



DEPARTMENT OF JUSTICE

**THE HEALTH CARE GUIDELINES AND ASSOCIATIONS --
HOW ASSOCIATIONS CAN WORK WITH
THE DEPARTMENT OF JUSTICE**

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
District of Columbia Bar Association

Four Seasons Hotel
Washington, D.C.

February 16, 1994

Good morning! It is a pleasure to be the kickoff speaker of the D.C. Bar Symposium on Trade Association Law & Practice. Hopefully, as kickoff speaker, I will give more of a Dallas Cowboys type speech than a Buffalo Bills type speech.

My topic today--Associations and the antitrust laws--is an important one. The antitrust laws are perhaps nowhere more applicable than in Association activity. Associations by their very nature bring together competitors. Whenever competitors get together there is the potential for antitrust concerns to arise. Just to mention a few examples:

- although I suspect the representatives of the FTC you will hear from later will discuss it in greater detail, just two weeks ago the FTC brought suit against two associations of language interpreters for fixing prices;
- statistical exchanges carried out under the auspices of an association could be problematic from an antitrust standpoint if certain protections are not implemented; and
- Associations engaged in standard setting can also run afoul of the antitrust laws for exclusionary practices.

I think it is appropriate to state that because of the very nature of Associations--that they bring together competitors--it is extremely important for both representatives of the Association and the Association's members to understand the antitrust laws and conduct their business in accordance with those laws.

The first thing I want to discuss is the relationship of the Statements of Antitrust Enforcement Policy in the Health Care Area to Associations. Later on I will discuss how Associations can work with the Department for the benefit of both the Association and the Department.

On September 15, 1993, the Department and the FTC jointly issued six Statements of Antitrust Enforcement Policy in the Health Care Area. The Statements specifically address issues that had arisen in the Health Care Field. Some of those issues, however, arise outside the Health Care Area as well. Two of the Statements in fact address issues that are extremely relevant to Associations. One Statement deals with the exchange of price and cost data among competitors. Another deals with Joint Purchasing Arrangements.

Associations often are involved in exchanges of price and cost data. Such exchanges can have benefits for Association members and consumers. Information derived from price and compensation surveys can allow industry participants to price their products or services more competitively, to offer compensation that attracts qualified personnel, and to realize areas where a company's costs may be way out of line and in need of change. However, without appropriate safeguards, such exchanges among competitors may facilitate collusion or otherwise reduce competition to the detriment of consumers.

Hospitals also frequently engaged in such exchanges. The antitrust enforcement Agencies were concerned that such exchanges

were being carried out without appropriate safeguards to prevent competitive concerns from arising. As a consequence, the Agencies decided to offer guidance on the appropriate safeguards for hospitals to implement when engaging in such exchanges. This was done in the form of a safety zone--essentially an area of protected conduct. The Agencies determined that they would not challenge hospital participation in written surveys if the following conditions were satisfied:

- 1) the survey was managed by a third-party (e.g., a trade association, consultant, or academic institution);
- 2) the information provided by survey participants was based on data more than 3 months old; and
- 3) there were at least five hospitals reporting data upon which each disseminated statistic was based, no individual hospital's data represented more than 25 percent on a weighted basis of that statistic, and any information disseminated was sufficiently aggregated so that it would not allow recipients to identify the prices charged or compensation paid by any particular hospital.

We believe that the guidance offered with respect to hospitals on this issue has broader, general applicability. The analysis on which the safety zone is premised is applicable to all competitors engaged in exchanges of price and cost data. You will note that the first requirement to fall within the safety zone can result in an important role for Associations--the third-party manager of the survey. Associations already often are involved in gathering and disseminating industry statistics on behalf of their members and may get more involved in the future to enable their members to avoid potential antitrust concerns.

If an Association, or anyone else for that matter, undertakes to conduct such surveys, then it should note the remaining two aspects of the safety zone in conducting the survey. The information being provided should be at least three months old, and it should be sufficiently aggregated so that dissemination would not allow recipients to identify the prices charged by or the particular costs of an individual competitor.

I want to emphasize that this is a safety zone--failure to satisfy all these criteria does not mean that the exchange is illegal. A price survey that does not meet one of the requirements (for example because it disseminated data if four industry participants instead of five were reporting the data) is not necessarily illegal. Such a survey may raise antitrust questions and it is possible the Agencies would conduct an investigation to see if the survey was having an anticompetitive effect in the marketplace. My advice to you as Associations is to try to follow the requirements of the safety zone wherever possible to prevent any antitrust concerns from arising.

