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During the 1990's, the health care industry has been experiencing revolutionary changes. The growth of managed care, the consolidation of physician practices, and the development and growth of physician practice management companies have spurred the creation of new economic arrangements and alliances, as providers, payors, and managers struggle to survive and prosper in a changing health care environment. In the face of decreasing payments from managed care payors, health care providers are constantly seeking new sources of revenue and new ways to expand their patient base.

The economic arrangements which providers enter into to achieve these objectives often raise questions under federal and state anti-fraud and abuse laws, prohibitions against fee splitting, and prohibitions against "self-referrals." In the State of Florida, the Florida Board of Medicine is often called upon to issue a Declaratory Statement as to whether a particular economic arrangement is in compliance with applicable provisions of Florida law.[1] The questions posed to the Board of Medicine in various requests for Declaratory Statements often involve a tension between innovative new ways to structure delivery of health care services in a changing health care industry and established prohibitions against fee-splitting, self-referral and other practices which are often associated with over-utilization of health care services. In weighing these competing values, the Board of Medicine has generally followed the more conservative road, favoring traditional ways of doing business and ruling that various new economic arrangements are in violation of applicable law.

The Florida Board of Medicine is one of several regulatory boards within the Florida Department of Business and Professional Regulation which are responsible for regulating the practice of various professions. The Board of Medicine consists of 15 members, 12 of whom must be licensed physicians. Although the principal function of the Board of Medicine is to review and

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1 Section 120.565 of the Florida Statutes provides that each agency shall provide by rule a procedure for the filing and prompt disposition of petitions for declaratory statements as to the applicability of a specified statutory provision or rule to a particular set of facts. Although a declaratory statement applies only to the petitioner and the particular facts presented, the declaratory statements are published and put parties on notice as to how the agency or board issuing the statement interprets a particular statute or rule.

adjudicate complaints against physicians alleging professional malpractice or other violations of the Medical Practice Act,[2] the Board of Medicine is also responsible for enforcing various provisions of the Medical Practice Act relating to the *business* of practicing medicine. Such provisions include, among others, the prohibition against "paying or receiving any commission, bonus, kick-back or rebate, or engaging in any split fee arrangement ... for patients referred to providers of health care goods and services.[3] In the past several years, the Board has issued several orders, in response to requests for Declaratory Statements, declaring illegal certain business practices and relationships which have been developed by providers and practice management companies in response to changes in the health care industry. Seeking to prevent or delay changes in the way the business of health care is conducted, the Board has relied upon broad interpretations of Florida's statutory prohibitions against fee-splitting and kick-backs in declaring its disapproval of certain business arrangements.

Perhaps the most significant of the Board's recent decisions is *In re: The Petition for Declaratory Statement of Magan L. Bakarania, M.D.*, issued by the Board on November 3, 1997.[4] In this Order, the Board declared that the payment by a physician group practice of a management fee equal to a percentage of the group's net income violates Florida's prohibition against fee-splitting.

In recent years, as physician practices have consolidated and grown in size, many physicians have turned to physician practice management companies to manage their practices and provide various other services. A wide range of compensation arrangements have been developed in connection with the provision of practice management services. In many instances, a physician group will pay its management company a percentage of the group's revenues or profits as consideration for management services provided by the company.

Dr. Bakarania is a Florida licensed physician who was considering joining a group practice which had recently entered into a long-term management agreement with Phymatrix Practice Management Company, a national practice management company.[5] Pursuant to the management agreement, the management company was to provide general management services, including but not limited to "practice expansion" services. The practice expansion services included creating a physician-provider network, developing relationships and affiliations with other specialists, hospitals, networks,

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2 FLA. STAT. ch.458 (1997)

3 FLA. STAT. § 458.331(1)(i) (1997).

4 20 FALR 395 (Nov. 3, 1997).

