Antitrust Compliance Training

Connecticut Chiropractic Association

April 2008

CCA Policy and Guidelines

ANTITRUST COMPLIANCE POLICY AND CODE OF CONDUCT

The Connecticut Chiropractic Association (the "CCA") is a not-for-profit organization. The CCA is not organized to and may not play any role in the competitive decisions of its members or their employees, nor in any way restrict competition among members or potential members. Rather it serves as a forum for a free and open discussion of diverse opinions without in any way attempting to encourage or sanction any particular business practice.

The CCA provides a forum for exchange of ideas in a variety of settings including its annual meeting, educational programs, committee meetings, and Board meetings. The Board of Directors recognizes the possibility that the Association and its activities could be viewed by some as an opportunity for anti-competitive conduct. Therefore, this policy statement clearly and unequivocally supports the policy of competition served by the antitrust laws and to communicate the Association's uncompromising policy to comply strictly in all respects with those laws. These laws prohibit activities that illegally restrain or reduce competition, control prices, allocate markets, or result in boycotts, specifically with respect to activities, negotiations and interactions with competitors and/or payers. In addition, the OAG's Stipulated Judgment and Release and the FTC's Consent Agreement prohibit specific conduct by, between and among the CCA, its officers, directors, members, employees, representatives and agents, which could lead to or constitute an antitrust violation.

CCA Policy & Guidelines Cont'd

While recognizing the importance of the principle of competition served by the antitrust laws, the Association also recognizes the severity of the potential penalties that might be imposed on not only the Association but its members as well in the event that certain conduct is found to violate the antitrust laws. Should the Association or its members be involved in any violation of federal/state antitrust laws, such violation can involve both civil and criminal penalties that may include imprisonment for up to 3 years as well as fines up to $350,000 for individuals and up to $10,000,000 for the Association plus attorney fees. In addition, damage claims awarded to the governmental agency and/or private parties to a civil suit may be tripled for antitrust violations. Given the severity of such penalties, the Board intends to take all necessary and proper measures to ensure that violations of the antitrust laws do not occur.

The following legal standards, code of conduct and guidelines are intended to ensure the CCA's strict adherence with the federal and state antitrust laws, the OAG's Stipulated Judgment and Release and the FTC's Consent Agreement, and to assist you with your compliance with these important laws and pronouncements. All officers, directors, members, employees, representatives and agents shall be required to review this CCA Antitrust Policy and Code of Conduct and adopt its provisions.

CCA Policy & Guidelines Cont'd

A. Legal Standards Applicable to Antitrust Compliance

The following legal standards will be observed relative to compliance with the antitrust laws:

- No CCA officer, director, member, employee, representative or agent may, directly or indirectly, or through any corporate or other device, in connection with the provision of chiropractic services in or affecting commerce, as "commerce" is defined in section 4 of the Federal Trade Commission Act, 15 U.S.C. §§44:

- Enter into, adhere to, participate in, maintain, organize, implement, enforce or otherwise facilitate any combination, conspiracy, agreement, or understanding between or among any chiropractors with respect to the provision of chiropractic services:

  a. to negotiate on behalf of any chiropractor with any payer regarding any term, condition, or requirement upon which any chiropractor deals, or is willing to deal, with any payer, including, but not limited to, price terms; or

  b. to deal, refuse to deal, or threaten to refuse to deal with any payer.

