

**A Doctor and a Lawyer Walk into a Bar:
Moving Beyond Stereotypes**

**Remarks by FTC Chairman Jon Leibowitz
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Good morning. Thank you so much for inviting me to speak today. I would particularly like to thank Dr. Cecil Wilson, the incoming AMA president, and Carol Vargo, who did a wonderful job of coordinating with my office.

So...a doctor and a lawyer, driving toward each other on a remote country road, collide head on. They both get out of their cars and stand by the side of the road to wait for the police. The lawyer, seeing that the doctor is shaken up, offers him a drink out of a hip flask. The doctor accepts and hands the flask back to the lawyer who caps it up and puts it back in his pocket. "Aren't you going to have a drink yourself?" asks the doctor. "Sure," replies the lawyer, "after the police leave."

I am here today to tell you – I am not that lawyer.

I am here today to tell you – no one at the Federal Trade Commission is that lawyer.

Unfortunately, but not surprisingly, too many doctors see us as just that. We know this from comments we receive when we resolve cases involving doctors – most recently the settlement against a group of doctors in Garfield County, Colorado.¹ One doctor accused the FTC of causing a shortage of physicians² – another complained our actions "defy logic"³ – still another told us that our decision "goes beyond socialism, it is a return to serfdom."⁴

The picture painted by these comments is not pretty. By a few doctors – and I am glad it is only a few – we are seen as surreptitious socialists bent on keeping you from charging a fair price for your services – as heartless regulators holding you to outdated antitrust rules that no other health care player has to follow – as fastidious bureaucrats rejecting any change that would allow you to care for patients more efficiently.

¹ Public Comments in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc.* (2010), available at <http://www.ftc.gov/os/comments/roaringfork/index.shtm>.

² Comment of Karen Snell in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc.* (Feb. 4, 2010), available at <http://www.ftc.gov/os/comments/roaringfork/546725-00004.htm>.

³ Comment of Robert Oliver, Plastic Surgery Specialists MD-PC in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc.* (Feb. 4, 2010), available at <http://www.ftc.gov/os/comments/roaringfork/546725-00005.htm>.

⁴ Comment of Samuel Hunter, Advanced Neurosciences Institute in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc.* (Feb. 4, 2010), available at <http://www.ftc.gov/os/comments/roaringfork/546725-00002.htm>.

Step back from those stereotypes, though, and you see that the FTC is, more often than not, on your side – as doctors who care about your patients and as consumers yourselves.

Surreptitious socialists didn't conduct a major law enforcement sweep last year targeting bogus cancer cures – the FTC did.⁵ Heartless regulators didn't set-up the national "Do Not Call" registry that lets you eat your dinner without sales pitches interrupting every bite – the FTC did.⁶ Fastidious bureaucrats aren't pushing Congress to work quickly to fix the Red Flags Rule that has unintentionally swept up countless small businesses – including every doctor, dentist, lawyer, gardener, plumber, and housekeeper who bill customers on a monthly basis – the FTC is.⁷

Let me assure you, we feel your pain on red flags, and we want to fix it. We agree with you that the red flags rule reaches too far. We have delayed enforcement of the rule to give Congress an opportunity to legislate a solution.⁸ As to doctors, I am pleased to announce that the FTC, as part of a stipulation with the AMA, will not enforce the rule against any AMA or state medical society members until the court of appeals resolves the issue. And we call on Congress to do that sooner rather than later; the financial reform legislation moving right now is a perfect opportunity.

One primary way the FTC protects consumers is by enforcing the federal antitrust laws. When competitors get together to fix prices or prevent new forms of competition, that's illegal because it almost always leads to higher prices and fewer choices for consumers. We enforce the antitrust laws whether it is doctors, chiropractors, big pharmaceutical companies, real estate agents, or record companies that are engaged in the anticompetitive practices that harm consumers.

Too often, I believe, our antitrust enforcement actions are portrayed as a barrier to improved care. If there is any stereotype I would like to disabuse you of today – that's the one.

At the FTC, we know that the vast, vast majority of doctors are hard-working professionals – dedicated to their patients, giving back to their communities with free or low cost care, working for a rational and compassionate health care system in the United States. We also believe that the nation's antitrust laws allow – even encourage – doctors to collaborate in ways that lower costs and improve patient care.

