UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

BUREAU OF COMPETITION

May 15, 1987

Charles E. Rosolio
Rosolio and Silverman, P.A.
502 Washington Avenue
Suite 320, Nottingham Centre
Towson, Maryland 21204

Dear Mr. Rosolio:

This letter responds to your request for a staff advisory opinion concerning the legality under the laws enforced by the Federal Trade Commission of the formation, marketing, and operation of Maryland Medical Eye Associates, P.A. ("MMEA"), a professional corporation. MMEA is owned by nine shareholders, all ophthalmologists, practicing in the Baltimore, Maryland metropolitan area.[1]

According to the materials accompanying your request, MMEA is a professional corporation formed for the purpose of offering ophthalmologic services to certain defined groups, specifically, corporations, labor unions, and Health Maintenance Organizations ("HMOs") in the Baltimore metropolitan area. MMEA will jointly market the services of its members and serve as a referral center for consumers seeking ophthalmologic services. MMEA will market itself as offering a full range of eye services at a variety of locations throughout the Baltimore area.

The nine physician shareholders of MMEA make up five separate medical practices located in different areas throughout the Baltimore metropolitan area.[2] Six of the nine physician shareholders in MMEA currently practice in two of these groups. One group consists of four physicians and the other group consists of two physicians. The other three shareholders each operate solo practices.

---

1 MMEA defines the Baltimore metropolitan area as Baltimore City, Baltimore County, Anne Arundel County, Howard County, and Glen Burnie, Maryland.

2 Four physicians who practice together have offices in Glen Burnie, Rosedale, Lockraven, and Randallstown; two physicians who practice together have offices in Lutherville and Parkville; and the three solo practicioners are located respectively in Dundalk, Towson, and Parkville. The distances between the physicians' offices range from approximately 9 miles to approximately 40 miles from each other. The only direct overlap is in Parkville, where the two partners and one of the solo practitioners each have an office.

You have indicated that ophthalmologists may compete in two separate product markets: medical and surgical eye care services offered only by ophthalmologists and those eye services offered by both ophthalmologists and optometrists. According to statistics you provided, there are approximately 105 ophthalmologists and 100 optometrists in the Baltimore metropolitan area.[3] Based on these figures, MMEA's shareholders' market share (based on the number of competitors) in the Baltimore metropolitan area[4] in the ophthalmologic/optometric eye care market is approximately four percent. MMEA shareholders' market share (based on the number of competitors) in the Baltimore metropolitan area in the ophthalmologic eye care market is approximately nine percent. There are no plans for additional shareholders to join the corporation, and MMEA anticipates that its market shares in each of the product markets will remain at their present levels.

The affairs of the corporation will be managed by its Board of Directors, which will consist of not fewer than three shareholders. The Board will elect the officers of the corporation each year at its first meeting following the annual meeting of shareholders. The physician founders of MMEA anticipated that the corporation would need approximately $100,000 to begin operation, and each shareholder is obligated to make a capital contribution of five thousand dollars ($5,000) and to make a loan to the corporation in the amount of five thousand dollars ($5,000).

As a condition of their becoming shareholders of the corporation, each physician is required to sign a Participation Agreement. Pursuant to the Agreement, the physician agrees to provide medically necessary ophthalmologic services to individuals who are patients of MMEA or who are participants in health plans in which MMEA is a participating member. MMEA will assist physicians in record keeping and other administrative duties. Each of the physicians participating in MMEA will continue to maintain his individual ophthalmologic practice.

---

3 During a telephone conversation, Dr. Friedel, one of the physician shareholders, stated that the figures were obtained from the Maryland Society of Eye Physicians and Eye Surgeons.

4 We assume for purposes of this advisory opinion that the Baltimore metropolitan area as defined above is the relevant geographic market.

It is anticipated that MMEA patients will constitute a small percentage of each physician's total number of patients.[5]

The physician, as a condition of his participation, agrees to maintain hospital privileges at an MMEA-approved hospital,[6] perform all services in accordance with proper medical practice and rules of professional conduct, and comply with all bylaws, rules and regulations, policies, and directives of MMEA.[7] Physicians will be required to submit information to MMEA regarding services provided to MMEA patients in the form of reports which set forth statistical, medical, and patient data. Such data will consist of information regarding the service performed, the reasons for the service performed, the date the service was performed, the age of the patient, and the total charge to the patient. Nothing in the agreement will prohibit physicians from participating in other alternative delivery systems or from giving them discounts greater than those offered MMEA. In fact, many of the physicians are presently participating providers in HMOs.