- Request, propose, urge, advise, recommend, advocate, or attempt to persuade in any way any chiropractor to deal or not deal with a payer, or accept or not accept the terms and conditions, including, but not limited to, price terms, on which the chiropractor is willing to deal with a payer;

CCA Policy & Guidelines Cont'd

- Exchange or facilitate in any manner the exchange or transfer of information among chiropractors concerning any chiropractor's willingness to deal with a payer, or the terms or conditions, including price terms, on which the chiropractor is willing to deal with a payer;
- Organize, sponsor, facilitate or participate in any meeting or discussion that the CCA expects or reasonably should expect will facilitate communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;
- Continue a formal or informal meeting that the CCA expects or reasonably should expect will facilitate communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;
- Continue a formal or informal meeting of chiropractors after any person makes any statement concerning one or more chiropractors' intentions or decisions, that if agreed would violate the OAG's Stipulated Judgment and Release and/or the FTC's Consent Agreement, unless the CCA immediately ejects such person from the meeting;
- Continue a formal or informal meeting where the CCA knows or reasonably should know that two or more persons are communicating concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;

CCA Policy & Guidelines, Cont'd

- Attempt to engage in any action prohibited by the OAG's Stipulated Judgment and Release and/or the FTC's Consent Agreement; and/or
- Encourage, suggest, advise, pressure, induce, or attempt to induce any person to engage in any action that, if taken by the CCA, would be prohibited by the OAG's Stipulated Judgment and Release and/or the FTC's Consent Agreement.

B. Officer, Director, Member, Employee, Representative and Agent Obligations Relating to Antitrust Compliance

1. Mandatory Compliance with Laws

- Compliance with and promotion of strict adherence to the federal and state antitrust laws, the OAG's Stipulated Judgment and Release and the FTC's Consent Agreement is a condition of membership, appointment, employment, association or affiliation with the CCA. In addition, both the OAG's Stipulated Judgment and Release and the FTC's Consent Agreement contain specific provisions governing the conduct of meetings, and the obligation of the CCA to eject persons from meetings and/or terminate meetings under certain circumstances. You must familiarize yourself thoroughly with the requirements of the OAG's Stipulated Judgment and Release and the FTC's Consent Agreement. (*See* APPENDICES A and B and visit the CCA website for detailed and current advisories on the topic of antitrust: **http://www.ctchiro.com**.

CCA Policy & Guidelines, Cont'd

- Certain activities of the Association and its members are deemed protected from antitrust laws under the First Amendment right to petition government. The antitrust exemption for these activities, 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.

- At all committee, educational meetings, or other business meetings of the CCA, speakers and participants will be informed about the CCA's Antitrust Policy

- CCA, its officers, directors, employees, representatives and agents shall establish and maintain an antitrust training and education program (the "CCA Antitrust Training and Education Program"), completion of which shall be required for all officers, directors, members, employees, representatives and agents of the CCA. Such training and education program shall cover compliance with federal and state antitrust laws, the OAG's Stipulated Judgment and Release and the FTC's Consent Agreement, in addition to all pertinent regulatory pronouncements relative to antitrust compliance and enforcement.

CCA Policy & Guidelines, Cont'd

- **2. Prohibited Conduct**

  No officer, director, member, employee, representative or agent of the CCA has any authority to act contrary to the provisions of the OAG's Stipulated Judgment and Release, the FTC's Consent Agreement, the antitrust laws or CCA's standards of conduct or to authorize, direct or condone violations by any other officer, director, member, employee, representative or agent. Any officer, director, member, employee, representative or agent who violates these laws and/or regulations not only risks individual indictment, criminal prosecution and penalties, civil actions for damages and penalties and administrative sanctions, but also subjects CCA to the same risks and penalties. Any CCA officer, director, member, employee, representative or agent who violates these laws may be subject to immediate termination of his or her membership, appointment, employment, association or affiliation with the CCA.

3. Examples of Prohibited Conduct

- Examples of activities and conduct which potentially could run afoul of the antitrust laws include arrangements or agreements by, between and among chiropractors to boycott or refuse to deal with managed care organizations or other third-party payers; to allocate patients, markets or territories; or joint restriction of advertising or marketing efforts.

