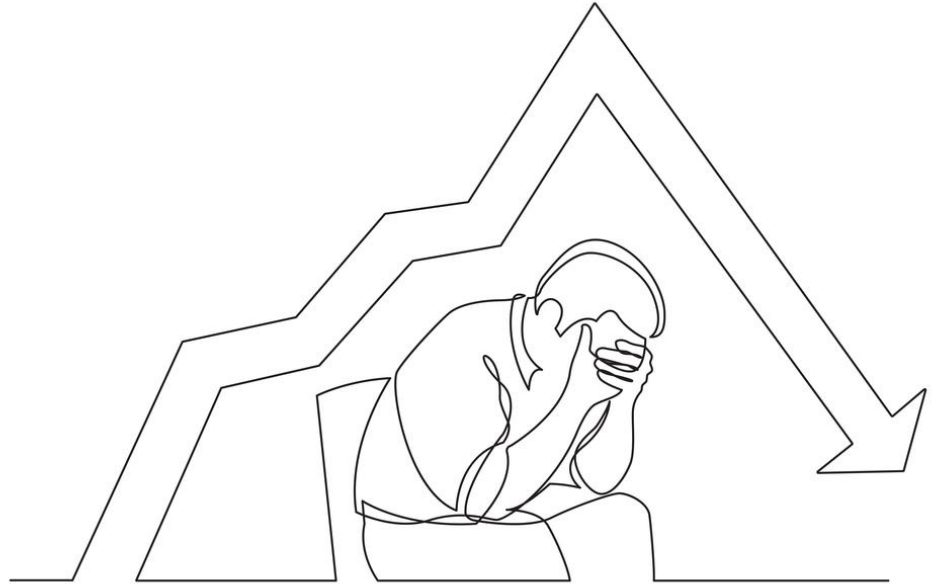
QUIZ!

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. T or F



MLS AND ANTITRUST

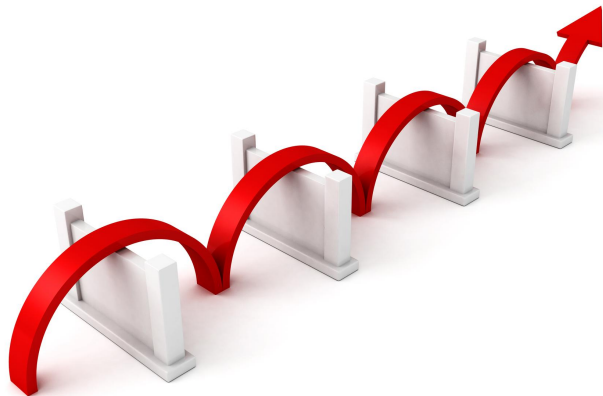
- ❑ Fix
- ❑ Control
- ❑ Recommend
- ❑ Suggest
- ❑ Prohibit
- ❑ Discourage



VIOLATIONS

Rules of Reason

- ❑ Horizontal mergers and agreements
- ❑ Other service providers



VIOLATIONS

Rules of Reason

- ❑ Tying arrangements



VIOLATIONS

Rules of Reason

- ❑ Vertical mergers and agreements



ENFORCEMENT

- ❑ Federal Violations
 - ❑ Sherman Act



ENFORCEMENT (SHERMAN ACT)

Criminal

- ❑ Fines (not tax deductible):
 - ❑ Corporate: up to \$1,000,000

ENFORCEMENT (SHERMAN ACT)

Criminal

- ❑ Fines (not tax deductible):
 - ❑ Corporate Officers or Directors:
Up to \$5,000 and/or prison up to one year


ENFORCEMENT (SHERMAN ACT)

Criminal

- ❑ Fines (not tax deductible):
 - ❑ Individual: Up to \$100,000 and/or prison up to 3 years

CIVIL PENALTIES

Civil Penalties

 A **civil penalty** or **civil** fine is a financial **penalty** imposed by a government agency as restitution for wrongdoing. The wrongdoing is typically defined by a codification of legislation, regulations, and decrees. (Wikipedia)

ENFORCEMENT (SHERMAN ACT)

Civil

- ❑ Treble damages ($\frac{2}{3}$ not tax deductible) available in actions by private persons

ENFORCEMENT (SHERMAN ACT)

Civil

- ❑ Award of attorney's fees available in actions by private persons

ENFORCEMENT (SHERMAN ACT)

Civil

- ❑ Court costs available in actions by private persons

ENFORCEMENT (SHERMAN ACT)

Civil

- ❑ Court costs available in actions by private persons

ENFORCEMENT (SHERMAN ACT)

