

## IN THE MATTER OF

## NISSAN MOTOR CORPORATION IN U.S.A.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3502. Complaint, June 29, 1994--Decision, June 29, 1994*

This consent order requires, among other things, a California-based corporation to disclose clearly and prominently in each advertisement either any significant restrictions that apply to obtaining a promotional benefit in connection with a test-drive offer, or that there are significant restrictions that apply to obtaining the benefit, and prohibits the respondent from misrepresenting the existence, nature or any conditions, restrictions or limitations on any promotional benefit it offers consumers in the future.

*Appearances*

For the Commission: *Phillip L. Broyles, Michael Milgrom and Melissa R. Sternlicht.*

For the respondent: *William C. MacLeod, Collier, Shannon, Rill & Scott, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Nissan Motor Corporation in U.S.A., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a California corporation, with its office or principal place of business located at 18501 South Figueroa Street, Carson, California.

PAR. 2. Respondent has advertised, distributed, offered for sale and sold (through dealers) new automobiles including the Nissan Stanza, a four door sedan.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for the Nissan Stanza Challenge Program, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

(A) Man: Okay, so I'm thinking about a new car. I'm reading the papers, I'm looking around. I finally decide on a Camry. Or maybe an Accord. That's nice, too. Okay, so either one. But then I hear about this thing that Nissan's doing. The Nissan Stanza Challenge, they call it. What is that? I don't know, but I like a challenge, so I go to a Nissan Dealer to check it out. Now get this. They tell me that if I buy the Camry or the Accord, they're gonna give me a hundred dollars. Did you understand what I said just then? Nissan will give you a hundred dollars to buy a Toyota or a Honda! So what's the catch, I ask myself, because there has to be a catch. There's no catch! Just test-drive a Nissan Stanza first. No sweat, easiest hundred I ever made, right? Wrong. See, Nissan knows once you drive a Stanza, with its powerful engine, roomy interior, great handling --you're not gonna want a Camry. Or an Accord. That's the catch.

Annrc: See the 1990 Stanza at your nearest Nissan Dealer now, where satisfaction is standard equipment.

Legal Annrc: Offer open to licensed drivers 18 years of age or older. Proof of purchase of 1990 Camry or Accord required. See your participating Nissan Dealer for details.

(Exhibit A, transcript of radio advertisement.)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that consumers who test drove a Nissan Stanza and subsequently purchased a Honda Accord or Toyota Camry during the period of the Nissan Stanza Challenge could readily obtain the \$100 payment specified in the advertisement.

PAR. 6. In truth and in fact, many consumers who test drove a Nissan Stanza and subsequently purchased a Honda Accord or Toyota Camry during the period of the Nissan Stanza Challenge could not readily obtain the \$100 payment specified in the advertisement. In order to receive the \$100, the consumer could not purchase the Honda Accord or Toyota Camry on the same day as the test drive, but had to purchase, take delivery, and submit documentary proof of the purchase within seven days after test driving the Nissan Stanza. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. In its advertising of the Nissan Stanza Challenge Program, respondent represented, directly or by implication, that respondent would pay \$100 to consumers who test drove a Nissan Stanza but purchased a Honda Accord or a Toyota Camry. These advertisements failed to disclose that in order to receive the \$100, the consumer could not purchase the Honda Accord or Toyota Camry on the same day as the test drive, and that the consumer had to purchase, take delivery, and submit documentary proof of the purchase within seven days after test driving the Nissan Stanza. These restrictions would be material to consumers in deciding whether to test drive a Stanza or otherwise take part in the Program. The failure to disclose that there were significant restrictions, in light of the representation made, was, and is, a deceptive act or practice.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Chairman Steiger and Commissioner Yao dissenting.

#### EXHIBIT A

##### Chiat/Day/Mojo Copy

- Man: Okay, so I'm thinking about a new car. I'm reading the papers, I'm looking around. I finally decide on a Camry. Or maybe an Accord. That's nice, too. Okay, so either one. But then I hear about this thing that Nissan's doing. The Nissan Stanza Challenge, they call it. What is that? I don't know, but I like a challenge, so I go to a Nissan Dealer to check it out. Now get this. They tell me that if I buy the Camry or the Accord, they're gonna give me a hundred dollars. Did you understand what I said just then? Nissan will give you a hundred dollars to buy a Toyota or a Honda! So what's the catch, I ask myself, because there has to be a catch. There's no catch! Just test-drive a Nissan Stanza first. No sweat, easiest hundred I ever made, right? Wrong. See, Nissan knows once you drive a Stanza, with its powerful engine, roomy interior, great handling -- you're not gonna want a Camry. Or an Accord. That's the catch.
- Anncr: See the 1990 Stanza at your nearest Nissan Dealer now, where satisfaction is standard equipment.
- Legal Anncr: Offer open to licensed drivers 18 years of age or older. Proof of purchase of 1990 Camry or Accord required. See your participating Nissan Dealer for details.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent had violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nissan Motor Corporation in U.S.A. is a corporation organized, existing and doing business under and by virtue of the laws of the state of California with its offices and principal place of business at 18501 South Figueroa Street, Carson, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## DEFINITIONS

1. "*Promotional benefit*" as used herein shall mean any prize award or consideration, including, but not limited to, money, favorable credit terms and optional equipment packages having a *bona fide* retail value over \$25.

2. "*Clearly and prominently*" as used herein shall mean as follows:

(a) In a television or videotape advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer, to read and comprehend it.

(b) In a print advertisement, the disclosure shall be in close proximity to the representation that triggers the disclosure in at least twelve (12) point type.

(c) In a radio advertisement, the disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it.

## I.

*It is ordered,* That respondent Nissan Motor Corporation in U.S.A., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any motor vehicle in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that persons who test drive a Nissan motor vehicle can readily obtain a promotional benefit when significant restrictions prevent consumers from readily obtaining that promotional benefit without disclosing clearly and prominently in each advertisement in which the representation is

made either the significant restrictions or that there are significant restrictions that apply to obtaining the promotional benefit.

