

BEFORE THE BOARD OF MEDICINE

IN RE
THE PETITION FOR
DECLARATORY STATEMENT OF:

ALAN GRAFF, M.D.,

Petitioner.

NO. 87-BOM-3

FILED

Department of Professional Regulation
AGENCY CLERK

CLERK

FINAL ORDER DATE

9-18-87

THIS CAUSE came before the Board of Medicine pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on June 6, 1987, in Tampa, Florida, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Alan Graff, M.D. (hereinafter Petitioner). Petitioner was represented by Jay Cohen, Esquire. No person or entity sought to intervene as a party. Having considered the Petition and supporting documentation provided by the Petitioner, the argument and testimony of the Petitioner, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. Petitioner is licensed in the State of Florida as a medical doctor under Chapter 458, Florida Statutes.
2. Petitioner is a stockholder in a Florida corporation, Specialty Associates, Inc., (hereinafter the "Corporation"). The remaining Stockholders of the Corporation are either medical doctors or osteopathic doctors licensed in the State of Florida. The purpose for which the Corporation was formed is to hire physician specialists for both the medical and osteopathic fields of medicine. Such specialists will perform services for patients referred to the Corporation by both the stockholders and also other physicians in the community who may refer services to the Corporation. These specialists will be paid a salary and will be hired pursuant to a written Agreement. In the course of his relationship with the Corporation, the Physician is an

independent contractor and the Corporation does not intend to nor will it exercise any control over the professional judgment of Physician or the manner in which Physician renders his medical services. The Corporation will maintain its own office which will be staffed with personnel and which will contain the necessary facilities for the specialists to conduct their examinations of patients. Where applicable, the specialist will see the patient in the hospital, or out-patient facility, and will perform surgical procedures as deemed necessary by the specialist. The specialist will be responsible for the patients' care through the date when the specialist determines his services are no longer medically necessary.

3. The Corporation will bill the patient and will pay the specialist a salary. No billing will come from the specialist directly to the patient.

4. When a patient is referred to the Corporation by a stockholder, the stockholder will inform the patient in writing of his ownership interest in the Corporation. The stockholders will not be employees of the Corporation. Each stockholders' investment is \$2,500.00, which is being treated by the Corporation as capital. Each stockholder will realize a return on his capital investment in accordance with his percentage of stock ownership in the Corporation and such return will in no manner be based upon the number of referrals by the stockholder. All stockholders are subject to the terms of a Stockholders' Agreement.

5. In the Petition for Declaratory Statement filed with the Board Petitioner requests the Board to answer substantially the following questions:

(a) Is a description of the Corporation and its activities, as set forth in paragraphs 2-4 above, in violation of Section 458.331(1)(i), (k), or (n), or Section 621.05, Florida Statutes?

(b) If the Corporation's Articles of Incorporation are amended to form a professional association under Chapter 621, Florida Statutes, would the Corporation then be in violation of Section 621.05, by reason of the Corporation's having both medical doctors and osteopathic doctors as stockholders and employees?

(c) If the Corporation's Articles of Incorporation are amended to form a professional association under Chapter 621 of the Florida Statutes, where the specialist employees are also stockholders, then would the Corporation be in violation of 458.331(1)(i), (k), or (n), Florida Statutes?

(6) The Petition was noticed by the Board in the June 5, 1987, issue of the Florida Administrative Weekly (Volume 13, No. 23, Page 2108).

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 filed by Petitioner is in substantial compliance with the requirements of Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, and Petitioner has the requisite interest to maintain this proceeding.

3. Subsections 458.331(1)(i), (k), and (n), provide as follows:

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

(i) 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.

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

(n) Exercising influence on patient or client in such a manner as to exploit the patient or client for financial gain of the licensee or of a third party, which shall include, but not be limited to, the promotion or selling of services, goods, appliances, or drugs.

4. The first issue to be determined is whether the proposed practice plan set forth in the statement of facts would violate subsection 458.331(1)(i), Florida Statutes, or whether, in other words, the proposed arrangement would constitute a split-fee arrangement as prohibited by that statutory provision. The Board finds that it does not. The statute prohibits paying or receiving a commission, bonus, kickback, etc., either directly or indirectly, for patients referred providers of health care goods and services. In the instant case, a review of the factual scenario establishes that there is no fee being paid or received for the referral. The clear wording of the statute permits the payment of a fee for services rendered to patients referred to or by the physicians so long as the fee is not paid for the referral itself. Furthermore, the provisions of the plan are that the specialists will receive a salary and the stockholders will receive a return on the capital investment in accordance with the percentage of stock ownership and the return will in no manner be based upon the number of referrals by the stockholder. By declining to base the financial

return in any way on the number of referrals, the proposed arrangement avoids the prohibitions of Section 458.331(1)(i), Florida Statutes.

