

STATE OF FLORIDA  
BOARD OF MEDICINE

IN RE: THE PETITION  
FOR DECLARATORY  
STATEMENT OF  
JAMES J. NORCONK, JR., MD,  
PAUL H. SKAGGS, MD,  
JOANNE W. WERNICKI, MD, and  
H. PAUL HATTEN, JR., MD

Final Order No. DOIH-01-2227-DS-MQA  
FILED DATE - 12/26/01  
Department of Health  
By: Vicki L. Kenan  
Deputy Agency Clerk

FINAL ORDER

THIS CAUSE came before the Board of Medicine (hereinafter "the Board") pursuant to §120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, at duly-noticed public meetings in Miami and Tampa, Florida on October 6 and December 1, 2001, for the purpose of considering the Petition for Declaratory Statement (attached as Exhibit A) filed on behalf of JAMES J. NORCONK, JR., MD, PAUL H. SKAGGS, MD, JOANNE W. WERNICKI, MD, and H. PAUL HATTEN, JR., MD (hereinafter Petitioners). Having considered the petition, the arguments submitted by counsel for Petitioners, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. This petition was noticed by the Board in Vol. 27, No. 38, dated September 21, 2001, of the Florida Administrative Weekly (page 4415). These findings of fact are those pled by Petitioners in their petition.

2. Petitioner, JAMES J. NORCONK, JR., MD, PAUL H. SKAGGS, MD, JOANNE W. WERNICKI, MD, and H. PAUL HATTEN, JR., MD, (hereinafter

"Petitioners") are allopathic physicians licensed to practice medicine in the State of Florida, and practice in the specialty of radiology.

3. Drs. Norconk, Skaggs and Wernicki are all of the shareholders of Paul H. Skaggs, MD, PA and Indian River Radiology, PA, each of which are Florida professional associations. The professional associations employ Petitioner Hatten to provide medical services to patients.

4. Petitioners are members in good standing of the active medical staff of Indian River Memorial Hospital (hereinafter "IRMH"), with full clinical privileges in the IRMH Department of Imaging Services, and provide radiology services to IRMH, along with Vero Radiology Associates, another physician group.

5. IRMH is a not-for-profit corporation qualified under Section 501(c)(3) of the Internal Revenue Code. IRMH leases and operates the Indian River Memorial Hospital and related facilities pursuant to a lease with the Indian River County Hospital District.

6. Petitioners also provide outpatient radiology services to patients of Indian River Radiology, PA at Petitioners' offices. Petitioners have purchased advanced radiology equipment for their outpatient radiology services to serve the needs of the community.

7. On or about May 7, 2001, the IRMH Board of Directors approved a resolution (hereinafter "the resolution") as follows:

That [IRMH] Management be directed, consistent with the Medical Staff Manpower Plan, to close the Department of Imaging Services, allowing appointment and reappointment to the medical staff in this department only to those individuals appropriately qualified and under written contract with [IRMH] to provide such services primarily to [IRMH], such action to be

effective immediately for all new applicants to the Department of Imaging Services and to be effective after May 1, 2002 for all reappointments to the Department of Imaging Services.

8. On or about September 1, 2001, Petitioners received IRMH's request for written proposal (hereinafter "the RFP") to provide inpatient and outpatient radiology services at the hospital's facilities.

9. The RFP:

a. identifies imaging equipment owned by IRMH hospital's desire to significantly upgrade the equipment/technology in the Department of Imaging Services over three years;

b. states that radiology coverage will be required 24 hours per day, 7 days per week;

c. states that the successful bidder will bill for professional services performed while the hospital will bill for associated facility fees;

d. requires the successful bidder and all employed radiologists to be free from any conflict of interest, including ownership interest or management positions in a competing facility within 10 miles of the hospital during the term of the contract;

e. permits the successful bidder to provide radiology services to any other non-competitive facility.

Neither the resolution nor the RFP define the word "primarily."

10. In his memorandum dated April 27, 2001 to the IRMH Board of Directors, Jeffrey L. Susi, President/CEO of IRMH (hereinafter "Susi"), stated that in any arrangement with a radiological group, the physicians would continue to receive 100%

of the physician fees, and no portion of the physician fees would accrue to the hospital.

11. The memorandum of law submitted by Petitioners references a letter from Susi to Petitioner Skaggs, which notified Petitioners that the hospital considered they had a conflict of interest because Petitioners' offices are located within 10 miles of IRMH. While this correspondence was not provided with the petition, the Board finds for purposes of the petition that Petitioner's ownership interests in Paul H. Skaggs, MD, PA and Indian River Radiology, PA would constitute a conflict of interest as defined by the RFP.

12. If Petitioners bid for and are awarded a contract to provide radiological services to IRMH, Petitioners would be required by the terms of the contract to divest themselves of their ownership interests and resign management positions in Paul H. Skaggs, MD, PA and Indian River Radiology, PA, or move the location of the office practice to a location more than 10 miles from IRMH.

13. If Petitioners decline to bid for the contract, or are not awarded the contract, they will not be reappointed to the medical staff of IRMH pursuant to the Board of resolution.

14. Petitioners assert at paragraph 17 of the petition that IRMH will require them either "to divest themselves of their interest in the offices and equipment . . . or sell (immediately or over time) such offices and equipment to the Hospital." At paragraph 21 of the petition, Petitioners assert that a contract with IRMH will require them to "abandon their independent outpatient radiology practice and all revenues derived therefrom. . ." and "to sell their outpatient radiology equipment and facilities to IRMH or

an unrelated third party." These paragraphs are inconsistent to the extent that paragraph 17 implies that Petitioners will be required to sell their equipment to the hospital, and paragraph 21 states that Petitioners may sell their equipment to a third party.

15. Paragraphs 17 and 21 of the petition are inconsistent with the RFP to the extent that the RFP restricts the bidders' independent practice of radiology within a 10 mile radius of the hospital, but does not prohibit ownership interests in independent practice outside the 10 mile radius of the hospital, and permits some undefined amount of independent practice outside hospital facilities.

16. Paragraph 21 of the petition asserts that a third-party purchaser of Petitioners' equipment would be restricted from providing radiology services in competition with IRMH. However, IRMH cannot restrict a third-party purchaser from establishing an office-based practice in radiology in competition with the hospital. The hospital can deny access to a hospital based practice by denying applications for clinical privileges at the hospital.

17. Petitioners have not advised the Board what their plan would be if they bid on the RFP. The deadline for bids has passed, and from the information presented, it appears that Petitioners did not submit a bid. Therefore, there is no contract between Petitioners and IRMH for the Board to interpret.

18. IRMH, through its agent Susi, has stated that the purposes of the resolution are to improve patient services and increase IRMH's market share of outpatient radiological services. In Susi's opinion, competition for outpatient radiological services

has reduced IRMH's income by \$500,000; closing the Diagnostic Imaging Department pursuant to the resolution will increase IRMH revenues significantly.

19. Due to the anticipated loss of hospital staff privileges, Petitioners have requested hearings pursuant to IRMH by-laws. IRMH has declined to provide hearing rights to Petitioners on the grounds that no action has been taken yet to deprive Petitioners of their hospital staff privileges.

20. Petitioners have alleged no required referrals of patients from Petitioners to IRMH, nor promises of referrals of patients from IRMH to Petitioners in exchange for payment of a portion of professional fees or any other remuneration. No information has been presented regarding the remuneration to be paid to Petitioners under a contract with IRMH to provide radiological services "primarily" to IRMH. Petitioners believe they may be required to sell their diagnostic equipment to IRMH pursuant to a contract, but this requirement is speculative, and the only information regarding a price to be paid for the equipment is that it will be *below* market value.

#### **CONCLUSIONS OF LAW**

21. The Board has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

22. The petition filed in this cause is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

23. In their petition, Petitioners requested the Board to interpret Sections 395.0191(4), 458.331(1)(i), 455.657 (now renumbered 456.054) and 817.505, Florida

Statutes. At consideration of the Petition by the Board at its meeting on October 6, 2001, Petitioners clarified that they were seeking interpretation as to whether the facts of the case establish a kickback.

24. The Board does not have authority to interpret Section 395.0191(4) or Section 817.505, and declines to do so.<sup>1</sup>

25. Section 458.331(1)(i) provides that it is a violation of the Medical Practice Act for a physician to

(i) Pay[] or receiv[e] any commission, bonus, kickback, or rebate, or engag[e] 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.

26. Section 456.054 provides that

It is unlawful for any health care provider or any provider of health care services to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.

"Kickback" is defined in Section 456.054(1) as

a remuneration or payment back pursuant to an investment interest, compensation arrangement, or otherwise, by a provider of health care services or items, of a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items, when the payment is not tax deductible as an ordinary and necessary expense.

27. The courts recognize that it is now standard practice to award exclusive

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<sup>1</sup>In *In Re Bakrania*, 20 FALR 395 (1998), the Board found that it did not have authority to interpret Section 817.505, Florida Statutes. See, footnote 7.

franchises to medical doctor groups to perform all of the hospital's work, in a contract basis, in such areas as pathology, radiology and anesthesiology. *Hospital Corporation of Lake Worth v. Romaguera*, 511 So. 2d 559 (Fla. 4<sup>th</sup> DCA 1986), citing *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F. 2d 1346 (7<sup>th</sup> Cir 1982).

28. The effect of IRMH's proposal and RFP will be to reduce competition to the hospital by forcing competing diagnostic facilities to choose between outpatient practice and hospital staff privileges unless they are located more than 10 miles from the hospital. This attempt may be a restraint of trade in violation of Chapter 542, Florida Statutes. The Board has directed that the petition be referred to the anti-trust department of the Office of Attorney General to address that issue.

29. The refusal of IRMH to renew Petitioners' hospital staff privileges under these circumstances may be a breach of contract, as was held in *Bilek v. Tallahassee Memorial Regional Medical Center, Inc.*, Case No. 91-973, 2d DCA, Final Judgment entered April 29, 1991. In addition, IRMH's refusal to renew staff privileges may be a violation of Section 395.0191(4); however, as stated above, any conclusion is beyond the Board's purview.

30. However, the facts presented do not constitute a kickback in violation of Sections 458.331(1)(i) and 456.054, Florida Statutes.

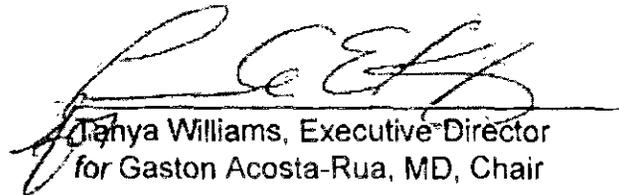
31. This Final Order responds only to the specific facts set forth and specific questions set forth by Petitioners in their Petition for Declaratory Statement, as clarified in their oral presentation. The conclusions of the Board are with regard to the specific statutory provisions addressed, and should not be interpreted as commenting on

whether the facts in the petition may or may not violate any other provisions of Chapters 458 or 456, Florida Statutes, or other related obligations placed on physicians in Florida. Furthermore, this Declaratory Statement is not a ruling on the legal validity or enforceability of any contract that may result from the RFP or any similar contract.

