

American Polygraph Association

Antitrust Compliance Program

Introduction

The American Polygraph Association (APA) is a not for profit membership corporation incorporated under the laws of the District of Columbia. It has approximately 3,000 members. The majority of the members are polygraph examiners, and fall in the categories of full members or associate members. Persons who have demonstrated professional or scientific interest in promotion and advancement of the polygraph profession through polygraph research or instrumentation may join as Science and Technology affiliates. A full member must be a graduate of a polygraph education program that substantially meets APA accreditation standards at the time the member graduates; must have completed at least two hundred polygraph exams using validated polygraph techniques as taught by APA accredited programs; and must have a baccalaureate degree. Associate members must be graduates of a polygraph education program that substantially meets APA accreditation standards at the time that the member graduates. Associate members may upgrade to full membership upon completing certain requirements relating to education and or experience.

All APA full members and associate members must conduct their practices in full conformance with the APA Standards of Practice and Code of Ethics.

APA members include polygraph examiners practicing in the United States and in many foreign countries. APA accredits polygraph education programs both in the United States and in foreign countries.¹ APA has Division affiliates which are organizations that agree to comply with certain APA Standards of Practice and Ethics requirements.

Antitrust Exposure for Associations and Association Members

The basic U.S. antitrust law (the Sherman Antitrust Act) is a conspiracy statute that prohibits two or more entities from engaging in conduct that unreasonably restrains trade.

¹ If APA conducts business in foreign countries, it may be subject to the antitrust laws of each country in which it does business.

In general terms, the Sherman Act prohibits competitors, directly or indirectly, from entering into agreements to fix prices, rig bids, allocate customers or territories or boycotting or refusing to deal with vendors or competitors. These types of violations are what are known as “*per se*” violations. That means that if a group of competitors are found to engage in one or more of these practices, the Court will not consider any excuses.

A “*per se*” violation of the Sherman Act subjects the violators to civil and criminal suits by the Department of Justice, civil and sometimes criminal suits by State Attorney Generals and treble damage suits by private plaintiffs. Individuals convicted of “*per se*” criminal violations of the Sherman Act are guilty of a felony and face mandatory jail sentences of up to 10 years.

All individuals, corporations, or other entities that violate the antitrust laws are also subject to civil penalties and private litigation that may result in treble damage awards.

Trade and professional associations may provide a forum for antitrust violations. At trade and professional association meetings, groups of competitors gather and unless an antitrust compliance program exists, the discussion may involve pricing. Such discussions can lead to direct or indirect agreements on what is a “fair” price or what is a “minimum” price to charge customers. If such an agreement is reached at a trade or professional association meeting, the individuals involved, the companies represented by those individuals, the trade or professional association and the trade or professional association staff attending the meeting could all be found to have committed a “*per se*” violation of the Sherman Act and be subject to the criminal penalties, including jail, provided by the Act.

In addition to “*per se*” type violations, the Sherman Act also prohibits conduct that involves a less serious type of violation that is generally described as an “unreasonable” restraint on trade that does not fall in the “*per se*” category. Cases brought against trade and professional associations under this theory are civil cases which involve monetary damages and possible injunctive relief. These cases involve allegations such as unreasonable membership restrictions

by an association or utilization of an association certification or standards program to “unreasonably restrain trade.”

“*Per se*” and “unreasonable restraint of trade” cases are usually prosecuted by the Antitrust Division of the Department of Justice. The Antitrust Division is the only federal antitrust agency with criminal enforcement authority. However, there is a second federal antitrust agency, the Federal Trade Commission (FTC) that has a broader range of enforcement authority than the Department of Justice.

Section 5 of the FTC Act declares that all unfair methods of competition or unfair or deceptive acts or practices affecting interstate commerce are illegal. However, the statute does not define what is an “unfair method of competition” or an unfair or deceptive act or practice.”

In recent years, the FTC has used Section 5 of the Federal Trade Commission Act as a basis for attacking trade and professional association codes of ethics that restrict the right of members to advertise; trade and professional association codes of ethics that declare it is “unethical” for a member to solicit another member’s customers; and trade and professional association codes of ethics that restricts a member from offering another member’s customer a discount to switch vendor’s.

The FTC has also attacked association minimum fee schedules and actions by associations to induce state legislatures to prohibit second level professionals from performing certain services previously restricted to first level professionals. In most cases, FTC actions result in Cease and Desist Orders against the associations. However, in certain cases, the FTC has the authority to seek civil penalties and disgorgement of illegally obtained profits.

