

A Quick Guide to Antitrust Issues

Academy Policy

The Academy's policy is to comply with the antitrust laws. Members should carefully review and follow the "Guidelines for the Avoidance of Inadvertent Anticompetitive Conduct" policy statement, found at www.aao.org/about/policy. In the event of any actual or perceived inconsistency between the guidelines and the information set forth in this quick guide, the guidelines shall control.

Lobbying Activities

Certain activities of the Academy and its members are deemed protected from antitrust laws under the First Amendment right to petition the government. The antitrust exemption for these activities, often referred to as the Noerr-Pennington Doctrine, protects ethical and proper actions or discussions by members designed to influence: (1) legislation at the national, state or local level; (2) regulatory or policy-making activities (as opposed to commercial activities) of a governmental body; or (3) decisions of judicial bodies. However, the exemption does not protect actions constituting a "sham" to cover anticompetitive conduct. A member making knowing and willful false statements to the government likewise does not enjoy immunity.

Interactions with Individual VA Facilities

- Asking an individual VA facility to limit the performance of eye surgery to physicians does not constitute lobbying activity, and therefore is not immune under the Noerr-Pennington Doctrine.
- To minimize any possible risk, the Academy should use a designated spokesperson to communicate with the VA facilities, and all communications should be consistent (i.e., emphasize factual matters comparing the education, training and experience of ophthalmologists to that of optometrists and the strong preference of veterans to have their eye surgery performed by physicians).
- Never threaten or imply any form of retaliation or the withholding of services if the VA facility fails to agree with the Academy's position. Strikes, "job actions," work slowdowns and/or boycotts can constitute a group boycott that violates the antitrust laws and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The fact that the target of the proposed strike or other activity is the government does **not** render the conduct immune from antitrust exposure.
- Never disparage the individual optometrist who either has privileges or is seeking privileges; instead, keep the discussion in general terms (for example, the education, training and experience of ophthalmology vs. optometry). Do not say or do anything to suggest that any optometrist has had poor outcomes or has put patients at risk unless we have specific and indisputable factual support for the statement.

Hospital Staff Privileges

- Gail Schmidt is the designated point person to forward the white paper ("Considerations in Evaluating Whether Optometrists Should be Granted Hospital Staff Privileges" as revised and updated November 2003) to anyone requesting a copy. Copies of the white paper will be sent without making additional substantive comments in a cover letter or orally.
- The Academy will not take any position as to whether a particular application for staff privileges should be granted or denied.
- Academy members should not contact hospitals to discuss staff privilege issues and should not comment if they are contacted by a hospital. All inquiries should be referred to Gail Schmidt.
- Academy members serving on hospital committees considering optometric staff privileges or proposed amendments to the medical staff bylaws that would open the staff to optometrists may wish to obtain legal advice from the hospital's legal counsel as to whether and to what extent they should be involved in the process.¹ No Academy member who participates in any such activities should state or imply that he or she is speaking for or otherwise representing the Academy.

Health Plan Credentialing Panels

- The Academy does not take any position as to whether or not individual optometrists should be credentialed by health plans or whether optometric services should be offered as part of a health plan.
- Academy members serving on health-plan credentialing committees considering optometric participation may wish to obtain legal advice as to whether and to what extent they should be involved in the process. No Academy member who participates in any such activities should state or imply that he or she is speaking for or otherwise representing the Academy.

Optometric Surgery Centers

- If construction requires a Certificate of Need, the Academy may state its position in opposition to the application.
- Putting any form of "pressure" on individual ophthalmologists and/or academic programs to not cooperate with optometry is very risky. Any contact with ophthalmologists or programs should be undertaken only by the Academy's EVP, with advice of legal counsel as to the specific nature of the contact.

Relationships with Ophthalmologists Who Support Optometric Bills

- Putting "pressure" on ophthalmologists who choose to cooperate with optometry in legislative battles is very risky. Any contact for the purpose of discussing the wisdom of supporting optometry should be undertaken only by the Academy's EVP with advice of legal counsel as to the specifics.
- Academy members must not have any discussions about, or that may have the effect of, either withholding patronage or services from or otherwise discouraging dealings with ophthalmologists who aid optometry.

¹ The risk is highly dependent on the facts and circumstances.

- Because supporting optometry in a legislative battle does not violate the Academy's Code of Ethics, Academy members should not file a complaint with the Ethics Committee. Moreover, Academy members must not label such ophthalmologists as "unethical" or use any similar term to describe them.
- It is acceptable for the Academy to publish a factual summary of a legislative battle, including a list of those who testified for and against a bill. If the testimony is transcribed or recorded, it is acceptable to provide a link to the testimony or to make copies available.
- Membership in the Academy and/or membership benefits must not be denied to anyone because of their support for optometry. However, the Academy is not obligated to appoint friends of optometry to its committees or to confer honors or achievement awards upon them.

Co-Management

- Co-Management is not per se unethical. Whether a particular co-management relationship is appropriate depends on the facts and circumstances.
- Academy members must not have any discussions about, or that may have the effect of, either withholding patronage or services from or otherwise discouraging dealings with ophthalmologists who choose to co-manage with optometrists.
- The Academy has enforceable ethical rules that may come into play in some co-management situations. Academy members should review the Code of Ethics and contact the Ethics Committee if they have questions or concerns.
- The joint position paper on ophthalmic postoperative care contains only guidelines and is not enforceable.