

C. Scott Litch

Chief Operating Officer and General Counsel



Why Worry about Antitrust Law?

This column examines some basic concepts about antitrust law and association data collection from AAPD members and sharing of information among our members. Associations such as the AAPD want to provide useful data and research for our membership, but must be cognizant of limitations imposed by federal antitrust laws. This is a timely issue for at least two reasons. One, the AAPD in 2009 will again initiate a general membership survey, which occurs every five years. Second, with the increased use of social networking, groups of pediatric dentists are increasingly sharing information and observations on social networks such as Facebook.

Antitrust laws do apply to professional membership associations such as the AAPD, although there are unique aspects of associations in determining whether their conduct violates the antitrust laws:

“It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975).”¹

In general, the AAPD must avoid:

- Surveys to establish usual, customary, and reasonable fees for pediatric dental services;
- Surveys of future planned prices or current prices;
- Identification of any one individual practices in reporting of survey data.

The following discussions should not take place, whether at AAPD face-to-face meetings or via listservs or other online forums (such as discussion boards) offered by the AAPD:

- Fees to be charged to patients;
- Division or allocation of the market for pediatric dental practices;
- What constitutes a fair profit or margin levels in a pediatric dental practice;
- The basis upon which pediatric dental fees are determined;
- Exchange of dental fee information concerning specific patients;
- Boycott of or a refusal to deal with a supplier to dental practices;
- Compilation of approved lists of suppliers to dental practices.

Conversely, AAPD member surveys can collect data under the following parameters:²

- Surveying of past information. The Antitrust Division and Federal Trade Commission recommend that to qualify for an “antitrust safety zone,” wage and price surveys should only ask about wages or prices charged at least three months prior to the date survey participants complete the survey;
- Reporting aggregate data only, not allowing the identification of any particular individual survey participant. No one single practice information should account for more than 25 percent of any item reported;

- Making survey participation voluntary; members are not required to participate in surveys;
- Asking members about a particular procedure that they believe should be covered by an insurer, and provide such information to the insurer;
- Seeking member suggestions for practice parameters or guidelines to assist in clinical decision-making, as the Council on Clinical Affairs does each year in developing AAPD clinical practice guidelines;
- Reporting on general trends in the profession;
- Describing advances or problems in technology or research;
- Demonstrating methods for pediatric dental practice to be more profitable via a better knowledge of costs;
- Summarizing effective methods of purchasing, marketing, and operating a pediatric dental practice;
- Education about the science and art of managing a pediatric dental practice;
- Developing responses to issues or concerns expressed by families in a pediatric dental practice.

For further information, contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169, ext. 29 or slitch@aapd.org.

FOOTNOTES

¹ David Marx, Jr. Presentation before “Fundamentals of Health Law Seminar”, American Health Lawyers Association, December 2-4, 2007.

² “Antitrust Concerns with Association Informative Exchanges” by Jeffrey S. Tenenbaum and George E. Constantine, Venable LLP.

PAC Corner

Thanks to all who have supported the AAPD PAC via the voluntary PAC contribution “check-off” on your current 2009-10 dues statement. Your support is critical to our long-term success. You can also review your current donation level by logging onto the Members Only section of the AAPD Web site (<http://www.aapd.org>) and clicking on the text “check my giving level.”

You received a specific appeal from your PAC Steering Committee district representatives, along with a one page flyer summarizing the AAPD PAC’s impact. I cannot overemphasize how important the AAPD PAC is to our advocacy efforts. This is especially so now during the intensive Congressional debate over health care reform legislation.

Our goal is building relationships with policymakers to promote winning strategies in support of children’s oral health. Indeed, in the health care reform debate there is a general acceptance of the importance of children’s oral health care. That is terrific! However, there are a variety of views on how best to move forward. Some, for instance, have argued that a dental home does not necessarily require a dentist and that a dental hygienist is on par with a primary care dentist. The AAPD of course promotes a true dental home for every child.

As I write this article, the AAPD is trying to convince legislators that dental hygiene training should not be added to the current Title VII primary care dentist training program. Unfortunately, some health committee staff have accepted at face value the argument that training hygienists in a broader array of duties and letting them go out and practice independently will improve access to care for children. I will not delve into all the arguments and counter-arguments and analysis that the AAPD has provided. I will simply point out

that the AAPD PAC has allowed us to establish relationship where we can get our folks in the door (such as Congressional Liaison Dr. Heber Simmons, Jr.) to talk face-to-face with members of Congress on this issue. While Congressional staff are very important and critical to the process, it is their bosses (the Members) who oversee their work and set priorities. Although we cannot guarantee a win on every issue, there is no opportunity if we cannot make our case.

Speaking of developing these relationships, please note that based on the successful (and award-winning) AAPD PAC fund-raiser for Senator Russ Feingold (D-WI) co-hosted with the Wisconsin Dental Association back in March, 2009, we are looking for similar opportunities with other state dental associations around the country. This gives the AAPD PAC a chance to give earlier in the two year election cycle, and be part of an intimate event focused exclusively on dental issues. We can also provide technical assistance if you wish to set up a pediatric dentists-only event in your office or home.

I urge each AAPD member to consider these benefits and to increase your support of the AAPD PAC. Experts advise that a goal of 100 percent of association members contributing to a PAC is unrealistic for any PAC. But the AAPD is a very dedicated and loyal group of highly skilled and caring professionals. Why not 50 percent? Why not 75 percent? This impacts the ability of your professional association to meet your needs in the public policy arena.

For further information about the AAPD PAC, please contact PAC Secretary C. Scott Litch at (312) 337-2169 ext. 29 or slitch@aapd.org.

Lewis A. Kay
PAC Steering Committee Chair