5. The next question to be determined is whether the factual description in paragraphs 2-4 of the statement of facts constitute a violation of Section 458.331(1)(k), Florida Statutes. That provision relates to the making of deceptive, untrue, or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine. Based on the description of the proposed activities, it is found that there is no violation of this statutory section in the proposed plan. Specifically, the proposal includes a provision that when the patient is referred to the Corporation by a stockholder, the stockholder will inform the patient in writing of his ownership interest in the Corporation.

6. The third question to be determined is whether the proposed arrangement violates Section 458.331(1)(n), Florida Statutes. That provision relates to exercising influence on the patient or client to exploit the client for financial gain. While there may have been previous interpretations of this or similar statutory provisions by professional licensing boards such as to prohibit a licensed professional from referring a patient to any business entity in which the professional held a financial interest, the provisions added to Section 458.331(1) in the 1986 legislative session, specifically Paragraph (gg), make clear that the physician may refer a patient for health care goods or services to a business entity in which the physician has an equity interest if the physician notifies the patient of his financial interest and of the patient's right to obtain such goods or services at the location of the patient's choice. By the enactment of this provision, which is essentially a disclosure provision, the legislature has explicitly stated that a physician may have a financial interest in a health care good or service to which he is referring patients so long as the

required disclosure is made. Thus, it is clear that the prohibitions in Subsection (1)(n) of Section 458.331 cannot be applied to every situation in which the physician promotes or sells services, goods, appliances, or drugs but may apply to those in which there is no compliance with the disclosure requirements of Subsection (1)(gg). There would, of course, also be a violation of Subsection (1)(n) if the patient were referred for goods or services which are not actually needed, a possibility which is not stated or presumed to be present in the facts set forth in the Petition.

7. With regard to the question of whether the description of the Corporation and its activities violate Section 621.05, Florida Statutes, the Board respectfully declines to answer this question and refers the Petitioner to the Department of State for an interpretation of that statutory section. A review of Chapter 621, Florida Statutes, makes clear that the state agency which is authorized with the enforcement of that Chapter is the Department of State. The Board's referral of Petitioner to the Department of State relates both to the question with regard to the description of the Corporation and to the question relating to possible amendment of the Articles of Incorporation to form a professional corporation under Chapter 621. In a similar circumstance, the Board of Medicine was petitioned with regard to the question of whether both medical doctors and osteopathic doctors may participate in such a business arrangement. See, In re the Petition for Declaratory Statement of David Marcus, M.D. In that case, as in this, the Board declined to interpret Section 621.05, Florida Statutes, for the reason stated above.

8. With regard to the question of whether if the Corporation's Articles of Incorporation are amended to form a professional association under Chapter 621 of the Florida Statutes, such that the specialist employees are also stockholders, and whether such arrangement would be in violation of Section 458.331(1)(i), (k), or (n), Florida Statutes, the Board

finds that they would not under the facts as outlined. For the reasons stated above, the proposed arrangement does not purport to pay a fee for the referral itself, but purports only to pay a fee for services rendered. In addition, the above arrangement would permit the stockholders to also be employees of the Corporation without violating the noted provisions since the return on the investment of capital would be based on the investment and not on the number of referrals. Finally, the proposal provides for a disclosure of the business interest to patients. The only caveat would be that the proposal as framed does not comply with all of the requirements of Subsection 458.331(1)(gg), Florida Statutes, but Petitioners have not explicitly invited the Board to interpret that statute as applied to the proposed arrangement.

9. There is competent, substantial evidence to support the Board's findings and conclusions.

WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that Subsections 458.331(1)(l), (k), or (n), Florida Statutes do not prohibit a physician from participating in the business arrangement set forth in the findings of fact paragraphs 2-4 of this Final Order, so long as the referring physician has provided the patient with the written disclosure of the nature of his interest, when required by Section 458.331(1)(gg), Florida Statutes.

Petitioner is hereby notified that he may appeal this order by filing one (1) copy of a Notice of Appeal with the Clerk of the agency and by filing a filing fee and one (1) copy of a Notice of Appeal with the District Court of Appeal within thirty (30) days of the date that this Order is filed, pursuant to the Florida rules of Appellate procedure and Chapter 120, Florida Statutes.

DONE AND ORDERED this 13 day of August, 1987.

BOARD OF MEDICINE


EMILIO D. ECHEVARRIA, M.D.
CHAIRMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been forwarded by certified mail to Adele I. Stone, Esquire, and Jay Cohen, Esquire, Atkinson, Jenn Diner, Stone & Cohen, Post Office Drawer 2088, 1946 Tyler Street Hollywood, Florida 33022-2088, at or before 5:00 p.m. this 18th day of August, 1987.



Dorothy J. Faircloth
Executive Director