

Working as a Mastermind Group – What are the Legal Basics?

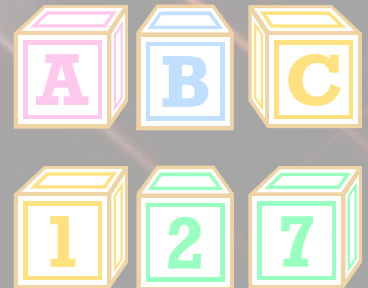
2018 NARPM® Broker/Owner Retreat

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The Legal Framework

- NARPM[®] Members are actual competitors
- NARPM[®] Members are potential competitors
- The antitrust laws apply to competitor collaborations

The Basic Law

- Sherman Act § 1:
 - Anticompetitive agreements are illegal: “Every contract . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”
15 U.S.C. § 1.

The Rough Part:

- Criminal penalties
 - Imprisonment
 - Fines
 - Big fish, smaller fish



More Common:

- Civil sanctions:
 - Injunctive relief
 - Divestiture, rescission, forfeiture
 - Damages (U.S. as a purchaser of goods)
- Private civil lawsuits:
 - Injunctive relief, treble damages, attorneys' fees
- Just defending an investigation or lawsuit is a substantial burden

Not Much Guidance in the Statute:

- All agreements restrain trade
 - Prohibited: Agreements that “unreasonably” restrain trade
- Unlike with certain regulatory regimes, there is no place to go for a quick answer for many collaborations
 - The antitrust agencies have issued formal guidance in only limited areas
 - Cases are usually fact-specific
 - Informal opinions are available but take a long time and a lot of money to obtain

Elements of a Section 1 Antitrust Violation:

1. Agreement
 - no agreement, usually no antitrust exposure
2. Unreasonably restrains trade
 - fact-specific
3. Affects interstate or foreign commerce
 - just about always met

The Agreement

- Could be express (written or oral)
- Could be implied from conduct
 - “conscious parallelism”
 - winks & nods, perhaps at association meetings



Determining Whether the Agreement To Restrain Trade Is Unlawful

- Per se v. rule of reason
 - A critical determination

Per Se = Automatically Illegal

- “Naked” agreement on prices or output
- No legitimate business justification
- Typically applies only to “horizontal” agreements:
 - Price fixing among competitors
 - Market allocation among competitors
- Per se violations can be criminal violations
 - Prison sentences
 - Individual and corporate fines
- The civil lawsuits almost always follow

Rule of Reason = Balancing

- Applies to most agreements with some legitimate business justification, even if between competitors
- The test asks “whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.”



The FTC Can Go Further

- FTC Act Section 5 prohibits “unfair methods of competition”
 - Courts have ruled that Section 5 is a “penumbra around the federal antitrust statutes”
 - Used most successfully to challenge “invitations to collude”
 - Little certainty

Antitrust and Professional Societies Can Be Targets

- Professional societies and trade associations are presumptively lawful and pro-competitive
- Because professional societies and associations are often groups of competitors and business partners, they can be subject to antitrust scrutiny

Antitrust and Professional Societies – Collaborations Lawful or Not?

- State Bar Association sets minimum fee schedule for title examinations
- National Society of Professional Engineers prohibits competitive bidding
- American Medical Association prohibits physician advertising
- Ethical rules prohibit members from soliciting other members' customers/clients
- A brand-new government lawsuit against a competitor collaboration
 - FTC suit against the three largest dental distributors
 - Alleges agreement not to sell products to Buying Groups formed by independent dental practices, a per se violation of Section 5
 - Alleges that one of the Big Three distributors invited the fourth largest distributor to join the conspiracy at a trade association meeting, a violation of Section 5
 - Legal principle? Avoid an unlawful agreement to exclude competitors that could limit competition (a “group boycott”)
 - Case could hurt or help NARPM members

Competitor Collaborations: Benchmarking

- Lawful: Surveys of historic cost data that meet the government's "antitrust safety zone"
 - 5+ contributors
 - Not one contributor over 20%
 - Data at least 3 months old
- Possibly unlawful: Detroit Nurses Case

Competitor Collaborations: Standardization

- Lawful: Beneficial standards developed through a fair and open process
- Possibly unlawful: Agreements to adhere to commercial terms that are more favorable than individual firms could obtain on their own

Competitor Collaborations: Group Purchasing

- Can members pool their purchasing power to receive better pricing from suppliers?
 - Yes, in most cases:
 - The group should represent less than 35% of the purchases
 - The purchased product should represent less than 20% of the final cost of the products/services the members sell
 - An independent third party (such as NARPM or a consulting firm) should coordinate the joint purchasing
 - Participation should be voluntary

Competitor Collaborations: Petitioning the Government

- Can members agree on a particular position to take before a city council, state legislature, or Congress even if our members seek legislation – such as licensing requirements – to exclude competition)?
 - Absolutely
 - Noerr-Pennington protection is extremely broad
 - “Sham exception” applies only if parties seek to use the process as an anticompetitive weapon
 - Care should be taken if confidential business information needs to be shared to undertake a petitioning activity
 - The protection applies when seeking to influence the rules the government follows when seeking bids for professional services -- but does not apply to permit competitors to coordinate their bids



Preventing Antitrust Problems

- Be familiar with NARPM's antitrust policy and the antitrust laws
- Call out potential antitrust issues when you spot them
 - State the potential issue and invite discussion regarding whether it is an issue
 - Consult NARPM staff and/or counsel if there are any questions about the propriety of the conversation
 - Leave the meeting if participants refuse to cooperate by addressing the issue

Questions?



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