

Department of Professional Regulation
AGENCY CLERK

DEPARTMENT OF PROFESSIONAL REGULATION
BEFORE THE BOARD OF MEDICINE

IN RE: The Petition for
Declaratory Statement of:
ALAN ALTMAN, M.D.

CLERK *[Signature]*
DATE 7-25-89

FINAL ORDER

THIS CAUSE came before the Board of Medicine (hereinafter, "Board"), pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on February 5, 1989, and April 9, 1989, for the purpose of considering the Petition for Declaratory Statement filed by Alan Altman (hereinafter "Petitioner"). No person or entity sought to intervene as a party.

Having considered the Petition, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner is licensed to practice medicine in the State of Florida pursuant to Chapter 458, and currently maintains an office at 5959 North West 7th Street, Miami, Florida 33126.
2. Petitioner is employed by a corporation which directly compensates him for his services. The corporation then bills patients or their insurance companies for services rendered by him and receives payments from the patient or insurance company directly. Petitioner asserts that many of the patients he treats have health insurance coverage. While the health insurance policy may vary greatly in a number of ways, he asserts they frequently have two features in common. First, many of these policies set their levels of reimbursement based upon the physician's "usual" or "customary" fee. Secondly, many of the policies pay only a fixed percentage of the "usual" or "customary" fee, such as 80%. The percent not paid by the insurance company is referred to as the "co-payment" amount, which amount is the responsibility of the insured to pay.

3. The Petitioner states that many physicians have instituted a practice commonly called as "waiver of co-payment" or "fee forgiveness." This is a practice whereby the physician performs a given service and submits a claim to the patient's insurance company for his "usual" or "customary" fee, but forgives or waives the amount which is to be contributed by the patient as co-payment for the service. For example, if the physician's "usual" fee for a given procedure is \$100.00 and the insurer will pay 80% of the physician's usual fee, the physician bills the insurer for \$100.00 for the procedure performed, accepts the \$80.00 from the insurer as full payment, and forgives or waives the patient's \$20.00 co-payment obligation.

4. Petitioner asserts that this practice is used by some physicians as a marketing technique to attract patients who are interested in the fact that they will be relieved of their obligation to pay the co-payment amount. He also asserts that this practice is also used for patients the physician knows will be unable to afford the co-payment. The corporation for which Petitioner works is considering offering the same practice to patients in order to avoid a competitive disadvantage.

5. Petitioner is concerned that the practice of waiver of co-payment or fee forgiveness may be considered a violation of the Sections of the Medical Practice Act cited below and requests a Declaratory Statement from the Board as to whether the practice outlined above constitutes filing a false report or making a deceptive, untrue, or fraudulent representation, since the physician bills the insurance company one amount, but in actuality is willing to accept a lesser amount as payment in full. Further, he asks whether the practice constitutes a kickback, rebate, or split-fee arrangement between the physician and the patient in exchange for the patient's business and whether it constitutes making deceptive, untrue, or fraudulent misrepresentations or employing a trick or scheme in the practice of medicine.

6. The Petition was noticed by the Board of Medicine in the January 13, 1989, issue of the Florida Administrative Weekly (Vol. 15, No. 2, Pg. 128).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code. The Petition for Declaratory Statement filed by Petitioner is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code.

2. The Board finds that the Petitioner has the requisite interest to receive the Declaratory Statement from the Board in that he is a licensed medical doctor who proposes a stated course of action and requests an interpretation of specified provisions in the law which relate to that stated course of action.

3. Petitioner specifically asks for interpretations of Sections 458.331(1)(h), 458.331(1)(i), and 458.331(1)(k), Florida Statutes. Those provisions provide, in pertinent part, as follows:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

(h) Making or filing a report which the licensee knows to be false. . . . Such reports or returns shall include only those which are signed in the capacity as a licensed physician.

(i) Paying or receiving any commission, bonus, kick-back or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical

centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services.

* * * * *

(k) Making deceptive, untrue, or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine.

4. In applying Section 458.331(1)(h), Florida Statutes, to the facts stated, the Board finds that the conduct outlined does constitute filing a false report if the physician knows at the time that he renders the billing that he does not intend to collect the full stated fee and if the practice of waiver or forgiveness of co-payment is routinely or customarily done.

5. With regard to the application of Section 458.331(1)(i), Florida Statutes, to the facts set forth in the Petition for Declaratory Statement, the Board finds that the conduct is violative of said provision in that the routine waiver of co-payment constitutes a rebate.

6. Finally, the Board further finds that using such a practice as a marketing technique to attract patients constitutes the employment of a trick or scheme in the practice of medicine, since the routine waiver of co-payment is violative of the other two statutes as noted above. Thus, it constitutes a violation of Section 458.331(1)(k).

7. The Board's response to this Declaratory Statement responds only to the questions asked and interprets only the statutory provisions cited by Petitioner. The conclusions by the Board with regard to the statutory provisions cited by Petitioner is not a comment on whether or not the proposal may or may not violate other provisions of Chapter 458, Florida Statutes, or other related obligations of physicians.

WHEREFORE, it is ORDERED AND ADJUDGED that Sections 458.331(1)(h), 458.331(1)(i), and 458.331(1)(k), do provide grounds for disciplinary action against a physician who renders a billing when, at the time he does so, he knows he does not intend to collect the full stated fee and he routinely and customarily waives or forgives co-payments by patients which are required by the relevant insurance contracts.

DONE AND ORDERED this 22 day of July, 1989.

BOARD OF MEDICINE


FUAD S. ASHKAR, M.D.
CHAIRMAN