

## **Association Antitrust Information**

The penalties for antitrust violations are severe. Convictions for associations can result in substantial fines, civil injunctions limiting their future activities, and even the dissolution of the association itself. Moreover, the cost of defending a suit, in terms of staff and volunteer time and legal fees, is enormous. Even if an association wins its case, the financial drain on the defense may make it a loser in the end. Lastly, antitrust actions are well publicized and an association can suffer serious injury to its reputation and the goodwill that its members enjoy, win or lose in court.

Thus, the association's staff, board and members have a tremendous responsibility to the organization to ensure that all of its activities are properly within the antitrust laws.

### **General Association Antitrust Cautions**

There are some basic rules that can assist in avoiding antitrust problems at association meetings. The association's staff, board and members – in other words, all connected with an association – should read and remember these basic rules expressed below. It should be noted in reviewing these don'ts that violations can be shown not only by express contract but also by unspoken or implied understanding.

- Don't discuss prices your company will charge customers. It is illegal to fix selling prices.
- Don't discuss changing prices. It is illegal to agree to change prices at the same time.
- Don't agree to refrain from advertising prices. Such agreements are illegal.
- Don't discuss or agree to not sell at less than a certain markup even though there is no agreement as to the precise price to be charged.
- Don't discuss or agree to fix buying prices for raw material.
- Don't discuss or agree to not buy from, or sell to, or deal with, particular persons or classes of customers or prospective customers.
- Don't discuss or agree to limit production.
- Don't discuss or agree to divide markets.
- Don't discuss or agree to refrain from bidding for an order or job.
- Don't discuss or agree to not sell in a particular market area.
- Don't discuss or agree to the exchange of specific customer prices among competing sellers.
- Don't discuss or agree to discontinue selling to one or more customers for non-payment of bills or otherwise.

### **PPA Antitrust Compliance Policy and Guidelines**

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#### **OVERVIEW**

Antitrust laws are among the most important of all federal and state laws affecting associations such as Professional Photographers of America. The purpose of antitrust laws is to preserve fair and honest competition. It is the long-standing and undeviating policy of PPA to comply in all respects with the letter and spirit of all antitrust laws.

#### **Education**

To ensure compliance with federal and state antitrust laws, PPA members are responsible for understanding those laws. PPA Guidelines for Antitrust Compliance are adopted as part of the Association's Antitrust Compliance Policy. Members of PPA are urged to become familiar with this Policy and these Guidelines.

#### **Agenda**

A detailed agenda is to be prepared for each meeting planned by the PPA Board of Directors or its Committees or Groups. The agenda will be distributed to participants prior to the meeting. If agenda items raise potential antitrust questions, legal counsel should review them in advance.

#### **Meetings**

Meetings of the PPA Board of Directors are regularly scheduled. Meetings follow the prepared agenda. Counsel is invited to be present at meetings at which antitrust-sensitive issues are to be discussed.

## **Minutes**

Accurate minutes are kept of all PPA Council, Board of Directors, Committee and Group meetings. The minutes of the preceding meeting are read and approved at each meeting. After the minutes have been approved, they are distributed to attendees in a timely fashion.

## **PPA Guidelines for Antitrust Compliance**

### Introduction

Antitrust laws were first enacted nearly a century ago to preserve and promote free and fair competition throughout the United States economy. Antitrust laws advance competition by preventing businesses and professionals from engaging in anti-competitive conduct such as price-fixing, market allocation, boycotts, monopolies, and other activities that limit free trade. Associations such as Professional Photographers of America, by bringing together photographic professionals and facilitating the exchange of ideas and information among those professionals, have the potential to undermine competition. Accordingly, government enforcers of antitrust laws monitor the activities of trade associations. Because associations are watched so carefully, PPA must be especially vigilant to assure that its policies and programs comply with antitrust laws. To ensure that Professional Photographers of America complies with antitrust laws, the Association has established guidelines that address:

1. The areas of antitrust law that potentially relate to PPA and its members,
  2. The dangers that must be avoided to minimize the risk of antitrust liability, and
  3. Policies and procedures to follow when teaching or discussing pricing.
- Members should be aware, however, that these guidelines don't address every potential area of antitrust concern for PPA and its members. Whenever there is doubt, it is the policy of PPA to seek the assistance of legal counsel experienced in antitrust matters.