MMEA will market its services throughout the Baltimore metropolitan area. Consumers responding to MMEA's marketing efforts will be referred by MMEA to the physician in their area. Persons who are not covered by contracts or arrangements with MMEA will be patients of the individual physicians and not patients of MMEA. In those instances, the physician will charge his normal fee. MMEA will receive a fee, yet to be determined, from the physician for each such referral.

MMEA also expects to enter into contracts with corporations and HMOs in the area. All payments for services provided to MMEA patients will be made directly to MMEA. MMEA will then

---

5 You stated during a telephone conversation that during the first five years of operation MMEA patients will probably account for less than ten percent of the total number of patients seen by each physician.

6 Physicians may admit MMEA patients to a non-MMEA approved hospital in the event of an emergency, but must notify MMEA within 24 hours. Failure of a physician to give post-emergency admission notification will result in denial of payment to the physician with no recourse against the patient.

7 MMEA has not yet developed any rules, regulations, policies, or directives.

distribute payments to each physician based on the services performed. A percentage of the fee due the physicians is withheld by MMEA to cover the expenses of operation. MMEA will offer its services to corporations at a percentage discount off its physicians' normal fees. MMEA will offer certain services, such as eye examinations and eyeglasses, on a capitation basis. Under the capitation program, purchasers will pay a fixed fee to MMEA in exchange for MMEA's promise to provide the covered eye services whenever needed. MMEA will also enter into contracts with HMOs. Physicians electing to participate in HMOs will be compensated for services rendered to HMO patients in accordance with a fee schedule to be adopted. The fee schedule will be determined by a committee made up of shareholders of MMEA and representatives of the HMO. Physicians participating in HMO programs also agree to a patient hold-harmless provision with respect to any physician services determined by the HMO utilization committee not to be medically necessary.

The law governing the proposed conduct is not entirely clear. However, based on our reading of the law, as well as our consideration of the types of anticompetitive conduct that warrant Commission action, we are of the opinion that the formation, marketing, and operation of MMEA, as proposed, is not likely to warrant challenge as a violation of the Federal Trade Commission Act, or any provision of the antitrust laws enforced by the Commission.[8]

The MMEA program contemplates that physicians will be jointly involved as shareholders in operating MMEA and that MMEA, in turn, will market its physicians' services and negotiate reimbursement rates with purchasers. Physician members of MMEA will be jointly involved in setting capitation rates for routine services, and setting the fee schedule and discounts for services not offered under the capitation program. Thus, the program will involve agreement among competing physicians regarding the prices at which they will offer their services to some patients.

Horizontal agreements among competitors regarding the price at which those competitors will sell their product or services are inherently suspect under the antitrust laws and are "among those concerted activities that the [Supreme] Court has held to

---

8 This advisory opinion is limited to the proposed program described in both your request for an advisory opinion and in your submissions. It does not constitute approval for actions that are different from those described, or for those not specified in the request.

be within the per se category." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 8 (1979) ("BMI"). However, "easy labels do not always supply ready answers," id., and the per se condemnation of price fixing extends only to those arrangements that are "'plainly anticompetitive' and very likely without 'redeeming virtue.'" Id. at 9. Thus, while naked horizontal price restraints by competitors are per se unlawful, such treatment is not appropriate where, even though prices are literally fixed among competitors, the setting of the prices is ancillary to a joint venture that is likely to be procompetitive because it creates a new product or market or achieves efficiencies otherwise unattainable.

Three Supreme Court cases are particularly relevant to analysis of the MMEA plan. In BMI, the Court declined to apply per se treatment to a joint licensing arrangement pursuant to which an association of competing composers, authors, and music producers established prices at which the members' musical works would be licensed. The Court found that the particular nature of the product -- copyrighted music -- and the virtual impossibility of individual use negotiations or policing of the unauthorized use of copyrighted materials required use of a blanket licensing concept, encompassing an agreement as to price, if there was to be a market at all for the product. Id. at 18-21, 23. The Court concluded that the blanket licensing arrangement had "certain unique characteristics," and created, "to some extent, a different product." Id. at 22.

