

Complaint

121 F.T.C.

IN THE MATTER OF

CALIFORNIA DENTAL ASSOCIATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9259. Complaint, July 9, 1993--Final Order, March 25, 1996*

This final order prohibits the 19,000 member professional association from restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing of the prices, terms or conditions of sale of dentists' services and the solicitation of patients, patronage or contracts to supply dentists' services. In addition, the final order requires, among other things, the respondent to update its Code of Ethics to comply with the provisions of the Commission's order and to publish the Commission's order and complaint, as well as an announcement describing the order's effect, in the California Dental Association Journal.

Appearances

For the Commission: *Sally L. Maxwell, Markus Meier, Gary H. Schorr, Linda B. Blumenreich, George R. Bellack, Elizabeth R. Hilder, David R. Pender* and *Robert Leibenluft*.

For the respondent: *Peter Sfikas* and *Tamra S. Kempf, Bell, Boyd & Lloyd*, Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the California Dental Association, a corporation, has violated and is violating the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent California Dental Association ("CDA" or "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is located at 818 "K" Street Mall (Post Office Box 13749), Sacramento, California.

PAR. 2. CDA is a professional association organized in substantial part to represent the interests of its dentist members. CDA has approximately 15,000 dentist members, constituting approximately 75% of the practicing dentists in California. CDA is engaged in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, CDA is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 3. CDA has 32 local component dental societies. Dentists are required to be members of the CDA component within whose jurisdiction they practice in order to be eligible for membership in CDA. CDA's activities, including those complained of, are directed by its House of Delegates, which is composed of delegates from CDA's component societies. CDA is a constituent society of the American Dental Association ("ADA"). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA.

PAR. 4. Most CDA members are engaged in the business of providing dental services for a fee. Except to the extent that competition has been restrained as herein alleged, and depending upon their specialties and geographic location, CDA's members have been and are now in competition among themselves and with other dentists.

PAR. 5. The acts and practices of CDA, including the acts and practices alleged herein, have been, or are, in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. In selecting a dentist, consumers generally consider factors of price and quality of service, including the dentist's training and experience, modes of treatment, areas of concentration or special interest, and the efficiency and convenience of the dental office. Truthful, nondeceptive advertising enables dentists to inform consumers about the price and quality factors of their services and about how their practices differ from other dentists, and thereby benefits consumers and promotes competition among dentists. For example, through advertising dentists can inform consumers of the location and nature of their practices and that they offer special discounts, such as for senior citizens. Such advertising can provide an incentive for dentists to offer services and prices desirable to consumers.

PAR. 7. CDA has restrained competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of this members and its component societies to restrict unreasonably the dissemination of information to consumers. In particular, CDA has combined or conspired to restrict the ability of dentists to engage in a wide variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive, including:

- A. Advertising price information such as discounted fees;
- B. Advertising relating to the quality of dentists' services, including statements that inform consumers that the dentist takes special steps to address consumers' fears about dental treatment; offers treatments not available from other dentists in the area; or has a practice that in some other respects is different from the practices of other dentists in the community; and
- C. Advertising that uses methods that may be particularly effective in conveying information to consumers.

PAR. 8. CDA has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

- A. Adopting, publishing, and maintaining rules that require dentists to refrain from a variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive;
- B. Coercing members who violate its advertising rules into ceasing such advertising;
- C. Expelling members who refuse to refrain from engaging in such advertising;
- D. Refusing to grant membership to any dentist who engages in such advertising; and
- E. Attempting to coerce non-members to comply with its rules, by, among other things, denying membership to, or cancelling the membership of, dentists whose non-CDA member employers advertise in a manner not acceptable to CDA.

PAR. 9. CDA's acts and practices have harmed consumers by restricting or preventing dentists from truthfully and nondeceptively informing the public of the price, quality and availability of their

services and how their practices differ from those of other dentists. Among other things:

A. CDA restricts certain categories of price advertising without regard to whether such advertising is truthful and nondeceptive. For example,

1. CDA prohibits all announcements of across-the-board discount offers, such as "SENIOR CITIZEN DISCOUNT" and \$25-off coupons for new patients.

2. CDA prohibits statements relating to low prices, such as "CARE AT REASONABLE PRICES," that can serve to signal a dentist's sensitivity to consumers' concerns about prices.

B. CDA restricts representations that relate to the quality of dental services without regard to whether the representations are truthful and nondeceptive. For example,

1. CDA bans a wide variety of advertising that it deems to constitute claims of "quality" or "superiority" without regard to whether such advertising is truthful and nondeceptive. CDA also prohibits quality claims through its bans on the use in advertising of adjectives, superlatives and subjective representations.

2. CDA has stopped dentist from using phrases in advertising such as "SPECIAL TREATMENT FOR NERVOUS PATIENTS," and "SPECIAL CARE FOR COWARDS," and thus has restricted claims that can inform the public that the dentist pays particular attention to consumers' fears and anxieties regarding dental procedures, and that the dentist takes special care to relieve those fears and anxieties.

C. CDA restricts certain methods of advertising without regard to whether the advertising claims are truthful and nondeceptive. For example,

1. CDA in effect discourages free dental screenings of schoolchildren by preventing dentists who provide such screenings from using their professional forms, which are imprinted with their names and addresses, in reporting the results of the screening.

2. CDA restricts the ability of dentists to attract patients and convey information to them about the dentists' practices by, for example, prohibiting dentists from hiring an agent to pass out coupons in front of the building in which a dentist practices, and from distributing business cards or other materials promoting the dentist's practice.

3. CDA prohibits dentists from advertising in any manner other than that which "contributes to the esteem of the public." Such a prohibition restricts dentists from using advertising techniques that may be particularly effective at gaining attention and conveying information to consumers.

4. CDA bans the advertising of 'guarantees' of dental services without regard to whether the advertisement is truthful and nondeceptive.

PAR. 10. In some of its activities that restrict truthful, nondeceptive advertising for dental services, CDA purports to "enforce" state statutes and regulations pertaining to advertising and solicitation. CDA, however, imposes on the market its own restrictive position on advertising regulation in situations where the state's policy is either unclear or is contrary to CDA's position. CDA is not an agent of the State and has not been authorized to interpret or enforce state laws on behalf of the State.

PAR. 11. CDA's actions described in paragraphs seven, eight and nine have had, or have, the tendency and capacity to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. Consumers of dental services have been deprived of the benefits of price and quality competition;

B. Consumers of dental services have been deprived of truthful, nondeceptive information for use in their selection of a dentist;

C. The costs to consumers of finding dental services at their desired cost and quality have been raised; and

D. Innovation in the delivery of dental services has been, or likely has been, hindered or restrained.

PAR. 12. The combination or conspiracy and the acts and practices described in paragraphs seven, eight, and nine constitute unfair methods of competition in violation of Section 5 of the Federal

Trade Commission Act, as amended, 15 U.S.C. 45. CDA's combination or conspiracy, or the effects thereof, is continuing and will continue or recur in the absence of the relief herein requested.

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JULY 17, 1995

I. INTRODUCTION

The Commission issued its complaint in this matter on July 9, 1993, charging California Dental Association ("CDA") with violations of Section 5 of the Federal Trade Commission ("FTC") Act, as amended, 15 U.S.C. 45.

The complaint identifies CDA as a California corporation which is a professional association organized in substantial part to represent the interests of its dentist members who are required, if they want to belong to CDA, to join one of its 32 component dental societies.

The complaint charges that CDA has violated Section 5 of the FTC Act by restraining competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of its members and its component societies to restrict unreasonably the dissemination of information to consumers by coercing its members to refrain from particular forms of advertising without regard to whether they are truthful and nondeceptive.

According to the complaint, these acts and practices have harmed consumers by preventing dentists from truthfully and nondeceptively informing the public of the price, quality, and availability of their services.

CDA's answer denied Commission jurisdiction over its activities because it is not a corporation within the generally accepted meaning of Sections 4 and 5 of the FTC Act, 15 U.S.C. 44 and 45, because its activities do not restrain or affect interstate commerce directly or substantially, and because its activities are the result of its desire to fulfill its public service obligations.

After extensive pretrial discovery, trial was held in San Francisco, California, from February 7, 1995 to February 21, 1995. The parties filed their proposed findings of fact and conclusions of law on April 6, 1995. The record was closed on April 20, 1995.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *Description of CDA*

1. Members

1. CDA is a professional association which is organized as a California non-profit corporation (Cplt at ¶ 1; Ans. at ¶ 1; Tr. 1139),¹ has no shares of stock or certificates of interest (Tr. 1769, 1141), and qualifies as a tax-exempt organization under Section 501(c)(6) of the IRS Code (Tr. 1770-71). CDA's principal place of business is located at 1201 K Street Mall, Sacramento, California (Ans. at ¶ 1). It has approximately 200 employees (Tr. 1138).

2. CDA has more than 19,000 dentist members, of which 13,500-13,700 are in active practice, who provide dental services for a fee (Ans. at ¶ 2) (Tr. 1166; CX-1550, CX-1656). The members represent about 75% of the practicing dentists in California (Tr. 1166; CX-1505, CX-1508-B, CX-1510-A, CX-1587-Z-107-08).

3. CDA is a "constituent" society of the American Dental Association ("ADA") (Ans. at ¶ 3; CX-1450-E) and its policies may not conflict with the ADA's Constitution and Bylaws (CX-1450-J). Its Code of Ethics conforms with the Principles of Ethics and Code of Professional Conduct of the ADA (CX-1450-J). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA (Ans. at ¶ 3; Tr. 1139).

¹ Abbreviations used in this decision are:

Tr.: Transcript of the trial
CX: Commission exhibit
RX: CDA's exhibit
Cplt: Complaint
Ans.: Answer
CB: Complaint counsel's trial brief
RB: CDA's trial brief
CPF: Complaint counsel's proposed findings
RPF: CDA's proposed findings
F. Finding

4. CDA has 32 "component" societies (Ans. at ¶ 3; CX-1450-I), which are local or regional societies, located within California, which it charters (CX-1450-E, I). The bylaws of the CDA component societies may not conflict with CDA's Bylaws or the Constitution and Bylaws of the ADA (CX-1450-I). CDA requires dentists to be members of the component within whose jurisdiction they practice in order to be eligible for membership in CDA (Ans. at ¶ 3; Tr. 1139; CX-1450-I).

5. Members of CDA are bound by the codes of ethics of ADA, CDA, and the members' respective component societies (CX-1450-Y).

6. CDA collects dues from its members for itself, its component societies, and ADA, and transmits those dues to its component societies and ADA (CX-1450-H, CX-1649-Y, CX-1650-Z-61, CX-1651-A-26-27). CDA dues are \$525 (CX-1649-X), ADA dues are \$330, and components charge from \$135 to several hundred dollars annually; the average annual "tripartite" dues paid by a member to all three associations are about \$1,100 (Tr. 1159). CDA also collects voluntary contributions for the California Dental Political Action Committee ("CalDPAC") from CDA members (CX-1649-X, CX-1650-Z-61).

7. For fiscal year 1993-1994, CDA projected annual revenues of \$19,889,461 (CX-1484-P). Membership dues represent the largest single source of CDA's revenues (Tr. 1762, Tr. 1142; CX-1484-P). Other major sources of revenues are: CDA scientific sessions; subscriptions to, and advertising in, CDA's official publications; interest income; sales of printed materials; and rent generated by CDA's headquarters building (CX-1484-P).

2. House of Delegates

8. CDA's House of Delegates is its supreme authoritative body (CX-1450-E) and is composed of 202 to 205 CDA members, 200 of whom are elected by CDA's component societies (Tr. 1139; Ans. at ¶ 3; CX-1450-J).

9. The House of Delegates has the power to determine CDA's policies, to amend its articles of incorporation, to adopt and amend its Code of Ethics, to determine and assess dues, to adopt an annual budget, to grant or revoke the charters of its component societies, and

to elect its officers, members of its council, and delegates to the ADA House of Delegates (CX-1450-K, Q, Z-4, Z-5, CX-1472-A).

3. Board of Trustees

10. CDA's administrative and managing body, the Board of Trustees, is vested with the power to conduct its business according to the policies established by the House of Delegates (CX-1450-O).

11. The Board has 52 members, including 43 trustees elected by CDA's component societies, the seven elected officers of CDA and two "appointed officers" -- the Executive Director and Editor -- who are appointed by the Board (CX-1450-N, O, S-T).

4. Standing Committees

12. CDA has six standing committees: Executive, Communications, Direct Reimbursement, Finance, Nominating, and Interdisciplinary Affairs (CX-1450-V-Y).

5. Councils

13. CDA operates ten councils, each of which is responsible for specific functions (Tr. 1148; CX-1450-T-V, CX-1484-Z-23-28). They are the:

14. a. Judicial Council which is charged with interpretation and enforcement of the CDA Code of Ethics (including the advertising restrictions which are the subject of this proceeding), as well as the discipline of CDA members found to have violated its Code (CX-1450-U-V, CX-1484-Z-27-28, CX-1571-G).

15. b. Council on Legislation which formulates positions on legislation and regulation on behalf of CDA and its members (Tr. 1285, 1154, 1208; CX-1483-Z-13, CX-1484-Z-25). The council has a close working relationship with CalDPAC, the "political arm" of CDA (CX-1483-Z-13, CX-1484-Z-26).

16. c. Council on Membership Services which recruits CDA members and is responsible for membership services and benefits (CX-1524-E).

17. d. Council on Education and Professional Relations which oversees a variety of CDA programs, including those which maintain a liaison role with the laboratory industry and monitor national and

statewide developments related to denturism and the expanded role of the dental hygienist (Tr. 1205-06; CX-1484-Z-24-25, CX-1571-I, CX-1649-N, Z-30-33).

18. e. Council on Dental Research and Development which monitors trends in infection control and monitors federal and state agency regulations (Tr. 1154; CX-1277-E, CX-1483-Z-11, CX-1484-Z-24).

19. f. Council on Peer Review which provides CDA members with a patient complaint resolution alternative to costly and protracted litigation (Tr. 1151-52; CX-1448-D, CX-1520-A, CX-1563, CX-1644-B).

20. g. Council on Scientific Sessions which holds two sessions yearly featuring continuing education courses, and displays by hundreds of vendors of new technology, treatment modalities, supplies, and equipment (Tr. 1155; CX-1483-Z-14, CX-1484-Z-27, CX-1502-A, CX-1571-A, D).

21. h. Council on Insurance which develops, monitors, and evaluates insurance programs to serve the needs of CDA members through its subsidiary, The Dentists Company Insurance Services (CX-1482-Z-19, CX-1483-Z-12, CX-1484-Z-5, CX-1571-H).

22. i. Council on Dental Care Programs which monitors government health care programs (Tr. 1149; CX-1483-Z-10, CX-1484-Z-23-24) and the activities of the State Board of Dental Examiners (Tr. 1149). It also has provided: input to third-party payers concerning dental care benefits and claims, insurance claim information to CDA members, and, in conjunction with ADA, a contract analysis service to help members to understand the legal implications of dental contracting (Tr. 1204; CX-1484-Z-23, CX-1571-F; CX-1483-Z-10). It also sponsors an annual dental care and insurance conference (CX-1481-Z-22, CX-1482-Z-17, CX-1483-Z-10).

23. j. Council on Community Health which is CDA's communications center for dental health activities and promotes National Children's Dental Health Month and Senior Smile Week (CX-1484-Z-23, CX-1571-H).

6. For-Profit Subsidiaries

24. CDA has five for-profit subsidiaries--four of which are operating companies--and a holding company for the operating companies (Tr. 1168).

a. The Dentists Insurance Company ("TDIC")

25. TDIC is a dental malpractice insurance company which underwrites insurance in California only for CDA members (Tr. 1768, 1785, 1168; CX-1587-Z-74). It also underwrites insurance for non-CDA members in Minnesota (Tr. 1785).

26. As of October 1993, TDIC insured approximately 8,800 California dentists, about two-thirds of all actively practicing CDA members (CX-1478-G).

27. CDA created TDIC in 1979 (Tr. 1784; CX-1575-A) as a result of the malpractice crisis in California and the threat of prohibitive insurance premiums for professional liability insurance (CX-1587-Z-62-63, CX-1482-L).

28. Except for one person, all members of TDIC's Board of Directors are, and always have been, members or officials of CDA. CDA's Executive Director is the Vice-Chairman of the TDIC Board of Directors (CX-1587-Z-101-02). TDIC's offices are located in the CDA headquarters building (CX-1448-B, C, CX-1587-Z-58-59, Z-65).

29. TDIC has made dividend payments of \$120,000 and \$320,000 to CDA during the last two years (Tr. 1769; CX-1484-Z-30). Additionally, TDIC pays CDA's Government Relations Office ("GRO") \$30,000 a year (Tr. 1785) for GRO's legislative and lobbying activities relating to professional liability insurance issues (CX-1650-Z-13-14).

b. The Dentists Company ("TDC")

30. CDA created TDC in 1982 to provide and broker a wide range of high quality products to CDA members (Tr. 1776; CX-1652-Y, CX-1484-Z-29), and to contribute financially to CDA's activities (CX-1448-C, CX-1472-A). TDC offers professional and personal financial services and other services to CDA members (Tr. 1778-80; CX-1570-A-F).

31. Except for one non-dentist/non-employee member, all members of the TDC Board of Directors are, and always have been, members or officials of CDA (CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDC Board of Directors (CX-1587-Z-102). CDA's Chief Financial Officer ("CFO") is the CFO and sole Vice-President of TDC (Tr. 1775-76). TDC's offices are located in the CDA headquarters building (Tr. 1778; CX-1448-B, C).

32. TDC made a dividend payment of \$100,000 to CDA in September 1992 (Tr. 1769; CX-1484-Z-29), and TDC's activities have added over \$5 million to CDA's assets (CX-1483-Z-15), materially improving CDA's financial position (CX-1483-Z-15, CX-1637-D).

c. The Dentists Company Insurance Services ("TDCIS")

33. CDA created TDCIS in 1983 (Tr. 1781). TDCIS is the broker/administrator for a number of CDA-sponsored business and personal insurance plans offered to CDA members (Tr. 1768, 1783-84; CX-1558-A-F, CX-1575-G-H). These insurance plans are offered only to CDA members (Tr. 1782; CX-1652-Z-9) and, in some cases, to the spouses and staff of CDA members and to employees of CDA's local component societies (CX-1558-A, F, CX-1575-G). TDCIS's insurance plans have more than 13,000 policyholders and more than 30,000 individual policies in place (Tr. 1782-83; CX-1484-W, Z-25, Z-29). TDCIS bills and collects more than \$55 million a year (Tr. 1783; CX-1484-W, Z-29).

34. TDCIS has a "close working relationship" with CDA's Council on Insurance (CX-1484-Z-29), which is "the entity that determines which insurance programs will be sponsored by [CDA], and subsequently brokered by [TDCIS]" (CX-1649-V). Members of the TDCIS staff attend the council's meetings and "maintain close levels of communication" (CX-1484-Z-29).

35. Except for one non-dentist/non-employee member, all members of the TDCIS Board of Directors are, and always have been, members or officials of CDA (Tr. 1781; CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDCIS Board of Directors (CX-1587-Z-102). CDA's CFO is the CFO and sole Vice-President of TDCIS (Tr. 1780; CX-1652-V). TDCIS's offices

are located in CDA's headquarters building (Tr. 1782; CX-1448-B, C).

36. "Each year, TDCIS has presented [CDA] with a dividend or other support based on TDCIS's income" (CX-1475-D). TDCIS pays CDA's GRO \$30,000 a year (Tr. 1781-82) for legislative and lobbying activities relating to insurance issues (CX-1650-Z-13-14).

d. The Dentists Company Management Services ("TDCMS")

37. CDA created TDCMS in 1987 (CX-1346-E). Its function is to manage the operation of the CDA headquarters building (Tr. 1768). Prior to 1994, TDCMS also provided many of the administrative services currently provided to CDA and its subsidiaries by CDA Holding Company, Inc. (CX-1346-E, CX-1466-A, G). CDA's Executive Director is the Chairman of the Board of TDCMS (CX-1652-Z-1-2). CDA's CFO is the CFO and Vice-President of TDCMS (Tr. 1784).

e. CDA Holding Company, Inc. ("CDAHC")

38. CDAHC was created to assume ownership of CDA's for-profit subsidiaries as part of its corporate reorganization in 1993 (Tr. 1764, 1773; CX-1466-A, G, CX-1472-A, N).

39. This reorganization was done primarily to further define and protect CDA's status as a Section 501(c)(6) tax-exempt organization (Tr. 1774, 1188; CX-1472-A, N, CX-1587-Z-60, CX-1652-Z-5).

40. CDA is the sole owner of CDAHC which, in turn, holds the stock of CDA's other for-profit subsidiaries (Tr. 1768, 1773, 1187).

41. CDA elects the members of CDAHC's Board of Directors (Tr. 1188-89, 1778; CX-1450-K, M, Z-4-5), and CDA's Board of Trustees may remove directors of CDAHC (CX-1450-O, CX-1587-Z-67). All but one member of CDAHC's Board of Directors are members or officials of CDA (Tr. 1189, 1792; CX-1450-Z-5, CX-1587-Z-66-67). CDA's current President is a member of CDAHC's Board of Directors (Tr. 1413; CX-1651-Z-20); CDA's Executive Director is Chief Executive Officer of CDAHC (Tr. 1136; CX-1652-R); and CDA's CFO is the CFO and sole Vice-President of CDAHC (Tr. 1787-88; CX-1652-Q). CDA employees assist CDA's CFO with his duties relating to CDA's for-profit subsidiaries (CX-1652-K-L, R, X). CDAHC pays a portion of the salaries of CDA's CFO and the staff

that assists him in providing services for CDAH (Tr. 1774-75; CX-1652-S).

