



BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

July 31, 1987

Andrew K. Dolan, Esquire
Bogle & Gates
The Bank of California Center
Seattle, Washington 98164

Re: Request of Academy of Ambulatory Foot Surgery for an
Advisory Opinion Regarding Peer Review

Dear Mr. Dolan:

Thank you for your letter of June 15, 1987 requesting a formal advisory opinion of the Commission on behalf of the Academy of Ambulatory Foot Surgery ("the Academy"). The Academy is a professional association of podiatric physicians that you describe as "committed to the proposition that virtually all foot surgery can be handled on an outpatient basis in physicians' offices." Your letter was forwarded to me by the Secretary of the Commission for reply, as I am the Assistant Director in the Bureau of Competition with responsibility for health care matters.

The Commission issues an advisory opinion only if a matter involves a substantial or novel question of fact or law on which there is no clear Commission or court precedent. FTC Rules of Practice § 1.1(a)(1). As you are aware, the Commission has examined the legal issues surrounding professional association peer review in its April 1982 advisory opinion letter to the Iowa Dental Association (which dealt with fees) and in its May 1983 advisory opinion letter to Rhode Island Professional Standards Review Organization (which dealt with utilization and quality review). Also, as you mentioned in your letter, the Bureau of Competition issued an advisory opinion on peer review of fees to the American Podiatry Association in August 1983.

The three existing advisory opinions, taken together, provide a fairly complete statement of the Commission's and the Bureau's analysis of the issues presented by professional association peer review -- especially when such peer review is purely voluntary, advisory and confidential. These peer review letters, copies of which I am enclosing for your convenience, not only indicate that a Commission advisory opinion is not warranted but also obviate the need for one. As these letters make clear, programs like you

describe in your request that are legitimately motivated and purely voluntary, advisory and confidential are not likely to raise any serious antitrust issues.

First, your stated purpose -- to advance the treatment philosophy of your members, "by providing third party carriers with a pool of expertise which would assist them in determining when they might safely restrict foot surgery to less expensive outpatient settings and utilize less invasive and less traumatic procedures" -- does not appear to be anticompetitive. Second, the voluntary and advisory nature of the program makes it unlikely that the peer review process could be used to coerce the participants into adopting an Academy-sponsored fee schedule, to unreasonably discourage procedures disfavored by the Academy, or otherwise to facilitate any anticompetitive conspiracies or boycotts. Finally, the fact that the contents and results of the peer review process will be kept confidential, and the fact that the Academy's 1500 members constitute only about 13 percent of the podiatrists practicing in the United States, make it unlikely that the peer review program will cause significant anticompetitive effects in either the market for podiatric services or for health care financing.

Thus, the proposed program -- if implemented and operating in the manner described in your letter -- should not pose any significant anticompetitive threat. You should be aware that the above advice does not bind either the Commission or the Bureau, which retain the right to reconsider the questions involved, and to take any action as would be in the public interest, should the actual operation of the program result in substantial anticompetitive effects.

I hope this information has been helpful to you.

Sincerely,



M. Elizabeth Gee
Assistant Director