WHEREFORE, the Board hereby finds that under the specific facts of the petition, as set forth above, the resolution and the RFP do not violate Sections 458.331(1)(i) or 456.054, Florida Statutes.

DONE AND ORDERED this 18 day of DECEMBER, 2000.

BOARD OF MEDICINE

  
Tanya Williams, Executive Director  
for Gaston Acosta-Rua, MD, Chair

**NOTICE TO PARTIES**

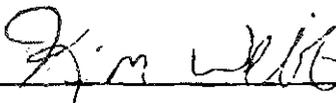
Pursuant to Section 120.569, Florida Statutes, the parties are hereby notified that they may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department of Health and one copy of a notice of appeal and the filing fee with the District Court of Appeal within 30 days of the date this Final Order is filed.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail to Petitioner JAMES J. NORCONK, JR., MD, PAUL H. SKAGGS, MD, JOANNE W. WERNICKI, MD, and H. PAUL HATTEN, JR., MD, c/o

Philip M. Sprinkle II, Esquire, Williams, Mullen, Clark & Dobbins, P.O. Box 1320,

Richmond VA 23218-1320, this 26 day of December, 2001.

  
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DEPARTMENT OF HEALTH  
MEETING OF THE  
FLORIDA BOARD OF MEDICINE

EMBASSY SUITES AIRPORT  
3974 Northwest South River Drive  
Miami, Florida

October 6, 2001

In the Matter of: PETITION OF NORCONK, SKAGGS,  
WERNICKI & HATTEN  
Re: Patient Referral

Tab No. 57 (Supplemental)

10:10 a.m. - 10:54 a.m.

BOARD MEMBERS PRESENT:

- GASTON J. ACOSTA-RUA, M.D., Chairman
- LAURIE K. DAVIES, M.D.
- JOHN W. GLOTFELTY, M.D.
- KRISTON J. KENT, M.D.
- PETER LAMELAS, M.D.
- GUSTAVO LEON, M.D., Second Vice Chair
- MONIQUE W. LONG
- B. DENISE McMILLIN, M.D.
- RAFAEL MIGUEL, M.D.
- ELIZABETH TUCKER, M.D.
- GILBERT RODRIGUEZ
- RAGHAVENDRA VIJAYANAGAR, M.D.
- GARY WINCHESTER, M.D.
- ZACHARIAH P. ZACHARIAH, M.D., First Vice Chair

**CERTIFIED  
COPY**

## P R O C E E D I N G S

1  
2 DR. ACOSTA-RUA: The next on the agenda is  
3 the petition for declaratory statement, Norconk,  
4 Skaggs, Wernicki, Hatten.

5 (All witnesses were sworn.)

6 DR. ACOSTA-RUA: Good morning, gentlemen.

7 MR. SPRINKEL: Good morning.

8 DR. ACOSTA-RUA: I hope you get together and  
9 decided that one is going to be the speaker. We  
10 cannot hear all of you.

11 MR. SPRINKEL: Yes, sir.

12 DR. ACOSTA-RUA: And there is somebody also  
13 in the audience, Mr. Pearling.

14 Mr. Pearling, I am going to give you an  
15 opportunity, brief opportunity to say something,  
16 so we have a big agenda here, gentlemen. We have  
17 been working here for a long time, but we wanted  
18 to give you the opportunity to say everything you  
19 have to say, but one person, please. And brief,  
20 and to the point, because we have read it, many of  
21 the documents you have sent to us.

22 MR. SPRINKEL: Thank you, sir. My name is  
23 Phillip Sprinkel. I'm with the law firm of  
24 Williams, Mullen, Clark and Dobbins. I've been  
25 counsel, been counsel to all these fine doctors

1 and Indian River Radiology for several years.

2 What we have before you today -- I know you  
3 all have read the materials -- is what, in my 21  
4 years of being a health care lawyer, is one of the  
5 most significant cases for the practice of  
6 medicine in general and, frankly, the physicians  
7 in the State of Florida.

8 The facts, I will skip over the facts as much  
9 as I possibly can in the interest of time, but I  
10 think it's been clear that there was never an  
11 issue raised with the quality of these physicians.

12 This does not appear to be a quality matter.  
13 There are no hidden agendas here. All of these  
14 physicians, there's been no sanctions, no -- in  
15 the past 15 to 20 years, no sanctions brought  
16 them, no limitations in privileges.

17 Indeed, one of the facts that's not present  
18 in this case is that two of the physicians, during  
19 the process of this amendment of the medical staff  
20 bylaws, have actually been re-upped for  
21 privileges, recognizing that when they come due  
22 again, they'll be taken away without  
23 qualification.

24 It's also a matter that, as I'm sure the  
25 Board can tell, not a matter of -- not an isolated

1 matter. I'm not sure that the hospital's proposed  
2 amendment to the medical staff bylaws could not be  
3 used against a surgeon who wants to do surgeries  
4 in his or her office, an internists who refers lab  
5 tests to some place other than the hospital's  
6 laboratory.

7 That having been said, the -- we are here  
8 today with five specific requests of the Board, so  
9 why don't I move straight into those.

10 The first -- and I do have to note that there  
11 is one significant enhancement to the materials  
12 that you have before you for counsel. I have ten  
13 copies of a case that I'd like to pass around not,  
14 obviously, to read today, but I would like to make  
15 notice of it in the record.

16 The reason why I think it's so important is  
17 this Board has actually ruled on this issue  
18 before.

19 In the case of Lester versus the Board of  
20 Professional Regulation back in 1977, which we've  
21 discovered actually predated the current law,  
22 there was a physician in DePugh Hospital who  
23 received payments by the hospital to bring his  
24 surgeries there.

25 This Board attempted to discipline him as if

1 being unprofessional conduct. The physician  
2 appealed the decision after it was rendered by the  
3 Board. The Leon County Circuit Court said, well,  
4 we're not sure it's unprofessional conduct, but we  
5 know it's unethical.

6 He then appealed to the First District Court  
7 of Appeals in Tallahassee and the Court reversed  
8 this Board, saying because there was no reference  
9 to kickbacks in the statute that the physician  
10 could not be disciplined by the Board.

11 And it was no surprise that at the next  
12 legislative session the kickback provisions that  
13 are before us today under 458 were presented to  
14 the Florida Legislature and adopted.

15 MS. LANNON: If you're going to -- if it's  
16 going to be entered into the record, then I want  
17 us to read it, otherwise -- if it goes up on  
18 appeal that you gave it to us --

19 MR. SPRINKEL: That's fine.

20 MS. LANNON: -- and it's clear that we didn't  
21 read it.

22 DR. ACOSTA-RUA: Read the whole thing?

23 MS. LANNON: I mean, you don't want to accept  
24 it, accepted it or want to read it.

25 DR. ACOSTA-RUA: Well, has this been

1 presented before?

2 MS. LANNON: Yes, but I think he said he just  
3 found this.

4 MR. SPRINKEL: We found it because it was on  
5 a case that pre --

6 DR. ACOSTA-RUA: You say you found it  
7 yesterday?

8 MR. SPRINKEL: No, sir. We found it after  
9 the date that the memorandum of law was submitted,  
10 but I only draw it to the Board's attention  
11 because the Board has ruled on the issue. That's  
12 all.

13 DR. ACOSTA-RUA: I think that is very unfair,  
14 to come here with four pages here in the middle of  
15 the morning.

16 MR. SPRINKEL: Oh.

17 DR. ACOSTA-RUA: And then for us to accept it  
18 without reading --

19 MR. SPRINKEL: Sir, you are not obligated to  
20 accept it. If you would like to decline it --  
21 it's your precedent. That's all I was suggesting  
22 to you and I wanted to bring that to your  
23 attention.

24 DR. ACOSTA-RUA: Well, we will decline.

25 MR. SPRINKEL: That's fine, sir.

1 DR. ACOSTA-RUA: Okay.

2 MR. SPRINKEL: The first -- as I indicated,  
3 we have five specific requests of the Board.

4 The first request is for the Board to rule  
5 that, were the practitioners to sell their  
6 practice or divest their practice or abandon their  
7 practice under the facts and circumstances  
8 presented in the petition, that it would be a  
9 violation of both Sections 455.657 and 458 and in  
10 breach of their professional guidelines.

11 In this regard, we request that you use in  
12 your review and apply the federally recognized  
13 standard which is, as the materials indicate,  
14 upheld as recently as 2000, that if even one  
15 purpose of the proposed business venture or the  
16 proposed contractual amendment by the hospital is  
17 to obtain referrals, that it should be in  
18 violation.

19 I think that when you look, as you interpret  
20 this, whether or not the Florida Board should  
21 consider looking at the federal law that's been  
22 submitted, I think you can safely do so for  
23 several reasons.

24 First, the statutory sections, when the  
25 enactment of 1992 amendments to Section 455 --

1 I'll make this as brief as I can -- expressly  
2 cited to the federal statutes.

3 If you look at both the Senate staff analysis  
4 and the final -- both sections of the Florida  
5 House, the Senate and the House, looked at the  
6 federal law when they enacted 455.

7 Second request: Petitioners request a  
8 finding by the Board that the economic pressure in  
9 the medical staff amendment confirmed by --  
10 proposed and passed by the Indian River Memorial  
11 Hospital, or at the very least, the granting or  
12 denial of medical staff privileges based solely on  
13 economic reasons is contrary to public policy.

14 In making this request, we are very conscious  
15 of the fact that the Board is limited on using its  
16 declaratory statement for adoption of Board/Agency  
17 policies when the Legislature should step in.

18 In this case, the Legislature has stepped in,  
19 I think as pointed out in the amicus briefs  
20 submitted by the Florida Physicians' Association,  
21 it's very clear that the Legislature has already  
22 made that decision, that in the review of granting  
23 or denial of medical staff privileges, economic  
24 considerations are not in play.

25 So, I believe that you have the precedent and

1 that you are not undertaking an expansion of your  
2 Board policies, you are simply looking to a ruling  
3 that if -- if the sole issue, the granting or  
4 denial of medical staff privileges is based on  
5 economic criteria that that would be contrary to  
6 public policy.

7 Again, I commend you to the case of Harris  
8 versus Gonzalez, which is in your materials. It  
9 specifically references this Board's licensure  
10 rules and guidelines in making that very  
11 determination.

12 The third request is a formal recognition,  
13 much as you did in the Bacarania (ph) case, of the  
14 similarity of intent and applicability of  
15 violations under Sections 455 and 458, to Section  
16 817.

17 I recognize that you may or may not have the  
18 ability to rule on a criminal statute, but you did  
19 acknowledge the similarity between those two  
20 statutes in your previous rulings in the Bacarania  
21 case.

22 And I would also request that you use your  
23 power to refer this matter to the Attorney General  
24 who is obviously here as part of your enforcement  
25 arm, to the extent that you think it's

1 appropriate.

2 The fourth request is -- and as has been  
3 promoted by the Florida Physicians' Association,  
4 is that this matter -- if you could use your power  
5 to refer this matter to the Agency for Health Care  
6 Administration.

