

A. Respondent American Medical Association publish a copy of this Order in the *Journal of the American Medical Association* and in *American Medical News*; [305]

B. Respondent Connecticut State Medical Society publish a copy of this Order in *Connecticut Medicine*; and

C. Respondent New Haven County Medical Association, Inc. publish a copy of this Order in *Issues and Insights*.

## IV.

*It is further ordered.* That respondents, within ninety (90) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this Order. [306]

## APPENDIX A

Constitutions and Bylaws of AMA's constituent and component medical societies providing that AMA's Principles of Medical Ethics shall govern the conduct of their members and that unethical conduct shall be grounds for expulsion:

Medical Society	Constitution and/or Bylaws
Allegheny County Medical Society	CX 2185, pp. 10, 13, 15, 17, 40, 42
Arizona Medical Association, Inc.	1871I, K-L
Bexar County Medical Society	472C, G
California Medical Association	477I, L, Z-6
Camden County Medical Society of the State of New Jersey	747L-M, R
Catawba County Medical Society	2226C, G
Chattanooga and Hamilton County Medical Society, Inc.	1904I, M, V
Chicago Medical Society: The Medical Society of Cook County	2025M, N
Colorado Medical Society	2307Z-9, Z-22, Z-27
Connecticut State Medical Society	991D, L-M (See 1404I, J)
Dallas County Medical Society	1905D, F, W-X
Medical Society of the District of Columbia	1976R-S, V [307]
Florida Medical Association	2543C, K

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Hampden District Medical Society	1990E, I	
Hartford County Medical Association, Inc.	1657A, G	
Honolulu County Medical Society	1828G, S	
Illinois State Medical Society	1915C, P, Q	
Jackson County Medical Society	1908A, D	
Jefferson County Medical Society	1872E, I-J	
Johnson County Medical Society	2020L, G-H	
Kentucky Medical Association	1827H-I, J	
King County Medical Society	1979E, R	
Kitsap County Medical Society	474B, G, J	
Knoxville Academy of Medicine	47G, H-I	
Lane County Medical Society	2131D, H, R	
Lehigh County Medical Society	2017H, F	
Los Angeles County Medical Association	476G, J, Z-15	
Louisiana State Medical Society	1901Q, Z-33	
Maricopa County Medical Society	1568E [308]	
Medical and Chirurgical Faculty of the State of Maryland	2050Z-22, Z-24	
Massachusetts Medical Society	885E, Y	
Michigan State Medical Society	1833K, M	
Missouri State Medical Association	1877I	
Multnomah County Medical Society	1874E, L, Z-5	
Nashville Academy of Medicine and Da- vidson County Medical Society	1825E, M	
Medical Society of New Jersey	1889O-P, U-V	
New Mexico Medical Society	1883Y, Z-14	
New Haven County Medical Association	1404I	
Medical Society of the County of New York	1876T, X	
Pennsylvania Medical Society	1886H, J, R	

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Philadelphia County Medical Society	756A, M, N
Pierce County Medical Society	135A-B, F, H
Prince George's County Medical Society	689K, D
Santa Clara County Medical Society	748N
St. Louis Medical Society	983E
Tarrant County Medical Society	1894A, E [309]
Tennessee Medical Association	14H, L
Texas Medical Association	1899D, U
Travis County Medical Society	1882B, N, Z-9
Medical Society of Virginia	1879Z-8, O-P, Z-5
Volusia County Medical Society	1961K, P, D-E
Washington State Medical Association	475G-H, O, M-N
State Medical Society of Wisconsin	1912B, G [310]

## APPENDIX B

## State Statutes Regarding Physician Advertising and Solicitation

In 1975, at the commencement of the proceedings in this case, a substantial majority of states had statutes which prohibited or restricted advertising by physicians. Ten states declared any form of physician advertising to be illegal:

- (a) Arizona, Ariz. Rev. Stat. §32-1401 (10)(C), §33-1451 (1976) (RX 706);
- (b) Arkansas, Ark. Stat. Ann. §72-613(m) (1975) (RX 707);
- (c) Florida, Fla. Stat. Ann. §458.1201(1) (f) (1976) (RX 710);
- (d) Georgia, Ga. Code Ann. §84-916(a)(6) (1976) (RX 711);
- (e) Louisiana, La. Stat. Ann. §37-1285(19) (1976) (RX 717);
- (f) Michigan, Mich. Stat. Ann. §14.542(11) (1), (11)(27)(g), (1976) (RX 719);
- (g) Missouri, Mo. Ann. Stat. §334.100(12) (1976) (RX 721);
- (h) Ohio, Ohio Rev. Code Ann. §4731.22(b)(5) (1975) (RX 727);
- (i) Tennessee, Tenn. Code Ann. §63-619 (1976) (RX 734); and,
- (j) Utah, Utah Code Ann. §§58-12-36(4), 58-1-25(1) (1973) (RX 736).

Eight states prohibited advertising in an "unethical" manner:

- (a) Delaware, Del. Code Tit. 24, §1741(9) (1974) (RX 709);
- (b) Idaho, Idaho Code §54-1810(c) (1976) (RX 713); [311]
- (c) Maine, Me. Rev. Stat. tit. 32, §3282(A)(B) (1977) (RX 718);
- (d) Nebraska, Neb. Rev. Stat. §71-147(11)-(13) (1976) (RX 722);
- (e) North Dakota, N.D. Cent. Code §43-17-31(11) (1960) (RX 726);
- (f) Rhode Island, R.I. Gen. Laws §§5-37-4, 5-37.1-5 (1976) (RX 731);
- (g) South Carolina, S.C. Code Ann. §40-47-200 (7) (1975) (RX 732); and,
- (h) Wyoming, Wyo. Stat. §33-340 (1975) (RX 740).

Four states prohibited all advertising except notices of openings or closings of a practice or listing in a directory:

- (a) Alaska, Alaska Stat. §§08.64303(b)(1), 08.64.380(3)(D) (1977) (RX 705);
- (b) Illinois, Ill. Rev. Stat. ch. 91, §§16a(13), 16a-1 (1976) (RX 714);
- (c) New Jersey, N.J. Stat. Ann. §45.9.16 (1976) (RX 723); and,
- (d) Oklahoma, Okla. Stat. Ann. tit. 59 §§503, 509(2) (1977) (RX 728).

Sixteen states made it illegal for a physician to engage in misleading or deceptive advertising:

- (a) Alabama Ala. Code §§34-24-90 (1975) (RX 704);
- (b) Connecticut, Conn. Gen. Stat. §20-44 (1958) (RX 708);
- (c) Hawaii, Haw.Rev.Stat. §§453-8, (5) (6) (1975) (RX 712);
- (d) Iowa, Iowa Code Ann. §§147.55-(7) (1976) (RX 715);
- (e) Kansas, Kan. Stat. §§65-2836(b), 65-2837(g) (1976) (RX 716); [312]
- (f) Mississippi, Miss. Code §73-25-29(8)(c) (1976) (RX 720);
- (g) New Mexico, N.M.Stat. Ann. §§67-5-9(9), (B)(9) (1975) (RX 724);
- (h) North Carolina, N.C.Gen. Stat. §§90-14, 9014(8) (1975) (RX 725);
- (i) Oregon, O.Rev.Stat. §677.190(10) (1971) (RX 729);
- (j) Pennsylvania, Pa.Stat. Ann. tit. 63, §421.15 (a)(92) (1976) (RX 730);
- (k) Rhode Island, R.I.Gen.Laws §§5-37-4, 5-37.1-5 (1976) (RX 731);
- (l) South Dakota S.D. Codified laws §§36-4-29, 36-4-30 (5) (1977) (RX 733);
- (m) Texas, Tex. Rev. Civ. Stat. Ann. art. 4505(6) (1976) (RX 735);
- (n) Vermont, Vt. Stat. Ann. tit. §§ 1353(2), 1361 (1977) (RX 737);
- (o) Virginia, Va. Code §§54-316, 54-317(4) (1977) (RX 738); and,
- (p) Washington, Wash.Rev.Code §§18.72.030(4), 18.72.250 (1975) (RX 739).

Alabama also provides for suspension or revocation of a medical license for any violation of the Principles of Medical Ethics as set forth in the *Opinions and Reports* of the Judicial Council of the AMA (RX 704B).

