

Sent via broadcast e-mail to constituent groups noted below

Memorandum

Date: October 1, 2001

To: State and Subspecialty Society

- Presidents
- Presidents-Elect/Vice Presidents
- Executive Directors

cc: State and Subspecialty Society Councillors

From: H. Dunbar Hoskins Jr., MD
Executive Vice President

Re: **Model Guidelines for the Avoidance of Inadvertent Anticompetitive Conduct**

In 1988, the Academy adopted its policy statement, *Guidelines for the Avoidance of Inadvertent Anticompetitive Conduct Policy*. This policy, developed with the advice of the Academy's legal counsel, applies to all Academy fellows, members, trustees, officers, councilors, committee members and representatives, and to other professional governmental organizations, and employees. In order to ensure that all Academy leaders are well-acquainted with this important issue, these guidelines are included in every Academy agenda book which is distributed by Academy staff. For example, these guidelines are always included in the Council agenda books distributed at the Academy's Mid-Year Forum and Annual Meeting. The guidelines can also be found on our website at http://www.aao.org/aaoweb1/Library/11266_1324.cfm.*

Recently, state societies have requested the Academy's guidance on issues with potential anti-trust implications. The Academy strongly encourages your society to have an anti-competitive policy in place. To assist you with this, our legal counsel has developed the attached **Model Guidelines** for your society's use. We strongly urge your society, if it doesn't already have such a policy in place, to consider adopting these or similar guidelines and to ensure that your society's officers and leaders become familiar with them. Please feel free to also check with your society's legal counsel if you have particular questions or concerns.

We hope this effort is helpful to you as leaders of your organizations.

* **Note:** Guidelines (and other Academy Policy Statements) may now be found at <http://www.aao.org/about/policy/> (10/01/2007)

POLICY STATEMENT

Guidelines for the Avoidance of Inadvertent Anticompetitive Conduct

Policy:

The _____ *Academy/Society of Ophthalmology*, with the advice of legal counsel, has adopted guidelines to help prevent inadvertent anticompetitive conduct. These guidelines apply to all of the *Academy/Society's* fellows, members, trustees, officers, committee members, representatives, and employees.

Background:

Antitrust laws prohibit certain types of behavior and agreements, even among professionals and professional societies. *Academy/Society* members have dedicated years of study and effort to developing their skills and professional reputations, and the *Academy/Society* does not want these tarnished by even the appearance of inappropriate behavior. Nor does the *Academy/Society* want its members or the *Academy/Society* exposed to criminal penalties (for individuals, up to \$350,000 and imprisonment up to three years for each offense, or up to \$10,000,000 for organizations) or treble-damage civil lawsuits. These guidelines are intended to help you be aware of the basic rules and protect against the real risk that you, your practice group, or the *Academy/Society* could face needless litigation.

The exposure to antitrust litigation and expense – even if you and the *Academy/Society* ultimately prevail – is real. For example:

- ✓ In 1999 the U.S. Justice Department sued the Federation of Certified Surgeons and Specialists, Inc. and obtained a court order preventing it from negotiating with any payor on behalf of its physician members, and from facilitating any agreement or understanding between competing physicians about any competitively sensitive information.
- ✓ In 1996 the Federal Trade Commission sued the Montana Associated Physicians, Inc. and obtained an order preventing it from negotiating or refusing to deal with third-party payors; determining the terms upon which physicians deal with such payors; or raising, maintaining, or adjusting the fees charged for any physician's services.
- ✓ AMA was reminded of the risks in 1990 when chiropractic prevailed in protracted and very expensive litigation. The court ruled that AMA had led an unlawful boycott of chiropractors and that AMA's conduct could not be justified by patient-care concerns. The court ordered AMA to take specific steps so that physicians could freely decide whether to have professional relationships with chiropractors.

Guidelines:

Academy/Society members compete with one another in providing quality care to the public.¹ As competitors, there are certain types of agreements that *Academy/Society* members cannot lawfully make.

