



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

April 17, 1997

Gregory J. Naclerio, Esq.
Ruskin, Moscou, Evans & Faltischek, P.C.
170 Old Country Road
Mineola, New York 11501-4366

Dear Mr. Naclerio:

This is in response to your letter of October 3, 1996 in which you ask for our opinion concerning the legality of several hypotheticals related to payments by physicians' professional corporations ("P.C.") to management services organizations.

In the first hypothetical you describe, the management company receives a per visit fee for each visit made to the P.C. This is legally unacceptable because the management company is involved in marketing and other management activities for the P.C. The non-licensee can be paid only for the fair market value of the services provided in an arms-length transaction. A transaction cannot be characterized as arms-length when the non-licensed party is responsible for generating the number of patients seen and provides the professional corporation with everything necessary for the practice from office space and medical equipment to technical and administrative support personnel. In addition, a per visit fee cannot be said always to reflect fair market value for management company services which may vary for each visit.

The second hypothetical involves the management company charging the P.C. its actual cost of providing services and an additional "fair market mark-up." Again, the non-licensee can be paid only for the fair market value of the services provided in an arms-length transaction. We cannot offer prospective advice as to what range of fees for management services would or would not constitute a reasonable fair market fee.

In your third, and final, hypothetical, the P.C. contracts with a billing company which is paid a percentage of the amount it collects. You state that you have two conflicting opinions from the department regarding this issue. This office is in receipt of separate correspondence from Ellen Kessler, Esq. of your firm dated October 29, 1996 requesting clarification of

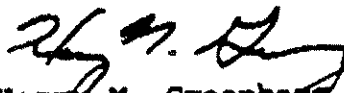
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the department's position and annexing four letters -- dated September 24, 1992, May 7, 1992, November 5, 1992 and October 10, 1996 -- on the basis of which your firm concludes the department has issued conflicting opinions.

On this issue, we maintain that any compensation arrangement which is based upon a percentage of physicians' gross revenues or profits, or net revenues or profits, of their practice or a discrete portion thereof, constitutes illegal fee-splitting unless expressly authorized by statute. The compensation of a person or company based upon a percentage of the total fees billed and/or collected clearly constitutes such an illegal arrangement when the billing company is providing billing services for all or a portion of a physician's practice. The only percentage compensation arrangement which this office recognizes as being outside the scope of the fee-splitting prohibition is the traditional percentage compensation arrangement entered into between physicians and collection agencies attempting to collect past due bills which would otherwise be uncollectible. In such cases the actual fee paid would have a remote connection, if any at all, to the revenues or profits generated by the practice or any discrete portion of the practice. Thus, the percentage fees paid to such agencies would not give the agencies an interest in the revenues of the physician's practice, create the appearance of an ownership interest in a non-licensee, serve as a basis for a non-licensee to attempt to influence the internal workings of the practice, or establish any other ill the statute was intended to prevent. The same cannot be said of percentage compensation arrangements between billing companies and physicians when the billing company is performing billing services for all or a specific part of a physician's practice. Further, nothing in the statute permits the characterization of such arrangements as anything but an illegal fee-splitting arrangement.

I trust this letter adequately addresses the questions you have raised.

Very truly yours,


Henry M. Greenberg
General Counsel