



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

February 29, 1984

Collin M. Haynie, D.C.
Chairman
Ethics Committee
North Carolina Chiropractic Association
5209 Michaux Road
Greensboro, North Carolina 27410

Dear Dr. Haynie:

Arthur Lerner has asked me to respond to your January 27, 1984, letter requesting approval of a code of ethics recently adopted by the North Carolina Chiropractic Association. Attached to your letter was a document with provisions numbered eighteen through twenty-five. The heading on the document indicates that these provisions are to supplement an existing code of ethics previously adopted by your association.

I do not have enough information to give you a definitive opinion on the legality of the ethical rules you submitted. For example, there is no indication of whether and how the code of ethics is to be enforced. I can, however, provide some informal guidance on the antitrust issues raised by these rules. You should understand that this advice does not bind the Commission.

The laws enforced by the Commission do not prohibit professional associations from adopting reasonable ethical codes designed to protect the public. Such self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumer welfare. In some instances, however, ethical rules can unreasonably restrict competition and thereby violate the antitrust laws.

The legality of the Association's self regulatory program depends on an assessment of its purposes and competition effects.^{1/} In assessing whether a professional association's

^{1/} See United States v. National Soc'y of Professional Eng'rs, 435 U.S. 679 (1978).

rules and procedures injure competition, it is sometimes necessary to know to what extent membership in the association is necessary in order to compete effectively. The greater the importance of membership as a competitive factor, the greater is the importance of ensuring that restrictions imposed by ethical rules are objective, reasonable, not overly broad, and applied in a fair and non-discriminatory manner. In the absence of an actual investigation, of course, I could make no judgment as to the competitive importance of membership in the Association.

Of course, some types of ethical rules amounting to agreements among competing members may injure competition unreasonably totally aside from the competitive significance of membership in the organization. For example, restraints on truthful advertising or on price competition are likely to be unlawfully anticompetitive, regardless of the importance of gaining or retaining membership in the organization.

The Association's proposed ethical rules include several provisions on advertising. In regulating advertising by its members, the Association runs significant antitrust risk when it adopts broad restraints on truthful advertising in order to prevent "unprofessionalism" (Rule 18) or advertising "unbecoming a professional person" (Rule 19). As the Commission's decision in its case against the American Medical Association makes clear, professional associations can legitimately prohibit false or deceptive advertising, but broad restraints on truthful advertising violate the FTC Act.^{2/} Thus, Rule 18, which addresses advertising of free x-rays, and Rule 19, which concerns "coupon advertising," raise serious antitrust questions.

Rule 20 declares it unethical to advertise that insurance deductibles or copayments will be waived, on the grounds that such advertising "may be used to mislead or misrepresent a material fact to an insurance company." The Commission has not considered the legality of such a restriction. I am aware of two state attorneys general who have held that advertising by dentists that they would waive a patient's copayment did not constitute false or misleading advertising, nor did it amount to fraud or misrepresentation against insurers.^{3/} The Association may wish to

^{2/} See American Medical Association, 94 F.T.C. 701 (1979), aff'd, 636 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 452 U.S. 960 (1982).

^{3/} See 64 Cal. Op. Att'y Gen. 782 (1981); La. Op. Att'y Gen. No. 82-345 (1982).

consider a more narrowly tailored rule, that prohibits misrepresentations of material facts to insurance companies.

Rule 21, which provides that it is "highly unethical" to charge insured patients a higher fee than uninsured patients, appears to be overbroad. Here again, the Association can properly prohibit false or misleading representations to insurers. Rule 21, however, appears to prohibit dentists from granting various discounts, such as discounts to those who pay cash at the time service is rendered. Agreements not to grant discounts can in some circumstances constitute illegal price-fixing.

Rule 22 appears to be a restatement of a ruling by the North Carolina Chiropractic Board of Examiners. There appears to be a word or words missing, so its meaning is not clear. An ethical ban on overprescribing would probably not raise any antitrust problems as long as it was applied fairly and in a nondiscriminatory manner.

Rule 23 appears to be aimed at preventing certain deceptive practice regarding bills submitted to third-party payers, and on its face presents no apparent problem.

Rule 24 also recites a requirement of the North Carolina Board of Chiropractic Examiners, in this case a requirement for prior approval by the Board of any advertising. If the Board has such a provision, it is in all likelihood a violation of the First Amendment as an illegal prior restraint. I am not aware of any cases addressing the question of a private association, such as yours, imposing such a prior approval requirement. In my opinion, such a rule would raise significant antitrust questions.

Rule 25 is an admonition to exercise "considerably more restraint" in advertising than that exhibited by commercial enterprises. It appears vague and overbroad. As noted above, efforts to restrict truthful advertising on the grounds that it is deemed overly "commercial" would pose serious antitrust risks.

I am enclosing for your information a copy of a recent Commission advisory opinion on a professional society's code of ethics. I encourage you to give serious thought to the issues I have raised above, and, in consultation with an attorney, to consider what kind of revisions in the proposed addition to your ethical code might be necessary to avoid antitrust problems. In

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addition, let me know as soon as possible what action the Association intends to take with respect to the ethical rules that you submitted.

Very truly yours,

Elizabeth R. Hilder
Attorney

Enclosure