

STATE OF FLORIDA
BOARD OF MEDICINE

IN RE: PETITION FOR DECLARATORY STATEMENT

PAUL J. BEFANIS, M.D.

FINAL ORDER

This matter came before the Board of Medicine (hereinafter the "Board") on June 2, 2007, in Tampa, Florida, for consideration of the above-referenced Petition for Declaratory Statement. The Notice of Petition for Declaratory Statement was published on May 18, 2007, in Vol. 33, No. 20, of the Florida Administrative Weekly. Petitioner did not make a personal appearance but was represented by Nicole E. Waters, Esquire.

In his petition, Paul J. Befanis, M.D., a Florida licensed physician, inquires as to whether his proposed "marketing program" would place him in violation of Section 458.331(1)(i), Florida Statutes.

FINDINGS OF FACTS

1. The Petitioner is a board certified Ophthalmologist who performs laser vision correction or other elective ophthalmological procedures. The procedures performed by the Petitioner are "self-paid" in nature, and accordingly, Dr. Befanis does not participate in the Medicaid program nor are any of the procedures paid for or funded by the State of Florida or the federal government.

2. The Petitioner is subject to the prohibitions set forth in Section 458.331(1)(i), Florida Statutes, and therefore, if he chooses to participate in the "Patient Charity Program" he may be substantially affected by enforcement of the statute in question.

3. Petitioner has engaged Modern Solutions, a marketing company, that among other things has proposed a marketing program known as the "Patient Charity Program." Under this program, the Petitioner would give \$10.00 to an existing patient's favorite charity when that patients gives his or her friends and family information regarding the patient's lasik surgery. The \$10.00 is given to the 501(c)(3) charity of the patient's choice.

4. In addition to the foregoing, when a patient refers a potential patient to the Petitioner and the referred patient receives lasik surgery, the Petitioner gives \$10.00 to the 501(c)(3) charity of the patient's choice.

CONCLUSIONS OF LAW

5. 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.

6. 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.

7. Section 120.565, Florida Statutes, reads as follows:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action

8. Because the Board has regulatory jurisdiction over the Petitioner and enforcement of Section 458.331(1)(i), Florida Statutes, may substantially affect his license to practice

medicine in Florida, the Petitioner has the requisite standing to bring this matter before the Board.

9. Petitioner inquires as to whether his participation in the "Patient Charity Program," the terms of which are set forth above, would place him in violation of Section 458.331(1)(i), Florida Statutes.

10. Section 458.331(1)(i) reads 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.

11. Section 456.054, Florida Statutes, also addresses and prohibits healthcare professionals from paying kickbacks. It reads as follows:

(1) As used in this section, the term "kickback" means a remuneration or payment, by or on behalf of a provider of health care services or items, to any person as an incentive or inducement to refer patients for past or future services or items, when the payment is not tax deductible as an ordinary and necessary expense.

(2) 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.

(3) Violations of this section shall be considered patient brokering and shall be punishable as provided in s. 817.505.

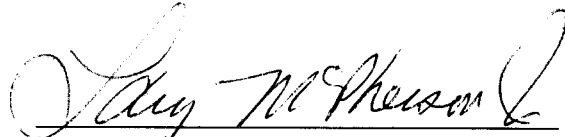
12. The Board is of the opinion that by participating in either aspect of the "Patient Charity Program" as set forth in paragraphs 3 and 4 above, the Petitioner would be inducing or creating an incentive for patients to refer others to Petitioner's practice for the purposes of undergoing laser correction or other ophthalmological procedures.

13. The Board believes that such payments constitute prohibited rebates and/or kickbacks, and therefore, are precluded by Sections 456.054 and 458.331(1)(i), Florida Statutes.

14. 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.

DONE AND ORDERED this 27 day of AUGUST, 2007.

BOARD OF MEDICINE


Larry McPherson, Jr., Executive Director
for H. Frank Farmer, Jr., 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: counsel for the Petitioner, Nicole E. Waters, Esquire, Law Offices of Nicole Waters, 1541 Ocean Avenue, Suite 200, Santa Monica, California 90401; and by interoffice mail to: Edward A. Tellechea, Senior Assistant Attorney General, PL-01 The Capitol, Tallahassee, Florida 3239-1050; and Josefina Tamayo, General Counsel, Department of Health, 4052 Bald Cypress Way, BIN A02, Tallahassee, Florida 32399-1703, on this 27th day of August, 2007.


Deputy Agency Clerk