STATE OF NEW YORK
DEPARTMENT OF HEALTH
Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

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

September 3, 1992

Dear :

This is in reply to your May 4, 1992 letter concerning the establishment of diagnostic ultrasound business in New York State. proposes to provide the equipment and technologists to perform diagnostic ultrasound testing services. The tests would be ordered by physicians who are neither employees nor owners of . The test results would be interpreted by either the ordering physician or a specialist, neither of whom would be employed by or hold any ownership position in . further proposes to submit "global" bills that include both the professional and technical portions of the diagnostic ultrasound testing, acting as a billing agent for the professional. You state that would not retain any portion of the professional reimbursement. and the physicians interpreting the results would agree contractually that the latter will pay the former a negotiated fee or a percentage share return for the billing services. You state that the fee would "not be based on any matrix for volume of referrals and that the fee, unless the reimbursement level is changed by the third party, would be static."

Education Law (Educ. L.) §6530(19) defines professional misconduct applicable to physicians as including:

> "Permitting 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. This prohibition shall include 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 twenty-eight of the public health law or article 13 of the mental hygiene law."

Further, Educ. L. §6531 provides that no physician "may directly or indirectly request, receive or participate in the division, transference, assignment, rebate, splitting, or refunding of a fee for...furnishing a professional care or service, including...any goods, services, or supplies prescribed for medical diagnosis, care, or treatment...." (emphasis added).

Certain professional subcontractor relationships are permissible under Educ. L. §6530. A physician can contract with a billing service acting as a conduit, to bill patients and to receive payments, for a flat fee unrelated to the income which the physician derives from charging the patients. However, the description of the relationship between and the interpreting physician in your May 4, 1992 letter indicates that would be more than a conduit for billing. The situation is similar to that which existed in Katz v. Zuckermann, 126 Misc. 2d 135 (Queens Co. Sup. Ct., 1984) wherein EEG and ECHO testing technicians had an agreement with a physician to divide on a 50-50 basis money received for all tests and expenses for maintenance of the equipment and office facilities. The Supreme Court concluded that the arrangement constituted fee-splitting.

> "At bar, plaintiffs did not share in the entire proceeds of the doctor's professional practice. Rather they received a percentage of the fee charged by the doctor for the services that they had performed on the patient. However, notwithstanding the fact that plaintiffs performed valuable services, their agreement with Dr. Zuckermann, whether written or oral constitute fee splitting and as such, the contract is void and unenforceable." supra, at 138.

Like the situation in Katz v. Zuckermann, supra, the proposed arrangement between and the treating and/or consultant

physicians involves the division of a fee paid by the patient for the rendering of professional care. Such an arrangement would in our opinion constitute professional misconduct.

Sincerely,

Peter J. Millock
General Counsel