42. CDA's House of Delegates recommends candidates for the boards of directors of the operating companies to CDAH, which then selects the directors of the operating companies (CX-1450-K, O, Z-5, CX-1587-Z-67). CDAH may remove and replace any of a subsidiary operating company's board members (CX-1450-Z-5).

43. CDA's Bylaws provide for payments by CDAH to CDA of dividends or other payments generated by CDA's for-profit subsidiaries (CX-1450-Z-5, CX-1466-A, CX-1484-W, CX-1587-Z-103). By design, CDAH currently does not generate profits; instead, it bills CDA and its subsidiaries for administrative services it provides, at cost (Tr. 1775).

7. Nonprofit Subsidiaries

44. CDA has two nonprofit subsidiaries organized under 501(c)(3) of the IRS Code: The CDA Relief Fund grants financial aid to dentists, their dependents, and survivors. The CDA Charitable Fund maintains a separate financial account for a disaster loan program (Tr. 1167-68, 1172; CX-1450-Z-4).

8. Rotunda Partners

45. CDA is the general partner of Rotunda Partners, which owns most of the CDA headquarters building in Sacramento (Tr. 1790). CDA owns 60% of Rotunda; TDIC owns the remaining 40% (Tr. 1169; CX-1652-Z-3).

9. California Dental Political Action Committee ("CalDPAC")

46. CalDPAC is an unincorporated association of dentists that was formed to make financial contributions to political candidates and parties sympathetic to issues of concern to dentistry (CX-1483-J, CX-1587-Z-129, CX-1650-Z-67-69).

47. CalDPAC is not legally a subsidiary or division of CDA, but it is considered the "political arm" of CDA and is closely affiliated with it (CX-1483-Z-13, CX-1484-Z-26, CX-1650-Z-3-4, Z-16, Z-50-55, Z-62-63, Z-67-68, CX-1587-Z-129-31; Tr. 1202).

48. Approximately 40 to 45% of CDA members contribute to CalDPAC (Tr. 1194; CX-1448, CX-1464-G, CX-1650-Z-65).

49. Over the past several years, the level of CalDPAC's political contributions has remained stable, at approximately \$300,000 to \$350,000 per two-year state legislative cycle (Tr. 1194; CX-1448-D, CX-1644-B, CX-1650-Z-67-68).

B. Interstate Commerce

1. Interstate Reimbursement For Dental Services

50. Fifty percent of the funding for California's Medicaid programs for dental services ("Denti-Cal") comes from the federal government. In calendar year 1994, the Denti-Cal program paid out approximately \$500 million to billing providers, most of whom were members of CDA (Tr. 728, 1286; CX-1658).

2. Interstate Sale and Lease of Equipment and Supplies

51. CDA members purchase, lease, and use substantial amounts of dental equipment and dental-related products from manufacturers and suppliers located outside of California (Tr. 1405, 295-96, 750-55, 1000-02, 463-64, 328-29, 673-75; CX-1651-Q).

52. The CDA Journal and CDA Update carry many advertisements for products and services by out-of-state manufacturers and suppliers (CX-1451-E, G, CX-1452-B, CX-1455-E, I, CX-1456-J, L, CX-1457-L, CX-1458-E, CX-1461-H, CX-1466-D, CX-1470-J, CX-1474-E, CX-1476-K, CX-1478-F, G, N, CX-1479-K, N, CX-1480-H, CX-1482-M, Z-8, Z-10, Z-13, Z-46, Z-48, Z-54, CX-1483-Z-19, CX-1484-Z-12, Z-32, Z-53), and a substantial number of readers of the publications purchase such items (CX-1453-P).

53. CDA's scientific sessions feature exhibitions by many out-of-state vendors of dental-related products and services which CDA members may purchase (Tr. 782-83, 1772; CX-1452-A, CX-1571-A).

3. Other Activities of CDA and Its Members Involving Interstate Commerce

54. In some cases, out-of-state suppliers of services to CDA members have been unable to use certain advertising practices because of CDA's ethical advertising restrictions (Tr. 803-05, 603-10; CX-1209). CDA has placed advertisements, which must comply with its Code of Ethics, in publications with national distribution, including the "Wall Street Journal," "Fortune," and "Business Week" (CX-1455-M, CX-1450-V, X, CX-1651-Z-43).

55. "[M]any of CDA's members have been and are now in competition among themselves and other dentists, both within and outside the State of California" (Ans. at ¶ 4), and some CDA members reside outside of the State (CX-1656).

56. CDA members treat patients who reside outside of California (Tr. 1405, 771-72, 293, 1000, 462-63, 326-27, 672-73; CX-1608-M-N, CX-1611-I, Z-87, CX-1651-N-O), and approximately 4.5% of its members reside outside of California (CX-1656).

57. CDA and its components use the U.S. Postal Service to communicate with their members or applicants for membership whose advertising they challenge (Tr. 1021, 354). They also communicate, when necessary, with the ADA, which is located in Chicago, Illinois (Tr. 374-75, 1223; CX-1587-Z-55, CX-1450-Z-1-2, CX-1469-Z-57-58, CX-1651-Z-71). CDA also uses the Postal Service to deliver its Journal and Update to out-of-state concerns (Tr. 1772-73; CX-1481-Z-26-31, CX-1482-Z-49-53, CX-1484-Z-47-51, CX-1448-D, CX-1571-D, CX-1625-I-N).

58. CDA officials and members attend out-of-state conferences (Tr. 1185; CX-1450-K, Z-3, Z-40-41, CX-1587-Z-51-54, CX-1651-Z-27-29).

59. CDA, through TDC and TDCIS, offers services to CDA members through out-of-state firms, including providers of life insurance (CX-1480-K), medical insurance (CX-1558-B), income insurance (CX-1558-C), disability insurance (CX-1558-D), accidental death and dismemberment insurance (CX-1480-D, F, CX-1558-E-F), office property insurance (CX-1480-D, F, CX-1558-E-F), VISA cards (CX-1484-Z-29), home equity loans (CX-1484-Z-29), home mortgages (CX-1484-G), and long distance phone service (CX-1484-Z-29).

60. TDIC operates in Minnesota and has applied for licenses to do so in other states (CX-1468-E, CX-1480-A, CX-1484-Z-30).

61. CDA secured a loan for \$39 million from an out-of-state insurance company to purchase its current headquarters building in Sacramento, California (Tr. 1790-91; CX-1470-F, CX-1652-Z-34-35).

62. CDA collects annual ADA membership dues from California members and transmits them to ADA headquarters in Illinois (Tr. 1190, 1415).

C. CDA Activities Conferring Pecuniary Benefits On Its Members

1. CDA's Purpose

63. CDA has often stated that one of its primary purposes is to "represent dentists in all matters that affect the profession" (CX-1546-A), and it provides the kind of benefits which individual dentists could not realize by acting individually (CX-1488, CX-1502-A, CX-1508-B, CX-1509-B, CX-1510-A, CX-1533, CX-1544).

2. Source of Revenues

64. CDA's budgeted revenue for its 1993-94 fiscal year was \$19,889,461 (CX-1484-P). Its largest source of funding was membership dues and revenue derived from membership-related activities such as the sale of professional liability insurance to members (Tr. 1762, 1142, 1812). CDA's current dues for active members are \$525. The average cost of dues for members of ADA, CDA and a CDA component ("tripartite dues") is approximately \$1100 (Tr. 1159).

3. Tax Status

65. CDA is exempt from federal income taxation pursuant to Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. 501(c)(6) (Tr. 1770, 1141, 1853; CX-1587-Z-55), which exempts "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests (26 CFR 1.501(c)(6)-1; Tr. 1771, 1853). CDA is not exempt from federal income taxation under 501(c)(3) of the Code, 26 U.S.C.

501(c)(3), which governs organizations formed and operated solely for religious, charitable, scientific, or educational purposes (Tr. 1853).

66. In calculating their federal and state income taxes, members of CDA may not deduct the cost of membership dues as a charitable contribution (Tr. 1416, 1858). Instead, members of CDA may deduct most of their dues as ordinary and necessary business expenditures directly connected with or pertaining to their trade or business (26 CFR 1.162-1(a), 1.162-6; Tr. 1415). However, CDA members may not deduct that portion of association dues allocated by CDA to political lobbying activities (Tr. 1416; CX-1478-C; CX-1479-N, CX-1587-Z-111-12), which, in 1993, was estimated to be approximately \$26 per member (CX-1478-C, CX-1479-N).

4. General Benefits of CDA Membership

67. CDA has often touted the benefits of membership, including such statements as:

[CDA] is dedicated to offering the most comprehensive array of benefits and programs to assist practitioners in practice management. OSHA compliance and infection control to name a few (CX-1575-B).

[CDA] offers far more services to its members than any other state [dental] association (CX-1544).

In fact, CDA's accounting expert identified upwards of 50 CDA membership benefits (Tr. 1843), whose value exceeds the average membership dues, resulting in a net benefit to its members (Tr. 1849, 1851-53, 1859).

68. CDA has stated that a selection of its programs and services has a potential value to members of between \$22,739 and \$65,127 (CX-1520-A-B, CX-1571-A, L). In 1993, its president stated: "CDA is extremely valuable to the members . . . CDA members are getting their money's worth and then some" (CX-1473-O).

69. CDA's "Direct Member Services" have accounted for as much as 65% of its total financial expenditures in a given year, with "Association Administration & Indirect Member Services" accounting for an additional 20% of expenditures (Tr. 1192-93; CX-1448-C, CX-1587-Z-120-21). The last time CDA conducted this analysis, "Services to the Public" accounted for seven percent of CDA's total expenditures (Tr. 1193; CX-1448-C).

5. Specific Benefits of CDA Membership

a. Lobbying and Efforts to Influence Government Action

(1) Council on Legislation

70. CDA's Council on Legislation monitors legislative and regulatory actions which have potential implications for dentistry and adopts policy positions on behalf of CDA (CX-1484-Z-25; Tr. 1285). CDA's GRO takes the policies established by the Council on Legislation and argues for them before the appropriate governmental body (Tr. 1285; CX-1562, CX-1571-E). The Council on Legislation gives GRO explicit instructions on about 100 bills per session of the California Legislature (CX-1650-Z-33).

71. CDA budgeted \$121,309 for "government relations" activities for 1993-94, not including the salaries of GRO's seven employees (CX-1650-Z-4, Z-37, Z-43, CX-1652-Z-22-23).

72. In 1992, CDA's President told its members:

Government is like an octopus in our lives. Its tentacles are everywhere: in our dental practices and in our homes. If CDA's not there, who is watching out for the interests of dentists? Nobody (CX-1484-X).

73. CDA has also claimed that it "provide[s] a strong, unified voice as we represent the interests of our members before regulatory agencies" (CX-1502-A).

74. Other remarks of CDA officials have emphasized the pecuniary benefits of its lobbying activities:

CDA's [l]egislative wins "mean money" to members (CX-1463-A). CDA represents the interests of its members and has been successful in defeating several bills which would have cost practitioners several thousands of dollars a year (CX-1532-A).

CDA's President stated, in 1993:

[w]hat we save the dentist in potential costs of what the government would like to do, saves the CDA member at least the equivalent of their annual dues every year (CX-1473-N).

75. Specific examples of CDA actions affecting government decisions include:

(2) Infectious/Hazardous Waste Regulation

76. CDA successfully opposed passage of provisions of three bills relating to infectious waste regulation, hazardous waste generator permits, and informed consent before placement of silver amalgam (CX-1458-F, CX-1463-A, I, CX-1483-K, CX-1510-A, CX-1520-A, CX-1539) at a CDA-estimated savings of over \$2,000 per year of practice and \$66,600 over 30 years (CX-1510-A, CX-1520-A).

(3) Malpractice Reform

77. CDA supported passage of California's Medical Injury Compensation Reform Act of 1975 ("MICRA") (CX-1555-I, CX-1587-Z-140-41) and continues to defend it (Tr. 1306). The passage of that bill, according to CDA's immediate past President, was of great benefit:

Professional Liability Premiums in California last year were one billion dollars. Without MICRA, it is estimated conservatively that the figure would easily exceed 2.5 billion dollars. That increase alone would pay all your CDA/ADA/local dues each year forever. What MICRA has done is assure that payments go to victims, that the costs of litigation are reduced, that windfalls are eliminated, and most importantly, that healthcare providers such as you and I can continue to treat patients without the fear of unfounded lawsuits (CX-1484-R, T).

(4) Workers' Compensation

78. CDA successfully supported a package of workers' compensation reform bills, which are projected to save employers, including dentists, a total of \$1.5 billion (CX-1477-F).

(5) Taxation of Dentists and Dental Practices

79. CDA, along with others, successfully opposed Proposition 167 which would have increased taxes for high bracket taxpayers (CX-1466-D, F, CX-1484-K).

(6) Mandatory Employer Healthcare Coverage

80. In 1992, CDA successfully opposed Proposition 166, which would have required employers, including dentists, to provide basic health care insurance coverage for part-time employees and their dependents (CX-1466-D, CX-1468-E, CX-1484-K).

(7) Denti-Cal

81. CDA has fought to preserve funding of the dental Medicaid program operated by the State of California ("Denti-Cal") (Tr. 726), and its efforts were "instrumental in retaining the Denti-Cal program and enhancing reimbursement rates" (CX-1571-A). More than 5,000 CDA members provide dental services to Denti-Cal patients (CX-1658).

(8) Unsupervised Practice By Dental Hygienists

82. CDA opposes, and has opposed, legislation that would permit dental hygienists to practice without supervision by a dentist (CX-1462-D, CX-1476-C, CX-1481-P, CX-1482-U, CX-1483-Z-13, Z-37, CX-1484-R, CX-1485-B, CX-1571-A, CX-1587-Z-138), an issue which affects dentists' "pocketbooks" (CX-1473, CX-1477-F, CX-1484-X).

(9) CalDPAC

83. CalDPAC's political activities benefit CDA members economically (CX-1277-C, CX-1375-B, CX-1462-E, CX-1472-F, CX-1483-J, CX-1520-A, CX-1571-A). In 1993, CDA's President described the GRO and CalDPAC as "of all we do, the things with the most importance for our future" (CX-1474-I, CX-1484-N).

(10) Litigation

84. CDA has been involved in legal challenges to or arguments in support of government and regulatory policies, including a challenge to HHS regulations implementing the Health Care Quality Improvement Act (CX-1477-A, CX-1482-M, S-T). CDA estimated the value of victory in that case as "[i]ncalculable related to

reputation" (CX-1571-L). *See also* CX-1453-C, CX-1480-D, H, CX-1650-L-M, CX-1461-F, CX-1472-H, CX-1587-Z-150, CX-1482-U, CX-1483-Z-38, Z-41.

(11) Other Government Action

85. CDA has supported or opposed many other legislative or regulatory actions which would affect its members' pocketbooks (CX-1474-E, K, CX-1484-Z-25, CX-1485-A, B, C, CX-1483-Z-13, Z-40, CX-1467-K, CX-1476-A, CX-1464-K, CX-1481-V, CX-1452-A, F, G, CX-1637-F, CX-1463-K).

b. Marketing and Public Relations

86. CDA budgeted over \$2.1 million for its marketing program for 1993-94 (CX-1484-P, CX-1652-Z-20). A major goal of this program, which is assisted by an advertising agency and a public relations firm (Tr. 1164; CX-1446-O, CX-1469-E, CX-1484-Z-1-2, CX-1587-Z-152-54) is to enhance the image of CDA and its member dentists and to distinguish the latter from non-members in terms of their commitment to quality care (Tr. 1412; CX-1481-X, CX-1483-Z-37, CX-1484-F, CX-1563, CX-1587-Z-155-56, CX-1648-A-B, CX-1651-Z-42, CX-1654-D, CX-1455-M).

87. Other marketing schemes used by CDA include: a campaign encouraging dental patients to insist that their dental plans give them the right to choose their own dentists (CX-1481-N, S, CX-1508-A, CX-1552-G); a campaign to encourage the Latino population to use CDA dentists (CX-1469-E, CX-1473-M, CX-1475-K, CX-1476-A, CX-1484-Z-2); and, the use of CDA logos on stationery and other business materials (CX-1497, CX-1555-F).

88. In 1985, CDA estimated that increased patient visits to member dentists because of the marketing program resulted in "nearly \$6,000 in additional revenues [per member dentist], or a 20-to-1 return on investment" (CX-1231-B).

c. Direct Reimbursement

89. Since at least 1989, CDA has promoted "direct reimbursement," an alternative to closed panel dental insurance plans (CX-1460-E, CX-1456, CX-1465-F, CX-1473-G, CX-1508-A) under

which employers self-fund the cost of dental benefits for their employees, without insurance company involvement (CX-1275-C, CX-1473-G).

90. Direct reimbursement benefits CDA members (CX-1534, CX-1535) by "eliminat[ing] many of the restrictions imposed by the insurance carriers" (CX-1457-J).

91. CDA has established a Direct Reimbursement Committee which administers this program, for which CDA budgeted \$94,985 (excluding staff salaries) in fiscal year 1993-94 (CX-1450-X-Y, CX-1484-P, CX-1652-Z-19, Z-22-23).

d. Practice Management and Related Programs and Services

92. CDA's twice-annual scientific sessions offer seminars on topics relating to the non-clinical aspects of dental practice, including practice management, risk management, dental administration, and investment and estate planning (CX-1448-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1512-B, CX-1522-F).

93. CDA's for-profit malpractice insurance subsidiary, TDIC, has offered practice improvement seminars dealing with patient relations and dental practice risk reduction (CX-1482-Z-37, CX-1484-Z-30, CX-1511-C, CX-1512-A, CX-1587-Z-82). TDIC also provides a quarterly newsletter, a home-study course, and a lending library of risk management resources (CX-1482-Z-37, CX-1563-E, CX-1571-J).

94. In response to "membership concerns about the impact of new OSHA and [EPA] regulations on dental practice" (CX-1481), CDA developed an OSHA compliance manual (\$25 for members, \$255 for non-members) (CX-1481-N, V, CX-1483-Z-11, Z-40, CX-1501, CX-1503, CX-1528, CX-1531, CX-1537, CX-1562-G, CX-1571-G, CX-1573-D, CX-1575-D; Tr. 1174).

95. CDA provides its members with "delinquent license notification" (CX-1458-A), a service which allows members whose licenses have expired to correct their status before the licenses are cancelled (CX-1526-C).

96. Another "important membership benefit" (CX-1494, CX-1566-B) is CDA's provision to members of OSHA and labor law posters required by law to be displayed in dental offices (Tr. 1174; CX-1462-L, CX-1483-K, CX-1492-A-B, CX-1499, CX-1501, CX-1510-A, CX-1573-D). CDA also provides members with information

about compliance with the Americans With Disabilities Act (CX-1503, CX-1510-A).

97. CDA provides other practice-related programs to members: A professional placement program which, CDA has stated, can save members several thousand dollars (CX-1520-B, CX-1448-E, CX-1453-O, CX-1493, CX-1513-B, CX-1515-B, CX-1520-B, CX-1524-A, CX-1543) (free to members; \$100 per six month period for non-members); a guidance or "mentor" program under which experienced dentists offer business advice to new CDA members (Tr. 338-39; CX-1453-D, CX-1496-B, CX-1522-B, CX-1519-G); an auxiliary recruitment program which places urgently needed dental hygienists, dental assistants, and dental lab technicians into member dentists' offices (CX-1455-C, CX-1587-Z-162, CX-1459-I, CX-1462-K, CX-1522-F-H, CX-1634-C, L, M); a program offering in-office training of beginning dental assistants (at a 25% discount) (CX-1455-C, CX-1634-G, CX-1517-B); a program which offers CDA members review and analysis of contracts which members may want to make with third-party payers, such as PPO's, capitation plans, or other dental benefits plans (Tr. 1248-49, 1175; CX-1451-A, C, CX-1483-Z-10, CX-1484-Z-23, CX-1501, CX-1503, CX-1562-F, CX-1563, CX-1571-A, F, CX-1575-C, CX-1639-B, CX-1644-B) which CDA estimates can save members hundreds of dollars in attorneys' fees (Tr. 1204; CX-1563, CX-1571-A); and an annual retirement and financial planning seminar (\$95 for CDA members; \$245 for non-members) (CX-1487-A-B, CX-1501, CX-1502-A, CX-1525-A, CX-1575-C, CX-1459-H, CX-1486-B).

e. Peer Review

98. CDA's peer review program provides members with an easier, less costly alternative than litigation to resolve patient complaints (Tr. 291-92, 1151, 1397-98; CX-1448-D, CX-1510-A, CX-1520-A, CX-1563, CX-1571-A).

99. CDA estimates that this program's value to members is about \$10,000 per incident as compared with "potentially costly, lengthy litigation" or disciplinary action by the State Board of Dental Examiners (CX-1520-A, CX-1571-A).

100. About 900-1,000 peer review cases are resolved each year (Tr. 1152, CX-1484-Z-23).

f. Scientific Sessions and Continuing Education

101. CDA sponsors two scientific sessions each year which it has described as "a premier member benefit" (CX-1488-A, CX-1520-A, CX-1571-A, CX-1489-A) and "the most visible and tangible membership benefit" (CX-1483-W).