CCA Policy & Guidelines, Cont'd

- The Association or any committee, district, or activity of the Association shall not be used for the purpose of bringing about or attempting to bring about any understanding or agreement, written or oral, formal or informal, expressed or implied, among two or more members or other competitors with regard to prices or terms and conditions of contracts for services or products. Therefore, discussions and exchanges of information about such topics will not be permitted at Association meetings or other activities.
- There will be no discussions discouraging or withholding patronage or services from, or encouraging exclusive dealing with any supplier or purchaser or group of suppliers or purchasers of products or services, any actual or potential competitor or group of actual potential competitors, or any private or governmental entity.
- There will be no discussions about allocating or dividing geographic or service markets or customers.
- There will be no discussions about restricting, limiting, prohibiting, or sanctioning advertising or solicitation that is not false, misleading, deceptive, or directly competitive with Association products or services.
- There will be no discussions about discouraging entry into or competition in any segment of the marketplace.
- There will be no discussions about whether the practices of any member, actual or potential competitor, or other person are anti-competitive unless the discussions or complaints follow the prescribed due process provisions of the Association's bylaws.

CCA Policy & Guidelines, Cont'd

4. Reporting Suspected or Known Violations

CCA and its officers, directors, members, employees, representatives and agents shall not knowingly and willfully make or cause to be made any false statement or representation of material fact in any report to a governmental agency with respect to CCA's antitrust compliance activities. In addition, CCA, its officers, directors, members, employees, representatives and agents shall not, with knowledge and fraudulent intent, fail to report any violations to proper law enforcement authorities.

Any officer, director, member, employee, representative or agent of the CCA who has knowledge of activities that he or she believes may violate the OAG's Stipulated Judgment and Release, the FTC's Consent Agreement, antitrust laws, or the CCA's Antitrust Compliance Policy or Code of Conduct, should consider, upon becoming aware of such activities, promptly reporting the matter to the CCA's Executive Director, the CCA's Compliance Officer or the CCA's General Counsel. Reports may be made anonymously but reporters are encouraged to identify themselves to facilitate follow up investigation and substantiation of concerns. Reporters will not be penalized, sanctioned or retaliated against in any way.

Enforcement Of Violations Of CCA Policy

- Any officer, director, member, employee, representative or agent of the CCA found in violation of rules or guidelines of the CCA shall be subject to strict disciplinary action, up to and including, immediate termination of his or her membership, appointment, association or affiliation with the CCA, even for a first offense in appropriate circumstances.

The Competitive Process

- Connecticut consumers have the right to expect the benefits of free and open competition, i.e., the best goods and services at the lowest prices.
- The competitive process only works when competitors set prices honestly and independently.
- Consumers are cheated when competitors collude and inflate prices.

Basic CCA Principles

- Act responsibly
- Don’t do anything you don’t want others to find out about
- Nothing is More Important Than Our Commitment To Integrity and Compliance

What do Antitrust Laws Do For the Consumer?

- Antitrust laws protect competition.
- Consumers benefit from competition through lower prices, better products and services.
- When competitors agree to fix prices, rig bids or allocate customers or sales territories, consumers lose the benefits of competition.
- The result is artificially higher prices.

Antitrust Laws and Enforcement

Sherman Act

- The Sherman Act is a federal law that prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity.
- Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the U.S. Department of Justice.
- Violation of the Sherman Act is a felony punishable by a fine of up to $100 million for corporations, and a fine of up to $1 million or 10 years imprisonment (or both) for individuals.
- In addition to fines, parties engaging in anticompetitive activity may be ordered to pay restitution to the victims.

Antitrust Laws and Enforcement

Connecticut Antitrust Act

- Conn. Gen. Stat. Section 35-24, makes it unlawful to restrain trade or commerce by fixing, controlling or maintaining prices, allocating or dividing customers or markets or refusing to deal or inducing third parties to deal with another person.
- Violations of the Act subjects an individual to a civil penalty of up to $25,000, and subjects a business or corporate entity held to have violated the Act to a civil penalty of up to $250,000.
- In addition to civil penalties, those found liable for violating the Act may be subject to paying restitution and damages.

