

Complaint

121 F.T.C.

IN THE MATTER OF

CALIFORNIA DENTAL ASSOCIATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9259. Complaint, July 9, 1993--Final Order, March 25, 1996*

This final order prohibits the 19,000 member professional association from restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing of the prices, terms or conditions of sale of dentists' services and the solicitation of patients, patronage or contracts to supply dentists' services. In addition, the final order requires, among other things, the respondent to update its Code of Ethics to comply with the provisions of the Commission's order and to publish the Commission's order and complaint, as well as an announcement describing the order's effect, in the California Dental Association Journal.

Appearances

For the Commission: *Sally L. Maxwell, Markus Meier, Gary H. Schorr, Linda B. Blumenreich, George R. Bellack, Elizabeth R. Hilder, David R. Pender* and *Robert Leibenluft*.

For the respondent: *Peter Sfikas* and *Tamra S. Kempf, Bell, Boyd & Lloyd*, Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the California Dental Association, a corporation, has violated and is violating the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent California Dental Association ("CDA" or "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is located at 818 "K" Street Mall (Post Office Box 13749), Sacramento, California.

PAR. 2. CDA is a professional association organized in substantial part to represent the interests of its dentist members. CDA has approximately 15,000 dentist members, constituting approximately 75% of the practicing dentists in California. CDA is engaged in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, CDA is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 3. CDA has 32 local component dental societies. Dentists are required to be members of the CDA component within whose jurisdiction they practice in order to be eligible for membership in CDA. CDA's activities, including those complained of, are directed by its House of Delegates, which is composed of delegates from CDA's component societies. CDA is a constituent society of the American Dental Association ("ADA"). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA.

PAR. 4. Most CDA members are engaged in the business of providing dental services for a fee. Except to the extent that competition has been restrained as herein alleged, and depending upon their specialties and geographic location, CDA's members have been and are now in competition among themselves and with other dentists.

PAR. 5. The acts and practices of CDA, including the acts and practices alleged herein, have been, or are, in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. In selecting a dentist, consumers generally consider factors of price and quality of service, including the dentist's training and experience, modes of treatment, areas of concentration or special interest, and the efficiency and convenience of the dental office. Truthful, nondeceptive advertising enables dentists to inform consumers about the price and quality factors of their services and about how their practices differ from other dentists, and thereby benefits consumers and promotes competition among dentists. For example, through advertising dentists can inform consumers of the location and nature of their practices and that they offer special discounts, such as for senior citizens. Such advertising can provide an incentive for dentists to offer services and prices desirable to consumers.

PAR. 7. CDA has restrained competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of this members and its component societies to restrict unreasonably the dissemination of information to consumers. In particular, CDA has combined or conspired to restrict the ability of dentists to engage in a wide variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive, including:

- A. Advertising price information such as discounted fees;
- B. Advertising relating to the quality of dentists' services, including statements that inform consumers that the dentist takes special steps to address consumers' fears about dental treatment; offers treatments not available from other dentists in the area; or has a practice that in some other respects is different from the practices of other dentists in the community; and
- C. Advertising that uses methods that may be particularly effective in conveying information to consumers.

PAR. 8. CDA has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

- A. Adopting, publishing, and maintaining rules that require dentists to refrain from a variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive;
- B. Coercing members who violate its advertising rules into ceasing such advertising;
- C. Expelling members who refuse to refrain from engaging in such advertising;
- D. Refusing to grant membership to any dentist who engages in such advertising; and
- E. Attempting to coerce non-members to comply with its rules, by, among other things, denying membership to, or cancelling the membership of, dentists whose non-CDA member employers advertise in a manner not acceptable to CDA.

PAR. 9. CDA's acts and practices have harmed consumers by restricting or preventing dentists from truthfully and nondeceptively informing the public of the price, quality and availability of their

services and how their practices differ from those of other dentists. Among other things:

A. CDA restricts certain categories of price advertising without regard to whether such advertising is truthful and nondeceptive. For example,

1. CDA prohibits all announcements of across-the-board discount offers, such as "SENIOR CITIZEN DISCOUNT" and \$25-off coupons for new patients.

2. CDA prohibits statements relating to low prices, such as "CARE AT REASONABLE PRICES," that can serve to signal a dentist's sensitivity to consumers' concerns about prices.

B. CDA restricts representations that relate to the quality of dental services without regard to whether the representations are truthful and nondeceptive. For example,

1. CDA bans a wide variety of advertising that it deems to constitute claims of "quality" or "superiority" without regard to whether such advertising is truthful and nondeceptive. CDA also prohibits quality claims through its bans on the use in advertising of adjectives, superlatives and subjective representations.

2. CDA has stopped dentist from using phrases in advertising such as "SPECIAL TREATMENT FOR NERVOUS PATIENTS," and "SPECIAL CARE FOR COWARDS," and thus has restricted claims that can inform the public that the dentist pays particular attention to consumers' fears and anxieties regarding dental procedures, and that the dentist takes special care to relieve those fears and anxieties.

C. CDA restricts certain methods of advertising without regard to whether the advertising claims are truthful and nondeceptive. For example,

1. CDA in effect discourages free dental screenings of schoolchildren by preventing dentists who provide such screenings from using their professional forms, which are imprinted with their names and addresses, in reporting the results of the screening.

2. CDA restricts the ability of dentists to attract patients and convey information to them about the dentists' practices by, for example, prohibiting dentists from hiring an agent to pass out coupons in front of the building in which a dentist practices, and from distributing business cards or other materials promoting the dentist's practice.

3. CDA prohibits dentists from advertising in any manner other than that which "contributes to the esteem of the public." Such a prohibition restricts dentists from using advertising techniques that may be particularly effective at gaining attention and conveying information to consumers.

4. CDA bans the advertising of 'guarantees' of dental services without regard to whether the advertisement is truthful and nondeceptive.

PAR. 10. In some of its activities that restrict truthful, nondeceptive advertising for dental services, CDA purports to "enforce" state statutes and regulations pertaining to advertising and solicitation. CDA, however, imposes on the market its own restrictive position on advertising regulation in situations where the state's policy is either unclear or is contrary to CDA's position. CDA is not an agent of the State and has not been authorized to interpret or enforce state laws on behalf of the State.

PAR. 11. CDA's actions described in paragraphs seven, eight and nine have had, or have, the tendency and capacity to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. Consumers of dental services have been deprived of the benefits of price and quality competition;

B. Consumers of dental services have been deprived of truthful, nondeceptive information for use in their selection of a dentist;

C. The costs to consumers of finding dental services at their desired cost and quality have been raised; and

D. Innovation in the delivery of dental services has been, or likely has been, hindered or restrained.

PAR. 12. The combination or conspiracy and the acts and practices described in paragraphs seven, eight, and nine constitute unfair methods of competition in violation of Section 5 of the Federal

Trade Commission Act, as amended, 15 U.S.C. 45. CDA's combination or conspiracy, or the effects thereof, is continuing and will continue or recur in the absence of the relief herein requested.

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JULY 17, 1995

I. INTRODUCTION

The Commission issued its complaint in this matter on July 9, 1993, charging California Dental Association ("CDA") with violations of Section 5 of the Federal Trade Commission ("FTC") Act, as amended, 15 U.S.C. 45.

The complaint identifies CDA as a California corporation which is a professional association organized in substantial part to represent the interests of its dentist members who are required, if they want to belong to CDA, to join one of its 32 component dental societies.

The complaint charges that CDA has violated Section 5 of the FTC Act by restraining competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of its members and its component societies to restrict unreasonably the dissemination of information to consumers by coercing its members to refrain from particular forms of advertising without regard to whether they are truthful and nondeceptive.

According to the complaint, these acts and practices have harmed consumers by preventing dentists from truthfully and nondeceptively informing the public of the price, quality, and availability of their services.

CDA's answer denied Commission jurisdiction over its activities because it is not a corporation within the generally accepted meaning of Sections 4 and 5 of the FTC Act, 15 U.S.C. 44 and 45, because its activities do not restrain or affect interstate commerce directly or substantially, and because its activities are the result of its desire to fulfill its public service obligations.