102. CDA budgets over \$1 million for these two sessions (CX-1481-Z-15, CX-1482-Z-47, CX-1483-M) not including staff salaries (CX-1652-Z-22-23), which are attended by thousands of dentists, dental auxiliaries, staff, exhibitors and guests (Tr. 1155; CX-1452-A, CX-1484-Z-27, CX-1488-A, CX-1489-A).

103. The sessions offer courses, seminars, and workshops covering scientific, clinical, practice management, and financial matters (Tr. 1156-57, 1416-19; CX-1448-D, CX-1480-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1522-F, CX-1587-Z-168).

104. Member dentists may attend these sessions free of charge (Tr. 289; CX-1483-Z-55, CX-1488-A, CX-1510-A, CX-1532-A, CX-1544, CX-1562-C, CX-1571-A, D, CX-1587-Z-166). Non-members must pay a registration fee (\$855 in 1993) to attend (Tr. 1156, 289-90, 381; CX-1481-Z-44, CX-1482-Z-35, CX-1483-Z-55, CX-1488-A, CX-1504-A, CX-1587-Z-166-67, CX-1638-A).

105. The scientific sessions also offer dentists a convenient way to earn continuing education credits which are required by the State (Tr. 1157, 1160, 1397, 1195-96; CX-1448-D). This is a free, substantial benefit to members. In contrast, non-members would have to pay from \$1,600 to \$2,000 a year to earn equivalent credits (Tr. 290-91, 1397; CX-1448-D, CX-1462-I, CX-1562-C, CX-1571-A-D, CX-1575-D, CX-1587-Z-166, CX-1644-B).

106. Income from the scientific sessions helps to defray the costs of operating CDA, and may offset dues increases (CX-1484-N, CX-1482-L).

g. Publications

107. The official publications of CDA, the CDA Journal and CDA Update, provide CDA members with "the latest information regarding dental research, techniques and materials, as well as legal and legislative news" (CX-1571-L). The subscription rate for the Journal for members is \$12; for non-members it is \$60 (CX-1484).

The rate for the Update is \$6 as compared to \$24 for non-members (CX-1480-B).

108. CDA has stated that, "[b]y providing its readers with the latest in scientific and practice management information, the Journal keeps CDA members on the leading edge of technology and dental care" (CX-1575-C).

h. Benefits Provided Through For-Profit Subsidiaries

(1) TDIC

109. TDIC's purpose is to provide "stable, reasonable professional liability insurance for CDA member dentists" (CX-1472-A). In California, insurance is offered only to CDA members (Tr. 1785; CX-1587-Z-74). CDA has estimated the annual "value to member" of this coverage at over \$1,000 (CX-1520-B). And, according to CDA's Executive Director: "If TDIC were not in operation, it is an absolute certainty that the kinds of liability insurance costs would have continued to rise and never stabilized the way they have" (CX-1587-Z-84).

110. CDA also provides, through TDIC, state-required liability insurance to candidates for the California, Nevada, and Western Regional dental licensure examinations (CX-1490, CX-1491-A-B, CX-1501, CX-1522-B, CX-1525-B, CX-1526-C, CX-1544, CX-1649-Z-21-22). This insurance is free of charge to CDA members; it is not available to non-members (CX-1501, CX-1544, CX-1649-Z-1).

111. TDIC provides professional liability insurance for over two-thirds of actively practicing CDA members (CX-1478-G, CX-1480-A, G, CX-1484-Z-30).

112. TDIC has paid dividends and made other payments to CDA which contribute to a stable dues structure and keep dues lower than they might have been (Tr. 1413-14, 1189-90, 1769, 1785).

(2) TDCIS

113. TDCIS' stated purpose is "to serve as broker and administrator for various insurance programs provided for CDA members" and "to provide the finest insurance programs at

competitive rates for eligible CDA members, their families and employees" (CX-1472-A, CX-1475-D).

114. TDCIS insurance plans are available only to CDA members (Tr. 1782, 1792; CX-1509-A-B, CX-1532-A, E) and, in some cases, the members' spouses and staff, and to CDA component dental society employees (CX-1558-A, F, CX-1575-G).

115. TDCIS has more than 13,000 policyholders, more than 30,000 individual policies in place, and bills and collects more than \$55 million a year (Tr. 1782-83; CX-1484-W, Z-25, Z-29). Moreover, "each policy purchased by a CDA member contributes to the net income of TDCIS, which ultimately provides dividends to CDA" (CX-1484-Z-29).

(3) TDC

116. TDC's purpose is to provide and broker a wide range of high-quality services and products to CDA members at competitive fees with net profits to ensure its growth and to support CDA's activities (CX-1448-C, CX-1472-A, CX-1484-Z-29, CX-1546-B, CX-1562-D, CX-1571-J, CX-1637-D). These services are available only to CDA members (Tr. 1792; CX-1509-A-B).

117. The services and products provided by TDC include: a revolving line of credit of up to \$5,000 to patients of CDA members (CX-1455-K, CX-1476-F, CX-1484-Z-29, CX-1570-D, CX-1571-J, CX-1587-Z-95-96). This "valuable service" was used by 1,042 dental offices as of March 1993 (CX-1484-Z-29); dental equipment financing (Tr. 1780; CX-1479, CX-1570-C, CX-1571-J); special discounts on U.S. Sprint long distance telephone services (CX-1460-G, CX-1484-Z-29, CX-1570-F, CX-1571-J); "reduced cost printing services" (CX-1521, CX-1563); a home mortgage program, which shortly after being offered, received over \$30.8 million in applications (Tr. 1778-79; CX-1476-G, CX-1480-G, CX-1570-E, CX-1571-J, CX-1651-Z-40); a VISA gold card issued by Marine Midland Bank (Tr. 1779; CX-1480-K, CX-1484-Z-29, CX-1570-E, CX-1571-J, CX-1572-A-B, CX-1651-Z-40); and, automobile leasing services (Tr. 1780; CX-1480-K, CX-1484-Z-29, CX-1570-D, CX-1571-J). These services are used by a substantial number of CDA members (CX-1479-P, CX-1484-Z-29).

118. TDC has paid dividends to CDA which help maintain a stable dues structure and keep membership fees lower than they

otherwise might have been (Tr. 1769, 1413-14, 1189-90). TDC's substantial payments to CDA (\$5 million) have materially improved its financial position (CX-1483-Z-15, CX-1484-Z-29, CX-1546-B, CX-1637-D).

i. ADA and Local Component Membership

119. CDA membership carries with it membership in the ADA and local component societies which offer additional worthwhile programs for members.

120. There are many benefits to membership in ADA. These include: a home mortgage program; professional liability insurance coverage; advice about dental benefits programs and alternative delivery systems; a contract analysis service; credit cards for personal and business use; credit union membership; group life and health insurance; an equipment leasing program; long distance telephone discounts; a practice financing program; the "Health Cap Card," providing credit for dental patients; an antitrust law brochure; ADA's Annual Session; national dental health promotions; audiovisual education and training materials; dental product evaluation programs; legislative representation; the "Journal of the American Dental Association" and the "ADA News newsletter"; toll-free access to the world's largest dental library; a health screening program for members; public relations activities that enhance the image of dentists; and, practice management information (CX-1574-A-B, CX-1639-A-M, CX-1649-Z-38-53, CX-1563). ADA membership benefits also include a peer review system (Tr. 1228), and services designed to help dentists run, and become efficient in the administration of, their dental practices (Tr. 1227-28, 1246). ADA also offers publications on "Building Successful Associateships," "Successful Valuation of a Dental Practice," and a "Directory of Dental Practice Appraisers and Valuers" (CX-1493, CX-1524-O, CX-1568-C), and advice regarding the Americans With Disabilities Act and its effect on the dental office (CX-1468-F). CDA has touted many of the above-listed programs, services, and activities of ADA as beneficial to CDA members (CX-1521, CX-1563, CX-1571-A, CX-1575-C, CX-1648-A).

121. Membership in local component societies also carries with it several benefits: referral services, provided at no charge to members (CX-1471-C, CX-1563, CX-1565-B, CX-1571-L), which

can save them thousands of dollars a year in fees which would otherwise be paid to commercial referral services (CX-1563, CX-1565-B, CX-1571-L); emergency referral services which can help new dentists increase their patient base and build their practices (CX-1560, CX-1626-B, CX-1653-F); component "study clubs" which assist new CDA members in learning some of the skills of practice management which are not taught in dental schools (Tr. 337-39; CX-1400-L). In addition, component continuing education courses are often offered at no charge to members (CX-1626-A), or at lower rates than are available to non-members (CX-1277-F, CX-1538-B, CX-1563). CDA has touted all of these programs and services as being beneficial to its members (CX-1499, CX-1521, CX-1563, CX-1571-L, CX-1648-A).

122. Finally, tripartite membership enhances a dentist's reputation and undoubtedly attracts customers who believe that membership in a professional organization is an indication of competence (*see* Tr. 1679, 1407, 1653, 1844, 287, 384; CX-789-B, CX-880-A).

D. CDA's Charitable Activities

123. Dr. Dale F. Redig, CDA's executive director, testified about CDA activities which improve the health of the public and promote the art and science of dentistry (Tr. 1136):

CDA has supported legislation promoting fluoridation, clarifying regulations and legislation related to OSHA standards, and has supported steps to increase compensation to California dentists under the Denti-Cal Medicaid program. After a series of court actions, Denti-Cal's reimbursement level is about 60 to 65% of the usual, customary and reasonable fees (Tr. 1143-45).

CDA supports infection control and the Dental Patient Bill of Rights, which promotes the welfare of dental patients in California (Tr. 1145-47). CDA seeks adequate dental prepayment systems which encourage the public to use dental care regularly (Tr. 1145).

124. CDA has supported legislation which benefits the public, even though it may be opposed by its members.

125. These programs include encouragement of fluoridation (Tr. 1360), increased training requirements for the use of conscious sedation (Tr. 1294), opposition to proposed laws that patients be tested for AIDS (Tr. 1297), opposition to "informed consent laws"

concerning amalgam fillings (Tr. 1299), and, encouragement of legislation to curtail smoking (Tr. 1293).

126. CDA's Council on Scientific Sessions promotes, for the benefit of the public, advances in dentistry by sponsoring scientific presentations (Tr. 1155-56).

127. CDA has disaster and relief funds which help member and non-member dentists who are in desperate financial need because of illness or disaster (Tr. 1167).

128. Dr. Martin Craven, President of CDA and a former member of the AMA, testified that the public service aspects of AMA and CDA are not comparable and described AMA, in contrast, as a mere political organization interested in accumulating wealth whereas CDA's focus is on improving the dental health of the citizens of California (Tr. 1402). In his opinion, the major purpose of CDA's activities is to benefit the public (Tr. 1431).

E. CDA's Advertising Policy

129. As a condition of CDA membership, a California dentist must subscribe to, adhere to, and be bound by its Code of Ethics and Bylaws (CX-1450-E, CX-1258-E).

130. CDA's Code states:

[a] member may be disciplined for unprofessional conduct as it is defined by the Dental Practice Act, and for violation of any law of the State of California relating to the Practice of Dentistry (CDA Code Section 5) (RX-64-A).

131. In a press release issued after the complaint in this matter was issued, CDA confirmed that its ethical rules govern members' conduct:

CDA, which represents about 70% of the state's dentists, requires that members follow the law and the organization's code of ethics. The association enforces compliance; violations can result in expulsion (CX-1442-B).

132. CDA's components have agreed with it that the ethical rules which it establishes, including advertising rules, shall be the rules by which all members are governed (CX-1263-B, CX-1281-S, T, CX-1290-C, CX-1315, CX-1410-A).

133. Section 10 of the CDA Code establishes the standard which its members' advertising must satisfy:

Although any dentist may advertise, no dentist shall advertise or solicit patients... in a manner that is false or misleading in any material respect.... (RX-64-B).

134. In addition to the Code's standard, CDA relies on California law (which is incorporated into the Code), the regulations of the Board of Dental Examiners, and on sections of the Business and Professions Code (Tr. 1082; RPF 60; RX-136-A-E) to provide advertising standards which it enforces through the Judicial Council (RPF 66-69).

F. Reasons For CDA's Advertising Policy

135. In 1976, CDA's president noted that:

[d]entists as a whole are in a position now where they can determine their own fees and treatment modalities without being overwhelmed by market pressures, regulated profits, etc.

136. He then warned that:

[If CDA does not survive] we [will] all end up in a frenzied competition for patients on the basis of fees alone . . . It comes down to the potential of each of us being pitted against each other, for fees, to attract patients, and eventually dental care would be downgraded (CX-1623-A-B).

137. This aversion to competition has continued. For example, in December 1987, the executive director of a component, in forwarding an advertisement to CDA, stated:

This dentist is not in our area, Glendora is in the San Gabriel Valley component; however, if you wish me to handle this, I would be happy to do so, Italian style!!! Just let me know. These Drug Store Ads make me sick (emphasis in original) (CX-547).

138. In 1988, referring an advertising matter to CDA, one of its component members stated: "[m]uch of the advertising is in newspaper/flyer type. Perhaps [dentists] would be willing to change or stop this type of advertising" (CX-941). Also in 1988, the editor of a component newsletter stated:

The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

139. In 1989, the president of another component, writing in its newsletter, generally disparaged advertising and warned members against individual advertising, noting, among other things, that because of a "busyness" crisis (a term coined by CDA in referring to dentists' complaints that they did not have enough business) many dentists had begun to advertise:

I am increasingly disturbed at not only the degree but the nature of advertising occurring in our profession today . . . [A 1978 study found that the group] most likely to seek the services of an advertising dentist is a large family headed by a male with an annual income lower than \$15,000 (1978) and a strong belief that dental fees are too high. Is this the type patient you want to make up your practice? The patients responding to advertising are, according to [other] studies, already "on and off" patients that drift from practice to practice with little or no loyalty or bond to their doctor. . . . If the shining image of dentists is tarnished by aggressive advertising we may be viewed as wholesale tradesmen rather than honored professionals (CX-1359-B).

140. In 1994, Dr. Quint, an Ethics Committee Chairman, testified that he conducts what he calls an "indoctrination meeting" with new members of his component (CX-1608-V); at this meeting, Dr. Quint advises:

Then I say does advertising pay. I say it is not cheap. The PennySaver costs -- If you want to send out a list of PennySavers for everybody. I don't know what it is right now but it used to be about \$1500 for a postal zone. That's expensive. Telephone book is about \$500 for a half a page, \$500 a month. Fliers, you can take them to patients' houses and leave them on their door. I have one dentist that did that and he got no patients whatsoever out of it. People just do not go to the dentist because they see a flier. That's my opinion.

What kind of patients do you get when you advertise? You get coupon clippers, one-timers, nonrefers, and your old patients then will say how come I don't get the deal. How come you can't give me a discount? Here's my coupon. I know that from experience of having a person in my office who did advertise (CX-1608-Z-1).

G. Enforcement of CDA's Advertising Policy

1. Dissemination of Policy

141. CDA includes its Code of Ethics in materials it provides to new members and applicants and they receive a copy of the Code annually (CX-1244-A, CX-1608-X).

142. CDA also furnishes articles concerning advertising enforcement to its components for inclusion in their newsletters and distributes copies of its Advertising Guidelines and Code to participants in its ethics workshops (Tr. 1437-38; CX-1219-B, CX-1161-A-E, CX-1244-A, CX-1248-H).

143. CDA also sends copies of its Code to non-members, such as dental schools, who it believes can assist it in enforcing the Code's advertising policy (Tr. 884; CX-1198, CX-1219-B, G, CX-1248-H, CX-1606-F, CX-1607-F, CX-1608-F, Z-35-37, CX-1214-B, CX-1367-A).

2. Review of Advertising

144. Applicants for CDA membership are required to submit copies of their advertising and advertising by employers and associates (Tr. 685; CX-1431-B).

145. Components considering applications for membership list applicants' names in their newsletters and ask that members send them information regarding ethical problems of which the members are aware (CX-1333-D).

146. At the behest of CDA, many components review yellow pages advertising every year to discover possible Code violations (Tr. 472-73, 932-33; CX-1243-D, CX-1253, CX-1268, CX-1283-H, CX-1292, CX-1305-G, CX-1324-C, CX-1338-B, CX-1342-B, CX-1352, CX-1361-B, CX-1371-A-B, CX-1378-B, CX-1404-F, CX-1413, CX-1446-H, CX-1577-Y-Z-2, CX-1608-Z-11-12, CX-1610-V, CX-1611-Z-7).

147. CDA requires that members who enter into settlement agreements to modify or terminate existing advertising submit future advertising for review and prior approval (*see, e.g.*, CX-57-C-D). CDA and its components require applicants who have been granted conditional status to submit advertising for review and prior approval for one year (CX-52-B).

148. CDA requires its components to check the advertising of straying members (Tr. 1354, 931; CX-1195, CX-699, CX-1371-A-B), and some members who have complained about another's advertising have monitored future advertisements for compliance (Tr. 931).

3. The Enforcement Role of CDA and Its Components

149. CDA and its components have agreed to procedures for enforcing the Code's advertising rules: the components undertake an initial investigation into charges of Code violations and, where possible, resolve the matter at the local level (CX-1579-Z-6-7). One component ethics committee chairman stated that the committees are "agents of liaison between [CDA's] Judicial Council and the members of [the component], to monitor the ethical practice of dentistry" (CX-1403-E) (*see also* Tr. 507, 854, 1355; CX-1610-Z-37).

150. When reviewing questioned advertising, component ethics committees take into account CDA's instructions (Tr. 1339-40), and CDA, in some cases, monitors components' advertising enforcement (CX-478-A-B).

151. Components usually follow CDA's advice on advertising issues (Tr. 854-55, 1355; CX-177-Z-4, CX-1608-Z-7, Z-37, Z-45-46).

152. CDA and its components have agreed that when the components cannot decide whether a particular advertisement violates the Code or when local efforts at resolving advertising issues fail, the matter will be referred to CDA (Tr. 1441; CX-1260, CX-1577-Z-9, CX-1579-Z-6, CX-1603-Z-22).

153. If, during the initial investigation, a member's advertising is questioned, the ethics committee looks into the matter. If an applicant's advertising is questioned, the membership committee begins an investigation (CX-642, CX-969-A, CX-1243-D).

154. In some components, questioned advertising is reviewed by the ethics committee as a whole; in other components, an individual committee member handles such matters (Tr. 479-80, 847-48, 927-28).

155. When a component finds that an applicant's advertising violates CDA's Code, it tries to settle the matter by contacting the applicant and asking that he modify or discontinue the advertisement (Tr. 690-91; CX-1606-Z-5-6).

156. If the component fails to resolve the matter, or is not certain that the advertisement violates the Code, it forwards the application to CDA's Membership Application Review Subcommittee ("MARS") for resolution (Tr. 1023; CX-1409-E, CX-1603-Z-24-25, CX-1606-Z-8).

157. MARS is a subcommittee of CDA's Judicial Council which reviews membership applications to ensure that applicants have complied with CDA's ethical rules (Tr. 1023, 1440; CX-1219-A, CX-1259-B, CX-1484-Z-27-28).

158. After MARS has decided whether an advertisement does or does not violate the Code it makes a recommendation to the referring component. Recommendations include: full membership; acceptance with counseling; "conditional applicant status"; or, denial of membership (Tr. 1026-29; CX-118-B, CX-248-B, CX-1589-S-T, CX-1026, CX-1608-Z-8-9, CX-1606-Z-8-9, CX-1609-Z-3).

159. In one of its recommendations concerning an application, CDA told the component:

Pursuant to action taken by CDA's Board of Trustees in December 1980, CDA will extend financial assistance in the event litigation ensues from the component's membership decision only if the component: 1) follows the recommendation of the MARS; and 2) advises the applicant of its membership decision within six months of the date of this letter. (*See, e.g.*, CX-864-B).

160. Until about 1985, CDA denied membership to any applicant who advertised in a manner that violated CDA's advertising rules (CX-1215-A), and the applicant was invited to re-apply in one year (*see, e.g.*, CX-1058-C).

161. Beginning in about 1986, CDA established a membership category that it refers to sometimes as "conditional applicant" status and sometimes as "pending member" status (*see, e.g.*, CX-993, CX-1243-U). This status was originally designed for first time applicants who were new graduates (within two years of graduation) (CX-1416-E). It can only be granted once, for a one-year period (CX-1243-U), and only CDA (through MARS) can approve this status (CX-1178-A).

162. "Conditional applicant" status is available solely to dentists whose advertising violates CDA's Code, and who are unable to correct the advertising immediately. It is granted only to applicants

who agree to correct the advertising in question as soon as possible, and to cease using the improper advertising representation (CX-1178-A).

163. Dentists who are "conditional" applicants do not receive the benefits of full membership; for example, they may not hold office or advertise that they are members of CDA or ADA (Tr. 1027; CX-1243-U). Moreover, they do not have the right to a Judicial Council trial if they do not agree with the subsequent re-evaluation of their advertising (CX-1243-U).

164. Conditional applicants are given one year to bring their advertising into conformance with CDA's Code (CX-1243-U). At the end of the one year period, the component conducts an inquiry into whether the conditional applicant has brought his or her advertising into compliance, and reports its finding to CDA (CX-1243-U). A conditional applicant is either granted full membership in CDA or dropped from membership at the end of the year depending upon whether he or she has made the changes required by CDA within that time period (CX-1243-U).