## II.

*It is further ordered,* That respondent Nissan Motor Corporation in U.S.A., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any motor vehicle in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, nature or extent of any condition, restriction or limitation on any promotional benefit offered to consumers.

## III.

*It is further ordered,* That, for three (3) years from the date that the advertisements are last disseminated, respondent shall maintain and, upon request, make available to the Commission for inspection and copying:

(A) Copies of all advertisements subject to paragraphs I or II of this order;

(B) Copies of all communications to affiliated dealers and all information and other materials supplied by respondent to the dealer in connection with any representation subject to paragraphs I or II of this order; and

(C) All correspondence received from consumers, whether received by respondent or by an agent of respondent, related to any promotional benefit program advertised in a manner subject to paragraphs I or II of this order.

## IV.

*It is further ordered,* That respondent shall, within sixty (60) days of service of this order, distribute a copy of this order to each of its operating divisions and to each officer and other person responsible for the preparation or review of advertising material including outside

advertising agencies, and to a representative of each of its affiliated dealers and shall secure from each such person a signed statement acknowledging receipt of a copy of this order.

V.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

VI.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner in which it has complied with this order.

JOINT DISSENTING STATEMENT OF  
CHAIRMAN JANET D. STEIGER AND COMMISSIONER DENNIS A. YAO

We dissent from issuance of the consent order with Nissan Motor Corp. Because the order does not sufficiently remedy one of the alleged law violations, it may give implicit approval to the use of seemingly attractive promotional offers that many consumers simply cannot utilize because of limitations such as severe time restrictions or extremely difficult documentation requirements.

Through advertisements for the Nissan Stanza "Challenge Program," Nissan ran a promotional program inviting consumers to come to a Nissan dealership, test drive the Nissan Stanza and receive \$100 if, after driving the Stanza, they bought either a Toyota Camry or a Honda Accord. The advertising expressly stated that there was "no catch" to this offer. What consumers were not told was that, in order to obtain the \$100, it was necessary to purchase and take delivery of the Camry or Accord and submit detailed proof of purchase (including documents not usually retained by consumers after purchase) to Nissan, all within seven days (but not on the same day as the test drive). The complaint alleges that the failure to

disclose that the program had such significant restrictions was deceptive, and that Nissan's explicit advertising claim that the offer had "no catch" falsely represented that consumers could readily obtain the \$100 payment.

In our view, the consent order may do little to remedy the failure to disclose allegation. Part I of the order prohibits Nissan from representing, directly or by implication, that persons who test drive a Nissan can "readily obtain" a promotional benefit -- when significant restrictions prevent consumers from readily obtaining that benefit -- unless Nissan also discloses either those restrictions or that significant restrictions apply. Since paragraph 5 of the complaint uses the same term, "readily obtain," to characterize the express "no catch" claim in Nissan's ad, and paragraph 4 of the complaint only references the advertisement with an express "no catch" claim, the order could be interpreted to require disclosure only when language similar to "no catch" or "no catches" is used.

To suggest otherwise -- namely that the order requires disclosure any time Nissan offers a promotion and uses very general language such as "Come on in and get a [benefit]" -- would read out of the order the "readily obtain" limiting language. Consequently, although we understand that some would read the order differently, the order might be interpreted as standing for the proposition that advertisements need not contain any disclosure of the nature or even existence of limiting conditions, no matter how onerous, unusual, or unexpected, unless the advertiser uses language similar to a "no catches" claim.

Moreover, even when an affirmative expression such as "no catches" is used in making an offer, the order would allow an advertiser to disclose only that significant restrictions apply to the offer, not what those restrictions are or where the consumer can obtain additional information about them. Although reasonable minds can differ on whether a disclosure that "significant restrictions" apply would adequately inform consumers when ready availability is implied in an advertisement, such a disclosure for an express "no catches" claim is manifestly contradictory. This order would seem to allow advertisers to claim to consumers that there are no catches in connection with the offer, so long as the ad elsewhere discloses that there are significant restrictions. The use of such contradictory statements in the same advertisement conflicts with

Commission precedent. *See* Commission Statement on Deception, 103 FTC 110, 180-81.

Finally, the order does not contain a point of sale disclosure requirement. Consequently, even if consumers understand the disclosure of "significant restrictions" as overriding the express "no catches" claim, there is no sure way of learning about the restrictions.

We do not suggest advertisers must disclose every limitation on their offers in advertising. Consumers generally expect that offers have reasonable time limits and other conditions. This order may suggest, however, that even severe restrictions -- *i.e.*, those that make the offer impractical or impossible for many consumers to redeem -- need not be disclosed in an adequate fashion. Such an approach is not without cost to consumers -- especially in cases, such as this one, where consumers usually shop for the product by visiting sales locations and, consequently, where such offers could induce them to make a special visit.

SEPARATE STATEMENT OF COMMISSIONERS MARY L. AZCUENAGA,  
DEBORAH K. OWEN, AND ROSCOE B. STAREK, III

We write to respond to the concerns expressed in our colleagues' joint dissenting statement about how the consent order in this matter might be interpreted and what it would seem to allow in connection with other promotional advertisements. Like other consent orders, this order was negotiated in response to particular facts and circumstances. Although the order identifies conduct the Commission will not allow, no legal inference properly can be drawn that conduct not mentioned in the complaint and order has been approved. The legal standards by which promotional advertisements are measured are well established in sources having precedential value. As always, advertisers would be well-advised to consult these sources to determine the legal standards to which they must conform.

