

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF COMPETITION

Norman Klombers, DPM
Executive Director
American Podiatry Association
20 Chevy Chase Circle
Washington, D.C. 20015

AUG 18 1983

John Grad, Esq.
General Counsel
Podiatry Society of Virginia
Post Office Box 1226
Alexandria, VA 22313

Dear Dr. Klombers and Mr. Grad:

This letter responds to the request of the American Podiatry Association ("APA") and the Podiatry Society of Virginia ("PSV"), an APA component society, for a Commission advisory opinion concerning a proposed program for peer review of podiatrists' fees, utilization, and quality of care, by APA and its component podiatric societies. By letter of March 22, 1983, APA asked whether the reissuance of its Peer Review Guidelines and Procedures Manual ("Guidelines") and the adoption and implementation of these Guidelines by APA component societies would violate the Federal Trade Commission Act. By letter of June 24, 1983, PSV joined in this request, and expressed its desire to adopt and implement the proposed Guidelines. APA and PSV have both advised me that, to expedite a response to their request, they would be satisfied with an advisory opinion letter from the Bureau of Competition ("Bureau"), pursuant to Section 1.1(b) of the Commission's Rules of Practice.

¹ In the past, APA has issued guidelines for use by its component societies. Following the Supreme Court's decision in *Union Labor Life Ins. Co. v. Pireno*, ___ U.S. ___, 102 S. Ct. 3002 (1982), which held that the professional peer review activities in that case were not exempt from the antitrust laws as part of the "business of insurance," APA recommended to its component societies that they indefinitely suspend all peer review activities. APA now proposes to recommend to component societies that they again conduct peer review activities in accordance with APA's Guidelines.

According to the information you have provided, APA is a nonprofit corporation existing as a confederation of fifty-two (52) component societies, with a total membership of approximately 8,200 doctors of podiatric medicine located throughout the United States. PSV has approximately 125 members. Although APA prepared its Guidelines for use by the component society peer review committees, they will not be binding on component societies and may be adopted with modifications. This advisory opinion, of course, is limited to the proposed program described in APA's and PSV's submission.

I understand that APA's purpose in re-establishing its peer review program is to provide a mechanism for the voluntary resolution of disputes regarding podiatric services.² According to the proposed Guidelines, patients, third-party payers (such as insurers), or podiatrists may request component societies' peer review committees to review their particular disputes. The matters reviewed will include disputes over podiatric fee levels or over the quality or necessity of care.³ The parties to a

² APA's stated purpose of "discharg[ing] a part of the profession's responsibility to the public by assuring that fees are in accord with the range of usual, customary, and reasonable charges in the particular community" could be interpreted as expressing an intention that component society peer review committees act on their own to prevent podiatrists from charging fees that are not "in accord" with the community's usual, customary, and reasonable charges. Such joint policing of fees might amount to price-fixing. APA, however, has indicated to us that the program is meant to serve an informational and mediatory function and to operate solely when the parties to a dispute voluntarily request a hearing; further, the Association does not intend its stated purpose to be read or interpreted as inviting or condoning price-fixing by members. The design of the program is consistent with this representation.

³ As I understand your proposal, the peer review committees will normally determine whether a disputed fee is "usual," "customary," or "reasonable" by applying the definitions of those terms that appear in the Guidelines. Particular third-party payers may define those terms differently in delineating the scope of their coverage. You have explained, however, that all participating payers will be made aware of the definitions the review committees apply. If a particular payer prefers to have its own definition applied in the peer

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dispute must voluntarily agree to participate in the peer review process. In addition, peer review determinations will be advisory in nature, unless the parties have freely agreed among themselves to be bound. You have further explained that APA's component societies or their peer review committees will not be involved in the decision by the parties whether to choose to be bound by the results of the peer review process.

The program described in the Guidelines contains other notable aspects. For example, deliberations and decisions by any review committee are considered confidential communications, to be released only to the third-party payer, the podiatrist being reviewed, and, when appropriate, to the patient, unless the law otherwise requires. Moreover, review committee deliberations and decisions are limited to the particular fee or use of services in question. Parties dissatisfied with the decisions of a peer review committee may appeal the committee's decision to the Regional Appeals Committee, which has all the powers of review the state committee possesses. Parties dissatisfied with Regional Appeals Committee decisions may appeal to the Insurance Committee of the APA Board of Trustees, but the Insurance Committee shall accept fee disputes for appeal only when the issue is unusually important.