Both the Antitrust Division of the Department of Justice and the Federal Trade Commission have repeatedly emphasized that trade associations, professional associations, and corporations need to establish a culture of antitrust compliance by establishing comprehensive antitrust compliance programs specifically directed at the type of antitrust risks to which the organization has the most exposure.

To establish a culture of antitrust compliance, the association should adopt a custom-designed antitrust compliance program, implement the program in a meaningful manner, communicate the details of the program to officers, directors, members and staff, set up a schedule for re-education updates and establish a “whistle-blower” program to encourage members and staff to report possible antitrust violations without fear of reprisals or loss of employment.

It is with this background, that the American Polygraph Association has established its antitrust compliance program.

How the Antitrust Laws Apply to APA and Its Members

I. Description of APA

APA is a professional association of polygraph examiners and organizations, corporations and persons who have a professional or scientific interest in polygraph research, instrumentation and the profession.

APA establishes standards of practice and ethical standards and accredits polygraph training institutions. APA regularly holds educational meetings for members and supports polygraph research and training activities and publishes a peer reviewed journal. In its “Mission Statement,” APA states that one of its goals is: “Governing the conduct of members of the Association by requiring adherence to a Code of Ethics and a set of Standards and Principles of Practice.”

Some polygraph examiners work for their own companies. Some polygraph examiners work for larger organizations that provide polygraph services to the public, corporations and the government. Some polygraph examiners work for government agencies.

II. Competition

Organizations and individuals providing polygraph services to the public sector and to government agencies are direct competitors. Polygraph examiners who act to “govern the conduct” of other polygraph examiners are engaged in antitrust sensitive conduct in that they collectively may restrict what other competitors can do. There are certain types of conduct by an

association and its members that are so egregious from an antitrust perspective that they are considered to be illegal “*per se*.” This means that if it can be proved that the association and its members engaged in this type of conduct, there are no defenses or excuses. Individuals found guilty of *per se* violations can be found to be subject to criminal penalties, including jail..

There are other types of antitrust conduct that are considered less serious. These types of conduct are covered by the antitrust “rule of reason.” Under the “rule of reason,” a court will find that this type of conduct violates the antitrust laws when it can be shown that the association and its members have the power to affect prices in a given market and where the anti-competitive effects of the conduct in question outweigh the pro-competitive benefits.

The following examines both categories of conduct with specific reference to the conduct of APA and its members.

III. “*Per Se*” Antitrust Violations

A. Price Fixing

An agreement by a group of professionals to fix the price that they charge for their services is a “*per se*” violation of the antitrust laws. In this context any agreement that “affects” prices will be considered the same as an agreement to “fix” prices.

As competing professionals, polygraph examiners may not agree on:

- 1) amounts to charge for various types of polygraph exams;
- 2) An amount of surcharge to add to the base amount for additional services;
- 3) What services are to be included in a base charge and what services should be subject to an extra charge;
- 4) What is a “fair” minimum charge for a polygraph exam?
- 5) Whether to charge for missed appointments;
- 6) Whether or not to charge interest for late payments or when to start charging interest or the amount of interest to charge;
- 7) Whether to include one certified copy of the final report in the base price or whether to charge for additional copies; and
- 8) Any other matter that affects the price of the services offered.

B. Customer Allocation

It would be illegal and a *per se* anti-trust violation for a group of polygraph examiners to agree to allocate, assign or divide customers. As an example, they could not agree that all requests for service from Customer A will go to Examiner X and all requests for service from Company B will go to Examiner Y. Customer allocation agreements take various forms including:

- 1) Agreements not to solicit certain accounts;
- 2) Agreements to quote “high prices” to non-favored accounts;
- 3) Agreements to provide poor service to accounts coming from a co-conspirator; or
- 4) Agreements to divide an account.

C. Territorial Allocation

Group of competitors cannot agree to limit offering services to specific geographic areas.

1) It would be illegal and a *per-se* anti-trust violation for several polygraph examiners, all of whom are licensed to provide services in a certain state, which has five major cities, each to agree to provide services in one of the five cities and not to provide services in the other four.

Similarly, it would be illegal for two firms of polygraph examiners located in the same city to agree that one firm will provide services only to customers located on the east side of the city and that the other firm will only provide services to customers located on the west side of the city.