A second Statement addressed the issue of Joint Purchasing Arrangements. Again, although it was produced in the context of the Health Care Industry, it has a broader, general applicability. Some industry participants get together in an Association to pool their buying requirements in an attempt to get a better deal than each individual competitor could have received alone. Through such joint purchasing arrangements, the participants frequently can obtain volume discounts and reduce transaction costs. However, if too many purchasers join together, the combined purchasers, acting through the Association may account for such a large portion of the purchases of the particular product that the Association can exercise market power and drive the price of the goods or services being purchased below competitive levels. In addition, the Agencies would be concerned if the products or services being purchased account for a sufficiently large proportion of the total costs of the product

or services being sold by the joint purchasers that price fixing or collusion among them could be facilitated.

In order to give participants in such joint purchasing arrangements guidance as to when antitrust issues may begin to surface, the Agencies established a safety zone addressing both of these issues. As long as the joint purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market, and the cost of the products and services purchased jointly accounts for less than 20 percent of the revenues from the product sold by each competing participant, the Agencies would consider such an arrangement to fall within the safety zone.

I would recommend to any Association that is involved on behalf of its members in a joint purchasing arrangement to review the Statement and follow the requirements of the safety zone to avoid any antitrust concerns.

Now I would like to discuss the constructive ways that Associations can represent their members' interests before the antitrust enforcement agencies. I believe Associations can play a number of important roles with the Agencies. First, Associations can play an active role in bringing to the attention of the federal enforcers potential anticompetitive conduct that is occurring and injuring your members. At the Department, we want to encourage businesses and Associations to report potential antitrust violations. It is our mission to ensure the functioning of a competitive economy, but your help in identifying potential areas of concern enables us to discover practices we may not have known existed. Our interest is not limited to competitive restraints imposed by U.S. firms. We encourage any Associations that believe their members were victims of foreign cartels to come forward and report that information to the Department.

Second, Associations can play a vital role in helping the Agencies to understand the workings of a particular industry and the concerns of the members in that industry. Referring back to the Statements of Antitrust Enforcement Policy in the Health Care Area for a minute, Associations played an important role in the development of those statements.

The Agencies had meetings with a number of groups, including the American Hospital Association and the American Medical Association--those Associations acted as conduits of suggestions, advice, and information from their members. It is impossible for the Department to meet with every industry participant, but Associations can do their members a real service by representing their interests to the Agencies.

To represent their members effectively, however, an Association cannot be parochial. It must recognize that the Agencies have a mission and statutory obligation to preserve the competitive functioning of the economy. Many industries would love to have antitrust exemptions. Of course, none wants antitrust exemptions to apply to other industries because they realize it will cause their costs to increase. In any event, a plea for antitrust exemptions is not likely to be favorably received by the Agencies. Nor are we likely to respond favorably to generalized claims that competition will not work in a particular industry.

On the other hand, where there are concerns regarding the scope or application of the antitrust laws to a particular industry or even a particular practice in an industry, an Association can bring that to the attention of the Agencies and work with the Agencies to attempt to find a way to resolve the concerns. Again, the Statements of Antitrust Enforcement Policy in the Health Care Area are a good example of a beneficial relationship between Associations and the Agencies.

The AHA and AMA, on behalf of their members, brought to the Agencies' attention legitimate concerns regarding the uncertainty of the application of the antitrust laws to particular practices in the health care field. The Agencies recognized the problem and took steps to resolve it. The Agencies realized, moreover, that whatever product they would come up with by themselves could be improved with the input of industry participants. The Associations played this role on behalf of their members by being willing to meet with us and provide helpful input. We were able to examine whether any particular language would have unintended or unforeseen consequences, whether we had sufficiently addressed the most pressing issues, and whether there might be better ways to reach the correct conclusion.

Over the years, Trade Associations have played a very constructive role in the U.S. economy. I have every reason to believe that they will continue to well represent the interests of their members. To the extent they keep their members out of antitrust trouble, and most have done that very well, they also serve the public interest. I have repeatedly said that an active antitrust program serves both producer and consumer interests. I welcome your cooperation in preserving competition in your industries. Working together with the Antitrust Division can benefit both the Division, for which we are grateful, and the members of the Association, for which they will be grateful. Associations can work hand in hand with the Division in helping to preserve our competitive economy.