Five Questions that State Psychological Associations Frequently Ask About
Managed Care Fee Advocacy and Antitrust Risks

Note: This document was designed primarily for state and local psychological associations but responds to questions that members commonly ask about what they and their associations can do and discuss in light of antitrust concerns.

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Most state psychological associations are aware that discussions about psychologists' fees raise serious concerns about violations of U.S. antitrust law. These concerns come to the forefront when members ask their state association to take action about rate cuts or low reimbursement rates paid by managed care organizations (MCOs).

The following is a basic discussion of five of the most common questions state associations ask about managed care fees and antitrust implications. It is based on the workshop on these issues at the APA Practice Organization's 2007 State Leadership Conference.

Disclaimers:

The following does not constitute legal advice but merely offers a simplified overview of the highly complex area of antitrust law. Antitrust law is highly fact-specific and therefore a state association cannot rely on general guidance like this document. Moreover, antitrust law is less clear than many other areas of law and regulation in terms of what exact activities are prohibited and what will lead to prosecution. Antitrust liability can be substantial, and even successfully defending an antitrust investigation or case could be a considerable drain on the state association's resources. Accordingly, before engaging in any activities that appear to potentially raise antitrust concerns, state associations are advised to retain counsel with antitrust expertise to help the association assess the risks associated with the proposed activity.

Although the APA Practice Organization cannot provide legal advice to state associations, we can discuss particular activities a state is considering and offer guidance as to whether the association should seek legal advice.

Q&A

1. Why can't the association engage in collective bargaining on behalf of members?

Price fixing is clearly illegal under antitrust law. Economic competitors cannot get together and agree on a price they will charge for their goods or services. For example, oil companies are prohibited from getting together to agree on how much to charge for a gallon of gas. Anitrust law also applies to smaller economic competitors. Psychologists

in independent practice in a particular market area are viewed as economic competitors. Thus, they cannot agree on a price that they will charge for their services. If, for example, a state association negotiated a rate on behalf of its members that they would charge a MCO, that would be an illegal agreement among competitors to fix prices.

It is important to note, however, that individual psychologists and integrated practice groups such as partnerships are always free to set their own rates or decide what MCO rates they will or will not accept. It is only when they act in concert with competing psychologists that antitrust law comes into play.

2. Why can't the association form a union to collectively bargain for members?

There is an antitrust exception for collective bargaining by unions, but that only allows a group of employees to collectively bargain with their employer. Psychologists in independent practice generally do not have an employee-employer relationship with MCOs, in part because the MCO does not control the details of the psychologist's work as an employer does. For example, an MCO generally does not dictate the psychologist's hours, when the psychologist can take vacation, how the psychologist dresses or keeps his/her office, etc.

3. Can the association warn that psychologists are likely to leave the MCO's panel if the MCO cuts its rates?

It is also clearly illegal under antitrust law for a group of economic competitors (like the psychologist members of a state association) to explicitly or implicitly threaten to boycott an MCO to influence fees. However, there is no clear antitrust definition of what is an *implicit* boycott threat. Thus, a state association must be very careful in making statements that might be construed as a veiled boycott threat. For example, there is an antitrust risk if the state association tells an MCO that if the company cuts rates, many psychologists are likely to leave the panel. Although this seems to be an obvious fact, of which the MCO is probably already aware, the statement may still be construed as an implicit boycott threat. Accordingly, although the impact of rates on panel adequacy and patient access to care is often the strongest argument against rate cuts, the association is advised to craft its statements carefully and consult with counsel before making such arguments.

4. What *can* the state association do?

There are several things that a state association can do about managed care fees. However, the association must do even these things carefully to minimize antitrust risks.

A. Petitioning the Government. An exception to the antitrust laws allows associations to petition government entities, such as state insurance commissions and legislators, and raise fee issues that would trigger antitrust concerns if not for the "petitioning the government" exception.

B. Gathering and disseminating historical price information. The Federal Trade Commission (FTC), the main federal agency that enforces the antitrust laws in the health care field, has created a "safe harbor" (a clearly delineated area of safe behavior that will generally not be deemed an antitrust violation) for collecting and disseminating historical price information. Thus, if the association follows the safe harbor guidelines, it can collect data on MCO fees (as well as private pay fees) in the market area and disseminate them to members. Further details of the safe harbor are described in Attachment A, but key factors are:

- Fee information must be at least 3 months old.

- The information must be collected confidentially so that psychologists in the association do not learn what fees competing psychologists are charging. For this reason, such surveys are often done by an accounting firm or other outside entity.

- When the association disseminates the survey results to members, it must do so in a way such that members cannot determine the identity of those charging particular fees. (For example, the association should not list the "average fee" for a geographic area if there is only one psychologist in that area, because this would make it transparent whose fee is listed.)

C. The Messenger Model. The association can act as the messenger to communicate members' concerns *carefully* to the MCO. For example, the association could convey members' concerns that the MCO is making it difficult for them to provide effective care to the MCO's subscribers. Of course, the association must be careful *not* to convey those concerns in a way that might be construed as an implicit boycott threat as described in Question 3 above, e.g., "Our members are concerned that there will be no psychologists left on your panel if you go through with this rate cut." In addition, it may be helpful to preface your messenger role with statements showing that you understand antitrust law, e.g., "We are not here to negotiate fees on behalf of our members."

5. Can the Association Use Antitrust Law Against the Big MCOs?

If an association could present evidence that different MCOs had agreed to fix the fees that they pay to psychologists, a prosecutor might be interested in looking at such a case. However, we have not yet seen a clear example of uniform rates paid by different MCOs in the same market area.

The state association could also make a potential antitrust claim if a single MCO truly "monopolized" the purchase of psychological services. To prove such a case would likely require evidence that (1) a single MCO dominates a particular market (i.e., effectively determines the price of psychological services) and (2) that the MCO has engaged in anticompetitive behavior that has improperly impacted prices.