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Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, Realtor® associations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters throughout Oregon and Washington.

Avoiding Antitrust Violations

Many brokers became familiar with antitrust laws during the course of the US Department of Justice lawsuit against the National Association of REALTORS® ("NAR"). In the lawsuit, it was alleged that NAR violated federal antitrust regulations by promoting anti-competitive activities. Despite knowing about the lawsuit, some brokers may not be aware of how antitrust laws govern their own real estate activities. This article will briefly discuss antitrust violations, and will present scenarios that will test the reader's knowledge of antitrust violations.

Federal and state antitrust laws are in place to protect consumers and promote a free marketplace. Under such laws, businesses are required to set their fees or prices and conduct their business relationships independent of competitors. Although two businesses in the same industry may end up with similar fees or have similar relationships with service providers, they cannot team together to set the same fees or form the same relationships. For instance, brokerage A may decide to list properties for x%, and brokerage B also happens to list properties for x%. If the brokerages decided on their listing commissions independently of each other, they would not be in violation of antitrust laws. However, if brokerage A and brokerage B teamed together, deciding that they should both list properties for x%, they would potentially be in violation of antitrust laws. This type of antitrust violation is called "price fixing."

Another prohibition under antitrust laws is a group boycott. Let's say principal brokers at brokerage A and brokerage B are having lunch together one day, and the principal brokers both decide that they dislike the service provided and prices charged by their local newspaper. In order to force the newspaper to lower its prices, both principal brokers tell the newspaper's advertising department that they will no longer place advertisements with the newspaper unless they provide better customer service and reduce their advertising prices. As the principal brokers began boycotting the newspaper after their lunch discussion, they may have participated in a group boycott, thereby violating antitrust laws.

Monopolies are also prohibited under antitrust laws, as they are anti-competitive, have a tendency to negatively impact consumers, and generally interfere with the free market system.

In educating their brokers and avoiding antitrust violations, brokerages should keep the following general rules in mind. First, brokers should not tell their clients that their fees are "standard" for the industry or area, and brokerages should not fix their fees in concert with other

brokerages or agree to divide geographic territories between brokerages. Second, brokers should not jointly decide with brokers outside their brokerage that they are going to boycott another brokerage or a service provider. Third, brokerages should be cognizant of their market share so as to ensure that they will not be considered a monopoly.

The following are two scenarios that will test your knowledge of antitrust violations, with explanations appearing below.

1. At a local Board of Realtors® luncheon, a group of brokers discuss the rising cost of home inspections performed by certain inspectors in their local market. One of the brokers asks the others what they should collectively do in order to ensure that their homebuyers don't have to pay the rising costs for these inspections. Is this an antitrust violation?
2. Brokerage owner Bob is evaluating his commission structure, and conducts an informal survey of local brokerages to determine what they charge. He also researches national trends regarding commissions. As a result of his survey and research, brokerage owner Bob elects to modify his commission structure, which is now nearly identical to multiple local brokerages' fee structures. Is this an antitrust violation?

In scenario one, it appears that the group of brokers may intend to boycott the inspectors as a group. Whether this constitutes a violation of antitrust laws will depend on many factors, including specifics as to the content of the luncheon conversation. Although the conversation itself is not necessarily the wrongful act, the intent of the brokers appears to be to push the inspectors to charge less. Brokers should steer clear of conversations in which it is suggested that they participate in a group boycott.

Scenario two involves a potential price fixing scheme. However, in reviewing the question, it is evident that brokerage owner Bob bases his commission structure on his own due diligence. Although his commission structure is based in part on what other local brokerages are charging, Bob has not attempted to negotiate a price fixing scheme with his competitors. Accordingly, this does not constitute an antitrust violation.

Conclusion

Brokers would be well advised to further educate themselves about antitrust laws so that they can avoid the harsh penalties involved with an antitrust violation. As brokerages may be held liable for their brokers' antitrust violations, brokerage owners should ensure that their brokers have an understanding as to what constitutes an antitrust violation, and how to avoid activities that may violate antitrust regulations.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at joelgrayson@mayliegrayson.com or by mail at 7959 SE Foster Road, Portland, Oregon 97206.