After extensive pretrial discovery, trial was held in San Francisco, California, from February 7, 1995 to February 21, 1995. The parties filed their proposed findings of fact and conclusions of law on April 6, 1995. The record was closed on April 20, 1995.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *Description of CDA*

1. Members

1. CDA is a professional association which is organized as a California non-profit corporation (Cplt at ¶ 1; Ans. at ¶ 1; Tr. 1139),¹ has no shares of stock or certificates of interest (Tr. 1769, 1141), and qualifies as a tax-exempt organization under Section 501(c)(6) of the IRS Code (Tr. 1770-71). CDA's principal place of business is located at 1201 K Street Mall, Sacramento, California (Ans. at ¶ 1). It has approximately 200 employees (Tr. 1138).

2. CDA has more than 19,000 dentist members, of which 13,500-13,700 are in active practice, who provide dental services for a fee (Ans. at ¶ 2) (Tr. 1166; CX-1550, CX-1656). The members represent about 75% of the practicing dentists in California (Tr. 1166; CX-1505, CX-1508-B, CX-1510-A, CX-1587-Z-107-08).

3. CDA is a "constituent" society of the American Dental Association ("ADA") (Ans. at ¶ 3; CX-1450-E) and its policies may not conflict with the ADA's Constitution and Bylaws (CX-1450-J). Its Code of Ethics conforms with the Principles of Ethics and Code of Professional Conduct of the ADA (CX-1450-J). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA (Ans. at ¶ 3; Tr. 1139).

¹ Abbreviations used in this decision are:

Tr.: Transcript of the trial
CX: Commission exhibit
RX: CDA's exhibit
Cplt: Complaint
Ans.: Answer
CB: Complaint counsel's trial brief
RB: CDA's trial brief
CPF: Complaint counsel's proposed findings
RPF: CDA's proposed findings
F. Finding

4. CDA has 32 "component" societies (Ans. at ¶ 3; CX-1450-I), which are local or regional societies, located within California, which it charters (CX-1450-E, I). The bylaws of the CDA component societies may not conflict with CDA's Bylaws or the Constitution and Bylaws of the ADA (CX-1450-I). CDA requires dentists to be members of the component within whose jurisdiction they practice in order to be eligible for membership in CDA (Ans. at ¶ 3; Tr. 1139; CX-1450-I).

5. Members of CDA are bound by the codes of ethics of ADA, CDA, and the members' respective component societies (CX-1450-Y).

6. CDA collects dues from its members for itself, its component societies, and ADA, and transmits those dues to its component societies and ADA (CX-1450-H, CX-1649-Y, CX-1650-Z-61, CX-1651-A-26-27). CDA dues are \$525 (CX-1649-X), ADA dues are \$330, and components charge from \$135 to several hundred dollars annually; the average annual "tripartite" dues paid by a member to all three associations are about \$1,100 (Tr. 1159). CDA also collects voluntary contributions for the California Dental Political Action Committee ("CalDPAC") from CDA members (CX-1649-X, CX-1650-Z-61).

7. For fiscal year 1993-1994, CDA projected annual revenues of \$19,889,461 (CX-1484-P). Membership dues represent the largest single source of CDA's revenues (Tr. 1762, Tr. 1142; CX-1484-P). Other major sources of revenues are: CDA scientific sessions; subscriptions to, and advertising in, CDA's official publications; interest income; sales of printed materials; and rent generated by CDA's headquarters building (CX-1484-P).

2. House of Delegates

8. CDA's House of Delegates is its supreme authoritative body (CX-1450-E) and is composed of 202 to 205 CDA members, 200 of whom are elected by CDA's component societies (Tr. 1139; Ans. at ¶ 3; CX-1450-J).

9. The House of Delegates has the power to determine CDA's policies, to amend its articles of incorporation, to adopt and amend its Code of Ethics, to determine and assess dues, to adopt an annual budget, to grant or revoke the charters of its component societies, and

to elect its officers, members of its council, and delegates to the ADA House of Delegates (CX-1450-K, Q, Z-4, Z-5, CX-1472-A).

3. Board of Trustees

10. CDA's administrative and managing body, the Board of Trustees, is vested with the power to conduct its business according to the policies established by the House of Delegates (CX-1450-O).

11. The Board has 52 members, including 43 trustees elected by CDA's component societies, the seven elected officers of CDA and two "appointed officers" -- the Executive Director and Editor -- who are appointed by the Board (CX-1450-N, O, S-T).

4. Standing Committees

12. CDA has six standing committees: Executive, Communications, Direct Reimbursement, Finance, Nominating, and Interdisciplinary Affairs (CX-1450-V-Y).

5. Councils

13. CDA operates ten councils, each of which is responsible for specific functions (Tr. 1148; CX-1450-T-V, CX-1484-Z-23-28). They are the:

14. a. Judicial Council which is charged with interpretation and enforcement of the CDA Code of Ethics (including the advertising restrictions which are the subject of this proceeding), as well as the discipline of CDA members found to have violated its Code (CX-1450-U-V, CX-1484-Z-27-28, CX-1571-G).

15. b. Council on Legislation which formulates positions on legislation and regulation on behalf of CDA and its members (Tr. 1285, 1154, 1208; CX-1483-Z-13, CX-1484-Z-25). The council has a close working relationship with CalDPAC, the "political arm" of CDA (CX-1483-Z-13, CX-1484-Z-26).

16. c. Council on Membership Services which recruits CDA members and is responsible for membership services and benefits (CX-1524-E).

17. d. Council on Education and Professional Relations which oversees a variety of CDA programs, including those which maintain a liaison role with the laboratory industry and monitor national and

statewide developments related to denturism and the expanded role of the dental hygienist (Tr. 1205-06; CX-1484-Z-24-25, CX-1571-I, CX-1649-N, Z-30-33).

18. e. Council on Dental Research and Development which monitors trends in infection control and monitors federal and state agency regulations (Tr. 1154; CX-1277-E, CX-1483-Z-11, CX-1484-Z-24).

19. f. Council on Peer Review which provides CDA members with a patient complaint resolution alternative to costly and protracted litigation (Tr. 1151-52; CX-1448-D, CX-1520-A, CX-1563, CX-1644-B).

20. g. Council on Scientific Sessions which holds two sessions yearly featuring continuing education courses, and displays by hundreds of vendors of new technology, treatment modalities, supplies, and equipment (Tr. 1155; CX-1483-Z-14, CX-1484-Z-27, CX-1502-A, CX-1571-A, D).

21. h. Council on Insurance which develops, monitors, and evaluates insurance programs to serve the needs of CDA members through its subsidiary, The Dentists Company Insurance Services (CX-1482-Z-19, CX-1483-Z-12, CX-1484-Z-5, CX-1571-H).

22. i. Council on Dental Care Programs which monitors government health care programs (Tr. 1149; CX-1483-Z-10, CX-1484-Z-23-24) and the activities of the State Board of Dental Examiners (Tr. 1149). It also has provided: input to third-party payers concerning dental care benefits and claims, insurance claim information to CDA members, and, in conjunction with ADA, a contract analysis service to help members to understand the legal implications of dental contracting (Tr. 1204; CX-1484-Z-23, CX-1571-F; CX-1483-Z-10). It also sponsors an annual dental care and insurance conference (CX-1481-Z-22, CX-1482-Z-17, CX-1483-Z-10).

23. j. Council on Community Health which is CDA's communications center for dental health activities and promotes National Children's Dental Health Month and Senior Smile Week (CX-1484-Z-23, CX-1571-H).

6. For-Profit Subsidiaries

24. CDA has five for-profit subsidiaries--four of which are operating companies--and a holding company for the operating companies (Tr. 1168).

a. The Dentists Insurance Company ("TDIC")

25. TDIC is a dental malpractice insurance company which underwrites insurance in California only for CDA members (Tr. 1768, 1785, 1168; CX-1587-Z-74). It also underwrites insurance for non-CDA members in Minnesota (Tr. 1785).

26. As of October 1993, TDIC insured approximately 8,800 California dentists, about two-thirds of all actively practicing CDA members (CX-1478-G).