165. Beginning in about 1990, MARS began granting full membership to applicants whose advertising was objectionable with the caveat that the component, whose real purpose is to obtain correction of objectionable advertising, "counsel" the dentist regarding such advertising (*see, e.g.*, Tr. 1028-29, 1522-23; CX-375-C, CX-478-A-B, CX-866-A, CX-1613-A). In such instances, CDA or the components first ensure that the applicant is willing to change, or has changed, the objectionable advertising (*see, e.g.*, CX-444-B, CX-648-A, CX-914-B), or that the component has received written assurance that the dentist will comply with CDA's Code (*see, e.g.*, CX-856-A-B). For example, in one recommendation to a component to accept and counsel an applicant, CDA emphasized that:

[CDA's recommendation of acceptance with counselling] is contingent upon [the applicant's] willingness to comply with your committee's requests in accordance with CDA's Code (CX-648-A).

166. In another recommendation, CDA advised a component:

Before MARS can recommend acceptance of Dr. Nicholl's application, it requires written assurance from Dr. Nicholl's [sic] that she will make the recommended changes contained herein, and ensure any future advertisements published on her behalf comply with the Dental Practice Act and the CDA Code (CX-775-B).

167. CDA informs applicants who are denied membership that they may reapply in one year or when the offending advertising is corrected (*see, e.g.*, CX-826).

4. Advertising Claims That CDA Has Restricted

a. Price Advertising

(1) Representations of Low Price

168. Advisory Opinion No. 3 to Section 10 of CDA's Code prohibits references to the cost of a dental service unless the representation:

is exact, without omissions . . . [makes] each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import (CX-1484-Z-49, Z-50).

169. At various times (1988, 1990, 1991, 1993) some of CDA's constituents warned members about using "terms that mislead" such as: "affordable" (CX-1363-C); "from," "between," "and up," "lowest prices" or any other implication of "bargains" (CX-1406-C); "affordable" or "reasonable" (CX-1318-B); comparative statements such as "from," "between," "as low as," "lowest prices" (CX-1257-E); and, words such as "reasonable," and "lowest" (CX-1391-B).

170. Several component ethics officials testified that low price references are objectionable without regard to whether they are false or misleading (CX-1610-Z-12-13, CX-1608-Y) (*see also* Tr. 1738, 703, 716, 944-45; CX-1580-Z-33).

171. From 1982 to 1993 CDA and its components warned members about the use of low price claims. For example, CDA recommended denial of an application because the applicant's use of the phrase "affordable family dentistry" was unverifiable and therefore inherently misleading:

Since there is no basis of comparison or knowledge upon which Dr. Hibbard could conceivably base his opinion that his fees are "affordable," this statement is false or misleading (CX-445-A).

172. In 1986, CDA recommended denial of an application, in part, because the applicant included in advertising the phrase

"affordable dentistry" on the basis that it "implies Dr. Gyaami is offering lower fees than other practitioners, or that he is offering a 'bargain'" (CX-408-B) (*see also* CX-306-A, CX-391-B, CX-605-B).

173. Appendix E of complaint counsel's proposed findings lists exhibits in which CDA restricted representations of low prices without regard to whether the claims were truthful and nondeceptive. *See also* CX-1659-Z-42-48 which lists the various phrases used by its members to which CDA has, at one time or another, objected.

(2) Representations of Discounts

174. Without regard to whether discount advertising is false or misleading, CDA requires that discount offers include five disclosures: (1) the dollar amount of the non-discounted fee for the service; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time, if any, the discount will be honored; (4) a list of verifiable fees; and (5) identification of specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount (CX-1262-I).

175. Since as far back as 1983, and continuing through 1993, CDA and its components have objected to across-the-board discounts (discounts on each service provided) that do not include at least the regular fee for each discounted service:

Sr. Citizen Discounts (1982)
(CX-753-A) (Dr. Mowery)
discount for cash; senior/family discounts (1989)
(CX-806) (Dr. Ghatnekar)
20% senior discount; 20% military discount (1991)
(CX-684-A) (Dr. McGreevey)
Senior citizen and military discount (1992) (CPF 894)
(CX-926) (Dr. Scott)
sr. citizen discounts; 40% off our regular prices for any treatment; excludes
orthodontics; offer expires 3/15/93 (1993) (CPF 921)
(CX-467-B-C) (Dr. Iskaq)
discount for all new patients (1993)
(CX-387-A) (Dr. Ghadimi)
senior citizen/military/student discount (1993)
(CX-333-A, F) (Dr. Dorotheo).

176. A number of component ethics committee chairmen, as well as the current Chairman and a former chairman of CDA's Judicial Council, testified that across-the-board discount offers that do not include at least the regular fee for each discounted service, are objectionable without regard to whether they are, in fact, false or misleading. For example, Dr. Nakashima testified that dentists cannot advertise, without the required disclosures, across-the-board discounts such as "senior citizens discount," and "discount for all new patients," even if the claims are true, and even if the advertiser has appropriate substantiation (Tr. 1742-43). (*See also*, Tr. 1064, 1067; CX-1577-Z-20-21, CX-1606-Z-20, CX-1608-Z-32).

177. One of CDA's components warned its members that its discount advertising requirements came close to a ban on discount advertising:

[T]he CDA Code of Ethics information requirements are nearly prohibitive - fees, %discount, length of time, etc. (CX-42, CX-589, CX-972).

178. In 1988, one of CDA's components made the same point:

The first mistake is advertising a discount. This is against ethical practice in the State of California. The second mistake, is advertising a discount fee without advertising the original fee (CX-806-A).

179. Dr. Miley, who was put on trial by CDA for four objectionable advertisements, testified that CDA's discount advertising rules effectively preclude across-the-board offers because, in order for a dentist to advertise in compliance with CDA's rules, he would have to include the regular fee for one hundred to three hundred different procedures. He concluded: "even though everybody said at the trial it was legal to advertise, the fact is you couldn't and meet their guidelines" (Tr. 360-61).

180. Dr. Kinney, a current member of CDA's Judicial Council, testified that literal application of CDA's discount advertising rules would not make sense:

[T]hat kind of ad would probably take two pages in the telephone book [and] [n]obody is going to really advertise in that fashion (Tr. 1372).

181. Dr. Cowan, a component ethics committee chairman, testified:

We wouldn't expect someone to list the prices of each and every service. Do you realize how many services there are that a dental office provides? . . . I mean, that would be totally unreasonable to expect them to list every single fee and the amount of the discount (Tr. 1593-94).

182. Appendix D to complaint counsel's proposed findings lists exhibits in which CDA restricted discount claims without regard to whether the representations were truthful and nondeceptive. *See also* CX-1659-Z-27-40 for a list of documents which reveal that, at one time or another, CDA has objected to discount claims by its members.

b. Non-Price Advertising

(1) Quality

183. In 1982, CDA informed its members that quality claims in advertising violated the Code of Ethics (CX-1228-A), quoting Advisory Opinion No. 8 to Section 10 of the Code which is still in effect:

Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in a material respect (CX-1484-Z-50).

184. A checklist used as recently as 1992 by one of CDA's components to inform members that their advertising violated CDA's Code included in a list of categories of phrases under the heading "Prohibitions":

use of words relating to quality of performance such as "high level," "fast results," and "progressive" (*see, e.g.*, CX-731-A).

185. In October of 1993, one of CDA's components warned its members in an "ETHICS UPDATE" that they should not use the term "quality" in advertising ("DON'T: Use terms that mislead: *i.e.*, 'quality' . . .") (CX-1363-D).

186. A number of component ethics committee chairmen testified that advertisements that include the word "quality" are objectionable without regard to whether they are, in fact, false or misleading:

The use of the word quality in any form is misleading because it's nonspecific and it implies superiority (CX-1610-Z-23);

The use of the word quality and perhaps the use of the word gentle are two unverifiable and unsubstantiable terms (CX-1610-Z-28);

Q. On the occasions that a dentist would use the word "quality" in advertising, would you consider that an unacceptable superiority claim?

A. I think the little blurb on advertising guidelines suggest that you don't use "superior quality" as an advertisement (CX-1577-Z-36-37).

(*See also*, Tr. 706; CX-1608-Z-42 (quality claims are objectionable "because there is no way to prove it")).

187. In 1993, one of CDA's components objected to an applicant's use of the phrase "quality care for less" but did not make any request for substantiation, and made no inquiry into whether the claim was in fact false or misleading; the component simply stated its objection, and directed the dentist to correct the advertising and to acknowledge, by checking a form supplied to him by the component, that he either had "discontinued" the advertising or "will alter or have altered the advertising to conform to" CDA's Code (CX-366-A, B).

188. In 1993, one of CDA's components objected to an applicant's use of the phrases "render personal quality dental care," and "providing you with the best in treatment" on the basis that "quality services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in a material respect" (CX-120-B).

189. In 1989, CDA notified a dentist that his advertising violated the Code since "you are advertising that your dental office provides superior dental services" because of these statements:

We believe quality in dentistry is never an accident. It is the result of caring, effort, and wise decisions. ("Implies that other dental offices do not put as much effort, care, etc., into achieving and providing quality dental services as your dental office.") (CX-868-A).

[W]e cater to those people that demand quality, personal attention, and punctuality. ("Implies other dental offices do not cater to patients with these demands.") (CX-868-A).

190. In 1986, CDA recommended denial of an application because, among other things, the applicant had advertised "claims as to the quality of services that are not susceptible to measurement or verification":

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Initial Decision

gentle dentistry team;
gentle, caring dental team
the dedicated professional . . . at Silver Ridge
quality dentistry with a touch of tenderness
quality dentistry in a pleasant and positive manner
the sensitive hygiene team
leading edge technology
you shouldn't have to wait hours or days for dental care. The team at Dr. Reid's is ready to help when you need them (CX-846-A-B).

191. In 1982, CDA notified one of its components that one of its members' advertising was objectionable because, among other things, it included a claim of quality: "we make the finest dental care easy for you" (CX-107-A). CDA did not direct the component to request substantiation for the claim, or to make an inquiry into whether the claim was in fact false or misleading; rather, it simply directed the component to request that the dentist "delete the word 'finest' from future advertisements" (CX-107-A).

192. In responding, the component ethics committee chairman stated:

It was very difficult for Dr. Brown to understand why words like quality and finest were in violation and I can see his point of view (CX-108-A).

193. Appendix F to complaint counsel's proposed findings lists exhibits in which CDA restricted quality claims without regard to whether the representations were truthful and nondeceptive. *See also* CX-1659-Z-50-59 for a list of documents which reveal that, at one time or another, CDA has objected to quality claims by its members.

(2) Comparative and Superiority Claims

194. In 1982, CDA informed its members that claims of superiority violate the Code (members should avoid the "implication of superiority") (CX-1228-A). In that same year it warned its members to avoid claims that imply professional superiority (for example, "comfortable") (CX-1229-A).

195. In 1988, the editor of a component newsletter advised its members that:

The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

196. In 1991, one of CDA's components warned its members:

You must avoid any inference of superiority, such as "high level," "progressive," "fast results," "modern," "latest," "new," etc. (CX-1406-C).

197. Other components warned members about the use of superiority claims:

The general message is that the advertisement to the general public may not be deceptive or show superiority over other practices (CX-1629-B) (in 1993).

Superiority claims in any form will guarantee problems with the California State Board and the CDA (CX-1363-C-D) (in 1993).

One of the "two most common mistakes" in advertising is:

using words that imply superiority of service, *i.e.*, "newest," "latest," or "progressive" (CX-1627-F) (in 1993).

198. A number of component ethics committee chairmen, as well as a former chairman of CDA's Judicial Council, testified that they object to all statements that they believe imply that the advertising dentist is superior to other dentists, regardless of whether the claims are, in fact, false or misleading:

[phrases that] impl[y] an essence of superiority by [the advertising dentist] as in relationship with other dentists . . . violate [CDA's] Code of Ethics (CX-1610-Z-12).

I don't think you can legally advertise that you are superior to anybody else. . . . You can't imply superiority (CX-1608-Z-15).

And how in heaven's name does any member of the public ever verify that [a dentist's service] is actually superior? (CX-1579-Z-13).

(*See also* Tr. 691-92, 716; CX-1580-Z-4); Tr. 880 (superiority claims are objectionable because they can never be substantiated); Tr. 938 (claims that imply superiority, such as "I am more gentle than other dentists in my area" are objectionable because such claims "may be very hard to verify"); Tr. 1030; CX-1577-Z-13-14, CX-1603-Z-31-32, Z-62 (superiority claims are "absolutely" objectionable).

199. In 1983, CDA recommended denial of an application for membership on the basis that, among other things, the applicant used a phrase ("we care") that violates CDA's Code because the phrase "implies superiority, or that Dr. Hibbard cares more than another dentist" (CX-449-A).

200. In 1986, one of CDA's components notified an applicant that his advertising violated CDA's Code because, among other things, it included the phrases "new improved," "a visit to your dentist needn't be unpleasant," "my number one concern is your care and comfort" because:

These statements imply that one is professionally superior to other practitioners or that one is pleasant while others are not; that one is concerned where others are not; or that one has some "new" and better technique available (CX-238-A).

201. The record reveals many other instances in which CDA, a component, or an ethics committee member objected to quality or superiority claims because they implied that other dentists did not provide the same quality service:

You'll appreciate our warm personal attention (CX-978-A) (in 1988)
State of the art dental services (CX-1026-A) (in 1992)
gentle (CX-467-A) (in 1993)
gentle, painless (CX-24-A) (in 1993)
caring dentistry (implying that [the dentist] cares, implies that others don't, perhaps) (CX-1610-Z-32-33)

202. In another case, CDA advised a member that his advertising was objectionable because the claim "you will find our reputation is impeccable" "implies that other dental offices do not have impeccable reputations" (CX-868-A-B, CX-626-A).

203. Dr. Kinney testified that a representation would be an objectionable superiority claim if the dentist is "claiming that they have something that sets them apart from the rest of the profession, that no one but themselves has the ability to either utilize this technique or understands it well" (CX-1578-Z-17).

204. Appendix G to complaint counsel's proposed findings lists exhibits in which CDA restricted superiority claims without regard to whether the representations were truthful and nondeceptive. *See also* CX-1659-Z-61-71 for a list of documents which reveal that, at

one time or another, CDA has objected to superiority claims by its members.

(3) Guarantees

205. Quoting state law, CDA has, as a practical matter, barred the advertising of guarantees by its members without regard to whether the offers are false or misleading. *See, e.g.*, CX-1017-A in which CDA, asserting that state law "prohibited" guarantees, stated:

Any violation of state law related to the practice of dentistry or unprofessional conduct as defined by the Dental Practice Act renders members liable to disciplinary action by the association according to Section 5 of the CDA Code of Ethics.

(*See also* CX-98-A, CX-354-A, CX-557-C-D, CX-497-C, CX-391-C, in which CDA made similar statements about member's advertisements, ignoring the fact that state law permits truthful, nondeceptive offers of guarantees (RX-137-B [1680(1)], RX-138 [651(L)])).

206. The record contains many examples of CDA's objections to members' advertisements which offered or, according to CDA, implied a guarantee:

Our 15 year reputation is your assurance of personal satisfaction (CDA: "[i]n this context, the word 'assurance' is synonymous with the word 'guarantee'") (CX-644) (in 1985).

removable braces that can straighten your smile in as little as 6 months (CDA: "May imply Dr. Moga is guaranteeing a dental service") (CX-740-C) (in 1985).

we guarantee our work (CX-22-B) (in 1985).

satisfy your dental needs, or we will refund your money (CDA: [phrase] appears to be a guarantee for dental services) (CX-98-A) (in 1987).

Ask about guarantee (CX-274-C) (in 1992).

we offer the safest and most painless (CX-1000-C) (in 1992).

outstanding success rates (CX-354-A) (in 1992).

sure fit, comfortable dentures (CX-495-A) (in 1992).

crowns and bridges that last (CX-497-C) (in 1993).

we guarantee satisfaction (CX-484-B, D) (in 1993).

207. Several component ethics committee chairmen and a former Judicial Council chairman expressed their opposition to offers of guarantees without considering whether they are false or misleading:

I don't think you ought to be saying you guarantee something (CX-1577-Z-14).

Q. In your opinion, does an advertisement that offers a guarantee, whatever the guarantee is, violate CDA's Code of Ethics?

A. I would say anything about a guarantee, yes . . . (Tr. 1047).

See also Tr. 937, 1456-57, CX-1603-Z-49, CX-1606-Z-15, CX-1611-Z-36.

(4) Consumer Anxiety

208. In 1984, one of CDA's components objected to an applicant's use of the phrase "gentle, quality care" (CX-799). The component advised the applicant that before his application could be completed, he would need to submit a written statement agreeing to cease using this phrase "and other terms which violate" CDA's Code (CX-799).

209. In 1983, CDA objected to a member's advertising because it included, among other things, the phrase "special treatment for nervous patients" (CX-367-B).

210. In 1985, CDA objected to advertising by an applicant's employer because it included, among other things, the phrase "special care for cowards" (CX-608-A).

211. In 1986, one of CDA's components notified an applicant that his advertising violated the Code because it included, among other things, the representations "a visit to your dentist needn't be unpleasant," and "my number one concern is your care and comfort" (CX-238-A).

212. In 1988, one of CDA's components objected to a member's advertising because it included, among other things, the words "sensitive" and "caring" (CX-761).

213. In 1991, one of CDA's components notified a member that his advertising did not conform to the Code because it included, among other things, the phrase "provide you with special service and comfort" (CX-684-A).

214. In 1992, one of CDA's components objected to an applicant's advertising because, among other things, it included the use of words relating to apprehensions of patients ("gentle dental care") (CX-767-A).

215. In 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the word "gentle" (CX-467-A).

216. Appendix C to complaint counsel's proposed findings lists exhibits that reflect CDA's restrictions on representations addressing consumers' fears and anxieties concerning dental care.

5. Materiality & Falsity

217. When CDA or its components analyze members' advertising claims, they purportedly apply the "false or misleading in a material respect" standard (CX-1484-Z-49); however, they have ignored this standard in some cases by overlooking the importance which challenged claims might have to consumers.

218. CDA and its components have objected to advertising to which, they assert, no one pays attention. For example, Dr. Quint testified:

When you use misleading statements, many people will say that's just a misleading statement and just don't pay any attention to it. That's why we tell our members don't bother using misleading statements because they are against the law and nobody pays any attention to them anyway (CX-1608-Z-19).

219. Dr. Lee, currently a member of CDA's Board of Trustees (Tr. 1007-09), testified that while he does not know whether discounts are important to consumers, discount offers violate CDA's Code if they do not include the regular fee for each discounted service (CX-1589-I, Z-48-49) (*see also* CX-1577-K-L, Z-2-3).

220. CDA and component officials charged with enforcement of the Code's advertising restrictions have, in several cases, equated the "material respect" standard with "misleading." An example of this approach is expressed in a component's 1990 newsletter:

Interpretation of "material respect" is a matter of degree. If an ad is obviously and demonstrably false or misleading, then it must also be false in some material respect. If an ad contains only slight misrepresentations of fact that would not deceive a prudent person, then the "material respect" rule has not been violated (CX-1252-C).

221. In trial testimony, Dr. Lee defined "material respect" as "[w]ould someone be misled reading the advertisement" (CX-1589-Z-30), as "[s]omething that I guess you can put substance to" and as "something indicating superiority"; furthermore, he could not explain

what was "material" about certain advertising claims that CDA had challenged (Tr. 1042-43).

222. In addition to their confusion about materiality, CDA or its components have applied their own advertising standards in place of "false and misleading" for certain claims regardless of the truth of such claims:

Claims that may "insult the public" (CX-1611-Z-44-45; Tr. 947-49)

Claims that were insulting or offensive to a dentist's peers (Tr. 961-64)

Claims that should be removed from an advertisement so that dentist's peers would feel more comfortable (CX-359-A)

Vague or ambiguous claims or claims the public would not understand (Tr. 944; CX-1611-Z-36-37)

Subjective claims (CX-48-H, CX-945-A)

Claims that do not "lift the image of the profession in the eyes of the public" or conduct which does not "elevate the esteem of the profession" (CX-1484-Z-49, CX-1611-Z-45, CX-115-A)

If advertising lists more than one location or uses fictitious name, unless approved by state (CX-745-C-D, CX-333-B)

Use of religious or ethnic affiliation in advertising (CX-1318-B).

6. Substantiation

223. In many instances, CDA and its components have restricted members' advertising on the ground that certain claims are inherently unverifiable. For example, the following claims were objected to (material in parentheses are comments by CDA or a component):

"a group of dentists dedicated to quality dental care at low cost" (implies superiority, not verifiable, and includes use of lowest price) (CX-373-B-C);

"comfortable and personalized" (CX-1078-A; unverifiable);

"latest equipment and gentle, caring techniques" ("Advertising claims as to the quality of services are not susceptible to measurement or verification. Accordingly, such claims are likely to be false or misleading in any material respect") (CX-759); and

"gentle, caring, qualified dentist" (implies superiority, raises unjustified expectations, and is not verifiable) (CX-413-B).

224. Some ethics committee chairmen, and a former chairman of CDA's Judicial Council, testified that certain advertising claims are inherently unverifiable. These claims include: "State of the art" (Tr. 880, CX-1580-Z-29); claims of low prices or quality claims (Tr. 1053, 1071); "affordable" or "reasonable" fees, "latest in dentistry,"

"quality gentle care" "caring" (Tr. 483-84, 490-91; CX-1610-Z-13, Z-17, Z-27-28, Z-32-33); all superiority and quality claims (CX-1608-Z-17, Z-52-53, Z-41-43); "more gentle than other dentists in my area" (Tr. 938).