- Members must not make any agreement to fix, raise, or stabilize prices or fees (or any element of prices or fees) or restrict services that a member can offer.
 - Example: Dr. Ford and Dr. Callahan, who practice in the same community, run into one another at a social hour sponsored by a pharmaceutical company. After they discuss some recent developments in refractive surgery, their conversation turns to the rates that they charge LASIK patients. Dr. Ford says that he would like to raise his rates for such patients, but he needs to know what Dr. Callahan would do. Dr. Callahan says that it is “a great idea whose time has come.” Two weeks later, Dr. Ford raises his rates. The following week, Dr. Callahan likewise raises his rates.
 - Problem: From these facts a jury might conclude that the two members made an agreement to fix prices, which would be a clear violation of the antitrust laws. Although a price-fixing agreement is illegal whether or not it is effective, here the fact that one doctor specifically “needed” to know how the other would respond would probably make it easier to demonstrate that an illegal agreement had been made.
 - Example: Dr. Freeport has decided to offer free screening for seniors in nursing homes. At the local Society meeting, several members sponsor a resolution condemning the practice of free screenings under penalty of expulsion or disciplinary action.
 - Problem: This resolution, if adopted, would constitute an illegal agreement to restrict service.
- Members must not make any agreement to allocate or divide geographic or service markets, customers, or patients.
 - Example: Dr. Harris and Dr. Wesley see one another at a lecture program at the medical school. Dr. Harris mentions that over the last several months, two patients have stopped seeing him and have gone to Dr. Wesley instead. Dr. Wesley says that he understands Dr. Harris’s point, and that he will not accept as new patients anyone who was seeing Dr. Harris, and that he knows Dr. Harris will extend the same courtesy, should it ever be needed.

¹ A contract, combination, or conspiracy can exist only if there are two or more separate economic entities acting together. Two ophthalmologists with competing, independent practices would each be considered a separate economic entity for this purpose. Those same two ophthalmologists, practicing together in one partnership or professional corporation, would be considered just one economic entity for this purpose. Thus, the two independent ophthalmologists could not agree with each other to fix their fees at specified levels for certain procedures, but the two ophthalmologists in partnership could agree on the prices that their partnership will charge, but they could not make any agreements with a third, independent ophthalmologist.

- Problem: In addition to the ethical issues that this raises, it also appears to be an agreement to refrain from competing for patients – and thus a violation of the antitrust laws.
- Members must not make any agreement to collectively refuse (or encourage others to refuse) to do business with a provider, a third-party payor, managed care organization, a supplier, a purchaser, a patient, or any groups of such persons or companies.
 - Example: An insurance company announces that it will no longer pay for a certain procedure. The issue comes up at a meeting of the local Society, and during the cocktail hour several leading members announce that they will not accept patients whose coverage is provided by that insurance company. Others in the group say that this is a great idea, and they support it.
 - Problem: These members appear to have agreed to refuse to deal with the insurance company (and its patients). Although each member had the right to make a unilateral decision not to accept such patients, the collective agreement is a per se violation of the antitrust laws.
- Members must not make any agreement to discourage entry into or competition in any segment of the health care market.
 - Example: Dr. Greene and Dr. Waugh are busy LASIK surgeons in competing practices. In response to what they perceive to be improper demands from referring optometrists, Drs. Greene and Waugh agree that in the future they will not comanage with any optometrists.
 - Problem: Drs. Greene and Waugh have made an illegal agreement to refuse to deal with the optometrists. (Note that the problem here is the agreement – any individual member and any practice group can make unilateral decisions as for the conduct of their own practice, so long as they do not make an agreement with members outside their own practice group.)
- Members must not make any agreement to restrict, limit, or prohibit truthful advertising.

An “agreement” does not have to be formal or written in order to be unlawful; it does not even have to be explicit. In fact, what often matters is not whether there actually is an agreement, but whether others might perceive that there is an agreement based on what they see (or think they see). For this reason, *Academy/Society* members should avoid ambiguous situations. For example:

- Members should use caution in discussing whether the practices of a particular member or other person (that is, an actual or potential competitor) are “unethical” or “anticompetitive” – this might be perceived as an attempt to unlawfully exclude someone from providing health care services.
- Members should also be cautious in any group discussions about the safety, quality or efficacy of the products or services of other health care providers. This does not mean that members should avoid reasonable discussion and assessment of the safety or efficacy

of technology, drugs, and devices – but the discussion should not sound like members will collectively refuse to refer business.

- Members should not discuss the benefits of jointly withholding business from some firm or group of people, or discouraging others from doing business with one or more people. This, too, can very easily be misconstrued as a group boycott.