27. CDA created TDIC in 1979 (Tr. 1784; CX-1575-A) as a result of the malpractice crisis in California and the threat of prohibitive insurance premiums for professional liability insurance (CX-1587-Z-62-63, CX-1482-L).

28. Except for one person, all members of TDIC's Board of Directors are, and always have been, members or officials of CDA. CDA's Executive Director is the Vice-Chairman of the TDIC Board of Directors (CX-1587-Z-101-02). TDIC's offices are located in the CDA headquarters building (CX-1448-B, C, CX-1587-Z-58-59, Z-65).

29. TDIC has made dividend payments of \$120,000 and \$320,000 to CDA during the last two years (Tr. 1769; CX-1484-Z-30). Additionally, TDIC pays CDA's Government Relations Office ("GRO") \$30,000 a year (Tr. 1785) for GRO's legislative and lobbying activities relating to professional liability insurance issues (CX-1650-Z-13-14).

b. The Dentists Company ("TDC")

30. CDA created TDC in 1982 to provide and broker a wide range of high quality products to CDA members (Tr. 1776; CX-1652-Y, CX-1484-Z-29), and to contribute financially to CDA's activities (CX-1448-C, CX-1472-A). TDC offers professional and personal financial services and other services to CDA members (Tr. 1778-80; CX-1570-A-F).

31. Except for one non-dentist/non-employee member, all members of the TDC Board of Directors are, and always have been, members or officials of CDA (CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDC Board of Directors (CX-1587-Z-102). CDA's Chief Financial Officer ("CFO") is the CFO and sole Vice-President of TDC (Tr. 1775-76). TDC's offices are located in the CDA headquarters building (Tr. 1778; CX-1448-B, C).

32. TDC made a dividend payment of \$100,000 to CDA in September 1992 (Tr. 1769; CX-1484-Z-29), and TDC's activities have added over \$5 million to CDA's assets (CX-1483-Z-15), materially improving CDA's financial position (CX-1483-Z-15, CX-1637-D).

c. The Dentists Company Insurance Services ("TDCIS")

33. CDA created TDCIS in 1983 (Tr. 1781). TDCIS is the broker/administrator for a number of CDA-sponsored business and personal insurance plans offered to CDA members (Tr. 1768, 1783-84; CX-1558-A-F, CX-1575-G-H). These insurance plans are offered only to CDA members (Tr. 1782; CX-1652-Z-9) and, in some cases, to the spouses and staff of CDA members and to employees of CDA's local component societies (CX-1558-A, F, CX-1575-G). TDCIS's insurance plans have more than 13,000 policyholders and more than 30,000 individual policies in place (Tr. 1782-83; CX-1484-W, Z-25, Z-29). TDCIS bills and collects more than \$55 million a year (Tr. 1783; CX-1484-W, Z-29).

34. TDCIS has a "close working relationship" with CDA's Council on Insurance (CX-1484-Z-29), which is "the entity that determines which insurance programs will be sponsored by [CDA], and subsequently brokered by [TDCIS]" (CX-1649-V). Members of the TDCIS staff attend the council's meetings and "maintain close levels of communication" (CX-1484-Z-29).

35. Except for one non-dentist/non-employee member, all members of the TDCIS Board of Directors are, and always have been, members or officials of CDA (Tr. 1781; CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDCIS Board of Directors (CX-1587-Z-102). CDA's CFO is the CFO and sole Vice-President of TDCIS (Tr. 1780; CX-1652-V). TDCIS's offices

are located in CDA's headquarters building (Tr. 1782; CX-1448-B, C).

36. "Each year, TDCIS has presented [CDA] with a dividend or other support based on TDCIS's income" (CX-1475-D). TDCIS pays CDA's GRO \$30,000 a year (Tr. 1781-82) for legislative and lobbying activities relating to insurance issues (CX-1650-Z-13-14).

d. The Dentists Company Management Services ("TDCMS")

37. CDA created TDCMS in 1987 (CX-1346-E). Its function is to manage the operation of the CDA headquarters building (Tr. 1768). Prior to 1994, TDCMS also provided many of the administrative services currently provided to CDA and its subsidiaries by CDA Holding Company, Inc. (CX-1346-E, CX-1466-A, G). CDA's Executive Director is the Chairman of the Board of TDCMS (CX-1652-Z-1-2). CDA's CFO is the CFO and Vice-President of TDCMS (Tr. 1784).

e. CDA Holding Company, Inc. ("CDAHC")

38. CDAHC was created to assume ownership of CDA's for-profit subsidiaries as part of its corporate reorganization in 1993 (Tr. 1764, 1773; CX-1466-A, G, CX-1472-A, N).

39. This reorganization was done primarily to further define and protect CDA's status as a Section 501(c)(6) tax-exempt organization (Tr. 1774, 1188; CX-1472-A, N, CX-1587-Z-60, CX-1652-Z-5).

40. CDA is the sole owner of CDAHC which, in turn, holds the stock of CDA's other for-profit subsidiaries (Tr. 1768, 1773, 1187).

41. CDA elects the members of CDAHC's Board of Directors (Tr. 1188-89, 1778; CX-1450-K, M, Z-4-5), and CDA's Board of Trustees may remove directors of CDAHC (CX-1450-O, CX-1587-Z-67). All but one member of CDAHC's Board of Directors are members or officials of CDA (Tr. 1189, 1792; CX-1450-Z-5, CX-1587-Z-66-67). CDA's current President is a member of CDAHC's Board of Directors (Tr. 1413; CX-1651-Z-20); CDA's Executive Director is Chief Executive Officer of CDAHC (Tr. 1136; CX-1652-R); and CDA's CFO is the CFO and sole Vice-President of CDAHC (Tr. 1787-88; CX-1652-Q). CDA employees assist CDA's CFO with his duties relating to CDA's for-profit subsidiaries (CX-1652-K-L, R, X). CDAHC pays a portion of the salaries of CDA's CFO and the staff

that assists him in providing services for CDAHC (Tr. 1774-75; CX-1652-S).

42. CDA's House of Delegates recommends candidates for the boards of directors of the operating companies to CDAHC, which then selects the directors of the operating companies (CX-1450-K, O, Z-5, CX-1587-Z-67). CDAHC may remove and replace any of a subsidiary operating company's board members (CX-1450-Z-5).

43. CDA's Bylaws provide for payments by CDAHC to CDA of dividends or other payments generated by CDA's for-profit subsidiaries (CX-1450-Z-5, CX-1466-A, CX-1484-W, CX-1587-Z-103). By design, CDAHC currently does not generate profits; instead, it bills CDA and its subsidiaries for administrative services it provides, at cost (Tr. 1775).

7. Nonprofit Subsidiaries

44. CDA has two nonprofit subsidiaries organized under 501(c)(3) of the IRS Code: The CDA Relief Fund grants financial aid to dentists, their dependents, and survivors. The CDA Charitable Fund maintains a separate financial account for a disaster loan program (Tr. 1167-68, 1172; CX-1450-Z-4).

8. Rotunda Partners

45. CDA is the general partner of Rotunda Partners, which owns most of the CDA headquarters building in Sacramento (Tr. 1790). CDA owns 60% of Rotunda; TDIC owns the remaining 40% (Tr. 1169; CX-1652-Z-3).

9. California Dental Political Action Committee ("CalDPAC")

46. CalDPAC is an unincorporated association of dentists that was formed to make financial contributions to political candidates and parties sympathetic to issues of concern to dentistry (CX-1483-J, CX-1587-Z-129, CX-1650-Z-67-69).

47. CalDPAC is not legally a subsidiary or division of CDA, but it is considered the "political arm" of CDA and is closely affiliated with it (CX-1483-Z-13, CX-1484-Z-26, CX-1650-Z-3-4, Z-16, Z-50-55, Z-62-63, Z-67-68, CX-1587-Z-129-31; Tr. 1202).

