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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
SAN FRANCISCO REGIONAL OFFICE

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COMMISSION AUTHORIZED

May 25, 1989

The Honorable Jack Jeffrey
Majority Leader
Nevada State Legislature
Nevada State Capitol Building, Room 106
Carson City, Nevada 89710

Re: Senate Bill 86

Dear Mr. Jeffrey:

The staff of the Federal Trade Commission is pleased to provide these comments in response to your request for our views on Senate Bill 86 ("S.B. 86").¹ The bill, if enacted, would prohibit a physical therapist from paying or receiving any fees in consideration for the referral of a patient. We believe that S.B. 86 is likely to injure consumers because restrictions on referral fees may interfere with legitimate health care delivery systems that contain costs. We respectfully recommend that the Nevada legislature consider these effects when determining whether to enact S.B. 86.

Interest and Experience of the Federal Trade Commission

For more than a decade, the Commission and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, lawyers, physicians, physical therapists and other non-physician health care providers.² The goal of the Commission has

¹ These comments represent the views of the staff of the Bureau of Competition and the San Francisco Regional Office of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

² The Commission's work in this area has included law enforcement investigations involving efforts to restrict the practice of physical therapy. See In re Iowa Chapter of the American Physical Therapy Ass'n, Dkt. No. C-3242 (consent agreement barring state physical therapy association from prohibiting its members from accepting employment by physicians or physician-owned clinics) (Nov. 4, 1988). In addition, the Commission's staff has submitted comments concerning legislative and regulatory proposals to enact such restrictions. Letter to the Honorable Ray Hamlett, Missouri House of Representatives
(continued...)

been to identify those restrictions on practice that impede competition or increase costs without providing adequate countervailing benefits to consumers.

Potential Harm to Consumers through Restrictions on Referral Fees

S.B. 86 would amend Section 2 of Nevada Revised Statutes Section 640.160, the Nevada statute that sets forth the grounds for discipline of physical therapists. Under the amended provisions, the Nevada State Board of Physical Therapy could refuse to issue or renew the license or registration of any physical therapist who:

- (h) Has entered into any contract or arrangement which provides for the direct or indirect payment of any portion of the money received from a patient for professional services to any person in consideration for the referral.
- (i) Has entered into any contract or arrangement to provide a person with a credit, gratuity, commission, professional discount, or wage in consideration for the referral of a patient.

We are concerned that these prohibitions could be construed to stifle innovative practice or referral arrangements. Because referral fees may promote competition, as discussed below, we suggest that you consider whether enactment of a prohibition on all referral fee arrangements may be detrimental to consumers.

Prohibitions on referral fees are often adopted to avoid the danger that a provider of professional services may make a referral for the purpose of receiving compensation, rather than serving the needs of the patient or client. Such broad prohibitions on all referral fees may, however, be too restrictive. This may be particularly true in view of changing conditions in the health care services market, where payment of fees to a referring provider or entity may be used as a means to contain health care costs.

²(...continued)
(Feb. 27, 1989) (regarding proposed legislation to prohibit physician employment of, and payment of referral fees to, physical therapists); Letter to the Honorable Chuck Hardwick, Speaker of the New Jersey Assembly (May 21, 1987) (regarding proposed legislation to prohibit physicians from having financial interests in physical therapy practices); letter to Lin Ng, Nevada Deputy Attorney General (Oct. 23, 1986) (regarding proposed regulation by the Nevada State Board of Physical Therapy to prohibit physician employment of physical therapists).

In recent years, alternative health care delivery systems, such as preferred provider organizations ("PPOs"), have developed. Although PPOs exist in many forms, all PPO programs involve a series of contractual arrangements between "preferred" health care providers and an intermediary, such as an insurer or self-insured employer, that acts as a third-party payor of health care benefits. PPO programs often attempt to select preferred providers for their ability to deliver quality health care at a low cost. Enrollees in PPO programs usually are given financial incentives (such as waivers of co-payments or deductibles) to encourage them to use the lower-cost preferred providers.

