

AALL and Antitrust

Frequently Asked Questions (FAQ)

1. Why do we need an antitrust policy?

The Executive Board feels a responsibility to provide members who are interested in consumer advocacy issues with information that would help them act in a manner that would not subject them or the Association to legal liabilities. Some activities of professional or trade associations may subject the associations or their members to liability under the antitrust laws. At its 2011 Summer Meeting the AALL Executive Board considered a proposed antitrust policy that was an effort to provide members with information on how the Sherman Antitrust Act could affect their activities. The Board did not adopt the proposed policy in order to allow more careful understanding and evaluation of the issues currently of concern to AALL members.

2. How do the actions of individual members affect AALL?

The Supreme Court has held that an association can be liable for a violation of the Sherman Antitrust Act when conduct of its lower-level staff members and volunteers causes injury to competition. *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). Even though ASME’s leadership was not aware of the activities and had not approved them, the association was liable because it had failed to prevent antitrust violations by its volunteers and staff, who had acted within their “apparent authority” for the association. ASME was required to pay treble damages for the violation.

3. I thought the Sherman Act only applied to trade associations. Is AALL a trade association or a professional association and what is the difference?

AALL is a professional association. A trade association acts solely to benefit its members. All of its activities are directed towards improving the business operations and opportunities of its members. A professional association, on the other hand, works not only to benefit its members but also to benefit society. AALL has a long history of activities that benefit not only law libraries and law librarians, but our society as a whole.

4. Does the Sherman Act apply to AALL? After all, our members aren’t competitors.

The Sherman Antitrust Act applies to the anticompetitive effects that can result when individuals act together as a group. The act generally applies to any agreement among competitors that restricts competition. 15 U.S.C. § 7 (2006) specifically notes that associations are considered ‘persons’ for purposes of the Sherman Act and the courts have made clear in several cases that the antitrust laws apply to the joint activities of members of an association. Those activities can have a significant effect on the functioning of competition in certain markets. While individual libraries may not be in competition with one another, the institutions that own the libraries ARE in competition for clients, students, etc. Congress has adopted a few statutory exemptions to the Sherman Antitrust Act (charitable organizations, labor unions, athletic leagues, newspapers) but

not for professional associations or for libraries. AALL cannot be used by any of its members as a vehicle for engaging in collective action that would be anticompetitive.

5. How can we be accused of price fixing if we are buyers not sellers?

We usually think of price fixing as a group of sellers conspiring to set prices for their industry, but collective action by buyers (a “buyers’ cartel”), such as a joint refusal to buy (a boycott) or a collective effort by a group of buyers to impose certain commercial terms on their suppliers, can suppress prices. *Swift & Co. v. United States*, 196 U.S. 375 (1905). Any collective action by buyers to set an agreed upon price to be paid, control the availability of services or products, or encourage boycotts is considered a per se violation of the Sherman Antitrust Act.

6. Why are buying groups allowed to negotiate purchases on behalf of their members? Isn't that collective action?

Joint purchasing is a type of collective action that can be considered beneficial to competition, but it must be conducted under carefully limited conditions. The Department of Justice and Federal Trade Commission joint statement of Enforcement Policy on Joint Purchasing (rev. 1996) explains that the agencies will not pursue legal action against a buying group unless its activity is large enough to affect the prices in the entire market. The statement sets up an “antitrust safety zone” when 1) a group’s purchases account for less than 35% of the total sales in the relevant market, 2) members of the group compete with each other, and 3) each member is spending less than 20% of its revenues for the jointly purchased products or services. A larger buying group or collective action to affect sellers’ prices would likely have the effect of controlling the sellers’ prices, which is considered anticompetitive.

7. What about the Salary Survey and the Price Index, isn't that price fixing?

Sharing future or current active pricing information can lead to a violation of the antitrust laws. Similarly, for employers to share salary information in order to suppress the amount paid to employees in the future would be unlawful. *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001). AALL only collects information on salaries that have already been paid in the past to our members. The Price Index only shows prices that have already been charged to members but on an aggregate basis, which does not disclose the specific information of any members. Such surveys that provide benchmarking information are usually considered beneficial to competition.

8. Can AALL sponsor programs that discuss vendor pricing?

The Association may sponsor programs that discuss overall pricing and economic trends in legal publishing. Speakers can offer their individual opinions about pricing levels and terms. All such discussions or exchanges must be conducted openly. A speaker or member may not advocate a boycott or any other collective actions by members that could have the effect of restricting the prices and terms offered by suppliers to AALL members. What cannot happen is for any AALL members to propose or undertake collectively any steps that might be seen as imposing restrictions on the sellers’ freedom to determine their own prices.

9. Can individual librarians discuss with one another vendor pricing, licensing, and service terms?

Individuals may discuss issues that are of mutual interest and concern. Such discussions, however, cannot be the basis for advocating or for taking any collective action by a group of buyers.

10. Do other professional associations have antitrust policies?

Yes, the American Library Association discusses its antitrust policies here:

<http://www.ala.org/ala/mgrps/mleader/factsheets/legalframework.cfm>

The Special Libraries Association policy can be found here:

<http://www.sla.org/content/resources/leadcenter/leadtrain/chpdivgd/legal.cfm>