D. Bid Rigging

It would be illegal and a *per se* anti-trust violation for two or more polygraph examiners to enter into an agreement to affect or rig a bid for services. This would include:

- 1) Agreeing that if four jobs are up for bid, Examiner A will bid low on Job X and other examiners will bid high;
- 2) Agreeing to alternate bidding high and low to ensure that all get a “fair” market share;
- 3) Refusing to bid on certain jobs to protect the “favored” bidder;

- 4) Agreeing to submit an intentionally high bid to make sure that a bid from a friendly competitor is accepted; or
- 5) Engaging in any other bidding conduct designed to make sure that a favored bidder is successful.

E. Boycotts or Refusals to Deal

It would be illegal and a *per se* anti-trust violation for two or more polygraph examiners to agree to refuse to deal with a competitor or vendor offering a legitimate product or service to the market. As examples:

1) Vendor A and Vendor B make competitive models of polygraph machines. Independent tests show that Vendor A's machines are better than Vendor B's machine. APA could publish the test results but could not recommend that all members buy only brand "A." APA could publish the test results and recommend that members consider the test results when making equipment purchases.

2) Certain states license polygraph examiners. APA may require that regular members operating in states with licensing requirements not only meet state licensing requirements, but also meet additional and more stringent membership requirements. APA could not require that members in a state with licensure requirements limit referrals only to other APA members in that state.

The antitrust statutes are conspiracy statutes prohibiting agreements among competitors to engage in the practices set out above. Acting unilaterally and not pursuant to any agreement, an individual polygraph examiner can set whatever prices, deal or refuse to deal with any customer or bid or not bid on any job, based on his or her own economic objectives.

F. Association *Per Se* Liability

If association members engage in conduct that is "*per se*" illegal while attending an association meeting and the association, directly or indirectly, has knowledge of such illegal activity, the association and the association staff who participate in the illegal conduct, directly or indirectly, may be held to be co-conspirators and equally liable.

As an example, if the members of the association decided to establish minimum fee levels at an association Board meeting and an association staff member sat through the entire meeting, took minutes, including the details of the minimum fee agreement, the association and the staff members could be found guilty of a criminal antitrust violation and the staff member would face criminal penalties including a jail sentence of not less than one year or more than ten years for engaging in a conspiracy to fix prices.

IV. Rule of Reason Antitrust Conspiracies

As a professional association, APA provides benefits for members that enable them to compete more effectively. APA requires that members meet certain standards and comply with Standards of Practice and a Code of Ethics. APA establishes standards that educational institutions with programs in polygraph education must meet to be accredited by APA.

Since not every polygraph examiner, even if licensed in the state in which he or she practices will meet APA membership criteria and since not every school that offers a program in polygraph education will qualify for APA accreditation, potential antitrust issue arises.

If APA's membership criteria do limit the ability of state licensed polygraph examiners who do not meet APA's membership criteria to compete in the marketplace, then there is conduct that, on its face, may be considered a concerted action by a group of competitors that restrains trade.

The conduct in question does not fall in the *per se* category and, as such, will be evaluated under the antitrust "rule of reason." Under the "rule of reason" the question is "Does the association have the power to affect a defined market?" If so, do the anti-competitive effects of the conduct outweigh the pro-competitive benefits? If the anti-competitive benefits do outweigh the pro-competitive benefits we have an unreasonable restraint on trade that arguably violates the antitrust laws.

For purposes of anti-trust consideration, a person claiming an anti-trust violation may argue that APA membership has economic value and that non-members may face impediments to employment in certain markets.² However, as a professional organization APA is entitled to

² Although United States District Court for the District of Arizona, in the case of *Haswood et al. v. American Polygraph Association, et al.* (Civ. 14-00253 PHX-GMS) implied that with regard to accreditation of schools APA does not have market power, it never actually ruled on that issue as it dismissed the case on procedural grounds including lack of standing as to certain plaintiffs and failure to allege antitrust injury as to the remaining plaintiffs.

set reasonable membership criteria. Also, although certain states may require some form of APA membership for licensure, such action is state action, not APA action.

APA's requirements for membership must be established based on specific criteria that the association believes are important to establish a skill level necessary for a highly qualified polygraph examiner.

As a professional organization, APA can adopt membership criteria that require a high level of skill sets rather than a minimum level of skill sets as long as the purpose of the practice is not to restrict access to the profession.

Membership in APA is open at various levels and the requirements for membership are designed to encourage high levels of professional conduct for the benefit of the public. Polygraph examiners who do not meet APA's requirements for membership are free to practice their profession subject to any state licensing requirements and APA does not engage in conduct aimed at denying non-members from access to the market.

APA's membership restrictions have pro-competitive benefits that outweigh the anti-competitive risks and thus strongly argue for meeting the test of the "rule of reason."

