

DEPARTMENT OF PROFESSIONAL REGULATION

BOARD OF MEDICINE

IN RE: PETITION FOR DECLARATORY  
STATEMENT OF:

WILLIAM D. ERTAG, M.D.

Petitioner.

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FINAL ORDER

THIS CAUSE came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Rule Chapter 20-4, Florida Administrative Code, on October 9, 1983, in Tampa, Florida, for the purpose of considering the Petition for Declaratory Statement filed by William D. Ertag, M.D. (hereinafter Petitioner). No person or entity sought to intervene as a party.

Having considered the petition, 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. His address is 720 Goodlette Road, Suite 203, Naples, Florida.

2. Petitioner is the President, a Director, and a stockholder of a Florida corporation. Twelve other individuals own stock in the corporation, ten of whom are medical doctors licensed in the State of Florida and two of whom are individuals who do not hold licenses to practice medicine in the State of Florida. Each of the thirteen investors owns 7.69% of the stock of the corporation. The corporation is not a publicly held corporation and its shares are not traded on a national exchange or over-the-counter market.

3. The corporation was formed in order to establish, own, and operate a durable medical equipment business. The business will rent and sell home medical equipment and supplies, including certain drugs as intravenous solutions, to clients of the corporation. The corporation will maintain an office and will staff the office with non-physician employees. The physician stockholders will not be employees of the corporation.

4. Another business entity in the durable medical medical equipment business (hereinafter DME business) has offered to enter into a subcontract with the corporation; a copy of the proposed subcontract was attached to the Petition for Declaratory Statement, pursuant to which the other entity and the corporation will perform the following services and have the following responsibilities:

(a) The two business entities will establish policies including health care protocols, provision of care for indigents, and billing and collection procedures.

(b) Employees of the corporation will advise the DME business of client needs. The DME business will acquire and deliver to the clients home care equipment and supplies responsive to the needs communicated. The DME business also will

provide client training and follow-up visits; will provide repair, maintenance, and pickup services; and will implement a management reporting tracking system to monitor the equipment and services provided.

(c) The DME business will bill and collect for all services provided to the clients of the corporation. The DME business will post all collections to the appropriate accounts and deposit all monies in the corporation's bank account. The corporation will be responsible for all bad debts and uncollectible accounts.

(d) The DME business will bill the corporation for all services rendered by that business, based on the price of the products rented or purchased. Petitioner asserts that he believes that the compensation represents fair market value for the services to be rendered and has been advised by the DME business that the compensation arrangement is standard within the industry.

(e) Petitioner asserts that the corporation will perform periodic reviews of all arrangements and operations to insure compliance with existing and future standards, regulations, and guidelines.

(f) Petitioner asserts that his investment in the corporation is \$500 and that the \$500 is being treated by the corporation as capital. Petitioner will realize a return on the capital investment solely in accordance with the percentage of stock ownership in the corporation. The return will in no manner, Petitioner asserts, be based upon the number of referrals by him. Petitioner is subject to the terms of a shareholder's agreement, a copy of which was attached to the Petition for Declaratory Statement.


(g) Petitioner states that the ability to purchase stock in the corporation is not tied in any way to the ability or willingness of Petitioner or of any of the other stockholders to make referrals to the corporation or to the likelihood that Petitioner or any of the other stockholders will make referrals.

(h) Petitioner states that he will not receive compensation from the corporation for serving as its President. However, Petitioner states that after start-up, the corporation may pay him director fees in an amount that represents fair market value compensation for services rendered.

(i) Petitioner states that the corporation does not intend to, nor will it exercise any control over his professional judgment or the manner in which Petitioner renders medical services to patients in the course of his medical practice.

(j) Petitioner further asserts that he anticipates that his participation in the corporation will lead to a stronger, more permanent working relationship with the corporation than the relationship Petitioner has had with others in the durable medical equipment business. This, Petitioner believes, will benefit both his medical practice and the durable medical equipment business of the corporation in that Petitioner will, based on his experience as a physician, be able to identify particular healthcare needs in the service area which the corporation may fulfill and Petitioner will be familiar with the quality of services provided by the corporation and will, therefore, be better able to assure continued high quality care for patients in his medical practice who need medical equipment or supplies.