Complaint

117 F.T.C.

IN THE MATTER OF

MANZELLA PRODUCTIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE WOOL PRODUCTS LABELING ACT AND SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-3503. Complaint, June 30, 1994--Decision, June 30, 1994*

This consent order prohibits, among other things, a New York wholesaler of gloves, and its owner, from misrepresenting the extent to which any gloves or other items of wearing apparel are made in the United States or any other country, and from violating any provision of the Wool Products Labeling Act, and requires them to pay \$7,500 in disgorgement in lieu of consumer redress.

#### *Appearances*

For the Commission: *Brinley H. Williams.*

For the respondents: *Gary L. Mucci, Saperston & Day, P.C.,*  
Buffalo, N.Y.

#### COMPLAINT

The Federal Trade Commission, having reason to believe that Manzella Productions, Inc., a corporation, and Anthony L. Manzella, Jr., individually and as an officer of said corporation (hereinafter sometimes referred to as respondents), have violated the provisions of the Wool Products Labeling Act and of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Manzella Productions, Inc., is a New York corporation which manufactures and sells gloves. Its principal office or place of business is located at 5684 Main Street, Post Office Box 1243, Buffalo, New York.

Respondent Anthony L. Manzella, Jr., is an officer and director of said corporation. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices herein set forth. His address is the same as that of the corporation.

PAR. 2. Respondents have manufactured, assembled, labeled and offered for sale, sold and distributed gloves under the Manzella name, which are sold through retailers to consumers. Such gloves include wool products, as “wool product” is defined in the Wool Products Labeling Act, 15 U.S.C. 68.

PAR. 3. The acts and practices of respondents alleged in this Complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have sold and distributed, or have caused to be sold and distributed certain models of gloves manufactured in China. In some cases, respondent removed the foreign country of origin labels from these gloves and affixed labels containing the statement, “Manufactured in the USA exclusively by Manzella.” Some of the gloves so labeled were of 85 percent wool and 15 percent nylon and some were made of leather. An example of the labels affixed by respondents is attached as Exhibit A.

PAR. 5. Through the use of the statement contained on the labels affixed to the gloves by respondents referred to in paragraph four, including, but not necessarily limited to, the label attached as Exhibit A, respondents have represented, directly or by implication, that such gloves are made in the United States.

PAR. 6. In truth and in fact, the gloves referred to in paragraph five, were manufactured in a foreign country with foreign component parts. Therefore, the representation set forth in paragraph five was and is false and misleading.

PAR. 7. The acts and practices of respondents as alleged in this complaint in misrepresenting foreign-manufactured gloves made of 85 percent wool as made in the United States constitute a violation of the Wool Products Labeling Act and the Commission’s Rules and Regulations promulgated thereunder, and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.


PAR. 8. The acts and practices of respondents as alleged in this complaint in misrepresenting foreign-manufactured leather gloves as made in the United States constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

117 F.T.C.

EXHIBIT A

Manufactured in the USA exclusively  
 by



**MANZELLA**  
 PO Box 1243 Buffalo, N.Y. 14231  
**WASHING INSTRUCTIONS**  
 Hand wash in Cool water. Dry flat.  
 85% Wool. 15% Nylon



## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act, and the Commission's Rules adopted thereunder; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Manzella Productions, Inc., is a corporation with its office or principal place of business located at 5684 Main Street, Post Office Box 1243, Buffalo, New York.

Respondent Anthony L. Manzella, Jr., is an officer of said corporation. In his capacity as an officer, he formulates, directs and controls the acts and practices of said corporation, and his business address is the same as that of the corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

## I.

*It is ordered,* That respondents Manzella Productions, Inc., a corporation, and Anthony L. Manzella, Jr., individually and as an officer of said corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any gloves or other items of wearing apparel in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from violating any provision of the Wool Products Labeling Act (15 U.S.C. 68) and the Commission’s Rules adopted thereunder (16 CFR Part 300), and from misrepresenting, in any manner, directly or by implication, the extent to which any such gloves or other item of wearing apparel are made in the United States, or any other country.

## II.

*It is further ordered,* That respondents, their successors and assigns, shall pay Seven Thousand, Five Hundred Dollars (\$7,500) as disgorgement in lieu of consumer redress. Such payment shall be by cashier’s check or certified check made payable to the Federal Trade Commission. Such check shall be held by counsel for the respondents until this order becomes final and then delivered to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C., within ten (10) days of this order becoming final. In the event of any default in payment, which default continues for more than ten (10) days beyond the due date of payment, respondents shall pay interest as computed under 28 U.S.C. 1961, which shall accrue on the unpaid balance from the date of default until the date the balance is fully paid.

## III.

*It is further ordered,* That for five (5) years after the last date of dissemination of any representation covered by this order, respondents or their successors and assigns shall maintain and, upon

request, make available to the Federal Trade Commission for inspection and copying:

(A) All materials that were relied upon in disseminating such representations; and

(B) All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

#### IV.

*It is further ordered,* That the respondent corporation shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

#### V.

*It is further ordered,* That the respondent corporation shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

#### VI.

*It is further ordered,* That respondent Anthony L. Manzella, Jr., shall, for a period of seven (7) years from the date of entry of this order, notify the Federal Trade Commission, within thirty (30) days, of the discontinuance of his present business and of his affiliation with any new business or employment. Each notice of affiliation with any new business shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment, and his duties and responsibilities.

