

STATE OF FLORIDA
BOARD OF MEDICINE

IN RE: PETITION FOR DECLARATORY STATEMENT

STEPHEN E. MITTELDORF, M.D.

FINAL ORDER

This matter came before the Board of Medicine (hereinafter the "Board") on October 7, 2006, in Tampa, Florida, for consideration of the above-referenced Petition for Declaratory Statement. The Notice of Petition for Declaratory Statement was published on September 29, 2006, in the Vol. 32 , No. 39, in the Florida Administrative Weekly.

The petition filed by STEPHEN E. MITTELDORF, M.D. inquired as to whether his participation in the "Stop Smoking Program" as set forth below would violate Section 458.331(1)(i), Florida Statutes?

FINDINGS OF FACTS

1. The Petitioner, Stephen E. Mitteldorf, M.D., (hereinafter "Petitioner") is a family practice physician licensed in Florida and conducts his business in Florida. As such, he is subject to the provisions of Chapters 458 and 456, Florida Statutes.
2. In his practice of medicine, Petitioner routinely performs and interprets electrocardiograms (EKGs) on patients in connection with annual physicals and other healthcare concerns.
3. Petitioner has been asked by the principals of a company that owns proprietary smoking cessation technology and employs the services of licensed physicians to operate smoking cessation programs employing such technology (the "Stop Smoking Program(s)") to enter into a marketing and referral relationship with the Company, which is described as follows.

4. Currently, a licensed physician who operates a Stop Smoking Program performs and interprets an EKG on each potential patient and administers the medical treatment related to the Stop Smoking Program. The Potential patient, if accepted into the Stop Smoking Program, pays the cost of the Stop Smoking Program, including the fee for the EKG, directly to the Company, who pays the physician for the medical services rendered. The Company does not accept any form of third party payment from a patient, whether health insurance, Medicare, Medicaid or otherwise.

5. In addition to having the ability to have EKGs performed and interpreted by the physician operating a Stop Smoking Program, the Company desires to develop relationships with third party physicians who would agree to perform and interpret EKGs on their patients who might be candidates for the Stop Smoking Program. The third party physicians would bill their patients directly for the performance and interpretation of the EKG under the billing code for Tobacco Dependency Disorder and refer such patients to a Stop Smoking Program for treatment. Such third party physicians would not accept any form of third party payment for performing and interpreting the EKG, whether health insurance, Medicare, Medicaid, or otherwise.

6. If the results of a patient's EKG were acceptable and the patient entered the Stop Smoking Program, the Company would give the patient a credit against the Stop Smoking Program cost in the amount of the cost of the EKG performed and interpreted by the referring physician. As such, the potential patient would pay the cost of the EKG directly to the third party physician performing the EKG and would not be billed by the Company for this service.

7. At no time would the Company pay the third party physician any remuneration, whether in cash or kind, in exchange for the third party physician performing and interpreting

EKGs on potential patients of a Stop Smoking Program, referring potential patients to a Stop Smoking Program, or otherwise.

8. At no time would a third party physician who agreed to perform and interpret EKGs on potential patients of, and refer potential patients to, a Stop Smoking Program pay any remuneration, whether in cash or in kind, to the Company.

9. The only remuneration the third party physician would receive would be the fee paid to the physician by the patient in exchange for the physician performing and interpreting the EKG.

10. The only remuneration the Company would receive would be the cost of the Stop Smoking Program, less the credit for the EKG performed by the third party physician, paid by the patient who entered the Stop Smoking Program.

11. The Company desires for Petitioner to enter into this marketing and referral relationship with the Company, and Petitioner desires to do so, provided such relationship does not subject the Petitioner to discipline pursuant to the Physician Disciplinary Statute.

CONCLUSIONS OF LAW

12. The Board of Medicine has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

13. The Petition filed in this cause is in substantial compliance with the provisions of 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code.

14. The Petitioner has demonstrated that he is substantially affected by Section 458.331(1)(i), Florida Statutes, as a licensed Florida physician, and therefore, has demonstrated the requisite standing.

15. Section 458.331(1)(i), Florida Statutes, provides as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2)

.....

(i) Paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services.