5 *Id.*

HMOs and PPOs, developing and providing ancillary services, and evaluating, negotiating and administering managed care contracts.[6]

As consideration for providing the specified management and practice expansion services, the management company would receive a management fee consisting of three separate components: (1) an operations fee equal to the company's actual out-of-pocket expenses for providing operational services; (2) a fixed annual fee, to compensate the company for providing general management services; and (3) a performance fee, equal to 30% of the group's net income.[7] Dr. Bakarania sought the Board's guidance as to whether the proposed compensation arrangement was in violation of the prohibition against fee-splitting, set forth in Section 458.331(1)(i) of the Florida Statutes.[8] That section prohibits the "paying or receiving of 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."

In its Order, the Board ruled that the payment of a performance fee which is equal to a percentage of the physicians' net income and which is payable without regard to the cost of the management services provided is a split-fee arrangement in violation of Florida law.[9] The Board found that the management company's practice expansion activities helped generate referrals, and that the payment of fees based on revenues generated by these referrals violated the prohibition against fee-splitting.[10] In its decision, the Board was not influenced by the fact that the proposed compensation structure is widely used, in Florida and elsewhere across the country, and is an essential element of the business relationship between practice management companies and the practices which they manage.[11]

In its decision, the Board sought to distinguish the *Bakarania* situation from the management agreements examined in a line of judicial decisions in Florida which hold that percentage fee payments to management companies

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6 *Id.* at 398-99.

7 *Id.* at 396-97

8 In most requests for Declaratory Statement, the petitioner is seeking a statement that a particular arrangement or transaction does not violate applicable statutes or regulations. In this particular instance, however, the physician group practice which Dr. Bakarania was planning to join was seeking to terminate its contractual relationship with Phymatrix. Thus, Dr. Bakarania was actually seeking a statement from the Board of Medicine to the effect that the subject management agreement was in violation of Florida law, and was, therefore, void or voidable.

9 *In re Bakarania*, 20 FALR at 398.

10 *Id.*

11 *Id.*

do not violate the fee-splitting prohibition.[12] According to the Board, the management agreements in the prior cases did not expressly require the management company to expand the physicians' practices or provide additional referrals of patients.[13] The Board concluded that the practice expansion activities performed by Phymatrix were equivalent to making referrals to the practice, and that payment of a fee for the practice expansion services based upon the practice's income amounts to prohibited fee-splitting.[14] The Board ignored the previously-accepted distinction between direct referrals from one provider to another provider, and practice expansion and network development activities which may develop additional business but do not result in referrals of specific patients.

Although the Board stated that its ruling was limited to the facts presented in the Petition for Declaratory Statement, and the decision was not intended to be construed as an absolute prohibition against percentage fees in physician practice management agreements,[15] it is difficult to determine from the decision what types of percentage arrangements would be permissible. It is possible that, in future management agreements, the management company could be compensated in different ways for the various services it provides. For example, the management company could receive a percentage-based fee for administrative management services and a flat fee for practice expansion and network development activities. This structure apparently would not violate the statutory provision against fee-splitting, as interpreted by the Board in *Bakarania*.

The *Bakarania* decision casts a cloud of uncertainty over the physician practice management business in Florida, raising doubts about the legality of many existing and proposed management contracts. According to persons associated with the practice management industry, a number of significant transactions were deferred, restructured or abandoned as a result of the *Bakarania* decision. Although not all physicians regard practice management companies favorably, such companies have provided valuable services and resources to many physician practices, and a management fee based on a percentage of revenues or income is usually an essential part of the contractual arrangement between the parties.

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[12] *See e.g.*, Practice Management Associates v. Orman, 614 So. 2d 1135 (Fla. 2d DCA 1993); Practice Management Associates v. Gulley, 618 So.2d 259 (Fla. 2d DCA 1993); Practice Management Associates, Inc. v. Bitet, 654 So. 2d 966 (Fla. 2d DCA 1995). These cases, which are cited at note 4 of the *Bakarania* Declaratory Statement, involve language in Florida's Chiropractic Practice Act which is virtually identical to the language set forth in section 458.331(1)(i) (1999) of the Florida Statutes.

