

STATE OF FLORIDA  
BOARD OF MEDICINE

IN RE: THE PETITION  
FOR DECLARATORY  
STATEMENT OF  
JEFFREY FERNYHOUGH, M.D.

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Final Order No. DOH-97-0332 Date 11-12-97

FILED

Department of Health  
AGENCY CLERK

By: Stephanie J. Dixon  
Deputy Agency Clerk

FINAL ORDER

THIS CAUSE came before the Board of Medicine (hereinafter Board) pursuant to §120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, on October 18, 1997, for the purpose of considering the Petition for Declaratory Statement (attached as Exhibit A) filed on behalf of Jeffrey Fernyhough, M.D. (hereinafter Petitioner). Having considered the petition, the arguments submitted by counsel for Petitioner, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner, Jeffrey Fernyhough, M.D., is an allopathic physician licensed to practice medicine in the State of Florida. Petitioner is employed as a physician by the Florida Back Institute.
2. In his practice of medicine, Petitioner has found it to be convenient and beneficial for his patients to offer them the opportunity to order those medications prescribed by Petitioner from a mail order pharmacy which guarantees next day delivery to the patient's home. With regard to those patients wishing to avail themselves of this service, Petitioner wishes to order the medication for the patient directly from his medical office. To accomplish this, Petitioner is considering entering into an arrangement that would provide for the installation of a specific mail

order pharmacy's computer in his medical office.

3. Petitioner believes that his patients will benefit from such an arrangement in that:

a. The computer will contain relevant patient data, medical history, and lists of previously and currently prescribed medications, which will allow Petitioner, with the assistance of sophisticated computer software, to determine whether medication he is currently prescribing for the patient has any adverse interaction with or is duplicative of any other medication which the patient is currently taking.

b. There will be increased convenience for the patient as appropriate medications can be ordered before the patient leaves Petitioner's office and is guaranteed to be delivered to the patient's home by the next day.

c. Petitioner will have access, on an ongoing basis, via the pharmacy's computer, to the patient's medical history and medications which the patient is taking, which information can easily be transferred electronically or otherwise to hospitals or other health care providers, as the need may exist.

4. In this regard, Petitioner is considering entering into an office space and personal services agreement the pertinent aspects of which are as follows:

a. The agreement will be for a minimum of one year and shall be set out in writing and signed by the parties.

b. The agreement will specify the precise portion of Petitioner's office to be covered by the agreement. With regard to same, the leased portion of Petitioner's office will be the Prime Counter Space located in Petitioner's medical office and which shall be in close proximity to the medical exam rooms and medical assistant who will be assisting Petitioner in ordering medications from the pharmacy and will be utilized for the purposes of installing and

maintaining the pharmacy's computer. Additionally, at the inception of such agreement, the pharmacy will have access, during Petitioner's office hours, to Petitioner's office and patient medical records, in order for the pharmacy to initially input all relevant patient data, together with the patient's medical history and medication history for all of Petitioner's patients. Further, during the term of the agreement, the pharmacy will have access, during Petitioner's office hours, to Petitioner's office, in order for the pharmacy to perform the necessary maintenance and updating of the pharmacy's computer.

c. Pursuant to the agreement, it is intended that the pharmacy will have full-time use of the prime counter space and access to Petitioner's office during Petitioner's office hours.

d. The agreement will specify the services to be provided by Petitioner's administrative personnel, together with the schedule of such intervals, as well as the length of time during which such personnel shall perform such services. With regard to same, on a daily basis, on those days on which Petitioner maintains office hours, administrative personnel of Petitioner shall input all relevant patient data for new patients of Petitioner. Such services shall be provided by Petitioner's administrative personnel for no more than one-half hour each day.

e. The payments to be made by the pharmacy to Petitioner are to be set out in advance under the agreement and will be based upon the amount and portion of the prime counter space utilized by the pharmacy, and the time which Petitioner's administrative personnel provide. The amount will be consistent with the fair market value of the prime counter space together with the cost of the administrative personnel (including payroll taxes, insurance, and fringe benefits) as same would be determined in an arm's length transaction and will not be determined in a manner that takes into account the volume or value of any referrals or business generated between Petitioner and the pharmacy.

f. The space leased by the pharmacy will not exceed that which is reasonable and necessary for the legitimate business purpose of the agreement and will be used exclusively for the purposes of the pharmacy computer pursuant to the agreement.

g. The services provided by Petitioner's administrative staff will not exceed that which is reasonable and necessary for the legitimate business purposes of the agreement.

h. Based upon the reasonable determination of Petitioner, the agreement would be commercially reasonable even if no referrals were made between the parties.

