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

February 8, 1985

Dennis L. Dedecker, D.D.S.
Secretary
Utah Society of Oral and Maxillofacial Surgeons
1480 South Orchard Drive
Bountiful, Utah 84010

Dear Dr. Dedecker:

Thank you for your December 20, 1984, inquiry regarding the legality of a fee survey which the Utah Society of Oral and Maxillofacial Surgeons (the "Society") plans to conduct. As you discussed with Linda Brody of this office, the Society would like to provide its members with information regarding the range of fees charged in the area, as well as the average fee charged for particular procedures. As I understand it, range of fee information will include a listing of the highest and lowest fees charged by members for individual procedures, rather than the range of fees, if any, charged by each provider. This response provides informal staff guidance, based on the limited information available. Moreover, staff advice is not binding on the Commission.

In general, the antitrust laws prohibit agreements that fix or otherwise tamper with the fees that competitors charge for their services. Depending upon the purpose or effect of the conduct, dissemination of price information by an organization of competitors can be found to constitute or facilitate an unlawful price agreement. While the case law does not set forth a clear test to determine the legality of every fee survey, it is generally recognized that absent either an anticompetitive purpose or effect, the publication of truthful, historic information regarding the prices charged by competitors in a non-concentrated market probably would not be found to violate the antitrust laws.

Thus, assuming no intent to restrain price competition is present, the critical issue regarding a price information exchange is its likely effect on competition. In a fairly recent Supreme Court case concerning a challenged price exchange system, the Court stated that a "number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication," United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978). Specifically, the types of factors that the Supreme Court has considered to be relevant include: the nature of the price information distributed, the number of sellers competing in the market, the ease with which

new sellers can enter the market, whether a reasonable substitute exists for the product or service, elasticity of demand, whether the competition for sales turns on price or on some other factor, the direction or movement of prices, and whether purchasers, as well as sellers, have access to the price information. See United States v. Container Corp. of America, 393 U.S. 333 (1969); Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). Actual evidence of effects, after a program has been undertaken, is the most probative evidence, but it is, of course, not available beforehand.

It is not possible to predict with certainty whether the Society's planned dissemination of price information would be illegal, on the basis of the limited information available concerning the structure and operation of the market, and the difficulty of foreseeing what effect distribution of the fee information will have either on the fees members charge for their services or on competition among members. I can, however, give you some general guidance regarding the Society's proposed course of conduct.

In most markets, dissemination of truthful, historic range of fee information, in itself, would not be likely to raise significant antitrust concerns. Mere publication of such information generally would not facilitate an unlawful price-fixing agreement among members. For example, dissemination of range of fee information would not usually appear likely to result in competitors concertedly charging the same, or similar, fees for particular procedures. Therefore, such dissemination would not generally be presumed to restrict price competition in violation of the antitrust laws.

Dissemination of the average prices charged for particular procedures can be more troublesome from an antitrust standpoint. A danger in the dissemination of average price information to physicians who currently charge varying prices and may provide services of varying levels of quality can be that the stated average may, through tacit or express agreement, serve as a focal point for artificial pricing conformity. For example, dissemination of an average price may be part of competitors' reaching a common understanding that the stated average will become the price they usually will charge, or even the minimum price charged, for a particular product or service. The risk of this may be greater in a market where there are only a small number of competitors.

I hope this information is helpful to you. If we can be of any further assistance, please call Linda Brody at (202) 724-01347.

Sincerely,

Arthur N. Lerner
Assistant Director