Bureau of Competition
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

May 14, 1984

Frederick C. Holler, M.D.
President
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Lowell Court Professional Building
Lewiston, Maine 04240

Dear Dr. Holler:

This letter responds to your request for guidance concerning the legality under the antitrust laws of a medical society such as the Maine Medical Association urging its members to freeze their fees or to lower their fees by a particular percentage. You have indicated that your question was prompted by reports in the press of proposals for a freeze on physicians' fees. I have treated your inquiry as a request for informal advice. More specific facts regarding the proposed conduct would be required for a formal advisory opinion.

I applaud your sensitivity to potential antitrust concerns. Collective decision-making by competitors on matters related to fees can raise significant antitrust issues, and an association such as yours should proceed with care in these matters.

As you may know, one of the fundamental rules of antitrust law is the ban on price-fixing. The law prohibits naked agreements among competitors to fix or stabilize the price at which they sell their goods or services. So basic is this rule to the framework of our economic system that conduct found to constitute price-fixing is deemed per se, or automatically, illegal. When per se illegal price fixing is involved, courts will not inquire into the reasonableness of the prices set or the validity of any proffered justifications for the restraint on competition.

The rule against price-fixing is not limited to agreements in which competitors agree to charge the same price. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980). As the Supreme Court recently reaffirmed in Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982), the prohibition applies with equal force to agreements to set maximum prices. Furthermore, agreements designed to stabilize prices are illegal, even though actual price levels have not been set. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

The Supreme Court explained the policy underlying the rule many years ago:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.

United States v. Trenton Potteries, 273 U.S. 392, 397-98 (1927).

This does not mean that competitors may never address matters involving price. The Supreme Court has made it clear, for example, that when competitors join together in an arrangement offering significant productive efficiencies, conduct reasonably necessary to the venture that involves the setting of prices will not be held per se illegal. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979). And, as you may be aware, the Federal Trade Commission and its staff have issued several advisory opinions explaining that properly conducted peer review of fees by professional societies is not prohibited by the antitrust laws. See Iowa Dental Association, 99 F.T.C. 648 (1982); Rhode Island Professional Standards Review Organization (May 9, 1983); American Podiatry Association (staff advisory opinion, August 18, 1983). Similarly, a medical society may gather fee information from its members and provide it to third party payers and governmental entities, along with the society's views, provided such activities are not part of a boycott or other collective effort to coerce third parties to adopt policies favored by the society and do not effectuate an agreement to set prices. See Michigan State Medical Society, FTC Docket No. 9129, slip opinion at 39 (February 17, 1983).

It would be illegal for independent competing physicians to agree among themselves to freeze their fees or to lower their fees by a particular percentage, because such conduct would constitute an illegal price-fixing agreement. See, e.g., United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 185 (3d Cir. 1970) (agreement on percentage of discount to be granted held to be illegal price-fixing). See also Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (agreement to terminate the practice of giving credit is squarely within the traditional per se rule against price fixing.) Nothing in the antitrust laws, however, prevents individual physicians from unilaterally deciding to freeze or lower their fees.

A medical society resolution that merely encouraged members voluntarily to take a particular action regarding fees would raise antitrust issues, but would not on its face constitute a price-fixing agreement. The principal concern would be the risk that the resolution might serve as part of, or evolve into, an agreement among members, whether express or implied 1/, to engage in the advocated action. In addition, guidance given by a medical society to its members could become coercive if the members did not clearly view the recommendations as purely advisory and voluntary.

The resolutions about which you have inquired -- a proposal to freeze fees and a proposal to lower fees by a particular percentage -- request physicians to take specific action with regard to their fees, and consequently raise serious antitrust concerns because of their potential for being used as vehicles for an illegal agreement. Whether a resolution would be found to constitute an illegal agreement would depend on all of the circumstances. In conducting this analysis, the specificity of the actions advocated in the resolutions you propose would be a factor that would increase the likelihood that competing physicians could be found to be agreeing among themselves to take particular action regarding their fees, rather than simply endorsing a general principle of fee restraint. If the Association monitored adherence to the terms of the resolution, that would be another factor that would increase the likelihood of finding an agreement in restraint of trade.

On the other hand, a medical society resolution urging physicians to consider the financial circumstances of patients in billing and to reduce fees and restrain price increases when possible should not, in itself, trigger antitrust liability. Indeed, such a resolution would probably not create serious antitrust problems even if it led to an agreement among competing physicians to abide by the terms of the resolution. The antitrust risk in such a resolution is reduced because the action advocated in the resolution is sufficiently broad and flexible so as to leave physicians who agree to abide by it wholly free to raise or lower their fees in particular instances as they deem appropriate. Of course, even this type of resolution would raise

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1/ A violation of the antitrust laws may be found even where there is no formal or express agreement to fix prices. An agreement may be inferred from conduct showing a mutual commitment to a common course of action. See United States v. Paramount Pictures, 334 U.S. 131, 142 (1948) ("It is not necessary to find an express agreement in order to find a conspiracy."), and Interstate Circuit Inc. v. United States, 306 U.S. 208, 227 (1939) ("Acceptance by competitors . . . of an invitation to participate in a plan, the necessary consequence of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.").

serious antitrust concerns if it appeared that it was being used as a vehicle for an agreement among individual physicians to fix or maintain their fees at a level prevailing at any particular time or within a particular range, or for an agreement to grant discounts solely to the elderly and the indigent and not to offer other types of discounts, such as discounts to health maintenance organizations or preferred provider organizations.

In sum, a general resolution urging physicians to try to minimize fee increases should not, in itself, present significant antitrust risks. A resolution urging a fee freeze or a specific percentage fee reduction is more problematical, because it could be found to part of, or lead to, a price-fixing agreement. If the Association were to adopt such a resolution, particular care should be taken to ensure that the purpose and effect of the resolution is independent, individual decision-making, and not concerted action.

I hope this information is helpful to you. Naturally, as with all opinions rendered by the Commission's staff, the Commission is not bound by this advice, as provided in Rule 1.3 of the Federal Trade Commission Rules of Practice.

Sincerely yours,

Arthur N. Lerner by mzb

Arthur N. Lerner
Assistant Director