### Antitrust Laws in General

The relevant federal antitrust statutes are the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act. The Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade in interstate commerce. Among the agreements prohibited by the Sherman Act are those that involve price fixing; allocation of markets or customers; and boycotts of competitors, suppliers, or customers. The Sherman Act also condemns monopolization. The Clayton Act prohibits various kinds of business behavior that tends to lessen competition or monopolize trade. Among the activities prohibited by the Clayton Act are exclusive dealing arrangements, acquisitions, and mergers that tend to lessen competition. The Federal Trade Commission Act, in addition to prohibiting the anti-competitive activities made illegal by the Sherman and Clayton Acts, bans unfair methods of competition and unfair or deceptive acts and practices. Unlike the Sherman and Clayton Acts, where most of what is prohibited requires the action of two or more parties, individuals or firms can be liable under the Federal Trade Commission Act, even though they did not act in concert with others. The Robinson Patman Act prohibits price discrimination where the effect is to lessen competition. In addition to the federal laws, most states have enacted statutes similar to the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. It is impossible for these summary guidelines to outline each state's antitrust laws. When particular questions arise, PPA and its members must look to their own states' antitrust laws and enforcement mechanisms. At the same time, it is prudent to use the federal antitrust laws for general guidance.

### Antitrust Enforcement

The Sherman Act is enforced by the Antitrust Division of the United States Department of Justice and by the Bureau of Competition of the Federal Trade Commission, as well as through private suits for three times actual damages ("treble damages") that can be brought by those who claim they have been injured as a result of antitrust violations. The government can bring either civil or criminal suits. The remedy for a civil suit in an action brought by the government is an injunction prohibiting the offender from future violations. Criminal penalties can include fines, imprisonment, or both. Sherman Act violations carry stiff fines with the added deterrent of significant jail terms. A violation of the Act is a felony, punishable by up to three years in prison. In addition, steep fines can be imposed for Sherman Act violations.

The Federal Trade Commission enforces the Federal Trade Commission Act by issuing cease-and-desist orders to stop practices found to violate the law. A violation of a Commission order may result in a penalty of as much as \$10,000 per day. Any association, such as PPA, that is adjudged to be in violation of antitrust laws can be dissolved by court order. It is important to note that each party found liable, no matter how small a role that party played, can

be held liable for all damages caused by all participants in the antitrust conspiracy. The legal costs incurred in defending an antitrust challenge, beyond the penalties that might ultimately be imposed, frequently run into the hundreds of thousands of dollars. Some associations have paid millions of dollars to defend themselves in especially long or complex antitrust suits.

#### Antitrust Laws Applicable to PPA

Among the federal antitrust laws of principal concern to PPA and its members is Section I of the Sherman Act, which renders illegal all "contracts, combinations, and conspiracies" in restraint of trade in interstate commerce. Section I is interpreted to prohibit only agreements that have the effect of unreasonably restraining trade. A violation of the law occurs when, upon examination of all the facts and circumstances surrounding the conduct in question, it is determined that trade is unreasonably restrained.

Certain activities are regarded by courts as unreasonable by their very nature and are considered illegal per se. When an activity is designated a "per se" antitrust violation, a conclusive presumption is created that the activity was engaged in for no other purpose than to restrain trade. Practices within the "per se" category include agreements to fix or set prices, fees, rates, or commissions, as well as certain kinds of agreements to boycott competitors, suppliers, or customers. Note that the concept of "price fixing" encompasses agreements not only to raise prices but also to lower or stabilize prices.

Virtually any agreement, arrangement, or understanding among competitors that involves tampering with free market prices, fees, rates, or premiums is a per se antitrust law violation. The Sherman Act prohibition applies to any anti-competitive agreement, whether written or oral, formal or informal, express or implicit. Only rarely is an anti-competitive agreement set out clearly in a written document. Antitrust liability is more often found by examining a course of business conduct from which a jury can infer the existence of an illegal conspiracy. The circumstances may be entirely innocent and lawful when viewed separately. However, the same circumstances, when viewed in the aggregate, may be held to constitute an antitrust conspiracy.

#### **Potential Antitrust Conflicts Affecting PPA Members**

The legality of activities of associations and their members under the various antitrust laws is determined according to standards no different from those used to determine the legality of the activities of other persons or firms. Special problems do arise, however, from the basic nature of an association. Many of an association's most fundamental policies and valuable programs directly impinge upon areas that could be construed as anti-competitive and therefore in violation of antitrust laws.