(k) Petitioner states that if he, in his professional judgment, determines that the durable medical equipment services are medically necessary and appropriate for his patients, he will refer patients to the corporation. He will post a sign prominently displayed in the reception area of his office and clearly noticeable by all patients that discloses that the corporation is a physician-owned company and that the patient is free to choose any supplier. He further states that patients who are seen in the hospital or home and who may not visit his office will receive, before they contract for durable medical equipment services, a brochure that includes the same disclosures.



corporation will be referring clients to his medical practice.

(1) Petitioner also owns stock in a Healthcare Personnel Company, a Florida corporation licensed to provide home health services under Chapter 400, Part III, Florida Statutes. Petitioner asserts that this Healthcare Personnel Company is not a parent, sister, or subsidiary of the corporation referred to above or otherwise related to the corporation. However, some employees of the corporation are employees of the Healthcare Personnel Company. Petitioner receives a return on his investment in the Healthcare Personnel Company based solely on his percentage of stock ownership. He asserts that neither this return nor the opportunity to purchase Healthcare Personnel stock are in any way related to the ability or willingness of Petitioner or other stockholders to refer patients to the Healthcare Personnel Company. Petitioner states that he may refer patients to the Healthcare Personnel Company under the same facts and circumstances and with the same disclosures described above in the context of his referrals to the corporation. He does state, however, that the Healthcare Personnel Corporation may refer patients to the corporation for medically necessary durable medical equipment services and the corporation may refer its clients to Healthcare Personnel for medically necessary home health services. The corporation, Healthcare Personnel Corporation, and Petitioner and the other stockholders of both business entities will not pay or receive any compensation for the referrals.

(m) This Petition for Declaratory Statement was noticed by the Board in the September 30, 1988, issues of the Florida Administrative Weekly (Vol.14, No.39, Pg.3730).

CONCLUSIONS OF LAW

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

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

3. The Board finds that 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 of the law administered by the Board.

4. Petitioner requests the Board to state whether the proposal outlined above in the Findings of Fact comports with the requirements of Section 458.331(1)(i), Florida Statutes. Section 458.331(1)(i), Florida Statutes, provides, in pertinent part:

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

(1) 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. Petitioner specifically asks whether his participation as an officer, director, or shareholder of the corporation is in full compliance with the provision quoted herein since the subcontract arrangement described in this petition between the corporation and the durable medical equipment business is not a payment by the DME business for referrals from the corporation. The Board agrees that the arrangement described herein does not violate 458.331(1)(i), since the arrangement is not based on the referrals by the corporation to the durable medical equipment business.

6. Secondly, Petitioner asks whether his participation as an officer, director, or shareholder of the corporation, his

Healthcare Personnel company, or his referral of patients to the corporation or to the Healthcare business violates Section 458.331(1)(1), Florida Statutes. As the Board has found on a previous occasion, Section 458.331(1)(1), does not prohibit remuneration so long as the remuneration constitutes a return on the investment made by the Petitioner and is not related to the number of referrals or the ability or willingness of the stockholders to make referrals. See, e.g. In Re: The Petition for Declaratory Statement of: Melbourne Health Associates, Inc. and John Loxito, M.D., 9 FALR 6295 (Dec. 3, 1987) and In Re: The Petition for Declaratory Statement of: Allen Graff, M.D., Order filed August 18, 1987.