225. One of CDA's components warned a member:

We would like to remind you that a fee survey - whether conducted formally or informally and by an individual or the dental society - is illegal and can be construed as price-fixing by the Federal Trade Commission. At this time the FTC is pursuing a lawsuit involving just this type of situation and it is being watched closely by the ADA. Your colleagues are restricted by law from relaying their fee schedule to other dentists - and we would ask that you keep in mind that the word of patients is not always totally reliable (CX-1293-A). (*See also* Tr. 490-91).

7. Verification by the Public

226. CDA components have objected to advertising claims because they are not verifiable by the public. For example:

In May of 1993, one of CDA's components informed a member that his advertisement violated the Code, in part, because the phrase "high quality dental services" suggests unique or general superiority to other practitioners [and] is not susceptible to reasonable verification by the public (CX-63-A);

Also in May of 1993, one of CDA's components objected to an applicant's use of the phrase "gentle" because, among other things, "statements should be avoided which contain a representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public" (CX-467-A);

In June of 1993, one of CDA's components objected to an applicant's use of the phrase "with the utmost degree of professional care" because, among other things, it is a quality claim that suggests superiority that is not susceptible to reasonable verification by the public (CX-120-B); and

In November of 1993, one of CDA's components objected to an applicant's use of the phrase "[we] render personal quality dental care" because it is a "representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which [is] not susceptible to reasonable verification by the public" (CX-381-B).

227. A number of component ethics committee chairmen, as well as Dr. Nakashima, the current chairman of CDA's Judicial Council, testified at trial and in depositions about verification of advertising claims by consumers. Dr. Lukens testified that the word "best" is objectionable because "it implies superiority and is undeterminable by the public" ("[i]f the public was to read that advertisement, they

would have no way of judging whether this dentist was better or worse than another dentist") (CX-1610-Z-10-11).

Dr. Abrahams testified:

Well, semantically how does one arrive at the ability to say that a practitioner offers something that's superior to what another practitioner offers, how does one verify it? How could the same thing, on the same realm, how does one know that one is offering -- as a consumer now, reading the advertisement -- how does one know that the prices are cheaper than someone else's (CX-1579-Z-20).

228. At trial, Dr. Lukens testified that an advertisement would be false or misleading if the general public would be unable to determine the truthfulness of the advertisement "just by reading it" (Tr. 486), and agreed that "representations that consumers cannot verify on their own from the ad are violations of respondent's code" (Tr. 509). Dr. Nakashima, in explaining his concerns about the phrase "we are dedicated to maintaining the highest quality of endodontic care," testified:

- A. Well, the statement needs to be verified in that it needs to state what specific manner of service qualifies them to say "the highest quality of endodontic" -- they need to spell out what it is that assures the patient the highest quality of -- what is it that they do that assures the patient the highest standards, the highest quality. They need to be able to validate and verify -- he needs to spell out what it is that he does makes the statement correct.
- Q. And he needs to do that in the ad, is that correct?
- A. Yes.
- Q. And even though he can verify it, has adequate substantiation, the dentist cannot advertise this phrase unless that substantiation is in the --
- A. It must be in the ad.
- Q. -- in the ad?
- A. Yes (Tr. 1545).

The next day, the Doctor testified that advertising does not need to include the required substantiation in order to comply with CDA's Code of Ethics (Tr. 1717-18).

229. CDA has also objected to the phrase "a caring gentle dentistry team," because it was not possible for a patient to verify claims such as "we care" (CX-737-B). In another matter, CDA objected to "affordable" because the public purportedly has no means to measure such claims (CX-596). A component also objected to an applicant's use of the word "trustworthy" for the same reason ("statements shall be avoided which would contain a representation

or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public") (CX-391).

H. CDA's Reliance on State Law and Regulation

230. Although not an agent of the State of California (Ans. at ¶ 10), CDA's advertising policies look for guidance to the Dental Practice Act, the Business and Professions Code, and regulations of the State Board of Dental Examiners (Tr. 1447-50, 1468-69; RX-136-A-E, RX-137-A-C, RX-138-A-G).

231. CDA takes an active role in enforcing advertising restrictions because it believes that, due to budget constraints, state agencies are not enforcing the laws on advertising (*see* CX-1442-A, CX-1444-A: "[t]he State Board of Dental Examiners has listed advertising enforcement dead last on its priority list"). (*See also* Tr. 1469-70; CX-1390-B, CX-1350-A, CX-1445-D).

232. The Chairman of CDA's Judicial Council testified that the President of the Board of Dental Examiners told him that "the only reason that there doesn't seem to be a strong emphasis on that [advertising] by the Board is due to budgetary constraints and staff constraints" (Tr. 1469-70); and, the former Chairman of CDA's Judicial Council, and a current member of CDA's Board of Trustees, testified:

[T]he board's capacity regarding advertisements is very, very low. I have never seen a case where the board has actually restricted or told anyone that their advertising was in violation of state law. . . . [Advertising is at or near the bottom of the Board's priority list] because the Board, because of budgetary restraints, has no money to go out and enforce that (Tr. 1034, 1038).

233. Other statements by CDA echo this sentiment:

[State law has] not been enforced by the state Board of Dental Examiners because of budgetary restraints. CDA is filling a void (CX-1442-A).

The state Board of Dental Examiners has listed advertisement enforcement dead last on its priority list. . . . The FTC doesn't do much enforcement either. [Respondent] does it because it needs to be done (CX-1444-A).

CDA is basically doing what the state agency should be doing. We are being sued because of [a] Code of Ethics that says 'must abide by the rules and laws of the state' which is the Dental Practice Act. Because the Board of Dental Examiners

does not have the funds to enforce the advertising portions the FTC is saying CDA should not (CX-1390-B).

[Respondent's position is that] our code only enforces state law, which the BDE [Board of Dental Examiners] have so far been unwilling to enforce (CX-1350-A). Manpower and priorities limit most of the board action to warning letters and follow-ups based only on complaints from other dentists (CX-1445-D).

[I]f Dr. Miley has his way and the CDA went after no one for discipline until the state board had, then the majority of the violations in the state would go unaddressed, they would go unaddressed for nonmembers, they would go unaddressed for members. No advertising violation would ever receive any kind of discipline whether it be a reprimand or a suspension or expulsion (CX-724-Z-161-62) (Argument by prosecutor at a CDA disciplinary hearing).

234. CDA's attempts to enforce state law have resulted in confusion about the appropriate standards which should be used when judging members' advertising. For example, during the trial a CDA representative agreed that 1680(i) of California's Business and Professions Code did not prohibit superiority claims that are truthful and not deceptive (Tr. 1477-78); yet, from 1982-1993, CDA took the position that all claims of superiority were unlawful:

Claims of superiority are proscribed by Section 1680(i) of the Dental Practice Act and thus violate Sections 5 and 20 of the CDA Code of Ethics (1983 letter to a component from CDA) (CX-885-A).

Words denoting professional superiority or the performance of professional services in a superior manner are prohibited by Business and Professions Code Section 1680(i) (CDA's Advertising Guidelines) (CX-1262-G) (1988).

MARS also determined that by using the phrase "Highest Standards in Sterilization," [dentists] are advertising in violation of Section 1680(i) of the Dental Practice Act, which prohibits advertising the performance of services in a superior manner, as well as the previously cited Section 5 of the CDA Code of Ethics (CX-394-B) (1993 letter).

235. CDA objects to "quality" claims, equating them, at times, to superiority claims (*see, e.g.*, CX-391-A); also, it has claimed from 1985-1993 that the Dental Practice Act imposes an absolute ban on guarantee offers (CX-22-B, CX-497-C). However, in 1985, the Board of Dental Examiners stated that it did not consider claims like "quality dental treatment" as superiority claims (CX-1622); and, during the trial a CDA representative testified that Section 1680(i) of the Business and Professions Code did not prohibit all guarantees (Tr. 1478-79).

236. CDA has also, from 1986 through 1993, told its members that Sections 651(b)(4) and (c) of the Business and Professions Code

imposes an across-the-board ban on representations of low prices (CX-832-B, CX-730-B, CX-32-A), but at trial, a CDA representative agreed that the Act does not prohibit all representations of low prices (Tr. 1479-80). Furthermore, the State Board notified CDA in 1986 that it did not object to the phrases "low fees," "reasonable fees," and "low cost" fees (CX-1426-A). (*See also* CX-1622).

237. From 1982 to 1993, CDA and its components have told their members that a Board of Dental Examiner's regulation concerning discount advertisements prohibits such advertising unless five elements are disclosed therein, a requirement which the Board modified in 1985 (CX-1622) but which CDA and its components continued to enforce. This requirement was so complicated that it essentially constituted an absolute ban on discount advertising:

Additionally, the words in the coupon "Presentation of this card allows one complete dental examination, x-rays, oral evaluation, and treatment plan at 25% discount for cash," violate the Dental Practice Act regulations for advertising a discount . . . (CX-445-B);

The referenced advertisement also contains the statement, "Senior Discount." The advertisement fails to list the dollar amount of the non-discounted fee for each service, and to inform the public of the length of time the discount will be honored. Therefore, the advertisement violates section 1051 of the regulations adopted by the Board of Dental Examiners . . . (CX-497-C-D, CX-855-A).

238. Requiring an advertisement offering a discount to senior citizens to list the dollar amount of the non-discounted fee for each service is, as a practical matter, a ban on discount advertising (F. 180).

239. Some witnesses understood that state law does not impose absolute prohibitions on certain kinds of advertisements; others were not so sure. For example, Dr. Lukens testified that representations of low prices violate the Dental Practice Act (Tr. 515-18) yet he did not know how the Board applies or enforces the Dental Practice Act regarding claims such as "prices as low as" or "lowest prices" (Tr. 535-36).

240. Dr. Soo Hoo testified that the Dental Practice Act prohibits advertising "anything about quality" (Tr. 706) but he has never asked the Board of Dental Examiners how they apply or enforce the Dental Practice Act regarding quality claims (Tr. 707).

241. Dr. Yee testified that he believes the Dental Practice Act prohibits offers of senior citizen discounts that do not include each

disclosure set out in Board regulations (Tr. 955-56). However, he also testified that he does not know how the Board of Dental Examiners applies or enforces the Dental Practice Act regarding discount advertising (Tr. 956). Nor does CDA, according to Dr. Lee, when it decides that a dentist's advertisement violates state law, determine the position of the Board of Dental Examiners concerning low price, guarantee, or discount advertising (Tr. 1034-36, 1046, 1049-50, 1065-66).

242. Also, Dr. Nakashima testified that he does not know how the Board applies or enforces the Dental Practice Act and Board regulations concerning discount advertising, offers of guarantees that are truthful and non-deceptive (Tr. 1475-76), or offers of a senior citizen discount that do not include the disclosures listed in Board regulations (Tr. 1537).

243. Moreover, CDA and its components challenge advertisements which, by their very nature, could not be false or misleading in a material respect. Thus, it has objected to advertising a fictitious name without obtaining a permit (CX-333-A), and an advertisement which is not exactly as approved by the Board of Dental Examiners . . . (emphasis in the original) (CX-543-B). CDA also objects to all advertising of ethnic or religious affiliations and referred to this objection at a 1990 ethics workshop (CX-1318-B; *see also* CX-731). CDA also challenges advertisements that include more than one location unless the state has permitted practicing at more than one location (CX-389-F).

244. CDA knows that California's attorney general has advised the Board of Dental Examiners that state laws and regulations pertaining to advertising must be enforced in a manner that is consistent with United States Supreme Court rulings with respect to advertising by professionals (CX-1425-D).

245. As early as 1986, CDA knew that the Board of Dental Examiners interpreted the statute concerning representations of low prices less strictly than CDA thought was warranted by the statute. Specifically, the Board informed CDA that it does not interpret literally a statutory restriction on the advertising of "low prices," and does not challenge representations such as "reasonable fees" or "low cost fees"; CDA insisted, however, that those representations are prohibited by the statute and asked for written confirmation of the Board's interpretation (CX-1426).

I. The Administration of CDA's Advertising Policy

1. CDA's Advertising Standards

246. The standard against which CDA has measured its members' advertising is set forth in Section 10 of its Code of Ethics, and has been unchanged from 1985 to 1993 (CX-1227-D, CX-1484-Z-49-50, CX-1577-Z-9-10, CX-1607-Z-8-9, CX-1610-Z-7). The standard during this period was whether the challenged advertisement was "false or misleading in any material respect" (CX-1284-E, 1982 Code of Harbor Dental Society) or "false, misleading or deceptive in a material respect" (1982 minutes of CDA's Judicial Council).

247. In 1993 CDA claimed that in reviewing advertising, it "applies the standard of false and misleading in a material respect to determine whether or not the advertisement in its entirety violates the CDA Code of Ethics" (CX-1205).

248. Dr. Lee, a former chairman of CDA's Judicial Council, instead of using the word "entirety," described the 1993 change as adding "totality" to the standard (CX-1589-Z-18-19).

249. The meaning of the words "entirety" or "totality" is unclear. Dr. Nakashima suggested that "reviewing the advertising in its entirety" means that the greater the seriousness and number of the violations, the more likely that a dentist will be denied membership in CDA or a member will be cited to trial (Tr. 1725-26). On the other hand, Dr. Lee, a current member of CDA's Board of Trustees and a former member, and chairman, of CDA's Judicial Council, when asked about the meaning of "viewing an advertisement in its entirety," answered that he did not know what it was about the entirety of various advertisements that caused claims to be false or misleading (Tr. 1049, 1051; CX-1589-Z-28-29).

2. Guidance With Respect to CDA's Advertising Standards

250. Dr. Yee testified that the phrase "we cater to cowards," which was, at one time, unacceptable, can now be used (Tr. 964). He was then asked:

Q. Has your committee gone back to that dentist and said "We objected to 'we cater to cowards' before, but we are no longer objecting"?

A. Not specifically that dentist, no.

Q. So how would that dentist know that advertising that the society has objected to before was no longer objectionable?

...
A. There is a component newsletter that comes out once a month in which, when it gets close to the time in which dentists are submitting their advertisements for the yellow pages, that we print the guidelines in which -- or in which we also state that we offer to review their advertisements. That's the way we disseminate information as to changes.

Q. And do you recall the newsletter stating that "We cater to cowards" is now okay, and it wasn't before, or is it just that you set out the standard that you use?

A. It's just that we set out the standard that we use.

251. Until 1988, CDA prohibited the following representations:

gentle dentistry; we cater to cowards (1983) (CX-971-B-C); gentle, quality care (1984) (CX-799); Fast and caring (1985) (CX-675-A); personalized (as in "complete personalized family dentistry") (1988) (CX-1106-A, B); gentle dental care (1992) (CX-767-A); and gentle care; gentle exams (1993) (CX-24).

252. In April 1988, CDA began to inform individual components or individual members that the use of the term "gentle" did not violate its Code (RX-6), but CDA did not then notify either its entire membership or all of its components of this change, and a number of the components continued to tell its members and/or applicants that CDA's Code prohibited the use of the term "gentle." For example, components objected to:

gentle dentistry is an art (1991 letter from component to applicant) (CX-563-A); the term "gentle" as in "gentle injections," "gentle exams," and "gentle care" (1993 letter from component to member) (CX-24-A-B); and "gentle"; "we cater to cowards" (1993 component newsletter) (CX-1363).

253. While CDA was aware in November 1992 that at least one of its components continued to restrict the use of the word "gentle" (CX-933), it took no action until June 1993 to notify the remainder of its components that the use of that word was acceptable (CX-1205). Even after this date at least one component continued to question whether the use of the word "gentle" was consistent with CDA's Code (CX-783).

254. Over the years, CDA has taken inconsistent positions concerning the word "reasonable." In 1985, it notified its components that while the use of the word "reasonable" in advertisements previously had been considered acceptable, it no

longer was acceptable because "reasonable" is an inexact reference to the cost of dental services, and along with the term "affordable," "may violate [CDA's] Code and state law and should be avoided." CDA directed the components "as soon as possible" to inform members of the information CDA was providing, referring this time to "violations" of the Code or state law (CX-1199-C).

255. In 1991, CDA changed its position, finding that the term "reasonable" was acceptable (CX-1223-D). This change was based on a 1978 decision -- re-discovered by CDA in 1991 -- by its Judicial Council that the word "reasonable" was not objectionable (RX-57).

256. In 1993, one of CDA's components advised a dentist that the phrase "reasonable fees" violated CDA's Code (CX-778-A).

257. Also in 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the representations "reasonable," "low prices," and "goes easy on your pocketbook" (CX-391-A).

258. Finally, in 1993, CDA itself recommended denial of an applicant for membership because, among other things, his employer's advertising included the phrase "reasonable fees quoted in advance" (CX-118-B).

259. One of the reasons for CDA's inconsistent interpretation of phrases used by its members in advertisements is the lack of a consistent procedure to inform members about changes in CDA's advertising rules.

260. Some of the problem lies in confusion about the role of CDA's Judicial Council and the component societies. For example, Dr. Nakashima testified that after his component asked CDA's Judicial Council about the use of "comfort" and "gentle treatment" and received a response:

Q. And when you found what their response was, did you send out a memo with an indication to your members saying that it has now been determined that "comfort" and "gentle treatment" are acceptable terms?

A. No.

...

We didn't feel that it was necessary for us to send a letter to all of our members about the determination of the Judicial Council. That has never -- we never perceived that as our role. . . . (Tr. 1489).

261. Interpretation and application of CDA's advertising rules varies between components. For example, Dr. Soo Hoo, the current

ethics committee chairman for the Southern Alameda County Dental Society disagrees with Dr. Nakashima of the San Francisco component that advertising a senior citizen discount without all of the required disclosures violates the Code (Tr. 696, 1742-43).

262. Interpretation and application of CDA's advertising rules even varies within a component depending upon which committee handles a matter: while Dr. Soo Hoo of his component's ethics committee believes that across-the-board senior citizen discounts do not violate the Code, his component's membership committee has challenged this kind of offer and, in 1989, denied an application for membership because the applicant offered "Senior Citizen Special Courtesy Discount" (CX-1016-D-E).

263. Dr. Cowan, ethics committee chairman of the Tri-County Dental Society, testified that he does not object to advertising simply because it contains words such as "reasonable," "low," or "affordable" (Tr. 1574-75), yet, his component's membership committee notified an applicant in 1993 that her advertising violated CDA's Code because, among other things, it included inexact references to the costs of dental services ("reasonable," "low prices," "goes easy on your pocketbook"), and asked her to sign, date and return the component's letter to indicate that she "acknowledges" the component's objections and that she will comply with the Code (CX-391-B). Inconsistencies like this may be due to the lack of contact between ethics committee chairmen in some components and their counterparts on membership committees (*see* Tr. 475-76, 856, 933; CX-1607-Z-1-2, CX-1608-Z-13-14).

264. Such inconsistencies are inevitable because of CDA's failure to adopt a procedure which ensures that rulings on members' advertising are promptly and consistently sent to all members:

Q. When you were on the Judicial Council, Dr. Lee, did you know how the components interpreted and applied CDA's Code of Ethics?

A. Did I -- did I know?

Q. Yes.

A. No.

Q. Did you know, when you were on the council, whether any component prepared and distributed any materials regarding advertising to its general membership?

A. No.

Q. And again this is when you were on the Judicial Council, did you know whether any component prepared and distributed any materials regarding advertising to give to applicants or new members?

A. No.

Q. Do you know whether any component has given its membership guidance concerning how to advertise consistently with CDA's code?

A. No, I'm not aware.

Q. Have you seen any component newsletters in which the component has given its membership guidance on how they could advertise consistently with CDA's code?

A. No.

Q. When you were on the Judicial Council, did you ever ask any of the components whether they were giving their members guidance on how to advertise consistently with CDA's code?

A. No (Tr. 1015-16).

Dr. Nakashima, the current chairman of CDA's Judicial Council, testified similarly at his deposition:

Q. Doctor Nakashima, how does the Judicial Council know, if it does, how the components are interpreting and implying CDA's code of ethics?

A. I don't really know that we know specifically how the -- I think the only time we know is when they refer matters up to us and they fill out the form and -- if they're having trouble, I guess they have to spell out to us exactly what it is that they're having trouble with. So that's the only way we know -- is, as matters are given to us from the forms that they fill out or send to us. That's how we know there's a problem going on.

Q. Doctor Nakashima, have you, as a member of the Judicial Council or as chairman of the Judicial Council, ever reviewed any component materials that addressed advertising? And what I mean at this time is, I -- materials that the component is going to use in workshops or materials that the component is going to give to new members to apprise them of appropriate rules?

A. No, we don't -- I don't individually review materials given out by the components to their new members, no (CX-1588-Y-Z-1).

J. The Effect of CDA's Advertising Restrictions

1. The Importance of Advertising

265. Dr. John Christensen, the owner of an advertising agency which specializes in dental advertising (Tr. 546, 559), testified that "the marketplace" [consumers] "told us that they are staying away from dentists because of this fear aspect" (Tr. 586), and that advertising emphasizing comfort will "absolutely" bring in more patients (Tr. 585); conversely, restrictions on quality of care advertising, or the advertising of discounts would affect both dentists and consumers:

The practitioners themselves, who -- if I am answering the question properly, the practitioners themselves that were not allowed to communicate these optimal benefits to their marketplace would not attract as many new patients into their practice. And I believe in that specific submarket and in a general sense there would be less people going to the dentist (Tr. 603).

