



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

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Ms. Syma Levine

Dear Ms. Levine:

This is in response to your telephone call yesterday raising a question about physician referrals in New York.

Making a referral for a fee is professional misconduct for physicians under the Education Law. Education Law § 6530(18) 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." Education Law § 6530(18) also prohibits practitioners from receiving compensation for the brokering of professional services rendered by health care providers who are neither members nor employees of the practice.

Fee-splitting is also professional misconduct. Education Law § 6530(19) prohibits "[p]ermitt[ing] 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 thirteen of the mental hygiene law." Likewise, under Education Law § 6531, it is generally professional misconduct if a physician has "directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting, or refunding of a fee for, or has directly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity, in connection with the furnishing of professional care or service, including . . . any . . . goods, services, or supplies prescribed for medical diagnosis, care, or treatment under [the Education Law]."

Any time a physician financially benefits from a referral, there is also a serious danger that the physician would be "[e]xercising undue influence on the patient" by making an improper referral, which is prohibited by Education Law § 6530(17), or "[o]rdering . . . excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient," which is

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prohibited by Education Law § 6530(35).

Physicians or business entities may not be providing medical or health services as practitioners of medicine engaged in private practice if they create business arrangements under which they profit from the provision of health services by others. Rather, these arrangements could make them a facility that requires establishment approval from the Department's Public Health Council under article 28 of the Public Health Law ("PHL"). For example, the arrangement could create a de facto diagnostic and treatment center under PHL § 2801-a. The Department uses the criteria set forth in 10 NYCRR § 600.8 to determine whether a diagnostic and treatment center is being operated.

New York also has a statutory prohibition (sometimes referred to as New York's "Stark" law) on self-referrals, that is, referrals to a health care provider with which the referring practitioner has a financial relationship (PHL Article 2, Title II-D, §§ 238 to 238-e, 10 NYCRR Part 34, Subpart 34-1). The general rule in PHL § 238-a and 10 NYCRR § 34-1.3 is that where a practitioner or immediate family member has a financial relationship with a health care provider, the practitioner may not make a referral to that health care provider for clinical laboratory, pharmacy, radiation therapy, X-ray or imaging or physical therapy services. Self-referrals for other health services may also be prohibited unless the referring practitioner makes certain disclosures required by PHL § 238-d and 10 NYCRR § 34-1.5.

Referrals to clinical laboratories are also specifically regulated by PHL Article 5, Title VI (PHL §§ 585-588) and 10 NYCRR Part 34, Subpart 34-2. Under New York's direct billing law (PHL § 586; see also, 10 NYCRR § 34-2.13), clinical laboratories cannot generally bill a referring physician; they have to bill the test subject or other enumerated entities who may pay on behalf of the test subject, such as an insurance company, health maintenance organization or an industrial firm for its own employees. Health services purveyors and the clinical laboratories to which they make referrals, may also be committing prohibited practices under PHL § 587 and 10 NYCRR §§ 34-2.3, 34-2.4, which generally disallow a clinical laboratory from giving any consideration to a health services purveyor for a referral of specimens for the performance of clinical laboratory services.

Also, it is illegal for a provider in the New York State Medicaid program to give or receive consideration for the referral of Medicaid services (Social Services Law § 366-d).

In addition, medical referral service businesses are prohibited under PHL Article 45, under which "[n]o person, firm, partnership, association or corporation, or agent or employee thereof, shall engage in for profit any business or service which in whole or in part includes the referral or recommendation of persons to a physician, dentist, hospital, health related facility, or dispensary for any form of medical or dental care or treatment of any ailment or physical condition" (PHL § 4501).

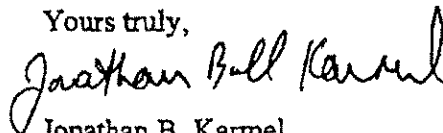
If you need to know how the Department would apply a specific New York State statute or regulation to a specific factual situation, you may send your question to us in writing. Please (1) quote and cite the statute or regulation you need interpreted and (2) describe the specific

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factual situation in detail.

We do not interpret the federal "anti-kickback" criminal statute (42 USC § 1320a-7b(b)), under which whoever knowingly and willfully solicits, receives, offers or pays any remuneration, directly or indirectly, overtly or covertly, in cash or in kind in return for referring an individual to a person for the furnishing, purchasing, leasing or ordering of any good, facility, service or item for which payment may be made under a federal health care program, may be guilty of a felony (but see also, 42 CFR § 1001.952). Likewise, we do not interpret the federal self-referral statute, the Ethics in Patient Referrals Act or "Stark" law (42 USC §§ 1395nn, 1396b(s), 42 CFR Part 411, Subpart J), under which a physician generally may not make a referral to an entity for the furnishing of certain designated health services for which payment could be made under Medicare or Medicaid if the physician has a financial relationship with that entity.

Yours truly,



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Bureau of House Counsel