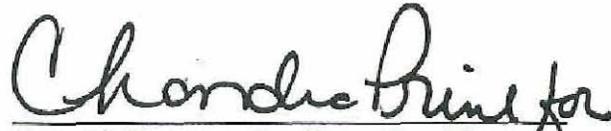
16. Upon reviewing the facts sets forth in Dr. Mitteldorf's petition, the Board is of the opinion that the proposed arrangement between Dr. Mitteldorf and the Company employing the Stop Smoking Program does not constitute a kickback or is prohibited in any way by Section 458.331(1)(i), Florida Statutes.

17. This Final Order is issued in response to the question propounded by the Petitioner as set forth in his Petition For Declaratory Statement. The Board's conclusion is based solely on the Board's application of the factual circumstances outlined in the Petition to the pertinent statutory provision set forth above and should not be interpreted as commenting on whether the facts in the petition may or may not violate any other provision of Chapter 458 or 456, Florida Statutes, or any rules promulgated thereunder.

This Final Order shall become effective upon filing with the Clerk of the Department of Health.

DONE AND ORDERED this 24 day of October, 2006.

BOARD OF MEDICINE


Larry McPherson, Jr., Executive Director
for Mammen P. Zachariah, M.D., Chair

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.569, Florida Statutes, Respondents 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 the filing fee and one copy of a notice of appeal 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 has been furnished by U. S. Mail to: Stephen E. Mitteldorf, M.D., 2401 University Parkway, Suite 202, Sarasota, Florida 34243; Denis A. Cohrs, Esquire, Denis A. Cohrs, P.A., 2575 Ulmerton Road, Suite 210, Clearwater, Florida 33762; and by interoffice mail to Edward A. Tellechea, Senior Assistant Attorney General, PL-01 The Capitol, Tallahassee, Florida 3239-1050; and Timothy Cerio, General Counsel, Department of Health, 4052 Bald Cypress Way, BIN A02, Tallahassee, Florida 32399-1703, on this 31 day of October, 2006.



Deputy Agency Clerk

**AMENDED PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA BOARD OF MEDICINE**

1. Name, Address, Telephone Number and Facsimile Number of Petitioner:

Stephen E. Mitteldorf, M.D.
2401 University Parkway, Suite 202
Sarasota, FL 34243

Florida License # ME 78671

Telephone # 813-969-2030
Facsimile # 813-969-2399

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK: Audia Stoffn
DATE 9/19/06

2. Name, Address, Telephone Number and Facsimile Number of Attorney for Petitioner:

Denis A. Cohrs, Esq.
Denis A. Cohrs, PA
2575 Ulmerton Road Suite 210
Clearwater, FL 33762
Telephone No.: 727-540-0001
Facsimile No.: 727-540-0027

3. Statutory Provisions, Agency Rules or Agency Orders on which this Declaratory Statement is Sought:

Section 458.331(1)(i), *Florida Statutes*.

4. Description of How the Statutes, Rules or Orders May Substantially Affect the Petitioner in the Petitioner's Particular Set of Circumstances:

a. Petitioner is a [family practice] physician, who is licensed to practice medicine in the State of Florida pursuant to Chapter 458, *Florida Statutes*, and who conducts his business in the State of Florida.

b. As a licensed physician in the State of Florida, Petitioner is subject to Section 458.331(1)(i), *Florida Statutes* (the "Physician Disciplinary Statute"). The Physician Disciplinary Statute, provides that a physician may be disciplined for:

Paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services.

c. In his practice of medicine, Petitioner routinely performs and interprets electrocardiogram tests ("EKGs") on patients, sometimes in connection with annual physical exams, sometimes in connection with specific health concerns.

d. Petitioner has been asked by the principals of a company (the "Company") that owns proprietary smoking cessation technology and employs the services of licensed physicians to operate smoking cessation programs employing such technology (the "Stop Smoking Program(s)") to enter into a marketing and referral relationship with the Company, which is described as follows.

e. Before a potential patient can enter a Stop Smoking Program, the potential patient must have an EKG performed and interpreted by a licensed physician to rule out any heart conditions that would keep the potential patient from meeting the physical requirements necessary to enter the Stop Smoking Program.

f. Currently, a licensed physician who operates a Stop Smoking Program performs and interprets an EKG on each potential patient and administers the medical treatment related to the Stop Smoking Program. The Potential patient, if accepted into the Stop Smoking Program, pays the cost of the Stop Smoking Program, including the fee for the EKG, directly to the Company, who pays the physician for the medical services rendered. The Company does not accept any form of third party payment from a patient, whether health insurance, Medicare, Medicaid or otherwise.

