



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

January 3, 1986

William T. McGuire
Executive Director
Passaic County Medical Society
642 Broad Street
Clifton, New Jersey 07013

Dear Mr. McGuire:

This is in response to your letter of September 16, 1985, in which you request guidance concerning certain medical society peer review activities. I understand that Jill Frumin of this office has spoken with you by telephone and that your request has been supplemented by information provided to her orally. In your letter, you explained that since July 1982, the Passaic County Medical Society (the "Society") has refused insurers' requests that the Society mediate disputes regarding physicians' fees on the basis of legal decisions, including the Commission's decision and order in the American Medical Association case. You state that the Society is reconsidering its policy of refusing such requests and contemplates conducting a fee review program. You seek information regarding the antitrust implications of such a program.

Before addressing the particulars of your proposed program, let me correct the Society's apparent misunderstanding of the Commission's final order in the American Medical Association case. As issued on May 19, 1982, the order (Part II-A) expressly excepts peer review of physicians' fee practices from its prohibitions. Thus, the order does not prohibit professional associations from conducting legitimate fee review programs. I am enclosing a copy of this order for your review.

As you explained in your letter, and in your telephone conversation with Ms. Frumin, as currently contemplated, the proposed fee review program would be conducted by the Society's Judicial Committee (the "Committee"). The Committee is a standing committee consisting of ten members who each serve a five-year term. As proposed, upon the Committee's receipt of a request for fee adjudication, the physician whose fee is at issue would be required to submit to the review, and he or she also would be required to abide by the Committee's decision. Neither

the insurer nor the patient who initiates a complaint would be necessarily bound by the Committee's determination. You have stated that the Committee's decision would be confidential; that is, decisions by the Committee would not be disseminated to the Society's general membership, but would be released only to the affected parties.

As Ms. Frumin has informed you, the Commission previously has given advice concerning the legal issues surrounding peer review of fees, utilization, and quality of care in a April 1982 advisory opinion letter to the Iowa Dental Association, and in a May 1983 advisory opinion letter to the Rhode Island Professional Standards Review Organization. In August 1983, the Bureau of Competition also issued an advisory opinion to the American Podiatry Association analyzing the legality of the Association's proposed fee review program. I am enclosing copies of these letters for your convenience. Taken together, these three opinion letters provide a fairly comprehensive analysis of the issues presented by professional association peer review. These letters explain generally that professional association peer review does not violate the antitrust law where no anticompetitive intent is present, the parties to the program participate voluntarily, the advice given is advisory in nature, and the results of the peer review process are kept confidential.

Given these guidelines, it would appear the Society's proposed program would be very different from the voluntary advisory fee review programs previously approved by both the Commission and the Bureau of Competition, and the program's operation could raise serious antitrust problems. First, the proposed program is mandatory, not voluntary for members. Thus, in order to join or retain membership in the Society, a physician must agree to allow the Committee to decide the appropriateness of all fees for which a complaint has been received. Second, the physician must agree to abide by the Committee's decision with respect to his or her challenged fee. In essence, under the Society's proposed program, the Committee, a combination of competing physicians, is granted both the right and the power to set competitors' fees.-- requirements that would not appear to be reasonably necessary to achieve a procompetitive benefit. Thus, such activities may constitute an unreasonable restriction on price competition, and therefore may violate the antitrust laws.

When a review process is both mandatory and binding, it becomes increasingly possible that the proposed program can be used either to coerce the parties who are bound into adopting a society-approved (or committee-approved) "fee schedule," or that a society might manipulate or use the review process in order to facilitate an anticompetitive conspiracy or boycott.

In cautioning you about the risks inherent in the Society's proposed program, we note that nothing in your letter, or in your conversation with Ms. Frumin, suggests that the Society is establishing the proposed program for an anticompetitive

purpose. The fact that the Committee would not release the results of its fee review decisions to the Society's general membership should help prevent the Committee's decisions from effectively setting fees charged by Society members. However, this safeguard would not appear to counteract all risk of anticompetitive results from operation of the plan, and we continue to believe that, as proposed, the program presents serious antitrust risks.