7 We, too, obviously, can bring that issue, but  
8 if you think it's of such significance, as we do,  
9 to the practice of medicine in the State of  
10 Florida, to refer the matter to the Agency for  
11 Health Care Administration for their review under  
12 Section 395.

13 And lastly, our fifth request is, frankly,  
14 speed. We are staring at -- we are staring at  
15 this amendment. There are two groups. Mr.  
16 Pearling represents the other group who is not  
17 before you today.

18 But our medical staff -- our world as we've  
19 known it as practitioners, as provided over 40 --  
20 or close to 40 years of service to the State of  
21 Florida, and they are all board certified, there's  
22 no quality -- our world is changing in five  
23 months.

24 DR. ACOSTA-RUA: Thank you, Counsel

25 MR. SPRINKEL: Thank you.

1 DR. ACOSTA-RUA: Mr. Pearling, will you come  
2 forward? You may use that microphone there.

3 MR. PEARLING: Thank you.

4 DR. ACOSTA-RUA: Make it brief.

5 MR. PEARLING: My name is Lester Pearling  
6 from the law firm of Broad and Cassell. I  
7 represent the Vero Radiology Associates, P.A.  
8 They are the second of the two radiology groups in  
9 Vero Beach who are impacted by this situation.

10 I want to speak primarily to the issue of  
11 fee-splitting, which is one of the more  
12 significant concerns in this case.

13 And I raise it because of the context in  
14 which this was -- this whole issue was presented  
15 to my clients by Indian River Memorial Hospital's  
16 CEO.

17 This was presented purely as an economic  
18 situation, basically the hospital saying we want a  
19 piece of your business, your outpatient business,  
20 49 percent, to be specific.

21 When the CEO was asked, if we don't sell you  
22 that percentage of our business, are we going to  
23 lose our hospital privileges, and the CEO  
24 responded affirmatively to that, that that would  
25 be the likely outcome.

1           Basically what the hospital is saying is that  
2 we will, in exchange for 49 percent or some other  
3 minority share of your business, give you  
4 exclusive access to our inpatient and outpatients  
5 of the hospital.

6           That, in my mind, is a classic case of fee-  
7 splitting. It's an offer of remuneration in  
8 exchange for referrals, disguised in other forms  
9 but, nonetheless, when it's boiled down, that's  
10 what it is.

11           The hospital had submitted a request for  
12 proposals to provide exclusive services at --  
13 within the hospital. My clients declined to  
14 participate in that, in part because of their  
15 belief that this was an illegal process that the  
16 hospital was engaging in and that by submitting a  
17 proposal that they would be a co-conspirator in  
18 that process from criminal perspective, but also a  
19 participant in a fee-splitting arrangement.

20           This is really a classic case of fee-  
21 splitting in a more sophisticated guise, and one  
22 that's sort of wrapped around what some might  
23 accept as a customary practice to allow exclusive  
24 privileges to be granted to certain departments in  
25 the hospital.

1           But that's supposed to be for quality  
2 reasons. And, as Mr. Sprinkel has pointed out,  
3 there's never been an issue, and the circumstances  
4 has always been an economic situation.

5           For that reason, I believe that this is a  
6 fee-splitting situation and I believe if my  
7 clients were to proceed with this type of  
8 arrangement, they would be violating the rules of  
9 this Board and Florida Law, and the Board should  
10 find that way.

11           DR. ACOSTA-RUA: Thank you, Mr. Pearling.

12           Now, I'm going to ask Ms. Lannon to address  
13 the issue here for the Board.

14           MS. LANNON: Okay. First of all, I think  
15 they have stated some findings, so I'm not even  
16 going to address that.

17           I think it's important to remember that this  
18 Board does not get to rule on whether hospitals  
19 are violating the hospital regs, so I don't  
20 believe that you can rule on the questions  
21 relating to 395 and whether the hospital is acting  
22 improperly.

23           As a matter of fact, in the rule hearing on  
24 the surgical care rule, that was one of the  
25 issues, that they kept saying it was economic

1           credentiailling, our position was that was an issue  
2           for them to deal with the hospitals in circuit  
3           court and not for the Board to do it.

4                       Secondly, the Board cannot rule on antitrust  
5           issues. The Board can only rule on the statutes  
6           it has. And it appears to me that the -- the  
7           outline that they have of what would occur is not  
8           a fee-splitting matter or a payment of commission  
9           or rebate.

10                      What they are asking is that these people  
11           come work for them. If I work for you, it's not a  
12           referral, we work together.

13                      There is nothing I could see in the contract  
14           that required referrals, it just said come work  
15           for us and don't work anywhere else. They don't  
16           have to agree to that, but I don't see where it is  
17           fee-splitting, because if they go to work for  
18           them, then they are part of them.

19                      So, that's my view. I understand the cases  
20           that they cite. I would say, on looking at the  
21           petition, paragraph 37 is about the 395, and I  
22           think the Board should decline to rule on that  
23           paragraph.

24                      41 is also asking for an interpretation of  
25           hospital law.

1 DR. ACOSTA-RUA: So I assume your  
2 recommendation is for the Board to --

3 MS. LANNON: To rule that this is not fee-  
4 splitting.

5 DR. LEON: Excuse me --

6 DR. ACOSTA-RUA: That it is not fee-  
7 splitting, or that the Board doesn't have  
8 jurisdiction in whatever they asking for?

9 MS. LANNON: No, the Board does have  
10 jurisdiction to answer the questions in 35, 36, 38  
11 on whether it's fee-splitting, and I'm suggesting  
12 the answer is no, it is not fee-splitting.

13 DR. ACOSTA-RUA: Okay. Dr. Leon.

14 DR. LEON: This is very difficult, but  
15 ethically I feel extremely uncomfortable to  
16 understand that major corporations would actually  
17 take over the practice of medicine by -- like you  
18 were for sale.

19 I am very uncomfortable with that. I'm in  
20 discomfort, and I believe there is fee-splitting  
21 there. So, morally I would feel very  
22 uncomfortable to vote saying that there's no fee-  
23 splitting.

24 If there is any possibility they can acquire,  
25 they can do it, they can work for them, but then,

1 as well, they can give you an incentive. You can  
2 go with the 50 and 49 issue, we are starting to  
3 create issues that the federal government, the  
4 state might see it differently.

5 As far as I'm concerned, on my end, I would  
6 definitely proceed with this very cautiously, and  
7 I think we have to have a little bit more  
8 information, and this -- I would vote against it.

9 I would vote, yes, my vote would be -- my  
10 motion would be that this definitely should be  
11 considered fee-splitting and that we should not  
12 vote against that.

13 DR. ACOSTA-RUA: But you are asking for more  
14 information --

15 DR. LEON: I am asking for more information.

16 DR. ACOSTA-RUA: You want to table it for  
17 more information.

18 MR. SPRINKEL: Mr. Chairman.

19 DR. ACOSTA-RUA: Just a minute.

20 MR. SPRINKEL: Yes, sir.

21 DR. ACOSTA-RUA: Let me understand what my  
22 director want to say. You want to have more  
23 information? You want to table this?

24 DR. LEON: As a matter of fact, -- as a  
25 matter of fact, I do. I'm sorry.

1           One of the things that we've been seeing  
2 constantly is that the hospitals do credential  
3 physicians in many different ways. And we have  
4 argued that before. And we've sat here doing and  
5 talking about economic credentialling.

6           We spoke about hospital now allowing  
7 physicians because they -- the three-mile zone  
8 area, quote, unquote, whether there be sufficient  
9 patients. That's not the issue.

10           We've got rules and laws that protect the  
11 hospitals, but there are very few rules and laws  
12 that protect the physician. And we're out there  
13 in the trenches in a different world looking from  
14 our perspective to this huge entrepreneurial  
15 corporation that wants to rule our lives.

16           And I am very uncomfortable. And that's very  
17 scary. To be honest with you, we are losing our  
18 grounds to practice medicine. Decency, I'm just  
19 talking about main practice of medicine.

20           And I think we -- one of our goals should be  
21 not only to observe things on a different  
22 perspective, but to protect ourselves and to know  
23 when things are going to hurt us personally  
24 because someone else wants to make the benefit of  
25 our sweat, our work and our money as well, and to

1 control our lives in a very subtle manner.

2 And I have to believe that -- I need more  
3 information, but I would definitely -- will not --  
4 I'm sorry --

5 DR. ACOSTA-RUA: No, I say you present it  
6 very well, that they are -- counsel here just  
7 presented today some new information. I denied  
8 them. We didn't have a chance to read that. It  
9 may be very important for that.

10 I sympathize with what the Dr. Leon has said  
11 and I agree we will entertain -- you already make  
12 a motion to table this?

13 DR. LEON: Yes, sir.

14 DR. ACOSTA-RUA: And to require more  
15 information, then we can have more -- all the  
16 information you can give us, but I need to hear a  
17 second --

18 DR. LAMELAS: Yes. Second.

19 DR. ACOSTA-RUA: Second.

20 DR. LAMELAS: They have a time factor here,  
21 and I don't know if that plays a role in that, but  
22 what I believe they are asking is for a  
23 declaratory statement on fee-splitting.

24 And the hospital is giving them the ultimatum  
25 here, either work for us or don't work at all.

1 DR. LEON: Yes.

2 DR. LAMELAS: The hospital is saying, we will  
3 -- we will -- you will not have privileges at this  
4 facility unless you divest yourself of any  
5 outpatient practice and you come and work for us  
6 as a radiologist.

7 So, this is -- they are giving them -- it's  
8 not fee-splitting in the general sense, dollar-  
9 for-dollar, but there is revenues being made by  
10 this group now that is going to be made by the  
11 facility.

12 So, they are -- they are, in effect, coercing  
13 them, you know, to -- in limiting their practice.  
14 So, I think it is fee-splitting by any -- by any  
15 stretch of the imagination.

16 DR. ACOSTA-RUA: Okay. Dr. Winchester and  
17 then Dr. Kent.

18 DR. WINCHESTER: Tabling this is okay with  
19 me, but there's one case that I'd like for us to  
20 look up. It's a case of Velig (ph) versus TMRMC,  
21 approximately five or six years ago. I think Ms.  
22 Lannon knows about it and Dr. Leon knows about it.

23 This is a case where a radiation/oncologist  
24 opened up a radiation facility directly across the  
25 street from the hospital and as a result the

1 hospital declined to renew his privileges.

2 I know it went through the First DCA and the  
3 hospital won. I don't know if it went any further  
4 than that.

5 To me this looks like fee-splitting. It  
6 doesn't sound fair, doesn't sound right, but I  
7 think we need to look at that case.

8 DR. ACOSTA-RUA: You are in favor of tabling?

9 DR. WINCHESER: Yes.

10 DR. ACOSTA-RUA: Okay. Dr. Kent.

11 DR. KENT: Yes. I just, again, want to make  
12 sure that Ms. Lannon understands that if this is  
13 the only place to practice in this town, that in  
14 essence, if you are given a contract that says  
15 sign with us and you say you don't have to sign  
16 it.

17 No, you don't have to sign it, you can leave  
18 town, and leave your private patients and  
19 everything else. But, basically they own the  
20 ability to practice medicine in this town and  
21 therefore you are not -- you don't have a choice  
22 to sign or not to sign.