Civil

- ❑ Interest on actual damages available from date of complaint in actions by private persons or government

ENFORCEMENT (SHERMAN ACT)

Civil

- ❑ Injunction available in action by Government

ENFORCEMENT (SHERMAN ACT)

Other

- ❑ Loss of individual's right to vote in public elections for felony conviction

ENFORCEMENT (SHERMAN ACT)

Other

- ❑ Possible loss of broker's or salesperson's license

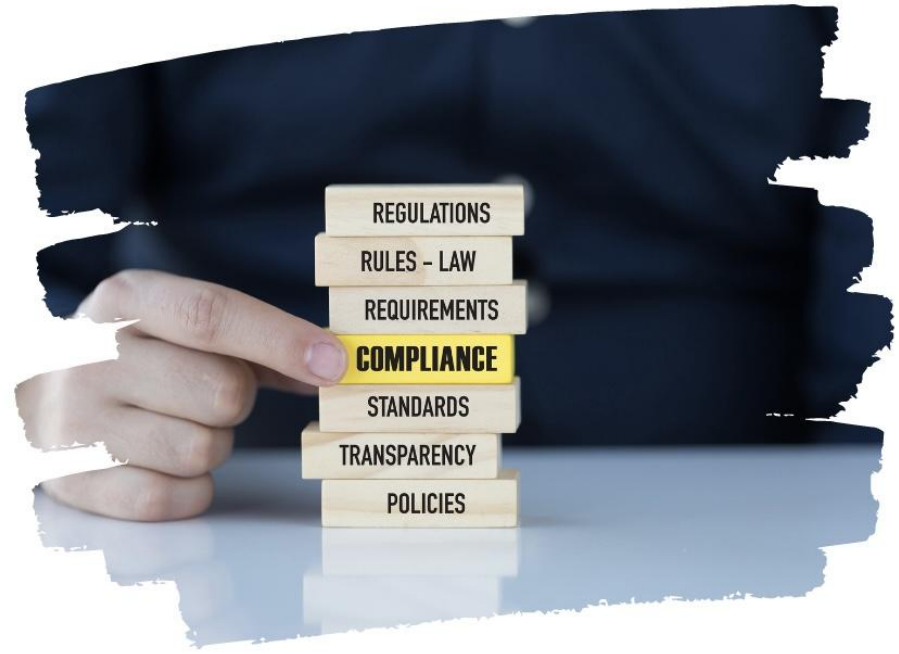
ENFORCEMENT (SHERMAN ACT)

Other

- ❑ Supervision of your business up to (10 years)

ENFORCEMENT (CLAY

- ❏ Civil remedies
same as Sherman
Act



ENFORCEMENT (CLAYTON ACT)

- ❑ No criminal penalties



ENFORCEMENT (FTC ACT)

- ❑ Cease and Desist Order
 - ❑ Prohibits unfair methods of competition or deceptive acts or practices by respondent

ENFORCEMENT (FTC ACT)

- ❑ Trade Regulation
 - ❑ Defines acts or practices that violate FTC Act

ENFORCEMENT (FTC ACT)

- ❑ Fines (not tax deductible):
 - ❑ Up to \$10,000 for each violation of “A” or “B” above

ENFORCEMENT (FTC ACT)

State violations



ENFORCEMENT (FTC ACT)

Criminal

- ❑ 48 states have criminal anti-trusts laws
 - ❑ some of which allow for fines up to \$1,000,000 for corporations
 - ❑ \$100,000 for individuals
 - ❑ prison terms up to 3 years

ENFORCEMENT (FTC ACT)

Civil

- ❑ 44 states allow both the state and an individual to sue
- ❑ 46 states provide for injunctions

ENFORCEMENT (FTC ACT)

Civil

❏ Parens Patriae-

- ❏ the principle that political authority carries with it the responsibility for protection of citizens.



ENFORCEMENT (FTC ACT)

Civil

- ❑ Attorney General of any state may bring a civil suit on behalf of the citizens of the state seeking damages identical to those available to any private person

MASSACHUSETTS



Criminal

- ❑ Fines (not tax deductible)
 - ❑ Corporate: up to \$100,000
 - ❑ Individual: up to \$25,000 and/or prison up to 1 year

MASSACHUSETTS

Civil

Treble damages



Permits a court to triple the amount of the actual/compensatory **damages** to be awarded to a prevailing plaintiff.



Treble damages are a multiple of, and not an addition to, actual **damages** in some instances.