#### OPINION OF THE COMMISSION

BY CLANTON, *Commissioner*:

The complaint in this case was issued on December 19, 1975, charging that the American Medical Association (AMA), the Connecticut State Medical Society (CSMS), and the New Haven County Medical Association, Inc. (NHCMA) violated Section 5 of the Federal Trade Commission Act ("Act")<sup>1</sup> through ethical restrictions on advertising and solicitation, as well as other competitive restrictions. The AMA is the largest medical and professional association in the world. (ID 6) Its membership includes approximately 200,000 physicians, representing 53 percent of all doctors in the nation and 72 percent of office-based practitioners. (RX 658) The AMA is a federation of 55 constituent associations, representing states, commonwealths, territories, and insular possessions. (RX 220, p.27, CX

<sup>1</sup> 15 U.S.C. 45(a)(1)(1976).

990E) Each of these constituent societies has in turn chartered component societies representing smaller geographic areas such as counties. (CX 990E) There are approximately 2,000 component societies in the AMA. (RX 220, p.27) Membership in a component society is a prerequisite to membership in a constituent association and membership in a constituent association is a prerequisite to membership in the AMA. (ID 6) [2]

CSMS is a constituent society of AMA composed of eight component county medical societies, one of which is NHCMA. In 1975, CSMS had approximately 4,400 members, representing approximately 82 percent of the physicians registered in Connecticut. NHCMA had approximately 1,200 members in 1975, representing approximately 71 percent of the physicians registered in New Haven County. (ID 8-9)

The AMA House of Delegates, which is composed of delegates from each constituent or state society, is the official legislative and national policymaking body of AMA with authority to amend the *AMA Constitution and Bylaws*, and the *Principles of Medical Ethics* ("*Principles*"). (ID 7) The AMA operates eight standing committees on specific subjects, known as Councils. *Id.* One of these councils, the Judicial Council, has responsibility for interpreting the *AMA Constitution and Bylaws*, and the *Principles*. (Tr. 3982)

The case against respondents focuses upon their ethical code and interpretations of this code. The AMA adopted a *Code of Ethics* at its first meeting in 1847. (ID 102) With minor revisions, the language and concepts of the original code remained unchanged until 1957. In that year, AMA's House of Delegates adopted a shortened version of the *Code of Ethics*, entitled *The Principles of Medical Ethics*, consisting of ten brief sections. As noted above, the Judicial Council interprets the *Principles* and hears actions based on infractions of the *Principles*. *Id.* The Judicial Council's interpretations are periodically published under the title *Opinions and Reports of the Judicial Council* ("*Opinions and Reports*").

The gravamen of the complaint in this case is that respondents, through their ethical canons, agreed to prevent or hinder their members from soliciting business, by advertising or otherwise, from engaging in price competition, and from otherwise engaging in competitive practices. The complaint alleged that these agreements constitute unfair methods of competition and unfair acts or practices in violation of Section 5.

Following an extended trial, the Administrative Law Judge (ALJ) concluded that the Commission possessed jurisdiction over the respondents' practices since each of the respondents is a "corpora-

tion" within the meaning of Section 4 of the Act, and because the challenged acts, practices, and methods of competition are in or affect commerce. With respect to the merits, the law judge found that respondents, their constituent and component medical societies, and their members have agreed to adopt, disseminate and enforce ethical standards that ban physician solicitation of business and severely restrict physician advertising. Additionally, the ALJ held that respondents have unlawfully sought to prevent or hinder certain contractual arrangements between physicians and health care delivery organizations and between physicians and nonphysicians. [3]

To remedy the violations found as well as to protect the public now and in the future, the ALJ issued an order that requires, *inter alia*, respondents to cease and desist from restricting advertising, solicitation, and certain contract practices of their members for a minimum of two years. At the end of this period, the order permits AMA to develop and disseminate ethical guidelines with respect to advertising and solicitation, on condition that respondents first obtain the Commission's approval of these guidelines.

Respondents argue in their appeal to the Commission that they are not "corporations" as defined in Section 4 of the Act. Although AMA concedes that its activities fall within and affect interstate commerce, CSMS and NHCMA urge the Commission to overrule the ALJ's finding of interstate commerce jurisdiction. All respondents object to the finding of a conspiracy, with AMA asserting that it should not be held accountable for the activities of its member societies and the Connecticut respondents attempting to disassociate themselves from proof involving AMA and unnamed state and local societies. With respect to the alleged restraints on advertising, solicitation and contractual arrangements, AMA rests its case primarily upon recent modifications to its ethical positions disseminated after issuance of the complaint and, together with the Connecticut respondents, challenges the sufficiency of the evidence to sustain the law judge's conclusions.

## I JURISDICTION

### A. Of "Corporations" Under Section 4

At the outset, the Commission must determine whether it has jurisdiction over the respondents. Section 5(a)(2) of the Act<sup>2</sup> extends

<sup>2</sup> 15 U.S.C. 45(a)(2)(1976).

the Commission's jurisdiction to "persons, partnerships, or corporations" and Section 4 defines "corporation" to include:

any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.<sup>3</sup>

In analyzing whether this language applied specifically to respondents, the ALJ felt that the Commission could "assert jurisdiction over nonprofit organizations whose activities [4] engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." (ID 238)<sup>4</sup>

Respondents challenge this formulation of the legal standard under Section 4, but their briefs reflect some differences regarding the standard to be applied. AMA argues that the sole inquiry under Section 4 should be to determine whether the respondent is carrying on business in order to accumulate gain for distribution to its shareholders or members. Focusing on the organization's purpose rather than its activities, NHCMA suggests that the proper test is whether the respondent has been organized for the purpose of engaging in business activities to provide gain to its members. Finally, CSMS urges a combination of the criteria suggested by the other respondents. It says that the test should be whether the respondent has been organized *and* operated to profit its members.

We are satisfied that the ALJ has articulated the proper test for examining whether respondent is a "corporation" within the meaning of Section 4. The substantiality test appropriately places the principal focus upon the nature of respondents' activities and is supported by precedent. *National Commission on Egg Nutrition*, 88

<sup>3</sup> 15 U.S.C. 44 (1976).

<sup>4</sup> The following abbreviations will be used in this opinion:

- ID - Initial Decision page number
- Tr. - Transcript page number
- CX - Complaint Counsel's exhibit number
- RX - Respondent AMA exhibit number
- RCX - Respondent's CSMS exhibit number
- RNHX - Respondent's NHCMA exhibit number
- RAB - Respondent AMA Appeal Brief
- RCAB - Respondent NHCMA Appeal Brief
- CAB - Complaint Counsel's Answering Brief
- TROA - Transcript of Oral Argument before the Commission
- App.A - Appendix A of this Opinion

F.T.C. 89, 177 (1976) *modified* 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 99 S. Ct. 86 (1978).<sup>5</sup> Clearly, Congress did not intend to bring "any and all nonprofit corporations regardless of their purposes and activities" within the Commission's jurisdiction. *Community Blood Bank of the Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011, 1018 (8th Cir. 1969). On the other hand, the legislature did not provide a "blanket exclusion" from FTC jurisdiction for all nonprofit corporations, since it recognized that certain "corporations ostensibly organized not-for-profit, such as trade associations, were merely [5] vehicles through which a profit could be realized for themselves or their members." *Id.* at 1017. Thus, the "mere form" of incorporation is not dispositive; it is the "reality" of a respondent being in law and in fact a charitable organization (the determination of which must necessarily be conducted on an ad hoc basis) that places it beyond the Commission's reach. *Id.* at 1018-19.

Respondents contend that for the Commission to assert jurisdiction over them, it must find that they are engaged in some undertaking for the purpose of realizing gain for ultimate distribution to their members. They argue that it is improper for the Commission to focus upon activities which provide only an "economic benefit" for their members. (RAB 17-18) It is clear, however, that an organization may fall within the ambit of Section 4 even though it only "indirectly" pursues profit for its members. *National Commission on Egg Nutrition, supra*, 517 F.2d at 488.<sup>6</sup> Section 4 does not require a transfer or delivery of monetary profits to the members of a nonstock corporation, only that the activities of the corporation provide pecuniary benefits to its members. AMA itself concedes as much when it acknowledges that the Commission has exercised jurisdiction many times in the past over trade associations. (RAB 19)<sup>7</sup> Its effort to distinguish these cases on grounds that the entities involved were devoted primarily to enhancing the pecuniary benefit

<sup>5</sup> In the related preliminary injunction action, the district court held that the respondent was a "corporation" within the meaning of Section 4 by virtue of the fact that many of its members were connected with the egg industry and because its activities "directly promote[d], at least to some extent, the financial health of the egg industry." *F.T.C. v. National Comm'n on Egg Nutrition*, 1975-1 Trade Cas. (CCH) ¶60, 246 at 65,967 (N.D. Ill. 1974), *rev'd on other grounds*, 517 F.2d 485 (1975), *cert. denied* 426 U.S. 919 (1976).