23 MS. LANNON: So they wouldn't be -- may I?

24 DR. ACOSTA-RUA: Sure.

25 MS. LANNON: The way I read this, they can

1 maintain a private practice, it's just that if  
2 they do, they will not be able to practice in the  
3 hospital.

4 DR. KENT: And basically a radiologist cannot  
5 practice without a hospital.

6 DR. ACOSTA-RUA: Yes. A radiologist cannot  
7 practice, the same like --

8 DR. TUCKER: But this is restraint of trade  
9 as best I can tell, also.

10 MS. LANNON: I agree. I don't disagreed with  
11 that. I think that there are real problems with  
12 this. I think there are antitrust problems, and I  
13 think there may be hospital bylaws problems, but I  
14 don't think those are issues this Board can  
15 address.

16 I do agree that it's probably restraint of  
17 trade. I don't see it as fee-splitting, though,  
18 because what they are doing -- deciding is whether  
19 to work for the hospital or not work for the  
20 hospital.

21 If they are part of the hospital they are not  
22 referring, they are part of the hospital.

23 DR. KENT: Well, should we -- in fact, if  
24 it's not our purview to do what we're talking  
25 about, can we refer -- at least refer it to the

1 Attorney General like they asked, and go ahead and  
2 refer it to the Attorney General?

3 DR. ACOSTA-RUA: Well, that's one thing that  
4 you can have a motion to do that, but let --

5 DR. KENT: I'm make a friendly amendment to  
6 the motion.

7 DR. ACOSTA-RUA: What -- the motion that he  
8 has was to table it.

9 Dr. Zachariah.

10 DR. ZACHARIAH: Mr. Chairman, I think you are  
11 running away with the motions. Maybe -- I may be  
12 the only physician on the table, maybe not, who  
13 agrees with Cathy Lannon.

14 This is not a fee-splitting thing. You've  
15 got to get all the motions on the -- for a moment  
16 in time you should realize with our position.  
17 Look at -- for a moment in time, forget about your  
18 practice, forget about your -- look for a moment  
19 that it has nothing to do with fee splitting.

20 It's under restraint of trade. If you don't  
21 like it, go to the United States Attorney General,  
22 or the Attorney General of Florida. That's their  
23 problem, not our problem.

24 They have come before us for a declaratory  
25 statement to if this is fee-splitting. The reason

1 is, I don't think it's fee-splitting. Anytime  
2 when a radiology group or a cardiology group  
3 practices at a hospital they say, guess what, you  
4 gather up your other thing and stay at hospital  
5 completely, or do what you got to do.

6 MR. SPRINKEL: Mr. Chairman --

7 DR. ZACHARIAH: Let me finish.

8 Now, reading this thing I do not believe --  
9 again, I'm not a legal expert, but I think that  
10 there is really a restraint of trade. There's no  
11 question in my mind that they have a restraint of  
12 trade, and that is not -- that is not in the  
13 purview of this Board. That's all I'm saying.

14 DR. ACOSTA-RUA: Counsel.

15 MR. SPRINKEL: Yes.

16 DR. ACOSTA-RUA: Let me let counsel talk for  
17 a moment.

18 MR. SPRINKEL: While I certainly respect Mr.  
19 Pearling, and I did not know he was coming today  
20 till just a couple of days ago, our argument is  
21 not fee-splitting.

22 Mr. Pearling represents another client. Our  
23 argument is that this is a kickback. All right.  
24 I either have to shift my patient population to  
25 the hospital by abandoning it, all right, or I

1 have to sell it to the hospital.

2 In either case I know one reason for doing it  
3 is so the hospital can get its market share. And  
4 if you look at that position of Mr. Susi in his  
5 April 27 letter, that's all he's talking about, is  
6 getting market share by shutting us down.

7 All right. I'm not talking about that --  
8 while again, I respect Mr. Pearling, don't -- the  
9 issue of our clients before the Board is this is a  
10 kickback.

11 DR. ACOSTA-RUA: Okay.

12 MR. SPRINKEL: Plain and simple. So, please  
13 don't take us down the fee-splitting lane.

14 DR. ACOSTA-RUA: Okay. Dr. Leon.

15 DR. LEON: It is a kickback, definitely.  
16 This either use -- you sell me -- you give me your  
17 patients or you don't work, but you're -- I'm  
18 going to get my share out of what you have. So,  
19 there is a kickback based on their getting the  
20 money and the patients.

21 DR. ACOSTA-RUA: Ms. Lannon.

22 MS. LANNON: If this is a kickback, then what  
23 the Board is saying is that every time a physician  
24 goes to work for somebody else with a promise of  
25 remuneration, you bring your patients with you,

1           you come to our group, that that's a kickback.

2           And if that's what you're saying, that's what  
3           you're saying. I just think you need to be aware  
4           of it.

5           DR. ACOSTA-RUA: We have to be careful. We  
6           discussed that. If you go and practice with  
7           another doctor it is expected that you are going  
8           to take your practice along, otherwise why is he  
9           going to get you. he will get a doctor just coming  
10          out of training.

11          But anybody who have a good practice and  
12          wants to be negotiating with a hospital, it's  
13          expected that he's going to take his patients  
14          there.

15          So, we have to be very careful. And we  
16          discussed this a lot.

17          DR. LEON: The only difference that person  
18          would not tell you that unless you come with me  
19          you don't work.

20          DR. KENT: That's right.

21          MR. SPRINKEL: Thank you.

22          DR. KENT: There's a world of difference  
23          here.

24          MR. SPRINKEL: Thank you.

25          DR. KENT: And that makes the whole

1 difference of the issue.

2 DR. ACOSTA-RUA: Yes, you can bring your  
3 patient or not --

4 DR. LEON: But or you don't work here, that's  
5 very serious.

6 DR. ACOSTA-RUA: That's very serious.

7 DR. LEON: This is so serious that we don't  
8 even know what's ahead of us.

9 DR. ACOSTA-RUA: Let me give a chance to the  
10 doctor. Dr. Kent.

11 DR. KENT: Just, as he was saying, there's a  
12 very big difference when you have a choice, and  
13 you make a choice to go and bring your patients to  
14 put it together, because it's best for everyone  
15 involved, or whether you have no choice, you're  
16 being coerced by the big -- the big brother that,  
17 you know, pay us or else we break your windows  
18 out. You know, it's a coercion deal. It's not  
19 a--

20 DR. ACOSTA-RUA: I understand. I just want  
21 to tell the Board, if you feel that you have  
22 enough information to go ahead and take a position  
23 of the Board, but remember that whatever we do  
24 here is going to take a precedent, and if you feel  
25 that you have all the information to do an

1 educated vote, then go ahead, and I go forward  
2 with the vote, I conduct the vote.

3 I don't agree with some of the things that  
4 have been said here, but I think that initially  
5 what Dr. Leon is saying is that we need some more  
6 information.

7 The counsel provided new information here  
8 that will be in their advantage, and I would have  
9 to -- like the opportunity to read it.

10 Dr. Davies.

11 DR. DAVIES: I would just caution that we  
12 need to be very, very careful about the legal  
13 crafting of this language. I think -- I think  
14 that everybody's probably understanding that we  
15 are very sympathetic to the physicians here.

16 But I would just caution that this could bite  
17 us later. So, let's think about this a little  
18 bit.

19 DR. ACOSTA-RUA: So what you are saying,  
20 agreeing is to be in favor of tabling that.

21 Dr. Kent.

22 DR. KENT: Again, instead of getting into the  
23 legal quagmire trying to get all these legal  
24 definitions, why can we not just say in this  
25 particular instance that we see bad things going

1 on for the people of the State of Florida and  
2 refer it to the Attorney General with our blessing  
3 that we think that if this smells bad, it looks  
4 bad, it's bad for the State of Florida, it's bad  
5 for the patients, it's bad for the doctors, it's  
6 wrong.

7 And we don't have to go and do all the legal  
8 work for them. All we have to do is say that  
9 we've looked at this particular case and this case  
10 stinks. It stinks bad, and we want to send it to  
11 the Attorney General with our blessing that this  
12 is bad for the State of Florida.

13 It's bad -- we understand medicine better  
14 than anyone else and now we're going to send it to  
15 the Attorney General and he's going to -- he's  
16 saying what does the Board of Medicine think about  
17 this.

18 We can look at this case and say, the Board  
19 of Medicine thinks that this is bad.

20 DR. ACOSTA-RUA: Yes, Ms. Lannon.

21 MS. LANNON: Well, but you have before you a  
22 petition for declaratory statement and you have to  
23 respond to that petition or table it. I mean, you  
24 have to take action on that petition.

25 And I would just -- I don't disagree with the

1 Board that this is bad. I just -- for example, a  
2 kickback is a kickback. But you have to be  
3 careful.

4 There are a lot of people who go to work for  
5 hospitals and work in exclusive practice  
6 arrangements, and are you saying those are all  
7 kickbacks because an incentive is offered for them  
8 to bring their patients with them?

9 The coercion I agree is wrong, but I'm not  
10 sure that the coercion is a factor in whether or  
11 not it's a kickback.

12 DR. LEON: Mr. Chair.

13 DR. ACOSTA-RUA: I really feel that we have  
14 to be very careful because we will be setting a  
15 precedent. You have all -- they refer about cases  
16 that have declaratory statement, then there's a  
17 lot of people --

18 DR. LEON: Mr. Chair.

19 DR. ACOSTA-RUA: -- they come -- they come in  
20 that --

21 DR. LEON: Mr. Chair.

22 DR. ACOSTA-RUA: Yes.

23 DR. LEON: I think we should table the --

24 DR. ACOSTA-RUA: You already said that.

25 DR. LEON: I think we should also get the

1 friendly amendment for the Attorney General with  
2 our recommendation and to think that whatever may  
3 happen now for them, it's going to happen for  
4 anesthesia, very similar physicians, whoever may  
5 have some sort of relationship with a hospital.

6 DR. ACOSTA-EUA: Dr. Winchester, do you  
7 second that?

8 DR. WINCHESTER: That's fine.

9 DR. ACOSTA-EUA: Okay.

10 DR. MIGUEL: Mr. Chairman -- is this the only  
11 hospital in the community?

12 MR. SPRINKEL: Yes, sir.

13 DR. MIGUEL: So, if there were other options,  
14 and I think I agree being a hospital-based  
15 physician, I'm very sensitive to this issue  
16 because this is a form of economic credentialling,  
17 plain and simple, and this is restraint of trade.

18 If there were options where they could  
19 practice elsewhere, then the hospital could make  
20 an argument that they can go elsewhere, we're not  
21 doing anything to hamper them and competition is  
22 good. That's part of America.

23 However, when it becomes the sole source of  
24 practice, I think things change considerably. And  
25 I'm certain that their attorneys are following

1 antitrust rules and economic credentialling and  
2 the rest.

3 So, as far as the fee-splitting, I don't  
4 know, but that's --

5 DR. ACOSTA-RUA: Well, you want us to table  
6 it and get some more information.

7 So, let's vote --

8 MS. LANNON: If you do table it for more  
9 information, I think you need to state what the  
10 more information is that you need.