[13] *In re Bakarania*, 20 FALR at 398.

[14] *Id.* at 399.

[15] *Id.*

The Board's decision in *Bakarania* was appealed to the District Court of Appeals by Phymatrix, and the Board agreed to stay its decision pending the outcome of the appeal. On June 25, 1999, the First District Court of Appeal affirmed the Board of Medicine's Order, stating, in a one paragraph *per curiam* opinion, that, because the appellant had not shown that the Board's interpretation of the law is "clearly erroneous," the Board's decision must be affirmed.[16]

In November, 1997, when the Board issued its Order in *Bakarania*, the physician practice management industry was growing rapidly. As the spread of managed care threatened to erode physicians' patient bases and reduce fees, many physicians were being enticed to sell their practices to practice management companies which promised to reduce operating costs by managing practices more efficiently, and to create countervailing market power to negotiate favorable contracts with managed care companies. The practice management companies also offered the possibility of windfall investment gains. Many physicians received stock in the management company as part of the consideration for the sale of their practice, and, based upon the favorable valuations Wall Street was according to these companies, physicians expected significant appreciation in the value of their stock. These expectations were dashed in 1998, when severe problems started appearing in the practice management industry, as many companies failed to provide competent management services, and did not produce promised cost savings and revenue increases. The market value of many publicly-traded management companies plummeted. Several practice management companies filed for bankruptcy protection, and other companies, including Phymatrix, announced plans to abandon the physician practice management business entirely, to concentrate on other health care business activities.

At approximately the same time the Board's Order in *Bakarania* was affirmed, the Board issued its Final Order *In re: The Petition for Declaratory Statement of Rew, Rogers & Silver, M.D.'s, P.A.*[17] In this Order, the Board reaffirmed prior orders which found that a percentage management fee did not necessarily violate the prohibition against fee-splitting if the management company was not responsible for generating referrals. The Board distinguished the case presented from the facts in *Bakarania*, finding that the management company managing the Rew, Rogers medical practice was not responsible for expanding or growing the practice. Further, the percentage fee was capped at a maximum of $10,000 per month, thus capping the

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[16] Phymatrix Management Co., Inc. v. Bakarania, 24 Fla. L. Weekly. D1500 (Fla. 1st DCA June 25, 1999).

[17] As of August 20, 1999, the Board had approved the draft Final Order, but the Order had not yet been signed or filed with the Department of Health.

management company's incentive to grow the practice. The Board held that, under these circumstances, the percentage management fee did not violate the fee-splitting provision. The Board did not specifically indicate whether the monthly fee cap was essential to its decision, or whether it was sufficient that the management company was not obligated to generate additional patients for the managed practice. In either event, this recent ruling indicates that the Board is not completely averse to the changing financial arrangements which are occurring in the medical industry, and the ruling should provide some measure of relief to practice management companies which receive a percentage of the managed group's income as all or part of their management fee.

Two other Orders issued by the Board in 1997, although having a narrower impact than *Bakarania*, also demonstrate the Board's reluctance to accept new economic arrangements involving physicians who are seeking ways to adapt to and prosper in the changing health care economic environment.

On November 3, 1997, the same day it issued its Order in *Bakarania*, the Board also issued its Final Order *In re: The Petition for Declaratory Statement of Jeffrey Fernyhough, M.D.*[18] Dr. Fernyhough sought the Board's guidance with respect to his proposal to lease "prime" counter space in his office to a mail-order pharmacy, for the installation of the pharmacy's computer terminal. Utilizing the computer terminal, Dr. Fernyhough's patients could order medications prescribed by the doctor and would receive them the next day by overnight mail delivery. The computer would contain relevant patient data (which would be entered by the doctor's administrative staff), and the computer's sophisticated software would enable the doctor to determine whether any prescribed medication would cause an adverse interaction or be duplicative of any other prescribed medication. The presence of the computer terminal in the doctor's office would also provide increased convenience for patients in ordering and obtaining prescribed medications. Patients would not be required to use the mail-order pharmacy for obtaining prescribed medications, and all patients would be advised of their right to obtain medication from the pharmacy of their choice.[19]