48. Approximately 40 to 45% of CDA members contribute to CalDPAC (Tr. 1194; CX-1448, CX-1464-G, CX-1650-Z-65).

49. Over the past several years, the level of CalDPAC's political contributions has remained stable, at approximately \$300,000 to \$350,000 per two-year state legislative cycle (Tr. 1194; CX-1448-D, CX-1644-B, CX-1650-Z-67-68).

B. Interstate Commerce

1. Interstate Reimbursement For Dental Services

50. Fifty percent of the funding for California's Medicaid programs for dental services ("Denti-Cal") comes from the federal government. In calendar year 1994, the Denti-Cal program paid out approximately \$500 million to billing providers, most of whom were members of CDA (Tr. 728, 1286; CX-1658).

2. Interstate Sale and Lease of Equipment and Supplies

51. CDA members purchase, lease, and use substantial amounts of dental equipment and dental-related products from manufacturers and suppliers located outside of California (Tr. 1405, 295-96, 750-55, 1000-02, 463-64, 328-29, 673-75; CX-1651-Q).

52. The CDA Journal and CDA Update carry many advertisements for products and services by out-of-state manufacturers and suppliers (CX-1451-E, G, CX-1452-B, CX-1455-E, I, CX-1456-J, L, CX-1457-L, CX-1458-E, CX-1461-H, CX-1466-D, CX-1470-J, CX-1474-E, CX-1476-K, CX-1478-F, G, N, CX-1479-K, N, CX-1480-H, CX-1482-M, Z-8, Z-10, Z-13, Z-46, Z-48, Z-54, CX-1483-Z-19, CX-1484-Z-12, Z-32, Z-53), and a substantial number of readers of the publications purchase such items (CX-1453-P).

53. CDA's scientific sessions feature exhibitions by many out-of-state vendors of dental-related products and services which CDA members may purchase (Tr. 782-83, 1772; CX-1452-A, CX-1571-A).

3. Other Activities of CDA and Its Members Involving Interstate Commerce

54. In some cases, out-of-state suppliers of services to CDA members have been unable to use certain advertising practices because of CDA's ethical advertising restrictions (Tr. 803-05, 603-10; CX-1209). CDA has placed advertisements, which must comply with its Code of Ethics, in publications with national distribution, including the "Wall Street Journal," "Fortune," and "Business Week" (CX-1455-M, CX-1450-V, X, CX-1651-Z-43).

55. "[M]any of CDA's members have been and are now in competition among themselves and other dentists, both within and outside the State of California" (Ans. at ¶ 4), and some CDA members reside outside of the State (CX-1656).

56. CDA members treat patients who reside outside of California (Tr. 1405, 771-72, 293, 1000, 462-63, 326-27, 672-73; CX-1608-M-N, CX-1611-I, Z-87, CX-1651-N-O), and approximately 4.5% of its members reside outside of California (CX-1656).

57. CDA and its components use the U.S. Postal Service to communicate with their members or applicants for membership whose advertising they challenge (Tr. 1021, 354). They also communicate, when necessary, with the ADA, which is located in Chicago, Illinois (Tr. 374-75, 1223; CX-1587-Z-55, CX-1450-Z-1-2, CX-1469-Z-57-58, CX-1651-Z-71). CDA also uses the Postal Service to deliver its Journal and Update to out-of-state concerns (Tr. 1772-73; CX-1481-Z-26-31, CX-1482-Z-49-53, CX-1484-Z-47-51, CX-1448-D, CX-1571-D, CX-1625-I-N).

58. CDA officials and members attend out-of-state conferences (Tr. 1185; CX-1450-K, Z-3, Z-40-41, CX-1587-Z-51-54, CX-1651-Z-27-29).

59. CDA, through TDC and TDCIS, offers services to CDA members through out-of-state firms, including providers of life insurance (CX-1480-K), medical insurance (CX-1558-B), income insurance (CX-1558-C), disability insurance (CX-1558-D), accidental death and dismemberment insurance (CX-1480-D, F, CX-1558-E-F), office property insurance (CX-1480-D, F, CX-1558-E-F), VISA cards (CX-1484-Z-29), home equity loans (CX-1484-Z-29), home mortgages (CX-1484-G), and long distance phone service (CX-1484-Z-29).

60. TDIC operates in Minnesota and has applied for licenses to do so in other states (CX-1468-E, CX-1480-A, CX-1484-Z-30).

61. CDA secured a loan for \$39 million from an out-of-state insurance company to purchase its current headquarters building in Sacramento, California (Tr. 1790-91; CX-1470-F, CX-1652-Z-34-35).

62. CDA collects annual ADA membership dues from California members and transmits them to ADA headquarters in Illinois (Tr. 1190, 1415).

C. CDA Activities Conferring Pecuniary Benefits On Its Members

1. CDA's Purpose

63. CDA has often stated that one of its primary purposes is to "represent dentists in all matters that affect the profession" (CX-1546-A), and it provides the kind of benefits which individual dentists could not realize by acting individually (CX-1488, CX-1502-A, CX-1508-B, CX-1509-B, CX-1510-A, CX-1533, CX-1544).

2. Source of Revenues

64. CDA's budgeted revenue for its 1993-94 fiscal year was \$19,889,461 (CX-1484-P). Its largest source of funding was membership dues and revenue derived from membership-related activities such as the sale of professional liability insurance to members (Tr. 1762, 1142, 1812). CDA's current dues for active members are \$525. The average cost of dues for members of ADA, CDA and a CDA component ("tripartite dues") is approximately \$1100 (Tr. 1159).

3. Tax Status

65. CDA is exempt from federal income taxation pursuant to Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. 501(c)(6) (Tr. 1770, 1141, 1853; CX-1587-Z-55), which exempts "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests (26 CFR 1.501(c)(6)-1; Tr. 1771, 1853). CDA is not exempt from federal income taxation under 501(c)(3) of the Code, 26 U.S.C.

501(c)(3), which governs organizations formed and operated solely for religious, charitable, scientific, or educational purposes (Tr. 1853).

66. In calculating their federal and state income taxes, members of CDA may not deduct the cost of membership dues as a charitable contribution (Tr. 1416, 1858). Instead, members of CDA may deduct most of their dues as ordinary and necessary business expenditures directly connected with or pertaining to their trade or business (26 CFR 1.162-1(a), 1.162-6; Tr. 1415). However, CDA members may not deduct that portion of association dues allocated by CDA to political lobbying activities (Tr. 1416; CX-1478-C; CX-1479-N, CX-1587-Z-111-12), which, in 1993, was estimated to be approximately \$26 per member (CX-1478-C, CX-1479-N).

4. General Benefits of CDA Membership

67. CDA has often touted the benefits of membership, including such statements as:

[CDA] is dedicated to offering the most comprehensive array of benefits and programs to assist practitioners in practice management. OSHA compliance and infection control to name a few (CX-1575-B).

[CDA] offers far more services to its members than any other state [dental] association (CX-1544).

In fact, CDA's accounting expert identified upwards of 50 CDA membership benefits (Tr. 1843), whose value exceeds the average membership dues, resulting in a net benefit to its members (Tr. 1849, 1851-53, 1859).

68. CDA has stated that a selection of its programs and services has a potential value to members of between \$22,739 and \$65,127 (CX-1520-A-B, CX-1571-A, L). In 1993, its president stated: "CDA is extremely valuable to the members . . . CDA members are getting their money's worth and then some" (CX-1473-O).

69. CDA's "Direct Member Services" have accounted for as much as 65% of its total financial expenditures in a given year, with "Association Administration & Indirect Member Services" accounting for an additional 20% of expenditures (Tr. 1192-93; CX-1448-C, CX-1587-Z-120-21). The last time CDA conducted this analysis, "Services to the Public" accounted for seven percent of CDA's total expenditures (Tr. 1193; CX-1448-C).

5. Specific Benefits of CDA Membership

a. Lobbying and Efforts to Influence Government Action

(1) Council on Legislation

70. CDA's Council on Legislation monitors legislative and regulatory actions which have potential implications for dentistry and adopts policy positions on behalf of CDA (CX-1484-Z-25; Tr. 1285). CDA's GRO takes the policies established by the Council on Legislation and argues for them before the appropriate governmental body (Tr. 1285; CX-1562, CX-1571-E). The Council on Legislation gives GRO explicit instructions on about 100 bills per session of the California Legislature (CX-1650-Z-33).

