State of North Carolina

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March 4, 1996

Mr. Thomas M. Mickey
Executive Director
North Carolina Veterinary Medical Board
P.O. Box 12587
Raleigh, N.C. 27605

Dear Mr. Mickey:

Thank you for providing me the opportunity to meet with the Board at its upcoming meeting on March 15, 1996. I understand that the Board's schedule that day is fluid due to the nature of its agenda items, and that 11:00 a.m. is a target time that we are shooting for.

Thanks also for taking the time to discuss with me the practices of some veterinarians that have come to our attention: not releasing prescriptions, or providing prescriptions for only a limited number of doses when a larger number is medically appropriate. As both of our agencies have received complaints about these practices, I would like to bring to your attention concerns that we hope the Board shares with this office, and to advise the Board of the applicable law and analogous precedents in other fields, with the goal of working together to address these matters.

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North Carolina law forbids unfair methods of competition and unfair or deceptive business practices. N.C. Gen. Stat. § 75-1.1(a). This statute is enforced by the Attorney General and through private actions. N.C. Gen. Stat. §§ 75-15 and -16. The General Assembly's purpose in originally enacting this provision

> is to declare, and to provide civil means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

N.C. Gen. Stat. § 75-1.1(b) (1977).

In Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), the North Carolina Supreme Court interpreted N.C. Gen. Stat. § 75-1.1(a) not to require intent, or bad faith, as necessary to proving a violation. Instead, it held, at page 548, that:

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

The first practice, the refusal of a veterinarian to release a prescription, compels the owner to purchase medication from the issuing veterinarian. It is a direct barrier to competition, the effects of which are to foreclose the opportunity of other sellers of veterinary medicines to compete for this business, and, in instances reported to us, to force the purchaser to pay prices more than twice as high as competitive prices. We have not heard of any therapeutic rationale for this practice. It is therefore our view that failure to release a prescription is both an unfair method of competition and an unfair business practice.

The second practice, limiting the number of doses provided in a prescription, raises competitive concerns because a price advantage may be available from competing sellers for only a larger volume purchase. Thus, issuing a prescription for only a small number of doses also has the effect of muting or even foreclosing competition, and of forcing the owner to forego purchasing veterinary medicines at competitive prices.

However, our information is that, in some instances, the number of doses provided by a prescription may be a matter of sound medical judgment. For some medical conditions or drug regimens in which close monitoring is indicated, a prescription for only a limited supply may help to induce the owner to return the animal in order to assure that necessary or appropriate monitoring takes place. Yet this appears to be the exceptional case. Many medications are taken for extended periods, even over the life of the animal, such as heartworm medication for dogs, and do not involve conditions that call for exceptional monitoring. The information presented to us indicates that for short term medications, a prescription for a quantity sufficient to fully address the condition is appropriate, and for long term medications, a prescription at least sufficient to last until the next reasonable date for a checkup is medically proper. Accordingly, it is our view that, in normal circumstances, issuing a prescription for a smaller number of doses than is medically warranted is an unfair method of competition and an unfair business practice.[1]

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[1] An alternative legal analysis, under longstanding antitrust law, reinforces the conclusions about these practices. For public health and animal welfare reasons, veterinarians have been granted by law what is in effect a legal monopoly over the issuance of prescriptions for veterinary

In response to analogous market conditions, the Federal Trade Commission promulgated a rule requiring eye care professionals to automatically release to the patient the prescription for eyeglasses immediately after the eye exam. (A copy of this rule is attached.) The Commission issued this rule based on its determination that an eye care professional's refusal to release the prescription merely increases the cost of eye care, with no countervailing benefits to patient care. This increased cost contributes to patients delaying or even foregoing eye care which, in turn, leads to other harms. For example, according to the American Optometric Association, before the rule was adopted, 85 percent of all serious injuries to persons 65 and older are caused by falls; 25 percent of these falls are directly related to uncorrected vision problems.

Similarly, although not as coercive as outright refusal to release a prescription, a medical doctor's "referral" of a patient to a supplier of ancillary goods or services, such as a pharmacy, in which the referring doctor has a financial interest, has been the subject of extensive discussion, study, and, ultimately, prohibition as unethical and unlawful. See American Medical Association Code of Ethics, Sect. 8.032; "Stark II," 42 U.S.C. § 1392nn; Physician Self-Referral, N.C. Gen. Stat. §§ 90-405 et seq.

When first addressing self-referral in 1986, the American Medical Association's Council on Ethical and Judicial Affairs recognized that there are inherent conflicts in fee-for-service medicine, and reminded physicians that the practice of medicine is unique and physicians are expected to put their patients' interest first. "Thus, when a physician's financial interest may conflict with the best interest of the patient, *it is assumed that the physician will not take advantage of the patient*." Reported in Council Report, "Conflicts of Interest," Council on Ethical and Judicial Affairs, American Medical Association, Journal of the American Medical Association, Vol. 267, No. 17, May 6, 1992, p. 2366 (emphasis added).

(footnote continued from preceding page)

medicines. However, veterinarians may not lawfully use their monopoly over prescriptions for gaining a competitive advantage in another market, such as the market for veterinary medicines. See Eastman Kodak v. Image Technology Services, 112 S.Ct. 2072, 119 L.Ed. 2d 265 (1992) (monopoly over copier parts cannot be used to exclude competitors, and gain competitive advantage, in market for copier servicing); United States v. Griffith, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948) (exhibitors cannot use their monopoly over theaters in several geographical areas to acquire exclusive license to exhibit films in geographic areas where exhibitors lacked monopoly power).

However, after incrementally tightening its self-referral standards over the years, reports of abuses persisted, and the Council finally determined that:

> it is necessary to strengthen its opinion on self-referral. It believes that physicians in general can be trusted to deal appropriately with the conflicts presented by self-referral. But anecdotes of excessive profit and utilization have been widespread. In this environment, the Council believes that the issue of self-referral is a part of the larger issue of physicians' commitment to professionalism....At the heart of the Council's view of this issue is its conviction that, however others may see the profession, physicians are not simply business people with high standards. Physicians are engaged in the special calling of healing, and, in that calling, they are the fiduciaries of their patients. They have different and higher duties than even the most ethical businessperson. This is the teaching of the Hippocratic oath and of the great modern teachers of ethical behavior. There are some activities involving their patients that physicians should avoid whether or not there is evidence of abuse.

Id., pp. 2367-2368.

In summary, this office has three overlapping concerns about these practices of some veterinarians. The first focuses on medically unjustified restraint of competition in the market for veterinary medicines. The second is directed to the ethics of these anticompetitive practices that not only place the veterinarian's commercial interest in direct conflict with the animal owner's, but that may also undermine the veterinarian's professional purpose – to promote animals' health – by foreseeably leading some owners to delay or forego veterinary treatment of their animals. And the third, reflected by the complaints both of our agencies have received, focuses on the damage these practices have on the public's perception of veterinarians' professionalism.

We are aware that the Board has previously alerted veterinarians that attorneys general from a number of states have advised that "the veterinarian may have no legally defensible ground for withholding the prescription so as to have it filled at his or her own facility." President's Letter, May 24, 1994, pp. 2-3. However, the complaints received by this office concern conduct after that date. We therefore request that the Board consider promulgating a rule, under its authority to regulate the conduct of veterinarians, that protects animal owners in their dealings with veterinarians, while equally promoting medically beneficial, ethical and highly professional policies of veterinarians.

Thank you for considering our concerns about these practices. I look forward to meeting with you and the Board in a few weeks.

Yours very truly,

K. D. Sturgis
Assistant Attorney General

Encl.