Where professional organizations establish education standards for education and training to be used by schools which train polygraph examiners, such standards, in order to meet the "rule of reason" should be reasonably designed to promote a level of educational achievement that will produce graduates who have skill sets necessary to achieve an appropriate level of professional competence. The level of professional competence need not be a minimum level but can be a higher level as long as APA has a rationale and reasonable substantiation for believing that the level of professional competence results in properly qualified graduates. If APA can show that its accreditation standards can be substantiated on a rational and reasonable basis and are not designed to keep qualified educational programs out of the market, APA's conduct should meet the requirements of the rule of reason.

APA's accreditation standards are developed by the School Accreditation Committee and approved by the APA Board of Directors. All the components of the standards are carefully reviewed during the developmental process and the final document reflects the opinion of the Committee and the Board as to what standards are necessary for a school polygraph educational program. The standards are designed to protect the public by accrediting educational programs that will produce highly qualified polygraph examiners. Accreditation by APA is voluntary. A

full or associate member of APA need not have graduated from an APA accredited educational institution but rather one that meets the accreditation requirements at the time of graduation.

APA does not advocate that polygraph examiners who have not graduated from an APA accredited educational program be denied access to the market.

It therefore appears that the APA accreditation practices meet the requirements of the “rule of reason.”

V. Adoption of Antitrust Compliance Program

In order to ensure that APA and its members do not engage in practices that may violate the antitrust laws, APA has, by vote of the Board of Directors, adopted this Antitrust Compliance Program. As part of this program APA will follow the following practices.

(A) *At Association Meetings:*

- (1) *Do not* discuss current or future prices (be very careful of discussions of past prices).
- (2) *Do not* discuss what is a fair profit level.
- (3) *Do not* discuss an increase or decrease in price.
- (4) *Do not* discuss standardizing or stabilizing prices.
- (5) *Do not* discuss pricing procedures.
- (6) *Do not* discuss cash discounts.
- (7) *Do not* discuss credit terms.
- (8) *Do not* discuss surcharges such as additional charges for copies of reports.
- (9) *Do not* discuss controlling sales.
- (10) *Do not* discuss allocating markets.
- (11) *Do not* complain to a competitor that its prices constitute unfair trade practices.
- (12) *Do not* discuss refusing to deal with a competitor because of its pricing or distribution practices.
- (13) *Do not* attend “rump” (informal meeting) sessions in connection with association meetings.

(B) *As to Self-Regulation and Membership Policies:*

- (1) *Avoid* restrictions on dealing with nonmembers.
- (2) *Avoid* unreasonable exclusions from membership, especially if there is a business advantage in being a member.
- (3) *Avoid* limitations on access to association information and publications, unless the limitation is based on protection of trade secrets or failure to provide data to an information exchange program.³

(C) *As to Ethical Codes:*

- (1) *Do not* require other members to refuse to deal with any member violating the association's code of ethics.
- (2) *Do not* arbitrarily enforce the code.
- (3) *Do not* impose unreasonably severe penalties for violations of the code.
- (4) *Do not* promulgate or enforce regulations or policies which have price-fixing implications, such as preventing the advertising of prices.

(D) *Antitrust Compliance Education*

As part of APA's Antitrust Compliance Program:

- (1) APA's Antitrust Compliance documents will be published on the APA website and all members will be encouraged to review the documents.
- (2) APA will have an annual antitrust compliance education session as part of a Board meeting.
- (3) APA will have an annual Antitrust Compliance Education session for APA staff.
- (4) APA will send a copy of its Antitrust Compliance Program to all Divisions and obtain their agreement to comply with the program.
- (5) APA has adopted an Antitrust Whistleblower Policy and will provide all staff members with a copy of the APA Antitrust Whistleblower Policy (attached as Exhibit A).

³ Non-members can be charged a fee that is greater than the fee charged members for purchasing publications or attending educational program. The fee differential must reflect the cost incurred by members in developing and production of the publications or program.

(6) APA will read the Antitrust Compliance Statement (attached as Exhibit B) before all Board meetings and membership meetings.

VI. Antitrust Investigations

A. Allegations Regarding Antitrust Violations

In the event that any allegations of possible antitrust violations are reported to APA's staff or APA's volunteer leadership, legal counsel will be contacted immediately. Legal counsel will make a thorough investigation of the allegations and report the results of the investigation to the APA Board of Directors with a recommendation for appropriate action.

B. Federal Trade Commission (FTC) or Antitrust Division, Department of Justice (DOJ) Investigations

1) Written Inquiry or Subpoena

In the event that the association receives a written inquiry or subpoena from a federal or state antitrust agency, the inquiry or subpoena will be immediately sent to legal counsel for review.