There is some support for the notion that a respondent is subject to FTC jurisdiction if one of its purposes is noncharitable in nature, perhaps only to the extent of its noncharitable activities. See *Community Blood Bank, supra*, 405 F.2d at 1022. ("[W]e hold . . . [t]hat under § 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital, which are organized for and actually engaged in business for *only* charitable purposes, and do not derive any 'profit' for themselves or their members . . . .") (Emphasis supplied.) In view of our determination, *infra*, that respondents are subject to the Commission's jurisdiction under the substantiality test, we need not determine whether jurisdiction might exist under some alternative test.

<sup>6</sup> The district court's opinion also supports the proposition that jurisdiction may attach even though there is no actual distribution of profits to the respondent's members. *National Comm'n on Egg Nutrition, supra*, 1975-1 Trade Cas. (CCH) ¶60, 246 at 65,967.

<sup>7</sup> This authority is well established. *E.g., FTC v. Cement Inst.*, 333 U.S. 683, 687 (1948); *Fashion Originator's Guild of America v. FTC*, 312 U.S. 457, 461 (1941); *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927).

of their members implicitly recognizes that the degree of pecuniary benefit conferred is the fundamental issue, not whether the benefit is physically distributed. [6]

AMA may have abandoned the contention offered below that for an organization to be subject to the Commission's jurisdiction, profit-seeking must play a dominant role in its activities. *Compare* RAB 25 with TROA 101. The Connecticut respondents continue to maintain, however, that a respondent is exempt from prosecution if its activities are substantially educational, scientific, and charitable in nature, *i.e.*, even if its commercial activities predominate. RCAB 8; RNAB 4-5. This latter formulation turns the correct standard on its head, in our view, permitting a corporation to escape liability before the Commission for anticompetitive practices, despite the fact that a major portion of its operations provide a pecuniary benefit to its membership. While commercial activity which is only incidental to the eleemosynary functions of a nonstock corporation may not support a claim of jurisdiction, *Egg Nutrition*, 88 F.T.C. at 178-79; *cf. Community Blood Bank*, 405 F.2d at 1017, an organization which exists in substantial part for the pecuniary benefit of its members surely comes within Section 4.

On a slightly different tack, AMA asserts that the legislative history of the Act reveals a congressional intent not to subject professional societies to Commission jurisdiction. In support of this proposition, it cites a decision construing a provision of the Florida antitrust statute,<sup>8</sup> the absence of professional society testimony on the bills that became the Federal Trade Commission Act, and the fact that the 95th Congress failed to enact legislation which would have given the Commission jurisdiction over all nonprofit corporations. We think respondent makes too much of too little. In essence, AMA would have us infer an exemption from the Act for a particular class of organizations, persons and corporations based upon the absence of specific statutory language or legislative history reflecting a congressional desire to have the Act apply to this class. The incredible sweep of such a position and the extraordinary demands it would place upon the legislature perhaps explain why it is unsupported by any precedent of which we are aware.

With respect to the inaction of the 95th Congress, it is well-settled

<sup>8</sup> In *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), the court held that the medical profession was not "any person" within the meaning of the Florida antitrust law. In considering it unlikely that the 1915 Florida legislature intended its statute to apply to the medical profession, the court applied state law and, in so doing, relied heavily on a recent state appellate court interpretation to that effect. *Mohammad, supra* at 552-53. However, the court reversed a decision granting summary judgment to defendants on a Sherman Act count, following the holding of *Goldfarb* that the learned professions are not exempt from the Sherman Act.

that "the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one."<sup>9</sup> The peril is particularly acute when the subject of congressional inaction is broader in scope than the point [7] for which it is cited. As noted by AMA, the legislation before the 95th Congress would have amended Section 4 to remove the nonprofit exemption altogether, exposing true charitable organizations to the jurisdiction of the Commission. Even assuming that the 95th Congress had some special insight into the intent of a Congress which preceded it by more than sixty years, it is impossible to fathom with any confidence the significance for this case of congressional inaction on the specific amendment recently considered.<sup>10</sup>

We find no reason to differ with the ALJ's conclusion that respondents are engaged substantially in activities which confer a pecuniary benefit upon their members. AMA's own statements belie any suggestion that such activities are only incidental to eleemosynary functions. One of the purposes for which AMA was founded in 1847 was to promote "the usefulness, honor and interest of the medical profession. . . ."<sup>11</sup> The AMA's articles of incorporation, as amended in 1902, stated that one of the objects of the Association was "safeguarding the *material* interests of the medical profession. . . ." (CX 1355-H) (emphasis added). Additionally, the proceedings of AMA's House of Delegates in 1975 indicate that the association continues to exist as "an organization of and for the medical profession." (CX 1042J) [8]

Promotional literature and other material sent by AMA to its members sound the recurring theme that the Association is substantially engaged in protecting the rights and fostering the interests of American doctors. (CX 1532B, 1224, 1528, 1545D, 232D, 2630) For

<sup>9</sup> *United States v. Price*, 361 U.S. 304, 313 (1960); see also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater v. United States*, 356 U.S. 590, 593 (1958); *United States v. United Mine Workers*, 330 U.S. 258, 281-82 (1947).

<sup>10</sup> The then Chairman of the Commission, Calvin J. Collier, testifying on behalf of the Commission, supported the amendment on grounds that it would avoid the often time-consuming proof necessitated by the *Community Blood Bank* analysis. Chairman Collier expressed the view that, where anticompetitive or deceptive behavior is involved, there was little reason for identifying "charitable" corporations, since the harm to the public is the same whether the corporation engages in such behavior for profit or for charity. H.R. Rep. No. 95-339, 95th Cong., 1st Sess. at 54 (1977). The excerpt from the Report of the House Committee on Interstate and Foreign Commerce, quoted by AMA, indicates only that certain minority members of the committee were concerned not that the Commission could properly exercise jurisdiction over an entity found to be "organized to carry on business for its own profit or that of its members," but rather that the proposed amendment would extend the Commission's jurisdiction to encompass genuine nonprofit organizations. *Id.* at 120.

<sup>11</sup> Memorandum in Support of Respondent American Medical Association's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction at 12-13 (March 24, 1976) (Quoting from the preamble to AMA's Constitution, adopted in May 1847).

AMA suggests that reliance upon references to the "interests" of physicians overlooks the fact that physicians have policy goals unrelated to profit maximization. While certain of these references are admittedly ambiguous, consideration of the record as a whole leaves little doubt that one of the purposes for which AMA was organized and for which it continues to operate is the economic betterment of its members.

example, a pamphlet sent to AMA's membership in 1974, entitled "What Do You Get For Your Dues?", emphasizes the "remarkable range of tangible benefits and services" provided by AMA membership and describes these benefits and services as "invaluable - personally and professionally." (CX 259C, D) The same pamphlet specifically refers to insurance programs, AMA's retirement plan, physician placement service, publications (such as *Prism*, a socio-economic magazine), authoritative legal information and guidelines, and "professional management information and guides to increase the productivity and profitability of your practice." (CX 259D)<sup>12</sup> The record provides ample substantiation for these promotional statements. (ID 57-59) Practice management programs warrant particular attention because they have been assigned a high priority by AMA and because they present some of the most "tangible benefits" to the association and its members. (CX 1543Z-10) We find it significant that expenditures for this program have more than doubled in the last three years. (ID 57)

According to AMA, the most important of all the tangible benefits and services they offer is the fact that a member has "an effective and influential national spokesman to represent [his/her] views, interests and rights." (CX 259Z-13) The record supports this assertion, describing legislative and lobbying efforts by AMA with respect to price controls on physicians' fees, Medicare, national health insurance, health maintenance organizations (HMOs), the Keogh Act, malpractice insurance legislation, and other issues affecting the financial health of AMA's membership. (See ID 41-49) AMA's intercession on behalf of its members with insurance carriers, such as Blue Shield, government medical care programs, and hospital administrators also provides economic benefits. (ID 50-53) The record of this proceeding documents additional pecuniary benefits in the form of litigation and substantial public relations activity in support of its legislative program. (ID 52-56)