266. Consumers of dental services select a dentist because of several factors. They include: price, including out-of-pocket costs, and discounted fees (Tr. 468, 588-89, 680, 778, 788-89, 857-58, 921, 1004; CX-1606-M-N, CX-1609-M, CX-1654-C); convenience (Tr. 680, 921, 1004; CX-1603, CX-1606-M); safeguards to prevent spread of disease (Tr. 578-79; CX-1588-K, L); sensitivity to fears about dental procedures (Tr. 585-88, 777; CX-1577-M, CX-1608-N, CX-1610-S); concern about their well-being (Tr. 576, 920-21; CX-1578-J, CX-1606-L-M, CX-1609-M, CX-1610-S); and, information about the type and quality of service (CX-1589-H-I-J, CX-1579-S-T, CX-1589, CX-1606-N, CX-1607-L-M, CX-1609-Z-13).

267. Advertising which conveys the above information is important to consumers (Tr. 469, 527, 680-81, 922).

2. The Importance of CDA Membership

268. There are important reasons for California dentists to become a member of CDA; reasons which explain why, when a member or applicant's advertising is challenged, the dentist often chooses membership over advertising, and changes his advertising to conform to CDA's rules.

269. As an example, an applicant, who was denied membership in 1989, told one of CDA's components:

As you are well aware, membership in the dental society is a distinction which bears fruit educationally, economically, as well as enhancing my reputation in the community. Denial of membership in the society has serious adverse consequences to me and my practice, and I do not intend to take this matter lightly (CX-880).

270. In 1987, the attorney of a dentist who was denied membership in CDA because of his employer's advertising wrote to the component:

[The applicant] recognizes the advantages of membership in your organization. Membership would allow him to (1) take advantage of the insurance benefits that can be obtained only through [respondent], (2) take advantage of your excellent

continuing education programs, and most important, (3) membership would enhance his reputation as a dentist due to the high standards your organization maintains (CX-789-B).

271. In 1985, an applicant who was denied membership in CDA told one of CDA's components:

One of my main reasons for joining the dental organizations was to have T.D.I.C. Insurance. I have an anesthetist who works with me to provide dental treatment under general anesthesia. T.D.I.C. is the only company providing that type of coverage for the general dentist.

If I am denied membership in the dental association then T.D.I.C. will not renew my insurance coverage and I will not be able to get it back. (Please see enclosed letter from T.D.I.C.) Also, I will have to pay a large payment to maintain the coverage for the year I have been covered by T.D.I.C., so I do not want to change companys [sic], even if there was another company that will be offering coverage (CX-802).

272. In 1988, a dentist facing possible loss of membership told CDA:

I have been a member of CDA and ADA for many years and do not take lightly my possible loss of membership in the ADA due to what I feel are unnecessary and possibly illegal restraints on my ability to advertise. . . . Resigning my membership in CDA will cause me to lose my membership in the ADA which is the only national dental organization of import, and this greatly distresses me (CX-427-A, B).

273. In 1988, an attorney for an applicant denied membership in CDA informed the component to which the applicant had applied that it was "imperative" that reevaluation of his client be completed promptly to avoid termination of the applicant's professional liability insurance, which he had obtained through CDA:

Obviously, any termination of my client's professional liability insurance is likely to cause him significant financial detriment. Therefore, your prompt action is essential (CX-512).

274. CDA is so important to some members that they have hired lawyers to assist them in gaining, or retaining, membership (CX-56, CX-83, CX-506, CX-510, CX-526, CX-789, CX-860). Also, applicants denied membership in CDA have reapplied for

membership (CX-1038-C, CX-1041, CX-362, CX-1011-A, CX-1103, CX-659-B, CX-664-A, CX-666, CX-304-A, CX-308).

3. Member Compliance With CDA's Advertising Restrictions

275. Dr. Abrahams, the Santa Clara County component ethics committee chairman, testified that "[t]o the best of my knowledge, every member of the Dental Association [his component] is compliant" with CDA's advertising rules (CX-1579-Z-38-39).

276. According to Dr. Hoey, the Redwood Empire component ethics committee chairman, "about 100%" of his component's members' advertising is consistent with the component's advertising rules (CX-1577-Z-44).

277. Dr. Quint, the San Gabriel Valley component ethics committee chairman, testified:

When I get a new phone book at home -- in the office at home I'll thumb through it. We do not see any fractures [sic] anymore because these people are educated to what they can say and what they can't say. It's very rare that you'll see an illegal ad, and if you do see one, it's right on the borderline. . . . We don't see illegal ads in the phone books anymore, hardly at all (CX-1608-Z-12).

278. Dr. Green, the West Los Angeles component ethics committee chairman, estimated that the advertising compliance rate of the members of his component is in the 90th percentile (CX-1606-Z-27).

279. The Central Coast component ethics committee reported at the component's 1988 board meeting that "all current yellow page advertisements in GTE and Pacific Bell telephone books are within the ethical guidelines as set forth by CDA" (CX-1265-A). At a 1989 board meeting, the component reported that the "SLO" directory had no violations (CX-1266-B).

280. In 1990, the Tulare-King ethics committee chairman reported that in the yellow page advertisements:

all display ads [in the telephone yellow pages] were reviewed & found to be in compliance for [component] members. Several minor errors in the listings section were noted & those not in compliance were contacted by individual Ethics Committee members (CX-1413).

281. In its 1989-90 annual report, the Kern County component reported that there had been no major incidents regarding advertising in the preceding year, only some minor infractions in the yellow pages listings (CX-1298-B), and in its 1992-93 annual report, the component reported:

This year has been a very quiet one for the ethics committee. This is due in large part because each of you is making the effort to follow our guidelines (CX-1300-C).

4. Changes to Challenged Advertisements by Members

282. From 1982 until 1993, CDA and its components have challenged hundreds of advertising representations which on their face are not false or deceptive (*see* CPF's 580-949 which analyze CDA's challenges to the advertisements of 393 dentists). Many dentists, whose advertising was challenged, agreed to modify it (Appendix B to Volume II of complaint counsel's proposed findings) despite the fact that modification or discontinuance of advertising could result in a decrease in patient volume (Tr. 272-74, 602-03).

283. Several component ethics committee chairmen testified that they did not know of a single instance where a member has refused to modify or discontinue challenged advertising (Tr. 862-63, 1353-56, 480, 689, 928; CX-1606-Z-3-4, CX-1608-Z-35, CX-1609-W), even when they disagreed with the component. For example, one dentist responded:

I disagree with your findings and know we could belabor the question for hours and come to no conclusion. Therefore we shall disagree agreeably. The statements in question will no longer be used in any mailings from this office (CX-480).

284. A group of dentists whose advertising was challenged because it included terms such as "fully modern" and "luxurious atmosphere" responded:

We take exception to being chastised for use of the terms "fully modern . . . luxurious atmosphere." To construe that these phrases imply superiority is a matter of opinion and subject to semantic disagreement. Indeed, to state that these terms are not verifiable is open to argument. The term "prices you can afford" should be taken in context. The phrase does not mean nor imply "lowest prices" (sec. 10 #3 & 4). Our philosophy is to strive for quality and our practice is to provide that at affordable prices. This is not a sales gimmick, it is policy.

Our intention is to work within the framework of CDA's code of ethics and we will be incorporating your recommendations in our new brochure. . . . While we agree to comply with your request, we feel that it is time that the Western Dental Association petition the California Dental Association to review the code of ethics (CX-145-A).

285. A dentist whose representation of low prices was challenged, responded:

Thank you for your written notice indicating that the Ethics Committee feels that my ad in the Santa Cruz Yellow Pages may be in violation to the Dental Practice Act . . . and [CDA's] Code of Ethics . . . as it relates to the phrase "Fees that Fit a Family Budget."

I do not feel that the phrase above violates the Code or the cited Dental Practice Act sections. However, I have never been one to take issue with the valuable work of the Ethics Committees of [CDA] unless it was clearly warranted.

In this case I have elected to alter the ad in the subsequent insertions for the Yellow Pages (CX-159).

286. In some cases, members whose advertisements have been challenged have simply given up advertising (CX-1406, CX-570, CX-606, CX-607), in one case, at a substantial cost. Referring to an advertisement which was discontinued ("gentle dentistry in a caring environment"), a component ethics committee stated:

It is the opinion of this Ethics Committee that this advertisement has provided [dentist] with 300 new patients in the last 6 months it is therefore a very big sacrifice for her to eliminate the ad (CX-244).

5. Effect of CDA's Advertising Restrictions on Non-Members

287. Respondent's restrictions on advertising also affect non-members of CDA, for CDA holds members and applicants responsible for advertising published by employers or other businesses such as referral services:

IT IS VERY IMPORTANT TO REMEMBER THAT IN ADVERTISING EACH CDA MEMBER IS RESPONSIBLE FOR ADVERTISEMENTS FROM WHICH HE OR SHE MAY BENEFIT WHETHER OR NOT THE MEMBER'S NAME IS STATED IN THE AD. Accordingly, members need to be aware that if their employers advertise in an unacceptable manner, the member is also responsible since he/she benefits from the advertisement as well. ("7 Questions Frequently Asked of CDA's Judicial Council" (CX-1358-B)).

288. Employers of dentists who are not CDA members have agreed to make changes in their advertising that CDA demands (CX-380-B). In 1993, an associate of a dentist who was applying for employment agreed to change his advertising:

I did have a chance to review the information enclosed and I have no problem making the appropriate modifications. The one advertisement mentioned was not my ad at all (it was placed by Dr. Paul, the general dentist with whom I share space) but I have spoken to him and he has assured me that he will make any and all appropriate modifications to ads that mention or contain my name (CX-124-A). (See also CX-510-B, F).

289. CDA has also contacted referral services to correct advertising which is not consistent with the Code. For example, it instructed a number of its components to contact more than twenty member dentists who participated in the da Vinci Studio referral service because its advertising was inconsistent with the Code (CX-279-96). CDA's objection was that the service had advertised "very affordable," and CDA instructed the components to contact participating members and "remind [them] of their ethical and legal obligations" (CX-279-96).

290. Similarly, in 1987, CDA recommended that acceptance of a dentist into membership be conditioned on correction of advertising by a competitor referral service, 1-800-DENTIST:

[Applicant] stated that she is represented by the 1-800-DENTIST referral service. A review of the advertising submitted for this service indicates several statement [sic] are in violation of the CDA Code of Ethics and state law. Please make sure [applicant] understands that she is responsible for any advertisement published on her behalf and that the following changes must be made for her to become an unconditional member next year (CX-413-B).

291. CDA also holds members and applicants responsible for what it deems objectionable advertising by hospitals that promote dental services. For example, in 1992, CDA determined that advertising by a hospital promoting dental services was inconsistent with its advertising rules and directed one of its components to meet with the member-dentists whose services were advertised, and instruct them either to have the advertising corrected, or have their names removed from it (CX-354-B). The hospital did correct the advertising, and did so even though the Board of Dental Examiners

determined that the advertising did not violate the Dental Practice Act (CX-355).

292. CDA members affiliated with a non-profit charitable organization, "Doctors with a Heart," discontinued use of a press release that informed the public that the organization would provide free care "to children whose parents cannot afford it" on Valentine's Day, after CDA threatened disciplinary action against them. The members discontinued the advertising even though they had been informed by a representative of the California State Board of Dental Examiners that the advertising did not violate state law. The members feared that they could not continue to participate in the program after 1988 and maintain their membership in CDA ("At this time it looks doubtful. There is just so much hassle a person can take from one's peers.") (CX-894, CX-897-D).

293. For other examples of applicants or members who have been challenged by CDA or one of its components on the basis that advertising by an employer or other entity with which the applicant is affiliated violates CDA's Code, see Appendix A to Volume II of complaint counsel's proposed findings.

6. Restrictions on Free Dental Screening of Schoolchildren

294. Through their members, CDA's components have offered school dental screening programs whose results are given to parents (CX-1168, CX-1169).

295. In the early 1980's, CDA became concerned that some members were using screening to promote their own practices by including their names and office addresses on materials that were sent to parents (CX-1118-D). It therefore notified members that screening programs should be arranged through the dental societies and that "even the handing out of business cards (or other printed materials) with the screening dentist's name is considered soliciting" (CX-1161-A-E).

296. In 1984, CDA's Judicial Council passed a resolution stating:

[I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession (CX-1115-A).

297. CDA based its policy on its interpretation of a state statute prohibiting the solicitation of school children "to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities" (California Education Code, Article 3, Section 51520) (CX-1115-B-C, CX-1166).

298. In May 1993, at the behest of CDA, which learned that certain members who were conducting school screenings were using materials which included their names and addresses, a component's president "advised all concerned by letter" that "[w]hether a rubber stamp or written name is used [by a screening dentist] it must not continue. It is a violation of state law and [CDA's] code of ethics" (CX-1343-B).

299. Several dentists have acceded to CDA's wishes regarding dental screenings.

Dr. Beth Hamann

300. Dr. Hamann conducted school dental screenings during the years she practiced in California. At times she gave students a toothbrush personalized with her name and telephone number, as well as a copy of her office newsletter (Tr. 797-98).

301. Her component society informed the schools where she conducted screenings that they were "not an acceptable activity for them to do with private dentists" (Tr. 796). Thereafter, the schools would not permit her to do screenings although the component never showed why the screenings were false or misleading (Tr. 797).

302. Cessation of the school screening meant that Dr. Hamann lost some potential customers (Tr. 798-99). Her component society did not, as it promised the schools, conduct screenings after Dr. Hamann was refused permission to do so (Tr. 797).

Dr. Roger C. Sanger, Dr. James P. Stenger and Dr. Ray E. Steward

303. In the 1980's, Drs. Sanger, Stenger, and Steward, CDA members, conducted private pre-school screenings, at their request, outside the auspices of their component; they used either their own forms or their component's form stamped with their name and office address (CX-1149-A).

304. The component to which the dentists belonged objected, in 1983, to the use of forms in their screenings which listed their names and address. The dentists agreed to stop using the component's forms when conducting screenings at private pre-schools (CX-1149-A), but did not agree to stop using their own forms (CX-1149-A).

305. CDA, asked for advice by the component, told it that under a recently adopted policy, solicitation of school children on any private or public school ground is deemed not to elevate the esteem of the dental profession, and recommended that the component counsel the dentists and report the results of the counseling to CDA (CX-1151-A-B).

306. The component then informed the dentists that CDA had advised that the dentists' screening form would need to be changed "to assure conformity with [CDA's] code" (CX-1152-A-D). In response, the dentists agreed not to perform screenings on public or private school premises and to participate only in component screenings. However, they did not agree to cease screening at day care centers using their own forms because they believed that day care centers did not fall within the definition of "schools," as they are not regulated by any educational agency of the state. The dentists did say they would modify their day care screening forms to eliminate the word "school" (CX-1153).

307. In July 1985, the component asked CDA whether day care centers are "schools" within the meaning of its resolution concerning school solicitation (CX-1154-A-B).

308. In form letters dated May 5, 1986, the component objected to the dentists' use of their pre-school health education form because such use "may" violate CDA's Code, and informed the dentists that they would have to delete their names from their screening form "to assure conformity" with CDA's Code. The dentists agreed to alter the screening form to conform to CDA's Code (CX-1155-57). In a separate letter, they informed the component that they no longer would conduct screenings in private or public schools other than at the request of the component, and then would use no forms other than the component's form (CX-1158).

Dr. Douglas Grosmark

309. In 1991, Dr. Douglas Grosmark, a CDA member, attended a Halloween carnival (held at an elementary school after school hours

ended) (CX-1133-A) and distributed toothbrushes imprinted with his name and an attached card containing an offer to have a "complimentary video exam & \$25 off your 1st visit" (CX-1132-B). Without Dr. Grosmark's knowledge, principals at two schools distributed the toothbrushes to the children during school hours (CX-1132-A-B, CX-1133-A-B).

310. By letter dated October 21, 1992, the component to which Dr. Grosmark belongs objected to his distribution at schools of any material on which his name was printed because it "may" violate a state law "which was adopted by [CDA] in 1981." The component asked him to confirm that his future visits to any school would comply with state law as interpreted by CDA (CX-1132-A-B).

311. The component was not satisfied with Dr. Grosmark's response and again demanded that he provide assurance that he would not distribute "imprinted" toothbrushes in the future, and informed him that "[a]ny further violations of this nature" would be reported to CDA (CX-1134). By letter dated November 25, 1992, Dr. Grosmark assured the component he would comply ("I do not intend to distribute imprinted toothbrushes to any schools") (CX-1135).

Dr. Rodney L. Mellor

312. Dr. Rodney Mellor, a member of CDA, is another dentist who conducted school screenings outside the auspices of his component and used his own materials in conducting the screenings (CX-1142-A-B).

313. In 1992, the component to which Dr. Mellor belongs objected to his use during school screenings of any materials on which his name was printed because it "may" violate state law (CX-1142-A). The component asked Dr. Mellor to provide assurance that any future visits he made to schools would comply with state law as interpreted by CDA (CX-1142-A).

314. Dr. Mellor acquiesced, and, by letter dated October 22, 1992, promised to comply with "ALL ethical standards" (CX-1143).

Dr. William D. Rawlings and Dr. J. Patrick Davis

315. Drs. Rawlings and Davis, members of CDA, are dentists who distributed their business cards at a pre-school program (CX-1146-A).

316. In 1993, the component to which the dentists belong objected to their distribution at pre-schools of business cards containing their practice's name because it "may" violate CDA's Code and state law (CX-1146-A). The component asked the dentists to provide assurance that they (1) would cease distributing business cards, or any other materials, on which their practice name appears during any school or pre-school programs, and (2) would include on all materials the complete name of their practice as it appears on their fictitious name permit (CX-1146-A-B). Drs. Rawlings, Davis, and Terry T. Yoshikane, by letter dated August 9, 1993, promised to make the required corrections (CX-1147).

317. Other dentists conducting screenings were contacted by CDA or their components with complaints that they did not comply with the Code or state law, but the record does not reveal whether they complied with the advice given them (CPF's 491, 492, 493, 494, 495).

7. Economic Analysis of CDA's Advertising Restrictions

318. CDA called, as a witness, Professor Robert Knox, who, complaint counsel stipulated, is an expert in economics and industrial organization (Tr. 1632).

319. Professor Knox has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising (Tr. 1624-25, 1629-32); however, he testified that since dental service markets are controlled by the same economic phenomena as other businesses, many characteristics of the California dental services market can be analyzed using general economic principles and theory (Tr. 1625).

320. CDA also called Dr. Albert H. Guay, a retired orthodontist, for insight into entry to the dental services market and practice-related aspects of dentistry (Tr. 1223-24, 1226-28). He is the Associate Executive Director of the ADA's Division of Dental Practice which assists members with the business aspects of dental

practice (Tr. 1246). Dr. Guay is not an expert in economics (Tr. 1250-52).

321. Dr. Guay testified that, unlike medical patients, dental patients are relatively price sensitive because they must pay for much of their care (Tr. 1243). Since dental treatment is not urgent, patients can "seek the best deal" (Tr. 1244, 1268).

322. Professor Knox testified that CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry (*i.e.*, an advantage which existing firms have over potential entrants (Tr. 1634)) into any dental market in California (Tr. 1633).

323. Professor Knox testified that the only entry barrier into dental service is the acquisition of a license issued by the California State Board of Dental Examiners (Tr. 1634); the need to complete dental school and the acquisition of an office and dental equipment are not barriers to entry (Tr. 1634, 1636). The over supply of dentists which complaint counsel point to as an entry barrier is, he stated, strong evidence of low entry barriers (Tr. 1637). In Professor Knox's view, CDA membership is not a prerequisite to successful practice in any California dental market (Tr. 1639).

324. Professor Knox also testified that scrutiny of dental advertising is pro-competitive because advertising which is false or misleading has a negative impact on competition (Tr. 1643-45).

325. Professor Knox believes that dental advertising should be critically examined because dental service is an "experience good," *i.e.*, a good that consumers cannot evaluate until after the service has been performed (Tr. 1632-33). Non-price claims, especially those relating to quality, are particularly difficult to verify (Tr. 1646-47), although, he conceded, consumers can make some judgments about quality of care (Tr. 1677-78).

326. Professor Knox concluded that even if CDA occasionally questions member advertisements which are not false or misleading in a material respect:

the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output (Tr. 1640).

327. Professor Knox rejected the entire State of California as a relevant geographic market on the basis of Mr. Christensen's testimony that a radius encompassing 20 to 30,000 people "would be a market for dental services in California" (Tr. 1642-43). Professor Knox concluded that the dental markets in California are disaggregated, and it would be very difficult for CDA to exercise market power over price and output in all of them (Tr. 1639).

328. On cross examination, the Professor agreed that dental services "could be" a relevant product market (Tr. 1689) and that California "could be" a relevant geographic market. He also agreed that, hypothetically, CDA members can collectively exercise market power "if they act together. . . ." (Tr. 1692).

329. Complaint counsel called three witnesses to testify about entry into the dental service market in California. According to Dr. John S. Miley, opening a dental practice in California today is "an extremely difficult thing to do" (Tr. 331), and Dr. Richard A. Harder, who has established a number of dental practices in California, testified that "it would take about 18 months to actually start generating enough income to match that current month's expenses, and then it would probably require up to about five years to actually recover the capital costs" (Tr. 300).

330. Dr. Curtis P. Hamann, together with his wife, had to borrow approximately \$400,000 to buy two existing dental practices (Tr. 756-60). The practices took about two years to become profitable, and it took about ten years for the Hamanns to pay off all of the associated debt (Tr. 764).