## VII.

*It is further ordered,* That respondents shall, within sixty (60) days after service of this order upon them, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

**Re: A program proposed by the American Medical Association and the Chicago Medical Society involving peer review of physician fees is not likely to violate federal antitrust laws. [American Medical Association, P923506]**

February 14, 1994

Dear Messrs. Johnson and Peterson:

This letter responds to the request of the American Medical Association (“AMA”) and the Chicago Medical Society (“CMS”) for an advisory opinion on the permissibility under the antitrust laws of a system of professional society peer review of physicians' fees. The proposed program has two facets: a system for rendering advisory opinions on patients' complaints about fees and other matters, and a disciplinary process aimed at “egregious” practices by physicians. The Commission is of the opinion that the proposed program would not be likely to violate any law enforced by the Commission if the disciplinary process is limited to certain abusive physician practices as described in this letter. However, to the extent that the proposed program contemplates authorizing a group of physicians to discipline a competing physician on the basis of fee levels alone, without regard to abusive conduct, there is a substantial danger that the implementation of the program may injure consumers and violate the antitrust laws. Antitrust law does not preclude AMA and CMS from addressing in other ways information disparities in the market that may result in what AMA considers to be excessive medical fees. As is discussed below, AMA and CMS could adopt a fee disclosure requirement to address this issue.

The Commission has often observed that the antitrust laws do not impede legitimate professional self-regulation that benefits consumers. For example, in the American Medical Association case, in which the Commission found that medical associations had violated the antitrust laws by suppressing the dissemination of truthful information about physicians' services and fees, the Commission nonetheless emphasized that the AMA had “a valuable and unique role” to play with respect to policing deceptive advertising and oppressive forms of solicitation by physicians. *American Medical Association*, 94 FTC 701, 1029 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

The Commission has never challenged a medical society's fee peer review program. Peer review was not an issue in the AMA case, and the order entered in that case, and orders in subsequent cases, made it clear that peer review of individual physicians' fees was not categorically prohibited. On the contrary, as AMA notes in its petition, the Commission has recognized the procompetitive benefits of properly managed peer review systems. More than a decade ago, the Commission formally approved a professional association's proposal for a fee peer review program that has many features in common with the system now proposed by AMA and CMS. *Iowa Dental Association*, 99 FTC 648 (1982).

Iowa Dental established a safe harbor for a certain kind of peer review system. In addition, members of the staff have publicly invited professional groups desiring to use other models to submit them for the Commission's consideration. And at least as early as 1985, the Commission's Bureau of Competition informally invited AMA to provide information on fee review so that the staff could evaluate AMA's concerns about the adequacy of the Iowa Dental approach. Although AMA never accepted that invitation, it did provide such information in connection with the present petition.

AMA and CMS ask the Commission's opinion on three changes from the type of program approved in Iowa Dental: (1) members of the medical society would be required to participate in the peer review process; (2) physicians charging unusually high fees would be subject to discipline in certain circumstances; and (3) the fact of a disciplinary action against a physician would be made public.

On the basis of information provided by AMA and CMS, the Commission is of the opinion that a program along the lines of that presented by the petition can benefit consumers and operate without violating any law enforced by the Commission. Requiring medical societies' members to provide information needed by advisory fee review committees in the course of their deliberations can promote the important information-generating value of such peer review. AMA's proposal to discipline doctors raises issues requiring careful analysis, but the Commission is of the opinion that the antitrust laws do not stand in the way of discipline for abusive practices as discussed in this letter or discipline for violations of certain information disclosure requirements. If the disciplinary action itself is legitimate, disclosing to the public the names of doctors who have been disciplined is not likely to injure competition, and may promote competition and bene-

fit consumers. Finally, as is discussed below, efforts to provide patients with more information about price also are likely to promote competition.

### I. Background of the Request

AMA points out in its petition that patients often lack good information about the prices of medical services, as well as about the quality and necessity of the services they receive. Often patients receive medical care without any prior discussion with the physician of the price to be charged. This behavior is due to a number of factors, including patients' relative lack of information, the prevalence of third-party payment, and patients' reliance on their doctors to act in the patients' best interests. In addition, in some cases, such as those involving emergency treatment, prior agreement on price is impossible. As a result, patients often may not know what price will be charged until after the services are rendered.<sup>1</sup> Once informed of the price charged, a patient may believe that the charge is unreasonable or that he or she cannot evaluate the reasonableness of the charge. AMA and CMS are concerned that in some situations, the fee charged may arise from fraud, misrepresentation, undue influence, or other abusive behavior by the physician.

Advisory peer review can give patients, and payers, information about the basis for a fee and an informed opinion about its reasonableness, and help them decide whether to pay a disputed bill or to continue to patronize a particular doctor. To the extent that AMA's proposal will provide information useful to consumers or their insurers, it is likely to serve consumers and promote competition. In cases where the fee charged arose from abusive behavior, professional discipline may also improve the functioning of the market by deterring such behavior.

The program approved in the Commission's 1982 advisory opinion to the Iowa Dental Association included a number of features designed to protect against possible anticompetitive effects. In particular, the program was strictly advisory. Participation was voluntary for all parties; decisions of the committees were advisory and were based solely on the facts and circumstances of each case; fee determinations were not published to the membership of the soci-

---

<sup>1</sup> After-the-fact disputes over price are less likely to arise where third party payers negotiate prices directly with providers of health care services in advance, as is the case in many managed care plans.

ety at large; and the society did not collect fee information or conduct fee surveys for use in the peer review process.

The Commission approval of the fee review system in Iowa Dental was based on the understanding that the program was designed to resolve specific disputes between patients and their dentists, not to coerce third-party payers or to confer professional sanction on particular fee levels or reimbursement systems. In order to assure that the program remained faithful to its stated purpose, the Commission advised IDA to view the process as a means of mediating disputes, not sanctioning particular price levels; not to allow panel decisions to become widely known; to base decisions on the individual judgment of panel members, not on fee schedules or other information sanctioned by the society; not to use the process to discipline providers who engaged in disfavored competitive activities or to discourage innovation, and not to discipline members who refuse to use the peer review process or to accept its guidance; and to avoid pressure on insurance companies to use the peer review process or to abide by its decision, or to use a particular definition of reasonable or customary in making reimbursement decisions.

The proposal of AMA and CMS contains many of the features included in the Iowa Dental program. This advisory opinion focuses on the few significant ways in which AMA's proposal departs from the Iowa Dental model.