Our determination that AMA engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which AMA is engaged. Respondent's educational, scientific, and public health efforts represent a laudable public service recognized by this agency and the country as a whole. Such activities do not, however, provide immunity from the laws designed to protect the public from anticompetitive practices. [9]

The record also persuades us that the Connecticut respondents

<sup>12</sup> See also CX 245D, reproduced at ID 40. It is noteworthy that AMA's "medicolegal" symposiums have frequently focused on the business practice aspects of the profession. (ID 58)

exist in substantial part for the economic advantage of their members and that the law judge's finding in this regard should be upheld. (See ID 73-101, 241-51) Without reiterating all of the various economic activities referenced by the ALJ, we note that both CSMS and NHCMA have promoted the economic interests of their members through lobbying and legislative efforts, through sponsorship of insurance plans such as the Professional Liability Insurance Program, and through relationships with third-party payers. Moreover, both of these respondents have played key roles in the formation of "Foundations for Medical Care," an alternative to HMO's operating on a prepaid basis with fee-for-service physicians.<sup>13</sup>

Record evidence concerning the CSMS *Relative Value Guide* ("RVG") provides added support to the ALJ's finding. The RVG provides a precise description and identification in coded form of the services rendered by physicians. (CX 1175D) When utilized with a conversion factor, a relative value guide can be used to generate a fee schedule. *Id.* CSMS first adopted the RVG in 1965, republished it in 1971, and distributed it to its membership and to third-party payers up until 1977. (I.D. 85-86) CSMS recommended no specific conversion factors, but did advise its members to check with other physicians in the community to derive an "appropriate" conversion factor. (CX 1171A) Although there is some evidence that third-party payers in Connecticut used their own or different relative value scales and that CSMS advised its members to use the precise coding approved by the specific third-party payer, the record also shows that the RVG was utilized by the NHCMA Peer Review Committee to decide complaints regarding members' fees and by the New Haven County Foundation for Medical Care. (CX 1178, 2424C, 2425, 2433) Based on this evidence, we conclude that the RVG provided important economic benefits to CSMS and NHCMA members.

The Connecticut respondents object to the law judge's finding that the benefits of AMA membership may be imputed to CSMS and NHCMA and that the benefits of CSMS membership may be imputed to NHCMA. This finding was based on the requirements that a physician must be a member of NHCMA in order to join CSMS and must be a member of both NHCMA and CSMS in order to join AMA. Clearly, little weight should be given to the fact that NHCMA was formed several years prior to CSMS or that both

<sup>13</sup> Respondents argue that the primary purpose of each of these functions is to advance societal welfare through better public health. We have already addressed the contention that to fall within the Commission's jurisdiction, an association must exist primarily for the economic benefit of its members. Likewise, it is unnecessary for the Commission to find that the dominant purpose or effect of any particular activity is profit-making so long as the aggregate total of activities providing any pecuniary gain represents a substantial part of a respondent's overall operation.

organizations predate the creation of the AMA. [10] AMA and CSMS provide valuable benefits to their members and membership in CSMS and/or NHCMA is the *sine qua non* of obtaining these benefits. The fact that approximately half of NHCMA's and CSMS' members chose to join the AMA provides some indication that these benefits were more than negligible. Consequently, we believe it proper to take into account the pecuniary advantages provided by the larger associations.

In light of this evidence regarding the economic activities of all three respondents, the Commission finds it difficult to discern the "striking similarities" alleged to exist between the respondents in this docket and the Kansas City Area Hospital Association ("KCAHA"), a respondent in the *Community Blood Bank* case. By contrast to our findings here, KCAHA funds never "inured to the benefit of any of [its] members" and were utilized "exclusively" for educational and charitable purposes. *Community Blood Bank, supra*, 405 F.2d at 1020. Here, there is abundant record evidence that respondents have engaged in activities providing pecuniary benefits to their members. Respondents' membership serves to distinguish them from the hospital association involved in *Community Blood Bank*, providing further evidence that they exist in substantial part for the profit of their members. Of the 43 member hospitals of KCAHA, 21 were incorporated as not-for-profit charitable or religious associations, 12 were instrumentalities of federal, state, or local governments, and only 2 were organized as proprietary corporations. *Community Blood Bank, supra*, 70 F.T.C. at 767, 405 F.2d at 1020 n. 16.

The KCAHA also differs from respondents in that it is exempt from Federal income tax as a charitable organization pursuant to 26 U.S.C. 501(c)(3)(1976), whereas respondents qualify for an exemption under 26 U.S.C. 501(c)(6)(1976).<sup>14</sup> [11] The latter provision exempts "business leagues, chambers of commerce, real estate boards, boards of trade or professional football leagues. . . ." <sup>15</sup> By contrast, the KCAHA and the American Medical Association Education and

<sup>14</sup> Affidavit of John F. Kelly at 2 (April 5, 1976), attached to Complaint Counsel's Memorandum in Opposition to Respondent's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction (April 8, 1976) ("Kelly Affidavit"); CX 1393.

<sup>15</sup> Section 1.501(c)(6)-1 of the Internal Revenue Regulations defines a "business league" as:  
. . . an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. Treas. Reg. §1.501(c)(6)-1 (1958).

Research Foundation, an AMA subsidiary, come within Section 501(c)(3) of the Code, 26 U.S.C. 501(c)(3)(1976).<sup>16</sup> This provision exempts from Federal income tax:

Corporations, and any community chest, fund, or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals . . . .

Respondents contend that it makes no difference under what provision an organization is tax-exempt, so long as it is not required to pay any tax. We recognize that a respondent's status as either a §501(c)(3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals. Nevertheless, the tax-exempt status is certainly one factor to be considered. Rulings of the Internal Revenue Service are not binding upon the Commission, *Ohio Christian College*, 80 F.T.C. 815, 848 (1972), but a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded. Here, respondents' inability to qualify under §501(c)(3) simply means that the IRS does not consider them to be organized and operated "exclusively" for charitable goals, a fact that sets them apart from the KCAHA.<sup>17</sup> [12]

AMA and NHCMA also appeal from the ALJ's determination that their ethical restrictions on advertising, solicitation and contract practice provide a substantial economic benefit to their members. In AMA's view, the law judge's finding amounts to the circular contention that a corporation is subject to Commission jurisdiction whenever it engages in anticompetitive behavior.<sup>18</sup> This argument has potential merit only in a case in which the jurisdictional finding is premised solely upon respondent's illegal acts, and in which the illegal activity does not confer a substantial economic benefit upon the respondent's members.<sup>19</sup> We cannot adopt the view that challenged acts and practices which provide some pecuniary benefit to an organization's membership should not be judged against the substan-

<sup>16</sup> *Kelly Affidavit* at 2.

<sup>17</sup> Of course, failure to qualify as tax exempt under §501(c)(3) does not by itself necessarily mean that a respondent is within the reach of Section 4 of the FTC Act, since, as we have discussed *supra*, the pecuniary benefit of its activities to its members must constitute a substantial part of its activities under Section 4.

<sup>18</sup> AMA also references its arguments, considered *infra*, that it has not imposed the alleged restrictions and that there is no evidence that these restrictions have affected its members' financial position. NHCMA simply states that the ALJ's finding is a conclusion on the merits and not a proper finding on the jurisdictional issue.

<sup>19</sup> A respondent could also come within Section 4 based on the alleged illegal activity alone if that activity conferred economic benefits upon its members and represented a substantial portion of its overall operations. *Cf. National Comm'n on Egg Nutrition, supra*, 517 F.2d at 488.

tiality criterion along with other activities simply because such acts and practices coincidentally violate Section 5.