4. Petitioner is also contemplating entering into a joint marketing arrangement with the pharmacy, pursuant to which Petitioner will market his practice and the pharmacy will market its business, through some or all of the following: direct mail, newspapers, magazines, billboards, television, and radio. With regard to the joint marketing, Petitioner and the pharmacy will jointly determine a budget for such marketing, as well as the method and means of such marketing. In conjunction with same, Petitioner and the pharmacy will contribute proportionate amounts toward such marketing activities.

5. This petition was noticed by the Board in Vol. 23, No. 39, dated September 26, 1997, of the Florida Administrative Weekly (p. 5271).

#### CONCLUSIONS OF LAW

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

2. 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.

3. Section 458.331(1)(I), Florida Statutes, provides in pertinent part that it is grounds for disciplinary action by the Board if a licensee is:

*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. . . .*

4. The Board finds that the agreement described is, simply put, a scheme to allow the pharmacy to pay Petitioner in return for providing referrals to the pharmacy in violation of Section 458.331(1)(I), Florida Statutes. Although the agreement purports to be a fair market lease, the Board does not accept Petitioner's representations that an as yet undetermined "fair market value" for "prime counter space" in his office can be determined in such a manner as to avoid Petitioner receiving a windfall from the lease of a few feet of counter space in the medical office he uses. Furthermore, the joint marketing venture described in the petition is yet another indicia of such a scheme. The petition fails to identify how much of the "joint" advertising will be paid for by the pharmacy. If the split in advertising costs is based on Petitioner's and the pharmacy's relative participation under the agreement, then it is likely that Petitioner will receive another windfall from the advertising he receives at the pharmacy's expense. The only thing that could possibly make paying such windfalls attractive to the pharmacy would be a significant number of referrals from Petitioner.

5. Petitioner also requested that the Board consider the application of Sections 455.236, Florida Statutes,<sup>1</sup> 455.237, Florida Statutes,<sup>2</sup> 455.227(1)(q), Florida Statutes,<sup>3</sup> and Subsection

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<sup>1</sup>This provision has been renumbered as Section 455.654, Florida Statutes.

<sup>2</sup>This provision has been renumbered as Section 455.657, Florida Statutes.

<sup>3</sup>This provision has been renumbered as Section 455.624(1)(q), Florida Statutes.

458.331(1)(j), Florida Statutes.<sup>4</sup> None of these provisions appear to have any particular relevance to the situation set forth in the petition with the exception of Section 455.227(1)(q), Florida Statutes, which is relevant only if the acts set forth therein are violative of the practice act or Chapter 455, Florida Statutes.

THEREFORE, as set forth above, the Board of Medicine finds that the agreement described in the petition would be in violation of the prohibitions set forth in Section 458.331(1)(l), Florida Statutes, and therefore as well a violation of Section 455.227(1)(q), Florida Statutes.

DONE AND ORDERED this 3rd day of NOVEMBER, 1997.

BOARD OF MEDICINE



EDWARD A. DAUER, M.D.  
CHAIRMAN

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS MAY BE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES REQUIRED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED AS SET FORTH ABOVE AND WITHIN THIRTY (30) DAYS OF RENDITION OF THIS FINAL ORDER.

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<sup>4</sup>Subsection 458.331(1)(j), Florida Statutes prohibits influencing patients for the purpose of engaging the patient in sexual activity and does not appear to have any relevance to this petition.