The pharmacy proposed to enter into a written agreement with the doctor pursuant to which the pharmacy would pay the doctor rent for lease of the counter space and reimburse the doctor for administrative services performed by the doctor's staff in connection with inputting patient data into the computer. The rental payments were asserted to be consistent with the fair

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[18] 20 FALR 4381 (Fla. Bd. of Medicine 1997).

[19] *Id.* at 4382

market value of the counter space being leased and with the cost of administrative personnel, as determined in an arm's length transaction, and would not be determined in a manner which takes into account the volume or value of any referrals or business generated between the doctor and the pharmacy.[20]

The Board refused to accept the doctor's representations that the fair market value of the prime counter space in his office could be determined in such a manner as to avoid the doctor receiving a windfall from the lease of a few feet of counter space. The Board found that the arrangement is "simply put, a scheme to allow pharmacy to pay Petitioner in return for providing referrals to the pharmacy in violation of Section 458.331(1)(i), Florida Statutes." In making its ruling, the Board apparently did not consider potential benefits to patients arising from the presence of the pharmacy's computer terminal in the doctor's office, or the advances in computer technology which may support changes in the traditional relationships between physicians and pharmacies.

The Board's Final Order *In re: The Petition for Declaratory Statement of George G. Levy, M.D.,* issued on May 2, 1997, represents another refusal by the Board to accept non-traditional economic relationships involving physicians.[21] In his medical practice, Dr. Levy had the need to order, from time to time, magnetic resonance imaging (MRI) studies for his patients. Dr. Levy sought to facilitate the prompt and efficient provision of MRI scans for his patients by engaging a qualified radiologist physician as a part-time employee, to interpret MRI scans performed for Dr. Levy's patients by an independent MRI center. The MRI center would perform the scans on Dr. Levy's patients and provide Dr. Levy with the MRI films, for interpretation by Dr. Levy's radiologist employee. Dr. Levy would utilize information contained in the radiologist's report to treat his patients. The MRI center would bill the patient's insuror for the "technical" portion of the scan. Dr. Levy's office would bill the patient's insuror for the "professional" portion or the interpretation. Dr. Levy would pay his radiologist employee on a "per-read" basis, paying him a specific amount for each interpretation. To the extent collections with respect to the professional component of the MRI service exceeded the per-read fees paid by Dr. Levy to his radiologist employee, Dr. Levy would retain the difference.

The Board ruled that Dr. Levy's retention of any portion of the professional fees billed for reading and interpreting scans and studies performed on his patients without Dr. Levy actually performing any

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20 *Id.* at 4383.

21 Final Order # AHCA-97-0495 (1997).

professional service is a "split-fee arrangement," in violation of Section 458.331(1)(i) of the Florida Statutes. In reaching this restrictive result, the Board apparently ignored the employer-employee relationship between Dr. Levy and the radiologist, ruling, in effect, that referrals from an employer to an employee will be subject to the same scrutiny as referrals between separate entities, and that an employer may not retain a portion of the revenue generated from services provided by his employee to referred patients.

On the other hand, the conservative result reached by the Board in *In re: The Petition for Declaratory Statement of Alan Levin, M.D. and Ameripath, Inc.*[22], which dealt primarily with the Florida Patient Self-Referral Act of 1992, [23] is consistent with applicable law, and the Board did not have to rely on an overboard interpretation of the statutory language to reach its conservative result. This case involved a proposal by Ameripath to provide pathologists to groups of dermatologist physicians, on a part-time basis, pursuant to independent contractor and employee leasing arrangements, so that the dermatology groups could provide clinical laboratory and pathology services for the groups' patients. The consideration to be paid by such groups to Ameripath would be less than the amount which the groups would be entitled to bill for the pathologists' services.[24]

The Board found that the proposed arrangements violated the Self-Referral Act. The Self-Referral Act prohibits a health care provider from referring patients for the provision of certain "designated health services" (including, among others, clinical laboratory services) to an entity in which the referring provider is an investor.[25] The referral of patients to the pathologist for clinical laboratory services, and the fact that the dermatology group billed for the pathologist's professional services, triggers the prohibitions of the Self-Referral Act.

