

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

IN RE: The Petition for

Declaratory Statement of:

JOSEPH M. ZETERBERG, M.D.,
Petitioner.

PROPOSED FINAL ORDER

THIS MATTER came before the Board of Medicine pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on December 2, 1989, and February 2, 1990, in Miami, Florida, for the purpose of considering the Petition for Declaratory Statement filed by Joseph M. Zeterberg, M.D.

Having considered the Petition, the Petitioner's written argument, the applicable laws, 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, having been issued license number ME 0020445.

2. The factual scenario Petitioner presents is as follows:

Petitioner desires to engage a medical practice management company (hereinafter "AAC" or "Corporation") to manage the business aspects of Petitioner's medical practice. Toward that end, Petitioner proposes a business arrangement with the Corporation as follows:

a) AAC proposed to purchase all the tangible and intangible assets comprising Petitioner's medical practice, except for Petitioner's patient charts and patient records.

b) AAC and Petitioner will enter into a management agreement pursuant to which AAC will provide all office space, equipment, staff, practice supplies, medical transcription, billing and accounts receivable services, and all marketing, business and medical support services, required for Petitioner to practice his profession of medicine. AAC, after consultation and Petitioner's concurrence, will maintain and administer the overall charge structure for Petitioner's practice. AAC, with the consent of Petitioner, will hire, discharge, supervise and manage all employees used in Petitioner's practice to the extent that such activities do not adversely affect Petitioner's delivery of health care. Petitioner will be responsible for the supervision of nurses, physician's trained assistants, physician's assistants or any other direct medical care employees in accordance with applicable law. AAC will develop all practice forms and will maintain all patient charts and records in accordance with applicable law. AAC also will market Petitioner's medical practice in the territory.

c) AAC will be responsible for developing a "circuit" within the territory surrounding Petitioner's market area. The concept of the circuit is that there are various outlying medical clinics and medical practice groups which do not have the capability to maintain a full time specialist in allergy care. By developing a contractual affiliation agreement with such practices, AAC can assure such practices that an allergy specialist can be available to see patients on a regular basis (typically one day a week). The affiliated clinics agree to make space and ancillary services and supplies available in their

clinic to the visiting physician (in this case, the Petitioner) on a regularly-scheduled basis for a flat rental payment. Appointments would then be made for Petitioner to visit such clinics on a rotational basis to see patients requiring specialized allergy care. Petitioner would bill each patient directly for his professional fee and services rendered while at each clinic. No portion of such fee billed or received by Petitioner is split with the affiliated clinic. The clinic serves as a convenient location for specialized allergy care to be administered to patients requiring same.

d) Under the management agreement between AAC and Petitioner, all revenues derived from Petitioner's practice (including revenues derived from billings arising from patients seen within the circuit) are divided on the following basis. The Petitioner receives the greater of (i) a set floor amount or (ii) a set percentage of such revenues, plus amounts necessary to pay Petitioner's malpractice premiums, professional membership and educational expenses, car allowance and the cost of fringe benefits. The remainder of the practice revenues are paid to AAC in consideration of the space, personnel, supplies, advertising, and administrative services provided by AAC to Petitioner. Petitioner is also paid a flat marketing and consulting fee to assist AAC in marketing its services to other physicians outside of the territory.

e) The Petitioner will be the owner of all patient charts and all professional records used in Petitioner's practice, and AAC (as Petitioner's agent) agrees to maintain those records in accordance with law.

f) In connection with the purchase of assets, Petitioner will execute a noncompetition agreement with AAC by which (except for the activities contemplated by the management agreement) Petitioner will not provide allergy services in the territory for an established period of time.

3. In the Petition for Declaratory Statement filed with the Board, Petitioner requests the Board to answer whether the business arrangement set forth above violates Section 458.331(1)(i), Florida Statutes.

4. The Petition was noticed by the Board in the November 9, 1989, issue of the Florida Administrative Weekly, vol. 15, no. 45, pg. 5353.

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 provisions of Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code.

3. Petitioner has a requisite interest to maintain this proceeding.

4. Petitioner requests the Board to interpret Section 458.331(1)(i), Florida Statutes, in light of the proposed arrangements as set forth in the Findings of Fact above, and state whether those

arrangements violate Section 458.331(1)(i), Florida Statutes.

5. Section 458.331(1)(i), Florida Statutes, provides 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.

6. Based on the specific facts asserted by Petitioner, it does appear that the arrangement would violate Section 458.331(1)(i), Florida Statutes. While the general arrangement for the Corporation to provide specified services and be reimbursed based upon a fixed percentage of revenue may not appear at first blush to be illegal fee splitting based upon this Board's rationale in In Re: Petition for Declaratory Statement of Edmond G. Lundy, M.D., filed December 3, 1987, the specific provision in this petition for the Corporation to pay a fee to a "circuit clinic" ostensibly for rental, in return for that clinic's referral of patients to Petitioner, appears to be an illegal "kick-back" as contemplated by Section 458.331(1)(i), Florida Statutes. The Board notes in particular that at the hearing it was adduced that if a general practitioner who is being paid a rental fee never made appointments for patients to see Petitioner at the office space purportedly being rented, the contractual arrangement would not be continued with that physician. The Board finds that this petition differs from the facts in the Lundy case in that the contract does not cover simply an administrative charge factor, but includes the activities of the company in going out and marketing the allergy care services.

7. In addition, Petitioner emphasizes that the fee received by Petitioner is not split with the clinic directly. However, the fee is split indirectly. The Statute prohibits engaging in a split-fee arrangement "in any form whatsoever... either directly or indirectly...." Although none of the fees collected by the specialist would be shared with the general practitioner, they would be shared with AAC. The referral occurs by virtue of the fact that the Corporation develops the "circuit" and arranges the appointments.

DONE AND ORDERED this 2 day of February 1990.

MARGARET C.S. SKINNER, M.D.
CHAIRMAN