Further guidance was provided by the Court in Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) ("Maricopa"), a case that is particularly relevant to MMEA's proposal. In Maricopa, the Supreme Court held as per se unlawful an arrangement whereby a group of competing physicians had jointly agreed, through foundations for medical care, on maximum prices at which they would sell their services to subscribers of health insurance programs "approved" by the foundations. The foundations for medical care also reviewed the necessity and appropriateness of treatment rendered by its members for subscribers, and acted as an "insurance administrator." In determining that no new product was being sold through the combination the Court stated that "[t]he foundations were not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risk of loss as well as opportunities for profit." Id at 356. Absent pooling of capital and risk sharing "[t]heir combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care." Id. The Court in Maricopa also found that the fixing of prices by the competing

physicians was not necessary to the achievement of the purported goals of the foundations. Id. at 352-54, 356.

In National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 85, 102 (1984) ("NCAA"), the Court applied the BMI rule and found that per se treatment was not appropriate in a situation where the joint venture required some horizontal restraint. In that case, the Court considered the legality of restrictions on price and output of televised college football games, found that the marketing and sale of league sports inherently required some horizontal agreement among competitors, and determined that rule-of-reason analysis was appropriate to consider the legality of particular restraints. The Court found, however, that the challenged restraints on price and output were not integral to the legitimate and procompetitive goals of the NCAA in offering televised college football. Under the rule of reason, the Court rejected petitioners' proffered justifications and found the restraints illegal.[9] While recognizing that a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies," the Court found that the NCCA had failed to demonstrate such efficiencies. NCAA, 468 U.S. at 113, quoting Maricopa, 457 U.S. at 365 (Powell, J. dissenting).

In assessing whether a price restraint purporting to serve a joint venture is appropriate for rule of reason rather than per se analysis, it is important to examine whether the participants have integrated their businesses through financial contributions and risk sharing in a manner that could warrant joint pricing. See Maricopa, 457 U.S. at 356.

MMEA physicians have partially integrated their services by pooling their capital and by sharing in the risks of the venture. Each physician will contribute $10,000 toward the venture and will participate in a capitation program with respect to certain eye services, and a fee-for-service program with respect to other services.

Under the capitation program the physicians jointly bear the risk that patient utilization will exceed the amount received by MMEA. If overutilization is caused by one physician, all the

---

9 Once the Court found an agreement not to compete in terms of price or output, its "rule of reason" analysis was limited to consideration of the defendant's justifications for the challenged restraints. In the absence of a valid justification, the NCAA's conduct was deemed to be unlawful without proof of its market power. NCAA, 468 U.S. at 110, 115.

physician members receive less reimbursement. Each physician thus has an incentive to hold down utilization of their own services as well as those of the other members. Thus, there appears to be substantial risk sharing with respect to services offered under the capitation program.

The physicians in MMEA will be reimbursed for other eye services on the basis of a fee schedule or on the basis of their actual charges minus a discount determined by MMEA. Although there is less integration with respect to the eye services not offered under the capitation program, this aspect of the program may also be appropriate for rule of reason analysis. As stated above, per se treatment is not appropriate where the setting of prices is ancillary and reasonably related to a joint venture or new product.

The MMEA physician shareholders appear to be creating a legitimate joint venture rather than engaging in naked restraints. MMEA will market itself as offering a full range of eye services at a variety of locations throughout the Baltimore area. Corporations and other organizations considering purchasing eye care for their employees may be interested in providers offering full coverage in a variety of locations. Since these physicians could not offer this program individually, they have pooled their capital and their services in order to reach a group of purchasers different from the patients to whom they are able to market their services on an individual basis. Thus, the MMEA plan seems analogous to the situation in BMI where the Court found that a new product was being offered.

In sum, unlike the venture in Maricopa, MMEA appears to involve significant integration among its physician shareholders. They have made capital contributions and assumed a degree of risk and created a product none of them could produce alone. Joint price setting appears to be an integral part of the plan. We therefore believe the restraint should be analyzed under the rule of reason. We thus look at the MMEA plan to see whether, on balance, the anticompetitive effects of the arrangement outweigh the procompetitive benefits.