**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 Jeffrey Fernyhough, M.D. c/o Mitchell F. Green, Esquire, Presidential Circle, 4000 Hollywood Boulevard, Suite 485 South, Hollywood, Florida 33021, this

\_\_\_\_\_ day of \_\_\_\_\_, 1997.

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AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Jeffrey Fernyhough, M.D., 900 Glades Road, #2-A, Glades Towers, Boca Raton, FL 33431-6405, Mitchell F. Green, Esquire, Presidential Circle, 4000 Hollywood Blvd., Suite 485 South, Hollywood, FL 33021, at or before 5:00 p.m., this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

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PETITION FOR DECLARATORY STATEMENT

NAME OF PETITIONER: Jeffrey Fernyhough, M.D.

ADDRESS OF PETITIONER: c/o Florida Back Institute  
1905 Clint Moore Road  
Suite 309  
Boca Raton, FL 33496

NAME OF AGENCY: Board of Medicine

AGENCY RULE, ORDER OR STATUTORY PROVISION ON WHICH DECLARATORY STATEMENT IS SOUGHT:

- A. Section 455.227(1)(q) Fla. Stat.
- B. Section 455.236, Fla. Stat.
- C. Section 455.237, Fla. Stat.
- D. Sections 458.331(1)(i) and (j), Fla. Stat.

DESCRIPTION:

1. Petitioner is licensed in the State of Florida, having been issued license No. 55496, and practices medicine in the State of Florida as an employed physician of Florida Back Institute.

2. In his practice of medicine, Petitioner has found it to be convenient and beneficial for his patients to offer them the opportunity to order those medications prescribed by Petitioner (the "Medication") from a mail order pharmacy (the "Pharmacy") which guarantees next day delivery to the patient's home, directly from Petitioner's office. With regard to those patients wishing to avail themselves of this service, the Petitioner's office can order the Medication for their patients from the Pharmacy, directly from the Pharmacy's computer, to be installed by the Pharmacy in Petitioner's office.

The benefit to the Petitioner and patient with regard to the utilization of the Pharmacy is as follows:

a. With relevant patient data, medical history, together with all other Medications which the patient is taking, inputted in the Pharmacy computer, through sophisticated computer software, the Petitioner can tell if the Medication which he is currently prescribing for his patient has any adverse interaction with or is duplicative of any other Medication which the patient is currently taking.

b. There is increased convenience to the patient as the Medication is ordered before the patient leaves Petitioner's office and is guaranteed to be delivered to the patient's home by the next day.

c. Petitioner has access, on an ongoing basis, via the Pharmacy's computer, to the patient's medical history and Medications which the patient is taking, which information can easily be transferred electronically or otherwise to hospitals or other health care providers, as the need may exist.

With regard to the foregoing, the Pharmacy will, initially, need to input all relevant patient data, together with the patient's medical history and Medications for all of Petitioner's patients on its computers, to be installed in Petitioner's office. It is contemplated that the computer(s) to be installed by the Pharmacy in Petitioner's office (the "Pharmacy's Computer") will be located on prime counter space, near the medical exam rooms and medical assistant of Petitioner, who, with Petitioner, will be ordering Medication prescribed by Petitioner from the Pharmacy, utilizing the Pharmacy's Computer, for those patients wishing to avail themselves of this service.

3. Based upon the circumstances outlined in paragraph 2 above, Petitioner desires to learn whether he would be subject to discipline in the following circumstance:

Petitioner enters into an agreement with the Pharmacy, pursuant to which the Pharmacy will lease, for a minimum of one (1) year, a portion of the prime counter space located in Petitioner's medical office (the "Prime Counter Space"), for the purpose of installing and maintaining the Pharmacy's Computer, which computer(s) shall be in close proximity to the

medical exam rooms and medical assistant, who, with Petitioner, will be ordering Medication prescribed by Petitioner from the Pharmacy, utilizing the Pharmacy's Computer, for those patients wishing to avail themselves of this service. In ordering such Medication, Petitioner will input the prescription information, method of payment and delivery instructions in the Pharmacy's Computer. The foregoing business arrangement will be evidenced by a office space rental and personal services agreement to be entered into between Petitioner and the Pharmacy.