Antitrust Laws and Enforcement (cont'd.)

- **Penalties are Severe.**
  - Companies and organizations have been fined hundreds of millions of dollars and individuals can receive prison sentences.
  - The CCA can lose its right to do business in the State.

- **Careless conduct can violate the law.**
  - What appears to be ordinary business contacts, such as a meeting about pricing or discussions at an industry trade association can raise "red flags" and expose us to a government investigation.
  - Because of the risks, **never** discuss competitive matters with other members.

Other Potential Sanctions

- Treble damages
- Attorneys fees
- Injunctive relief – which may mandate the way the Association must conduct its business.

Federal and State Antitrust laws prohibit:

- Agreements that unreasonably restrain trade, including:
  - Price fixing and market or customer allocation
  - Concerted refusals to deal (group boycotts)
  - Tying arrangements (I'll sell you this only if you agree to buy this as well)
- Monopolization

Agreements in Restraint of Trade

- Section 1 of the Sherman Act:

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce...is declared to be illegal."

- Section 35-26 of the Connecticut Antitrust Act:

"Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful."

What constitutes an "agreement"

- Agreements between competitors need not be in writing.
- Can be implied from one's conduct or a conversation.
- Most antitrust cases involve an agreement between the parties that has been inferred from circumstantial evidence supporting a conspiracy.
- If the plaintiff can produce evidence supporting a conspiracy, the defendant may be required to prove their conduct was the result of independent (not coordinated) conduct.

What is Price Fixing?

- Price fixing can take many forms, and any agreement among competitors that restricts price competition violates the antitrust law. Examples of price-fixing agreements include those where competitors agree to:
  - Establish or adhere to price discounts;
  - Hold prices firm;
  - Eliminate or reduce discounts;
  - Adopt a standard formula for computing prices;
  - Maintain certain price differentials between different types, sizes, or quantities of products;
  - Adhere to a minimum fee or price schedule;
  - Fix credit terms; or
  - Not advertise prices.

Bid Rigging

- Bid rigging is the way that competitors conspire to raise prices when purchasers, including state or local government seek to acquire goods or services by soliciting competing bids.

Bid-rigging

- Practices that raise “red flags” (and avoid):
  - Last minute changes to bid documents at time of submission
  - Discussions with competitors immediately prior to submitting bids
  - Statements that a given contract “belongs” to a particular bidder
- Any of the above may support an inference of an agreement to rig bids.

Types of Bid Rigging Schemes

- Bid suppression – an agreement between competitors to either refrain from bidding or withdrawing a submitted bid so that a designated competitor's bid will be accepted.
- Complementary Bidding – also called "cover" or "courtesy" bidding occurs when one or more competitors agree to submit bids that are either too high to be accepted or contain special conditions that will not be acceptable to the purchaser. This includes those situations where you did not intend on bidding but agree to do so to "help out" a competitor.
- Bid rotation – In this scheme all conspirators submit bids, but take turns on being the low or winning bidder.
- Subcontracting – Competitors agree not to bid or to submit a losing bid in exchange for subcontracts from the successful low bidder.

Bid-rigging: Subcontractors

- Contractor-subcontractor relationships can present special problems.
- Agreements between a specialized subcontractor and a general contractor to work together to submit a bid is OK.
- Agreements between entities that could bid independently where one submits the prime bid and the second agrees to be a subcontractor may give the appearance of an agreement not to compete for the prime contract.
- Is the arrangement to make your bid more competitive or is to remove a competitor from the process and raise the ultimate price?

