



# STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Mark R. Chasen, M.D., M.P.P., M.P.H.  
Commissioner

Paula Wilson  
Executive Deputy Commissioner

June 13, 1994

Dear

This is in response to your letter to me of April 5, 1994 and our follow up meeting of April 11, 1994, in which you requested an opinion regarding the legality of a proposed arrangement between your client, a business corporation, and various medical professional corporations ("P.C.'s") in this state. We believe the proposed arrangement would violate various provisions of §6530 of the Education Law for the reasons set forth below.

According to your letter, your client would provide the P.C.'s with the following services:

1. fully furnished office space;
2. diagnostic equipment;
3. technicians;
4. support personnel to confirm appointments, transcribe interpretations, and prepare reports;
5. general office management;
6. marketing the value of the types of mobile diagnostic testing provided by the P.C.'s and the qualifications of the P.C.'s to provide these services to the general medical and chiropractic community.

In our meeting you stated that your client solicits physicians to perform the above mobile diagnostic testing services. Patient referrals generally come from other physicians who rent office space to the physician P.C.'s performing the above testing. You also mentioned that billing for all testing is done by another company owned by the same shareholders who own the above business corporation, for which it charges a fee of 5-7% of all billings it does for each P.C.

While you refer to the fee paid to your client for each

type of test performed as a "fixed usage fee" based upon the cost of the equipment used, the skill of the technician conducting the test, the time required to perform the test and transcribe the physician's interpretation, and the fixed cost of providing the services, your letter also acknowledges that the fees are also comprised of a mark up of as little as 6¢ to as much as 25¢, depending on what your client is able to convince a particular P.C. to pay. The P.C., in turn, charges fees to the patient ranging from \$500 to \$2400.00, depending upon the type of testing performed.

### Potential Statutory Violations

1. ~~Section 18B(1)(b)~~ - This paragraph prohibits "[d]irectly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a patient or in connection with the performance of professional services." We believe this prohibition is raised by two separate aspects of the proposed arrangement.

~~Section 18B(1)(b) prohibits a licensee from receiving any fee or other consideration to or from a third party for the referral of a patient or in connection with the performance of professional services.~~  
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In addition, to the extent that your client bargains with referring physicians to rent office space from them for the P.C.'s in exchange for obtaining patient referrals for the P.C.'s, the referring physicians also would be violating this prohibition.

2. ~~Section 18B(1)(c)~~ prohibits "[p]ermitting any person to share in the fees for professional services other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor, or consultant authorized to practice medicine or a legally authorized trainee practicing under the supervision of a licensee." The prohibition includes "any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice, except as otherwise provided by law with respect to a facility licensed pursuant to article 28 of the public health law or article 13 of the mental hygiene law."

As we stated in a recent opinion letter regarding proposed arrangements which appear similar to the one being proposed by your client (a copy of which was provided to you prior to the date of our meeting):

"Any arrangement or agreement between a licensee and a non-licensee, including individuals who may be licensed in different

professions, under which the licensee is obligated to pay for services, goods, or facilities provided by the non-licensee, and the amount of the payment is related directly or indirectly to the licensee's income from the practice constitutes misconduct by the licensee (United Calendar Manufacturing v. Huang, 94 AD2d 176 (2d Dept 1983)). This means that payment for goods and services to a non-licensee cannot be based upon a direct percentage of the professional fee charged and cannot be based upon any other formulation, which while not a direct percentage, amounts to the same thing.... The non-licensee can be paid only for the fair market value of the services provided in an arms length transaction." Letter from P. Millock, Esq. to A. Reider, Esq., dated March 22, 1994.

~~In the instant situation, the fee paid to your client would not be paid at fair market value for the services provided. The fee would be provided on the basis of negotiated fees that can vary from practitioner to practitioner. While the base fee for each type of test is a flat fee, a negotiated percentage is always added to the flat fee. The arrangement also cannot be characterized as an "arms length" transaction since your client is responsible for generating the number of patients seen and provides the P.C.'s with everything necessary for them to conduct the testing from office space and medical equipment to technical and administrative support personnel.~~

In addition, section 6530(19) also prohibits the other corporation owned by your client's shareholders from receiving a percentage of the billings as a fee. Enclosed are copies of previous opinions issued by this office on that issue.

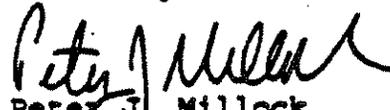
3. Public Health Law §2801-a - Under the proposed arrangement, your client would control the solicitation of patient referrals, the size and location of the office, the purchase and maintenance of equipment, the hiring of administrative and technical staff, and the fees to be paid to your client by the physician P.C.'s for providing all of these services. In effect, such a business can be viewed as a de facto diagnostic and treatment center. Criteria used by this Department in determining whether a diagnostic and treatment center is being operated are set forth in 10 NYCRR §600.8, a copy of which is attached. Operation of a diagnostic and treatment center without establishment approval from the Department's Public Health Council constitutes a violation of §2801-a of the Public Health Law.

4. Section 6530(35) of the Education Law prohibits the "[o]rdering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient." Inherent in a situation in which the "marketer" of health services, the referring physician, and the interpreting physician all have an incentive to ensure that a high volume of medical testing is maintained is the possibility of ordering and performing excessive and/or unwarranted tests. Consequently, the potential for violation of this provision exists in the instant situation.

5. Education Law §6530(17) prohibits "[e]xercising undue influence on the patient, including the promotion of the sale of services, goods, appliances, or drugs in such a manner as to exploit the patient for the financial gain of the licensee or of a third party." For the same reasons discussed under point 4, the potential for violation of this provision also exists under the proposed arrangement. To the extent that physicians participate in an arrangement which promotes unnecessary testing, they are violating this prohibition.

I trust that the above discussion provides you with sufficient information for you to advise your client.

Sincerely,



Peter J. Millock  
General Counsel

Enclosures