The Self-Referral Act contains an exception from the basic prohibition for referrals by a member of a group practice for services provided solely for the group's patients and that are provided by or under the direct supervision of another member of the group.[26]

The Board properly found that the proposed arrangement did not qualify for this exception.[27] When the services provided by a part-time pathologist were considered as part of the services provided by a dermatology group, the group would not meet the Self-Referral Act's definition of a "group practice."

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22 19 FALR 4525 (Fla. Bd. of Medicine 1997).

23 FLA. STAT. §455.236 Fla. Stat. (1992) (renumbered FLA. STAT. § 455.654 (1997)).

24 *In re Levin*, 19 FALR at 4526.

25 *See id.* at 4527.

26 FLA. STAT. §455.654(3)(k)3.f. (Supp. 1998).

27 *In re Levin*, 19 FALR at 4528.

The statutory definition of a "group practice" requires (i) that each member of the group provide "substantially the full range of services which the health care provider routinely provides ... through the use of shared office space, facilities, equipment and personnel," and (ii) that substantially all of the services of the health care providers who are members of the group are provided through the group and are billed in the name of the group."[28]

The Board found that, because a pathologist would be providing a limited range of services for a dermatology group, he would not be providing, on behalf of the group, the full range of services which he normally provides as part of his overall practice. Thus the dermatology group would not meet the first test set forth in the statutory definition. The Board also found that, because a pathologist would be employed on a part-time basis and would devote only part of his professional time to providing services through the dermatology group, in many instances, the requirement that members of the group provide *substantially* all of the services provided by such persons through the group would not be satisfied.[29]

The prohibitions of the Self-Referral Act are set forth clearly and explicitly, and allow less room for interpretation than the prohibition against fee-splitting. The Board's Order in *Levin* involved the application of a fairly explicit law to a particular set of facts rather than a determination of the parameters of a more general law which is subject to varying interpretations. Curiously, after holding that the proposed arrangements in *Levin* violated the Self-Referral Act, the Board also ruled, using rather circular reasoning, that the arrangements also violated the prohibition against fee-splitting.[30]

Florida's statutory prohibitions against fee-splitting and self-referral are designed to control health care costs by discouraging unnecessary referrals induced by financial incentives. Proper interpretation and enforcement of these statutory provisions is essential to maintaining the economic integrity

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[28] FLA. STAT. §455.654(3)(f) (1997).

[29] Noting that the Self-Referral Act did not specifically define the term "substantially all," as that term relates to services provided by members of the group, The Board noted the similarity of the definition of "group practice" contained in the "Stark Bill" the federal statute prohibiting self-referrals - and borrowed the standard established by federal regulators implementing the Stark Bill, which require that at least 75% of the total patient care services provided by members of a group be furnished through the group.

[30] After finding the arrangements violated the Self-Referral Act, the Board stated:

> Therefore, to the extent that such referrals would involve splitting professional fees between the referring entity of physicians and the Ameripath employed pathologists, such arrangement would result in a violation of [the statutory prohibition against fee-splitting], because it would entail a split-fee arrangement.

19 FALR at 4529.

of the health care system. The prohibitions should not be interpreted so broadly, however, so as to thwart innovation and the development of new relationships or arrangements which may promote efficiency or better or more convenient service for patients. The Board of Medicine should recognize that the health care industry is changing rapidly. In reviewing proposed new economic arrangements, the Board should weigh the benefits which may accrue to patients and to physicians from such arrangements against the possibilities of abuse which may be inherent in such relationships.