

What Could Be the Harm in That?

By Mary David

The lawfulness of discussing translation and interpreting rates is a question that comes up frequently in association-related listserv groups. When it comes to rates, most translators and interpreters would like to know that they are in the same ballpark as everyone else, and newcomers just want to know what the ballpark is. What could be the harm in that?

The answer is plenty. But first a little background.

Short History of U.S. Antitrust Laws

In the late 19th century, the U.S. marketplace was dominated by businesses that had created anti-compete agreements in order to manipulate prices. Businesses that were members of trusts, as these relationships were called, would initially cut the prices of their goods and services to the point where competitors were driven out of business. Members of the trust were then able to raise their prices as they wished without the threat of competition. In 1890, Congress passed the Sherman Antitrust Act to outlaw trusts and prohibit such illegal monopolies. In 1914, the Clayton Antitrust Act added two more antitrust laws to the books, and the Federal Trade Commission (FTC) was established shortly afterward with the mandate to enforce antitrust regulations. An important point to note here is that these laws were enacted to protect competition and preserve the free-market system, the basis of the U.S. economy.

ATA's Policy on Antitrust

Now fast forward to the late 20th century. In 1990, the Federal Trade Commission (FTC) investigated the ATA for possible failure to comply with antitrust laws. After two years of

investigation and a significant amount of money spent in defending the association—as well as many association members spending time in Washington testifying before the FTC—the investigation was closed with a statement from the FTC that the closure did not mean that a violation had not occurred. The Commission also reserved the “right to take such further action as the public interest may require.”

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Three years later, the FTC issued a cease-and-desist order to the International Association of Conference Interpreters (AIIC) after finding AIIC in violation of U.S. antitrust law (see page 16 for details).

This is a part of ATA's history that no one wants to repeat. ATA is firmly committed to ensuring that the association fully complies with the relevant antitrust laws as they pertain to the activities of ATA. There is an obligation to not only set a high standard regarding antitrust, but also to abide by the spirit of the law as well as the letter of the law.

Antitrust and Listserv Discussions

The potential for ATA, or any other association for that matter, to be involved in legal action as a result of listserv discussions is a reality because the forum for discussion was

developed on the basis of membership in the association. It is important for members to understand that an association cannot be used as a forum for rate discussions. Specifically, ATA's policy on antitrust compliance as it relates to online and offline discussions states:

“Bear in mind that discussions among members [including chapters and divisions] regarding translation rates, methods of calculating translation rates, rate levels, future rate expectations, rate projections, or any other matters which may affect translation rates can create a risk of antitrust violations. Do not circulate written statements, comments, suggestions, or views, etc., regarding any matters which may affect translation rates, and do not make public announcements or statements on those matters.”

The ATA policy statement on antitrust is published in the print version of *The ATA Membership Directory* and in the *ATA Annual Conference Program*. The policy is also available on ATA's website under “Membership,” then “ATA Policy.” A copy of the policy is reprinted on page 17 as well.

Associations at Risk

Associations, by their very nature, are at particular risk of antitrust violation since they bring together competitors to discuss issues related to their industry. They will often take a unified action to promote the commercial and professional goals of their members. This is one of the basic reasons that associations are organized.

At the same time, however, there is a real danger that any “unified ➡

action” taken by industry competitors will cross the line to become an antitrust violation. In fact, a recent article published online by the American Society of Association Executives (ASAE) warned that the courts continue to be concerned with the “collection and exchange of competitively sensitive information” in associations. Such information is said to include salary surveys, exchange of price information, and reporting of information regarding customers’ creditworthiness.¹

Associations are also held accountable for educating their officers, staff, and members regarding potential antitrust violations and for enforcing adherence to the law in all association activities. This is not always easy since the antitrust statutes leave considerable room for judicial interpretation of the facts in each case. Consequently, the decisions rendered in past cases offer the best reference for how associations can avoid antitrust violations.

Review of Antitrust Case Law

Over the years, the courts have liberally interpreted the Sherman Antitrust Act to prohibit a broad range of business practices within associations. For example:

- The informal, voluntary exchange of pricing information among association members may be inferred by the courts to be a concerted action—and an antitrust violation, even without an express agreement among the participants—if the exchange results in price stabilization. See *U.S. v. Container Corporation of America et al.* 393 U.S. 333 (1969).
- An association may be held liable for members’ activities at an

association function or elsewhere. See *FTC v. Superior Court Trial Lawyers Association, et al.*, 493 U.S. 411 (1990).

