

STATE OF FLORIDA  
BOARD OF MEDICINE

Final Order No. DOH-99-0977-DS-MOA Date 8 25 99

IN RE: THE PETITION FOR  
DECLARATORY STATEMENT OF  
REW, ROGERS & SILVER, M.D.'S, P.A.

FILED  
Department of Health  
Angela Hall, AGENCY CLERK  
By: *Stephen G. De...*  
Deputy Agency Clerk

**FINAL ORDER**

THIS CAUSE came before the Board of Medicine (hereinafter Board) pursuant to section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, on August 7, 1999, for the purpose of considering the Petition for Declaratory Statement (attached as Exhibit A) filed on behalf of Rew, Rogers & Silver, M.D.'s, P.A. (hereinafter Petitioners). Having considered the petition, the arguments made by counsel for Petitioners, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions:

**FINDINGS OF FACT**

1. Petitioners are medical doctors licensed to practice medicine in the State of Florida, specifically anesthesia and pain management. Petitioners are currently contemplating entering into a management agreement with a management company.
2. The proposed management contract (attached as Exhibit B), provides that the management company will provide Petitioners with professional office space, office personnel and equipment, administrative services such as scheduling, billing, routine collections, and secretarial services, telephone service, utilities, office supplies, and custodial services.

3. In return, Petitioners are required to pay an amount equal to fifty percent (50%) of Petitioners' monthly net collections<sup>1</sup>, provided, however, that said amount shall never exceed \$10,000.00 per month.<sup>2</sup>

4. Petitioners are solely responsible for medical services provided in the practice and there is no requirement that either party be responsible for expanding or growing the medical practice of Petitioners. There is no requirement to participate in practice or referral networks and there is no requirement for either party to obtain contracts for medical services or provide such services. There is no requirement that either party network or advertise Petitioners' services.

5. The term of the proposed agreement is one (1) year and pursuant to the proposed agreement, either party to the agreement may voluntarily terminate the agreement by delivering written notice at least thirty (30) days prior to the intended date of termination.

6. Other than with regard to keeping secret any operational secrets of the other party, there are no covenants restricting the future practice of either party after termination of the proposed agreement.

7. There are no other agreements between the parties to the proposed agreement that materially affect the relationship between the parties.

8. Petitioners seek a statement by the Board determining whether the proposed agreement would violate the fee splitting prohibitions set forth in section 458.331(1)(i), Florida Statutes.

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<sup>1</sup> Petitioners are also required to pay the expense of one-half FTE for a clinical assistant and such payment shall be calculated prior to the application of the 50% payment.

<sup>2</sup> Petitioners calculate that they are currently generating monthly revenues of between \$7500.00 and \$10,000.00 and their practice is winding down without any expectation of significant growth in their practice or practice revenues.

9. This petition was noticed by the Board in Vol. 25, No. 20, dated May 21, 1999, of the Florida Administrative Weekly (p:2477).

### 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. The Board is aware of the prohibition against using a declaratory statement as a vehicle for the adoption of broad agency policies. This Declaratory Statement addresses only the specific facts set forth herein as presented in the Petition.

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. This Board has previously found that it is acceptable for physicians to enter into reasonable business agreements that include payment for services rendered based on a calculation of a percentage of income or profits. See, *In re Lundy*, 9 FALR 6289 (1987) (no violation created by contract requiring payment of 40% of collections in return for practice management services); *In re Lozito*, 9 FALR 6295 (1987) (limited partnership can pay fixed rent plus 5% of operating profits for lease because agreement did not involve referrals to partnership); and *In re Zeterberg*, 12 FALR 1035 (1990) (percentage payment in practice management

agreement would have been acceptable except for contract requirements to participate in "circuit" of referring clinics).

5. More recently, the Board has reiterated that agreements which provide for the payment of a percentage of profits in return for the provision of services by a practice management company that include obligations to bring more patients into the practice, by obtaining referrals, and securing managed care or other payor contracts; arranging for the provision of ancillary services by providers outside the managed practice; and securing access to more extensive networks for the practice, are prohibited by section 458.331(1)(i), Florida Statutes. See, *In re Bakarania*, 20 FALR 395 (1998).