331. Dr. Miley testified that the financial requirements for setting up a dental practice are a big impediment for young dentists today, since they are coming out of school \$50,000-100,000 in debt (Tr. 330). *See also* CX-1628 ("private practice is most young dentists' first choice of practice setting . . . However, if young dentists can't make a living in that setting, considering the cost of beginning/buying a practice on top of education loans, they are forced to practice in alternative settings").

III. CONCLUSIONS OF LAW

A. *CDA's Activities are in or Affect Commerce*

The Commission has jurisdiction over acts or practices "in or affecting commerce," Section 5 FTC Act, 15 U.S.C. 45, providing that their effect on commerce is substantial, *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980); *Hospital Building Co. v. Trustees of Rex Hospital* ("Rex Hospital"), 425 U.S. 738, 745-46 (1976). And, as long as the challenged acts or practices create "unreasonable burdens on the free and uninterrupted flow" of commerce, even local activities are subject to FTC jurisdiction, *Rex Hospital*, 425 U.S. at 738, 745-46.

The potential harm from the challenged conduct, rather than its actual effect on commerce, is the jurisdictional standard:

because the essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself--rather than the overt acts performed in furtherance of it--proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful.

Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991).

In *American Medical Association*, 94 FTC at 701 (1979), *aff'd* as modified, 638 F.2d at 443 (2d Cir. 1980), *aff'd* by an equally divided Court, 455 U.S. at 676 (1982) ("AMA"), the Commission determined that it had jurisdiction over state and local medical societies which restricted advertising by health-care professionals because these activities, some of which were local in character, had a substantial effect on interstate commerce, 94 FTC at 993-96.

As in *AMA*, CDA's activities "as a matter of practical economics," *Rex Hospital*, 425 U.S. at 745-46, place, or have the potential to place, substantial burdens on interstate commerce. These activities include:

The receipt by CDA's members of reimbursements, which cross state lines, for dental services provided by them under health insurance plans which involve the federal government, *i.e.* Denti-Cal, which paid \$500 million to participating dentists (F. 50).

The purchase or lease of substantial amounts of dental equipment from out-of-state manufacturers (F. 51).

Competition between CDA members and out-of-state dentists for patients, the out-of-state residence of some CDA members, and the treatment of patients residing outside of California (F. 55, 56).

Restrictions on the contents of advertising by out-of-state suppliers and the placement by CDA of advertisements in national publications (F. 54).

The use of the U.S. Postal Service to enforce CDA's Code of Ethics (F. 57).

The collection and transmission of ADA dues from member dentists to ADA in Chicago (F. 62).

The operations of CDA's for-profit subsidiary, TDIC, which provides professional liability insurance to out-of-state dentists (F. 60).

The operations of CDA's subsidiaries, TDC and TDCIS, which provide insurance and other services to CDA members through out-of-state companies (F. 59).

The attendance of CDA officials and members at out-of-state conferences (F. 58).

B. CDA is a Corporation Under Section 4 of the FTC Act

Section 5 of the FTC Act gives the Commission jurisdiction to prevent unfair methods of competition by "persons, partnerships, or corporations," 15 U.S.C. 45. Section 4 of the Act defines "corporation" as "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members. . . ." 15 U.S.C. 44.

In *AMA*, the Commission held that its jurisdiction under Section 4 extends to "nonprofit organizations whose activities engender a pecuniary benefit² to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity," *AMA*, 94 FTC at 701, 983 (1979); *see also Michigan State Medical Soc'y*, 101 FTC 191, 284 (1983) ("MSMS"):

certain organizations ostensibly organized not-for-profit, such as trade associations, may be vehicles through which a profit could be realized for themselves or their members.

In its most recent case dealing with this issue, *College Football Ass'n*, 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("CFA"), the Commission adopted a "two-pronged" test to determine whether an entity such as CFA is "organized to carry on business . . . for profit" and is subject to its jurisdiction.

² An expense which otherwise would necessarily be incurred by members, *Ohio Christian College*, 80 FTC at 815, 848 (1972).

The Commission's test is derived from Section 501(c)(3) of the Internal Revenue Code which provides an exemption from income taxation for:

[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

Looking to this provision the Commission stated:

The guidance from federal tax law is clear. Congress has sought to protect and support specific categories of not-for-profit organizations by freeing them from tax liabilities but only so long as (1) no part of their net earnings inures to the benefit of any private shareholder or individual and (2) the activities which generate the income--whether conducted by a feeder organization or by the exempt entity itself--are in furtherance of exempt purposes. The test is two-pronged and requires an adequate nexus between the entity's operations and recognized public purposes. CFA, at 23,357.

CDA argues that its operations satisfy this test because it is a *bona fide* nonprofit corporation which is exempt from federal taxation under a similar provision of the Internal Revenue Code, 501(c)(6). (RB, pp. 4, 16-17).

CDA made the same argument in a motion for summary decision which I denied on September 27, 1994. In that order, I found that CFA did not undermine the relevance of the AMA decision, for the Commission held:

We recognize that a respondent's status as either a Section 501(c)(3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals. . . . Rulings of the Internal Revenue Service are not binding upon the Commission.

Citing this language and referring to a significant difference between CFA and AMA, *i.e.*, the for-profit nature of AMA's members' businesses, AMA, 94 FTC at 989, I held that:

even though CDA is exempt from federal taxation because it is a "*bona fide*" nonprofit organization, an additional issue must be addressed: whether its activities

which confer a pecuniary benefit to its members are a substantial or incidental part of its total activities.

CDA has not convinced me that my ruling was incorrect; thus, inquiry into the Commission's jurisdiction over CDA must include an analysis of the pecuniary benefits which its activities confer on its members and a determination as to whether those activities represent "a substantial part of [CDA's] overall operation." *AMA*, 94 FTC at 988 n.13.

In *AMA*, 94 FTC at 986-91, 741-63, 785-93, 796-801, 918, 921-34, and *MSMS*, 101 FTC at 283-84, the Commission and the ALJ found that the following activities of the respondents provided economic benefits to their members: lobbying; litigation; public relations and marketing; advice helping members to increase the efficiency, productivity, and profitability of their medical practices; professional placement; peer review; retirement; continuing education; publications; and non-profit subsidiaries and affiliates providing financial, insurance and other services.

Citing *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969), CDA claims that it is not organized for its or its members' profit and that its profit-making activities are ancillary to its primary purpose, which is to serve public, not private, interests.

CDA serves the public interest through its councils which give advice about dental health and which monitor the ethics of its members (F. 14, 17, 18, 19, 22, 23); CDA has also taken positions on fluoridation and other matters which benefit the general public, but may adversely affect its members (F. 123-25, *see also* F. 126-27).

Nevertheless, and despite the testimony of CDA's President, Dr. Craven (F. 128), the evidence presented by complaint counsel convincingly establishes that, as in *AMA*, a substantial part of CDA's activities result in pecuniary benefits to its members:³

Lobbying: CDA represents its members with respect to legislative, political and regulatory matters which, but for its intervention, might result in adverse pecuniary consequences (F. 70-73, 76-85). CDA has brought to its members' attention the pecuniary benefits of these activities (F. 74, 77).

³ "Our determination that *AMA* engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which *AMA* is engaged [but] such activities do not . . . provide immunity from the laws designated to protect the public from anticompetitive practices." *AMA*, 94 FTC at 987.

Litigation: By challenging, or supporting challenges to, legislation and regulatory activities which are adverse to their interests, CDA has benefitted its members' pecuniary interests (F. 84).

Marketing and Public Relations: CDA's marketing and public relations activities benefit its members by fostering a positive image of them (F. 86-88).

Direct Reimbursement: Promoting direct reimbursement benefits CDA's members by avoiding problems engendered by insurer restrictions on payment and procedures (F. 89-91).

Practice Management: CDA has an extensive array of programs which increases its members' efficiency and productivity (F. 92-97).

Peer Review: CDA's peer review system may provide a less costly alternative to traditional methods of resolving patient complaints about dental problems (F. 98-100). *See AMA*, 94 FTC at 798, 932, 988.

Scientific Sessions: CDA's twice-yearly scientific sessions give its members the opportunity, cost free, to satisfy their continuing education requirements (F. 101-06). *See AMA*, 94 FTC at 790, 986; *MSMS*, 101 FTC at 211, 249.

Publications: As in *AMA*, 94 FTC at 761, 791, 928, 932, 987 and *MSMS*, 101 FTC at 208-09, 248, 283, CDA's publications provide pecuniary benefits to its members by providing technical and scientific information about dentistry (F. 107-08).

For-Profit Subsidiaries: CDA, through its for-profit subsidiaries, offers its members professional liability insurance (TDIC, F. 109-12), business and personal insurance (TDCIS, F. 113-15), and financial services (TDC, F. 116-18). *See AMA*, 94 FTC at 757, 761-62, 790-91, 928, 932-33, 987-88; *MSMS*, 101 FTC at 207-08, 210-11, 248-49, 283.

Membership in ADA and Local Components: Membership in ADA and a local component supplements and extends the benefits obtained from membership in CDA (F. 119-22). *See AMA*, 94 FTC at 785, 796, 930-31, 988-89; *MSMS*, 101 FTC at 212, 249.

The enumeration of these benefits establishes that a CDA member taking advantage of all, or even a few of them, would realize a substantial pecuniary benefit.

Statements made by CDA in touting the benefits of these services to its members -- and taking into account some exaggeration -- substantiate that conclusion (F. 67, 68, 74, 76, 77, 84, 88, 97, 99, 105, 108, 109). In contrast, CDA's services to the public accounted for seven percent of its total expenditures. The remainder went to direct member services, association administration and indirect member services (F. 69).

*C. CDA, Its Members, and Its Component Societies Have
Conspired to Restrain Members' Advertising*

When an organization is controlled by a group of competitors, antitrust law views the organization as the competitors' agent, and the organization as a combination or conspiracy of its competitor-members. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 682, 692 (1978).

CDA is an association of competing dentists, who, by agreeing to abide by its Code of Ethics, including those provisions regarding advertising (F. 129-33), have conspired among themselves, and with CDA and the component societies which enforce those restrictions (F. 149-67). Compare *AMA*, in which the Commission stated that "promulgation of a code of ethics implies agreement among the members of an organization to adhere to the norms of conduct set forth in the code" 94 FTC at 998 n.33. As to the component societies, the Commission held, in *AMA*, that *AMA* had conspired with its constituent and component medical societies since all of them had articulated, implemented, and enforced ethical guidelines, 94 FTC at 996-1002.

Here, the evidence establishes, as complaint counsel contend, "a 'common design and understanding' on the part of respondent, its component societies, and the individual dentists that comprise the membership of those dental societies to promulgate, disseminate, and enforce ethical restrictions on advertising" (CB, p. 33). See *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946):

Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding . . . the conclusion that a conspiracy is established is justified.

Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 767 (1984) ("Copperweld"), relied upon by CDA, does not affect this conclusion. In this case, the Supreme Court held that under certain circumstances, legally separate entities such as a parent and its wholly owned subsidiary, "must be viewed as that of a single entity for purposes of [antitrust analysis]." If so treated, "there is no sudden joining of economic resources that had previously served different

interests, and there is no justification for [antitrust] scrutiny." *Id.* at 771.

The Supreme Court in *Copperweld* was referring to a corporation and its wholly-owned subsidiaries which, because the law views them as an entity, are incapable of conspiring.

CDA, its component societies and its members are, in contrast, legally separate and independent entities which are engaged in activities whose purpose is to restrict truthful advertising, and they have therefore conspired to do so. See *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 610 (1988) ("Mass Board"). See also *Northern Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987).

D. The Agreement to Restrict Advertising Violates Section 5 of the FTC Act

1. The Restrictions Are Inherently Suspect

In *Mass Board*, the Commission found that the Board of Registration in Optometry had promulgated regulations restricting advertising by optometrists.

Citing recent Supreme Court decisions rejecting a *per se* analysis of conduct that is essential to a legitimate purpose,⁴ and recognizing that the Supreme Court has been reluctant to condemn rules adopted by professional associations as presumptively unreasonable, *Mass Board*, 110 FTC at 602, 606, the Commission adopted a method of analysis which "is more useful than the traditional use of the *per se* or rule of reason labels but which is consistent with the recent cases that apply a traditional analysis." *Mass Board*, 110 FTC at 603-04.

This structure is readily described as a series of questions to be answered in turn. First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition . . . Such an efficiency

⁴ *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 1012 (1984) ("NCAA"); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 10, 23-24 (1979).

defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry -- a third inquiry -- is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry -- there are no likely benefits to offset the threat to competition.

Mass Board, 110 FTC at 604 (emphasis in original).

Since "[a]dvertising plays an indispensable role in the allocation of resources in a free enterprise system" *Bates v. State Board of Arizona*, 433 U.S. 350, 364 (1977), restraints on truthful advertising "are inherently likely to produce anticompetitive effects," *Mass Board*, 110 FTC at 605, *AMA*, 94 FTC at 1005, and are illegal absent a plausible justification.

CDA has a legitimate interest in fostering truthful, informative advertising by its members and has, since 1985, announced an advertising policy which would restrict only those advertisements which are false or misleading in a material respect (F. 246) or which are false or misleading in their entirety (F. 247).

However, CDA has not followed its policy, and has, instead, created confusion among its members as to the meaning of "material respect" (F. 217-221) and what is or is not acceptable in their advertising (F. 250-58).

This confusion is caused by uncertainty about the role of CDA's Judicial Council and the component societies. The result is the lack of a consistent procedure to inform members about changes in CDA's advertising rules (F. 259-64). Thus, CDA has banned not only those advertisements which violate its announced policy but also advertising which is lawful and informative.

CDA's actions are consistent with a mindset which believes that advertising by dentists is demeaning (F. 135-40), a view which the Supreme Court has long condemned. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976):

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

See also AMA, 94 FTC at 1026:

The equivocal language of [AMA's] 1976 Statement and its often antagonistic tone toward advertising and solicitation . . . has sent a clear signal to the profession.

As a consequence, CDA has successfully (F. 275-93) withheld from the public information about prices (F. 168-73), discounts (F. 174-82), quality (F. 183-93), superiority of service (F. 194-204), guarantees (F. 205-07), and the use of procedures to allay patient anxiety (F. 208-16).

CDA has also, regardless of their truth, expressed displeasure with claims that are allegedly insulting, offensive to peers, vague or ambiguous, subjective, or do not elevate the esteem of the profession. CDA has also banned advertising listing more than one location or which claims a religious or ethnic affiliation (F. 222). All of these restrictions are inherently suspect. *Mass Board*, 110 FTC at 606 (restrictions on price advertising are "aimed at affecting the market price"); *Mass Board*, 110 FTC at 607: "The fact that [a] ban deprives consumers of information concerning service rather than price in no way diminishes the inherently anticompetitive nature of the restraints."

2. The Restrictions Are Not Justified

CDA has not met its burden of establishing that the inherently suspect advertising restrictions which it has imposed "are capable of creating or enhancing competition," *Mass Board*, 110 FTC at 604.

The reason that CDA adopted its advertising policy may have been, in part, to protect consumers from false or deceptive advertising, but its policy also reflects, in its inception and its implementation, a hostility toward advertising by its members even if it is truthful and nondeceptive.

As a voluntary regulator of its members' advertising, CDA should have enforced its policy so that its restraints were "narrowly directed toward false or deceptive advertising," *AMA*, 94 FTC at 1009. It has not done so. Instead, it has failed to apply "general principles of deceptive advertising law in a . . . context taking into account the substantial body of law construing Section 5 of the FTC Act," *AMA*, 94 FTC at 1030, and has unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect.

Thus, CDA has banned price advertisements which are inexact (F. 168) or which fail to reveal all price information even though the Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977), recognized that there was no reason for a ban on the phrase "very reasonable fees," because "advertising will permit the comparison of rates among competitors, thus revealing if the rates are reasonable." *Id.* at 382 (F. 169). *See also AMA*, 94 FTC at 1030: "it is especially important that price advertising remain as unfettered as possible." CDA has done the opposite: it has adopted rules for discount advertising which effectively outlaw it by imposing requirements which cannot be met (F. 179-80).

CDA's fears of the deceptive potential of non-price claims has also resulted in unnecessary disputes about and bans on advertising claims of quality or superiority of service on the grounds that they are subjective, unverifiable and incapable of measurement (F. 226-29). *See AMA*, 94 FTC at 1023:

Respondent's counsel defended the ban on self-laudatory and superiority claims on the grounds that such claims convey no useful information and can only be misleading, since they are not susceptible to any kind of measurement. This characterization of claims on the basis of their utility to consumers or ease of measurement illustrates the potential scope of respondent's ban on "solicitation."

CDA argues that its members have leeway with respect to advertising claims, but the evidence belies its assertion. For example, CDA's requirements for discount claims effectively ban advertising making this claim without regard to their truth and the same is true with respect to other claims: price (F. 170); quality (F. 183, 186); superiority (F. 198); guarantees (F. 205); and, miscellaneous claims (F. 222).

CDA cannot justify its advertising restrictions by pointing to state law (F. 230) as a model for determining what is or is not lawful:

A state, acting on behalf of the interest of its citizens, is undoubtedly entitled to greater latitude in preventing deceptions and unfair practices than a professional association representing the interests of horizontal competitors, *AMA*, 94 FTC at 1010 n.55.

In any event, CDA has expressed displeasure about members' advertisements which would satisfy state law (F. 234-43).

Finally, CDA's fears that dentists involved in school screenings (F. 295-98), may pressure children or parents into using their services is not supported by any record evidence and its actions have denied schoolchildren the benefits of dental screening.

3. CDA's Members Do Not Have Market Power

Relying on testimony by Dr. Knox, CDA's economic expert, complaint counsel state that "respondent's members collectively have, and can exercise, market power in the dental service market in California" (CB, p. 52).

CDA, its components and its members have illegally conspired to prevent members, and potential members, from using truthful, nondeceptive advertising, and this conspiracy has injured those consumers who rely on advertising to choose dentists.

This conclusion, which is well-documented, does not, however, establish that CDA's members have "market power" -- *i.e.*, the "ability to raise prices above those that would prevail in a competitive market," *United States v. Brown University*, 5 F.3d 658, 668 (3d. Cir. 1993).

Complaint counsel's argument is based on Dr. Knox's agreement on cross-examination that California could be a relevant geographic market, and that dental services could be a relevant product market (F. 328). However, Dr. Knox did not testify that these markets existed.

Complaint counsel also obtained a concession, based on a hypothetical, that CDA members could collectively exercise market power if they acted together (F. 328) but Dr. Knox did not testify that CDA, in fact, could exercise market power and complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised.

The problems experienced by dentists in opening a practice in California are real (F. 329-31) but they do not pose an insurmountable obstacle to entry. Since that is the case, CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local. *See Langefeld and Morris, Analyzing Agreements Among Corporations: What Does The Future Hold?* 36 Antitrust Bull. 651, 677 (1991):

[e]ntry by independent firms prevents voluntary associations from raising prices above the competitive level that would exist without the association.⁵

However, the failure to establish the conditions for satisfaction of a Rule of Reason analysis⁶ is not fatal. *See Mass Board*, 110 FTC at 602 n.8:

The Court [in *FTC v. Indiana Dentists*, 476 U.S. 447 (1986)] rejected the dentists' argument that the Commission erred in not making elaborate market power determinations. . . .

IV. SUMMARY

A. The Commission has jurisdiction over the acts and practices of CDA which are challenged in the complaint.

B. CDA, along with its components and members, has engaged in a combination or conspiracy to restrain trade by unreasonably preventing its members or potential members from using truthful, nondeceptive advertising to the injury of its members and to consumers of dental services.

C. CDA's acts and practices unreasonably restrain competition and constitute an unfair method of competition in violation of Section 5 of the FTC Act.

V. ORDER

In view of CDA's violation of Section 5 of the FTC Act, the order proposed by complaint counsel is, with one exception, justified.

Part I defines terms used in the order. The only unusual definition is that of "restricting," which is defined as "taking any action against a dentist based on the advertising practices of the dentist's employer." There is evidence that this has occurred and the prohibition is appropriate (F. 210, 293).

Part II of the order requires CDA to cease and desist from engaging in practices which the complaint challenges, including its restraints on advertisement of price, services, facilities, and equipment.

⁵ Messrs. Langefeld and Morris were, respectively, the Director and Assistant to the Director for Antitrust in the FTC's Bureau of Economics.

⁶ "Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason," *Sanjuan v. The American Board of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994).

Part III A of the order requires CDA to remove from its Code of Ethics provisions that are inconsistent with the order. Part III A also requires CDA to remove from its Code of Ethics and Bylaws any other policy statements or guidelines that are inconsistent with Part II of the order.

Part III B of the order requires respondent to ban any component that continues to engage in practices prohibited by Part II of the order.

Part IV A of the order requires CDA to inform its members of the order's provisions.

Part IV D of the order requires CDA, for five years, to mail a copy of the order, complaint and announcement to each new member.

Parts IV B and IV C of the order require CDA to send notices to and reconsider the membership status of certain members who have been disciplined by CDA in the enumerated ways.

Parts V A and V B of the order require CDA, every six months for three years, to maintain a written record for each time it or its component societies take action against a dentist because of his or her advertising practices.

Part VI A of the order requires CDA to establish and maintain, for five years, a program which will ensure its compliance with the order.

Parts VI B-E are standard provisions common to other Commission orders.

