

# International Legal Technology Association Antitrust Compliance Policy and Guidelines

## SECTION 1: ILTA'S COMMITMENT

The International Legal Technology Association (ILTA) is committed to full compliance with all federal, state and local laws, including the antitrust laws. ILTA expects its staff, its members and all member representatives participating in ILTA activities to be familiar with and sensitive to the antitrust laws affecting trade associations. This document provides information about federal antitrust laws that relate to the conduct of association activities. **All ILTA stakeholders must conduct themselves in conformity with the policy and guidelines.**

The federal antitrust laws most relevant to trade associations such as ILTA are the Sherman Act, the Clayton Act and the Federal Trade Commission Act. The antitrust laws promote vigorous and fair competition.

ILTA brings substantial procompetitive benefits to its members and to the broader legal market, including both providers and consumers of legal services. ILTA provides opportunities for peer connections and a wide array of educational opportunities through conferences, publications and Web-based delivery of content and more. ILTA must not and will not be a vehicle for members to reach unlawful agreements regarding prices or other aspects of competition.

All ILTA employees and members, and all persons participating in ILTA activities, are expected to observe the guidelines set forth in this Antitrust Compliance Policy (Sections 2 and 3), to comply with all antitrust laws, and to ask appropriate officials of ILTA whenever there is a question about the legality of a particular practice.

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### NOTES:

Failure to comply will result in the penalties described in Section 4 of this document.

The laws are described in more detail in Section 5 of this document.

Section 6 provides an example of antitrust liability in a trade association.

Details regarding the implementation and oversight of this policy document are provided in Section 7.

## SECTION 2: AVOIDING ANTITRUST VIOLATIONS

It is the responsibility of ILTA and each of its members to avoid violation of the antitrust laws. Members can meet that responsibility by following these guidelines:

### **Do not make agreements with competing firms that might limit competition between you.**

Any agreement, understanding or arrangement between competitors (horizontal arrangement) that limits competition — whether written or oral, formal or informal, express or implied — is subject to antitrust scrutiny. Any attempt to reach such an agreement may be unlawful, even if it is unsuccessful. The following types of agreements, which courts have found always (or almost always) unreasonably restrain competition, give rise to “per se” antitrust violations and should always be avoided. **Interactions and activities among ILTA’s members must never be used to reach or facilitate agreements among member entities or other persons with respect to any of these types of agreements:**

- **Price-Fixing Agreements:** Any agreement or understanding between competitors or potential competitors on prices charged to others for products, assets or services violates the antitrust laws. Every price-fixing agreement is illegal, whether it is meant to raise, lower or just stabilize prices. Agreements may be illegal even if they only indirectly affect prices because they involve such things as discounts, promotional allowances, rebates, commissions, credit terms or billing practices. It is also illegal for competitors to agree on the prices they will pay for products or services sold by others.
- **Bid-Rigging Agreements:** Agreements or undertakings among competitors (or potential competitors) regarding any method by which prices or bids will be determined, submitted or awarded are illegal. For law firms, this encompasses agreements relating to responses to a prospective client’s request for proposals. It includes agreements as to whether or not to bid, billing rates, discounts and other terms of representation.
- **Agreements to Allocate Markets, Customers or Territories:** It is illegal for competitors or potential competitors to agree to divide or allocate customers or territories. An agreement among competitors is also illegal if it provides that they will refrain from selling a certain product or providing a certain service generally, or in any geographic territory or to any category of customer.
- **Group Boycotts and Collective Refusals to Deal:** Agreements among independent concerns that they will boycott or refuse to buy from particular suppliers or sell to or serve particular customers are generally prohibited by the antitrust laws. This does not necessarily preclude sharing certain information about a company (e.g., its credit history) so long as there is no discussion on whether to deal with that company.

**Be cautious about arrangements with customers and suppliers that might affect competition with others.** While vertical arrangements are usually evaluated under a rule of reason standard, rather than as per se violations of the antitrust laws, ILTA members must

exercise caution in their relationships with suppliers and customers. The following are some of the arrangements that may raise a red flag. **Interactions and activities among ILTA's members may not be used to implement or facilitate any of these practices:**