11 DR. ACOSTA-RUA: The more information -- he  
12 just provided more information to us and I'm sure  
13 that they would provide more.

14 DR. GLOTFELTY: What more information do you  
15 want? I'm fine if you want to table it, but I  
16 can't think of any other information that they are  
17 going to supply. I mean, we know what it is --

18 DR. ACOSTA-RUA: You mean you feel  
19 comfortable in voting there -- what would you  
20 think about it?

21 DR. GLOTFELTY: I'm saying they said for more  
22 information.

23 DR. ACOSTA-RUA: He provided some more  
24 information.

25 DR. GLOTFELTY: I know, but what more

1 information are they going to provide?

2 DR. ACOSTA-RUA: He just provided, Dr.  
3 Glotfelty, some new information today. And they  
4 want --

5 DR. GLOTFELTY: Well, he's here today. But  
6 if we are going to table it for more information,  
7 I have no idea in the world what more information  
8 you want.

9 DR. ACOSTA-RUA: I would like to hear, what  
10 do you think. Everybody has been expressing what  
11 they think.

12 DR. GLOTFELTY: I think it's a lousy  
13 arrangement. I think it's stupid. I think it's  
14 bad, but I don't know that we have any control  
15 over it.

16 DR. ACOSTA-RUA: Do you think there is fee-  
17 splitting?

18 DR. GLOTFELTY: No. But it's lousy. It's  
19 economic credentialling.

20 DR. ACOSTA-RUA: That's not what they are  
21 asking us.

22 DR. GLOTFELTY: I know that.

23 DR. ACOSTA-RUA: Yes, Dr. Tucker.

24 DR. TUCKER: I would just -- I urge us to  
25 vote, but the other information -- I mean, I don't

1 want to just have this and have a chance to review  
2 it, but also to have the case that Dr. Winchester  
3 brought up.

4 MS. LANNON: Right.

5 DR. TUCKER: And have a chance to review that  
6 as well.

7 DR. ACOSTA-RUA: Okay. So now we have a  
8 motion and second to table. And everybody have an  
9 opportunity to talk.

10 All in favor of table.

11 (Show of hands.)

12 DR. ACOSTA-RUA: Opposed?

13 (Show of hands.)

14 DR. ACOSTA-RUA: Two opposed.

15 MR. SPRINKEL: Mr. Chairman, would that  
16 include a referral to the Attorney General for  
17 review?

18 DR. KENT: Yes.

19 DR. ACOSTA-RUA: He got it down in the  
20 motion. He wants that in the motion.

21 MR. SPRINKEL: Okay.

22 DR. ACOSTA-RUA: Okay. Thank you.

23 MR. SPRINKEL: And will you let us know if  
24 there's anything else or will you -- does this  
25 mean we do not hear again for three months when

1 the -- you know, I -- with all due respect to the  
2 Board, I'm in a little bit of a quagmire.

3 So, if the issue is tabled and I now sell the  
4 practice which we do not want to do, and three  
5 months from now you go "That is a violation of  
6 your disciplinary rules," where are we --

7 DR. ACOSTA-RUA: Well --

8 MR. SPRINKEL: In deep kimchi, I guess.

9 DR. KENT: You're up the creek.

10 DR. ACOSTA-RUA: But we are not the ones that  
11 put you in that position. And we are trying to do  
12 something that it's going to establish a precedent  
13 in the State of Florida, and we have to be very  
14 careful with what we do.

15 MR. SPRINKEL: I certainly understand --

16 DR. ACOSTA-RUA: We didn't put you or you  
17 clients in that position. We are trying to be  
18 fair.

19 MR. SPRINKEL: Yes, sir. I understand that.

20 DR. ACOSTA-RUA: So, anything that you can  
21 provide to us to try to be fair, is welcome.

22 MR. SPRINKEL: Mr. Chairman, but then does  
23 the tabling mean that you do not take this matter  
24 up again until what date in the future?

25 DR. ACOSTA-RUA: December.

1 MR. SPRINKEL: Mr. Chairman, will you  
2 entertain a proposed order that you can then  
3 consider along with your other information?

4 MS. LANNON: Yes.

5 MR. SPRINKEL: So that in December, then we  
6 are back -- we are then on your calendar in  
7 December.

8 MS. LANNON: If I may, I would suggest to the  
9 Board, if you are going to take it back up in  
10 December, that if they want to submit a proposed  
11 order, if the hospital wants to submit a proposed  
12 order that, of course, you would welcome it,  
13 whether you --

14 DR. ACOSTA-RUA: Okay. We will --

15 MS. LANNON: -- adopt it is up to the board.

16 DR. ACOSTA-RUA: The advice is from her, that  
17 we would take it.

18 MR. SPRINKEL: All right. And how do we  
19 follow the Attorney General recommendation? With  
20 whom will we be speaking? Do you know?

21 MS. LANNON: I will make the referral and  
22 then somebody will probably contact you.

23 MR. SPRINKEL: Okay. And then would you --  
24 thank you. And then perhaps later on I can get  
25 your telephone number -- or I can get it through

1 the Board. I'll get your telephone numbers and I  
2 can know where that is.

3 MS. LANNON: Yes. I was going to refer it,  
4 anyhow.

5 MR. SPRINKEL: Okay.

6 MS. LANNON: To the antitrust section.

7 MR. SPRINKEL: Very good. Thank you. Thank  
8 you very much. Appreciate your time.

9 DR. ACOSTA-RUA: Thank you.

10 DR. DAVIES: Can I just ask -- we are  
11 probably going to need a declaratory statement in  
12 the December meeting, then.

13 Would it be appropriate for there to be  
14 interaction between Board counsel and the folks  
15 who are trying to get the declaratory statement so  
16 that we're sure we have the right legal language?

17 Can an interaction occur?

18 DR. ACOSTA-RUA: Yes.

19 MS. LANNON: There have been interactions.

20 DR. ACOSTA-RUA: There have been.

21 MS. LANNON: That's how you got the petition.  
22 Didn't you --

23 MR. SPRINKEL: Yes, absolutely.

24 MS. LANNON: -- call and that's how you got  
25 the petition --

1 MR. SPRINKEL: Yes. I didn't tell you this--

2 DR. DAVIES: See, my big concern is the legal  
3 language that we come up with. I think everybody  
4 is sympathetic.

5 MS. LANNON: Does the Board want to propose a  
6 draft that would say it's not fee-splitting and  
7 they'll do a proposed draft that says it is?

8 MR. SPRINKEL: Well, ours will be a kickback.

9 MS. LANNON: Kickback.

10 MR. SPRINKEL: Yes.

11 DR. DAVIES: See, I don't know the correct  
12 mechanism here. That's why I'm asking.

13 DR. ACOSTA-RUA: They are in contact with --  
14 actually what happened is, you know, Leanne is  
15 sick and she has not been here, but she talked to  
16 Cathy and they have been talking about it and they  
17 have been in contact with them. Okay.

18 DR. KENT: And I would ask that we go one  
19 step further and assist them if -- not just on  
20 kickback, I don't want to limit them just to that,  
21 but on antitrust and on any other issues that we  
22 might be able to use here, that we support them in  
23 any way that we legally can support them to go  
24 forward with this.

25 DR. LAMELAS: I think the general sense, from

1 what I see on the Board, is that if this is the  
2 sole place that these people could practice and  
3 they already have an established practice,  
4 inpatient and outpatient, that the hospital is  
5 creating a very uncomfortable environment there in  
6 the sense from Members of the Board is that there  
7 is a problem here.

8 DR. DAVIES: My whole point is I would just  
9 like to direct counsel to craftily word this so  
10 that we are -- you know, most of us are concerned  
11 about the precedent that we are setting.

12 DR. ACOSTA-RUA: Okay.

13 DR. DAVIES: And if we just come back in  
14 December and we have the same exact thing again,  
15 and we all say, well, you know, we're worried  
16 about the precedent.

17 DR. ACOSTA-RUA: No, no.

18 DR. DAVIES: I want somebody to think very  
19 carefully about this and craft the language very  
20 carefully before we come back.

21 DR. ACOSTA-RUA: That we can understand it.  
22 And so we will go back to Leanne and I will talk  
23 to Leanne.

24 MR. SPRINKEL: And we will work with Ms.  
25 Gustafson -- and she has been very helpful, by the

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way. Thank you very much.

DR. ACOSTA-RUA: Thank you.

MR. SPRINKEL: Thank you all.

(Thereupon, the matter was concluded.)

C E R T I F I C A T E

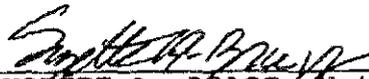
THE STATE OF FLORIDA, )  
COUNTY OF SEMINOLE, )

I, Suzette A. Bragg, Court Reporter and  
Notary Public, State of Florida at Large,

DO HEREBY CERTIFY that the above-entitled  
and numbered cause was heard as hereinabove set out;  
that I was authorized to and did transcribe the  
proceedings of said hearing, and that the foregoing and  
annexed pages, numbered 1 through 40, inclusive,  
comprise a true and correct transcription of the  
proceedings in said cause.

I FURTHER CERTIFY that I am not related to  
or employed by any of the parties or their counsel, nor  
have I any financial interest in the outcome of this  
action.

IN WITNESS WHEREOF, I have hereunto  
subscribed my name and affixed my seal, this 29 day of  
October, 2001.

  
SUZETTE A. BRAGG, Notary Public  
State of Florida at Large

My Commission Expires: 2/21/2005



**WILLIAMS MULLEN  
CLARK & DOBBINS**

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FROM: Stephen C. McCoy

DATE: September 27, 2001

PAGES, INCLUDING COVERSHEET: 2<sup>4</sup>

CLIENT NO.: 028842.0001

PLEASE FORWARD THE ATTACHED MEMORANDUM TO CRYSTAL, PER MY CONVERSATION WITH MS. TANYA WILLIAMS. THANK YOU.

If you have any questions, please call Gloria McCanna at 643-1991, Ext. 1358.

Time: \_\_\_\_\_

## Griffin, Crystal A

---

**From:** Baker, Joe Jr  
**Sent:** Friday, October 26, 2001 10:22 AM  
**To:** Griffin, Crystal A  
**Cc:** Tanya Williams  
**Subject:** O&P

Crystal, in reference to the FMA and Fla Orthopaedic Society's concerns about O&P matters, I would refer you to ss. 468.808 and 812(1)(a), F.S. It is the Board of Orthotists and Prosthetists' contention that it is the intent of the Legislature, by enacting the regulation of the O&P profession, to limit who is authorized to provide O&P services to patients.

S. 468.808, F.S., makes it clear that only a "licensed orthotist, prosthetist, or pedorthist" can delegate duties to a non-licensed person.

The exemptions listed in s. 468.812, F.S., only exempt from the requirements for licensure persons "licensed under chapter 458, chapter 459 ...". The Board's interpretation of this section is that only the licensees of these various practice acts are exempt from licensure and that read in conjunction with s. 468.808, F.S., these exempt persons do not have authority to delegate to support personnel.

If I can comment further, please let me know.

