

In early 1981, as the hospital became full and was essentially operating with a waiting list, Dr. Joanie Grant-Green, the founder and owner of the hospital, indicated she wished to establish a contract that would ensure the quality of the programs and success of the hospital by formally having Dr. Nowels and Dr. Kaplan be responsible for the programs, to continue to serve as Medical Directors, and to provide the highest quality medical services to all patients coming to the hospital who did not already have an attending physician. At that time it was very difficult to discover any physicians who were routinely willing to travel out to Grant Center, which was perceived as being "far out in the Everglades." After negotiations, a formal contract was signed on July 24, 1981. This initial contract contained the same right of first refusal provision that is part of the existing contract, as described in . . . this Petition.

Dr. Grant sold Grant Center Hospital to First Executive Life Insurance Company in 1982, with the contract continuing in force. Each Petitioner acquired a minority stock interest (8 1/3%) in Grant Center Hospital. The price paid by Petitioners for such interest was the same per share value as paid by the majority owner, First Executive Life Insurance. Petitioners had no ownership interest in Grant Center Hospital prior to the purchase of this interest. A five year, non-cancelable contract was renegotiated and signed on March 5, 1982. During this time, Dr. Nowels and Dr. Kaplan helped establish a sister hospital, Grant Center Hospital at North Florida (Ocala), with similar programs. (At that time Dr. Nowels and Dr. Kaplan were practicing under the name of Psychiatric Associates: PAPA.)

Petitioners fulfilled their obligation under the contract with Grant Center Hospital and have continuously served as Medical Director for Grant Center Hospital from June, 1977 to the present. Petitioners have achieved a great degree of success in enhancing the reputation of Grant Center Hospital within the community and increasing the occupancy rate. Petitioners also believe they were instrumental in raising the quality of care and treatment at Grant Center Hospital.

In late 1983, Grant Center Hospital was purchased by the Forum Group, a hospital chain operating company. As part of this sale, Petitioners sold their entire interest in Grant Center. The contract in question continued in effect, but was amended on August 31, 1983. Among other things, the contract term was extended to

The Petitioners also believe that during this thirteen (13) year period of association with Grant Center Hospital, with offices at the hospital, with use of the same telephone number, and with a large portion of their outpatient practice being at Grant Center Hospital, that the medical community has come to co-associate the hospital and Dr. Nowels and Dr. Kaplan's medical practice. Dr. Nowels' and Dr. Kaplan's referral sources refer to the hospital as if it were the same as a referral to them. Indeed, over the years, all such interactions by Dr. Nowels, Dr. Kaplan and their group have been to promote the association with the hospital, often with jointly sponsored meetings, seminars, and visits to referral agencies and groups. The contract specifically calls for this interwoven relationship.

In October, 1984, Grant Center Hospital was purchased by Hospital Corporation of America (HCA), which then assumed the obligations and benefits of the contract Grant Center Hospital had with the Petitioners. HCA Health Services of Florida, Inc., a Florida Corporation, presently remains the owner of Grant Center Hospital. In March 1985 Petitioners entered into an amendment of their contract with Grant Center Hospital. It is clear from the added paragraphs of this contract revision that it was HCA's intent to limit Dr. Nowels and Dr. Kaplan's Medical Director duties solely to Grant Center Hospital, to further their close association to the hospital.

H.C.A. has not indicated any dissatisfaction with Dr. Nowels and/or Dr. Kaplan or any of the Medical Director services being provided. In fact, HCA has specifically indicated its pleasure with these services and has requested these services be continued, as explained in [a] letter from the HCA Regional Vice President.

HCA has recently advised the Petitioners it considers the contract between the Petitioners and HCA may be illegal and unenforceable, at least in part. Specifically, under paragraph 12(b) of the contract it states:

"The hospital agrees to provide PAPA with first refusal rights for all new hospital patients who have no attending psychiatrist. Said right of first refusal is to be acted upon by PAPA immediately. Failing such action by PAPA, the Hospital reserves the right to refer any such patient to other psychiatrists."

HCA has alleged that this cause in the contract in question is an



referred to providers of health care goods and services." That statutory section also states: "The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services."

It has been alleged by HCA that the above quoted clause in the contract in question, giving the Petitioners the right of first refusal for new patients who have no attending psychiatrist, constitutes a kickback. Petitioners believe that HCA is taking this position so they may repudiate the right of first refusal provision in the contract and refer the patients in question to a broader base of physicians, during a time of declining hospital census.

Petitioners would point out that under the contract between them and Grant Center Hospital, all new hospital patients who have no attending psychiatrist remain free to select an attending psychiatrist. The contract in question does in no way restrict a patient's freedom of choice in selecting an attending physician. The right of first refusal given to the Petitioners by the contract in question is only effective when the patient and the patient's guardian or parent consent to the Petitioners acting as the attending psychiatrist for such a new hospital patient. The clause in question is no more than a referral agreement, subject to the consent of the patients.

The Petitioners believe that the clause in question, above quoted, in no way constitutes a kickback or a fee splitting arrangement with themselves, Grant Center Hospital, or any other party. This clause only applies to persons who want to be patients of the Hospital and who have no attending psychiatrist. It is necessary that each such patient be referred to an attending psychiatrist for that person to become a patient of Grant Center Hospital.