CDA objects to certain provisions of the order. It claims that since it has never restricted advertising because it is undignified or unprofessional, Part II of the order which requires it, *inter alia*, not to restrain "representations not contributing to the esteem of the public or the profession" should be stricken. This part of the order is appropriate because CDA and its components have expressed concerns about such advertising (F. 222).

CDA also opposes the requirement in Part IV C that would require it to send notice to, and reconsider the membership applications of, members who were dropped by CDA over the last ten years for non-payment of dues. I agree that this provision has no apparent connection with CDA's illegal acts and it will be stricken.

Finally, CDA argues that Part III of the order is vague. This part requires CDA to remove from its Code and Bylaws any provision which is inconsistent with provisions of Part II. There may be differences of opinion by CDA and Commission staff about

provisions which are inconsistent but they can be resolved without resorting to further litigation.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*CDA*" means the California Dental Association, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors and assigns.

B. "*Component societies*" means those dental societies or dental associations defined as component societies in the June 1986 edition of CDA's Bylaws. In the event that CDA's Bylaws are amended to denominate component societies differently or to define or describe a new category of dental societies or associations that replace or are substantially similar to the component societies defined in the June 1986 edition of CDA's Bylaws, "component societies" means those dental societies or dental associations as well.

C. "*Person*" means any natural person, corporation, partnership, unincorporated association, or other entity.

D. "*Restricting*" includes taking any action against a dentist based on the advertising practices of the dentist's employer.

II.

It is further ordered, That respondent, directly or indirectly, or through any corporate or other device, in or in connection with its activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists

or by any organization with which dentists are affiliated, including, but not limited to advertising or publishing:

1. Superiority claims;
2. Comparative claims;
3. Quality claims;
4. Subjective claims and puffery;
5. Prices, including discounted prices;
6. Promises to refund money to dissatisfied customers;
7. Exclusive methods or techniques; and
8. Representations that do not contribute to the esteem of the public, or of the profession.

B. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means, including, but not limited to, the distribution of business cards and forms containing a dentist's name, business address, or telephone number in connection with dental screenings of children at public and private schools.

C. Inducing, requesting, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate Parts II.A. or II.B. of this order.

Provided, however, that nothing contained in this order shall prohibit respondent from formulating, adopting, disseminating to its component societies and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

III.

It is further ordered, That respondent shall:

A. Within sixty (60) days after the date this order becomes final, remove from respondent's Code of Ethics and from its Bylaws and any other policy statement or guideline of respondent, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part II of this order, including but not limited to:

1. Sections 7, 10, and 21 of respondent's Code of Ethics; and
2. Advisory Opinions 2(c), 2(d), 3, 4, and 8 to Section 10 of respondent's Code of Ethics.

B. Terminate for a period of one (1) year respondent's affiliation with any component society within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said component society has, after the date this order becomes final, engaged in any act or practice that if committed by respondent would be prohibited by Part II of this order; unless prior to the expiration of the one hundred twenty (120) day period, said component society informs respondent by a verified written statement of an officer of the society that the component society has eliminated and will not reimpose the restraint(s) in question, and respondent has no grounds to believe otherwise.

IV.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, publish in the "Journal of the California Dental Association" ("CDA Journal"), or any successor publication, with such prominence and in the same size type as feature articles are regularly published in the CDA Journal, or any successor publication, and distribute by first class mail to each of its component societies and to each of its members:

1. This order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order; and
2. Any documents revised pursuant to Part III.A. of this order.

B. For each person who, because of the advertising or solicitation practices of the person or the person's employer, currently

is subject to a CDA disciplinary order, or currently is suspended from membership in CDA:

1. Within thirty (30) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix B to this order;

2. Within forty-five (45) days after the date this order becomes final, (a) review the person's file, and (b) determine whether the suspension or disciplinary order is consistent with Part II of this order; and

3. Within sixty (60) days after the date this order becomes final, send by first class mail a letter notifying the person whether CDA has lifted the suspension and or vacated the disciplinary order, and, if not, detailing the reasons for maintaining the suspension or retaining the disciplinary order.

C. For each person currently not a member of CDA who, because of the advertising or solicitation practices of the person, or of the person's employer:

1. Has been expelled from CDA during the ten (10) year period preceding the date this order becomes final;

2. Has been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final; or

3. Was contacted by CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final, and who subsequently resigned from CDA:

- a. Within thirty (30) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, an announcement in the form shown in Appendix C to this order, and an application form for membership in CDA; and

- b. Within forty-five (45) days after the date an application from such person for membership is received, (i) review the application, and (ii) send by first class mail a letter notifying the person whether membership has been granted, and, if not, detailing the reasons for the denial.

D. For five (5) years after the date this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order to each person who applies for membership in CDA within thirty (30) days after CDA receives an application from such person.

V.

It is further ordered, That respondent shall:

A. For a period of three (3) years after the date this order becomes final, create and maintain a written record in each instance in which respondent or one of its component societies takes action with respect to advertising for the sale of dental services. The record required by this paragraph shall, at a minimum, clearly specify the particular representation that is alleged to be false or deceptive, and the basis for concluding that the particular advertisement is false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

B. Within six months after the date that this order becomes final, and every six months thereafter for a period of three years, file with the Federal Trade Commission, Bureau of Competition, Division of Compliance, copies of each and every record created pursuant to Part V.A. of this order.

VI.

It is further ordered, That respondent shall:

A. Establish, within sixty (60) days after the date this order becomes final, and maintain for a period of five years thereafter, a compliance program to aid in ensuring that respondent and its component societies act in conformance with the requirements of Parts II and V of this order. Said compliance program shall include, at a minimum:

1. Establishing a compliance officer or committee that shall supervise review of the activities of respondent and its component societies with respect to advertising; and

2. Establishing procedures to ensure that respondent receives written notice of all action, whether formal or informal, taken by respondent's component societies with respect to advertising.

B. Within one hundred and twenty (120) days after the date this order becomes final, file with the Federal Trade Commission a verified report in writing setting forth in detail the manner and form in which respondent has complied and is complying with this order.

C. Within one (1) year after the date this order becomes final, annually thereafter for a period of five (5) years, and at such other times as the Federal Trade Commission may by written notice to respondent request, file a verified report in writing with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order, and setting forth in detail any action taken in connection with the activities covered by this order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

D. For a period of five (5) years after the date this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II, III, and V of this order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

APPENDIX A

[Date]

ANNOUNCEMENT

The Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from or restrict its members in engaging in truthful, nondeceptive advertising or solicitation.

As a result of the order, CDA may not interfere if its members or their employers wish to:

1. Advertise or publish truthful, nondeceptive:
 - (a) Superiority claims;
 - (b) Comparative claims;
 - (c) Quality claims;
 - (d) Unsubstantiated or unverifiable claims, including puffery and subjective representation;
 - (e) Prices, including discounted prices;
 - (f) Promises to refund money to dissatisfied customers;
 - (g) Claims that include the use of adjectives or superlatives to describe any offered services;
 - (h) Exclusive methods or techniques; and
 - (i) Representations that do not contribute to the esteem of the public, or of the profession.

2. Engage in the solicitation of patients, including by means of distributing business cards and forms containing a dentist's name, business address, and telephone number in connection with dental screenings of children at public or private schools.

The order does not prevent CDA from formulating and enforcing reasonable ethical guidelines prohibiting representations, including unsubstantiated or unverifiable representations, that CDA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or guidelines prohibiting the solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

In particular, the order means that as long as CDA's members do not engage in falsehood or deception, CDA cannot prevent or discourage them from advertising or otherwise soliciting patients, except with respect to "uninvited, in-person solicitation of actual or potential patients, who,

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because of their particular circumstances, are vulnerable to undue influence."

For more specific information, you should refer to the FTC order itself, a copy of which is enclosed.

Bernard L. Allamano
Legal Counsel
California Dental Association

APPENDIX B

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. In addition, the order requires CDA, within 45 days after the order became final, to review (a) all current suspensions of CDA membership, and (b) all disciplinary orders, imposed because of the advertising or solicitation practices of a member or the advertising or solicitation practices of the member's employer. The order requires CDA, within 60 days after the order became final, to inform each such member in writing that the suspension has been lifted, or the disciplinary order vacated, or, if not, CDA is required to give detailed reasons for maintaining the suspension or retaining the disciplinary order.

CDA is currently reviewing your case to determine whether the disciplinary action taken against you is in accordance with the FTC order. For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

If you have any questions concerning the status of CDA's review of your case, feel free to contact the Association at (). You may also contact the Federal Trade Commission.

Bernard L. Allamano
General Counsel
California Dental Association

APPENDIX C

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). The order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. Pursuant to the order, CDA is sending a membership application form to dentists, such as yourself, who because of their advertising or solicitation practices, or the advertising or solicitation practices of their employers:

1. Have been expelled from CDA during the ten (10) year period preceding the date the order became final;
2. Have been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date the order became final; or
3. Were contacted by CDA, or any CDA component, during the ten (10) year period preceding the date the order became final, and who subsequently resigned from CDA.

The order requires CDA, within 45 days after it receives an application from any such person, to act on the application and inform the applicant whether membership has been granted and, if not, to detail the reasons for the denial.

CDA encourages you to apply for membership. If you apply for membership, your application will be considered in accordance with the terms of the FTC order. For more specific information, you should refer to the FTC order itself.

If you have any questions concerning application, feel free to contact the Association at (). You may also contact the Federal Trade Commission.

Bernard L. Allamano
General Counsel
California Dental Association

OPINION OF THE COMMISSION

BY PITOFSKY, *Chairman*:

This is a case in which a large percentage of dentists located in California, operating through their trade association, the California Dental Association ("CDA"), placed unreasonable restrictions on members' truthful and nondeceptive advertising of the price, quality, and availability of their services. We find such restrictions on competition through regulation of advertising to be a violation of Section 5 of the Federal Trade Commission Act. In reaching that conclusion, we find that CDA is not a "not for profit" organization beyond the reach of FTC authority, that its actions affect interstate commerce, and that CDA and its members are capable of conspiracy and have conspired to impose these advertising restrictions.

The order that we impose leaves CDA free to regulate false and misleading forms of marketing and advertising by its members, but does not allow it to impose broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services.

I. BACKGROUND

The complaint in this case, issued on July 9, 1993, charges respondent with restraining competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (1995) ("FTC Act" or "Act"), by placing unreasonable restrictions on its members' truthful and nondeceptive advertising of the price, quality, and availability of their services. After extensive pretrial discovery, a three-week trial, and post-trial motions, the record was closed on April 20, 1995, and a decision and final order were entered by the administrative law judge ("ALJ"), Lewis F. Parker, on July 17, 1995.

The ALJ first rejected CDA's arguments that the Commission lacks jurisdiction because CDA is not "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44, and that its activities do not restrain or affect interstate commerce within the meaning of Sections 4 and 5 of the Act, 15 U.S.C. 44 and 45. The ALJ found that CDA's

actions affect interstate commerce, ID at 65-67,¹ and that, notwithstanding CDA's status as a nonprofit corporation, the association confers a substantial pecuniary benefit on its members so as to place it within the Commission's jurisdiction under *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969), and *American Medical Association*, 94 FTC 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) ("AMA"), ID at 67-71. The ALJ next rejected CDA's contention that, just as a corporation cannot legally conspire with its wholly owned subsidiary, CDA could not, as a matter of law, conspire with its members and local components. The ALJ determined that unlike a corporation whose economic interests are fused with those of its wholly owned subsidiary, CDA is an association of competing dentists who are legally capable of conspiracy and who, by agreeing to abide by the Code of Ethics, have conspired with one another and with CDA and its local component societies to restrict advertising. ID at 71-72.

Turning to the legality of the individual restraints, the ALJ concluded that the members of CDA by agreement had unreasonably withheld from the public information regarding the prices, discounts, quality, superiority, guarantees, and availability of services of member dentists, as well as information about their use of procedures to diminish patients' anxiety. ID at 74-75. The complaint did not challenge the right of members of CDA through their association to suppress advertising that was misleading or deceptive or otherwise caused unavoidable and unreasonable harm to consumers. Accordingly, the ALJ enjoined CDA from further interference with advertising by member dentists, except insofar as CDA has a reasonable basis for concluding, *i.e.*, reasonably believes, that such advertising is false or deceptive within the meaning of Section 5 of the FTC Act, or with respect to the solicitation of patients who may be particularly vulnerable to undue influence. ID at 80-82.

CDA appeals from the Initial Decision on the grounds that the ALJ erred in concluding that CDA is a corporation within the meaning of Section 4 of the FTC Act, that CDA is capable of

¹ The following abbreviations are used in this opinion:

- ID - Initial Decision of the ALJ
- IDF - Numbered Findings in the ALJ's Initial Decision
- CX - Complaint Counsel's Exhibit
- RX - Respondent's Exhibit
- T - Transcript of Trial before the ALJ

conspiring with its members and its component societies, and that CDA's actions were unlawful under Section 5 of the Act.² Our analysis of the liability issues and assessment of certain facts differ from the ALJ's but we nonetheless reach the same conclusion on liability and, accordingly, affirm the Initial Decision as modified below and adopt the ALJ's findings of fact except insofar as they are inconsistent with this opinion.³

II. RESPONDENT

CDA is a professional association, organized under California law as a non-profit corporation, with its principal place of business in Sacramento, California. CDA is composed of 32 local component societies, and is itself a constituent member of the American Dental Association ("ADA") (which is not a party to this suit). IDF 3-4. To qualify for membership at the state level, CDA requires a dentist to be a member of the local component society in the jurisdiction where the dentist practices. Similarly, a California dentist is not eligible for membership in the ADA without membership in CDA. IDF 3-4. Each CDA member must abide by the codes of ethics of the local component to which the dentist belongs, the CDA, and the ADA, CX 1450-Y; IDF 5, and expressly promises to do so in his or her application by signing the following statement:

"I CERTIFY that I have read the Constitution, Bylaws, Code of Ethics and the Principles of Ethics of the dental society, the California Dental Association, and the American Dental Association and upon submission of this application I will comply with the Constitution, Bylaws, Code of Ethics and the Principles of Ethics of the dental society, the California Dental Association, and the American Dental Association, and I further agree that I will recognize the authorized officers of said society and said associations as the proper and sole authorities to interpret all areas of professional conduct and will at all times abide by and be governed by their interpretations." CX 1258-E.

² CDA does not appear to challenge the ALJ's conclusion that its activities had the requisite nexus to interstate commerce, and, in any event, we affirm the ALJ's conclusion on this score without further elaboration.

³ Complaint counsel's Motion To Correct The Record And To Supplement A Response Given At The Oral Argument (filed on December 6, 1995), and respondent's Motion For Leave To File CDA's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed on March 7, 1996) are hereby granted. Respondent's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed as an attachment to the March 7, 1996 motion), and complaint counsel's Reply To CDA's Response To Certain Questions Posed During Oral Argument (filed on March 18, 1996), have been considered by the Commission, and are disposed of by the Final Order and Opinion of the Commission.

Each organization's code and bylaws must not conflict with those of the association of which it is a part. CX 1450-I; IDF 4.

The CDA has more than 19,000 members. Between 13,500 and 13,700 are in active practice, representing around 75% of the practicing dentists in California. IDF 2. In some communities, CDA may represent an even larger share of the practicing dentists. For example, in 1994 the Mid-Peninsula Dental Society, whose region included Palo Alto, claimed to represent over 90% of practicing dentists in its area. CX 1433.

CDA is run on the principle of parliamentary supremacy. Its House of Delegates, composed of about 200 CDA members, chosen mainly by the components, has the power to amend CDA's articles of incorporation, adopt and amend its Code of Ethics, determine and assess dues, adopt an annual budget, grant or revoke the charters of its component societies, and elect its officers, Council members, and delegates to the ADA House of Delegates. IDF 9; CX 1450-K; CX 1472-A. Aside from a managing Board of Trustees and a number of standing committees, the CDA operates ten Councils, one of which is the Judicial Council, which is charged with interpreting and enforcing CDA's Code of Ethics. IDF 10-23. The Judicial Council's Membership Application Review Subcommittee ("MARS"), in turn, examines whether applicants have complied with the Code of Ethics. IDF 14; IDF 157.

III. JURISDICTION

CDA challenges the ALJ's conclusion that it is a corporation "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44. First, it maintains that the ALJ applied the wrong legal standard, arguing that the ALJ ignored the two-pronged approach set forth in *College Football Association*, 5 Trade Reg. Rep. (CCH) ¶ 23,631 (July 8, 1994) ("CFA"), by applying the test laid out in the Commission's earlier decision in *American Medical Association*, 94 FTC 701. Second, CDA argues that dentists do not in fact derive any pecuniary benefit from their membership in CDA and that any activity that might be characterized as for profit is ancillary to its nonprofit mission and therefore does not suffice to confer jurisdiction upon the FTC. We disagree.

Under Section 5, as amended, the Commission is authorized to "prevent persons, partnerships, or corporations," with certain exceptions not relevant here, "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4, as amended, in turn, defines the term "corporation":

"'Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44.

The statute does not further specify the boundary of the for-profit limit to our jurisdiction (or nonprofit exemption as it is alternatively known), and the test we apply was first articulated in *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). In that case, the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form places it beyond the Commission's jurisdiction. An examination of the legislative history of the Act led the court to conclude that "Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members." 405 F.2d at 1017. See also *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 487-88 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). The Eighth Circuit explained that the nonprofit exemption extends only to corporations that are "in law and in fact charitable," 405 F.2d at 1019, and concluded:

"[U]nder Section 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital." *Id.* at 1022.

We applied this standard in *AMA*, 94 FTC 701, where we ultimately found that the American Medical Association had violated

Section 5 of the FTC Act by restricting advertising and solicitation by its members. In finding jurisdiction we rejected the AMA's claim that the statutory term "profit" was limited to direct gains distributed to its members. Nor did we accept the organization's claim that the mere existence of substantial, eleemosynary activities would place it beyond the purview of the statute. We agreed, instead, with the ALJ, who had decided that the Commission can "assert jurisdiction over nonprofit organizations whose activities engender a pecuniary benefit to its members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." *Id.* at 983 (citation omitted). We have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations. *See, e.g., Michigan State Medical Society*, 101 FTC 191, 283-84 (1983).

As the ALJ correctly observed, our subsequent decision in CFA is consistent with AMA. *See ID at 68*. CFA addressed the question whether a nonprofit organization, all of whose members are not for-profit entities, is subject to the Commission's jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. As we noted in CFA, our jurisdictional analysis in that case did not call AMA into question. We reiterated that "a finding that a substantial part of an association's activities engender[s] pecuniary benefits for profit-seeking members is sufficient to establish that the association is organized to carry on business 'for the profit' of its members." *Id.* at 23,362. AMA proved insufficient, however, to decide the jurisdictional question in CFA, since "a finding that such activities engender pecuniary benefits for entities that are not for-profit is not [a sufficient basis to establish jurisdiction]." *Id.* We were thus compelled to press on in CFA to ensure that no other aspect of the organization's activities could serve as a jurisdictional predicate.

Drawing on *Community Blood Bank* and our review of federal tax law, we concluded that Section 4 imposes a two-pronged test that looks to both the source and destination of an organization's income. "The not-for-profit jurisdictional exemption under Section 4," we held, "requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests." *Id.* at 23,357. Because CFA's activities bore a sufficient nexus to its charitable purposes and because its income was

distributed entirely to members who were not for-profit entities, we concluded that it met both prongs and, accordingly, was exempt from our jurisdiction.

As is plain from the opinion, an organization that falls short on either prong comes within our jurisdiction. Therefore, rather than undermine our decision in AMA, CFA simply adds an additional step of analysis when an organization satisfies the prong enunciated in AMA.

CDA falls within our jurisdiction for the same reasons the AMA did, and, as a result, we need not examine the nature of its activities in addition to the substantial pecuniary benefits it generates for its members. CDA, like the AMA, is organized as a nonprofit corporation under state law and is exempt from federal income taxes under Internal Revenue Code 501(c)(6), 26 U.S.C. 501(c)(6) (1995), which applies to "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests. *See* 26 CFR 1.501(c)(6)-1 (1995). It thus apparently does not qualify for exemption under I.R.C. 501(c)(3), 26 U.S.C. 501(c)(3), which exempts organizations that are "organized and operated exclusively for [eleemosynary purposes]... no part of the net earnings of which inures to the benefit of any private . . . individual." This status is pertinent to our jurisdictional analysis, but in applying the AMA test, we nonetheless review for ourselves whether CDA confers pecuniary benefits upon its members as a substantial part of its activities. *See* 94 FTC at 990 n.17.⁴

In deciding that the AMA's activities engendered pecuniary benefits to its members, the Commission pointed to founding documents and promotional literature indicating that one of the AMA's goals was to serve the "material interests" of the medical profession and provide "tangible benefits and services to its members," such as insurance programs, a retirement plan, a physician placement service, publications, authoritative legal information, and practice management programs. *See* 94 FTC at 986-87 (citations omitted). The Commission also cited the AMA's legislative and lobbying efforts on behalf of physicians as an important tangible benefit provided by the organization to its members. *Id.* at 987; *see also Michigan State Medical Society*, 101 FTC at 283-84.

⁴ We find no reason at this time to adopt, as complaint counsel urges, a rebuttable presumption "that any trade or professional association with a 501(c)(6) tax classification . . . operate[s] in substantial part for the economic benefit of its members, and therefore [is] subject to Commission jurisdiction." Brief for complaint counsel at 17-18.