The essential inquiry of any restraint on competition is "whether or not the challenged restraint enhances competition." NCAA, 468 U.S. at 104. Here we are concerned with the effect of the restraint on competition among the participants and the effect of the restraint on competition market wide. We have concluded that while the MMEA plan may eliminate some

competition among the participants, this appears to be more than offset by its procompetitive aspects.

The MMEA plan does not appear likely to substantially restrict competition in the market. First, the plan affects only a small percentage of the physicians' total patients, and the physicians will continue to compete with respect to non-MMEA patients. Second, MMEA participants do not appear to have sufficient market power to affect the market price for eye services in the Baltimore metropolitan area, nor does the restriction of output appear to be a realistic danger.

Moreover, MMEA may enhance competition by offering a package of services to purchasers of eye care services that could not be offered by the physicians individually. Thus, the MMEA plan appears to be offering a new product in competition with other eye care providers which is likely to create incentives to increase price and service competition throughout the Baltimore metropolitan area. As the Supreme Court noted in NCAA, "a restraint in a limited aspect of a market may actually enhance market competition." NCAA, 468 U.S. at 104.

This office retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke its opinion if implementation of the proposed program results in substantial anticompetitive effects, if the program is used for improper purposes, or if it would be in the public interest to do so. Finally, as I am sure you are aware, the above legal advice is that of staff of the Bureau of Competition only. Under the Commission's Rules of Practice § 1.3(c), the Commission is not bound by this advice and reserves the right to rescind it at a later time and take such action as the public interest may require.

Sincerely,

M. Elizabeth Gee

M. Elizabeth Gee
Assistant Director

LAW OFFICES
ROSOLIO AND SILVERMAN, P. A.
SUITE 320, NOTTINGHAM CENTRE
502 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(301) 339-7100

CHARLES E. ROSOLIO*
STEVEN D. SILVERMAN
JOHN P. EVANS
JEFFREY M. KOTZ
DEBORAH A. ZGORSKI

*ALSO ADMITTED IN D. C.

ROCKVILLE OFFICE
SUITE 510
5515 SECURITY LANE
ROCKVILLE, MARYLAND 20852
(301) 231-7250

August 19, 1986

Secretary of the Federal Trade Commission
6 Pennsylvania Avenue, N.W.
Room 392
Washington, D.C. 20580

Dear Sir/Madam:

Request is hereby made for your office to issue an advisory opinion which examines the proposed business conduct of Maryland Medical Eye Associates, P.A. ("MMEA") to determine whether said conduct will be considered a conspiracy to monopolize the practice of ophthalmology in the Baltimore metropolitan area in violation of Title 15 United States Code Annotated, sections 1 and 2. An advisory opinion from your Commission is necessary because the matter involves a substantial or novel question of fact and law for which there is no clear Commission or court precedent and the subject matter of the request and consequent publication of Commission advice is of significant public interest. This request is being made on behalf of the nine stockholders of MMEA who are as follows: Arnold Alper, M.D., Stanley Amernick, M.D., Richard Balcer, M.D., George Duncan, M.D., Samuel Friedel, M.D., Joyce Lammlein, M.D., Rodney Ortel, M.D., Ronald Seff, M.D., Martin Schuman, M.D.

Maryland Medical Eye Associates, P.A., is a Maryland professional corporation which was incorporated on June 11, 1986. The corporation was formed for the purpose of engaging in the licensed practice of ophthalmology. More specifically, the business purpose of the corporation is to offer ophthalmic services to defined groups, such as employees of corporations in the Baltimore Metropolitan Area.

The corporate charter provides for a Board of Directors consisting of three directors. This number can be increased but shall never be less than three. The Board is empowered to authorize the issuance of shares of the corporate stock of any class or classes.

The Board also may classify or reclassify any unissued shares by fixing or altering them in such respects as voting powers and dividends. The corporate charter also provides that there may be no less than four (4) stockholders.