- **Resale Price Agreements:** Agreements between a seller and a customer on the price at which the customer will resell a product or asset are still frequently illegal. The seller may, however, suggest a resale price if it is completely clear that the customer may accept or reject the suggestion and will not be penalized if it disregards the suggestion.
- **Tying Arrangements:** A “tie-in” or “tying” arrangement permits a buyer to purchase one (tying) product or service only if it agrees to buy a second, distinct (tied) product or service from the seller. This might happen, for example, if a law firm that had the dominant ERISA practice in the community refused to perform ERISA work for clients unless the clients also used the law firm for their litigation needs. These types of agreements should be avoided.
- **Exclusive Dealing:** Exclusive dealing arrangements come in various forms. Such arrangements have the effect of inducing a buyer to purchase all of its requirements for a particular product or service for a period of time from a single supplier. Exclusive dealing is evaluated under the rule of reason.
- **Reciprocity:** In a reciprocal dealing arrangement, a customer makes purchases from a supplier only on the condition that the supplier will buy products or services from the customer. Such reciprocal arrangements are especially troublesome when one of the parties is openly or implicitly coerced.

**Avoid even the appearance of impropriety.** Details regarding the appearance of impropriety can be found in the concluding paragraphs of Section 5, “Unlawful Agreement May Be Inferred from Circumstantial Evidence.”

**Be vigilant about other antitrust matters that may arise in trade associations.** Several antitrust enforcement actions against trade associations have focused on situations that are central to the functioning of these organizations.

**Membership:** Because a trade association provides certain benefits to its members, the denial of membership to qualified competitors of the members could violate antitrust laws. Membership in ILTA is open to all entities that satisfy basic membership requirements, and any decision to deny membership to a qualified entity or to expel a member will be reviewed with counsel. All member entities will be given an equal opportunity to participate in ILTA activities and benefits.

In addition, certain programs and activities may be available to nonmember entities if their exclusion would put them at an unreasonable competitive disadvantage to members.

**Collection and Dissemination of Data:** Statistical data may be compiled for legitimate purposes. Gathering of statistical information may cause problems from an antitrust standpoint, however, if its use somehow harms competition. Broadly speaking, the farther removed the data are from prices and costs, the less company-specific they are, the more historical they are, and the wider their public dissemination is, the less likely it is that they will raise antitrust problems. ILTA will never disclose or disseminate market-sensitive data supplied by individual member firms without advice of counsel.

**Codes, Standards and Certification Programs:** Reasonable industry codes, standards and certification programs may promote valid interests, including the protection of consumers and the maintenance of high standards of ethics and conduct. Members should, however, be alert for anticompetitive effects that a particular standard may have. A standard that is unreasonably biased in favor of a certain entity or group of entities at the expense of others may raise significant antitrust problems. Care should therefore be used both in creating and applying codes, standards and certification criteria, and in influencing other organizations as they do so.

**Marketing and Communications:** Be careful that all advertising, announcements and other communications that might affect competition are accurate and are not deceptive or misleading. Cooperative advertising programs may be suspect if they discriminate and benefit certain firms at the expense of their competitors.

**Government Relations:** There is a constitutional right to petition legislatures and government agencies for action, and, if properly undertaken, such activity is not subject to the antitrust laws. The right to petition, however, does not provide unlimited antitrust protection. If the activity is not really designed to achieve government action, but amounts to a sham used to injure competition, it may raise serious antitrust problems. Activities are not immunized from the antitrust laws because a government representative encourages and participates in them.

## SECTION 3: PRACTICAL GUIDELINES FOR PARTICIPATION IN ILTA ACTIVITIES

Association meetings, conference calls, social gatherings and other activities bring competitors together. While participation in these activities is generally rewarding, procompetitive and lawful, such activities may also provide opportunities to reach unlawful agreements. Discussion of certain subjects, with or without subsequent concerted action, may give rise to antitrust enforcement action. The mere appearance of impropriety — even when the parties have done nothing wrong — can cause major disruption and expense. With these risks in mind, ILTA has adopted the following guidelines for participating in various association activities:

### Meetings

Whenever feasible, a written agenda will be prepared in advance and reviewed by the appropriate ILTA staff member (relative to the attendees at the meeting), and a link to this antitrust policy document will be provided on each agenda.

ILTA members that are primarily consumers of legal services (rather than suppliers of legal services) will be encouraged to participate in ILTA committees and volunteer teams that might deal with antitrust-sensitive subjects.