71. CDA budgeted \$121,309 for "government relations" activities for 1993-94, not including the salaries of GRO's seven employees (CX-1650-Z-4, Z-37, Z-43, CX-1652-Z-22-23).

72. In 1992, CDA's President told its members:

Government is like an octopus in our lives. Its tentacles are everywhere: in our dental practices and in our homes. If CDA's not there, who is watching out for the interests of dentists? Nobody (CX-1484-X).

73. CDA has also claimed that it "provide[s] a strong, unified voice as we represent the interests of our members before regulatory agencies" (CX-1502-A).

74. Other remarks of CDA officials have emphasized the pecuniary benefits of its lobbying activities:

CDA's [l]egislative wins "mean money" to members (CX-1463-A). CDA represents the interests of its members and has been successful in defeating several bills which would have cost practitioners several thousands of dollars a year (CX-1532-A).

CDA's President stated, in 1993:

[w]hat we save the dentist in potential costs of what the government would like to do, saves the CDA member at least the equivalent of their annual dues every year (CX-1473-N).

75. Specific examples of CDA actions affecting government decisions include:

(2) Infectious/Hazardous Waste Regulation

76. CDA successfully opposed passage of provisions of three bills relating to infectious waste regulation, hazardous waste generator permits, and informed consent before placement of silver amalgam (CX-1458-F, CX-1463-A, I, CX-1483-K, CX-1510-A, CX-1520-A, CX-1539) at a CDA-estimated savings of over \$2,000 per year of practice and \$66,600 over 30 years (CX-1510-A, CX-1520-A).

(3) Malpractice Reform

77. CDA supported passage of California's Medical Injury Compensation Reform Act of 1975 ("MICRA") (CX-1555-I, CX-1587-Z-140-41) and continues to defend it (Tr. 1306). The passage of that bill, according to CDA's immediate past President, was of great benefit:

Professional Liability Premiums in California last year were one billion dollars. Without MICRA, it is estimated conservatively that the figure would easily exceed 2.5 billion dollars. That increase alone would pay all your CDA/ADA/local dues each year forever. What MICRA has done is assure that payments go to victims, that the costs of litigation are reduced, that windfalls are eliminated, and most importantly, that healthcare providers such as you and I can continue to treat patients without the fear of unfounded lawsuits (CX-1484-R, T).

(4) Workers' Compensation

78. CDA successfully supported a package of workers' compensation reform bills, which are projected to save employers, including dentists, a total of \$1.5 billion (CX-1477-F).

(5) Taxation of Dentists and Dental Practices

79. CDA, along with others, successfully opposed Proposition 167 which would have increased taxes for high bracket taxpayers (CX-1466-D, F, CX-1484-K).

(6) Mandatory Employer Healthcare Coverage

80. In 1992, CDA successfully opposed Proposition 166, which would have required employers, including dentists, to provide basic health care insurance coverage for part-time employees and their dependents (CX-1466-D, CX-1468-E, CX-1484-K).

(7) Denti-Cal

81. CDA has fought to preserve funding of the dental Medicaid program operated by the State of California ("Denti-Cal") (Tr. 726), and its efforts were "instrumental in retaining the Denti-Cal program and enhancing reimbursement rates" (CX-1571-A). More than 5,000 CDA members provide dental services to Denti-Cal patients (CX-1658).

(8) Unsupervised Practice By Dental Hygienists

82. CDA opposes, and has opposed, legislation that would permit dental hygienists to practice without supervision by a dentist (CX-1462-D, CX-1476-C, CX-1481-P, CX-1482-U, CX-1483-Z-13, Z-37, CX-1484-R, CX-1485-B, CX-1571-A, CX-1587-Z-138), an issue which affects dentists' "pocketbooks" (CX-1473, CX-1477-F, CX-1484-X).

(9) CalDPAC

83. CalDPAC's political activities benefit CDA members economically (CX-1277-C, CX-1375-B, CX-1462-E, CX-1472-F, CX-1483-J, CX-1520-A, CX-1571-A). In 1993, CDA's President described the GRO and CalDPAC as "of all we do, the things with the most importance for our future" (CX-1474-I, CX-1484-N).

(10) Litigation

84. CDA has been involved in legal challenges to or arguments in support of government and regulatory policies, including a challenge to HHS regulations implementing the Health Care Quality Improvement Act (CX-1477-A, CX-1482-M, S-T). CDA estimated the value of victory in that case as "[i]ncalculable related to

reputation" (CX-1571-L). *See also* CX-1453-C, CX-1480-D, H, CX-1650-L-M, CX-1461-F, CX-1472-H, CX-1587-Z-150, CX-1482-U, CX-1483-Z-38, Z-41.

(11) Other Government Action

85. CDA has supported or opposed many other legislative or regulatory actions which would affect its members' pocketbooks (CX-1474-E, K, CX-1484-Z-25, CX-1485-A, B, C, CX-1483-Z-13, Z-40, CX-1467-K, CX-1476-A, CX-1464-K, CX-1481-V, CX-1452-A, F, G, CX-1637-F, CX-1463-K).

b. Marketing and Public Relations

86. CDA budgeted over \$2.1 million for its marketing program for 1993-94 (CX-1484-P, CX-1652-Z-20). A major goal of this program, which is assisted by an advertising agency and a public relations firm (Tr. 1164; CX-1446-O, CX-1469-E, CX-1484-Z-1-2, CX-1587-Z-152-54) is to enhance the image of CDA and its member dentists and to distinguish the latter from non-members in terms of their commitment to quality care (Tr. 1412; CX-1481-X, CX-1483-Z-37, CX-1484-F, CX-1563, CX-1587-Z-155-56, CX-1648-A-B, CX-1651-Z-42, CX-1654-D, CX-1455-M).

87. Other marketing schemes used by CDA include: a campaign encouraging dental patients to insist that their dental plans give them the right to choose their own dentists (CX-1481-N, S, CX-1508-A, CX-1552-G); a campaign to encourage the Latino population to use CDA dentists (CX-1469-E, CX-1473-M, CX-1475-K, CX-1476-A, CX-1484-Z-2); and, the use of CDA logos on stationery and other business materials (CX-1497, CX-1555-F).

88. In 1985, CDA estimated that increased patient visits to member dentists because of the marketing program resulted in "nearly \$6,000 in additional revenues [per member dentist], or a 20-to-1 return on investment" (CX-1231-B).

c. Direct Reimbursement

89. Since at least 1989, CDA has promoted "direct reimbursement," an alternative to closed panel dental insurance plans (CX-1460-E, CX-1456, CX-1465-F, CX-1473-G, CX-1508-A) under

which employers self-fund the cost of dental benefits for their employees, without insurance company involvement (CX-1275-C, CX-1473-G).

90. Direct reimbursement benefits CDA members (CX-1534, CX-1535) by "eliminat[ing] many of the restrictions imposed by the insurance carriers" (CX-1457-J).

91. CDA has established a Direct Reimbursement Committee which administers this program, for which CDA budgeted \$94,985 (excluding staff salaries) in fiscal year 1993-94 (CX-1450-X-Y, CX-1484-P, CX-1652-Z-19, Z-22-23).

d. Practice Management and Related Programs and Services

92. CDA's twice-annual scientific sessions offer seminars on topics relating to the non-clinical aspects of dental practice, including practice management, risk management, dental administration, and investment and estate planning (CX-1448-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1512-B, CX-1522-F).

93. CDA's for-profit malpractice insurance subsidiary, TDIC, has offered practice improvement seminars dealing with patient relations and dental practice risk reduction (CX-1482-Z-37, CX-1484-Z-30, CX-1511-C, CX-1512-A, CX-1587-Z-82). TDIC also provides a quarterly newsletter, a home-study course, and a lending library of risk management resources (CX-1482-Z-37, CX-1563-E, CX-1571-J).