## II. The Proposed Fee Review Program

AMA states that it wants to encourage its state and local constituent and component medical societies to operate fee review programs in accordance with general guidelines developed by AMA.<sup>2</sup> CMS desires to operate such a program. The proposed peer review structure involves two separate tracks. Patient Grievance Committees ("PGCs") would hear complaints from patients, insurers, or others regarding physician behavior, including complaints relating to fees, and would render advisory opinions on the reasonableness of fees charged. Professional Disciplinary Committees ("PDCs") would

---

<sup>2</sup> AMA states that its guidelines are merely a model that will be made available to state and local societies, and that local variations on this model may be adopted in some cases. This advisory opinion, of course, is limited to the facts set out in this letter, and the conclusions stated here may not apply to peer review systems that depart from those facts.

have the power to discipline members who engaged in certain kinds of misconduct.

In fee complaint cases, the PGC would gather information from the complainant and from the physician, and would render its opinion about the reasonableness of the fee and the appropriateness of any other behavior at issue. The opinion would be based on the specific facts of the complaint, taking into account such factors as the fees ordinarily charged by other doctors in the community, the nature and difficulty of the services performed, and any unusual complexities or other circumstances in the case. The committee members would rely primarily on their own expertise and experience, but could refer to other sources of information on fees, including third-party or government data bases or the opinions of other doctors sought out by the committee. The committee would not maintain fee data to use as a benchmark for evaluating fees. Proceedings of the PGC would be confidential, and its opinions on the reasonableness of fees would not be publicized.

Neither the complaining party nor the physician would be required to accept the opinion of the committee. The rendering of the advisory opinion is intended to facilitate an agreement between the parties on an appropriate fee, but the committees would not follow up their advisory opinions to determine whether the doctor had accepted the fee recommended by the committee.

Complaints involving charges of serious misconduct might be considered by the PGC, but they would also be referred to the Physician Disciplinary Committee or to appropriate government authorities for consideration. The PDC would conduct formal hearings, and could impose sanctions including reprimand, censure, payment of a fine, suspension, and expulsion from membership in the medical society.

### III. Issues Raised by the Petition

#### A. *Mandatory Participation in Advisory Peer Review*

One significant difference between the advisory fee review proposed by AMA and CMS and the program approved in Iowa Dental is that members of the medical society would be required to participate in the Grievance Committee process; that is, society members would be subject to discipline for refusing to cooperate with the

committees or to provide relevant information. Generally, the doctor would be expected to make the patient's medical records available and to explain the basis for the fee that was charged, including any unusual factors in the case that might justify a higher than usual fee. Doctors would not be required to accept the decision of the committee as to the reasonableness of the fee, or to adjust the fee in conformance with the opinion. Thus, the advisory nature of the process would be preserved.

AMA and CMS assert that mandatory participation in peer review proceedings will make the process more available to consumers and more effective. In most cases, the committee needs access to the patient's medical records and other information in the doctor's possession in order to evaluate a complaint.

The Commission is of the opinion that requiring medical society members to participate in advisory fee review in the circumstances described above is not likely to endanger competition and is reasonably related to making available to consumers the information that the process is designed to produce. The emphasis in *Iowa Dental* on the voluntary nature of the peer review was designed to protect against the possibility that the process could lead to coercion of dentists or insurance companies, or to standardization of fees. These dangers do not appear to require that participation be voluntary, however, at least in the context of the system contemplated by AMA and CMS.

First, the patient and the insurer are free to decide whether to participate in the fee review proceeding, and the opinion of the committee is advisory. Therefore, the process is not likely to result in coercion of third-party payers to accept reimbursement policies favored by the profession. Second, fee review committees' opinions about fees charged are not binding on the physicians, and the societies will impose no form of penalty on physicians for failure to adhere to the committees' advice as to the fee.<sup>3</sup> Third, the committees will not develop a benchmark schedule of fees, and there will be no public disclosure of the committees' decisions concerning specific fees. For these reasons, it does not appear likely that the process will be used to coerce participants or to establish or enforce an agreement on fees recommended by the committee. Thus, mandatory participation in

---

<sup>3</sup> Antitrust issues would not be raised if a doctor agrees with a patient or insurer, outside the peer review process, to abide by the committee's determination, so long as such agreement is not required by the medical society.

advisory peer review of fees does not appear to violate the laws enforced by the Commission.

Because guidance given by a professional association can sometimes be coercive, medical societies should exercise care to ensure that the advisory nature of the process is clearly communicated to all participants and strictly maintained in practice. Antitrust concerns would be raised if, for example, the peer review process became a vehicle for coercing doctors into adopting a pricing policy sanctioned by the society. The advisory nature of the program should be carefully observed in order to avoid coercion or other unlawful agreements.

### *B. Physician Discipline*

The second, and most fundamental, departure from the fee peer review program approved in the Iowa Dental opinion is the proposal to discipline physicians in certain instances involving fee complaints. The petition states that conduct warranting discipline includes such things as fraud, intentional provision of unnecessary services, and exercising undue influence over a vulnerable patient (p. 5), and that the proposed disciplinary program would for the most part involve this type of abusive conduct (p. 20).

The antitrust laws do not prevent the imposition of professional discipline when such abusive conduct occurs. Thus, the predominant thrust of the proposed disciplinary program appears entirely consistent with the antitrust laws. However, the program creates a substantial danger that it will injure consumers and violate the antitrust laws insofar as it also proposes disciplinary action against physicians solely on the basis of fee levels, where there has been no fraudulent, deceptive, or similar abusive conduct. As is discussed below, this danger is not eliminated by making agreement to the fee by a "fully informed and competent patient," as that phrase is used in the petition, a defense to a charge of "fee gouging." A straightforward requirement that physicians disclose certain fee information, however, would not raise antitrust concerns.