- Actions by an association member or officer that an outsider could assume were authorized by the association may be interpreted by the courts to be an act of the association, for which the association would bear legal responsibility. See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

Further review shows that a number of associations have faced FTC antitrust charges in the past, and many have been held liable by the courts. To note just two: In 1997, the FTC found that the International Association of Conference Interpreters (AIIC) had violated U.S. antitrust laws by establishing and enforcing association standards, including minimum daily rates, specified payment for travel and rest, as well as uniform per diem allowances.² And in 1995, the New England Juvenile Retailers Association dissolved when the FTC charged the association with unfair acts and anti-competitive practices. Retail members of the association had sent letters to furniture manufacturers who advertised in discount mail order catalogs, complaining about the economic impact the catalogues were having on their individual businesses and threatening to refuse to do business with those manufacturers.³

An agreement among competitors to refuse to do business with certain customers or suppliers in an effort to keep a customer from receiving services is an unlawful group boycott.⁴ Consequently, any discussion, no matter how fleeting, about blacklisting individuals or

companies is prohibited. See *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Fashion Originators’ Guild of America, Inc. v. FTC*, 32 U.S. 457, 467-68 (1941); *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985).

Compensation Surveys and Antitrust Law

Claims of antitrust violations are frequently based on evidence that compensation and price-related information has been shared between competitors. There does not have to be an expressed agreement between the competitors to use the shared information to control the market in order for an antitrust violation to have occurred. This aspect of the law has led most associations to steer clear of conducting pay rate surveys. Within the last decade, however, new guidance from the FTC and the Department of Justice, as well as existing case law, has allowed association compensation surveys to be carried out with the following conditions:

1. A third party manages the collection of the data.
2. The information is made available to both association members and nonmembers.
3. Wage and rate information collected is at least three months old (nothing current).
4. No one participant’s information accounts for more than 25% of any item reported.
5. Participation in the survey is voluntary.
6. Unregulated discussions of the results are discouraged by the association.

Using these guidelines and under the oversight of legal counsel, ATA com-

piled and published *The ATA Translation and Interpreting Compensation Survey* (2nd edition) in 2003. This publication is available from ATA Headquarters (contact Maggie Rowe at (703) 683-6100 if you are interested).

Industry compensation surveys are often viewed by members as one of the most valuable benefits any association can offer. Nonetheless, there are still a number of significant legal concerns and risks associated with the collection of pay rate data. This is an area where associations must proceed with caution.

Payment Practices Lists

Ensuring payment is a primary concern for all. With only limited resources for pursuing collections, the freelancer learns, sometimes the hard way, to do a little research on a new client's past payment practices before taking the job. And what better way to do this than to ask other translators and interpreters about their experiences with the client? This was the beginning of online client reference sites for translators and interpreters, also known as "payment practices lists."

Payment practice lists offer translators and interpreters an opportunity to report slow payers as well as non-payers. And, in turn, translators and interpreters can review the lists for information on clients. Some lists are free and some require a paid membership.

These kinds of watchdog projects are certainly not new; many consumer groups have published such lists on paper for years. Most advise that their lists are for reference only, cautiously steering clear of any implied boycott.

While ATA does not sponsor, support, or recommend any payment

The American Translators Association Policy Statement

Antitrust laws make unlawful any agreements among competitors that directly or indirectly restrain competition, including agreements among competitors which directly or indirectly affect prices. Gathering and publishing of information on competitive rates charged by translators must be performed under procedures intended to ensure that the information gathered and published is impartial and objective and does not encourage the setting of rates. ATA intends to comply with such procedures in the dissemination of any rate information.

ATA intends to comply strictly with antitrust laws and all other laws that affect ATA. The Association requires that its Division and Chapters comply strictly with those laws. It is essential that ATA, its Divisions and Chapters, and its members ensure that activities comply with antitrust laws. The purpose of this Policy Statement is to focus on the need for antitrust compliance.

We urge that ATA members follow these guidelines:

- Avoid actions which create a risk of antitrust violations.
- Bear in mind that discussions among members regarding translation rates, methods of calculating translation rates, rate levels, future rate expectations, rate projections, or any other matters which may affect translation rates can create a risk of antitrust violations. Do not circulate written statements, comments, suggestions, or views, etc., regarding any matters which may affect translation rates, and do not make public announcements or statements on those matters.
- Matters that affect rates or restrain competition among members should not be discussed at meetings.
- Consult with counsel on any question which might have competitive or antitrust implications.