94. In response to "membership concerns about the impact of new OSHA and [EPA] regulations on dental practice" (CX-1481), CDA developed an OSHA compliance manual (\$25 for members, \$255 for non-members) (CX-1481-N, V, CX-1483-Z-11, Z-40, CX-1501, CX-1503, CX-1528, CX-1531, CX-1537, CX-1562-G, CX-1571-G, CX-1573-D, CX-1575-D; Tr. 1174).

95. CDA provides its members with "delinquent license notification" (CX-1458-A), a service which allows members whose licenses have expired to correct their status before the licenses are cancelled (CX-1526-C).

96. Another "important membership benefit" (CX-1494, CX-1566-B) is CDA's provision to members of OSHA and labor law posters required by law to be displayed in dental offices (Tr. 1174; CX-1462-L, CX-1483-K, CX-1492-A-B, CX-1499, CX-1501, CX-1510-A, CX-1573-D). CDA also provides members with information

about compliance with the Americans With Disabilities Act (CX-1503, CX-1510-A).

97. CDA provides other practice-related programs to members: A professional placement program which, CDA has stated, can save members several thousand dollars (CX-1520-B, CX-1448-E, CX-1453-O, CX-1493, CX-1513-B, CX-1515-B, CX-1520-B, CX-1524-A, CX-1543) (free to members; \$100 per six month period for non-members); a guidance or "mentor" program under which experienced dentists offer business advice to new CDA members (Tr. 338-39; CX-1453-D, CX-1496-B, CX-1522-B, CX-1519-G); an auxiliary recruitment program which places urgently needed dental hygienists, dental assistants, and dental lab technicians into member dentists' offices (CX-1455-C, CX-1587-Z-162, CX-1459-I, CX-1462-K, CX-1522-F-H, CX-1634-C, L, M); a program offering in-office training of beginning dental assistants (at a 25% discount) (CX-1455-C, CX-1634-G, CX-1517-B); a program which offers CDA members review and analysis of contracts which members may want to make with third-party payers, such as PPO's, capitation plans, or other dental benefits plans (Tr. 1248-49, 1175; CX-1451-A, C, CX-1483-Z-10, CX-1484-Z-23, CX-1501, CX-1503, CX-1562-F, CX-1563, CX-1571-A, F, CX-1575-C, CX-1639-B, CX-1644-B) which CDA estimates can save members hundreds of dollars in attorneys' fees (Tr. 1204; CX-1563, CX-1571-A); and an annual retirement and financial planning seminar (\$95 for CDA members; \$245 for non-members) (CX-1487-A-B, CX-1501, CX-1502-A, CX-1525-A, CX-1575-C, CX-1459-H, CX-1486-B).

e. Peer Review

98. CDA's peer review program provides members with an easier, less costly alternative than litigation to resolve patient complaints (Tr. 291-92, 1151, 1397-98; CX-1448-D, CX-1510-A, CX-1520-A, CX-1563, CX-1571-A).

99. CDA estimates that this program's value to members is about \$10,000 per incident as compared with "potentially costly, lengthy litigation" or disciplinary action by the State Board of Dental Examiners (CX-1520-A, CX-1571-A).

100. About 900-1,000 peer review cases are resolved each year (Tr. 1152, CX-1484-Z-23).

f. Scientific Sessions and Continuing Education

101. CDA sponsors two scientific sessions each year which it has described as "a premier member benefit" (CX-1488-A, CX-1520-A, CX-1571-A, CX-1489-A) and "the most visible and tangible membership benefit" (CX-1483-W).

102. CDA budgets over \$1 million for these two sessions (CX-1481-Z-15, CX-1482-Z-47, CX-1483-M) not including staff salaries (CX-1652-Z-22-23), which are attended by thousands of dentists, dental auxiliaries, staff, exhibitors and guests (Tr. 1155; CX-1452-A, CX-1484-Z-27, CX-1488-A, CX-1489-A).

103. The sessions offer courses, seminars, and workshops covering scientific, clinical, practice management, and financial matters (Tr. 1156-57, 1416-19; CX-1448-D, CX-1480-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1522-F, CX-1587-Z-168).

104. Member dentists may attend these sessions free of charge (Tr. 289; CX-1483-Z-55, CX-1488-A, CX-1510-A, CX-1532-A, CX-1544, CX-1562-C, CX-1571-A, D, CX-1587-Z-166). Non-members must pay a registration fee (\$855 in 1993) to attend (Tr. 1156, 289-90, 381; CX-1481-Z-44, CX-1482-Z-35, CX-1483-Z-55, CX-1488-A, CX-1504-A, CX-1587-Z-166-67, CX-1638-A).

105. The scientific sessions also offer dentists a convenient way to earn continuing education credits which are required by the State (Tr. 1157, 1160, 1397, 1195-96; CX-1448-D). This is a free, substantial benefit to members. In contrast, non-members would have to pay from \$1,600 to \$2,000 a year to earn equivalent credits (Tr. 290-91, 1397; CX-1448-D, CX-1462-I, CX-1562-C, CX-1571-A-D, CX-1575-D, CX-1587-Z-166, CX-1644-B).

106. Income from the scientific sessions helps to defray the costs of operating CDA, and may offset dues increases (CX-1484-N, CX-1482-L).

g. Publications

107. The official publications of CDA, the CDA Journal and CDA Update, provide CDA members with "the latest information regarding dental research, techniques and materials, as well as legal and legislative news" (CX-1571-L). The subscription rate for the Journal for members is \$12; for non-members it is \$60 (CX-1484).

The rate for the Update is \$6 as compared to \$24 for non-members (CX-1480-B).

108. CDA has stated that, "[b]y providing its readers with the latest in scientific and practice management information, the Journal keeps CDA members on the leading edge of technology and dental care" (CX-1575-C).

h. Benefits Provided Through For-Profit Subsidiaries

(1) TDIC

109. TDIC's purpose is to provide "stable, reasonable professional liability insurance for CDA member dentists" (CX-1472-A). In California, insurance is offered only to CDA members (Tr. 1785; CX-1587-Z-74). CDA has estimated the annual "value to member" of this coverage at over \$1,000 (CX-1520-B). And, according to CDA's Executive Director: "If TDIC were not in operation, it is an absolute certainty that the kinds of liability insurance costs would have continued to rise and never stabilized the way they have" (CX-1587-Z-84).

110. CDA also provides, through TDIC, state-required liability insurance to candidates for the California, Nevada, and Western Regional dental licensure examinations (CX-1490, CX-1491-A-B, CX-1501, CX-1522-B, CX-1525-B, CX-1526-C, CX-1544, CX-1649-Z-21-22). This insurance is free of charge to CDA members; it is not available to non-members (CX-1501, CX-1544, CX-1649-Z-1).

111. TDIC provides professional liability insurance for over two-thirds of actively practicing CDA members (CX-1478-G, CX-1480-A, G, CX-1484-Z-30).

112. TDIC has paid dividends and made other payments to CDA which contribute to a stable dues structure and keep dues lower than they might have been (Tr. 1413-14, 1189-90, 1769, 1785).

(2) TDCIS

113. TDCIS' stated purpose is "to serve as broker and administrator for various insurance programs provided for CDA members" and "to provide the finest insurance programs at

competitive rates for eligible CDA members, their families and employees" (CX-1472-A, CX-1475-D).

114. TDCIS insurance plans are available only to CDA members (Tr. 1782, 1792; CX-1509-A-B, CX-1532-A, E) and, in some cases, the members' spouses and staff, and to CDA component dental society employees (CX-1558-A, F, CX-1575-G).

115. TDCIS has more than 13,000 policyholders, more than 30,000 individual policies in place, and bills and collects more than \$55 million a year (Tr. 1782-83; CX-1484-W, Z-25, Z-29). Moreover, "each policy purchased by a CDA member contributes to the net income of TDCIS, which ultimately provides dividends to CDA" (CX-1484-Z-29).

(3) TDC

116. TDC's purpose is to provide and broker a wide range of high-quality services and products to CDA members at competitive fees with net profits to ensure its growth and to support CDA's activities (CX-1448-C, CX-1472-A, CX-1484-Z-29, CX-1546-B, CX-1562-D, CX-1571-J, CX-1637-D). These services are available only to CDA members (Tr. 1792; CX-1509-A-B).