#### 1. Abusive Conduct

Nothing in the antitrust laws prohibits competitors from engaging in self-regulation to protect consumers from fraud, deception, undue influence, and other abusive practices. Such regulation is likely to

promote, rather than impede, competition, by enabling consumer purchase decisions to be made free from deceptive practices. Such practices distort the operation of a market economy, and their elimination enhances competition and consumer welfare. *See American Medical Association*, 94 FTC 701, 1009 (rules banning false or deceptive advertising and unfair solicitation may enhance competition).

Thus, AMA's proposal to discipline physicians for such abusive conduct in the context of fee peer review does not present a significant issue under the antitrust laws. For example, AMA's proposal that physicians be disciplined for intentionally providing unnecessary services is unlikely to restrict competition. Indeed, in a 1983 advisory opinion approving a code of ethics for the American Academy of Ophthalmology, the Commission stated that a rule barring "the ordering of unnecessary procedures for pecuniary gain" raised no antitrust concerns. 101 FTC 1018, 1019 (1983).

Similarly, establishing as a basis for discipline the obtaining of a fee through fraud, deception, undue influence, or other types of exploitation constitutes legitimate self-regulation that does not raise antitrust concern. As noted above, these practices distort consumer purchase decisions, and thereby harm consumers. While the Commission cannot define in advance all the circumstances of exploitative behavior that may occur in the context of fee agreements for physician services, some general principles can be identified.

First, affirmative misrepresentations of material facts about the fee to be charged, the services to be performed, the basis for the fee, or other fee-related matters are proper subjects for disciplinary action. Moreover, a representation may be deceptive because of the failure to disclose qualifying information necessary to prevent an affirmative statement from creating a misleading impression.

Second, as a general matter, an evaluation of whether a patient has been deceived in the purchase of medical services requires an evaluation of relevant surrounding circumstances, in order to assess the overall impression conveyed. For example, some patients may be particularly susceptible to deception due to the stress of a serious medical condition. *See, e.g., Travel King*, 86 FTC 715 (1975) (terminally ill consumers susceptible to exaggerated cure claims). It is appropriate, therefore, for AMA to assess deception from the perspective of such individuals.

Third, patients sometimes may be subject to undue influence that causes them to agree to treatment and to incur unexpectedly high fees. The Commission has previously recognized that in certain circumstances consumers of medical services may be vulnerable to undue influence in their in-person dealings with physicians, and has approved action by medical societies to prevent such abuses. See *American Medical Ass'n*, 94 FTC at 1030 (permitting AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence). Action by medical societies to address cases where undue influence has occurred is consistent with this approach, and presents no anti-trust concern.

Special circumstances are presented in cases in which the patient is unable to make a meaningful choice about a fee, for example in cases involving emergency medical treatment. In such situations, the patient may be unusually vulnerable to exploitation. Such factors may properly be taken into account in deciding whether a physician has engaged in abusive conduct.

Thus, insofar as AMA and CMS are proposing in the context of fee review to discipline physicians for fraudulent, deceptive, or similar abusive practices, the program is consistent with the antitrust laws. This advisory opinion, of course, does not provide advance approval for banning all behavior a medical society might choose to define as abusive, or authorize an otherwise unjustified action based on the assumption that all patients are always vulnerable. But medical society programs to address fraud, deception, and similar abuse of consumers present no inherent antitrust problems.

## 2. Discipline Based Solely on Fee Levels

While AMA and CMS expect that disciplinary cases will for the most part involve abusive conduct of the sort described above, the petition also contemplates disciplinary sanctions for “fee gouging” where there has been no such misconduct. The informational peer review system and the discipline for abusive practices that the Commission has approved in this letter are of direct assistance to consumers who have concerns about the fees charged by their doctors. Discipline in the absence of such abusive practices, however, threatens to injure consumers rather than assist them. As is discussed below, a requirement that physicians disclose certain fee-related information

to consumers would address the information disparities discussed in the petition, without posing a similar risk of consumer injury.

*a. The Concept of "Fee Gouging"*

As AMA and CMS recognize, serious antitrust issues are raised by a system of collective competitor regulation of prices. *See, e.g., Arizona v. Maricopa Medical Society*, 457 U.S. 332 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). The petition explicitly disclaims any intention of establishing a "fee control" system. (p. 22.) In proposing discipline for "fee gouging," however, the program in part contemplates medical society discipline of physicians solely on the basis of their fee levels, without regard to abusive conduct of the type discussed above. While not identical in nature to the maximum fee schedule condemned by the Supreme Court in *Maricopa*, the proposed program would in effect create an agreement among competitors that none of them will charge any price that the group deems "excessive." Thus, the program would allow competitors to set the maximum fees of their rivals.<sup>4</sup> Moreover, because the term "fee gouging" has no clearly defined limits, medical societies would have wide latitude in regulating their members' fees, increasing the risk that the program in practice would amount to competitor control over physician pricing.

The petition bans "fee gouging" but does not make it clear what is encompassed in that term beyond the kinds of abuses discussed above, with respect to which the Commission has approved the imposition of discipline. While the "fee gouging" label evidently is designed to convey an impression of improper conduct, it is not clear how the term would be applied to particular fees, and the petition has neither provided a useable definition nor described the standards that would be used to determine when a physician has engaged in "fee gouging".

The Commission's staff has engaged in an intensive effort to learn from AMA and CMS about the operation of the proposed disciplinary system and the problems it seeks to address. At the staff's

---

<sup>4</sup> Although the program would involve a retrospective review of a fee already charged rather than an agreement on future pricing, the prospect of discipline for "fee gouging" would likely have an effect on price setting by society members beyond those actually disciplined. Indeed, AMA and CMS expect and intend that the threat of medical society discipline for "fee gouging" will have a direct impact on doctors' pricing practices.

request, AMA submitted documents relating to currently-functioning county medical society fee review committees and written responses to questions. AMA and CMS representatives also held a lengthy telephone conference with FTC staff members to explore the ramifications of the proposal. These discussions have further demonstrated the failure of AMA and/or CMS to specify a standard for determining what conduct would be subject to discipline as "fee gouging."