6. The facts set forth in the Petition in this case and as adopted above are more analogous to the scenarios found in *Lundy* and *Lozito*. This case is clearly distinguished from *Bakarania* because of the absence of any obligation for the practice management company to add patients to the managed practice. In fact, in this case, the incentive for the practice management company to grow the practice is capped at a maximum of \$10,000.00 per month or total annual payments of \$120,000 regardless of the growth of the managed practice.

7. This Final Order responds only to the specific facts set forth and specific questions set forth by Petitioners in their Petition for Declaratory Statement. The conclusions of the Board are with regard to the specific statutory provision addressed and should not be interpreted as commenting on whether the proposed facts may or may not violate other provisions of Chapter 458, Florida Statutes, or other related obligations placed on physicians in Florida. Furthermore, this Declaratory Statement is not a ruling on the legal validity or enforceability of the proposed contract or any similar contract.

WHEREFORE, the Board hereby finds that under the specific facts of the Petition, as set forth above, the proposed contractual arrangement described by Petitioners is not prohibited by section 458.331(1)(f), Florida Statutes.

DONE AND ORDERED this 25 day of August, 1999.

BOARD OF MEDICINE



JAMES CERDA, M.D.  
CHAIRMAN

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 Petitioners c/o Michael K. Blazicek, Esquire, Josepher, Blazicek & Batteese, P.A., 100 S. Ashley Drive, Suite 1190, Tampa, Florida 33602 this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

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In Re:

RECEIVED

BOARD OF MEDICINE

The Department of Health, Florida Board of Medicine )

FILED

DEPARTMENT OF HEALTH  
DEPUTY CLERK

CLERK *Stephanie Q. Dorn*

DATE 5-4-99

PETITION FOR DECLARATORY STATEMENT  
THE DEPARTMENT OF HEALTH, FLORIDA BOARD OF MEDICINE

- (1) The name, address, telephone number, and any facsimile number of the petitioners:

Rew, Rogers & Silver, M.D.  
3104 W. Waters Avenue  
Suite 204  
Tampa, FL 33614  
Telephone: (813) 931-0056  
Facsimile: (813) 931-7617

- (2) The name, address, telephone number, and any facsimile number of the attorney of the petitioners:

Michael K. Blazicek, Esq.  
Josepher, Blazicek & Batteese, P.A.  
100 S. Ashley Drive  
Suite 1190  
Tampa, FL 33602

Telephone: (813) 228-7755  
Facsimile: (813) 228-9006

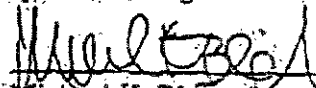
- (3) The statutory provision on which the declaratory statement is sought:

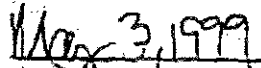
Florida Statute 458.331(1)(i)

- (4) A description of how the statutes, rules, or orders may substantially affect the petitioners in the petitioner's particular set of circumstances:

The statute substantially affects the petitioners because they are medical doctors licensed to practice medicine in the State of Florida, specifically anesthesia and pain management. The petitioners are currently contemplating entering into a management agreement with a management company pursuant to the proposed agreement attached and incorporated by reference as petitioner's exhibit (1).

Petitioners are concerned that the proposed arrangement might be found to be in violation of section 458.331(1)(i), Florida Statutes and the Board's position on split fee arrangements.

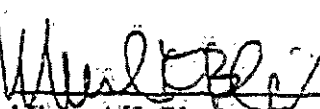
  
Michael K. Blazicek  
Attorney for Petitioner

  
Date

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished,

by Federal Express, this 3rd day of May, 1999, to: Department of Health, c/o Ronda Bryan, Central Records Unit, 2020 Capitol Circle S.E., BIN C01, Tallahassee, FL 32399-3251; Agency Clerk, Department of Health, Office of General Counsel, 2020 Capitol Circle, S.E., BIN A02, Tallahassee, FL 32399-1703; and Allen Richard Grossman, Esq., Office of the Attorney General, The Capitol, Tallahassee, FL 32399-6536.