You should be aware that the above advice does not bind either the Commission or the Bureau of Competition. Both the Commission and the Bureau of Competition retain the right to reconsider the questions involved. If implementation of the proposed program results in substantial anticompetitive effects, or if the program is used for improper purposes, the Bureau or the Commission may take such action as would be in the public interest.

I hope that this information is helpful to you. If you have any questions, please feel free to call me at (202) 724-1341 or, Ms. Frumin at (202) 724-1340.

Sincerely,

M. Elizabeth Gee
M. Elizabeth Gee
Assistant Director

Enclosures

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the
man
C. Gee, let's talk, ant*

PASSAIC COUNTY MEDICAL SOCIETY



September 16, 1985

FEDERAL TRADE COMMISSION
RECEIVED

SEP 18 1985

ASSISTANT DIRECTOR
BUREAU OF COMPETITION

Director of Health Care
Bureau of Competition
FEDERAL TRADE COMMISSION
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20001

Dear Madam/Sir:

As of July, 1982 this Medical Society has refused the requests of insurance carriers for it to act as an arbiter to judge the reasonableness of fees charged for medical services that a third party is called upon to pay. In reaching this decision, the Society relied on the opinion of its legal counsel. Counsel, in turn, relied on both the Federal Trade Commission Order (Docket No. 9064) issued May 19, 1982 and the views expressed by the United States Supreme Court in *Union Labor Life Insurance Company v. Pireno*, decided June 23, 1982.

As you are no doubt aware, there is considerable pressure for medical societies to take a more active role in reviewing fees in light of containment of health costs. Responding to this pressure, we find ourselves in the position of reviewing our policy as stated above.

To be in conformity with guidelines set down by our State Society, the review of fees submitted by insurance carriers would take place within the judicial structure of our Society. What concerns us is that the Judicial Committee, upon receipt of such a request, comes to a conclusion which is binding on the physician. Further, the physician has no choice as to submitting to the Judicial Committee's review or refusing to submit. I am enclosing for your reference the current Bylaw of this Society dealing with the Judicial Committee, as well as that Committee's Guidelines for reviewing cases and the Rules and Regulations of the Judicial Council of the Medical Society of New Jersey - by which this Society is bound.

We will appreciate the benefit of your guidance at your earliest convenience.

Sincerely,

William T. McGuire
Executive Director

GUIDELINES: JUDICIAL COMMITTEE

Procedure For Processing Complaints

A. Receipt of complaint

1. a patient who wishes to file a complaint shall be advised by PCMS Staff to first try to resolve the problem by speaking with the physician;
2. all complaints must be submitted to the Judicial Committee in writing;
3. receipt of the complaint shall be acknowledge at once and in writing by PCMS Staff;
4. if appropriate, copies of all bills, receipts, canceled checks, or medical records shall be requested.

B. Physician's input

1. a copy of the complaint shall be sent to the involved physician at once;
2. the physician shall be instructed to respond in writing within twenty (20) days of receipt of letter. If the physician fails to respond, it will mean that he/she accepts the facts of this matter as stated.
3. if appropriate, copies of all bills, receipts, or medical records shall be requested.

C. Submission to the Committee

1. the chairman of the Committee shall designate 2 Committee members to review the case;
2. copies of the complaint and the physician's response shall be sent to the designated members;
3. the designated members are encouraged to discuss the matter with the involved physician to determine if the matter may be resolved;
4. the designated members shall prepare a written response to the patient.