g. In addition to having the ability to have EKGs performed and interpreted by the physician operating a Stop Smoking Program, the Company desires to develop relationships with third party physicians who would agree to perform and interpret EKGs on their patients who might be candidates for the Stop Smoking Program. The third party physicians would bill their patients directly for the performance and interpretation of the EKG under the billing code for Tobacco Dependency Disorder and refer such patients to a Stop Smoking Program for treatment. Such third party physicians would not accept any form of third party payment for performing and interpreting the EKG, whether health insurance, Medicare, Medicaid, or otherwise.

h. If the results of a patient's EKG were acceptable and the patient entered the Stop Smoking Program, the Company would give the patient a credit against the Stop Smoking Program cost in the amount of the cost of the EKG performed and interpreted by the referring physician. As such, the potential patient would pay the cost of the EKG directly to the third party physician performing the EKG and would not be billed by the Company for this service.

i. At no time would the Company pay the third party physician any remuneration, whether in cash or kind, in exchange for the third party physician performing and interpreting EKGs on potential patients of a Stop Smoking Program, referring potential patients to a Stop Smoking Program, or otherwise.

j. At no time would a third party physician who agreed to perform and interpret EKGs on potential patients of, and refer potential patients to, a Stop Smoking Program pay any remuneration, whether in cash or in kind, to the Company.

k. The only remuneration the third party physician would receive would be the fee paid to the physician by the patient in exchange for the physician performing and interpreting the EKG.

l. The only remuneration the Company would receive would be the cost of the Stop Smoking Program, less the credit for the EKG performed by the third party physician, paid by the patient who entered the Stop Smoking Program.

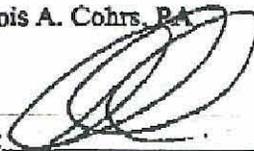
m. The Company desires for Petitioner to enter into this marketing and referral relationship with the Company, and Petitioner desires to do so, provided such relationship does not subject the Petitioner to discipline pursuant to the Physician Disciplinary Statute.

n. Based on the plain language of the Physician Disciplinary Statute, it is Petitioner's understanding that this marketing and referral relationship would not violate the Physician Disciplinary Statute. Petitioner's review of case law and Declaratory Statements issued by the Florida Board of Medicine reveal no law that would suggest otherwise.

WHEREFORE, Petitioner respectfully requests that the Florida Board of Medicine issue a Declaratory Statement finding that Petitioner, by entering into the marketing and referral relationship with the Company described above, would not subject himself to discipline pursuant to Section 458.331(1)(i), *Florida Statutes*.

Respectfully submitted,

Denis A. Cohrs, PA

By: 

Denis A. Cohrs, Esq.
2575 Ulmerton Road Suite 210
Clearwater, FL 33762
Attorney for Petitioner
Florida Bar No.: 0470309

From: McPherson, Larry
Sent: Wednesday, October 25, 2006 4:10 PM
To: Alls, Wendy; Alphin, Lynda; Austin, Cheryl; Bowen, Whitney; Cappe, Martha; Chester, Tammy; Clayton, Connie; Connell, Christina; Davis, Bettye; Denson, Angela; Dickens, Karrell D; Gilley, Carmelette; Graham, Cheryl; Gray, Melinda; Groover, Alexia M.; Harmon, Aaron; Hills, Tangela; Jackson, Tiana; Johnson, Vera M; Knight, LaShonda; Kress, Elizabeth; List, Crystal A; McPherson, Larry; Moody, Amanda S; Morss, Shirley B; Nelson, Dane; Nelson, Gloria J; Perez, Rafael; Prine, Chandra; Randolph, Camela; Richardson, Matt P; Smiley, Cheryl; Smith, Teri; Trexler, JoAnne; Wiggins, Tiffany; Willis, Gwyn
Cc: 'Ed Tellechea'; Sanders, Sylvia (MQA); Baker, Joe Jr; Poston, Rebecca; Erlich, Donna; Foster, Sue; Gee, Lucy; Hentz, James; King, Pamela E; Orcutt, Diane
Subject: Delegation

Citizens,

During my absence on Thursday, October 26, Board of Medicine Executive Director authority is delegated to Chandra Prine, 345-4135.

Larry McPherson
Executive Director
Florida Board of Medicine