7. Petitioner also requests interpretation by the Board of various statutory provisions relating to his financial interests in these business entities and disclosure thereof. Specifically, he requests interpretations of Section 455.25, Florida Statutes, and Sections 458.331(1)(k), (1)(n), (1)(gg), Florida Statutes. Those statutory provisions provide, in pertinent part as follows:

Section 455.25:

It shall be a misdemeanor of the first degree . . . for any health care practitioner licensed under Chapter 458 . . . to make any professional referral for physical therapy services as defined in s.486.021, or to provide medicinal drugs from any source other than on a complimentary basis when the practitioner has a financial interest of for which the practitioner will receive some financial remuneration unless in advance of any such referral the practitioner notifies the patient, in writing, of such financial interest.

Section 458.331 provides in pertinent part:

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

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

(n) Exercising influence on the 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 promoting or selling of services, goods, appliances, or drugs.

(gg) Referring any patient, for health care goods or services, to a partnership, firm, corporation, or other business entity in which the physician or the physician's employer has an equity interest of 10% or more unless, prior to such referral, 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. . . .

8. In interpreting the arrangement as proposed by the Petitioner in light of the statutes cited, the Board finds that the arrangement is not in violation of any of these statutes except in one detail. Specifically, the Board notes that although the proposal clearly provides that the Petitioner will disclose that the corporation is a physician-owned company to the patients in writing in advance of the provision of any service, it does not state that he will disclose that he has a financial interest in the company. The statutes require that the petitioner disclose that the individual practitioner has a financial interest in the business entity or in the provision of service and not just that the service is a physician-owned service. Petitioner's assertion of facts does not explicitly provide that the Petitioner would disclose his personal interest in these business entities and to that extent it is lacking. Other than that issue, the requirements of 455.25 and 455.331(1)(gg), with regard to disclosure are met. Furthermore, the second prong of the disclosure requirement of 458.331(1)(gg) will be met by the Petitioner's further disclosure to the patient that the patient is free to choose any supplier.

9. With regard to the provisions of Section 458.331(1)(k), relating to making deceptive, untrue, or fraudulent representations in the practice of medicine or employing a trick



engaging in a split-fee or rebate arrangement and Petitioner is disclosing the financial interest (if he corrects the one deficit noted above), the Board does not interpret the arrangement as constituting a deceptive, untrue, or fraudulent representation. The Legislature, by setting forth the disclosure requirements, has implicitly permitted arrangements such as Petitioner outlines, so long as Petitioner makes referrals only when those referrals are medically necessary. Based on the facts set forth by Petitioner in the Petition for Declaratory Statement that referrals will be made only when the services are medically necessary and appropriate, there is no violation of this statutory section.

10. Finally, with regard to the request for interpretation of Section 458.331(1)(n), relating to exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain of the licensee or a third party by the promotion or selling of services, goods, appliances, or drugs, the Board interprets this provision in pari materia with the other provisions discussed within this declaratory statement. Read in pari materia with these provisions, particularly the facts that the referrals will be made only for medically necessary purposes; the Petitioner will not be receiving remuneration for the referral itself, but, at most, a return on his investment; and Petitioner will be disclosing his financial interest in the ventures (if he makes the one correction noted above), the Board finds that the arrangement does not violate Section 458.331(1)(n), Florida Statutes.

11. This Declaratory Statement responds only to the questions asked and interprets only the statutory provisions cited by the Petitioner. The conclusion by the Board that the proposal does not constitute a violation of the Sections noted above, other than the one shortcoming relating to the disclosure of financial interest, is not a comment on whether or not the proposal may violate the other provisions of Chapter 458, Florida

Statutes, or other related obligations of the physicians.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED

That Section 455.25 and subsections 458.331(1)(i), (k), (n), (gg), Florida Statutes, do not prohibit a physician from participating in a business arrangement set forth in the Findings of Fact of this Final Order, with the exception that the Petitioner must disclose to the patients whom he is referring to the other business entities in which he has a financial interest his personal financial interest in the business ventures and not just the fact that the business ventures are physician-owned.

DONE AND ORDERED this 12<sup>th</sup> day of Jan, 1989.

BOARD OF MEDICINE

Emilio D. Echevarria  
EMILIO D. ECHEVARRIA, M.D.  
CHAIRMAN