D. Committee action

1. the designated members shall present the case to the Committee along with pertinent information (e.g. attempt to mediate) and also the proposed written response;
2. the Committee shall discuss the case and come to a resolution of the matter;
3. should further information or clarification be required, the Committee may:
 - a) request same from the parties involved,
 - b) invite the physician to meet with the Committee;
4. should cooperation by the physician be needed to resolve the case (e.g. reduction of fee), the Committee shall gain such cooperation from the physician.

E. Resolution

1. the patient and physician shall be informed simultaneously of the Committee's resolution.

GUIDELINES: JUDICIAL COMMITTEE
(continued)

F. Further action

1. if either the patient or the physician is dissatisfied with the resolution, PCMS Staff shall inform that party that a request may be made to appear before the Committee;
2. the request to appear must be made in writing within 15 days;
3. assurance shall be given by the patient that no court action is in process or contemplated;
4. Grievance Report Form A, shall be sent to the Judicial Council of the Medical Society of New Jersey;
5. each party shall be interviewed separately;
6. legal or other counsel may accompany either party. However, counsel of any kind may only advise that party. Further participation, such as questioning witnesses or arguing to the Committee shall be denied;
7. the Society's legal counsel shall be present and shall provide the Committee with advice on conducting a fair and objective hearing;
8. the physician and patient shall be informed simultaneously of the Committee's decision.

G. Appeals

1. should either party still be dissatisfied after appearing before the Committee, an appeal may be made to the Judicial Council of the Medical Society of New Jersey;
2. the Guidelines of the Judicial Council shall be followed from this point.

DISCIPLINARY POWERS

The decisions of the judicial committee of a component society are binding upon all members of that component society, and the judicial committee of each component society in the enforcement of its findings, duly arrived at, has the power to censure, suspend, or expel any member of its society for just cause. Likewise, if the county judicial committee or a joint county judicial committee shall find after a hearing that a complaint, allegation, or grievance involves a matter which, in its opinion, would empower the State Board of Medical Examiners to revoke or suspend the license of a practitioner, it shall be the duty of such committee forthwith, by written complaint, to refer the findings to the appropriate law enforcement agency or the State Board of Medical Examiners. Disciplinary Sanctions are not to be implemented until termination of the forty-five (45) day appeal period mentioned in Paragraph #10 of the following Regulations.

All decisions of the Judicial Council and of the judicial committees are binding upon the respective members of MSNJ. They are not offered to members merely as advice. No member is free to decide whether or not he will conform to them. In addition, after the forty-five (45) day appeal period has expired, the judicial committees may, in their judgment, notify hospital medical staffs and other appropriate agencies, as indicated, of their findings and determinations.

Any dissatisfaction or criticism involving the judicial mechanism -- by individual members or component societies -- should be directed, without delay, to the Judicial Council.

The Regulations which follow are all supplementary to the Bylaws and these Fundamentals.

RULES and REGULATIONS

for the processing of grievances and complaints involving members of the Medical Society of New Jersey and its component medical societies

CENSURE within the Medical Society of New Jersey's Judicial Mechanism has generally followed two formats:

- a.) PRIVATE - Verbal criticism directed by the Judicial Committee to the defendant physician in Executive Session.

- b.) PUBLIC - A report of censure to the county medical society which is read at a meeting of the county medical society and published in the minutes thereof. It may also be published in the Bulletin of the given county medical society or otherwise distributed in the judgment of the Judicial Committee.

Please add this addendum under
Disciplinary Powers on Page 2

REGULATIONS

For the Processing of Grievances and Complaints

1. a) A complaint against a member or members received by the Medical Society of New Jersey shall be referred to the Judicial Council, which in turn shall assign it to the judicial committee of the component medical society of proper jurisdiction (the component society in which the doctor or doctors complained against holds membership).

