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FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Peter M. Sfikas, Esq.
200 East Randolph
Suite 7300
Peterson, Ross, Schloerb & Seidel
Chicago, Illinois 60601

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Dear Mr. Sfikas:

This is in response to your request for an advisory opinion concerning a proposed program for peer review of dental fees by the Iowa Dental Association ("IDA" or "Association") and its component district dental societies.

It is the Commission's understanding that IDA wishes to institute a peer review program to aid the cost containment efforts of third-party payors¹ and assist patients in the resolution of fee-related disputes with dentists. Under the proposed IDA peer review program, a patient, a third-party payor or a dentist involved in a particular fee dispute may request a determination by a peer review panel of an IDA component district dental society as to the appropriateness of the fee charged in that particular case. Participation in the program will be purely voluntary (with no proceeding held unless each of the disputants agrees to participate)² and all determinations will be purely advisory in nature. Furthermore, the decision of each peer review panel will be based solely on the facts and circumstances of the particular case and will not be disseminated beyond the patient, third-party payor, and dentist involved in the case. Similarly, distribution of decisions internally will be limited to the dissemination required to perform appellate and administrative functions, and the Association will neither collect information on dental fees nor conduct surveys relating to such fees.

Based on its understanding of the fee peer review program as it is outlined above and further detailed in your submissions, it is the Commission's opinion that operation of the program would not, in and of itself, be violative of Section 5 of the Federal Trade Commission Act.

¹ Third-party payors (also called "third-party providers" in IDA's submissions) are entities -- such as insurance companies, service companies, or employers -- who reimburse patients for all or part of the cost of dental care, or make direct payments to dentists on behalf of patients for such services.

² Thus, when a dispute is between a third-party payor and a dentist, both the third-party payor and the dentist must agree to participate in the particular proceeding. Likewise, when the dispute is between a patient and his or her dentist, both the patient and dentist must agree to participate for the peer review process to be utilized.

The Commission is of the view, however, that great care must continually be taken in carrying out the program to assure that its purpose remains legitimate and that it does not produce significant anticompetitive effects and thereby run afoul of the antitrust laws.³ Proffered guidance given under the auspices of a major professional society can readily become coercive if the voluntary and advisory nature of the program is not perceived and sustained by all participants. Likewise, joint action relating to fees can readily threaten independent pricing, if determinations about particular past prices become generalized in future fee or reimbursement decisions. IDA should avoid antitrust risk, therefore, by vigilantly safeguarding the voluntary and advisory nature of the fee peer review process, and the limited scope of each proceeding, to prevent a lessening of price competition or innovation and to avoid unlawful coercion.

Competition will be best protected if all concerned parties view fee peer review as a means of mediating specific fee disputes, rather than a process for the collective sanctioning of fee levels or particular practices. The Commission believes that limited dissemination of fee decisions by the peer review panels is crucial if the program is to serve as a mediation service, rather than a means to facilitate price fixing or coercion. Serious antitrust concerns would therefore arise if IDA, district societies, Association members, or the disputants involved in particular peer review proceedings allowed panel decisions to become widely known.

Of equal importance, the difficulty and complexity of a procedure should be evaluated based on the individual expertise and judgment of the panel members. To the extent that any reference is made to external factors or benchmarks, such as relative value scales, consideration should be limited to fee information not sponsored or sanctioned by the Association or a component dental society. Likewise, peer review of fees would be subject to antitrust challenge if it were used either to discipline dentists who engage in advertising or other forms of competition or to discourage innovative practices not officially approved or widely used within the professional community. The

³ The Supreme Court will clarify in a pending case the extent to which peer review is within the antitrust exemption for the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq. Fireno v. New York State Chiropractic Association, 650 F.2d 387 (2d Cir. 1981), cert. granted, ___ U.S. ___ (Sup. Ct. Nos. 81-389, 81-390 Nov. 16, 1981). It therefore does not seem warranted for the Commission to offer its own advice to IDA on this issue at this time.

Association should take no steps to discipline either panelists who do not follow IDA's policies or member dentists who decline to utilize the peer review process or accept its guidance.

To prevent unlawful coercion of third-party payors, IDA should make it clear that the Association is neither conferring preferred status on insurers and other companies that participate in the program and accept panel recommendations, nor urging member dentists to avoid or pressure companies that fail to participate in the program and acquiesce in panel recommendations. Furthermore, antitrust concern would be triggered if the program were used to determine whether a third-party payor's fee schedule or reimbursement program is sufficient or reasonable -- the likelihood that the program would have anticompetitive effects would be minimized if it only determines the appropriateness of a particular dental fee charged in a particular case. Likewise, the fee review program may not be used to pressure third-party payors into accepting or standardizing particular definitions of what is a "usual" or "customary" fee. When a dispute involves one of those terms, antitrust risk would be reduced if the panel takes the third-party payor's definition as given.

Furthermore, dentist-patient disputes need to be handled with special care when no third-party payor is involved. A third-party payor independently establishes its own general contractual criteria and standards for reimbursement and is often able to make an independent appraisal of the overall fairness of the fee peer review process and of individual peer review decisions. A patient bringing a claim to the program will have no previously established criteria or payment formula and will usually be unable to make such appraisals. And, unlike the third-party payors, the patient may not have the financial ability or incentive to defend his or her position in court if dissatisfied with the peer review determination. Where no insurance contract or prior fee agreement between dentist and patient exists, IDA should be particularly careful not to let the peer review process be used to set or sanction particular "reasonable" or "customary" fee levels for general use by members. Also, it is most important that the patient be made aware of the voluntary and advisory nature of the process and, if he or she chooses to participate, be given a fair hearing. IDA might specifically advise patients that peer review determinations are based on the experience and judgment of the individual panel members and do not represent formal adjudications, based on a formula, that the patient is bound to accept. IDA might also consider adding safeguards that will help assure that dentist-patient disputes are resolved in an even-handed manner. Though not required, having local consumer

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organizations help select "consumer representatives" to be added to panels hearing such disputes might be one such safeguard. Alternatively, local government representatives or consumer organizations might supply IDA or their district dental society with a list of knowledgeable "consumer advisors" to assist a patient who chooses to participate in fee peer review.

Lastly, the Commission maintains the right to reconsider the questions involved or to rescind or revoke its opinion in accordance with Section 1.3(b) of the Rules of Practice in the event that implementation of the peer review program results in anticompetitive effects, should the purposes of the program no longer remain legitimate, or should the public interest otherwise so require.⁴

By direction of the Commission.



Carol M. Thomas
Secretary

⁴ This Advisory Opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. It does not, of course, constitute approval for the specific operations of any particular peer review program that may be or become the subject of litigation before the Commission or any court.