

# **Antitrust Compliance Policy for the New Jersey Association of Professional Mediators**

## **Introduction**

The antitrust laws of the United States and the various states prohibit agreements, combinations and conspiracies in restraint of trade. Because the New Jersey Association of Professional Mediators (“NJAPM”) and other trade and professional associations are, by definition, combinations of competitors, one element of a possible antitrust violation is generally present, and only some action by the association that unreasonably restrains trade generally needs to occur for there to be an antitrust violation. Consequently, associations are common targets of antitrust plaintiffs and prosecutors.

The consequences for violating the antitrust laws can be severe. A conviction can carry stiff fines for the association and its offending leaders, jail sentences for individuals who participated in the violation, and a court order dissolving the association or seriously curtailing its activities. The antitrust laws can be enforced against associations, association members, and the association’s employees by both government agencies and private parties (such as competitors and consumers) through treble (triple) damage actions. As the principal federal antitrust law is a criminal conspiracy statute, an executive who attends a meeting at which competitors engage in illegal discussions may be held criminally responsible, even if he or she says nothing at the meeting. The executive’s attendance at the meeting may be sufficient to imply acquiescence in the discussion, making him or her liable to as great a penalty as those who actively participated in the illegal agreement.

The antitrust laws prohibit competitors from engaging in actions that could result in an unreasonable restraint of trade. Above all else, association members should be free to make business decisions based on the dictates of the market – not the dictates of the association.

Some activities by competitors are deemed so pernicious and harmful that they are considered *per se* violations – it does not matter whether or not the activities actually have a harmful effect on competition; the effect is presumed. One of the most common *per se* violations is price or fee fixing.

Other actions such as standards development and certification programs generally are evaluated under a rule of reason – there is a balancing between the pro-competitive and anti-competitive aspects of the activities – the pro-competitive effects must outweigh the anti-competitive ones. These areas also should be approached with caution and legal guidance.

## **NJAPM Antitrust Policies and Procedures**

NJAPM has a policy of strict compliance with federal and state antitrust laws, rules and regulations. Therefore:

I. These policies and procedures and the attached NJAPM Antitrust Policy Guidelines, shall apply to all NJAPM members, Board of Directors (the “Board”) and/or Board Committee members, attendees at meetings sponsored by NJAPM, and to all representatives of NJAPM attending outside meetings.

II. Discussion of fees or fee levels is prohibited. In addition, no discussion is permitted of any elements of an individual practitioner's or company's operations which might influence fees such as:

- a. Cost of operations or services;
- b. Discounts;
- c. Terms of service; and
- d. Profit margins, provided this limitation shall not extend to discussions of methods of conduct and similar matters in which expenses, fees or efficiency is merely incidental.

III. It is a violation of Antitrust laws to agree not to compete, therefore, discussions of division of territories or clients or limitations on the nature of business carried on or services provided are not permitted.

IV. Boycotts in most any form are unlawful. Discussion relating to boycotts is prohibited, including discussions about blacklisting or unfavorable reports about particular clients including their financial situation.

V. It is NJAPM's policy that all meeting attended by representatives of NJAPM where discussion can border on an area of antitrust sensitivity, that NJAPM's representative request that the discussion be stopped and ask that the request be made part of the minutes of the meeting being attended. If others continue such discussion, NJAPM's representative should excuse him/herself from the meeting and request that the minutes reflect that he/she left the meeting at that point and why he/she left. Any such instances should be reported immediately to the Board.

*[NJAPM ANTITRUST POLICY GUIDELINES ON FOLLOWING PAGE]*

## NJAPM ANTITRUST POLICY GUIDELINES

*(Meeting leaders to distribute or reference Guidelines at all NJAPM meetings)*

NJAPM members should avoid discussing certain subjects when they are together, including at formal NJAPM membership, Board of Directors (“Board”), Board Committee, and other NJAPM-sponsored meetings, as well as in informal contacts with other industry members, and should adhere strictly to the guidelines below. Any questions should be directed to the Board.

- **DO NOT** discuss the dollar amount of prices, fees or rates, the dollar amount of features that can impact (raise, lower or stabilize) prices such as discounts, costs, salaries, or profit margins, or other specific terms and conditions of the pricing of services. Note that a price-fixing violation may be inferred from price discussions followed by parallel decisions on pricing by association members – even in the absence of an oral or written agreement.
- **DO NOT** agree with competitors as to uniform terms of service or contract provisions.
- **DO NOT** exchange data concerning fees, prices, bids, costs, salaries, or other business practices unless the exchange is made pursuant to a well-considered plan that has been approved by NJAPM’s legal counsel.
- **DO NOT** agree with competitors to divide up clients, markets or territories.
- **DO NOT** agree with competitors not to deal with certain clients or others.
- **DO NOT** try to prevent a client from retaining your competitor(s).
- **DO NOT** discuss your clients with your competitors.
- **DO NOT** agree to any association membership restrictions, standard-setting, certification, accreditation, or self-regulation programs without the restrictions or programs having been approved in advance by NJAPM’s legal counsel.
- **DO** insist that NJAPM’s meetings that have agendas are circulated in advance and that minutes of these meetings properly reflect the actions taken at the meeting. All NJAPM meetings generally should have written agendas prepared and circulated in advance.
- **DO** leave any meeting (formal or informal) where improper subjects are being discussed. Tell everyone why you are leaving and request that the fact of your leaving the meeting be reflected in the minutes.
- **DO** ensure that only authorized NJAPM personnel send out all written and electronic correspondence on behalf of NJAPM and that NJAPM members, Board or Board Committee members do not hold themselves out as speaking or acting with the authority of NJAPM when they do not, in fact, have such authority.
- **DO** ensure that if questions arise about the legal aspects of NJAPM’s activities or your individual responsibilities under the antitrust laws, you seek advice and counsel from your own counsel or from the counsel of NJAPM.