While it seems clear that the petition implicitly defines "fee gouging" to include charging a fee that is very high relative to prevailing charges for comparable services, AMA and CMS have not been able to delineate a consistent or practical standard to guide peer review committees' actions on "fee gouging" complaints. At one point, the petition's discussion of "fee gouging" gives as an example charging a fee 2 to 3 times the "market level" for a major procedure (p. 12). At another point, the petition points to Opinion 6.05 of the Code of Medical Ethics as the "current reference point for what constitutes fee gouging." (p. 12, n.15) That provision defines as "excessive" any fee that a reviewer would have "a definite and firm conviction . . . is in excess of a reasonable fee," in light of all the relevant circumstances. In a separate letter to the staff, AMA appeared to distinguish between fees that are merely "excessive" under Opinion 6.05, which would be subject only to advisory fee review, and fees "so high as to border upon fraud," which would be subject to the disciplinary process.<sup>5</sup> This letter defined the latter category as fees "at least 50 percent above the range of usual and customary."

These alternative definitions demonstrate the absence of a clear standard for discipline. AMA and CMS seek to have medical societies exercise significant disciplinary power while providing little guidance as to how that power ought to be exercised. Moreover, medical society opinions about "market level" price, a "reasonable" fee, and "usual and customary" fees, even if guided by some data, will ultimately represent subjective judgments by physicians serving on disciplinary committees. While a medical society's opinion about the reasonableness of a fee provided through the sort of advisory fee review that the Commission has approved can provide useful information to consumers and third party payers, basing a disciplinary sys-

---

<sup>5</sup> Letter from Michael L. Ile, AMA, to Judith A. Moreland, FTC, February 18, 1993.

tem on such subjective judgments would place great power in the hands of medical society review committees.<sup>6</sup>

In addition, correspondence and other statements of AMA and CMS representatives suggest that conduct other than charging a very high fee would also be considered "fee gouging." In particular, discipline could be based on a pattern of fees that exceeded the prevailing level by a relatively small amount.<sup>7</sup> The possibility of such an approach is further indication that the proposed discipline for "fee gouging" could evolve into a system involving substantial competitor control of fee setting. Furthermore, a disciplinary program that threatened sanctions for doctors who fail to adjust pricing behavior in accordance with a PGC's advisory determination that a fee was "excessive" would fundamentally undermine the advisory nature of PGC fee review. As is discussed above, the assurance that fee review is voluntary is the foundation of the Commission's approval of that part of the program.

In sum, while AMA and CMS have stated that their intent is not to establish a fee control program, the disciplinary system as currently described in the petition would give medical societies significant power to regulate the fees charged by their members, and little guidance as to how that power ought to be exercised.

*b. The Disclosure of Fee Information*

The Commission has considered whether the concerns raised by the breadth of the "fee gouging" concept would be reduced by the provision in the petition that conduct will not be deemed "fee gouging" where there has been prior agreement to the fee by an informed patient:

Fees much higher than normal would not constitute fee gouging if agreed to by a fully informed and competent patient that was not subject to undue influence.

(pp. 12-13.) This provision, which in effect makes nondisclosure an element of "fee gouging," does not in its present form reduce the antitrust risks inherent in the proposal.

---

<sup>6</sup> As is discussed below, such an aggregation of power in the hands of competing providers of medical services carries significant risk of consumer injury.

<sup>7</sup> Letter from Michael L. Ile, AMA, to Judith A. Moreland, FTC, February 18, 1993.

The breadth of the ban on “fee gouging” -- and the resulting risk of consumer harm -- could be reduced by including nondisclosure as an element of the concept of fee gouging, by specifying that physicians would not be subject to disciplinary review if they had disclosed relevant fee information.<sup>8</sup> The proposed program’s disclosure provision does not have this effect, however, because the information that would have to be disclosed to ensure that a patient is “fully informed” is so extensive that it is unlikely that a physician could ever make disclosures sufficient to avoid discipline. Thus, even if patients knowingly selected an expensive specialist on the recommendation of their primary care physician, and if the specialist fully discussed his or her services and fees and other material information in his or her possession in a meeting with the patient, the specialist’s fee apparently could later be attacked as fee gouging. This occurs because under the current proposal, in order for the patient to be “fully informed,” the specialist would have to disclose the fees of other physicians and perhaps other information to which the specialist may not have access.<sup>9</sup>

In short, the concept of a “fully informed consumer” set forth in the petition does not significantly reduce the antitrust concerns noted above because it appears unlikely that a physician would possess all the necessary information or that physicians could be confident that their disclosures would be deemed adequate.<sup>10</sup> Thus, physicians would be subject to discipline based on broad and essentially standardless review of their fee levels by their competitors.

While the proposed program’s “fully informed consumer” provision does not eliminate the competitive concerns already discussed, AMA and CMS can take steps to address the information disparities

---

<sup>8</sup> In most cases, the physician should be able to disclose in advance the fee that will be charged for the service or procedure, and the possibility of additional charges should complications arise. There may also be other information helpful to patients that doctors could disclose. For example, in many cases physicians may have information that would permit them to estimate the extent of the patient’s insurance coverage, and therefore the extent of the patient’s liability after insurance payment. Alternatively, the doctor might inform the patient that insurance may not cover the whole fee, and that the patient might want to contact the insurance company to find out what its maximum payment for the service would be, or to inquire about what other doctors are likely to charge.

<sup>9</sup> According to the petition (p. 13, n.16), for a patient to be fully informed the physician must not only disclose his or her own fee, but make sure that the patient knows what other physicians in the area charge for the service. Elsewhere, the petition (p.21) suggests that a patient has received adequate disclosure only if given “full information about comparable fees and the quality and need of the service being offered . . . .”