Some of the contractual arrangements used by PPOs may, however, involve legitimate payments that could be construed as referral fees, and therefore be prohibited under the proposed legislation. For example, some PPO programs require participating providers to remit to the PPO a percentage of the fees earned from treating PPO patients referred to the practitioner by the PPO. This is one method used to fund a PPO's administrative expenses. Under the proposed legislation, this payment could be construed as a fee in consideration for the referral of a patient. Prohibiting payment of fees in such circumstances might restrict the ability of physical therapists to participate in such alternative health delivery systems. Consumers could therefore lose the advantages of obtaining physical therapy services at preferred provider rates.

Prohibitions on payment of referral fees may also restrict the ability of physical therapists to participate in referral services. Referral services, which can be either for-profit or not-for-profit, refer prospective patients to one or more providers based on the stated needs of the patients and the qualifications or prices of the providers. They also typically make available a wide variety of information on the providers to whom they refer patients. Such information can promote competition by enabling patients to compare fees and services offered. For example, a referral service can inform patients as to which providers will accept Medicare assignment. The fees paid to a referral service are unlikely to provide an incentive for anyone to refer patients for unnecessary care. This is because the entity receiving the fee -- the referral service -- does not recommend or suggest that the patient obtain medical care. In the case of physical therapy, the patient already has a prescription from his or her physician and is using the service to locate a physical therapist with particular qualifications (location, price, area of specialization). Prohibitions on payment of fees for referral services may limit the availability of such services, and hinder consumers in locating independent physical therapy practices. For these reasons, we believe that the proposed legislation may raise costs to consumers.

Less Restrictive Alternatives

One reason that has been advanced for adopting legislation, such as that proposed by S.B. 86, that places restrictions on the relationship between referring entities and health care services providers is to ensure that medical care referrals are based on the needs of the patient, rather than on the financial interests of the practitioner. It may be argued that a physician who has a financial relationship with a physical therapist may have an incentive to prescribe treatment that may not be appropriate. When patients are unaware that a physician's referral could be motivated by financial considerations, they arguably may be misled about the necessity and cost of the recommended treatment. Prohibitions on the underlying arrangement may be intended to avoid the potential for abuse of the trust that a patient places in a practitioner to make appropriate referrals based on independent professional judgment of the patient's best interest.

The possibility that a physician may order unnecessary treatment is a problem associated with many aspects of medical service delivery, not just physical therapy. Whenever a physician prescribes x-rays, injections, surgical procedures, or other forms of treatment (including follow-up visits) to be provided in the doctor's office, financial considerations could, in theory, affect the recommendation. States, however, generally do not ban doctors from ordering those other services, even when the services are provided by the doctor's own practice.

Moreover, there are clearly less restrictive means of preventing abuse or deception than prohibiting all referral arrangements. For example, a physical therapist could be required to disclose to a patient that the therapist will pay or receive a fee in consideration for a referral. Such a requirement would provide patients with information to aid in their decision whether to use the recommended provider. In addition, we note that current Nevada law already subjects a physician to discipline if he or she fails to disclose to a patient any financial or other conflict of interest. NRS Section 630.305(6).

Conclusion

In sum, we believe that S.B. 86 may unnecessarily inhibit beneficial competition and limit consumer choice. The proposal is broader than necessary to protect consumers from physical therapists' and physicians' potential conflicts of interest. If necessary, you may wish to consider developing a less restrictive

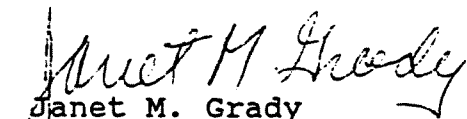
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alternative, such as allowing referral fees with an appropriate disclosure. Consumers should not be deprived unnecessarily of the benefits of competition, including the ability to choose the provider and practice arrangements most suited to their needs. For these reasons, you may wish to consider whether the enactment of legislation prohibiting referral fee arrangements is detrimental to consumer welfare.

We appreciate the opportunity to present these comments.

Very truly yours,


Janet M. Grady
Regional Director