As you know, the antitrust laws treat peer review sponsored by a professional association as concerted activity of the members of the association. Such joint action violates the Federal Trade Commission Act and the other antitrust laws if it unreasonably restrains competition. The major competitive concern peer review of fees creates is that it may threaten independent pricing by the association's members and dampen the cost-control efforts of third-party payers, resulting in higher fees. Similarly, peer review involving the necessity, or quality, of care can injure competition if used to discourage or hinder innovative-practice techniques or cost-control arrangements. These anticompetitive results would, of course, be most likely to occur if the sponsoring organization has market power or intends such results, and if patients, payers, or practitioners are coerced into using the peer review process and abiding by its decisions.

review process, it may so request. If that request is not honored, the payer may, of course, choose either not to submit its claim to the peer review committee or not to follow the recommendation the committee made.

In considering the request submitted by APA and PSV, the Bureau has reviewed both the Commission's advisory opinion on fee review issued April 8, 1982, to the Iowa Dental Association, and the Commission's advisory opinion on utilization and quality of care review issued May 9, 1983, to the Rhode Island Professional Standards Review Organization (copies enclosed).⁴ The Bureau is of the opinion that operation of the proposed peer review program, as described, would not violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

This conclusion is based on several elements. First, APA's intent in designing the proposed program or in recommending that component societies recommence peer review activities does not appear to be anticompetitive. Moreover, the voluntary and advisory⁵ nature of the program makes it unlikely that the peer review process, if operated as proposed, could be used either (a) to coerce the parties into adopting the policies of APA or its component societies or (b) to facilitate price-fixing, boycotts, or other anticompetitive conspiracies. Further, the procedural safeguards described above should limit the dissemination of information concerning the matters under review and their results, thus obviating any fears that the process might influence practices in a whole community or state. It therefore appears unlikely that the proposed program will cause significant anticompetitive effects in markets for the financing or provision of podiatric services.

⁴ We have also reviewed the Supreme Court's decision in *Union Labor Life Insurance Co. v. Pireno*, ___ U.S. ___, 102 S. Ct. 3002 (1982). The *Pireno* decision did not decide whether peer review programs violate the antitrust laws. *Pireno* held only that peer review does not constitute the "business of insurance" and therefore is subject to antitrust scrutiny, and no other case has addressed the legality under the antitrust laws of peer review programs.

⁵ As discussed above, the program APA proposes is advisory unless the parties to a dispute independently agree to be bound by the results of the peer review process. Because neither APA nor its local components will participate in the parties' independent agreement to abide by the decision of the peer review process, nor attempt to assure such compliance, the sponsoring society cannot coerce or put undue pressure on the participants who choose to be bound.

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John Grad, Esq.
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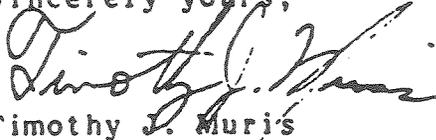
In fact, implementation of the proposed program may benefit competition, thereby benefiting consumers. As the Commission stated in its advisory opinion to the Rhode Island Professional Standards Review Organization, peer review programs provide contracting insurers, employers, and consumers with "expert" information in deciding whether to pay for medical care in particular instances. Because peer review can help participating health care plans reduce costs, it may increase the competitive incentives for other third-party payers to participate in effective cost-containment programs. Peer review programs may also cause market-wide pressure on providers to practice in a cost-conscious manner, and give them greater incentives to do so.

In implementing the proposed program, continued care and vigilance should be exercised to insure that the program's purpose remains legitimate and that it does not produce significant anticompetitive effects and thereby violate the antitrust laws. The Bureau 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 peer review 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 my staff has advised you, the above legal advice is that 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.

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Sincerely yours,


Timothy J. Muris
Director
Bureau of Competition

Enclosures