All *Academy/Society* meetings should be conducted in a manner consistent with these guidelines. Moreover, care should be taken to be able to demonstrate that members followed these guidelines in their meetings. For example, all meetings should follow written outlines or an agenda, and minutes should be prepared and preserved. Except for matters protected by the attorney-client privilege, all discussions conducted and all decisions reached at those meetings should be reflected in the minutes of those meetings. *Academy/Society* representatives to other organizations should take reasonable steps to ensure that such organizations follow the same practice.

Statements made by individuals apparently acting on behalf of the *Academy/Society* are particularly dangerous. Such statements (e.g., issuing any statement on *Academy/Society* letterhead or speaking at a conference without stating that the views expressed are solely your own) may be construed as demonstrating an unlawful agreement when in fact no agreement exists at all. *Academy/Society* members should particularly refrain from statements suggesting they have agreed not to deal with a particular group of suppliers or competitors.

The antitrust laws do not prohibit the *Academy/Society* or its members from asking the legislature or other governmental bodies to establish rules affecting the profession, even if those rules when adopted may have some effects on competition – because petitioning the government is one of our fundamental rights and duties as citizens. But just because citizens can ask the government for something does not mean that they can “jump the gun” by agreeing to adopt the requested measure among themselves before the government acts. *Academy/Society* members should be careful to ensure that their discussions do not look like a prohibited form of private agreement. *Academy/Society* members should not use the *Academy/Society*’s name in connection with collective political action unless it has been approved by the *Academy/Society*’s Board or an appropriate Board committee.

Academy/Society members are strongly encouraged to consult with competent antitrust counsel before undertaking any collective activity that might have competitive implications. *Academy/Society* members, especially those in leadership positions, may also benefit from attending antitrust compliance programs.

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 Policy Statement "Guidelines for the Avoidance of Inadvertent Anticompetitive Conduct" found at <http://www.aao.org/aao/member/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.
- Lobbying in support of the VETS Act is protected and Academy members are *encouraged* to communicate with members of Congress and their staff regarding the VETS Act.

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 with the VETS Act themes (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 factual support for the statement.

Hospital Staff Privileges:

- Gail Schmidt has been designated as the 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 White Paper will be posted on the Academy’s website and the membership will be made aware of its existence.
- 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.

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

Optometric Surgery Centers:

- If construction requires a Certificate of Need, the Academy may state its position in opposition to the application.²
- 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.
- 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 and it may list the names of those who testified for and against a bill. If the testimony is transcribed, 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.

² For example, the Academy submitted an opposition to the CON in Illinois.

- 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.

[1] The risk is highly dependent on the facts and circumstances

[2] For example, the Academy submitted an opposition to the CON in Illinois

POLICY STATEMENT

Guidelines for the Avoidance of Inadvertent Anticompetitive Conduct

Policy:

The American Academy of Ophthalmology, with the advice of its legal counsel, has adopted guidelines that must be followed to avoid inadvertent anticompetitive conduct that could be attributed to the Academy. These guidelines shall apply to all of the Academy's fellows, members, trustees, officers, councilors, committee members, and representatives to other professional or governmental organizations, and employees.

Background:

The Supreme Court of the United States has held that a trade association would be liable under the federal antitrust laws for treble damages arising from unlawful acts of one of its representatives, even if those acts were not authorized by the organization, if the representative had the "apparent authority" (viewed from the perspective of outsiders) to speak or act in the name of and with the apparent endorsement or backing of the organization. The Court held that the appearance of authority could be created, for example, if the representative's unlawful acts were statements written on the organization's letterhead or if other writings or oral statements were made in the representative's capacity with the organization. The Court's holding applies to all membership organizations, including the Academy.

Evaluation:

It is essential that all personnel and representatives of the Academy be specifically aware of the types of conduct that could be found to constitute anticompetitive conduct and that they adhere to straightforward guidelines designed to avoid inadvertent anticompetitive conduct and the possible attribution of that conduct to the Academy.

Guidelines:

Except when expressly authorized in advance by the Board of Trustees of the Academy or in a manner determined by the Board of Trustees, the following guidelines shall prevail.