2) Visit by FTC or DOJ Investigator

An APA staff member shall be appointed as the responsible person to meet with any FTC or DOJ investigator who visits the association offices without warning and requests access to books and records of the association or requests to interview employees.

If such a visit occurs, the responsible staff person should obtain the name of the investigator, his or her contact information and ask to look at the person's identification.

The staff person should ask the investigator to explain the purpose of the investigation and then politely state that it is the policy of the association to cooperate with all government investigations but before answering any questions or providing access to any files or documents, the staff person must consult counsel.

The investigator should be asked to wait in the office reception area while staff person calls counsel and receives advice on how to proceed.

In the event that the investigator has a subpoena, the staff person should get a copy of the subpoena and send an electronic copy to counsel immediately. In very rare occasions, the Department of Justice will obtain a court warrant to conduct a raid on the offices of a company

or an association. In such a situation several FBI agents will show up at the associations offices, ask all the employees to go to one location and begin seizing documents, computer files, computers, etc. Employees will not be permitted to call counsel, use the telephone or use cell phones until the raid is completed. It is extremely unlikely that such a raid would occur at APA. The FBI needs a warrant issued by a court to authorize such a raid. A subpoena does not provide authority to obtain immediate access without first giving the association the right to contact counsel and obtain counsel's advice on how to proceed. Staff should be educated as to how to respond to an antitrust investigation.

VII. Minutes and Agendas

A detailed agenda should be prepared prior to all meetings of the association and the association's Board of Directors. Counsel should review the agenda to ensure that there are no antitrust sensitive issues scheduled for discussion. If counsel determines that a scheduled discussion item may be antitrust sensitive, counsel will advise the association of the best way to deal with the issue presented.

Accurate minutes should be kept of all association and association Board of Directors meetings. Minutes should be approved by counsel before adoption.

VIII. Rump Sessions

The APA will not permit rump sessions to be held in connection with association meetings.

Approved by the APA Board of Directors on _____
(date)

Exhibit A

APA Whistleblower Policy

It is the policy of APA to fully comply with all laws including federal and state antitrust laws. Compliance with the law means not only following the law but also creates an obligation on all APA employees to report to his or her supervisor or to APA Counsel, any activity of the association or association members that the employee has reason to believe may violate any law including the antitrust laws.

It is recognized that all employees are not legal experts. Employees are encouraged to seek guidance from supervisors or legal counsel whenever the employee has a legal compliance question.

In no instance will any employee be sanctioned or adversely affected from bringing any such matter to the attention of his or her supervisor, the association or the association's legal counsel even if it turns out that no violation of law or policies exist.

Exhibit B

APA Antitrust Policy Statement (To Be Read Before All Association Meetings)

It is the policy and intent of the American Polygraph Association (hereinafter APA), its Officers and Members to comply with all federal and state anti-trust laws, regulations and amendments thereof. APA has adopted a comprehensive Antitrust Compliance Program which is available on our website. APA recommends that all of you become familiar with the program.

The APA shall not, nor shall any of its Officers or Members, in any fashion whatsoever attempt to lessen competition or fix prices or to create a combination or monopoly in violation of federal or state laws.

Discussions of price fixing and/or price levels are strictly prohibited. There shall be no discussion as to the allowances for discounts, terms of sale, profit percentages and/or mark ups.

Discussions of a division, separation and/or limitation of territories, customers, and/or service providers and/or limitation of the nature of business carried on or products sold and/or services delivered are not permitted.

Boycotts in any form or nature are strictly prohibited. Discussion or engagement relating to boycotts, blacklisting, unfavorable reports about a particular individual, company or organization, including their financial situation is strictly prohibited.

If any discussion or action in violation of anti-trust statutes occurs, you should object, have your objection noted in the minutes of any meeting and, if the discussion or practice continues, leave the room. Further, the prohibitions apply to discussions in an informal or social setting, not just regularly scheduled meetings. If you see any prohibited practices at any APA meeting or social event, it is your duty to raise your concerns to a leader of the APA and/or APA General Counsel.

As part of our Antitrust Compliance Program, we remind members before each meeting that we will not engage in any conduct that could be construed as price fixing, bid rigging,

customer allocations or group boycotts, or in any way might be considered an unreasonable restraint on trade.

If you have any questions regarding our Antitrust Compliance Policy, please contact APA's General Counsel. This is a very serious matter and your cooperation and adherence to these policies are expected.