⁵ FTC News Release, FTC Sweep Stops Peddlers of Bogus Cancer Cures (Sept. 18, 2008), *available at* <http://www.ftc.gov/opa/2008/09/boguscures.shtml>.

⁶ Fed. Trade Comm'n, National Do Not Call Registry, <http://www.ftc.gov/donotcall> (last visited June 7, 2010).

⁷ FTC News Release, FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule (May 28, 2010), *available at* <http://www.ftc.gov/opa/2010/05/redflags.shtml>.

⁸ *Id.*

Take the case of Grand Junction, Colorado. Back in the mid-1990s, the FTC found that physicians in Grand Junction were charging prices significantly higher than elsewhere in the state.⁹ Almost all of the doctors in Grand Junction had agreed that a single organization would bargain with health insurance plans on behalf of the entire group.¹⁰ That meant that the plans had to pay the doctors whatever fees the organization demanded because the health plans had almost nowhere else to turn for physician services in the county.¹¹ And, the doctors' agreements kept new, innovative health plans from entering the Grand Junction area.¹²

The FTC challenged the conduct, and the case settled before it went to trial; the Commission and the doctors agreed to an order that did two things: stopped the anticompetitive pricing practices and allowed doctors to collaborate when doing so could lead to cost savings and better health care for patients.¹³

And the doctors in Grand Junction did exactly that. They worked together, not to fix prices, but to reduce unnecessary medical procedures and to build a community-wide electronic record system that shares office notes, test results, and hospital data for patients.¹⁴ Today, Grand Junction is cited as one of the places in the United States with the lowest cost and highest quality health care.¹⁵

Who knows whether the doctors in Grand Junction would have turned their collaboration over prices into cooperation to improve the quality and affordability of care if the FTC hadn't stepped in. But we do know that the Grand Junction case argues against stereotypes. We see doctors cooperating to serve their patients more efficiently and at a lower cost – and we see the FTC allowing, even encouraging, collaboration.

Step back from your stereotypes and you find we agree more often than not.

We agree that the same rules of competition should apply to insurers as apply to everyone else; the AMA supports eliminating the antitrust exemption for insurers, and so do I.

We agree that the Medicare reimbursement formula that asks doctors alone to fix the nationwide problem of entitlement spending is flawed and must be reformed.

⁹ See *In the Matter of Mesa County Physicians Independent Practice Association, Inc.*, 127 F.T.C. 564 (1999) (consent order, etc.) available at <http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=564>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Atul Gawande, *The Cost Conundrum, What a Texas town can teach us about health care*, THE NEW YORKER, June 1, 2009, available at http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande?currentPage=all#ixzz0qGnj0fe2.

¹⁵ *Id.*

We agree that the pernicious practice of “pay-for-delay” must end.¹⁶ This is when brand name pharmaceutical companies sue generic manufacturers for patent infringement – and then turn right around and settle the case by paying off the generic manufacturers not to sell their products.¹⁷ These deals are win-win for the drug companies but lose-lose for your patients. The big pharmaceutical companies win because they can continue to charge monopoly prices for their drugs; the generic companies win because they collect a big, fat paycheck for sitting on the sidelines; but consumers – your patients – lose because they pay unnecessarily high prices for their necessary medicines. The FTC estimates these settlements are costing consumers \$3.5 billion a year, as they deny patient access to far less expensive but equally effective drugs.¹⁸ By speaking out against these unsavory sweetheart deals, you are defending competition and your patients. And, by the way, I think we are going to win this battle.

