

# The Journal of the Michigan Dental Association

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Volume 106 | Number 4

Article 10

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4-1-2024

## Dentistry and the Law: Why Dentists Must Pay Attend to Antitrust Law

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### Recommended Citation

Schulte, Dan JD (2024) "Dentistry and the Law: Why Dentists Must Pay Attend to Antitrust Law," *The Journal of the Michigan Dental Association*: Vol. 106: No. 4, Article 10.

Available at: <https://commons.ada.org/journalmichigandentalassociation/vol106/iss4/10>

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By Dan Schulte, JD  
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# Why Dentists Must Pay Attention to Antitrust Law

**T**he various antitrust laws can seem unfair, complicated, and many times irrelevant to the practice of dentistry. However, you're reminded that these laws

do apply to dentists. You also should be aware that the U.S. Justice Department ("DOJ") and the Federal Trade Commission ("FTC") historically have been active in the health care industry, with many prosecutions of physicians and dentists for antitrust violations. These prosecutions have arisen from alleged joint contracting activities, joint refusals to deal, association advertising restrictions, etc.

Since associations like the MDA have competing dentists as their members, the MDA's activities as well as activities by individual dentists are subject to the antitrust laws and DOJ and FTC action also. Therefore, a basic understanding of the antitrust laws is essential for all MDA members. The following is a brief description of what the antitrust laws prohibit, and what you should avoid doing.

## Requirements for violation

Specifically, the antitrust laws make contracts, combinations, or conspiracies in restraint of trade illegal.

Since associations like the MDA have competing dentists as their members, the MDA's activities as well as activities by individual dentists are subject to the antitrust laws. Therefore, a basic understanding of the antitrust laws is essential for all MDA members.

An action is illegal if:

- Two or more competitors (e.g., dentists not working for the same employer) have an agreement to engage in some joint activity.
- The agreement results in or has the effect of unreasonably restraining competition.

## The agreement

The agreement must be between two or more competitors. A completely integrated dental group practice is a single competitor. The simplest example of that is when several dentists all own and are employed by the same practice. However, it is possible for separate dental practices to be "integrated" such that the DOJ/FTC will consider them a single competitor. This is not easy to accomplish. The practices must be financially integrated (e.g., engage in risk sharing, split overall profits and losses, etc.) and clinically integrated (e.g., share patient outcome information, have common diagnosis and treatment protocols, etc.).

The "agreement" need not be formal or written. A tacit understanding is enough. Dentists do not need to know the agreement is illegal in order to violate the law. The key is to avoid even the appearance of an illegal agreement. For example, informal conversations with other dentists at a dental society meeting about problems incurred with a dental plan or insurer, which result in some dentists terminating their contracts with the plan or insurer, may be construed as an illegal agreement. A letter to another dentist that merely discusses fees may evidence an agreement or understanding to fix prices.

## Unreasonable restraint on competition

In order for joint action or an agreement to constitute an antitrust violation, it must unreasonably restrain competition. This occurs when the effect or purpose of the agreement is to decrease competition. To determine whether the agreement is unreasonable, the courts use

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**Sunday, May 5: Live Webinar:** Building Virtual Patients for Predictable Outcomes of Complex Full-Mouth Implant Rehabilitation. Speaker: Junying Li, DDS, MS, PhD. Where: Online course. One and one half CE credits.

**Tuesday, May 14: Life Webinar:** Biofilm Management: Are We at a Tipping Point with Guided Biofilm Therapy? Speaker: Penny Hatzimanolakis, DHP (C), MSC. Where: Online course. Two CE credits.

**Saturday, May 18: Live Webinar:** 'Occlusion' to Know for Your Practice. Speaker: Sang J. Lee, DMD, MMSc. Where: Online course. One CE credit.

**Wednesday, May 22: Live Webinar:** Infection Prevention and Control in Dentistry. Speaker: Sanjay Chand, MD. Where: Online course. Three CE credits.

**Wednesday, May 22: Live Webinar:** Removable Partial Denture Design: A Comprehensive Guide. Speaker: Fang-Yu Su, DMD, MSD. Where: Online course. One CE credit.

**Friday, May 24: Live Webinar:** The Why Behind the Smile: Motivations for Orthodontic Care. Speaker: Maria Doughan, DDS, MSc. Where: Online course. One CE credit.

**Thursday, May 30: Live Virtual Event:** Common Ulcers of the Oral Cavity — A Comprehensive Review. Speaker: Junu Ojha, BDS, MS. Where: Online course. Four CE credits.

**Thursday, May 30: Live Webinar:** Tips and Tricks for Successful Local Anesthesia. Speaker: David McMillan, DDS. Where: Online course. One and one half CE credits.

**Friday, May 31:** A Hands-On Review of Local Anesthesia Techniques. Speakers: Ana Janic, DDS, MS; M. Lynne Morgan, RDH, MS, MA; and Carl Stone DDS, MA, MBA, MA. Where:

School of Dentistry. Five CE credits.

## UNIVERSITY OF MICHIGAN

These listings of next month's in-person courses and live webinars are provided by the University of Michigan School of Dentistry. Visit <https://dent.umich.edu/education/continuing-dental-education> for a complete listing.

*No listings for May were listed online at press time.* ●

### Dentistry and the Law (Continued from Page 22)

two different standards, depending on the type of agreement.

**Illegal per se:** If the agreement involves price-fixing, group boycotts, or the allocation of practice territories or patients, the courts apply the per se rule. Under the per se rule, the court presumes that an unreasonable restraint of competition occurred. The plaintiff must only prove the existence of the agreement, not that the agreement decreased competition. Under the per se analysis, it does not matter that the dentists did not intend to violate the antitrust laws, or that the agreement operates to lower consumer prices.

**Rule of reason:** If the per se rule does not apply, a court applies the rule of reason. Under this analysis, the court balances the pro-competitive purposes and effects of the agreement against the anti-competitive purposes and effects. If, on balance, the agreement is anti-competitive, then the agreement is illegal.

Price-fixing and group boycotts constitute the greatest risks of joint activities conducted by dentists that may lead to antitrust violations. Price-fixing is an agreement or understanding among competitors to fix, stabilize, raise, or lower prices (or

any element of price), and is per se illegal. The following types of activity generally constitute price-fixing, if conducted by independent dentists:

- An understanding to submit a certain fee to a dental plan or insurer.
- An understanding not to discount fees beyond a certain percentage.
- A letter to an insurer stating that if fee schedules are not raised, specified dentists will terminate their contracts.

Likewise, oral or written communication between independent dentists regarding fees should be avoided.

An agreement by two or more dentists not to deal with a third party may constitute an illegal group boycott. The following types of activity may be considered group boycotts if conducted by independent dentists:

- A tacit understanding to refuse to participate with a dental plan or insurer.
- An understanding among general dentists not to refer to a specialist who participates in an unpopular dental plan.
- An agreement to terminate participating contracts with a plan for any reason.

### Antitrust law enforcement

Antitrust laws may be enforced by the DOJ, the FTC, and the state of Michigan. Lawsuits alleging violations may also be brought by private parties. The DOJ and the state of Michigan may bring either a criminal or civil action against dentists who are alleged to have violated the antitrust laws. Criminal actions are felonies punishable by imprisonment and fines. Lawsuits by private parties seek monetary damages (which may be trebled) and injunctive relief.

The best practice is for dentists to be aware of antitrust law and to make every effort to avoid illegal activities. ●

*Questions? Contact the MDA's Bill Sullivan, vice president, advocacy and professional relations, at 517-346-9405.*