117. The services and products provided by TDC include: a revolving line of credit of up to \$5,000 to patients of CDA members (CX-1455-K, CX-1476-F, CX-1484-Z-29, CX-1570-D, CX-1571-J, CX-1587-Z-95-96). This "valuable service" was used by 1,042 dental offices as of March 1993 (CX-1484-Z-29); dental equipment financing (Tr. 1780; CX-1479, CX-1570-C, CX-1571-J); special discounts on U.S. Sprint long distance telephone services (CX-1460-G, CX-1484-Z-29, CX-1570-F, CX-1571-J); "reduced cost printing services" (CX-1521, CX-1563); a home mortgage program, which shortly after being offered, received over \$30.8 million in applications (Tr. 1778-79; CX-1476-G, CX-1480-G, CX-1570-E, CX-1571-J, CX-1651-Z-40); a VISA gold card issued by Marine Midland Bank (Tr. 1779; CX-1480-K, CX-1484-Z-29, CX-1570-E, CX-1571-J, CX-1572-A-B, CX-1651-Z-40); and, automobile leasing services (Tr. 1780; CX-1480-K, CX-1484-Z-29, CX-1570-D, CX-1571-J). These services are used by a substantial number of CDA members (CX-1479-P, CX-1484-Z-29).

118. TDC has paid dividends to CDA which help maintain a stable dues structure and keep membership fees lower than they

otherwise might have been (Tr. 1769, 1413-14, 1189-90). TDC's substantial payments to CDA (\$5 million) have materially improved its financial position (CX-1483-Z-15, CX-1484-Z-29, CX-1546-B, CX-1637-D).

i. ADA and Local Component Membership

119. CDA membership carries with it membership in the ADA and local component societies which offer additional worthwhile programs for members.

120. There are many benefits to membership in ADA. These include: a home mortgage program; professional liability insurance coverage; advice about dental benefits programs and alternative delivery systems; a contract analysis service; credit cards for personal and business use; credit union membership; group life and health insurance; an equipment leasing program; long distance telephone discounts; a practice financing program; the "Health Cap Card," providing credit for dental patients; an antitrust law brochure; ADA's Annual Session; national dental health promotions; audiovisual education and training materials; dental product evaluation programs; legislative representation; the "Journal of the American Dental Association" and the "ADA News newsletter"; toll-free access to the world's largest dental library; a health screening program for members; public relations activities that enhance the image of dentists; and, practice management information (CX-1574-A-B, CX-1639-A-M, CX-1649-Z-38-53, CX-1563). ADA membership benefits also include a peer review system (Tr. 1228), and services designed to help dentists run, and become efficient in the administration of, their dental practices (Tr. 1227-28, 1246). ADA also offers publications on "Building Successful Associateships," "Successful Valuation of a Dental Practice," and a "Directory of Dental Practice Appraisers and Valuers" (CX-1493, CX-1524-O, CX-1568-C), and advice regarding the Americans With Disabilities Act and its effect on the dental office (CX-1468-F). CDA has touted many of the above-listed programs, services, and activities of ADA as beneficial to CDA members (CX-1521, CX-1563, CX-1571-A, CX-1575-C, CX-1648-A).

121. Membership in local component societies also carries with it several benefits: referral services, provided at no charge to members (CX-1471-C, CX-1563, CX-1565-B, CX-1571-L), which

can save them thousands of dollars a year in fees which would otherwise be paid to commercial referral services (CX-1563, CX-1565-B, CX-1571-L); emergency referral services which can help new dentists increase their patient base and build their practices (CX-1560, CX-1626-B, CX-1653-F); component "study clubs" which assist new CDA members in learning some of the skills of practice management which are not taught in dental schools (Tr. 337-39; CX-1400-L). In addition, component continuing education courses are often offered at no charge to members (CX-1626-A), or at lower rates than are available to non-members (CX-1277-F, CX-1538-B, CX-1563). CDA has touted all of these programs and services as being beneficial to its members (CX-1499, CX-1521, CX-1563, CX-1571-L, CX-1648-A).

122. Finally, tripartite membership enhances a dentist's reputation and undoubtedly attracts customers who believe that membership in a professional organization is an indication of competence (*see* Tr. 1679, 1407, 1653, 1844, 287, 384; CX-789-B, CX-880-A).

D. CDA's Charitable Activities

123. Dr. Dale F. Redig, CDA's executive director, testified about CDA activities which improve the health of the public and promote the art and science of dentistry (Tr. 1136):

CDA has supported legislation promoting fluoridation, clarifying regulations and legislation related to OSHA standards, and has supported steps to increase compensation to California dentists under the Denti-Cal Medicaid program. After a series of court actions, Denti-Cal's reimbursement level is about 60 to 65% of the usual, customary and reasonable fees (Tr. 1143-45).

CDA supports infection control and the Dental Patient Bill of Rights, which promotes the welfare of dental patients in California (Tr. 1145-47). CDA seeks adequate dental prepayment systems which encourage the public to use dental care regularly (Tr. 1145).

124. CDA has supported legislation which benefits the public, even though it may be opposed by its members.

125. These programs include encouragement of fluoridation (Tr. 1360), increased training requirements for the use of conscious sedation (Tr. 1294), opposition to proposed laws that patients be tested for AIDS (Tr. 1297), opposition to "informed consent laws"

concerning amalgam fillings (Tr. 1299), and, encouragement of legislation to curtail smoking (Tr. 1293).

126. CDA's Council on Scientific Sessions promotes, for the benefit of the public, advances in dentistry by sponsoring scientific presentations (Tr. 1155-56).

127. CDA has disaster and relief funds which help member and non-member dentists who are in desperate financial need because of illness or disaster (Tr. 1167).

128. Dr. Martin Craven, President of CDA and a former member of the AMA, testified that the public service aspects of AMA and CDA are not comparable and described AMA, in contrast, as a mere political organization interested in accumulating wealth whereas CDA's focus is on improving the dental health of the citizens of California (Tr. 1402). In his opinion, the major purpose of CDA's activities is to benefit the public (Tr. 1431).

E. CDA's Advertising Policy

129. As a condition of CDA membership, a California dentist must subscribe to, adhere to, and be bound by its Code of Ethics and Bylaws (CX-1450-E, CX-1258-E).

130. CDA's Code states:

[a] member may be disciplined for unprofessional conduct as it is defined by the Dental Practice Act, and for violation of any law of the State of California relating to the Practice of Dentistry (CDA Code Section 5) (RX-64-A).

131. In a press release issued after the complaint in this matter was issued, CDA confirmed that its ethical rules govern members' conduct:

CDA, which represents about 70% of the state's dentists, requires that members follow the law and the organization's code of ethics. The association enforces compliance; violations can result in expulsion (CX-1442-B).

132. CDA's components have agreed with it that the ethical rules which it establishes, including advertising rules, shall be the rules by which all members are governed (CX-1263-B, CX-1281-S, T, CX-1290-C, CX-1315, CX-1410-A).

133. Section 10 of the CDA Code establishes the standard which its members' advertising must satisfy:

Although any dentist may advertise, no dentist shall advertise or solicit patients... in a manner that is false or misleading in any material respect.... (RX-64-B).

134. In addition to the Code's standard, CDA relies on California law (which is incorporated into the Code), the regulations of the Board of Dental Examiners, and on sections of the Business and Professions Code (Tr. 1082; RPF 60; RX-136-A-E) to provide advertising standards which it enforces through the Judicial Council (RPF 66-69).

F. Reasons For CDA's Advertising Policy

135. In 1976, CDA's president noted that:

[d]entists as a whole are in a position now where they can determine their own fees and treatment modalities without being overwhelmed by market pressures, regulated profits, etc.

136. He then warned that:

[If CDA does not survive] we [will] all end up in a frenzied competition for patients on the basis of fees alone . . . It comes down to the potential of each of us being pitted against each other, for fees, to attract patients, and eventually dental care would be downgraded (CX-1623-A-B).