The following are the relevant aspects of the contemplated business relationship between Petitioner and the Pharmacy, to be contained in the office space rental and personal services agreement (the "Agreement"):

a. The Agreement will be set out in writing and signed by the parties.

b. The Agreement will specify the precise portion of Petitioner's office to be covered by the Agreement. With regard to same, as previously stated, the leased portion of Petitioner's office will be the Prime Counter Space, for purpose of installing and maintaining the Pharmacy's Computer. Additionally, at the inception of the Agreement, the Pharmacy will have access, during Petitioner's office hours, to Petitioner's office and medical records, as well as the Pharmacy's Computer, in order for the Pharmacy to initially input all relevant patient data, together with the patient's medical history and Medications for all of the Petitioner's patients. Further, during the term of the Agreement, the Pharmacy will have access, during Petitioner's office hours, to Petitioner's office, in order for the Pharmacy to perform the necessary maintenance and updating of the Pharmacy's Computer.

c. Pursuant to the Agreement, it is intended that the Pharmacy will have full-time use of the Prime Counter Space, as well as access, during Petitioner's office hours, to Petitioner's office and the Pharmacy's computer.

d. The Agreement will specify the services to be provided by Petitioner's administrative personnel, together with the schedule of such intervals, as well as the length of time during which such personnel shall perform such services. With regard to same, on a daily

basis, on those days on which Petitioner maintains office hours, administrative personnel of Petitioner shall input all relevant patient data, together with the patient's medical history and Medications, for those new patients of Petitioner. Such services shall be provided by administrative personnel of Petitioner for no more than one-half (1/2) hour each day.

e. The payments to be made by the Pharmacy to Petitioner are set out in advance under the Agreement, are based upon the amount and portion of the Prime Counter Space utilized by the Pharmacy, the time which the administrative personnel of Petitioner shall be required to provide administrative services for the Pharmacy, and is consistent with the fair market value of the Prime Counter Space, together with the services to be provided by administrative personnel of Petitioner, with fair market value based upon a reasonable valuation attributed to the Prime Counter Space, together with the cost of the administrative personnel (including payroll taxes, insurance and fringe benefits), as same would be determined in an arm's length transaction and is not determined in a manner that takes into account the volume or value of any referrals or business to be generated between the Petitioner and the Pharmacy.

f. The space leased by Petitioner to the Pharmacy (i.e. the Prime Counter Space) does not exceed that which is reasonable and necessary by the Pharmacy for the legitimate business purpose of the Agreement and is to be used exclusively by the Pharmacy during the term of the Agreement.

g. The services provided by the administrative personnel of Petitioner to the Pharmacy does not exceed that which is reasonable and necessary by the Pharmacy for the legitimate business purpose of the Agreement.

h. Based upon the reasonable determination of the Petitioner, the Agreement would be commercially reasonable even if no referrals were made between the parties.

4. Petitioner is also contemplating entering into a joint marketing arrangement with the Pharmacy, pursuant to which Petitioner will market his practice and the Pharmacy will market its business, through some or all of the following: direct mail, newspapers, magazines, billboards, television and/or radio. With regard to the joint marketing, the Petitioner and

Pharmacy will jointly determine a budget for such marketing, as well as the method and means of such marketing and the media for same. In conjunction with same, the Petitioner and Pharmacy shall contribute proportionate amounts toward such marketing activities, based upon the portion of the space and /or time dedicated to the Petitioner and Pharmacy relative to such marketing activities.

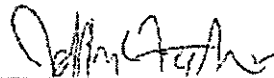
Based upon the contemplated business arrangement outlined in paragraphs 3 and 4 above, Petitioner desires to know whether he would be subject to discipline.

ISSUE: Would the foregoing arrangements subject Petitioner to discipline as a violation of Section 455.236, 455.227(1)(q), 455.237, 458.331(1)(i) or 458.331(1)(j), Fla. Stat.?

Date:

April 21, 1997

PETITIONER:



Jeffrey Fernyhough, M.D.  
c/o Florida Back Institute  
1905 Clint Moore Road  
Suite 309  
Boca Raton, FL 33496