*Joe Baker, Jr.*

**Board Executive Director**

**FSB/MSA/Division of Health Care Practitioner Regulation**

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**STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION  
BOARD OF MEDICINE**

**In Re: The September 10, 2001 Petition  
for Declaratory Statement of:**

**JAMES J. NORCONK, JR., M.D.,  
PAUL H. SKAGGS, M.D.,  
JOANNE W. WERNICKI, M.D., and  
H. PAUL HATTEN, JR., M.D.,  
Petitioners**

---

**PETITIONERS' MEMORANDUM OF LAW**

**SEPTEMBER 27, 2001**

---

**Philip M. Sprinkle, II  
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(804) 783 6934**

**Counsel for Petitioners**

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*Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person:*

*(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or*

*(B) to purchase, lease, order or arrange for or recommend purchasing, leasing or ordering any good, facility, service or item for which payment may be made in whole or in part under a Federal health care program.*

*shall be guilty of a felony and upon conviction thereof shall be fined not more than \$25,000 or imprisoned not more than five years, or both.*

Fla. Stat. ch. 458.331(1)(i) (2001) ..... 12

*[Prohibits] 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 surgery centers, or pharmacies.*

Fla. Stat. ch. 455.657 (2001) ..... 9

*[Prohibits any] remuneration or payment back pursuant to an investment interest, compensation arrangement, or otherwise, by a provider of health care services or items, of a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items, when the payment is not tax deductible as an ordinary and necessary expense.*

Fla. Stat. ch. 817.505(1) (2001) ..... 14

*[No person, including any health care provider or facility, may] offer or pay any commission, bonus, rebate, kickback or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce*

*the referral or patients or patronage from a health care provider or health care facility.*

Fla. Stat. ch. 395.0191(4) (2001) ..... 16

*The applicant's eligibility for staff membership or clinical privileges shall be determined by the applicant's background, experience, health, training, and demonstrated competency; the applicant's adherence to applicable professional ethics; the applicant's reputation; and the applicant's ability to work with others and by such other elements as determined by the governing board, consistent with this part.*

**Rules**

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### STATEMENT OF SUBJECT MATTER JURISDICTION

Section 120.565, Florida Statutes, permits any substantially affected person to seek a Declaratory Statement regarding an Agency's opinion as to the applicability of a statutory provision as it applies to the petitioner's particular set of circumstances. Fla Stat. Ch. 120.565(1) (2001). Rule 28-105.002 of the Florida Administrative Code (the "Code") provides, in pertinent part, that a Petition seeking a Declaratory Statement shall be filed with the clerk of the Agency having authority to interpret the statute. Fla. Admin. Code Ann. r. 28-105(2)(2001). On September 10, 2001, Petitioners, James J. Norconk, Jr., M.D., Paul H. Skaggs, M.D., Joanne W. Wernicki, M.D., and H. Paul Hatten, Jr., M.D. (the "Petitioners") filed a Petition for Declaratory Statement (the "Petition") with the Florida Board of Medicine (the "Board") requesting the Board's ruling with regard to Florida Statutes Sections 395.0191(4), 458.331(1)(i), 455.657 and 817.505.

### STATEMENT OF FACTS

Drs. Norconk, Skaggs and Wernicki are all of the shareholders of Paul H. Skaggs, M.D., P.A. and Indian River Radiology, P.A., each a Florida professional association (the "Associations"). Dr. Hatten is employed by the Associations to provide professional medical services to patients. Petition, ¶ 2.<sup>1</sup> The Associations share office space (the "Petitioner's Offices"), at which the Petitioners provide comprehensive outpatient radiology services to patients residing in a number of local counties, including Indian River County. Pet., ¶ 1.

Indian River Memorial Hospital ("IRMH") is a not-for-profit corporation qualified under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. IRMH leases and operates the 335-bed Indian River Memorial Hospital building and related facilities (the "Hospital Facilities"), located in Vero Beach, Florida. Pet., ¶ 7.

The Petitioners are members in good standing of the active medical staff (the "Hospital Staff") of IRMH, with full clinical privileges in the IRMH Department of Imaging Services. The Petitioners have provided both inpatient and outpatient radiology services to patients at IRMH for almost twenty (20) years, during which time inpatient and outpatient radiology services at IRMH have been provided by as many as three different independent radiology practices. Radiology services at IRMH are currently provided by the Petitioners and Vero Radiology Associates, a second private radiology practice whose members serve on the Hospital Staff. Pet., ¶ 6.

Petitioner's office-based outpatient radiology services have developed over the past fifteen to twenty years, in response to a community demand for services in excess of those being provided by the IRMH Department of Imaging Services. On several occasions during that time, Petitioners requested that IRMH expand outpatient services and/or participate with them in joint ventures for the purchase of equipment or retention of personnel, in each case to meet the community need for state-of-the-art outpatient radiology equipment and expanded services. IRMH declined each of the Petitioners' requests for its participation and assistance in bringing such equipment and services to the community. Pet., ¶ 8.<sup>2</sup>

On May 7, 2001, the IRMH Board of Directors (the "Board of Directors") approved, by a vote of eleven (11) votes in favor and four (4) against, the following resolution (the "Resolution"):

That [IRMH] Management be directed, consistent with the Medical Staff Manpower Plan, to close the Department of Imaging Services, allowing appointment and reappointment to the medical staff in this department only to

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<sup>1</sup> Hereinafter, citations to the Petition will be designated as "Pet."

<sup>2</sup> IRMH did, by letter dated April 15, 1997, offer to purchase the Associations at a price far below their market value. However, IRMH did not respond to Petitioners' letter inviting further discussion of joint venture opportunities between the parties and has otherwise rebuffed all of the Petitioners' offers to cooperatively bring services and/or equipment to the local community.

those individuals appropriately qualified and under written contract with [IRMH] to provide such services primarily to [IRMH], such action to be effective immediately for all new applicants to the Department of Imaging Services and to be effective after May 1, 2002 for all reappointments to the Department of Imaging Services.<sup>3</sup>

Both the Medical Credentialing Committee and the Medical Executive Committee of IRMH recommended against adoption of the Resolution when it was presented for their review. On March 7, 2001, the Medical Staff of IRMH voted to reject the Resolution (then in proposed form) by a margin of one hundred and six (106) votes against to zero (0) votes in favor. In addition, on or about May 1, 2001, the Indian River County Medical Society (the "Medical Society") publicly stated its opposition to the Resolution by means of a press release and "open letter" which had been executed by approximately one hundred and thirteen (113) community physicians. Per, ¶ 11.

By letter to the Board of Directors dated April 27, 2001 (the "Susi Letter"), Mr. Jeffrey L. Susi, the Chief Executive Officer of IRMH ("Susi"), supported the Resolution (then in proposed form). Susi stated that, over the prior three years, competition from private radiology practices, including those of the Petitioners, had "taken" \$500,000 worth of outpatient business from IRMH. The Susi Letter indicated that, if IRMH were to form a relationship with doctors having "properly aligned goals and incentives," IRMH could "capture" one-third of the local market share in outpatient radiology services and secure an additional \$4 million in revenue. Per, ¶ 13.

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<sup>3</sup> The Board of Directors first considered the Resolution on or about January 1, 2001, at which time the Resolution (the "Proposed Resolution") provided as follows:

That [IRMH] Management be directed, consistent with the Medical Staff Manpower Plan, to close the departments/services of Invasive Cardiology, Radiology and Radiation Oncology, allowing appointment and reappointment to the medical staff in these areas only to those individuals appropriately qualified and under written contract with [IRMH] to provide such services only to [IRMH]. Per, ¶ 10.

In an article appearing in the Vero Beach Press Journal on May 6, 2001, Susi again stated, in support of the Resolution, that competition from the Petitioners and Vero Radiology Associates has "taken" \$500,000 in annual outpatient radiology business from IRMH. Susi also stated that, by adopting the Resolution and requiring radiologists on the Hospital Staff to provide outpatient radiology services exclusively to patients of IRMH at the Hospital Facilities, IRMH may be expected to gain an additional \$1.2 million to \$2.9 million in revenues derived from such services. Pet., ¶ 15. In no instance have Susi or IRMH provided any data in support of or to substantiate the claims of IRMH. In fact, both Susi and IRMH have conveniently failed to share data from IRMH's own financial records that demonstrate that the Petitioners have assisted IRMH in generating \$7,761,104.00 and \$8,423,573.00 in net positive "unallocated operating margin" for the fiscal years that ended on September 30, 1999 and September 30, 2000, respectively, during which period other departments of IRMH were losing money. Pet., ¶ 14.

On or about September 1, 2001, the Petitioners received from IRMH a request for their written proposal to provide inpatient and outpatient radiology services primarily at the Hospital Facilities (the "RFP"). The RFP notified the Petitioners of the closure of the IRMH Department of Imaging Services and stated, in part, that IRMH:

will require that the successful bidder, and all employed/subcontracting radiologists, be free from any conflict of interest, such as an ownership interest or management position in a competing facility within ten miles of [IRMH] during the term of the Agreement.

Pet., ¶ 20. By letter dated September 21, 2001, Susi notified the Petitioners that the Petitioners have a conflict of interest, as defined in the RFP, above, due to the fact that the Petitioners Offices are located within ten miles of IRMH. In the letter, Susi requested "clarification" of how the Petitioners "plan to assure compliance with the above if selected" to provide radiology

services at IRMH. Letter dated Sept. 21, 2001, from Jeffrey L. Susi, President/CEO to Paul M. Skaggs, M.D.

If the Petitioners enter into an exclusive contract with IRMH in order to secure reappointment to the Hospital Staff and the continued ability to provide radiology services to IRMH patients, they will be required, under the terms of the RFP, to terminate, divest or sell to IRMH their independent outpatient radiology practice and all revenues derived therefrom. Pct. ¶ 21. IRMH, according to the Susi Letter and Susi's public statements in support of the Resolution, expressly expects to "capture" some or all of the revenues currently generated in connection with the Petitioners' independent medical practice. Pct. ¶ 12, 13, 15. In addition, the RFP indicates that the Petitioners will be required to sell their outpatient radiology equipment and facilities to IRMH or an unrelated third party or to abandon their practice. Pct. ¶ 21.

#### Statement of Facts Involving Quality of Care

IRMH did not allege, at any time prior to January 1, 2001, the date of the Proposed Resolution, that the Petitioners, or any of them, had engaged in behavior constituting "good cause" for suspension, denial or revocation of privileges under the Code. Since that time, however, IRMH has made repeated and unsubstantiated claims regarding the Petitioners' quality of care while persistently refusing to engage in the formal peer review process required by the Policy and by Florida law. Pct. ¶ 22. For example, by letter to the Hospital Staff dated June 13, 2001, Susi stated that "the current arrangement with [the Petitioners] has not produced the best level of radiology service to Hospital inpatients, emergency patients and Hospital outpatients, and therefore, is not in the best interests of the Hospital or the community." Pct. ¶ 24.