b) A complaint against a member or members received by a component society shall be immediately referred to the judicial committee of that component society.
2. No complaint shall be given official consideration unless it is submitted in writing, signed, and presents in full all necessary details.
3. Receipt of a complaint in proper form by a judicial committee shall be acknowledged to the complainant or complainants in writing, and the date of receipt of the complaint shall be therein noted.
4. The member or members of the component medical society against whom the complaint is lodged shall be informed, in writing, of the receipt of the complaint, the date of receipt and shall be supplied with a copy thereof.
5. The possibility of amicable settlement of the differences by means of individual contact with the parties to the complaint shall be explored by a designated member or members of the judicial committee before the complaint is officially presented to the full judicial committee for action.
6. When the complaint is not possible of such amicable settlement, and when assurance has been given by the complainant (s) that no court action is in process or contemplated, the judicial committee shall accept the complaint for processing.
7. A hearing shall be scheduled forthwith by the judicial committee, to which physician-members are summoned and non-members are invited. Grievance Report Form A (supplied by the Judicial Council) shall now be completed and sent without delay to the Judicial Council of the Medical Society of New Jersey.

In the case of complaints made by third parties, the patient or patients who received the medical care rendered should also be invited to attend the hearing. However, failure of such patients to respond to such invitation shall not constitute basis for cancellation of the hearing.

REGULATIONS (continued)

Any member of the judicial committee who is a party to or who has an interest in the complaint, shall at this juncture disqualify himself from participation in the processing of the complaint.

It is advised that parties to the complaint be separately interviewed and interrogated in the course of the hearing. They may be represented at the hearing by legal or other counsel.

All evidence and testimony presented at the hearing and all discussion by the judicial committee relevant thereto shall be confidential to the judicial mechanism. No discussion of the complaint shall be indulged by any member of a judicial committee or of the Judicial Council except in the hearing dealing with the complaint or in the executive session following the hearing, or in fulfillment of official investigatory or judicial assignments.

8. Subsequent to the hearing and the departure of the parties to the complaint, all findings of the judicial committee shall be arrived at in executive session.
9. All principals shall be immediately and simultaneously informed of the committee's findings. This notification is to be signed by an officer of the committee and forwarded by registered or certified mail.
10. All parties to the complaint, when notified of the committee's findings, shall also be informed of their right of appeal to the Judicial Council of the Medical Society of New Jersey from the findings of the judicial committee. The parties shall likewise be specifically informed that any appeal to the Judicial Council must be filed, in writing, within forty-five (45) days of the date of the formal notices to them of the findings of the judicial committee.
11. At the time of notification to the parties to the complaint of the findings of the committee, Grievance Report Form B shall be completed and sent to the Judicial Council of the Medical Society of New Jersey.
12. In the event that a judicial committee, either by choice or through neglect, does not hold a hearing or effect adjustment of a complaint within sixty days (60) days of receipt of a complaint properly submitted, the Judicial Council shall investigate the delay and shall in its discretion recommend procedures for the effective and prompt processing of the complaint.

REGULATIONS (continued)

13. If no request for appeal is made within the specified time, all original exhibits received in conjunction with the complaints -- such as originals of prescriptions, letters, bills, etc. -- shall be returned by the judicial committee of the component society to the principal or principals who submitted them.
14. Records of a county judicial committee shall be subject to inspection exclusively by members of that committee and/or its legal counsel, the Judicial Council, and its legal counsel.

CHAPTER VI - JUDICIAL COMMITTEE

Section 1. Purpose

The judicial mechanism is intended to make available a means whereby differences and disagreements in the areas of ethical and professional conduct can be brought to a settlement that is fair to the interest of all parties. The mechanism is intended to demonstrate that medicine can equitably and amicably settle its own problems in the areas of ethical and professional conduct. (MSNJ Judicial Council: Guidelines, p. 1)

The primary objectives of the judicial mechanism are:

- 1) to assure that basic principles of a fair and objective hearing shall be accorded the physician whose professional conduct is being reviewed;
- 2) to provide reasonable safeguards for the public against conduct which is not in the best interest of patients.