Finally, AMA charges that the law judge improperly rejected the budgetary analysis which it offered to quantify the proportion of its activities devoted to the economic benefit of members. At trial, AMA offered the testimony and report of its expert witness, Dr. Frederick Sturdivant, who classified respondents' activities as follows:

- (1) Category A - education, scientific, and association activities;<sup>20</sup>
- (2) Category B - indirect economic benefit;
- (3) Category C - direct economic benefit;
- (4) Category D - miscellaneous (RX 743, p. 5)

Dr. Sturdivant then analyzed each of AMA's 318 project request forms from 1977 and, after consulting with appropriate AMA officials where necessary, assigned each project to a specific category. (Tr. 6428, 6459) Dr. Sturdivant's [13] report indicates that AMA allocated 90.6% of its budget to Category A activities,<sup>21</sup> leading him to conclude that AMA "is a professional association engaged overwhelmingly in scientific and educational activities." (RX 743, p. 28) Dr. Sturdivant's analysis indicates that 5.8% of the budget had a direct or indirect economic benefit to members (Categories B and C), and 3.6% belonged in the miscellaneous group (Category D). *Id.*

Dr. Paul Feldstein, complaint counsel's expert witness, criticized the Sturdivant Report generally on grounds that a budgetary approach is unsuitable for examining the economic relationship of an association of health professionals to its members. (CX 2586-C, -D) Dr. Feldstein also found certain specific deficiencies with the Sturdivant Report. The correction of these deficiencies led him to the conclusion that between 35 and 43 percent of AMA's budget provides economic benefit to its members. (CX 2586-D)

The resource allocation decisions of an organization certainly provide one perspective on the purposes of that organization. However, there are analytical problems with such an approach, since a small budget allocation may have a disproportionate benefit

<sup>20</sup> Category A was further subdivided as follows:

- 1) lay public education;
- 2) journals and scientific publications;
- 3) scientific policy;
- 4) other scientific;
- 5) data on physicians and health care;
- 6) medical quality control and education;
- 7) government interface; and
- 8) organizational maintenance and operations. (RX 743, p.7)

<sup>21</sup> The percentages set forth in the text reflect our recalculation of Dr. Sturdivant's percentages to take account of the nine projects omitted from his original computations and noted at RX 743, p. 8. Seven of the nine projects not classified by Dr. Sturdivant have been allocated to Category D.

to members. Additional difficulties arise when the focus is a professional association, inasmuch as the activities of such a group do not fit neatly into economic and non-economic pigeonholes. Certain legislative and lobbying activities, for example, may have economic as well as public health or welfare objectives.<sup>22</sup> Likewise, a professional association's legal counsel may be essential to achievement of that association's eleemosynary goals, yet spend a significant portion of time advising members on the commercial aspects of their profession. These observations are especially applicable to AMA. (CX 2586 O-Q, Tr. 8882, 8988, 9066-71, 9082-83, 9128) Indeed, disaggregation of AMA's budget into economic and non-economic components is especially problematic due to the fact that AMA has consolidated many of its programs in recent years, reducing the number of programs from 583 in 1975 to 318 in 1977 and presumably enlarging the number of distinct activities contained in individual programs. (Tr. 6428-29) [14]

Apart from some general discomfort with application of the budgetary approach to this case, we entertain certain reservations as to the validity of Dr. Sturdivant's findings. At the outset, we note that Dr. Sturdivant had done no previous work with respect to the medical profession or, for that matter, any professional or not-for-profit association. (Tr. 6416-17) Because of his background and because proper classification of each of AMA's activities necessitated an understanding of those activities, Dr. Sturdivant was compelled to rely upon the program descriptions contained on the AMA request forms prepared after the complaint was filed<sup>23</sup> and on supplemental information provided by AMA officials. (Tr. 6431, 6459) In view of the clear opportunity for manipulation of the input to Dr. Sturdivant's study and the absence of any procedural safeguards to minimize the likelihood of manipulation, we are particularly reluctant to give his report any weight. *See Philadelphia Carpet Co.*, 64 F.T.C. 762, 776 (1964), *aff'd per curiam*, 342 F.2d 994 (3d Cir. 1965).

In addition to these problems, we find Dr. Sturdivant's report deficient in a number of other respects. First, we do not view it as appropriate to consider organization maintenance in the non-economic benefit category. Most of these activities are neutral in nature and should be excluded from the calculation. Others, such as the funds allocated to the Advisory Committee on Services to Young

<sup>22</sup> The Commission considers Dr. Sturdivant's decision to include all legislative and lobbying efforts in Category A as particularly suspect. As we indicated *supra*, a number of these activities have a direct economic impact on AMA's members. Moreover, Dr. Sturdivant conceded that he had conducted only a summary review of AMA's legislative positions and was unaware, for example, of the AMA's activities with respect to the Keogh Act. (Tr. 6458-59)

<sup>23</sup> These forms were prepared in May or June 1976. Dr. Sturdivant testified that he did not know what instructions had been given to the individuals who prepared the project descriptions. (Tr. 6431)

Physicians might, upon examination of its recommendations, be included in Category B or C.<sup>24</sup> Second, Dr. Sturdivant failed to include expenditures by entities established by the AMA with Association funds, such as the American Medical Assurance Company,<sup>25</sup> which perform significant economic services for AMA's membership. (Tr. 6451) The Sturdivant Report is also vulnerable to charges that the classification criteria were not applied in a consistent fashion. (CX 2586-M) Lastly, the wide variations in expenditures for legislative and political activities by AMA from year to year may make it inappropriate to use any single year as a basis for a budgetary analysis of the AMA. (CX 2586-K, L) [15]

Accordingly, we affirm the ALJ's finding that respondents are "corporations" within the meaning of Section 4.

#### B. Interstate Commerce Jurisdiction

Although the AMA admits that its challenged activities fall within the Commission's interstate commerce jurisdiction, (Tr. 2120, 2124) CSMS and NHCMA contend that they are local organizations with local concerns and that their acts and practices cannot be considered, as they were by the ALJ, to be in or to affect commerce. We find little merit in these arguments. CSMS and NHCMA were not charged with acting independently to restrict the practices of Connecticut physicians. The complaint alleges and the Commission finds, *supra* at 18, that all three respondents have conspired with others to restrict advertising, solicitation, and certain contract practices of their members throughout the United States. The participation of respondents along with other AMA constituent and component societies in this nationwide conspiracy, taken together with AMA's stipulation that its acts and practices are in and affect interstate commerce, thus leave little room for doubt that the alleged activities of CSMS and NHCMA also fall within interstate commerce. As the Supreme Court has stated:

The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. (*FTC v. Cement Institute*, 333 U.S. 683, 696 (1948).)

#### Even apart from the involvement of the Connecticut respondents

<sup>24</sup> Dr. Sturdivant included this in Category A because he saw it as an aspect of attracting and retaining young physicians in the AMA. (Tr. 6571) Under this approach, almost any project providing economic benefit to AMA's members could be considered part of the organization's maintenance activities.

<sup>25</sup> This company provides reinsurance for medical liability insurance companies owned by state medical societies. (ID 54)

in this national conspiracy, there is ample proof of an interstate commerce nexus in the aggregation of factors cited by the law judge. (ID 252) Foremost among these is the impact the restrictions have upon out-of-state public and private funds providing payment for medical services rendered in Connecticut. Respondents' ethical restrictions affect the volume and destination of these payments, which total several million dollars per annum. (ID 10, 252) Although CSMS and NHCMA concede the substantiality of these payments, they argue that they relate to the practice of medicine by their members, not to their own challenged acts, and that the record merely demonstrates that individual activities of their members may affect interstate commerce. In our view, respondents' argument reflects a misunderstanding of the applicable law and unduly cabins the jurisdiction of the Commission, contrary to the recently expressed intent of Congress. [16]

The legislative history of the Magnuson-Moss Act<sup>26</sup> reveals that Congress broadened the Commission's jurisdiction so that it would encompass "acts or practices which, although local in character, affect interstate commerce." H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. at 45 (1974).<sup>27</sup> Since Section 1 of the Sherman Act has been held to apply to contracts, combinations, or conspiracies which, however local their immediate objectives, substantially and adversely affect interstate commerce, *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948), acts or practices within Sherman Act jurisdiction must a fortiori be subject to FTC jurisdiction. Accordingly, it is instructive to look to cases construing the Sherman Act for initial guidance as to the reach of Section 5.<sup>28</sup>

Such cases provide substantial precedent for the ALJ's conclusion. In *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738 (1976), for example, the Court reversed a summary dismissal on jurisdictional grounds since the complaint alleged that petitioner's purchases of out-of-state medicines and supplies and its revenues from out-of-state insurance companies would be less than they otherwise would be if respondents and their co-conspirators succeeded in blocking petitioner's planned hospital expansion. Assuming in this case that each of respondents' members does not have an equal desire to advertise or solicit customers (TROA 32), the revenues of some physicians subject to the alleged restrictions unquestionably will be affected by those restrictions.

<sup>26</sup> Pub. Law No. 93-637, 88 Stat. 2183 (1974).

<sup>27</sup> One of the reasons for the amendment was to obviate the inordinate expenditure of time and effort required to marshal evidence needed to satisfy purely jurisdictional technicalities.

<sup>28</sup> Of course, practices that affect commerce in a less than substantial way may nonetheless be within the Commission's jurisdiction.

