

DEPARTMENT OF PROFESSIONAL REGULATION  
BOARD OF MEDICINE

IN RE: The Petition for  
Declaratory Statement of:  
EDMUND G. LUNDY, M.D.,  
Petitioner.

FILED

Department of Professional Regulation  
AGENCY CLERKCLERK: *Melinda H. Wagner*

DATE 12/13/87

FINAL ORDER

THIS MATTER came before the Board of Medicine pursuant to Section 120.565, F.S., and Chapter 28-4, Florida Administrative Code, on December 5, 1986, in Tampa, Florida, for the purpose of considering the Petition for Declaratory Statement filed by Edmund G. Lundy, M.D. (hereinafter Petitioner). Petitioner was represented by Martin J. Gensauer, Esquire. No person or entity sought to intervene as a party.

Having considered the petition, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. Petitioner is licensed in the State of Florida as a medical doctor, having been issued license number 0020352. His address is 2241 North University Drive, Suite A, Pembroke Pines, Florida, 33024.
2. Petitioner is contemplating entering into a business transaction, as set forth below, and wishes the Board to interpret whether such business transaction would constitute a "split-fee arrangement" within the meaning of Section 458.331(1)(j), Florida Statutes (1985) <sup>1/</sup>. The Board of Medicine

<sup>1/</sup> Paragraph (j) of subsection (1) of Section 458.331, Florida Statutes (1985) was redesignated as Paragraph (i) in the 1986 Supplement.

administers Section 458.331(1)(j) and Section 458.331(2), under which discipline may be imposed for any violation of Section 458.331(1)(j).

3. Petitioner intends to establish and become a shareholder of a Florida corporation that will serve as a vehicle for both providing services to patients as well as providing additional services to a group of otherwise independent physicians, as described below. Petitioner also intends to affiliate with subscribing specialists, as described in subparagraph (b). The details of the two proposed business arrangements which the Petitioner requests that the Board review in light of the statutory provisions cited above are as follows:

(a) Lease of Office Space, Advertising,  
and Administrative Services to Family  
Practitioners:

The first proposed activity of the corporation would be to establish an office space with medical facilities sufficient to provide general medical care of the nature provided by specialists in family practice. The facilities would include sophisticated diagnostic equipment and materials. The corporation would lease the office space and equipment to one or more family practitioners. The corporation would also provide advertising for the facility including, but not necessarily limited to, newspaper, radio and television advertising. Such advertising would promote the convenience, availability, and sophistication of the facility as well as the professional and academic background and qualifications of the lessee practitioners.

Patients seen by such family practitioners at the facility would pay the corporation for the services rendered by the particular family practitioner. The corporation would return sixty percent of the fee for such services to the particular family practitioner who provided such services, and the corporation would retain forty percent of the fee as payment for lease of the space and for providing advertising and administrative services, including receptionist, secretarial, billing and collection services. The practitioners would be relieved of the administrative burden of billing and collection of fees for such services. The receptionists and secretaries provided to the family practitioners would be employees of the corporation.

(b) Billing, Advertising and Marketing  
Services for Specialists:

The corporation would also provide certain billing, advertising, and marketing services for particular physician specialists. Specialists would subscribe to be affiliated with the corporation. The corporation would seek as subscribers one or more physicians in each of a number of medical specialties. Each subscribing specialist could refer patients to a subscribing physician in another specialty, if the first specialist deemed such referral in the best interest of the patient. No physician would be under any obligation at any time to refer a patient to any subscribing specialist, and a

physician could at all times refer patients to a nonsubscribing specialist.

In the event a subscribing specialist referred a patient to another subscribing specialist, then the specialist to whom the patient was referred would agree that such patients would be a client of the corporation for the particular services rendered at the time. Any fee charged to such referred patient for those particular services would be payable to the corporation, and the corporation would remit 85 percent of that amount to the attending physician.

In exchange for the retained 15 percent, the corporation would provide billing, advertising, and marketing services for the subscribing specialists. The corporation would be responsible for billing and collecting from those patients who did not pay at the time the services were rendered. In addition, the corporation would provide comprehensive advertising for the subscribing specialists. Such advertising would include, but would not necessarily be limited to, newspaper, radio, and television advertising. The corporation would promote the availability of full-service medical care to prospective patients through the affiliation of the subscribing specialists. The fair market value of the services to be provided by the corporation would be approximately equal to the fee retained by the corporation.

