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
Paula Wilson
Executive Deputy Commissioner

March 22, 1994

Dear

This is in response to your letter to me of December 30, 1993 in which you ask whether particular payment methodologies used by a professional corporation ("P.C.") to pay a business corporation for services rendered would violate §6530(19) of the Education Law. We believe that the first two proposed methodologies clearly would constitute impermissible fee splitting under that statute and that the third proposed methodology also probably would violate that subdivision for the reasons discussed below.

The business corporation in question provides space, equipment, and management services to the physician owned P.C. In addition, the business corporation also services the diagnostic equipment, provides supplies, pays the utilities, provides housekeeping and janitorial services and clerical and non-medical technical personnel.

1. Under the first proposal, the physicians would bill for the professional component ("reading fees"), retain 10% of the amount received, and share any profit with the business corporation on a 50/50 basis.

Education Law §6530(19) prohibits arrangements, contractual or otherwise, in which a professional licensee arranges or agrees to pay for goods or services provided by an individual or entity not licensed to practice the same profession in which the amount paid is directly or indirectly related to the income or receipts which the licensee derives from the professional services provided. (Artacho v. Golding, 133 AD2d 596 (2d Dept. 1987); Baliotti v. Walkes, 115 AD2d 581 (2d Dept. 1985), app. dismissed, 68 NY2d 664; Okereke v. State, 129 AD2d 373 (3d Dept. 1987); Katz v. Zuckerman, 119 AD2d 732; Sachs v. Saloshin, 138 AD2d 586 (2d Dept. 1988)).

In the above hypothetical, the amount to be paid to the entity not licensed to practice medicine would be directly related to the income derived from the professional services provided and would therefore be prohibited.

2. Under the second proposal the business corporation would receive 50% of the physicians' reading fees. This would clearly constitute illegal fee-splitting for the reasons discussed with regard to your first hypothetical.

3. The third proposal is described only as the payment of a "fixed" fee for each service rendered although the amount would vary by as much as almost $200 depending upon the procedure performed. We find this description too vague to comment upon specifically, but we can provide you with the general parameters within which any payment arrangement should be evaluated.

Any arrangement or agreement between a licensee and 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. We question whether that, in fact, is what would be occurring under your third proposal. The non-licensee can be paid only for the fair market value of the services provided in an arms-length transaction.

Not every situation in which payments approximate a percentage of the fee for professional services, however, constitutes unprofessional conduct. For example, if the unlicensed provider of goods or services charges "X" for each item provided and the licensee's fee for such services approximates a multiple of "X", it would not constitute unprofessional conduct if it can be demonstrated that the amount charged by the unlicensed provider is equal to the providers' cost plus some established profit margin which the provider wishes to receive from the goods or services

provided or rendered to the licensee. In such situation the parties engaged in such an arrangement will have the burden of demonstrating that the fees charged are not calculated on a percentage of the fee for professional services. The parties would also have to demonstrate that the "X" amount is for not more than fair market value of the use of the equipment and/or technical services rendered.

I trust that you will advise your clients accordingly.

Sincerely,

Peter J. Miller

Peter J. Miller
General Counsel