A year earlier in *Goldfarb, supra*, 421 U.S. at 783, the Court determined that a minimum fee schedule for title examinations imposed by the county bar association had a sufficient nexus with interstate commerce because a substantial portion of mortgage funds used to purchase homes in the county came from outside the state. The Court further noted that substantial loan money was guaranteed by the United States Veterans Administration and the Department of Housing and Urban Development, both of which were headquartered out-of-state. Because lenders require title examinations as a condition of making loans, the Court held that the legal services at issue were an integral part of an interstate transaction and that a restraint on those services substantially affected commerce under the Sherman Act. *Id.* at 784-85. [17] Just as the minimum fee schedule deprived consumers of free competition in the title search market, respondents' ethical restrictions have a significant impact upon the volume, price, and distribution of medical services in the State of Connecticut. And, whereas the financing of property in *Goldfarb* was affected only indirectly by the restraint through the title examination requirement, the restraint here affects the very services being financed by out-of-state funds. Rather than a restriction going to an integral but collateral service, as was involved in *Goldfarb*, the restraint before us is more analogous to a restriction intended to prohibit the sale of property that would otherwise be financed with out-of-state funds.<sup>29</sup>

The Sherman Act real estate cases cited by respondent are distinguishable because they do not involve the broader jurisdictional standard of Section 5. In addition, these cases are factually different from the case at bar. Unlike physicians, whose services are the principal cause of interstate health insurance payments, real estate brokers have been found to be neither necessary nor integral participants in the interstate aspects of realty financing and insurance. *McLain v. Real Estate Bd. of New Orleans*, 583 F.2d 1315 (5th Cir. 1978), cert. granted, 99 S. Ct. 2159 (1979). In *Bryan v. Stillwater Bd. of Realtors*, 578 F.2d 1319 (10th Cir. 1977), plaintiff's contention that he had been unlawfully expelled by the defendant was found to have no logical nexus with allegations that the defendant's conduct occurred in interstate commerce. In *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, 578 F.2d 1326 (10th

<sup>29</sup> In *State of Arizona v. Maricopa Medical Soc'y*, 1979-1 Trade Cas. (CCH) ¶62,694 (D. Ariz. 1979), a medical society was found to be affecting commerce through alleged price fixing. The court there found that while the sales by physicians of their services were not interstate transactions, ¶62,694 at 77,894, the alleged price-fixing affected the sale of services by physicians and the sale of services by physicians directly affected the health insurance premiums and claim payments that cross state lines. *Id.* at 77,894-95. The restraints involved in this case have much the same effect upon health care payments. See also *United States v. American Soc'y of Anesthesiologists, Inc.*, 1979-2 Trade Cas. (CCH) ¶62,739 (S.D.N.Y. 1979).

Cir. 1978), plaintiff's allegation was limited to the conclusory statement that the parties were engaged in the interstate brokerage of real estate.

We therefore concur in the ALJ's finding that the challenged practices of the Connecticut respondents are in and affect interstate commerce. [18]

## II LIABILITY

The focus of this case is the legality under Section 5 of respondents' restrictions upon the advertising, solicitation, and contractual practices of their members. The nature, scope, and impact of these restrictions are specifically at issue. All respondents challenge the adequacy of the evidence to sustain a finding that they have unreasonably and unfairly restricted physicians' advertising, solicitation, and contractual arrangements. While AMA does not directly defend its 1971 guidelines, which were in effect at the time this proceeding was commenced, it argues that our focus should be upon ethical guidelines adopted *pendente lite* and that, in any event, it is not responsible for enforcement actions taken by state and local medical societies. CSMS and NHCMA both emphasize their individual autonomy and assert that the evidence is insufficient to connect them in a conspiracy with AMA. They further allege that they were given insufficient notice of the allegation of conspiracy involving their members. We address each of these issues below, beginning with the conspiracy allegations.

### A. Conspiracy

Evidence adduced at trial provides substantial proof of a conspiracy to impose the challenged ethical restrictions: first, between and among respondents and other constituent associations and component societies, and second, between respondents and their members. We note at the outset that the structure of respondent's organization—a single national organization, state or constituent associations, and local or component societies—is conducive to development of system-wide consensus on ethical matters to which all members must adhere. The governing structure of the AMA reflects this hierarchical system in that members of the AMA House of Delegates are selected by constituent associations and members of the constituent societies' ruling bodies are selected by their respective component societies. (ID 7)

The record also describes the various steps taken by respondents to insure that all of their members follow the same or substantially

similar ethical guidelines. The constitutions and bylaws of AMA, CSMS, and NHCMA, as well as most of AMA's other constituent and component medical societies make compliance with AMA's *Principles of Medical Ethics* a requirement of continued membership. (CX 990I, 991D, 1404I, ID 306-09) Although state associations may apply their own principles of professional conduct to their members, those principles may not be inconsistent with the *Constitution and By-Laws* of the AMA. (CX 1435Z-20)<sup>30</sup> Moreover, AMA has said that a physician acts "unethically" when he or she disregards "local custom," and has urged its [19] component societies to "exercise great caution to insure full compliance with the spirit and intent of the *Principles*." (CX 210, 462Z-9) Although the Connecticut respondents argue to the contrary, AMA has stated that county societies are required to apply all of the interpretations contained in the *Opinions and Reports* (CX 489). It is evident, therefore, that the *Principles* and the *Opinions and Reports* play a central role in delineating the ethical standards for physicians in this country.

In addition to promulgation and distribution of broad ethical pronouncements to constituent and component societies, AMA has provided ethical advice to local societies in specific situations. (CX 54, 168, 768B, 1287)<sup>31</sup> AMA refers complaints and inquiries on ethical matters to the appropriate state or local societies and constituent associations refer complaints and provide guidance to component societies. (ID 105) In short, the record of this proceeding substantiates the involvement of respondents, as well as affiliated medical societies, in the enforcement of the challenged ethical restrictions. (See ID 118-24, 133-44, 146-48, 152-60, 172-76, 187-94, 198-99, 212-21, 223-26) These enforcement activities were fully consistent with the *Principles* and interpretations of the *Principles* found in AMA's *Opinions and Reports*. Indeed, there is no evidence before us that state or local medical societies have ever strayed far from the ethical norms established by AMA.

Measured against recent decisions involving conspiracy allegations in a professional association context, there can be little dispute over the law judge's findings on the conspiracy issue.<sup>32</sup> In *Goldfarb*,

<sup>30</sup> A member of the AMA must comply with the *Principles* in order to retain his or her membership. (CX 990I)

<sup>31</sup> On occasion, AMA's advice has ventured beyond ethical interpretations to guidance regarding enforcement action. For example, Mr. Edwin J. Holman, then secretary to AMA's Judicial Council, suggested that the Saginaw County Medical Society advise a physician that a sign posted on his lawn advertising medical treatments should be removed. (CX 91A) Alternatively, Mr. Holman suggested that the local society promulgate guidelines and, if the offending physician did not remove the sign after an appropriate period of time, bring charges of unethical conduct against the physician. (CX 91A, B)

<sup>32</sup> Respondents' reliance upon *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1921) and *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1924), is misplaced. The Court there rejected claims of a conspiracy between the International and its local unions in connection with damage caused to the Coronado Coal Company's Prairie Creek mine, finding that the interference with the coal company was neither initiated, participated in, or ratified by the International. *Id.*

*supra*, 355 F. Supp. 491, [20] 494-96 (E.D. Va. 1973), the district court found that the Virginia State Bar and the Fairfax County Bar Association had agreed to fix prices. The district court noted that the Virginia State Bar had played only a minor role in the matter. However, holding that defendants were engaged in a "classic illustration of price fixing," 421 U.S. at 783, the Supreme Court dispelled any doubt as to the culpability of the state defendant:

Of course, an alleged participant in a restraint of trade may have so insubstantial a connection with the restraint that liability under the Sherman Act would not be found, see *United States v. National Assn. of Real Estate Boards*, 339 U.S., at 495; however, that is not the case here. The State Bar's fee schedule reports provided the impetus for the County Bar, on two occasions, to adopt minimum-fee schedules. More important, the State Bar's ethical opinions provided substantial reason for lawyers to comply with the minimum-fee schedules. Those opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths. (421 U.S. at 791 n. 21).