Without prior approval by ILTA counsel, no discussion will be permitted between or among ILTA members of the following subjects:

- Any individual member's current or future prices, fees, billing rates, costs, discounts, profit margins, rebates or other pricing components
- Price or rate advertising
- What constitutes a fair, appropriate or "rational" price or profit margin
- Whether or not to do business with a particular supplier, customer or competitor
- Allocating markets, customers, territories or products

If someone begins discussing an improper subject, the meeting leader or coordinator should request that the discussion cease. If the discussion continues, the meeting leader or coordinator should request that the meeting be adjourned. If the meeting continues, the meeting leader or coordinator should immediately report the incident to the Executive Director.

Law firm "pricing practices" may be discussed only in accordance with all of the foregoing restrictions. **Under no circumstances will ILTA advocate, encourage, or facilitate concerted or parallel action by its members or the adoption of any particular pricing practice.**

### Communications

All defamatory, abusive, profane, threatening, offensive or illegal commentary or materials are strictly prohibited. Messages should not pertain to commercial interests or political causes.

When discussing products or services, refrain from discussing pricing, and speak factually and objectively. Commentary should not reflect a person's preference for or against a specific party, group, cause or movement.

### **Standard-Setting and Certification**

ILTA will participate in standard-setting and certification programs only if they will serve an identifiable public interest and will not unreasonably restrict competition. Under no circumstances will ILTA participate in standard-setting or creating certification requirements as devices to fix prices, limit output, chill innovation, or exclude competitors from the market.

## **SECTION 4: CONSEQUENCES OF FAILURE TO COMPLY**

### **Criminal Enforcement**

Violations of the Sherman Act may be prosecuted as felonies and are punishable by steep fines and imprisonment. Individual violators can be fined as much as \$1 million and sentenced to up to 10 years in prison for each offense; corporations can be fined up to \$100 million for each offense. In the period 2009-2013, the Antitrust Division of the U.S. Department of Justice, which is responsible for criminal antitrust enforcement, charged 109 corporations and 311 individuals with criminal antitrust violations, collected \$4.2 billion in criminal fines and secured average prison sentences of 25 months.

### **Civil Enforcement**

The Antitrust Division and the FTC generally have concurrent jurisdiction to bring civil enforcement actions under the Sherman Act and the Clayton Act. In addition, state attorneys general, individuals and companies may initiate civil lawsuits seeking treble damages and attorneys' fees.

Even unfounded allegations can be a significant drain on the financial and human resources of ILTA and its members. **ILTA strives to avoid even the appearance of impropriety in all of its activities.**

## SECTION 5: OVERVIEW OF THE ANTITRUST LAWS

### The Sherman Act

The two substantive provisions of the Sherman Act address concerted action by two or more entities in restraint of trade (Section 1) and monopolization or attempted monopolization (Section 2). Section 1 addresses both concerted action between or among competitors (horizontal arrangements) and concerted action between or among parties at different levels of the distribution chain, such as vendors and purchasers, or manufacturers and distributors (vertical arrangements). Historically, trade association activities found to constitute antitrust violations have been horizontal. Because ILTA's membership consists largely of competing law firms, our focus will be primarily on horizontal arrangements. However, because ILTA also has members, such as corporate law departments, who are consumers of legal services, vertical arrangements must be considered as well.

Section 1 literally prohibits “every contract, combination . . . or conspiracy in restraint of trade.” However, recognizing that every contract restrains trade to some degree, the Supreme Court has held that Section 1 prohibits only *unreasonable* restraints of trade. Certain conduct has been found to be so inherently likely to harm competition it is considered to be *per se* unreasonable. As the Fifth Circuit has quothably observed: “The per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score.”

Price fixing and allocation of markets or customers are the most common per se violations. Most other horizontal arrangements such as industry standard-setting and association membership rules as well as vertical restraints, including exclusive dealing and most-favored-nation clauses, are evaluated under a “rule of reason” standard. While application of the “rule of reason” can be very complex, the principal inquiry is focused on whether the restraint promotes or suppresses competition.

Section 2 of the Sherman Act covers the relationship between a dominant firm and its customers, suppliers and competitors; Section 2 prohibits “monopolization” and attempts to monopolize. The elements of the offense of monopolization are (a) possession of market power in the relevant market, and (b) the willful acquisition or maintenance of that power. Elements of the offense of attempt to monopolize include a specific intent to achieve monopoly power and a dangerous probability that such result will occur.

Section 2 may apply in the trade association context if the association itself or one or more of its members possesses market power. Standard-setting activity and exclusion of prospective trade association members may run afoul of Section 2 and Section 1 of the Sherman Act.