(AMA: Guidelines for Due Process, pp. 1 & 4)

Section 2. Composition

- (A) The Judicial Committee shall be the judicial body of this Society and shall consist of ten (10) members appointed by the president of this Society.
- (B) Each member shall be appointed for a term of five (5) years. He/she may succeed self once, but in no case shall a member serve for more than ten (10) years. All terms commence on June 1st and terminate on May 31st of the appropriate year.
- (C) The president shall attempt a balance in membership among the major specialties and the hospital Medical Staffs.
- (D) To be a member of the Judicial Committee, one must be an active member in good standing for at least five (5) years.
- (E) No officer or trustee of this Society shall serve as a member of the Judicial Committee.
- (F) The president may appoint up to two (2) non-physicians for a term of one (1) year. Such a member may be re-appointed for a period not to exceed five (5) years total.

Section 3. Organization

- (A) The Judicial Committee shall meet as soon after the Annual Meeting as is convenient for the purpose of reorganization. Thereafter, it shall meet: as often as may be necessary to transact its business, at the call of the chairperson, or at the request of any five (5) of its members. Five (5) members shall constitute a quorum.
- (B) A chairperson, appointed by the president for a term of one (1) year, shall preside at all meetings of the Judicial Committee. The chairperson shall be selected from the membership of the committee and shall have both a voice in all deliberations and the right to vote.
- (C) The Executive Director of this Society, or a staff person designated by the Committee's chairperson, shall serve as secretary to the Judicial Committee for the purpose of acting as its agent. This person shall not be a member of the committee and shall not vote. The secretary shall be present during deliberations of the committee and shall have a voice when deemed appropriate by the chairperson.
- (D) The Judicial Committee shall function in conformity with the stipulations set forth in these Bylaws, its own Rules and Regulations, and the Rules and Regulations promulgated by the Judicial Council of the Medical Society of New Jersey.
- (E) The Judicial Committee shall be guided in its deliberations by:
 - 1) the Constitution and Bylaws of the Passaic County Medical Society;
 - 2) the Constitution and Bylaws of the Medical Society of New Jersey;
 - 3) the Opinions of the Judicial Council of the Medical Society of New Jersey;
 - 4) the Opinions of the Judicial Council of the American Medical Association;
 - 5) the Code of Ethics of the American Medical Association;
 - 6) laws, Rules and Regulations promulgated by civil government.

Section 4. Duties

The duties of the Judicial Committee shall be as follows:

- 1) to interpret and rule upon all questions of an ethical nature that shall confront the membership or any committee or other entity of this Society;
- 2) to adjudicate all disputes or controversies arising within this Society;

- 3) to receive complaints, accusations or inquiries from any source concerning the professional conduct or ethical deportment of members of this Society;
- 4) to carry out the Rules and Regulations promulgated by the Judicial Council of the Medical Society of New Jersey.

Section 5. Powers

- (A) In pursuance of its investigatory and judicial functions, the Judicial Committee shall have authority to:
- 1) request information or testimony from all members. Willful failure to cooperate with the committee on the part of any member may be considered as a basis for disciplinary action by the committee against such member;
 - 2) recommend a resolution to any matter submitted to the committee. Failure of any member to abide by the decision of the committee shall be grounds for disciplinary action;
 - 3) summon a member to appear before the committee. Failure of a member to respond to summons without a reason acceptable to the committee shall be grounds for disciplinary action;
 - 4) censure, suspend or expel any member for just cause;
 - 5) report by written complaint to the Judicial Council of the Medical Society of New Jersey any reasonable grounds or evidence of a matter cognizable by the New Jersey State Board of Medical Examiners as a ground for revocation or suspension of a license to practice medicine and surgery.
- (B) The Judicial Committee shall have complete authority to fulfill its mandate as stated in this Bylaw and within the guidelines detailed in Section 3 (E) and shall be free of review by any other body in this Society except for the Appeals Process as established by the Judicial Council of the Medical Society of New Jersey.