In response to such allegations, and in accordance with Article IV of the IRMH Policy on Appointment, Reappointment, and Clinical Privileges (the "Policy"), the Petitioners have

requested the appointment of a hearing panel by IRMH. Article IV of the Policy permits members of the Hospital Staff to request the appointment of a hearing panel to review and recommend a course of action regarding any action by IRMH that affects a Hospital Staff member's rights. Article IV, Part B, Section 2 specifically establishes the right of any Hospital Staff member to a hearing to review the revocation of his or her appointment to the Hospital Staff or the denial of his or her reappointment. Pet. ¶ 26-7.

By letters dated August 28, 2001 and addressed to each of the Petitioners individually, Susi, on behalf of IRMH, denied the Petitioners' requests for a hearing under the Policy. In his letters, Susi stated that none of the Petitioners have been the subject of an unfavorable determination regarding their respective appointments to the Hospital Staff or clinical privileges at the Hospital Facilities. Pet. ¶ 28. The response of the Petitioners is attached as Exhibit 14 to the Petition.

#### SUMMARY OF ARGUMENT

The Resolution and other actions of IRMH, described above, implicate three Florida laws and one federal law that prohibit the exchange of remuneration for patient referrals. First, according to the Florida Anti-Kickback Statute (Section 455.657, Florida Statutes), it is unlawful for any provider of health care services "to offer, pay, solicit or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients."<sup>4</sup> Second, the Florida Fee-Splitting Statute (Section 458.331(1)(i)) permits the Board to discipline physicians for "paying ... any commission, bonus, kickback or rebate ... either directly or indirectly, for patients." Third, the Florida Patient-Brokering Statute (Section 817.505(1)) prohibits any health care provider or facility from offering or paying "any commission, bonus,

rebate, kickback or bribe, directly or indirectly, in cash or in kind, ... in any form whatsoever, to induce the referral or patients or patronage from a health care provider or health care facility." Finally, the federal Anti-Kickback Statute prohibits the purchase of referrals in terms almost identical to those set forth in Florida law. The federal statute prohibits the offer or payment of:

any remuneration, directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person to refer an individual to a person for the furnishing ... of any item or service for which payment may be made [by Medicare or Medicaid].

The Florida courts have not ruled on the applicability of the Florida Anti-Kickback law, or the other statutes described above, under circumstances similar to those set forth in the Petition and this memorandum. However, both the Florida courts and a number of federal courts have applied the federal Anti-Kickback Statute to similar situations. Given the similarity of the wording between the state and federal statutes at issue, it is clear that the Florida legislature intended to parallel the protections and proscriptions of federal law when it enacted the Florida Anti-Kickback Law, the Florida Fee-Splitting Statute and the Florida Patient-Brokering Statute. Indeed, the Florida legislature expressly tied interpretation of the Florida Patient-Brokering Statute to the Federal Anti-Kickback Statute. Section 817.505(3)(a) provides that the Patient-Brokering Statute does not apply to "any discount, payment, waiver of payment or payment practice not prohibited by [the Federal Anti-Kickback Statute]." As a result, federal guidance as to the interpretation and applicability of the Federal Anti-Kickback Statute is instructive with regard to Florida law, as well.

IRMH, acting through its Board of Directors and Chief Executive Officer, Jeffrey Susi, has informed the Petitioners that they will not be reappointed to the Hospital Staff and, therefore,

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<sup>4</sup> Please note that, during the 2001 session of the Florida legislature, Section 455.657 was recodified as Section 456.054. For purposes of consistency with the Petition and related materials, the memorandum will continue to refer to the statute as "Section 455.657."

be permitted to treat patients at IRMH, unless and until they (i) abandon, divest or sell their outpatient radiology practice to IRMH or some unrelated third party, and (ii) sign a written agreement to provide inpatient and outpatient radiology services "primarily" at the Hospital Facilities. The express purpose of IRMH's demand, as enunciated by Jeffrey Susi in letters, memoranda to the Board of Directors, and newspaper articles, is to enable IRMH to "capture" the Petitioners' patients and outpatient revenues and thereby increase the revenues of IRMH's Department of Imaging Services. The Petitioners believe that, given IRMH's express intent to "capture" additional revenues, if the Petitioners agree to shut down or sell their outpatient practice in order to secure reappointment to the Hospital Staff and access to IRMH patients, they may violate one or all of the statutes set forth above and expose themselves to discipline by the Board of Medicine, state administrative and criminal sanctions, and punishment under federal law.

#### ARGUMENT.

- I. **THE PETITIONERS' AGREEMENT TO TERMINATE, DIVEST OR SELL TO IRMH THEIR INDEPENDENT MEDICAL PRACTICE AND THEREAFTER PROVIDE SERVICES EXCLUSIVELY OR PRIMARILY AT IRMH WOULD, UNDER THE CIRCUMSTANCES PRESENTED, CONSTITUTE A VIOLATION OF THE FLORIDA ANTI-KICKBACK STATUTE, SECTION 455.657, FLORIDA STATUTES.**

IRMH has demanded that the Petitioners contract to provide medical services "primarily" at the Hospital Facilities and give up their independent medical practices as a condition to their reappointment to the Medical Staff. As noted above, IRMH has provided the Petitioners and the Associations with these options: divest, close or sell their outpatient business to IRMH at a price far below fair market value. In addition, Susi has clearly indicated, in both the Susi Letter and public statements made on behalf of IRMH, that IRMH has adopted the Resolution in order to "capture" an increased share of the outpatient radiology market and secure additional revenue.

Pursuant to Section 455.657, Florida Statutes (the "Florida Anti-Kickback Law"), it is unlawful for any provider of health care services "to offer, pay, solicit or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients."

For purposes of the Florida Anti-Kickback Law, the term "kickback" is defined as:

a remuneration or payment back pursuant to an investment interest compensation arrangement, or otherwise, by a provider of health care services or items, of a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items, when the payment is not tax deductible as an ordinary and necessary expense (emphasis added).

Fla. Stat. ch. 455.657 (2001). Petitioners believe that, under the facts set forth in the Petition, their closure or sale of their independent outpatient business in order to retain Hospital Staff privileges and, therefore, access to outpatients and inpatients at IRMH, would fall foursquare within this prohibition.

The Florida courts have not engaged in substantial review of the criminal application of the Florida Anti-Kickback Law.<sup>5</sup> In fact, one of the few reported Florida decisions focuses on the federal Anti-Kickback Statute, 42 U.S.C. §1320a-7b(b) (2001) (the "Federal Anti-Kickback Statute"), the provisions of which are substantially identical to the Florida Anti-Kickback Law.<sup>6</sup> Specifically, the Federal Anti-Kickback Statute prohibits any person from offering or paying any "remuneration" to any person or entity, directly or indirectly, in cash or in kind, that is intended to induce such person or entity:

<sup>5</sup> See, e.g., Harris v. Gonzalez, 789 So.2d 405 (Fla. Dist. Ct. App., 2001) (in which the Court held that a contract between a physician and the seller of nutritional dietary supplements, under which the physician agrees to refer all of his patients to the seller in return for fifty percent of the seller's net profits, violates the Florida Anti-Kickback Statute and is void as a matter of public policy).

<sup>6</sup> In Medical Development Network, Inc. v. Professional Respiratory Care, Inc., 673 So.2d 565 (Fla. Dist. Ct. App., 1996), the Fourth Circuit of the Florida District Court of Appeals considered an agency contract which provided for the payment of sales commissions calculated as a percentage of the value of Medicare and Medicaid sales generated by an agent. The court ruled that the contract involved the exchange of "remuneration" for patient referrals and therefore violated the Federal Anti-Kickback Statute. Id., at 567-8.

to refer an individual to the person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part by any Federal health care program.

Id. As a result, federal court decisions regarding the Federal Anti-Kickback Statute are instructive regarding the scope and applicability of the Florida Anti-Kickback Law, and the Florida legislature and Florida courts both look to federal jurisprudence in drafting and interpreting legislation designed to parallel the protections of the Federal Anti-Kickback Statute.

Several federal courts have expressly held that, if even one purpose of a relationship or arrangement between a physician and another person or entity is to induce the referral of patients, the relationship violates the Federal Anti-Kickback Statute. See, e.g., United States v. Greber, 760 F.2d 68 (3d Cir., 1985) (holding that "if even one purpose of the payment was to induce future referrals, the [Federal Anti-Kickback] statute has been violated"); U.S. v. Kats, 871 F.2d 105 (9<sup>th</sup> Cir., 1988) (quoting Greber in finding that the Federal Anti-Kickback statute "is violated if 'one purpose of the payment was to induce future referrals'"); U.S. v. Bay State Ambulance and Hospital Rental Service, 874 F.2d 20 (1<sup>st</sup> Cir., 1989).

A more recent federal court decision is directly on point. In U.S. v. McClatchey, 217 F.3d 823 (10<sup>th</sup> Cir., 2000), the defendant, Dennis McClatchey, was the chief operating officer of Baptist Medical Center ("Baptist"), a community hospital located in Kansas City, Missouri. McClatchey assisted in the negotiation of a contract between Baptist and two physicians, Robert and Ronald LaHue (the "LaHues"), pursuant to which the LaHues agreed to serve as co-Directors of Gerontology Services at Baptist. At trial, the evidence showed that (i) McClatchey expressed his belief, prior to negotiating the contract, that "a relationship with the Lahues would result in the LaHues 'bringing their patients to Baptist,'" and (ii) Baptist, in fact, subsequently provided services to the majority of the LaHues patients who required hospital care. Id., at 827.

In affirming McClatchey's felony conviction for violation of the Federal Anti-Kickback Statute, the Court ruled that

a person who offers or pays remuneration to another person violates the [Federal Anti-Kickback Statute] so long as one purpose of the offer or payment is to induce the Medicare or Medicaid patient referrals (emphasis added).

*Id.*, at 835. The Lahues were separately convicted for felony violation of the Federal Anti-Kickback Statute in connection with their entry into the contract and subsequent referral of patients to Baptist. U.S. v. Anderson, 85 F.Supp.2d 1047 (D.Kan., 1999).

As set forth above, IRMH has closed the Department of Imaging Services to all physicians who do not provide services "primarily" to IRMH patients using the Hospital Facilities. According to the RFP, any physicians providing inpatient or outpatient services within ten miles of the Hospital Facilities will be denied reappointment to the Medical Staff. Moreover, Susi's public statements on behalf of IRMH, as well as the Susi Letter, have notified both the Petitioners and the community at large that Board of Directors' purpose in approving the Resolution, the RFP, and the policies which they represent is to "capture" some or all of the referrals for outpatient services currently being received by the Petitioners and Vero Radiology Associates.