The recently enacted health care bill – and I congratulate the AMA leadership on your involvement in its passage – gives us much more on which we can agree – and more than that, on which we can work together going forward. Let me touch on two such issues: health information technology, or HIT, and clinical integration. These are two areas that have come up before the FTC and that you have addressed in your recent publication: *Competing in the marketplace: How physicians can improve quality and increase their value in the health care market through medical practice integration*.¹⁹

That report discusses how doctors are using HIT tools to track individual patients as well as patient populations, improve the flow of work in clinics, and help patients follow doctors’ orders. At the FTC, we recognize that HIT systems can be an important tool to help improve the quality of patient care and to lower costs. Indeed, recently the FTC looked at three different collaborations that use sophisticated HIT systems. We issued three favorable advisory opinions, and in each matter, recognized the efforts to benefit patients with better quality care delivered more efficiently.²⁰

¹⁶ FTC News Release, FTC Chairman, Members of Congress Call for Legislation to End Sweetheart “Pay-for-Delay” Deals That Keep Generic Drugs Off the Market (Jan. 13, 2010), available at <http://www.ftc.gov/opa/2010/01/payfordelay.shtm>.

¹⁷ FED. TRADE COMM’N, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS (2010), available at <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.

¹⁸ *Id.*

¹⁹ AMERICAN MEDICAL ASSOCIATION, COMPETING IN THE MARKETPLACE: HOW PHYSICIANS CAN IMPROVE QUALITY AND INCREASE THEIR VALUE IN THE HEALTH CARE MARKET THROUGH MEDICAL PRACTICE INTEGRATION (2d ed. 2008), available at <http://www.ama-assn.org/ama1/pub/upload/mm/368/competing-in-market.pdf>.

²⁰ See Letter from Jeffrey W. Brennan, Assistant Director, Bureau of Competition, Federal Trade Commission, to John J. Miles (February 19, 2002) [hereinafter *MedSouth, Inc.*], available at <http://www.ftc.gov/bc/adops/medsouth.htm>; Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Federal Trade Commission, to Christi J. Braun and John J. Miles (September 17, 2007) [hereinafter *GRIPA*], available at <http://www.ftc.gov/bc/adops/gripa.pdf>; Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Federal Trade Commission, to Christi J. Braun (April 13, 2009) [hereinafter *TriState Health Partners, Inc.*], available at <http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf>.

That is not to say HIT is a free pass to fix prices. And it does raise issues about privacy and data security. But this as an area where we can work together: the FTC with our expertise in protecting consumer data – the AMA with your knowledge of what data doctors need to produce more efficient and better patient care.²¹

Another matter on which we can work together is clinical integration, a framework for otherwise competing physicians to collaborate to reduce costs and provide improved health care. At the FTC, we get involved because the providers in these arrangements frequently use joint contracting with health insurers or other payers.

Some of you may recall that, in 1996, the FTC and the Department of Justice revised the Statement of Antitrust Enforcement Policy, or “the Statements,” on physician network joint ventures to recognize clinical integration specifically.²² This acknowledgement was in response to concerns raised by the AMA and to the fact that clinical integration could allow health care providers to achieve efficiencies that none of these providers could achieve alone. The update in 1996 discussed the possibility of legitimate clinical integration in the absence of financial risk sharing and stated that the agencies would be open to consideration of other, as-yet unidentified, forms of integration.

The AMA report highlights this, and I quote: “Physicians may be unaware of the flexibility permitted by the numerous lawful collaboration options available to them,”²³ and “Physicians can choose from an almost infinite range of integration options.”²⁴

Let me assure you: the FTC agrees. As the 1996 revisions reflect, what matters is substance.²⁵

The AMA report also offers excellent advice to those of you who are considering joint venture arrangements. Quoting from the report again:

“Physicians should keep in mind ... that their primary motivation for integrating should be to bring to market a valuable and competitive product that they could not otherwise produce acting independently. Physicians should develop their models and only then determine whether their proposal needs some tweaking or modifications because of the antitrust laws. Physicians should not view the

²¹ The Commission has issued the Health Breach Notification Rule. This rule requires certain businesses not covered by the Health Insurance Portability and Accountability Act (HIPAA) – such as vendors of personal health records – to notify affected consumers, the FTC, and in some cases, the media, after a breach of unsecured personal health information. FTC enforcement of the rule began on February 22, 2010. See 16 C.F.R. § 318.1 (2009).

²² U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996) [hereinafter *Statements*], available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>.

²³ American Medical Association, *supra* note 19, at 1.

²⁴ *Id.* at 8.

²⁵ It is not the quantity but the quality of the integration that matters. Antitrust law does not pick winners and losers in the marketplace.

antitrust laws as a bar that prohibits them from creating innovative health care products that enhance quality and lower cost.”²⁶

We could not say it better. Moreover, the FTC’s past actions in bringing cases and in providing guidance regarding joint ventures in the health care industry have been consistent with these principles.

