



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 27 1997

Dee Hartzog, Esquire
Weintraub, Genshlea & Sproul
400 Capitol Mall, 11th Floor
Sacramento, CA 95814

Dear Ms. Hartzog:

This letter responds to your request on behalf of the International Chiropractor's Association of California ("ICAC") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6, regarding ICAC's plans to form a statewide chiropractic contracting organization.

Based on the information provided, we understand that ICAC is a nonprofit professional association, and that the planned chiropractic services network ("ICAC network" or "the network") will be a separate, for-profit firm open to ICAC members who otherwise meet the ICAC network's credentialing criteria.

You have represented that the ICAC network will be a nonexclusive network, with the participating contractors free to contract directly with payers, or to participate in other provider-controlled and non-provider-controlled network organizations, outside the context of the ICAC network and without any requirement of notification to, or approval by, ICAC. Moreover, many of the chiropractors who participate or who are likely to participate in the ICAC network already participate in competing chiropractic networks, and will continue to do so.

ICAC will attempt to limit the ICAC network to no more than 50% of the chiropractors in any relevant geographic market who provide the type of chiropractic services ICAC's network will offer. You have represented that if ICAC learns that its share of the providers who meet that description exceeds 50% in any local relevant market, ICAC will take appropriate action to reduce its membership in that market.

The ICAC network will negotiate maximum fee-for-service rates with each of its network-user clients. Participating

chiropractors will not be permitted to charge more than the negotiated maximum rate, and they must charge only their usual rates if those rates are lower than the negotiated maximum rate. The negotiated rates, therefore, will not result in an increase in the charges of individual participating chiropractors. We would be concerned if the result of your proposal would be to increase the usual rate for chiropractors to the negotiated maximum rate for those chiropractors currently charging rates below the negotiated maximum rate.

Participating chiropractors also will be required to agree to ICAC-established maximum frequency of treatment guidelines that will limit the number of visits and treatments for which a participating chiropractor will be reimbursed at the contract rate (or at their usual rate, if that is lower than the contract rate) for specified diagnoses. Rates of reimbursement will be greatly reduced if those frequency guidelines are exceeded. Aside from those guidelines, ICAC will monitor participating chiropractors' utilization patterns, and it will first warn, and then discontinue the participation of, chiropractors whom it deems to be over-utilizers.

To provide further incentives to its member-chiropractors to achieve cost-reducing utilization controls and other customer benefits, ICAC will establish a "risk pool." That is, ICAC will negotiate cost-saving and performance goals with each of its network customers, and it will withhold 20% of each participating chiropractor's billings, with the proceeds to be divided between ICAC and the customer depending on ICAC's success in achieving those negotiated savings and performance objectives. The withhold will be calculated based on the negotiated rate, or, if lower, the usual rate of the participating chiropractor. Absent the overall network's efficient operation, all or part of the risk pool will not be available to the participating chiropractors for distribution. This will give the network as a whole the incentive to act efficiently.

Any portion of the risk pool that is returned to ICAC will then be divided among its participating chiropractors. The division of the risk pool among the participating chiropractors will be based in part on each chiropractor's contribution to ICAC's success in achieving the desired savings and other performance goals. This will operate to give the participating chiropractors additional incentive to act efficiently within the network.

Based on the information set forth above, it appears that the ICAC network will be a bona fide joint venture in which the participating chiropractors will assume significant financial risk by participating in the fee withhold arrangements described above. See Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy and Analytical

Principles Relating to Health Care and Antitrust at 70-71 (Sept. 27, 1994) ("1994 Joint Enforcement Policy Statements")). Thus, ICAC's proposed provider network will be analyzed pursuant to the rule of reason to determine if the proposed network is likely to be anticompetitive.

The Antitrust Division's rule of reason analysis of such a network focuses on whether the proposed network will create, enhance or facilitate the exercise of market power (i.e., the ability to impose supracompetitive prices or to prevent the formation of competing chiropractic networks). Based on the information available to us at this time, it appears that the proposed network is not likely to be anticompetitive.

ICAC's network will be but one of several competing chiropractic networks, and, as noted above, it appears likely that the ICAC network will be nonexclusive in practice, not just in name. See 1994 Joint Enforcement Policy Statements at 69-70 (listing indicia of non-exclusivity examined by the Agencies). This will allow participating chiropractors to join other networks or compete with the network on an individual basis. We would be concerned if the network, contrary to your representations, proved to be exclusive in practice.

ICAC is unlikely to be successful if it seeks to act anticompetitively. Potential users have told us they could fulfill their need for chiropractic services with just a small number of chiropractors in any relevant local market. Thus, if ICAC attempted to demand noncompetitive terms, it appears likely that a small number of chiropractors would have the ability and incentive to supplant ICAC by offering their services on competitive terms. This could include chiropractors not participating in the ICAC network, chiropractors who do participate in the network (because of the non-exclusivity of the network) and, potentially, chiropractors who do not currently practice in the local market in question. It does not appear that ICAC could effectively discourage member chiropractors (or nonmember chiropractors) from taking such action if ICAC demanded noncompetitive terms. Our investigations in this and other matters involving chiropractors indicate that chiropractors, unlike many physicians, do not depend on other chiropractors to provide or accept referrals, or for access to hospital staff privileges or other hospital perquisites.

It also appears that the ICAC network will offer significant, efficiency-related benefits for its customers. Specifically, potential users with whom we spoke in the course of our investigation explained that they use (or expect to use) chiropractic services in much smaller proportions than other provider services (such as hospital or physician services). It appears from our investigation that a significant body of potential users may be willing to offer chiropractic services to

their enrollees only if they can do so by contracting with a chiropractic network organization that offers the kind of utilization controls and other benefits that will be offered by the ICAC network or similar networks. Therefore, it will be efficient for ICAC to assume, and for all of its user customers to share, the cost of establishing and monitoring a chiropractic provider network.

The proposed joint venture entails the sharing of financial risk (through the risk pool), and it offers the prospect of significant consumer benefits. Furthermore, it does not appear to pose a significant prospect of an anticompetitive outcome. Consequently, the Department has no present intention to challenge ICAC's planned chiropractic network organization. In accordance with our normal practice, however, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest if the ICAC network proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made publicly available immediately. In addition, any supporting data that you have not identified as confidential business information under paragraph 10(c) of the Business Review Procedure also will be made publicly available.

Sincerely,

A handwritten signature in cursive script, reading "Anne K. Bingaman". The signature is written in dark ink and is positioned above the typed name and title.

Anne K. Bingaman
Assistant Attorney General