Customer or Territorial Allocations

- An agreement in which competitors divide markets among themselves:
  - Competitors agree to allocate customers amongst themselves; or
  - Competitors agree to allocate sales territories or geographic markets
  - In the trash hauling industry, this has been referred to as the “property rights” system (i.e., the customer is the “property” of a given company)

All of these agreements affect "price"

- Extends beyond agreements to charge a specific price to include:
  - Floor prices, price ceilings or credit terms
  - Agreement not to bid or to bid non-competitively
  - Dividing or trading customers
  - An agreement not to advertise
  - Exchanging price information in order to increase or stabilize prices

Vertical Restraints

- Agreements with suppliers, customers or resellers to:
  - Set minimum prices
  - Set maximum prices
  - Suggest or promote resale prices
  - Restrict or allocate sales territories
- In some respects, the current law is unsettled, although generally now judged under the “rule of reason” (weighing the competitive harm against the procompetitive justification for the practice).

Vertical Agreements that Might Give Rise to Liability

- Fixing specific or minimum resale prices.
- Cutting off a reseller that prices below a prescribed level.
- Cutting off a reseller at the request of a competing reseller.
- Unlawful tying agreements (I'll only sell you my pencils if you also purchase my eraser).

Vertical Agreements that Usually Do Not Pose Problems

- Exclusive territories for resellers
- Bundling or tying where (company name) has no market power or where the products are offered separately.
- Suggesting or promoting reseller-advertised resale prices.

Tying Agreements

- It is unlawful to require the purchase of one product in order to purchase a second product *where*:
  - (company name) has market power (usually a very large market share and the ability to raise prices) in the first (i.e. tying) product.
  - The products can be and are sold separately.
  - There is no legitimate business justification for requiring that they be purchased together.

Monopolization

- The intentional acquisition or maintenance of the power to control prices or exclude competition.

  Elements:

  1. Market Power
  2. Abuse of monopoly position

Abuse of Monopoly Position

- The existence of monopoly power is not illegal, it's the illegal use of that power that runs afoul of the law.
- "Abuse" could include any type of "predatory" or "exclusionary" conduct.
- Exclusionary conduct may include conduct that has no apparent rational business purpose other than their adverse effect on competitors such as (i) a refusal to deal with competitors, customers or suppliers, (ii) exclusionary boycotts, or (iii) exclusive deals that foreclose competitors from a substantial portion of the market.
- Predatory conduct is defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.
- "Abuse" does ***not*** include simply charging a monopoly price or refusing to sell to a customer for legitimate business reason, even if that customer is a competitor.

Ways the CCA Can Get into Trouble with Antitrust Enforcers

- Discussing prices, terms, or product offerings among members/competitors or at industry meetings.
- Calling up a competitor complaining that she/he stole a customer.
- Discuss bids or bidding strategy with a member/competitor at bidder conferences.
- Urging, Inciting or Signaling competitors not to deal with a buyer or seller (a “boycott”).

Dos and Don'ts

- Do what is best for the customer.
- Use and communicate information honestly.
- Play hard, as long as you play fair.
- Don't submit a bid on work you don't want to help out a competitor who does.
- Be very careful in how you entertain or give gifts to customers (e.g., patients or referral sources); there is a very gray line as to what is appropriate and what constitutes an illegal inducement.

Dos and Don'ts (cont'd)

- Don't make references to industry-wide or association price schedules;
- Don't submit a bid for work that you or your practice is incapable of performing to cover a competitor's bid.
- Don't pick up bid packages or drop off bids for competitors.
- Don't discuss advance pricing with your competitors

List of Dos and Don'ts

- Don't make statements that a particular customer, contract or sale territory "belongs" to a certain chiropractor.
- Don't target or gang up on specific competitors.
- Don't speak with competitors about prices, promotions, terms of sale, future business plans, boycotts, refusals to deal, market share or specific customers.

Hypothetical Situations You may Encounter.

Hypothetical Situation #1

- If a managed care organization or other payer specifically requests a bid from you or your practice or offers a contract, what is the proper response?
  a) Thanks, but we generally don't look to contract with managed care organizations.
  b) We're happy to evaluate your RFP or contract and will get back to you if we decide to bid.