1. Discussions as described below shall not be conducted at any formal or informal meeting of the fellows and members, the Board of Trustees, the Council, a Council Section, or a committee of the Academy or by any Academy representative to any formal or informal meeting of any other professional or governmental organization, and must be avoided in all other contacts with actual or potential competitors.
 - a) Discussions about, or that may have the effect of, fixing, raising, depressing, pegging, or stabilizing prices or fees; or any element of prices or fees; or establishing minimum or maximum prices or fees;
 - b) Discussions about, or that may have the effect of, either withholding patronage or services from or otherwise discouraging dealings with, or encouraging exclusive dealings with, any health care provider or group of health care providers, any supplier or purchaser or group of suppliers or purchasers of health care products or services, any actual or potential competitor or group of actual or potential competitors, or any patient, group of patients, or other segment of the public;

- c) Discussions about, or that may have the effect of, allocating or dividing geographic or service markets, customers, or patients;
 - d) Discussions about, or that may have the effect of, restricting, limiting, prohibiting, or sanctioning advertising, or soliciting that is not false, misleading, or deceptive;
 - e) Discussions about, or that may have the effect of, discouraging entry into or competition in any segment of the health care market;
 - f) Discussions about whether or not the practices of any member, actual or potential competitor, or other person are "unethical" or "anticompetitive"; and
 - g) Discussions about the safety, quality, or efficacy of the products or services of, or the prices or fees charged by, any health care provider or group of health care providers, any supplier or purchaser or group of suppliers or purchasers of health care products or services, or any actual or potential competitor or group of actual or potential competitors. This does not restrict or prohibit study and reasonable discussion and assessment of the safety or efficacy of technology, drugs, and devices.
2. Minutes shall be prepared and maintained for all meetings of the fellows and members, the Board of Trustees, the Council, Council Sections, and committees of the Academy. Except for matters protected by the attorney-client privilege, all discussions conducted and all decisions reached at those meetings shall be reflected in the minutes of those meetings. Academy representatives to other organizations shall take reasonable steps to ensure that minutes of the meetings of those organizations are prepared and maintained, except for matters protected by the attorney-client privilege, and that all discussions conducted and decisions reached at those meetings are reflected in the minutes of those meetings.
 3. No fellow, member, trustee, officer, councilor, committee member, representative, or employee of the Academy shall have the authority to, or shall, issue any written statement on Academy letterhead to anyone on any of the subjects enumerated in item 1 above.
 4. No fellow, member, trustee, officer, councilor, committee member, representative, or employee of the Academy shall have the authority to, or shall, issue any oral or written statement to anyone on any of the subjects enumerated in item 1 above, in which or in connection with which the person issuing the statement identifies his or her affiliation with the Academy or purports to act on behalf of, in the name of, or with the endorsement of or backing of the Academy.
 5. Notwithstanding anything apparently or expressly to the contrary contained in the preceding items, a person who is affiliated with the Academy and who has been specifically authorized by the Academy or its Board of Trustees or its Executive Committee to communicate in the name of and on behalf of the Academy to representatives of the executive and legislative branches of government with respect to administrative or legislative proposals that are under consideration by those branches and are of direct concern to the Academy, shall not be required to comply with item 3 or item 4 above with respect to any oral or written communication that satisfies the following conditions:

- a) Is first approved by the Board of Trustees or in a manner determined by the Board of Trustees; and
 - b) Is related solely to the substance or merits of a proposal that is then the subject of administrative or legislative hearings or proceedings being conducted by the executive or legislative branch of government and that does or could, if adopted, relate to the science and art of medicine pertaining to the eye and related structures or to the provision of or in payment for services involving prevention, diagnosis, or treatment of disorders affecting the eye and related structures; and
 - c) Is made by that person as a participant in those hearings or proceedings and solely in connection with that participation; and
 - d) Is made directly and solely to a representative of the executive or legislative branch of government who is a participant in those hearings or proceedings with copies of such communications provided only to persons designated by the Board of Trustees of the Academy or in a manner determined by the Board of Trustees.
6. An exact copy of each written statement described in items 3, 4, or 5 above and an exact transcription of each oral statement described in items 4 or 5 above, whether or not the statement has been expressly authorized in advance either by the Board of Trustees of the Academy or in a manner determined by the Board of Trustees, shall be furnished to the Academy's Executive Vice President immediately after the statement is issued, together with a complete record of its distribution.

Approved by: Board of Trustees, February 1988
Reaffirmed by: Board of Trustees, May 1994
Reaffirmed by: Board of Trustees, September 1997
Reaffirmed by: Board of Trustees, February 2001
Revised and
Approved by: Board of Trustees, June 2007