<sup>10</sup> Moreover, the petition suggests that in some circumstances a fee could be considered “fee gouging” even if it had been agreed to in advance by a fully informed patient. (p. 21)

discussed in the petition. For example, there is no reason under the antitrust laws why AMA and CMS could not adopt an across-the-board requirement that physicians disclose relevant fee information in advance of treatment whenever it is possible to do so,<sup>11</sup> just as they currently require physicians to disclose in advance the possible risks of treatment in order to obtain informed consent to the treatment.<sup>12</sup>

In some contexts, disclosure requirements can result in less information rather than more being available to consumers. For example, the Commission has recognized that requiring excessive disclosures in advertising can discourage advertising by increasing its costs.<sup>13</sup> However, each required disclosure must be evaluated in its own context, and in the context of discussions between physicians and patients about appropriate medical care, requiring some information about price to be provided would not appear to raise inherent problems under the antitrust laws. As long as the disclosure requirements were not unduly burdensome and were a legitimate response to the information disparities noted in the petition, they would not be likely to restrain competition unreasonably.<sup>14</sup>

### 3. Consumer Harm Resulting from Discipline Based Solely on Fee Levels, Without Regard to Abusive Conduct

A program that based discipline solely on the level of the fee charged, without regard to the presence of fraud, deception, or other exploitation, would pose a substantial danger of consumer harm in various ways. As noted above, such a program would amount to competitor regulation of fee levels. As the law recognizes, the as-

---

<sup>11</sup> AMA has proposed, as part of its health care reform proposal, that health care providers be required to release price information to patients before treatment. It recognizes that the availability of price information can increase the role of competitive forces in health care markets and encourage cost-conscious patient decision-making. American Medical Association, *Health Access America* (2d. edition) at 5, 6. To date, however, AMA has not required its members to disclose to patients the cost of treatment in advance. In 1992, the AMA House of Delegates adopted a resolution "encouraging" doctors to post the prices of their most commonly performed procedures.

<sup>12</sup> See Council on Ethical and Judicial Affairs, AMA, *Code of Medical Ethics and Current Opinions*, Opin. 8.08 (Informed Consent) at p. 38 (1992).

<sup>13</sup> See, e.g., *Advertising of Ophthalmic Goods and Services*, Statement of Basis and Purpose and Final Trade Regulation Rule, 43 Fed. Reg. 23992, 24002 (1978).

<sup>14</sup> Since no proposed disclosure requirement is before the Commission, it cannot render an opinion of the permissibility under the antitrust laws of any particular requirement. AMA and CMS, if they choose to adopt a disclosure requirement, should evaluate in the first instance what kinds of disclosures might be useful to patients without being unduly burdensome to the doctors.

sumption by competitors of the power to control market prices poses inherent dangers to consumers. *See, e.g., United States v. Trenton Potteries*, 273 U.S. 392, 397-98 (1927). The Commission does not question that the disciplinary system is not intended to lead to uniform fees or to establish a price floor. But however well-intentioned, an agreement among competitors that allows them to regulate prices creates a dangerous probability that such an aggregation of power will ultimately result in increased prices for consumers. *Id.*; *see also Arizona v. Maricopa Medical Society*, 457 U.S. 332 (1982).

Moreover, an agreement among competitors not to charge in excess of what the group deems to be “reasonable” could have a variety of adverse effects on consumers aside from an ultimate increase or standardization of prices. It could, by instituting competitor control over price levels, operate to discourage entry into the market and deter innovation. For example, a program of fee level discipline could be used to discourage the introduction of superior but more expensive medical treatments or procedures. Competitors unable or unwilling to offer a particular procedure themselves could declare that those who did so were “price gougers” if the procedure were significantly more expensive than the procedure for which it was a substitute. Such a program of fee level control could infringe on consumers’ ability to decide that unusual qualities of a physician’s services justified a higher than usual price, substituting instead the collective judgment of competitors as to what a consumer should want to purchase.

Finally, any system of discipline lacking clear standards is susceptible to arbitrary enforcement and abuse. Discipline based on a vague concept of “fee gouging” could be used to obstruct doctors who, for whatever reasons, are not in favor with their colleagues, including those who are aggressive competitors, more in demand, or simply better qualified.

### *C. Disclosure of Disciplinary Actions*

AMA proposes to publicize the fact that a physician has been disciplined, but not the amount of the fee in question, when the infraction giving rise to the discipline involved a fee matter. Assuming that the underlying disciplinary action did not itself violate the antitrust laws, as is discussed above, the Commission is of the opinion that making disciplinary decisions public without disclosure of the fee in

question does not endanger competition, and would not be likely to violate the antitrust laws.

#### IV. Conclusion

Accordingly, the Commission concludes that the proposed fee review program, insofar as discipline would be imposed in cases involving abuses such as fraud, deception and undue influence, would not violate Section 5 of the Federal Trade Commission Act or any other statute enforced by the Commission. Because the potential breadth of the petition's concept of "fee gouging" raises sufficient possibility that other aspects of the proposed disciplinary system could injure consumers, the Commission cannot give advance approval to those aspects of the proposal as currently framed in the petition. As is indicated above, however, AMA and CMS can, consistent with the antitrust laws, require physicians to disclose certain price-related information to their patients in advance of services, in order to redress information disparities that exist in the market.

This advisory opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. It does not, of course, constitute approval for specific instances of implementation of the program that may become the subject of litigation before the Commission or any court, since application of the program in particular situations may prove to cause significant injury to competition and consumers, and thereby violate the Federal Trade Commission Act. The Commission retains the right to reconsider the questions involved, and with notice to the requesting parties in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion in the event that implementation of the proposed program results in significant anticompetitive effects, should the purposes of the program be found not to be legitimate, or should the public interest so require.