Finally, this Policy Statement is intended to highlight antitrust issues affecting ATA and its members. It does not answer all questions which may arise under the antitrust laws. ATA urges that members who have antitrust questions consult legal counsel.

As Adopted by ATA Board of Directors on March 25, 1990

practice lists, the association does recognize that this kind of reference can be useful to freelancers. Website links to several client reference sites are provided at the end of this article.

No Matter How Innocent

No matter how innocent a particular act may be, legal difficulties for ATA and for the individual or corporate ATA member can result if it leads others to believe that a violation has occurred. And there are serious consequences, both criminal and civil. Violations of the Sherman Antitrust Act are felonies

that can subject an individual to fines of up to \$350,000 and imprisonment for as long as three years. Corporate violators may be fined up to \$10 million, and injunctions can be issued that would impair the corporation's ability to compete effectively.⁵

The Bottom Line

Antitrust laws were created specifically to protect small companies and independent contractors from being forced out of business by any group conspiring to control the market. The goal is, and always has been, to ➡

give individuals a chance to compete fairly and to let the market set the price. The laws are enforced to keep bullies from dominating the competition. It is time to take the blinders off and recognize that antitrust laws were written to protect us, not hurt us.

The bottom line is that even though you might personally disagree with a simple listserv discussion falling under the purview of antitrust laws, the FTC and Department of Justice would more than likely see it differently. And the cost of taking the chance—or even challenging this application of the law—is more than any of us can afford.

References

1. Tenenbaum, Jeffrey S., and George E. Constantine III, Esq. 2004. "Antitrust Concerns With Association Information Exchanges." *Association Law & Policy*, April 1, 2004. www.asaenet.org (accessed December 22, 2004).
2. Glassie, Jefferson C. 1997. "Federal Trade Commission Finds AIIC Violated U.S. Antitrust Laws, But Dismisses Non-Price Charges." *The ATA Chronicle* 26, pp. 12-13.
3. Varney, Christine A. 1996. Vertical Restraints Enforcement at the FTC. Prepared remarks for ALI-ABA Eleventh Annual Advanced Course on Product Distribution and Marketing, Utah.
4. Federal Trade Commission and the United States Department of Justice. Determining What is Per Se Unlawful: Identifying Strong Likelihood of Anticompetitive Effects, Group Boycotts. *Per Se Illegality And Truncated Rule Of Reason: The Search For A*

Foreshortened Antitrust Analysis. 1997. www.ftc.gov/opp/jointvent/2Persepap.htm.

5. Federal Trade Commission. Antitrust Offenses. 2002 Federal Sentencing Guidelines. www.ussc.gov/2002guid/2002guid.pdf (Chapter 2, Part R).

Online Antitrust Resources

1. Antitrust Resources (Federal Trade Commission) www.ftc.gov/ftc/antitrust.htm
2. Antitrust Division (Department of Justice) www.usdoj.gov/atr
3. Antitrust Case Filings (Department of Justice) www.usdoj.gov/atr/cases.html
4. Antitrust Enforcement and the Consumer (Department of Justice) www.usdoj.gov/atr/public/div_stats/9142.htm
5. Public Documents (Department of Justice) www.usdoj.gov/atr/pubdocs.html
6. Antitrust Guidelines for Collaborations Among Competitors (Federal Trade Commission and Department of Justice) www.ftc.gov/os/2000/04/ftcdojguidelines.pdf
7. FTC Decision in the Matter of International Association of Conference Interpreters (AIIC) www.ftc.gov/os/1997/03/aicord.htm

Online Payment Practice Resources

1. Aquarius www.aquarius.net
2. Black and White List www.gotranslators.com/Engl/Reports.php
3. Payment Practices Tools www.gotranslators.com/Engl/BPTools.php
4. Payment Practices www.trwenterprises.com/payment_practices.htm
5. ProZ www.proz.com
6. Translator Client Review List www.tcrlist.com
7. Translation Agency Payment <http://finance.groups.yahoo.com/group/translationagencypayment>
8. TranslatorsCafe www.translatorscafe.com

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Note: The preceding article was reviewed by ATA's attorney. This information does not constitute legal advice or opinion.