The Petitioners believe that the contract adequately compensates their efforts as medical director by a salary of \$140,000.00, and by payment of a salary of an additional psychiatrist to assist in meeting the terms of the contract. The Petitioners' right of first refusal was established to require them to continue to provide office services directly on the grounds of Grant Center Hospital (Petitioners have maintained such an office since 1977), to more readily be available to provide immediate care for patients (as is stipulated in the contract), and to ensure the highest quality of care possible through the demonstrated competence and skills shown over the many years of association with Grant Center Hospital.

The right of first refusal clause served as an inducement to the Petitioners to enter into and to continue a long-term arrangement with Grant Center and is an important part of the entire contractual arrangement between the Petitioners and Grant Center. The

enhanced quality of care at the hospital and the success and growth of the hospital as a result of this contractual arrangement also benefitted the practice of the Petitioners.

3. At the hearing, it was adduced that both doctors are on the staffs of other hospitals and refer patients to other hospitals. They are not obligated to refer their patients only to Grant Center Hospital. Furthermore, the doctors have the right of first refusal only with respect to patients who do not have a psychiatrist or do not request to see another psychiatrist. In addition, each patient has the right to refuse to be treated by the doctor to whom the referral is made. Furthermore, the doctors testified that not only do the patients have the right to request to see another member of the medical staff, but also the patients are informed of that right. Neither Dr. Nowels nor Dr. Kaplan has declined the care of a patient for financial reasons.

4. Based on these facts, Petitioners ask the Board of Medicine to issue a declaratory statement that responds to the following questions:

a. Under the above-stated facts, does the clause giving the physicians the right of first refusal constitute an illegal kickback or fee splitting arrangement in violation of Section 458.331(1)(i), Florida Statutes?

b. Under the above-stated facts, does the clause giving the physicians the right of first refusal constitute exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain of the licensee in violation of Section 458.331(1)(n), Florida Statutes?

c. Under the above-stated facts, does the clause giving the physicians the right of first refusal create a situation or arrangement in violation of any part of Chapter 458, Florida Statutes, or Chapter 21M, Florida Administrative Code?

5. The Petitioners make it clear in their petition that they do not intend to violate the law by adhering to the contract and Petitioners explicitly agree to immediately desist any and all activities found by the Board to be in violation of the Medical Practice Act, if any, pursuant to the Declaratory Statement.

6. The petition was noticed by the Board of Medicine in the November 9 issue of the Florida Administrative Weekly (Vol. 15, No. 45, Pg. 5354).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code. The Petition for Declaratory Statement filed by Petitioners is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Chapter 284, Florida Administrative Code.

2. The Board finds that the Petitioners have the requisite interest to receive the declaratory statement from the Board in that they are licensed medical doctors who propose a stated course of action and request an interpretation of specified provisions of the law which relate to that stated course of action.

3. Petitioners specifically ask for interpretations of Sections 458.331(1)(i) and 458.331(1)(n), Florida Statutes. These provisions provide, in pertinent part, as follows:

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

* * *

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

* * *

(n) Exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain of the licensee or other third party, which shall include, but not be limited to, the promoting or selling of services, goods, appliances, or drugs.

4. In applying Section 458.331(1)(i), Florida Statutes, to the facts found above, the Board finds that the conduct of the physicians does not constitute an illegal commission, bonus, kickback, rebate, or split-fee arrangement by virtue of the contract containing a right of first refusal, so long as the contract with the hospital also requires these physicians to perform certain administrative duties as co-medical directors. If these physicians are not required to perform administrative duties as co-medical directors under the contract containing the right of first refusal, then other physicians who are willing and qualified to provide the same services are not excluded from entering into a similar agreement. In making this determination, the Board gives particular attention to the fact that the Petitioners are on the staffs other hospitals and are not obligated to place their patients only in the facility in question.

5. With regard to the application of Section 458.331(1)(n), Florida Statutes, to the facts found above, the Board finds that there is an indirect financial gain in the stated arrangement; however, the arrangement does not exploit the patient in contravention of the statute in light of the fact that the patient can refuse to be treated by Petitioners and would receive care from another psychiatrist if the patient so requests.

6. With respect to the request that the Board evaluate the above-stated facts and state whether the facts create a situation or arrangement in violation of any other part of Chapter 458, Florida Statutes, or Chapter 21M, Florida Administrative Code, the Board declines to render such an opinion. Under the statute and rules relating to Petitions for Declaratory Statement, it is the duty of Petitioners to identify the statutes and rules which Petitioners wish to have interpreted; it is not the obligation of the Board to survey the statutes and rules to determine whether a violation of some other provision may have occurred.

7. The Board's response to this Petition for Declaratory Statement responds only to the questions asked and interprets only the statutory provisions provided by Petitioners. The conclusions by the Board with regard to the statutory provisions cited by Petitioners are not a comment on whether the proposal may or may not violate other provisions of Chapter 458, Florida Statutes, or other related obligations of Petitioners.

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DONE AND ORDERED this 12th day of February, 1990.

BOARD OF MEDICINE
MARGARET C.S. SKINNER, M.D.
CHAIRMAN