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

COMMISSION APPROVED
P864610

November 6, 1985

H. Fred Varn, Executive Director
Florida Board of Dentistry
130 North Monroe St., Suite 15
Tallahassee, Florida 32301

Re: Docket No. 85-DS-05

Dear Mr. Varn:

The Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics[1] are pleased to respond to the request by the Florida Attorney General's Office for comments concerning the Petition for Declaratory Statement filed with the Board of Dentistry of the Florida Department of Professional Regulation in August 1985 by Harvey Adelson, D.D.S. (Docket No. 85-DS-05) (hereinafter "the Petition").

The Federal Trade Commission is empowered under 15 U.S.C. § 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to its statutory mandate, the Commission encourages competition among members of the licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the competitive effects of restrictions on the kinds of business arrangements that state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others are permitted to use in their respective practices. Our goal is to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing substantial countervailing benefits.

The Board has been asked in the Petition to interpret Fla. Stat. Ann. § 466.028(1)(n) (West Supp. 1985), which provides that the following conduct shall be grounds for disciplinary action:

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1 These comments represent the views of the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Federal Trade Commission, however, has reviewed these comments and has voted to authorize their presentation.

> Exercising influence on the patient or client in such a manner as to exploit the patient or client for the financial gain of the licensee or of a third party, which includes, but is not limited to, the promotion or sale of services, goods, appliances, or drugs and the promoting or advertising on any prescription form of a community pharmacy unless the form also states "This prescription may be filled at any pharmacy of your choice."; or paying or receiving any commission, bonus, kickback or rebate; or engaging in any split-fee arrangement in any form whatsoever with a dentist, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, dentists, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a dentist from receiving a fee for professional consultation services.

Specifically, the Petition asks:

> Does a violation of Section 466.028(1)(n), F.S. occur when a dentist makes a patient referral to another dental office where:
>
> (1) The referring dentist has an ownership interest in the referred dental office . . . .[2]

The purpose of this letter is to suggest certain factors that may assist the Board in determining whether § 466.028(1)(n) prohibits dentists from referring patients to other dental practices in which they have an ownership interest. While we recognize the potential conflict of interest created by such investments, we believe that construing this statute to permit such investments where adequate disclosure is made to patients, rather

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2 Petition, ¶ 5. We do not comment on any other questions posed in the Petition. We also assume that the dentist's percentage of the profits in the "referred dental office" does not vary with the number of patients he or she refers to that dental office.

than banning them altogether, may provide valuable procompetitive and consumer benefits.

It does not appear that dentists' investments in other dental practices to which they refer patients are explicitly prohibited by a plain reading of § 466.028(1)(n). The statute prohibits "exercising influence on the patient . . . in such a manner as to exploit the patient . . . for the financial gain of the licensee." Many activities by dentists, such as the recommendation and subsequent provision of dental care, involve influencing the patient in a manner that may result in the financial gain of the dentist. The statute, however, prohibits such conduct only when it exploits the patient. Exploitation connotes taking unfair advantage of patients, which, we suggest, does not occur merely because a dentist refers patients to a dental practice in which he or she has a financial interest, particularly where, as we discuss later, this interest is fully disclosed to the patient. As an example of exploitation, this statute does use the broadly worded language "any split-fee arrangement in any form whatsoever with a dentist . . . either directly or indirectly." However, the terms "commission, bonus, kickback or rebate" and "split-fee arrangement" all suggest a situation in which a dentist shares in the fees paid to another dental practice by each patient referred to the other practice by the first dentist. An ownership interest, by contrast, involves the potential receipt of "profits" or "dividends," words which the legislature did not use, and which are not conditioned on the making of any referrals.[3]

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3 Congress has enacted a provision similar to § 466.028(1)(n) in the context of the Medicare program. It provides that it is a felony whenever a person

> knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind --
>
> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter . . . .

42 U.S.C. § 1395nn(b)(1) (1982). See also 42 U.S.C. § 1396h (similar statute governing Medicaid program). Although this statute appears broader than the Florida statute because it covers "any remuneration," it has apparently never been

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Since the statute does not explicitly prohibit the practice in question, we suggest that the Board, in determining whether this statute implicitly prohibits the practice, look for guidance to the policy reasons behind this fee-splitting prohibition. We believe that fee-splitting statutes typically are designed to prevent a dentist from receiving undisclosed kickbacks for patient referrals because some dentists may recommend unnecessary dental care or care from practitioners who charge excessive fees or who are not necessarily the most competent, solely because such practitioners kick back a portion of their fees. The potential harm is that patients, many of whom know little about dental disease, have little direct information about practitioners, are worried about their health and are unaware of any potential conflict of interest, are likely to rely heavily on such recommendations by their dentists.

Investments by dentists in other dental practices to which they refer patients do not, we believe, pose the same risk of exploitation as direct payments for referrals. Indeed, the potential harm to the public of dentists' investments in other dental practices to which they refer patients is akin to that of many other common practices in the medical and dental fields that are not generally considered exploitative of patients.[4] For

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applied to prevent a health care provider from referring patients to businesses or medical practices in which the provider has an ownership interest. The Health Care Financing Administration, in fact, issued an opinion letter in 1980 regarding a proposal by a group of physicians to form a limited partnership for the purpose of providing out-patient radiology services to the general public. The opinion stated: "We do not believe that physician referrals to an entity in which the referring physician maintains an ownership (or other investment) interest would, per se, violate the illegal remuneration provisions of section 1877 [of the Social Security Act, 42 U.S.C. § 1395nn]." Letter from Irv Cohen, Deputy Director, Office of Program Validation, Health Care Financing Administration (Nov. 25, 1980). See also Letter from Martin L. Kappert, Director, Bureau of Quality Control, Health Care Financing Administration (Dec. 10, 1980) (physician's ownership interest in a medical supply company to which the physician may refer his patients does not violate 42 U.S.C. § 1395nn).

4 The problem of self-dealing may be most evident when a dentist recommends that he himself provide additional dental services to the patient. Indeed, the danger of exploiting patients may be greater in that situation than when the dentist, for example, refers the patient to a periodontist in a

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example, when one dentist refers a patient to another dentist in the same professional service corporation or partnership, the referring dentist will share in any profits generated by the fees paid to the second dentist. The division of profits will depend on the distribution of shares in the professional service corporation or partnership. Presumably, this would not be found to violate § 466.028(1)(n). Furthermore, allowing dentists to invest in other dental practices seems little different from allowing dentists to invest in dental laboratories, dental equipment manufacturers, pharmaceutical companies, or pharmacies which they patronize or which they recommend or require (i.e., by prescription) that their patients patronize. It might be helpful to the Board, in determining whether § 466.028(1)(n) allows dentists to invest in other dental offices to which they refer patients, to consider whether these other practices have resulted in any exploitation of patients.[5]

Restricting the ability of dentists to invest in other dental practices to which they refer patients may have several competitive effects. First, a dentist who refers some patients for further care to a dental practice in which he or she has invested, may be better able to assure continued high quality care for those patients. This is because an investment interest may lead to a stronger, more permanent working relationship between the referring dentist and the other dental practice. In addition, a dentist who invests his or her money in another dental practice, like any long-term investor, has a direct economic interest in insuring that the practice will provide quality services. This is because a dental practice that acquires a reputation for performing unnecessary or poor quality dental care is likely to lose patients as well as referral business from other providers and may ultimately lose money.

Second, prohibiting dentists from investing in other dental practices to which they refer patients may limit the ability of established dentists to use their experience to reduce the costs of providing dental care. For example, their experience may

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practice in which the referring dentist has a partial ownership interest. This is because of the more attenuated financial reward in the latter case and because a referred patient may feel more comfortable exploring alternative sources of care.

5 Militating against exploitation of patients in these situations is the fact that the dentist's reputation and possibly his or her malpractice liability is at stake whenever he or she refers a patient to another dentist or to a laboratory, or whenever he or she prescribes a drug.

enable them to organize a new practice efficiently by procuring office space and equipment and hiring dentists and office personnel in a manner that reduces costs and thus may result in lower prices for dental care.

Third, such a prohibition may limit the ability of dentists to use their experience to help satisfy the particular dental care needs of a community. Established general practice dentists are in a unique position to detect and respond to a need, for example, for a new dental practice that offers care in certain specialties, in certain locations, or at more convenient hours.