### The Clayton Act

Section 3 of the Clayton Act prohibits tying arrangements (where a seller uses its market power over one product to require a customer to buy another product the customer would otherwise buy from another supplier or not at all) and exclusive dealing agreements that foreclose markets from other competitors. Section 7 of the Clayton Act bars mergers and acquisitions that may



substantially lessen competition. Section 8 of the Clayton Act prohibits officers and directors from serving on the boards of two companies that compete significantly with each other.

Generally, the **Robinson-Patman Act** amendments to the Clayton Act bar sellers from discriminating in price between different purchasers of commodities “of like grade and quality,” if such discrimination might substantially reduce competition. This prohibition is subject to defenses for meeting the price offered by a competitor and for differences justified by cost. A buyer may violate the Robinson-Patman Act if it knowingly induces or receives an unlawful discrimination in price; but the buyer can be held liable only if the seller is subject to liability. If ILTA or its members engage in joint purchasing activities, the Robinson-Patman provisions could come into play.

Section 4 of the Clayton Act authorizes private parties to sue for violation of the federal antitrust laws and to recover three times their actual economic damages, plus attorneys’ fees. Private parties may sue to enforce the Sherman Act, which does not contain a private remedy. Private plaintiffs may also seek injunctive relief, along with attorneys’ fees, under Section 16 of the Clayton Act.

### **The Federal Trade Commission Act**

Section 5 of the Federal Trade Commission Act (“FTC Act”) prohibits “unfair methods of competition . . . and unfair or deceptive acts or practices . . .” The FTC Act empowers the FTC to challenge such practices regardless of their adverse effect on competition. Only the FTC may enforce the FTC Act; private parties may not sue under the Act.

### **State and Foreign Antitrust Laws**

Most states and the District of Columbia have their own antitrust laws; many were modeled after the federal antitrust statutes, though there are some variations from state-to-state. In addition, many countries in which ILTA may conduct activities or in which ILTA members do business have antitrust laws similar to those of the United States.

### **The FTC’s Unfair Competition Authority**

The Federal Trade Commission Act (FTC Act) prohibits all “unfair methods of competition” and “unfair or deceptive acts or practices.” The FTC Act covers antitrust violations like those described in this document, and it forbids conduct that falls short of those violations. The FTC Act prohibits all forms of deceptive or misleading advertising and trade practices, such as disparaging a competitor’s product, harassing a customer or competitor, and stealing trade secrets and customer lists.

### **Unlawful Agreement May Be Inferred from Circumstantial Evidence**

To prove violation of Section 1 of the Sherman Act, a plaintiff must prove the existence of a contract, combination or conspiracy, *i.e.*, a concerted action by two or more parties in restraint of trade. Circumstantial evidence is admissible and relevant in proving concerted action between or among competitors.

Mere participation in a trade association does not constitute evidence of a conspiracy in restraint of trade. In certain circumstances, however, a trade association's actions may satisfy the concerted action requirement of Section 1. An agreement among firms is treated the same way under Section 1 of the Sherman Act whether it is among the firms themselves or the decision of a trade association of which the firms are members. On the other hand, an association's actions satisfy the concerted action requirement only when taken in a group capacity. The issue then is whether actions by a member or officer of a trade association are the individual's actions or can be attributed to the group. That is an issue generally decided by the trier of fact — the jury or the judge. No formal action by the association is required for a finding of concerted action; so the actions of an individual member or officer of the association can be deemed concerted action without any formal approval by the association.

Evidence of parallel behavior by members of a trade association — even consciously parallel behavior — by itself, is not sufficient to prove concerted action. Similarly, trade association meetings among competitors, taken alone, show merely an opportunity to conspire, and are not sufficient by themselves to infer a conspiracy. On the other hand, evidence that competitors actually discussed a particular matter at a trade association gathering and then took identical or very similar action relating to that matter might well be sufficient to support a finding of concerted action under Section 1 of the Sherman Act.

## **SECTION 6: EXAMPLE OF ANTITRUST LIABILITY IN A TRADE ASSOCIATION**

**Trade association discussions may trigger antitrust liability even without evidence of subsequent parallel activity.**

Significantly, the FTC has taken enforcement action against a trade association under Section 5 of the FTC Act, without evidence of actual coordinated pricing activity, based on members' discussions of "strategies for raising retail prices" and exchanges of "information on competitively-sensitive subjects." In explaining the complaint against the National Association of Music Merchants ("NAMM"), the FTC noted that concerted action that impairs competition may be challenged under Section 1 of the Sherman Act; and it asserted that unilateral conduct that facilitates collusion may be challenged under Section 5 of the FTC Act. The FTC alleged that NAMM sponsored meetings at which the improper discussions took place, set the agenda for the meetings and helped steer the discussions. The antitrust concern according to the FTC was that the improper discussions could "facilitate the implementation of collusive strategies going forward."