Hypothetical Situation #1-Analysis

- Assuming that every chiropractor is making an independent business decision that its best interest is served by not entering adjoining markets, then no antitrust violation exists.
- BUT, even the hint of an agreement could give rise to a lengthy dispute over whether an illegal conspiracy existed.
- In this situation, extreme caution is warranted to avoid compromising interactions with competitors in adjacent markets.

Hypothetical Situation #1-Analysis

- The proper response is to offer to review the request for a bid or the contract and then to act independently and for good business reasons.
- Avoid implying that there may be an agreement with a competitor by flatly refusing to bid or contract without giving the invitation reasonable business consideration.

Hypothetical Situation #2

- Members of a trade association are upset with the reimbursement amount a managed care organization will pay the members for particular services.
- The members discuss the perceived unfairness with the level of reimbursement, voice their displeasure amongst themselves and some make the statement they will not participate in the program.
- Subsequent to the meeting, many of the members decline to provide services/good or otherwise participate in the program.
- Have they engaged in an illegal boycott?

Hypothetical Situation #2 – (cont'd)

- Decisions whether to participate that are made independently do not violate the antitrust laws. On the other hand, a joint decision not to participate in order to pressure the agency into raising the price will run afoul of the antitrust laws.
- The "gray area" revolves around when conduct is independent and when it crosses the line to a coordinated agreement. Factors that might lead to the inference that conduct amounts to a boycott include:

  - keeping membership apprised of who has declined to participate;

Hypothetical Situation #2-Analysis (cont'd)

- communications to membership along the lines of "good luck if you can make money on this", or "if enough of us refuse to participate, they'll have to raise the price", may be seen as communications amounting to a call for a boycott.

- While those trade association members that did not agree to the boycott would not be liable, sorting out who participated in the agreement would be a factual dispute.

Hypothetical Situation #3

- What can you do to lessen antitrust sensitivity?
  - At the time the initial conversations occur, make the record clear that you would not entertain further such discussions. For example state, “I don’t think that’s an appropriate topic for us to discuss” and notify CCA’s legal counsel after the meeting.
  - Base your response to any contract or bid opportunity upon your own independent business judgment.

Confidential or Proprietary Information

- Never use a competitor's confidential or proprietary information.
- Never use a competitor's bid if you are involved in bidding, especially on Government contracts.
- Never use information on a competitor that someone offers to sell.

Legitimate sources of competitive information

- Newspaper and press accounts.
- Other public information, such as annual reports or published sales materials.
- Customers giving you a competitor's proposal, but only if it is not confidential.
- Trade shows.
- Information publicly available on the Internet.

Conduct that might indicate a Bid Rigging Scheme

- Competitors submitting identical bids;
- Bidders seem to win bids on a fixed rotation;
- Fewer competitors than normal bids on a project;
- Large dollar differential between the winning bid and other bids;
- One bidder submits substantially higher bids on some bids than others, with no logical reason to explain the difference in cost.

What is my role in Antitrust Enforcement?

- If you encounter business behavior that appears to violate the CCA policy, you should consider notifying:
  - The Executive Director, the Antitrust Compliance Officer and/or the CCA's General Counsel
  - Information provided will be kept confidential
  - You **will not** be subject to retaliation for alerting company officials to possible illegal, improper conduct or breaches of the company's policies.
  - You may also contact the Office of the Attorney General:

    Michael E. Cole, Assistant Attorney General
    Chief, Antitrust Department
    Office of the Connecticut Attorney General
    55 Elm Street
    Hartford, CT 06106
    860/808-5040

- If you suspect that someone within our organization has violated our compliance policies and you do not report it to appropriate company officials, **you** could be subject to disciplinary action up to and including termination of your membership, appointment, association or affiliation with the CCA.
- If you suspect an antitrust violation among competitors inquiries can be made to the Office of the Attorney General at the address and telephone number provided above.