

BOARD OF MEDICINE
ZACHARIAH P. ZACHARIAH, M.D.
CHAIRPERSON

DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

In re: The Petition for Declaratory
Statement of:

BARRY D. ZARETZKY, M.D.,

Petitioner.

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 April 14, 1991, for the purpose of considering the Petition for Declaratory Statement filed by Barry D. Zaretzky, M.D. (hereinafter Petitioner). No person or entity sought to intervene as a party. Having considered the petition, the other evidence and documents of record, 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, Florida Statutes, and has been issued license number ME 29353
2. Petitioner practices gastroenterology in, among other places, the offices of primary care physicians. When he does so, he pays rental fees to the primary care physicians in connection with the delivery of his services. He asks the Board whether such payments violate Section 458.331(1)(i), Florida Statutes.
3. The details of the business arrangements are as follows:

From time to time a primary care physician will recommend that his or her patients be examined and/or treated by a gastroenterologist.

The respective primary care physician and/or patient often prefer that the gastroenterological examination and/or treatment take place in the office of the primary care physician. The physician is thereby assured that the

patient, in fact, is seen by a gastroenterologist and is more readily available for consultation regarding diagnosis and/or treatment. The patient often benefits by not having to travel to an unfamiliar setting such as a gastroenterologist's office or a hospital.

Since approximately July 1988, Petitioner has provided gastroenterological services in the setting of the primary care physician's office. Typically, a primary care physician telephones Petitioner to schedule an appointment or appointments for Petitioner's gastroenterological services. The primary care physician is not affiliated, directly or indirectly, with Petitioner or his professional association and is under no obligation to recommend Petitioner's services.

Using a mobile van, Petitioner transports the medical equipment and most supplies needed to perform the requested medical services to the primary care physician's office. In performing his services to the patient, Petitioner uses an examining room at the office of the primary care physician. In addition, Petitioner uses patient gowns, pillow cases, linen, etc. supplied by, and laundered at the expense of, the primary care physician.

Petitioner bills patients directly for his gastroenterological services. To compensate the primary care physician for the use of the examining room, Petitioner pays the physician a rental fee. No written lease or license is executed by the parties. Until recently, all rental fees have been a flat, \$50.00 fee which is not tied to the number of patients seen during a visit to the primary care physician's office. Approximately six months ago, the Petitioner in certain instances began paying referring physicians a rental fee of \$35.00 for each hour Petitioner uses the primary care physician's examining room.

Petitioner examines more than one patient in greater than fifty percent (50%) of such office visits made by Petitioner. Each patient examination and/or treatment procedure varies in length from approximately 15 to 120 minutes.

4. This petition was noticed by the Board of Medicine in the April 5, 1991, issue of the Florida Administrative Weekly (Vol. 17, No. 14, Pg. 1513).

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.
2. 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.
3. Petitioner has the requisite interest to maintain this petition.
4. Section 458.331(1)(i), Florida Statutes, provides for disciplinary action for the following violations:

Paying or receiving any commission, bonus, kickback, 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.

5. Upon a review of the facts stated in the Petition, the Board finds that the situation described does constitute a kickback, fee-splitting arrangement. Petitioner does not pay a flat fee per month for rent, rather the fee is paid only if patients are referred to him. See, In re: The Petition for Declaratory Statement of Joseph M. Zeterberg, M.D., 12 FALR 1035 (Order signed February 2, 1990).

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

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

That the business arrangement described above does constitute a violation of Section 458.331(1)(i), Florida Statutes.

This Order takes effect upon filing with the Clerk of the Department of Professional Regulation.

DONE AND ORDERED this 11th day of July, 1992.

BOARD OF MEDICINE
ZACHARIAH P. ZACHARIAH, M.D.
CHAIRPERSON