It is noteworthy that the record in *Goldfarb* was devoid of proof that the state association had sent letters or referred complaints to the county bar associations. Nor was there any evidence that the state bar had coordinated the activities of its constituent societies with respect to specific fact situations. In fact, the uncontradicted evidence showed, as it does here with respect to AMA, that the Virginia State Bar had never taken any disciplinary action against an attorney for failing to adhere to the fee guidelines. *Goldfarb*, *supra*, 355 F. Supp. at 496. The case thus stands for the proposition that a professional association may take part in a conspiracy in restraint of trade even though its participation is limited to promulgating ethical guidelines with the intent that affiliated societies will enforce those guidelines and that members will follow them.<sup>33</sup> [21]

A conspiracy involving a professional society, affiliated national

259 U.S. at 393. Indeed, the union's constitution provided that no district was permitted to engage in strikes involving all or a major portion of its members without sanction of the International, and that a district could order local strikes only on their own responsibility. *Id.* 259 U.S. at 384-85. AMA's role in the promulgation and enforcement of the ethical restrictions at issue in this proceeding is considerably more extensive than the role of the International in the Prairie Creek incident.

<sup>33</sup> As such, the conspiracy here is different in character from that considered in *Interstate Circuit v. United States*, 306 U.S. 208 (1939), where a conspiracy was inferred, in large measure, from the fact that without "substantially unanimous" action on the part of all distributors there was a risk of a substantial loss of business and goodwill. *Id.* at 222. By contrast, promulgation of a code of ethics implies agreement among the members of an organization to adhere to the norms of conduct set forth in the code. The extent to which members abide by the ethical standards does not bear upon the existence of a conspiracy, rather it indicates how effective the conspiracy has been in carrying out its objectives.

and state societies, and its members, was established in the *Professional Engineers* case, a case remarkably similar to the facts in this docket. *United States v. National Society of Professional Engineers*, 389 F. Supp. 1193, 1201 (D.C.C. 1974), *vacated*, 422 U.S. 1031 (1975) *aff'd on rehearing*, 404 F. Supp. 457 (D.D.C. 1975), *aff'd and modified*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd* 435 U.S. 679 (1978).<sup>34</sup> The National Society of Professional Engineers (NSPE), which counted as members 17 percent of the registered engineers in the United States, was affiliated with professional engineering societies in each state. *Id.* at 1195. Enforcement of the NSPE Code of Ethics was principally left to these state societies, although NSPE developed disciplinary procedures for the state societies to follow and played a significant role in coordinating and encouraging state society enforcement efforts. *Id.* at 1196.<sup>35</sup> State societies were autonomous in the sense that NSPE had no authority to compel an affiliated society to take any action or to refrain from taking any action; NSPE's only power over affiliated societies was the power to withdraw their charters of affiliation. *Id.* at 1213. NSPE's actions were characterized as successful by the district court, inasmuch as there were few significant defections by NSPE members from the ethical restriction upon bidding practices. *Id.* at 1196.

AMA attempts to distinguish the *Professional Engineers* case by suggesting that NSPE was found to have violated the antitrust laws on the basis of its own code of ethics, not on the basis of actions by state or local affiliates. AMA Reply Brief at 14. Such an argument, however, misperceives the thrust of that case, since, as in the instant matter, the conspiracy determination in *Professional Engineers* was supported by evidence that the NSPE promulgated the anticompetitive ethical guidelines and assisted state officials in enforcing those guidelines.<sup>36</sup> [22]

We further reject the notion proffered by AMA that the autonomy of its constituent and component societies and their voluntary adoption of an ethical code precludes a finding of conspiracy. The law is clear that a conspiracy may be found whether or not one conspirator exercises control over the actions of its co-conspirators. *FTC v. Cement Institute*, 333 U.S. 683 (1948); *cf. United States v.*

<sup>34</sup> See also *United States v. Texas State Bd. of Public Accountancy*, 464 F. Supp. 400 (D.Tex. 1978), *aff'd and modified*, 592 F.2d 919 (5th Cir. 1979) (conspiracy found between the state board and accountants holding permits to practice in Texas on basis of acquiescence of permit holders in ban on competitive bidding under threat of disciplinary action by state board).

<sup>35</sup> Authoritative interpretations of NSPE's Code of Ethics are contained in the opinions of NSPE's Board of Ethical Review. *Professional Engineers*, *supra*, 389 F. Supp. at 1214.

<sup>36</sup> The district court noted that NSPE officials had promoted and coordinated enforcement with officials from affiliated societies in the District of Columbia, Pennsylvania, North Carolina, West Virginia and Kentucky in connection with a West Virginia airport project. *Id.* at 1210-12.

*Texas State Bd. of Public Accountancy, supra*, 464 F. Supp. at 403. Certainly, the autonomous status of the affiliated societies in the *Professional Engineers* case did not absolve the NSPE of liability in the face of evidence showing that the NSPE encouraged and coordinated state and local enforcement activity. *Professional Engineers, supra*, 389 F. Supp. at 1196, 1201, 1213.<sup>37</sup>

The Connecticut respondents argue that the trial record does not even contain "slight evidence"<sup>38</sup> connecting CSMS and NHCMA to the alleged conspiracy of AMA and other medical societies. Both respondents further maintain that they were afforded insufficient notice of the second prong of complaint counsel's conspiracy theory charging a conspiracy between respondents and their members.<sup>39</sup>

In our view, the evidence is more than sufficient to connect the Connecticut respondents to the conspiracy involving AMA and other medical societies restricting the advertising, solicitation, and contract practices of their members. As the ALJ noted (ID 283-87), there is not only evidence generally of the ties between AMA and its member societies on ethical matters, from which an inference can be drawn as to the Connecticut respondents' involvement in the conspiracy, but there is also independent evidence of specific actions by these respondents directly linking them to the conspiracy. Moreover, the evidence of affirmative acts by the Connecticut respondents is bolstered by the absence of any proof whatsoever demonstrating that CSMS and NHCMA ever took any position in conflict with AMA's challenged restraints. [23]

The CSMS has adopted the *Principles* (CX 991D). While it has not formally adopted the *Opinions and Reports*, it has indicated that the "policies of the AMA are guides to our action" (Tr. 8282) and has cited the recommendations of the Judicial Council in discouraging a senior citizen discount program for medical services. (CX 30) Moreover, CSMS has stated that "advertising is prohibited by medical ethics." (CX 30) Consistent with this position, the vice president of CSMS filed a complaint in his official capacity with NHCMA, charging Dr. Leon Zucker with unethical publicity in connection with a newspaper article reporting surgery performed by Dr. Zucker. (CX 2006A, *see also* ID 167-68.) In another incident, a member of the CSMS Council, the executive body of CSMS, filed a complaint with the NHCMA against Dr. Sugn Liao, regarding

<sup>37</sup> We note that local societies are not so autonomous that they are permitted to have less stringent restrictions upon advertising or solicitation than those found in the 1977 edition of *Opinions and Reports*. (App. A, p. 1)

<sup>38</sup> Once a conspiracy is established, only "slight evidence" is needed to connect a particular participant with that conspiracy. *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087 (5th Cir. 1978), *cert. denied*, 437 U.S. 903 (1978); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978).

<sup>39</sup> AMA apparently does not contest the finding of a conspiracy between it and its members. (RAB 33-47; *but see* TROA 17)

newspaper and TV advertising for an acupuncture clinic opened by Dr. Liao. (CX 701A; see also ID 160.) With respect to the contract practice allegations, the record shows that the CSMS House of Delegates approved resolutions disparaging the corporate practice of medicine and supporting the traditional fee-for-service method of compensation. (CX 1344Z-9, -10, -11)

The evidence concerning respondent NHCMA is equally incriminating. NHCMA bylaws provide that "[t]he principles of medical ethics of the AMA as reflected in the Judicial Council shall govern the conduct of members," (CX 1404I) creating a strong inference that members of NHCMA are bound by the *Opinions and Reports* as well as the *Principles*. While this evidence alone is sufficient to sustain a finding of liability against NHCMA, the record also documents the actions taken by NHCMA against Drs. Zucker and Liao, (ID 160, 167-68)<sup>40</sup>, and investigation by NHCMA of a radiology clinic to determine if it was soliciting patients (CX 782-86), action against Dr. Zucker on another occasion for telephone directory listings outside the area in which Dr. Zucker's office was located, (CX 136A, B) and efforts by NHCMA to limit announcements of office openings and relocations to one newspaper insertion. (CX 81)<sup>41</sup> [24]

With respect to the Connecticut respondents' position regarding inadequate notice of a conspiracy between them and their members, we note that the complaint alleged a conspiracy between "respondents and others." (Complaint ¶¶6-7) Complaint counsel's trial brief explained, however, that the case-in-chief would only challenge "an agreement among respondents and their affiliated medical societies to hinder competition among medical doctors." Trial Brief of Counsel Supporting the Complaint at 1 (April 18, 1977). Although complaint counsel described AMA as "a collective body of individual entrepreneurs" during the case-in-chief, (Tr. 503-04) this brief reference was clearly inadequate to correct the impression previously conveyed in the trial brief. An articulation of the alternative theory, i.e., a conspiracy between respondents and their members, is found in complaint counsel's conspiracy memorandum filed prior to defense hearings, but even this statement conflicts with other sections of the memorandum. Memorandum on Conspiracy Law and Related Evidence Questions at 2, 19 n., 26 (November 7, 1977).