In order to secure reappointment to the Hospital Staff, and the continued ability to provide inpatient and outpatient medical services to IRMH patients, the Petitioners will be required to shut down, or sell to IRMH or others, their independent outpatient radiology practice and thereby enable IRMH to "capture" some or all of patients who would otherwise have been referred to the Petitioners for radiology services. Each and every Federal Circuit court that has ruled on the issue has determined that if even one purpose of an agreement or relationship is to induce the referral of Medicare and Medicaid patients, then the parties have violated the Federal

Anti-Kickback Statute. The language of the Florida Anti-Kickback Law closely tracks that of the Federal Anti-Kickback Statute, and it is reasonable to assume that Florida courts would interpret it using reasoning similar to that adopted by the Federal Circuits described above, as did the Florida court in the Harris case discussed in note 3, above. The Petitioners' entry into an exclusive contract with IRMH, under the circumstances described in the Petition and above, would therefore appear to constitute a violation of the Florida Anti-Kickback Law.<sup>7</sup>

**II. THE PETITIONERS' AGREEMENT TO TERMINATE, DIVEST OR SELL TO IRMH THEIR INDEPENDENT MEDICAL PRACTICE AND THEREAFTER PROVIDE SERVICES EXCLUSIVELY OR PRIMARILY AT IRMH WOULD, UNDER THE CIRCUMSTANCES PRESENTED, CONSTITUTE A VIOLATION OF THE FLORIDA FEE-SPLITTING STATUTE, SECTION 458.331(1)(i), FLORIDA STATUTES.**

Section 458.331(1)(i), Florida Statutes ("Section 458.331"), provides that the Board may discipline physicians for, among other practices:

Paying or receiving any commission, bonus, kickback or rebate ... 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 surgery centers, or pharmacies (emphasis added).

Fla. Stat. ch. 458.331(1)(i) (2001).

As with the Florida Anti-Kickback Law, the Florida courts have not ruled on the applicability of Section 458.331 to situations similar to the circumstances described in the Petition.<sup>8</sup> Similarly, while the Board has issued a large number of declaratory statements

<sup>7</sup> Although the issue may be beyond the scope of the Petition or the Board's jurisdiction, the Petitioners respectfully note that the Florida Anti-Kickback Law also prohibits the solicitation or acceptance of kickbacks intended to induce patient referrals. As a result, IRMH, Susi and potentially the individual members of the Board of Directors who voted in favor of the Resolution may be in violation of the Florida Anti-Kickback Law, as well.

<sup>8</sup> The Florida courts' interpretations of Section 458.331 and similar statutes have instead focused largely on whether financial arrangements constitute "fee-splitting." See, e.g., Practice Management Associates, Inc. v. Orman, 614 So.2d 1135 (Fla. 2d Dist. Ct. App., 1995) (upholding a practice management agreement, under which the manager's compensation was calculated as a percentage of practice revenues, as not constituting a split-fee arrangement under F.S. 460.413); Practice Management Associates, Inc. v. Blickensderfer, 18 FLW D2470 (Fla. 2d Dist. Ct. App., 1993).

interpreting Section 458.331, none of its rulings appear to be on point. However, Section 458.331, like the Florida Anti-Kickback Law, prohibits behavior substantially similar to that prohibited by the Federal Anti-Kickback Statute. As a result, the rulings in Greber and subsequent federal decisions strongly suggest that the Petitioners will violate Section 458.331 if they agree to abandon their outpatient radiology practice in order to (i) obtain reappointment to the Hospital Staff and, therefore, to continue to treat inpatients and outpatients of IRMH, and (ii) permit IRMH to "capture" some or all of the Petitioners' current patients.

In addition, while the Board's past declaratory statements do not address circumstances identical to those set forth in the Petition, the Board's analysis of Section 458.331 is instructive. The Board has, on several occasions, approved agreements under which a physician or physician group pays for management services based on a percentage of the physician or group's revenues or profits. See e.g., In re Rew Rogers & Silver, M.D.'s, P.A., No. DOH-99-0977-DS-MOA (1999) (payment of 50% of net collections, up to a monthly maximum of \$10,000, permitted because there is no obligation for manager to add patients to the practice); In re Lundy, 9 FALR 6289 (1987) (percentage-based payments approved because there is no requirement to secure referrals); and In re Lozito, 9 FALR 6295 (1987) (partnership may pay rent based, in part, on profits because agreement does not involve referrals).

In stark contrast to these cases, however, the Board has consistently held that, when the agreement or relationship in question involves obligations to refer patients or to increase the number of patients served by one party to the agreement, the agreement or relationship is in violation of Section 458.331. See In re Zeterburg, 12 FALR 1035 (1990) (practice management agreement requiring percentage compensation would be permissible but for requirement that practice participate in group of referring clinics); In re Bakarrada, 20 FALR 395 (1998) (practice

management agreement that requires manager to bring patients into medical practice and secure practice's access to networks is prohibited by Section 458.331).

Under the facts presented in the Petition, IRMH has demanded that the Petitioners abandon their independent outpatient medical practice or sell their practice to, among other parties, IRMH at a price far below fair market value as a condition precedent to their reappointment to the Hospital Staff and continued ability to treat IRMH patients. Moreover, Susi, on behalf of IRMH and the Board of Directors, has publicly stated that the purpose of the Resolution and the RFP is to "capture" the patients currently being served by the Petitioners and Vero Radiology Associates and thereby increase revenues generated by the IRMH Department of Imaging Services by up to four million dollars. Under these circumstances, if the Petitioners agree to comply with the Resolution and abandon, divest or sell their outpatient practice, Petitioners believe that they would be subject to discipline by the Board for violation of the Section 458.331 prohibition against "paying ... any commission, bonus, kickback or rebate, ... either directly or indirectly, for patients referred" by IRMH. Importantly, the potential for discipline is not even a threat against which Petitioners may request indemnity by IRMH.

**III. THE PETITIONERS' AGREEMENT TO TERMINATE, DIVEST OR SELL TO IRMH THEIR INDEPENDENT MEDICAL PRACTICE AND THEREAFTER PROVIDE SERVICES EXCLUSIVELY OR PRIMARILY AT IRMH WOULD, UNDER THE CIRCUMSTANCES PRESENTED, CONSTITUTE A VIOLATION OF THE FLORIDA PATIENT-BROKERING STATUTE, SECTION 817.505(1), FLORIDA STATUTES.**

Section 817.505(1), Florida Statutes (the "Patient-Brokering Statute"), provides, in pertinent part, that it is unlawful for any person, including any health care provider or facility, to:

Offer or pay any commission, bonus, rebate, kickback or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage from a health care provider or health care facility (emphasis added).

Fla. Stat. ch. 817.505(1) (2001).

Although the Florida courts have not addressed the applicability of the Patient-Brokering Statute to facts similar to those set forth in the Petition, the Florida legislature has formally recognized the similarities between the Patient-Brokering Statute and the Federal Anti-Kickback Statute by enacting as an exception to the Patient-Brokering Statute "any discount, payment, waiver of payment or payment practice not prohibited by 42 U.S.C. §1320a-7b(b) [the federal Anti-kickback Statute], or regulations promulgated thereunder." Fla. Stat. ch. 817.505(3)(a) (2000). Furthermore, as noted above, Florida courts have looked to federal law in interpreting similar statutes. The Greber opinion and subsequent federal court decisions, discussed above, should therefore constitute persuasive guidance for the Board.

Under Greber and subsequent federal interpretations of the Federal Anti-Kickback Statute, the parties to an arrangement in which remuneration of any kind changes hands will violate the Federal Anti-Kickback Statute if even "one purpose" of the arrangement is to induce the referrals of Medicare or Medicaid patients from one party to the other. Greber, at 69; McClatchey, at 835. Moreover, the McClatchey decision involved the facilitation by a hospital administrator of a contract between the hospital and two physicians, under which the physicians would provide medical director services to the hospital and the physicians, it was hoped, would be "bringing their patients to" the hospital. McClatchey, at 827. Under those circumstances, the court found both the hospital administrator and, in a separate decision, the physicians to be in violation of the Federal Anti-Kickback Statute.

Under the facts set forth in the Petition, IRMH has proposed that the Petitioners enter into an exclusive agreement with IRMH, which would require the Petitioners to shut down, sell or divest themselves of their independent medical practice and is expressly intended to help IRMH

capture additional outpatient revenues. Any such arrangement would, under the McClatchey decision, expose both the Petitioners and IRMH (including Susi and potentially the Board of Directors) to liability for violation of the Federal Anti-Kickback Statute. Analysis of the same facts under the Patient-Brokering Statute also appears likely to expose the Petitioners to liability.

**IV. IRMH'S DECISION TO BASE REAPPOINTMENT TO ITS MEDICAL STAFF ON CRITERIA NOT ENUMERATED IN SECTION 395.0191(4) CONSTITUTES A VIOLATION OF FLORIDA LAW.**

Section 395.0191(4), Florida Statutes ("Section 395.0191(4)"), sets forth criteria that must be considered by licensed facilities, including IRMH, in evaluating applications for appointment or reappointment to such facilities' medical staffs and provides, in pertinent part, that:

The applicant's eligibility for staff membership or clinical privileges shall be determined by the applicant's background, experience, health, training, and demonstrated competency; the applicant's adherence to applicable professional ethics; the applicant's reputation; and the applicant's ability to work with others and by such other elements as determined by the governing board, consistent with this part.

Fla. Stat. ch. 395.0191(4) (2001) (emphasis supplied). Moreover, Section 59A-3.217(4)(e) of the Florida Administrative Code (the "Administrative Code") sets forth standards for the appointment or reappointment to, or dismissal from, a licensed hospital's medical staff. The Administrative Code provides, in pertinent part, as follows:

The governing body [of the hospital] shall require that eligibility for privileges, delineation of privileges, and reappointments, be based on the applicant's background, experience, health, training, demonstrated current competence, adherence to applicable professional ethics, reputation, ability to work with others, ability of the hospital to provide adequate facilities and supportive services for the applicant and his patients, and such other elements as the governing body determines that are not inconsistent with this part.

Fla. Admin. Code Ann. r. 59A-3.217(4)(e) (2001).

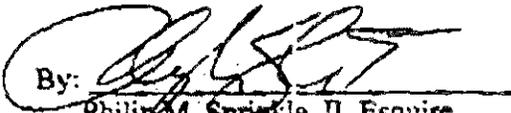
As more fully set forth above and in the Petition, Susi has, since the date of the Proposed Resolution, made statements indicating that the Petitioners may have failed to provide medical services in accordance with quality of care standards set forth in the IRMH Medical Staff Bylaws, the IRMH Rules and Regulations and the Policy. However, by letters dated August 28, 2001 Susi, on behalf of IRMH, denied the Petitioners' requests for a hearing under the Policy and specifically stated that none of the Petitioners have been the subject of an unfavorable determination "in either the reappointment or disciplinary process." As noted above, the Petitioners' response is attached as Exhibit 14 to the Petition.

Article IV of the Policy permits IRMH to reduce or revoke the clinical privileges of Hospital Staff members, or to deny them reappointment, under circumstances substantially similar to those enumerated in Section 395.0191(4) and Section 59A-3.217(4)(e) of the Code. See Pet. ¶ 30. In his letters dated August 28, 2001, Susi, on behalf of IRMH, admits that none of the Petitioners have been the subject of, and IRMH's decision to deny them reappointment is not based upon, "an unfavorable determination in ... the disciplinary process." As result, it appears that IRMH has determined to deny the Petitioners reappointment to the Hospital Staff

based on factors not set forth in the Policy, Section 395.0191(4), or Section 59A-3.217(4)(e) of the Code. IRMH is therefore in violation of Florida law.

Respectfully Submitted,

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