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September 16, 2002

Mr. Donald S. Clark  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Re: Additional Testimony Subsequent  
to FTC Workshop on Health Care  
and Competition Law and Policy  
September 9-10, 2002

Dear Mr. Clark:

I would like to avail myself of the opportunity to furnish additional testimony subsequent to the FTC Health Care and Competition seminar of September 9-10, 2002. The views expressed are solely my own and do not represent any other person or body.

By way of introduction, I have been in solo practice in neurosurgery for thirty-one years. I have served as President of my Hospital Staff, of my County Medical Society, and of the State Neurosurgical Society. I also have served in the California Medical Association House of Delegates, I have chaired the CMA Professional Liability Committee for five years, and I currently represent the American Association of Neurological Surgeons in the AMA House of Delegates.

The original discussions leading to the eventual HR 1304 (Campbell) began among California neurosurgeons and many of us have followed the course of that legislation with keen interest. I also have had the opportunity to review Robert Pitofsky's testimony strongly in opposition to HR 1304 before the House Judiciary Committee and am, of course, also aware of the House of Representatives' passage of HR 1304 by 2:1 margin. Whatever the political implications of that vote, it would certainly appear that Congress is aware of and sympathetic to the bargaining inequities of the current health care market.

The opportunity to attend the FTC hearing was my first experience with such hearings. For someone living three thousand miles away, the hearing was extremely informative. It also offered a chance to learn more about the widespread activities of the FTC and the critical role that it plays in at least just one segment of its huge agenda. I appreciate having been able to attend.

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I would like to make the following points:

- 1) With all due respect to the Commission, physicians view the FTC as part of the problem rather than of the solution. If one considers the enormous numbers of health plan consolidations, mergers, and other associations, often resulting in enormous shares of the marketplace by a very limited number of companies, one must ask why none of these appear to have been seriously challenged by the FTC - acknowledging that they surely have all been studied. Mr. Simons acknowledged that the Commission is currently 0/7 in contesting hospital mergers and that that whole issue is under review. One then looks at the string of unbridled successes of the FTC in challenging physician groups of all shapes, sizes, and composition. Is this because physicians are singularly incompetent in their attempts to present any type of united front, is it because physician groups are acknowledged to lack the economic ability to fight protracted legal battles, or is it that current interpretation of antitrust precludes any meaningful economic bonding of physicians?
- 2) Simply put, there is currently no way that physicians can compete with health plans. In her testimony, Cara Lesser indicated that health plans have had an apparent policy of termination and then negotiation. Her comment was that this left patients in limbo; it certainly leaves physicians in limbo as well. Health care contracts with providers in California are purely and simply a "take it or leave it" matter and many of us who have attempted to modify those terms have been told that health plans do not negotiate with individual physicians. Three companies insure easily eighty percent of my non-Medicare patients and there is simply no way economically that I can walk away from these contracts, notwithstanding terms that are patently unsatisfactory, such as evergreen clauses, unilateral ability to change payment schedules, inadequate mechanisms for bill review, etc. As a sidelight, while this insurer power has driven down physician fees (I currently am receiving approximately thirty percent of the surgical fee I received for the same operation ten years ago), this economic power has not resulted in reduction of health care costs.
- 3) While I share the Commission's concern with rising health care costs and its effect upon availability of care to patients, I would hope that there is an understanding that physician fees will have little alternative but to increase in the forthcoming years. Our fees have been driven to the point where a recruitment of new physicians has become enormously difficult and will have a far greater impact upon patient care than any physician fee changes could ever have. For example, thirty years

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ago I was the fifth neurosurgeon in my hospital. Currently I am the only one. As I plan to retire in approximately one year, we are beginning to look for at least one new neurosurgeon in this community. The economics of practicing here have made such recruiting extraordinarily difficult. Some type of legislative or regulatory leniency may become an absolute necessity.

4) I was gratified to hear the Commission's interest in quality. However, in perusing the handbook documents, such as the opposition to the Alaska Health Plan and noting the admonitions in the letter regarding the MedSouth proposal, one sees a continued emphasis upon price with the (assumed) next conclusion that increased price would reduce access to health care. While quality in health care is certainly a paramount issue, the Commission may need to decide how to balance issues of health and of price and the subsequent assumption of decreased health care access. I would add that physicians clearly share not only a deep concern regarding quality of care, but regard themselves as the monitors of such quality. It is difficult to take one's natural leadership role in this arena while battered by economic forces that threaten survival.

Let me suggest an example. Let us assume that in California there are four hundred practicing neurosurgeons. If one subtracts the neurosurgeons at the academic centers and at Kaiser and other exclusive HMOs, one then has roughly one hundred neurosurgeons in institutions able to compete with the remaining three hundred. If these three hundred neurosurgeons form a fully-integrated unit with one provider number, and - more importantly - a strong emphasis upon board certification, peer review, continuing medical education, outcomes measurement, etc., to create a large group, then such an organization would represent an opportunity for unparalleled quality. If one allowed other neurosurgeons either to enter or not enter that group (depending upon their preference, qualifications, or whatever), this organization need not restrict such membership. Clearly this group would have an enormous economic power, perhaps even equal to that of some insurers in other states where they occupy well over seventy-five percent of the market. Is there any question in the Commission's mind that you would find some way to regard this an anti-competitive, price-fixing, and otherwise unacceptable. In short, it would appear that your message is that quality is fine and certainly desirable, but let's not take this matter too far!

I appreciate the opportunity to submit this to you. Once again, I found the seminar extremely informative and enjoyable.

Sincerely yours,

George H. Koenig, M.D.