BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 15, 1990

Peter M. Sfikas
Peterson, Ross, Schloerb & Seidel
200 East Randolph Drive
Suite 7300
Chicago, Illinois 60601-6969

Dear Mr. Sfikas:

This letter responds to your request on behalf of the American Dental Association for a staff advisory opinion concerning the legality under the antitrust laws of a study that ADA proposes to conduct of the usual, customary and reasonable ("UCR") rates that are established by dental insurers.

Dental indemnity benefit plans commonly will pay for a given dental service the amount that the insurer determines to be "usual, customary and reasonable." The patient is responsible for any portion of the dentist's charge over the UCR amount. Because different insurers use varying methodologies to calculate UCR levels, patients insured under different plans, but receiving identical services from the same dentist, may receive different UCR benefits. Differing reimbursement levels may result from varying definitions of the term UCR (including the use of different percentiles to establish the customary fee screen), as well as from the use of different charge data to calculate usual or customary fee levels. ADA wishes to increase its understanding of why different fee screens are established and how these different fee screens affect consumers.

The ADA proposes to conduct, through an actuarial firm, a study of the various ways in which UCR rates are established by insurers and the effects of different UCR dental insurance plans on the out-of-pocket costs paid by consumers. In particular, the study will focus on the effects on consumers resulting from varied definitions of what constitutes a UCR plan, different procedures for manipulating charge data, use of differing data on which UCR fee screens are based, and the designation of varying percentiles of the accumulated fee data as the UCR screen.

During the course of the study, an actuarial firm employed by ADA would collect from a number of insurance companies data concerning the charges submitted for a specified number of dental procedures over a six-month period. This information would be used to analyze the distribution of, and variations in, dental

fee levels between, and within, various geographic regions. According to your letter, ADA intends to take precautions to ensure that the raw fee data supplied to the actuarial firm will not be available to ADA or its members. The report issued at the end of the study will not enable any dentist to determine the UCR fee screens used by any individual insurer in the dentist's geographic area.

The ultimate purpose of the study is to assist ADA in proposing guidelines for the development and use by insurers of fee screens in UCR dental insurance policies. The study is intended to result in a report that will document the basic principles that ADA recommends insurers consider in developing procedures for determining acceptable fee levels under UCR contracts and will include statistical analyses designed to be of assistance in implementing these principles. The report will be made available to the insurance industry and to public policymakers.

ADA anticipates that the study may indicate that it is feasible and beneficial to consumers to develop uniform standards, either through legislation or industry consensus, with respect to certain terms in UCR dental insurance plans. Among other things, the report will illustrate the potential impact on insurers' claims costs of setting the customary fee screen at the 80th, 85th, 90th, and 95th percentiles of charges in a particular area. However, you state that ADA does not intend to recommend that insurers set the UCR rate at any particular percentile. Nor will ADA attempt independently to set standards for UCR plans.

Based on the information you have supplied, which is summarized above, it does not appear that the survey that ADA proposes to undertake, or the study that it intends to result from it, would violate any law enforced by the Federal Trade Commission. The antitrust laws generally forbid agreements among competitors or their agents that fix, formulate, or interfere with prices or otherwise unreasonably restrict the terms of trade. Serious antitrust concerns would be raised if ADA or its members used the survey or the report that ADA intends to produce to facilitate an agreement among dentists to set or regulate prices, or to exert collective pressure on third-party payors to accept particular prices or standards for reimbursement under UCR contracts. However, it does not appear that either the survey or the study is likely to have these effects.

With respect to the collection of information regarding fees, you have stated that the actuarial firm would withhold raw data from ADA and its members, and that the report will not

enable dentists to determine the UCR fee screens that particular insurers use. As a result, there does not appear to be a serious danger that ADA members will use the survey to facilitate an agreement on prices.

With respect to the establishment of standards for UCR dental benefit contracts, you have stated that ADA does not intend to recommend that insurers adopt any specific percentile rate for the determination of the UCR amount, and that it will not establish its own standards. Therefore, there does not appear to be an immediate danger that ADA will orchestrate or engage in collective negotiation between dentists and insurers over reimbursement levels or other terms of sale of dental services.

Your letter states that ADA anticipates that it may be in the public interest to standardize certain terms used in UCR dental insurance plans, and that ADA intends to participate, along with the insurance industry, in the process of attempting to develop such standards. Voluntary standards can be procompetitive by providing consumers with useful information and making it easier for them to compare competing products. ADA's discussions with insurers about the possibility of standardizing terms, and its study and recommendations regarding problems faced by consumers with UCR dental benefit plans, do not inherently raise antitrust concerns. Of course, an organization of competing sellers may not engage in collective negotiations over price, or organize a concerted refusal to deal designed to coerce buyers into accepting terms of trade desired by those sellers. Serious antitrust issues would arise if ADA, acting as a combination of its members, exerted collective pressure on insurers to adopt particular standards or entered into negotiations with insurers to establish dental prices or other terms of service.

As I am sure you are aware, this opinion is that of staff 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 and take such action as the public interest may require. This office 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 program results in substantial

anticompetitive effects, if the program is used for other improper purposes, or if it otherwise would be in the public interest to do so.

Very truly yours,

Mark J. Horoschak
Assistant Director