When a group of providers band together to eliminate competition, reduce choices, and increase prices to consumers, we try to stop them. But, when we see a bona fide joint venture that is intended – and has the potential – to improve care and lower its cost, we won’t stand in the way. The questions we ask are: What are the likely benefits of the collaboration? Are the joint negotiations reasonably necessary to achieve those benefits? And will the combined group be so large that it can raise prices?²⁷

Our role is not merely reactive. We also provide guidance, known as advisory opinions. You can come to the FTC with a proposed collaboration. And, our staff will work with you, analyze the proposal, and where feasible, provide an opinion on whether the staff would recommend an enforcement action if you were to implement the proposal.²⁸

Now let me turn to the future and identify some areas of common interest and, I hope, agreement. The new health care reform law promotes innovative payment structures that should improve the quality and affordability of patient care. The law addresses the “bundled payments” issue by mandating both Medicaid and Medicare projects which will look at ways to pay when cases involve both hospitalization and related care for a particular diagnosis.^{29, 30} The FTC is particularly interested in these projects. In fact, in 1996, we identified bundling as a way a network of competing physicians might share substantial financial risk.³¹

Moving to another provider network issue, the law establishes pilot programs for Medicare called “accountable care organizations” or ACOs as possible devices to

²⁶ American Medical Association, *supra* note 19, at 4.

²⁷ In legal terms, does the collaboration have the potential for procompetitive benefits, are the joint negotiations ancillary to that achieving those benefits, and will the entity have market power? See *Statements*, *supra* note 22; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

²⁸ In some circumstances, the Commission itself will issue the opinion. See Staff of the Health Care Div., Bureau of Competition, Fed. Trade Comm’n, Guidance From Staff of the Bureau of Competition’s Health Care Division on Requesting and Obtaining an Advisory Opinion (2010), available at <http://www.ftc.gov/bc/healthcare/industryguide/adv-opinionguidance.pdf>.

²⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2704 (2010) (establishing a demonstration project under Medicaid to evaluate integrated care around a hospitalization).

³⁰ *Id.* at § 3023 (establishing the National Pilot Program on Payment Bundling).

³¹ See *Statements*, *supra* note 22.

improve quality and lower the cost of health care.³² Each ACO will be responsible for both the cost and the quality of care for at least 5,000 patients. ACOs will share with Medicare any savings that they generate because of their efficiency in meeting HHS performance targets. While the details of the ACO program are not yet available, so long as the government purchases the services and unilaterally sets payment levels and terms, there won't be an antitrust issue.

Looking to the future, though, there may be questions. ACOs are in the very early stages of formation and evaluation, but there is already talk of their moving into the private sector. Such a transition could indeed raise competition issues, and we want to work with you going forward.

These are few of the issues that deserve attention. So I am pleased to announce that, in the fall, we will hold a public workshop on competition policy, payment reform, and the new models for delivering high-quality, cost-effective health care. We will focus on how ACOs could affect competition among commercial payers and provide consumers with access to affordable health care services.

We hope that many of you will join us at the workshop to share your expertise and join the discussion because – contrary to stereotype – the FTC would much prefer conversation to collision.

I hope today I have been able to clear up exactly who we are at the FTC. Do we enforce antitrust laws? Absolutely. If you fix prices – that is, if independent doctors jointly negotiate the fees they charge – we will make you stop. But if you join together to improve patient care and lower costs, not only will we leave you alone, we'll applaud you. And we'll do everything we can to help you put together a plan that avoids antitrust pitfalls.

To conclude my remarks today – a doctor and a lawyer walk into a bar. The bartender says, "What is this, some sort of joke?"

No, it's not a joke. Whether it is walking into a bar – or sitting down at a workshop – we need to move beyond stereotypes and toward common ground – our common desire to see a thriving profession for doctors, patients efficiently treated with high-quality care, and our nation moving closer to the goal of affordable quality health care for everyone.

³² Patient Protection and Affordable Care Act § 3022 (establishing the Medicare Shared Savings Program).