The total number of shares of capital stock which is authorized to be issued is One Hundred Thousand (100,000) shares of common stock. Fifty Thousand (50,000) shares is Class A common stock with a par value of One Dollar ($1.00) and Fifty Thousand (50,000) shares is Class B common stock with a par value of One Dollar ($1.00). Class A stockholders will have all voting rights and powers; whereas Class B stockholders will have no voting rights for any purpose. No holders of any shares of stock shall have any preemptive rights to purchase any shares of the corporate stock. All of the nine (9) stockholders listed herein are or will be owners of Class A stock, with each owning One Hundred (100) shares. For the issuance of such stock, each stockholder is obligated to make a capital contribution of Five Thousand Dollars ($5,000.00) and to make a loan to the corporation in the amount of Five Thousand Dollars ($5,000.00).

As previously indicated, MMEA currently has nine stockholders who are ophthalmologists licensed to practice medicine in the State of Maryland. MMEA is a professional corporation organized under Title 5 (Subtitle 1) of the Corporations and Associations Article of the Annotated Code of Maryland and, thus, is precluded from having any shareholder that is <u>not</u> a licensed ophthalmologist. The corporation is physician-controlled as a result of statutory mandate and for no other reason. An affirmative vote of two-thirds (2/3) of the stockholders entitled to vote is required for such actions as election of new directors, amendment of the charter, merger or consolidation of the corporation, issuance of shares of stock of any class, sale or transfer or all or substantially all of the property or assets of the corporation, participation by the corporation in a share exchange, and voluntary or involuntary liquidation, dissolution or winding up of the corporation.

As a condition of their becoming stockholders of the corporation, the ophthalmologists [physician] are required to sign a Participation Agreement. Pursuant to the Agreement, the physician

agrees to provide medically necessary services in the area of ophthalmology to individuals who are patients of MMEA. MMEA will assist the physician in record keeping and other administrative duties. Each of the ophthalmologists who are participating in this venture as stockholders, as well as participating physicians, have their own ophthalmologic practices that they have previously developed and intend to continue to maintain such practices. It is thus anticipated that the patients seen by the ophthalmologists as participating physicians of MMEA will constitute a small percentage of the total number of patients seen and treated by the ophthalmologist in his/her overall practice.

The physician, as a condition of his participation, agrees to meet all criteria adopted by MMEA, maintain hospital privileges at an MMEA-approved hospital, perform all services in accordance with proper medical practice and rules of professional conduct, and comply with rules and regulations of MMEA. Furthermore, the physician is required to submit information to MMEA regarding services provided to MMEA patients in the form of reports which set forth statistical, medical and patient data.

The MMEA physician will be compensated for services rendered to MMEA patients in accordance with the MMEA fee schedule to be adopted. In no event shall a physician bill or seek compensation from any patient for services provided by the physician for which premiums have been paid to MMEA. Although a precise fee schedule has yet to be adopted and may vary with particular types of contracts and entities, it is intended that such fees will be competitive with other physicians and groups similarly situated in the marketplace.

The physician is required to maintain professional liability insurance in an amount of no less than One Million Dollars ($1,000,000.00) per incident and Three Million Dollars ($3,000,000.00) per annum. Proof of such insurance coverage shall be furnished to MMEA upon request.

Each physician is deemed to be an independent contractor and not an employee of the corporation. The physician is responsible for the payment of any and all taxes, retirement benefits or any other payments for or on his behalf. MMEA shall be permitted to use the physician's name in the list of physicians under contract with MMEA.

The physician is permitted to terminate his contract with MMEA by giving MMEA one hundred twenty (120) days' written notice of his intention to terminate. MMEA may terminate the agreement with any physician provided it has just cause for such termination and gives the physician ten (10) days' written notice. In the event of termination of the agreement by the physician or MMEA, the physician is prohibited from soliciting MMEA patients for a period of one hundred eighty (180) days after the date of termination. However, this does not preclude a physician from continuing to treat patients who were not patients of MMEA.

The Articles of Incorporation, By-Laws, Participation Agreements and other documents are available for inspection upon request. If I can be of any further assistance to you, please do not hesitate to contact me.

Very truly yours,

ROSOLIO AND SILVERMAN, P.A.

Charles E. Rosolio

CER/lcb
cc: Samuel Friedel, M.D.
Rodney Ortel, M.D.
Martin Schuman, M.D.