In addition, it is contemplated that the corporation would eventually establish multiple facilities to provide physical office space for subscribing specialists as well as for additional family practitioners. The establishment of such multiple facilities is the principal goal of the corporation. Not only will this permit greater economies of scale for the participating physicians, but it will afford to patients greatly increased availability of specialists in most major areas of medical practices. It is further contemplated that the corporation will eventually seek to negotiate with various private entities to serve as an independent contractor to provide comprehensive medical care for the employees of such entities.

4. The Petition was noticed by the Board in the January 23, 1987, issue of the Florida Administrative Weekly (Vol. 13, Number 4, Page 310).

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Section 120.565, F.S., and Chapter 28-4, Florida Administrative Code.
2. The petition filed by Petitioner is in substantial compliance with the provisions of Section 120.565, F.S. and Chapter 28-4, Florida Administrative Code.
3. Petitioner has the requisite interest to maintain this

proceeding.

4. Section 458.331(1)(j), F.S. (1985), provides as follows:

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

(j) 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.

5. The first question presented by the petition is whether the arrangements set forth in subparagraph (3)(a) in the Findings of Fact would violate Section 458.331(1)(j), F.S. (1985). Upon review of the factual details and the statute, the Board is of the opinion that the proposal set forth in (a) above would not constitute a violation of the "fee-splitting" statutory provision. The statute, in essence, prohibits referral fees. In the first scenario, there is simply a charge for services rendered and there is no referral arrangement whatsoever. The specific arrangement is that the corporation would provide specified services and the family practitioners would pay the corporation for the services rendered to each particular family practitioner. While the scenario establishes that the patients' fees would be paid to the corporation and sixty percent of the fee would be returned to the practitioner, the sixty percent of the fee is attributed to the payment for lease of the space and equipment and for the provision of advertising and administrative services. Since the fee is not in any apparent way, either directly or indirectly, tied to an arrangement whereby the corporation makes referrals to the physicians or the physicians

the arrangement as being prohibited by the statutory provision at issue.

6. The second question presented by the petition is whether the factual details of the proposal set forth in subparagraph (3)(b) in the Findings of Fact, would constitute a violation of Section 458.331(1)(j), F.S. (1985). In contrast to the first situation, where there is no tie-in of the payment for services to referrals to be made or received, the scenario described in (b) would, in the Board's view, constitute a violation of the statute at issue. While the first paragraph of the proposed arrangement specifies that the referrals to be made by the subscribing physicians are to be in the best interest of the patient and that the subscribing physician would not be under an obligation to refer a patient to any subscribing specialist, the arrangements set forth in the second paragraph clearly provide for a referral fee or split-fee. Specifically, under the facts set forth, if one subscribing specialist referred a patient to another subscribing specialist, then the patient would be deemed a patient of the corporation and not of the "receiving" physician and the corporation would retain 15% of the fee charged to the patient. While that 15% is characterized as a charge for billing, advertising, and marketing services, the Board finds that it is, in actuality, a split-fee or referral fee. As can be deduced from an evaluation of the specific facts, if one of the subscribing specialist physicians receives a referral from a non-subscribing specialist, then the physician keeps 100% of the fee. Only if both the referring physician and the receiving physician are members of the corporation is the 15% of the fee payable to the corporation. Section 458.331(1)(j), F.S., prohibits a fee being paid or received for a referral.

7. There is competent substantial evidence to support the Board's findings and conclusions.

WHEREFORE, it is ORDERED AND ADJUDGED that Section 458.331(1)(j), F.S. (1985), does not prohibit a physician from entering into an arrangement whereby a percentage of the fees

charged to the patient are payable to a corporation for the provision of space, equipment, advertising, and administrative services. Section 458.331(1)(j), F.S. (1985), does, however, prohibit a physician from entering into an arrangement whereby that physician, as a subscribing participant in a business arrangement, provides a percentage of the patient fee to the corporation with whom he or she has the business arrangement if the patient he or she sees has been referred by another physician who has also entered into a similar business arrangement with the corporation.

Pursuant to Section 120.59, F.S., the Petitioner is hereby notified that he may appeal this final order by filing one copy of a notice of appeal with the clerk of the agency and by filing the filing fee and one copy of a notice of appeal with the district court of Appeal within thirty days of the date this order is filed, as provided in Chapter 120, F.S., and the Florida Rules of Appellate Procedure.

DONE AND ORDERED this 19<sup>th</sup> day of November,  
1987.

BOARD OF MEDICINE

*Emilio D. Echevarria*  
EMILIO D. ECHEVARRIA, M.D.  
Chairman