Finally, because such a prohibition would eliminate an entire category of potential investors, it may reduce the amount of equity capital available for entry into the dental services market by recent dental school graduates as well as by innovative types of practices that may offer newer or better dental services or discounted prices to the public. The effect of such a prohibition may be particularly significant since shareholders in dentists' professional service corporations are already limited by law to licensed dentists.[6]

Considering the possible competitive harm caused by a broad ban on dentists' investments in other dental practices to which they refer patients, and absent evidence that the practice in question has proved to be exploitative, we suggest that a simple disclosure to patients could, at least in most cases, prevent the exploitation of patients that § 466.028(1)(n) was designed to address. For example, the Board could interpret this statute to require a dentist who refers a patient to another dental practice in which he or she has an ownership interest to fully disclose the nature of that interest to the patient, perhaps in writing. A patient who is so informed can decide for himself or herself whether, in light of all the circumstances, the potential conflict of interest may have adversely influenced the dentist's judgment.

The approach we recommend is similar to the position adopted by the American Medical Association regarding the referral of patients to hospitals:

> [A] physician may own or have a financial interest in a for-profit hospital, nursing home or other health facility, such as a free-standing surgical center or emergency

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6 Fla. Stat. Ann. § 621.09 (West 1977).

> clinic. However, the physician has an affirmative ethical obligation to disclose his ownership of a health facility to his patient, prior to admission or utilization.[7]

In addition to requiring disclosure, it appears that the Board, pursuant to § 466.028(1)(n), can avoid exploitation or abuse by disciplining dentists on a case-by-case basis in all conflict-of-interest situations where dentists in fact "exploit the patient or client for the financial gain of the licensee." For example, the Board could presumably discipline a dentist for referring a patient for unnecessary dental care to another dental practice in which the referring dentist has a financial interest. It might also be appropriate for the Board to discipline a dentist who has invested in another dental office when the percentage of the profits from that other office varies with the number of patients he or she refers to that office. Finally, the Board could apparently also discipline a dentist if an investment in another dental practice is nothing more than a sham to cover up

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7 § 4.04, Current Opinions of the Judicial Council, American Medical Association (1984). See also House of Delegates of the American Medical Association, Report of the Judicial Council, Conflict of Interest Guidelines (December 1984).

A similar disclosure approach has been taken by some states. For example, California Bus. & Prof. Code § 654.1 (Deering Supp. 1985) provides that physicians, dentists, and other health care providers

> may not refer patients . . . to any clinical laboratory . . . in which the licensee has any membership, proprietary interest, or co-ownership in any form, or has any profit-sharing arrangement, unless the licensee at the time of making such referral discloses in writing such interest to the patient . . . . The written disclosure shall indicate that the patient may choose any clinical laboratory for purposes of having any laboratory work or assignment performed.

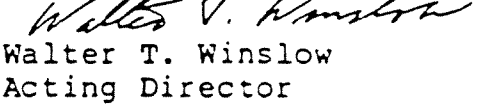
California law also provides that a referral to a laboratory in such a situation is unlawful "if the prosecutor proves that there was no valid medical need for such referral." Cal. Bus. & Prof. Code § 650 (Deering Supp. 1985). See Opinion No. 84-806, Attorney General of the State of California (Feb. 8, 1985).

an agreement by the dentist to refer patients to the other practice for compensation substantially in excess of any legitimately earned profits. For example, if a dentist has invested a relatively small percentage of the equity capital in a dental practice but receives a relatively large percentage of the profits, it may indicate that he or she is being compensated for referring patients rather than as a return on a bona fide investment.[8]

For the foregoing reasons, we suggest that the Board consider whether § 466.028(1)(n) allows dentists to refer patients to other dental practices in which they have an ownership interest where adequate disclosure of such interest is made to patients.

We appreciate this opportunity to comment on the Petition. Please let us know if we can be of any further assistance.

Sincerely yours,



Walter T. Winslow
Acting Director

cc: John E. Griffen, Esq.
Assistant Attorney General
State of Florida

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8 In certain circumstances, abuses by health care providers of their patients' trust may be a deceptive act or practice or unfair method of competition in violation of § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45 (1982).