MASSACHUSETTS

Civil

- ❑ Award of reasonable attorney's fees



MASSACHUSETTS

Civil

❏ Court cost



MASSACHUSETTS

Civil

- ❑ Injunctive relief and stay

MASSACHUSETTS

- ❑ Any individual harmed may bring private action - need not be the Attorney General



RISK REDUCTION

The following are examples of words or phrases occasionally used by salespeople that would permit a judge or jury to infer that real estate brokers/ salespeople are engaged in an illegal conspiracy.



RISK REDUCTION

❏ “I’d like to lower the commission rate, but our professional association has a rule...”



RISK REDUCTION

- ❑ “This is the rate that everyone charges.”
- ❑ “This is the going rate”



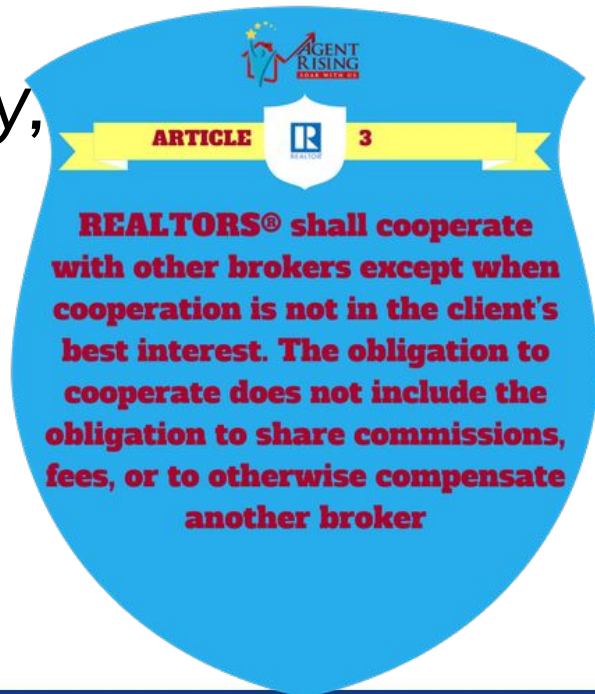
RISK REDUCTION

- ❏ “The Listing Service will not accept less than a 120-day listing”



RISK REDUCTION

❏ “Before you list with XYZ Realty, you should know that nobody shows their listings.”



REALTOR?

- ❑ “If John Doe was really professional (or ethical), he would have joined our professional association”

RISK REDUCTION

❑ “The best way to deal with John Doe is to boycott him”

RISK REDUCTION

- ❏ “No member of our professional association will accept a listing for less than ninety days.”



RISK REDUCTION

❏ “Let him stay in his own market.
This is our territory”

SOURCE

The above examples are taken from
NAR [“Antitrust Compliance Program”](#)
booklet.

RISK REDUCTION

Some of the examples are not literal but capture the essence of the publication.

DON'T...

Do not discuss fees, charges, or business practices with competitors anywhere. This includes tennis courts, golf course or during a house party.



Do...

Be clear and specific in all written correspondence



Do...

Be sure you know what you are
talking about and to whom

BE CAREFUL...

Avoid conversations about how commissions were negotiated and how you reached your own office decisions with anyone but the folks in your own firm



DO NOT...

- ❑ Do not keep dual or secret files of documents

OTHER SOURCES:

- ❑ NAR Antitrust Compliance Guide for Realtors ® and Realtor® - Associates
- ❑ NAR “Antitrust and Real Estate Manuals” Volume I & II
- ❑ NAR CD “Antitrust and Real Estate”
- ❑ [NAR Talking Points](#)



OTHER SOURCES:

- ❑ NAR Antitrust Compliance Guide for Realtors ® and Realtor® - Associates
- ❑ NAR “Antitrust and Real Estate Manuals” Volume I & II
- ❑ NAR CD “Antitrust and Real Estate”
- ❑ [NAR Talking Points](#)



LINKS

- ❏ <http://mass.gov/legis/laws/mgl/gl-93-toc.htm>
- ❏ <http://www.realtor.org/libweb.nsf/pages/fg704>
- ❏ <http://www.realtor.org/rmotoolkits.nsf/pages/brokerrisk17>

NEW ANTITRUST LINKS

<https://notorious-rob.com/2019/03/gotterdammerung-a-very-serious-legal-threat/>

<https://notorious-rob.com/2019/03/do-not-minimize-ragnarok-very-serious-legal-threat-part-2/>

<https://www.inman.com/2019/03/16/why-the-bombshell-law-suit-might-be-a-dud/>

<https://www.inman.com/2019/03/19/why-the-bombshell-law-suit-might-be-a-dud-part-2/>



QUESTIONS?



Find Me! Friend Me! Like Me! Share!
Kate Lanagan MacGregor
508-728-3648
Kate@AgentRising.com