Following a settlement with NAMM, the FTC issued an order requiring that NAMM cease and desist (i) from encouraging, advocating, participating in, or facilitating the exchange of information between or among its members relating to retail price or to any term, condition or requirement upon which any musical product manufacturer or dealer deals, or is willing to deal, with any other such manufacturer or dealer; and (ii) from entering into, enforcing, encouraging or otherwise facilitating any agreement between or among musical product manufacturers or dealers relating to those matters. The order specifically does not prohibit NAMM from publishing or disseminating aggregated survey data or, in the context of industry education, the sharing of best practices and training materials.

### **Avoiding the Appearance of Impropriety**

In order to avoid even the appearance of impropriety, all ILTA personnel and members must refrain from discussion of the competitively-sensitive topics identified in this policy document while participating in ILTA-related events and activities, except as specifically authorized in this document or as approved in advance by counsel.

### **The Delicate Subject of Law Firm Pricing Practices**

Few topics engender as much interest and debate among lawyers and consumers of legal services (both individual and corporate) as the pricing of those services. As we use the term "pricing" in the legal sector, it is a far cry from "price fixing." It does include knowledge-sharing around best practices in budget development, monitoring engagements, adoption of services within law firms and law departments, aligning pricing professionals' efforts with the business strategies of their firms, supply chaining, enhancing communication between law firm pricing professionals and law department procurement professionals, role and construction of pricing experience databases, and third-party tools to assist pricing strategies. Not surprisingly, ILTA members — including law firms, corporate law departments and others — have taken an intense interest in exploring all of the issues relating to these topics and in expanding the

relevant knowledge base. Specifically, ILTA has structured forums to facilitate dialog among pricing and procurement professionals from law firms and corporate law departments. Educational content, delivered both in-person and via the Web, have been and will be developed to allow for knowledge-sharing among these professionals.

None of these activities are undertaken for the purpose of facilitating agreements of any kind. To the contrary, ILTA participants seek to generate debate and to expand the information available to help firms make independent decisions. Nevertheless, ILTA reminds its staff, its members and all participants in ILTA activities that agreements between competitors with respect to price or any aspect or component of price, is forbidden by the antitrust laws and by ILTA policy. Moreover, all are cautioned not to discuss, formally or informally: current or future prices, billing rates, or discounts; what is or is not a fair or appropriate profit margin; or any other subject that might facilitate coordinated pricing behavior.

## **SECTION 7: IMPLEMENTATION AND OVERSIGHT**

### **Responsibility for Antitrust Compliance**

ILTA's Board of Directors have responsibility to oversee implementation of ILTA's antitrust compliance program. The Executive Director is responsible for day-to-day management and implementation. Ultimately, however, it is your responsibility — as an ILTA staff member or as a participant in ILTA activities — to ensure that your conduct comports with these guidelines and complies with the antitrust laws.

### **Training and Communication of ILTA's Policy and Guidelines**

ILTA's Executive Director will distribute a copy of this policy document to each current ILTA employee and to each future employee as part of his or her initial orientation. Each employee, director and officer will be asked to sign an acknowledgment that he or she has read the document and has been given an opportunity to ask questions. ILTA member participants will be notified of the document's location and their responsibilities to observe the policy. Subscribers to online forums that focus on discussion of best practices in pricing models will be provided strong messaging around this policy document. The document will be available on ILTA's public website. The meeting guidelines will be linked from each meeting agenda and embedded in the footer of each electronic notification about ILTA events. ILTA's orientation for new directors and officers will include a presentation on antitrust compliance and member responsibilities.

### **Monitoring and Enforcement**

The Executive Director will monitor ILTA's operation and activities as appropriate to ensure compliance with these procedures. He/she will promptly investigate any conduct that is reported or otherwise suspected to violate the antitrust laws. Any such violations may result in disciplinary action, up to and including termination of employment (for ILTA employees) or termination of membership (for ILTA members).

ILTA requires that its employees promptly report any suggested violations of the antitrust laws. Retaliation or retribution against an employee for reporting a suspected antitrust violation is strictly forbidden.