<sup>40</sup> The testimony of Dr. Tierney, who received the complaints against Dr. Zucker as president of NHCMA, reflects some concern regarding the accuracy of the headline of the article which formed the basis for the complaint. (Tr. 8483) This headline characterized the operation performed by Dr. Zucker as "rare," whereas Dr. Tierney felt the term "uncommon" to be a more appropriate description of its frequency of occurrence. *Id.* The minutes of the NHCMA Board of Censors meeting with Dr. Zucker, however, reflect a concern with "personal aggrandizement," and do not allude in any respect to a deception problem. (CX 695C,D)

<sup>41</sup> NHCMA's reliance upon the advice of AMA and AMA's dependence upon NHCMA for enforcement action is also well-documented. (CX 672-73A, 783, 784A, 785)

Complaint counsel's proposed findings submitted to the ALJ after trial contain the first clear statement of the alternative conspiracy theory. Proposed Findings of Fact and Conclusions of Counsel Supporting the Complaint at 260 (July 27, 1978). Respondents had an opportunity to address this theory before the law judge and before the Commission on appeal from the initial decision and in fact addressed the evidence in support of this theory in their appeal briefs. (RCAB at 48; RNAB at 38) Moreover, respondents do not allege and we do not understand how the allegation of a conspiracy between them and their members would necessitate the introduction of evidence additional to that already offered to rebut the alleged conspiracy between respondents and other constituent and component societies. We conclude, therefore, that any incertitude which may have existed with respect to complaint counsel's conspiracy allegations during trial did not prejudice CSMS and NHCMA since all facts relevant to the alleged unlawful acts were fully litigated. See *Golden Grain Macaroni v. FTC*, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); *Armand Co., Inc. v. FTC*, 84 F.2d 973 (2d Cir. 1936), cert. denied, 299 U.S. 597 (1936). [25]

#### B. Restrictions on Advertising and Solicitation

As its principal defense to the charge of unlawfully restricting the advertising and solicitation of its members, AMA asserts that it should not be judged on the basis of what it characterizes as "obsolete" positions contained in the 1971 *Opinions and Reports*, but rather that the Commission should consider instead the statements contained in the 1977 *Opinions and Reports*. Respondent contends that the appropriate standard for judging this ethical code is the rule of reason. Analyzed according to this standard, AMA suggests that the record is devoid of proof establishing that it has unlawfully suppressed competition. With respect to its prior ethical position, as articulated in the 1971 *Opinions and Reports*, AMA argues that it neither enforced this position nor engaged in a conspiracy with constituent and component societies (TROA 29, 34). It concedes, however, that some statements contained in the 1971 *Opinions and Reports* could be construed as prohibiting price advertising and that state and local societies might have violated the law. (TROA 30-31, 33).

Before examining the facts of record, it is necessary to determine whether respondent's restrictions should be tested under a *per se* standard or according to the rule of reason. The ALJ found it unnecessary to consider whether AMA's restrictions constituted a *per se* violation of Section 5 since he concluded that the rule of reason

was clearly violated. Complaint counsel agree with this assessment but nonetheless urge that the restrictions on advertising and solicitation imposed by respondents should be considered illegal on their face. (TROA 91-92)

These restrictions do represent a restraint upon price advertising (ID 118-22, 132, 154, 193), and it is true that restraints on the advertising of prices have previously been considered *per se* illegal by some courts. *United States v. Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961); *United States v. The House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶71,517 (S.D. Fla. 1965). Moreover enforcement of these restrictions by disciplinary action that threatens or results in the loss of valuable privileges associated with membership has earmarks of a group boycott, long considered a violation of the antitrust laws without regard to business justifications. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).<sup>42</sup> [26]

But while *per se* rules are considered a valid and valuable tool of antitrust enforcement, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 99 S. Ct. 1551, 1556 (1979), we are not prepared to classify the challenged restraints as *per se* illegal in this instance and thereby preclude analysis of procompetitive justifications offered on their behalf. Professional restraints on advertising and solicitation have not previously been subject to extensive scrutiny under the antitrust laws, and the courts have been reluctant to classify practices as *per se* violations before acquiring sufficient experience with them. *Broadcast Music, supra*, 99 S. Ct. at 1556-7. In addition, we recognize that professional services may differ in some respects from other businesses. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978); *Goldfarb, supra*, 421 U.S. at 788-89 n.17. Arguments suggesting that competition is contrary to the public interest are not cognizable under the rule of reason, but other justifications for ethical norms, such as the facilitation of nondeceptive advertising, may be procompetitive and must be taken into account. *Professional Engineers, supra*, 435 U.S. at 692, 696.

We turn then to consideration of the reasonableness of respondents' advertising and solicitation guidelines.<sup>43</sup> The test of legality is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may

<sup>42</sup> These restrictions further evince in certain respects the characteristics of a horizontal allocation of customers, (ID 171-73) also considered to be *per se* illegal under the antitrust laws. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

<sup>43</sup> While it is unnecessary in this case for us to distinguish between the analysis required under Section 1 of the Sherman Act and Section 5, it is important to note that acts or practices that fall short of violating the Sherman Act may nonetheless traverse the more encompassing standard of illegality defined by Section 5.

suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Professional Engineers, supra*, 435 U.S. at 691. To assess the legality of the restrictions under a rule of reason analysis, we must examine their nature, purpose and effect on competition, including in the calculus any possible procompetitive impact. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). As the Court observed in *Professional Engineers, supra*, the unreasonableness of trade restrictions can be based either

- (1) on the nature or character of the contracts, or
- (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. (435 U.S. at 690)

Thus, the contours of the analysis required under the rule of reason will vary somewhat depending upon the nature of the restraint. [27]

Evaluation of AMA's *Principles of Medical Ethics*, the 1971 *Opinions and Reports*, and assertions of AMA, state and local medical society officials, allows little latitude for dispute over the nature and scope of respondents' restrictions at the time the complaint was issued.<sup>44</sup> The *Principles* make clear that physicians should "uphold the dignity and honor of the profession" and "should not solicit patients."<sup>45</sup> All solicitation, whether direct or indirect, is forbidden, and "solicitation" is defined in the 1971 *Opinions and Reports* as any "attempt to obtain patients or patronage by persuasion or influence." (CX 462Z-6)<sup>46</sup> Hence, it is fair to say that almost all advertising and promotional activity is proscribed, with a few narrowly circumscribed exceptions. *See, generally* ID 115-118. A doctor may only furnish the public with information regarding his or her name, type of practice, location of office and office hours, and this information must be communicated through the "accepted local media," which includes "telephone listings, office signs, professional cards, and dignified announcements." (CX 462Z-6) Although the guidelines in theory permit listing in a physician or telephone

<sup>44</sup> We reject respondents' suggestion that the focus for determining liability should be ethical positions or statements disseminated after issuance of the complaint. AMA does not contend that this case is moot. Consequently, its 1977 edition of *Opinions and Reports* is properly assessed in the context of relief rather than of liability. *See infra* at 45-57.

<sup>45</sup> AMA's first *Code of Ethics*, adopted in 1847, contained the following section:

It is derogatory to the dignity of the profession to resort to public advertisements or private cards or handbills, inviting the attention of individuals affected with particular diseases—publicly offering advice and medicine to the poor gratis, or promising radical cures; or to publish cases and operations in the daily prints, or suffer such publications to be made;—to invite laymen to be present at operations,—to boast of cures and remedies,—to adduce certificates of skill and success, or to perform any other similar acts. These are highly reprehensible in a regular physician. (*Percival's Medical Ethics*, App. III at 226 (C. Leake ed. 1927).)

<sup>46</sup> Our discussion here also encompasses solicitation restraints applicable to medical organizations through contract practice restrictions imposed upon physicians. (CX 462Z-13)