The essential principle, which should guide PPA policies, programs, and members in avoiding antitrust violations, is that no illegal agreements, arrangements, or understandings can be reached or carried out through the Association. Conduct that might give the appearance of an illegal agreement must also be avoided. Officers, directors, members, and staff of PPA must be alert to conduct that could fall into areas of antitrust concern.

In analyzing whether information to be exchanged at any Professional Photographers of America meeting or seminar could possibly be in violation of antitrust guidelines, two critical questions must be asked:

1. Could the information being presented affect the marketing and business policies (including competitive behavior) used by the attendees in their businesses?
2. Could the information being presented affect the independent business decisions of the companies or firms represented by the attendees?

As a general rule, if the answer to these two questions is yes, and if the exchange of information is intended to or results in an alteration of the competitive behavior of an individual company relative to setting prices, fees, rates, or commissions; or results in a boycott of competitors, suppliers, or customers, then it is prohibited by these guidelines. More specific guidelines are as follows:

1. Discussion or exchange of information at PPA meetings or seminars concerning future price information or future competitive positions of an individual company or companies is prohibited.
2. Information concerning the current experience of an individual competitor may, in some circumstances, be viewed as a means of "signaling" future pricing or business decisions. It is, therefore, potentially suspect, and should not be presented or exchanged without an affirmatively stated purpose that is consistent with current industry-wide data or experience.

3. Where an interpretation or analysis of information concerning past or current experience or prices is exchanged, the risk that collective action will be linked to future market conduct is substantially increased. The prediction of a trend and its implications is, as a general rule, a matter for individual and independent decision-making, and this fact should be made clear when such interpretation and/or analysis is presented.

## CONCLUSION

In conclusion, PPA policy prohibits any activities that could be considered anti-competitive or in violation of federal or state antitrust laws. Any questions about such issues should be addressed to legal counsel.

## **Instructor Information**

(to clarify what pricing instruction is permissible)

### Portrait/Wedding Photography

Pricing portrait/wedding photography is tied directly to the costs incurred by the specific business.

Three types of costs are incurred by portrait/wedding businesses: capital expenses, cost of sales, and general expenses (for purposes of pricing, the impact of capital expenses is expressed through the depreciation line item of general expenses). Because these costs vary substantially from business to business, prices charged by individual businesses will vary as well. Accordingly, teaching how to identify and classify each of these cost areas is permissible. In addition, explaining the mathematical relationship between cost of sales, general expenses, and profit-which vary from business to business-can be taught. Further, the mechanics of pricing, based on each studio's appropriate cost of sales percentage (relative to its specific general expenses and profit percentage) can be taught. What you cannot teach, suggest, or imply is that any given group of photographers should get together and decide upon a standardized price for products. Such a suggestion would be both a violation of antitrust laws and inappropriate advice to your students, whose costs vary so widely from business to business.

While it is necessary to illustrate these principles using hard numbers, it is the theory behind the pricing methodology that must be emphasized, making it clear that understanding the methodology is crucial, and that the use of hard numbers in no way is a recommendation of prices to be charged.

### Commercial Photography

Pricing commercial photography includes the additional complication of usage charges. While portrait/wedding photography is a business-to-retail relationship, commercial photography is a business-to-business structure. Buyers of commercial photography understand the impact of usage charges (both in terms of type of job involved and regional differences in typical usage fees); therefore, it is essential to discuss negotiating strategies when teaching pricing. While it is necessary to present these strategies in terms of real prices and hard numbers, it is the thinking behind the strategies that must be emphasized, making it clear that understanding negotiating strategies is more important than the numbers being discussed, and that the use of hard numbers in no way is a recommendation of prices to be charged.

Further, it is permissible to discuss pricing surveys (prepared either by entrepreneurs or trade associations) in terms of regional differences, means, and averages. It also is acceptable to discuss the decision-making process involved in costing a specific job as well as delineating its costs and arriving at appropriate mark-up factors. The impact of business overhead in developing pricing of individual jobs or day rates also can be discussed.

### Price Lists

When teaching how to construct price lists, it is permissible to hand out sample price lists only for the purpose of demonstrating how different types of price lists are structured and not to suggest that the level of pricing displayed should be adopted by students.