137. This aversion to competition has continued. For example, in December 1987, the executive director of a component, in forwarding an advertisement to CDA, stated:

This dentist is not in our area, Glendora is in the San Gabriel Valley component; however, if you wish me to handle this, I would be happy to do so, Italian style!!! Just let me know. These Drug Store Ads make me sick (emphasis in original) (CX-547).

138. In 1988, referring an advertising matter to CDA, one of its component members stated: "[m]uch of the advertising is in newspaper/flyer type. Perhaps [dentists] would be willing to change or stop this type of advertising" (CX-941). Also in 1988, the editor of a component newsletter stated:

The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

139. In 1989, the president of another component, writing in its newsletter, generally disparaged advertising and warned members against individual advertising, noting, among other things, that because of a "busyness" crisis (a term coined by CDA in referring to dentists' complaints that they did not have enough business) many dentists had begun to advertise:

I am increasingly disturbed at not only the degree but the nature of advertising occurring in our profession today . . . [A 1978 study found that the group] most likely to seek the services of an advertising dentist is a large family headed by a male with an annual income lower than \$15,000 (1978) and a strong belief that dental fees are too high. Is this the type patient you want to make up your practice? The patients responding to advertising are, according to [other] studies, already "on and off" patients that drift from practice to practice with little or no loyalty or bond to their doctor. . . . If the shining image of dentists is tarnished by aggressive advertising we may be viewed as wholesale tradesmen rather than honored professionals (CX-1359-B).

140. In 1994, Dr. Quint, an Ethics Committee Chairman, testified that he conducts what he calls an "indoctrination meeting" with new members of his component (CX-1608-V); at this meeting, Dr. Quint advises:

Then I say does advertising pay. I say it is not cheap. The PennySaver costs -- If you want to send out a list of PennySavers for everybody. I don't know what it is right now but it used to be about \$1500 for a postal zone. That's expensive. Telephone book is about \$500 for a half a page, \$500 a month. Fliers, you can take them to patients' houses and leave them on their door. I have one dentist that did that and he got no patients whatsoever out of it. People just do not go to the dentist because they see a flier. That's my opinion.

What kind of patients do you get when you advertise? You get coupon clippers, one-timers, nonrefers, and your old patients then will say how come I don't get the deal. How come you can't give me a discount? Here's my coupon. I know that from experience of having a person in my office who did advertise (CX-1608-Z-1).

G. Enforcement of CDA's Advertising Policy

1. Dissemination of Policy

141. CDA includes its Code of Ethics in materials it provides to new members and applicants and they receive a copy of the Code annually (CX-1244-A, CX-1608-X).

142. CDA also furnishes articles concerning advertising enforcement to its components for inclusion in their newsletters and distributes copies of its Advertising Guidelines and Code to participants in its ethics workshops (Tr. 1437-38; CX-1219-B, CX-1161-A-E, CX-1244-A, CX-1248-H).

143. CDA also sends copies of its Code to non-members, such as dental schools, who it believes can assist it in enforcing the Code's advertising policy (Tr. 884; CX-1198, CX-1219-B, G, CX-1248-H, CX-1606-F, CX-1607-F, CX-1608-F, Z-35-37, CX-1214-B, CX-1367-A).

2. Review of Advertising

144. Applicants for CDA membership are required to submit copies of their advertising and advertising by employers and associates (Tr. 685; CX-1431-B).

145. Components considering applications for membership list applicants' names in their newsletters and ask that members send them information regarding ethical problems of which the members are aware (CX-1333-D).

146. At the behest of CDA, many components review yellow pages advertising every year to discover possible Code violations (Tr. 472-73, 932-33; CX-1243-D, CX-1253, CX-1268, CX-1283-H, CX-1292, CX-1305-G, CX-1324-C, CX-1338-B, CX-1342-B, CX-1352, CX-1361-B, CX-1371-A-B, CX-1378-B, CX-1404-F, CX-1413, CX-1446-H, CX-1577-Y-Z-2, CX-1608-Z-11-12, CX-1610-V, CX-1611-Z-7).

147. CDA requires that members who enter into settlement agreements to modify or terminate existing advertising submit future advertising for review and prior approval (*see, e.g.*, CX-57-C-D). CDA and its components require applicants who have been granted conditional status to submit advertising for review and prior approval for one year (CX-52-B).

148. CDA requires its components to check the advertising of straying members (Tr. 1354, 931; CX-1195, CX-699, CX-1371-A-B), and some members who have complained about another's advertising have monitored future advertisements for compliance (Tr. 931).

3. The Enforcement Role of CDA and Its Components

149. CDA and its components have agreed to procedures for enforcing the Code's advertising rules: the components undertake an initial investigation into charges of Code violations and, where possible, resolve the matter at the local level (CX-1579-Z-6-7). One component ethics committee chairman stated that the committees are "agents of liaison between [CDA's] Judicial Council and the members of [the component], to monitor the ethical practice of dentistry" (CX-1403-E) (*see also* Tr. 507, 854, 1355; CX-1610-Z-37).

150. When reviewing questioned advertising, component ethics committees take into account CDA's instructions (Tr. 1339-40), and CDA, in some cases, monitors components' advertising enforcement (CX-478-A-B).

151. Components usually follow CDA's advice on advertising issues (Tr. 854-55, 1355; CX-177-Z-4, CX-1608-Z-7, Z-37, Z-45-46).

152. CDA and its components have agreed that when the components cannot decide whether a particular advertisement violates the Code or when local efforts at resolving advertising issues fail, the matter will be referred to CDA (Tr. 1441; CX-1260, CX-1577-Z-9, CX-1579-Z-6, CX-1603-Z-22).

153. If, during the initial investigation, a member's advertising is questioned, the ethics committee looks into the matter. If an applicant's advertising is questioned, the membership committee begins an investigation (CX-642, CX-969-A, CX-1243-D).

154. In some components, questioned advertising is reviewed by the ethics committee as a whole; in other components, an individual committee member handles such matters (Tr. 479-80, 847-48, 927-28).

155. When a component finds that an applicant's advertising violates CDA's Code, it tries to settle the matter by contacting the applicant and asking that he modify or discontinue the advertisement (Tr. 690-91; CX-1606-Z-5-6).

156. If the component fails to resolve the matter, or is not certain that the advertisement violates the Code, it forwards the application to CDA's Membership Application Review Subcommittee ("MARS") for resolution (Tr. 1023; CX-1409-E, CX-1603-Z-24-25, CX-1606-Z-8).

157. MARS is a subcommittee of CDA's Judicial Council which reviews membership applications to ensure that applicants have complied with CDA's ethical rules (Tr. 1023, 1440; CX-1219-A, CX-1259-B, CX-1484-Z-27-28).

158. After MARS has decided whether an advertisement does or does not violate the Code it makes a recommendation to the referring component. Recommendations include: full membership; acceptance with counseling; "conditional applicant status"; or, denial of membership (Tr. 1026-29; CX-118-B, CX-248-B, CX-1589-S-T, CX-1026, CX-1608-Z-8-9, CX-1606-Z-8-9, CX-1609-Z-3).

159. In one of its recommendations concerning an application, CDA told the component:

Pursuant to action taken by CDA's Board of Trustees in December 1980, CDA will extend financial assistance in the event litigation ensues from the component's membership decision only if the component: 1) follows the recommendation of the MARS; and 2) advises the applicant of its membership decision within six months of the date of this letter. (*See, e.g.*, CX-864-B).

160. Until about 1985, CDA denied membership to any applicant who advertised in a manner that violated CDA's advertising rules (CX-1215-A), and the applicant was invited to re-apply in one year (*see, e.g.*, CX-1058-C).

161. Beginning in about 1986, CDA established a membership category that it refers to sometimes as "conditional applicant" status and sometimes as "pending member" status (*see, e.g.*, CX-993, CX-1243-U). This status was originally designed for first time applicants who were new graduates (within two years of graduation) (CX-1416-E). It can only be granted once, for a one-year period (CX-1243-U), and only CDA (through MARS) can approve this status (CX-1178-A).

162. "Conditional applicant" status is available solely to dentists whose advertising violates CDA's Code, and who are unable to correct the advertising immediately. It is granted only to applicants

