



Bureau of Competition
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

August 26, 1985

Peter M. Sfikas, Esq.
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Suite 7300, 200 East Randolph Drive
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Dear Mr. Sfikas:

Your letter of April 30, 1985, requests a staff advisory opinion regarding the legality of proposed fee surveys that your client, the American Dental Association ("ADA"), intends to conduct.

According to your letter, the ADA would like to conduct ad hoc surveys of dentists' fees in market areas where the local dental association affiliated with the ADA requests it to do so. These surveys would provide information to aid dental patients or dentists in "evaluating fees of dentists and/or the level of benefits offered by third party payers." Either ADA staff or paid consultants would conduct the proposed surveys. Local dentists would not be involved, other than by filling out survey questionnaires. You state that the fee data generated by the ADA surveys would not be released generally on a current basis. The data, "based on a range of prevailing fees in a given area," would, however, be made available to patients who have reason to question the fees their dentists charged for specific procedures (as, for example, when an insurance company has denied full reimbursement of a dentist's charges on the stated ground that the invoiced fee is higher than that usual, customary, or reasonable in the local market). The availability of such information, you assert, will aid consumers in evaluating both their dentists and their insurance plans.

In addition the survey results would be made available, on request from a specific dentist, when an insurance company refuses to pay that dentist's fee for a particular procedure. As currently contemplated, the ADA staff would make disclosure in such circumstances to the dentist so that he or she might provide an explanation to the patient or question the insurance company's determination. Alternatively, the ADA could make disclosure directly to the patient or insurer without disclosure to the dentist. No party -- the dentist, the patient, or the insurer -- would be obligated to take any action on the basis of survey findings.

Based on the information provided in your letter, the program proposed does not appear to involve or raise significant antitrust dangers. The antitrust laws generally forbid agreements among competitors or their agents that fix, formulate, or interfere with prices, fees, or otherwise unreasonably restrict terms of trade. Depending on the purpose and effect of the conduct, dissemination of information about prices by an organization of competitors, especially to its members, can facilitate or constitute an unlawful agreement to set or regulate prices. Several aspects of the proposed conduct, however, indicate that it is unlikely that the ADA's proposal would be used to facilitate price fixing. First, the survey results would not be made generally available to competing dentists. Second, the fee data that would be distributed to consumers and insurers, and perhaps on occasion to specific dentists, would be a range of fees, rather than survey results regarding one specific price. Third, the program would be voluntary in nature -- no party is required to take any action as a result of the survey findings. Given these facts, and in light of the purpose of the proposal and the generally unconcentrated nature of local dental services markets, the proposed conduct would not appear likely to violate the Federal Trade Commission Act.

Of course, if the fee survey results were, despite these factors, to be used as a vehicle for an agreement to restrain competition, the program would raise serious antitrust concerns. If used as a tool for collectively affirming the "legitimacy" of fees that fall within a particular range, then the surveys could suggest collusion among dentists, or with the ADA, on pricing policies in local communities. Similarly, antitrust concerns would be raised if the survey results were used to create collective pressure on third-party payers to accept particular prices or benchmarks for reimbursement schedules. In this regard, the ADA should be particularly careful should it choose to provide information directly to insurers on the request of individual dentists. Such conduct could, under certain circumstances, create the implication that the ADA is acting as a representative for the "collective" of its members in defining usual, customary, or reasonable fees.

In sum competition in local markets for dental services will apparently be adequately protected against anticompetitive abuse of the program if the statistics produced through the proposed surveys are treated by all parties solely as a means for helping to educate patients, third-party payers, and dentists. In implementing the program, however, continued care should be exercised to insure that the program's purpose remains legitimate

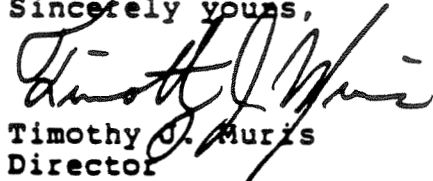
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and that it does not produce anticompetitive effects. The Bureau retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke its opinion if implementation of the proposed survey program results in substantial anticompetitive effects, if the program is used for improper purposes, or if it would be in the public interest to do so.

Finally, as I am sure you are aware, the above legal advice is that of the Bureau of Competition only. Under the Commission's Rules of Practice § 1.3(c), the Commission is not bound by this advice and reserves the right to rescind it at a later time.

Sincerely yours,



Timothy J. Muris
Director
Bureau of Competition