  
Michael K. Blazicek  
FBN: 0886068  
JOSEPHER, BLAZICEK & BATTEESE, P.A.  
Attorneys for Defendants  
First Union Center, Suite 1190  
100 S. Ashley Drive  
Tampa, FL 33602  
(813) 228-7755

## MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT (the "Agreement") is made and entered into this day of April, 1999 (hereinafter "Effective Date"), by and between GROUP, INC., a Florida corporation (the "Corporation"), and REW, ROGERS & SILVER, M.D.'S, P.A. (the "PA").

### WITNESSETH:

WHEREAS, the Corporation and the PA desire to enter into an agreement whereby the Corporation will provide the PA with office space in its facility and billing and administrative services for its medical practice in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereby agree as follows:

- Office Space. The Corporation hereby agrees to provide professional office space ("Space") to the PA at the Facility and at such other locations owned or leased by the Corporation as the parties may agree upon. The parties agree and acknowledge that this Agreement is not a lease or transfer of property interest and that the PA has no legal rights in or to the Corporation's property interest regarding the Facility. Initially, the Space will be available for use by the PA between the hours of \_\_\_\_\_ a.m. and \_\_\_\_\_ p.m. every Monday through Friday. The Space also may be available for additional periods as agreed to from time to time by the parties hereto.
- Staff Services, Equipment, Personnel, etc. The Corporation also shall provide the PA with use of the Corporation's existing equipment to be identified by the parties, such office personnel necessary to arrange for routine administrative functions and schedule office appointments relating to the PA's practice, billing of all patient accounts and maintaining all books, journals, ledgers of account and any financial statements, performance of routine secretarial services relating to the operation of the PA's practice, routine collection of delinquent accounts receivable prior to their referral to collection agencies, administrative duties connected with the operation of the PA's practice; and such other services, equipment and supplies necessary for the performance of the above-stated services, including telephone service, utilities, office supplies and custodial services.
- Payment for Office Space, Support Services, Equipment, etc. The PA shall pay monthly to the Corporation as compensation for the office space and services described in Sections 1 and 2, an amount equal to fifty percent (50%) of the PA's monthly Net Collections, provided, however, that in no event shall the monthly compensation exceed \$10,000. "Net Collections" means all revenue collected by the Corporation on behalf of the PA; provided, however, that Net Collections shall be reduced by any credits, discounts, refunds, and other adjustments attributable to billings for services rendered by the PA. The cost of any drugs or medical supplies provided in the treatment a patient of the PA, and the expense of one-half FTE for a clinical assistant shall be paid directly to the Corporation in addition to the 50% payment described above, and such payment shall be computed prior to the application of the 50% payment.



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4. Billing and Collection. The PA authorizes the Corporation to bill and collect for all professional services rendered by it, and agrees to execute all powers of attorney, agreements or other instruments which may be required from time to time to give the Corporation the fullest authority available to bill and collect on its behalf from insurers, third party payors, health maintenance organizations, individual patients, governmental bodies and other payors for professional services.

5. Independence of Professional Practice.

(a) The PA's relationship with the Corporation shall, at all times during the term of this Agreement, be that of an independent contractor. The PA shall not be considered by reason of the provisions of this Agreement or otherwise to be an employee of the Corporation. The PA agrees that it shall not hold itself out to the public whether by advertising or in any other way, as an employee of the Corporation.

(b) The PA and the Corporation acknowledge and agree that the professional practice of the PA is independent and separate from the business of the Corporation. The parties acknowledge and agree that they are not doing business as a joint venture, partnership or other business association. Neither party shall supervise or otherwise be responsible or liable for the services performed by the other.

(c) The PA acknowledges and agrees that it shall have no claim whatsoever against the Corporation for vacation pay, sick leave, retirement or social security benefits, workers' compensation, disability, unemployment insurance benefits, or employee benefits of any kind whatsoever by virtue of this Agreement, and that it shall not be entitled to participate in the plans, arrangements, or distributions by the Corporation pertaining to or in connection with any pension, bonus, profit sharing, or similar plans or benefits for the Corporation's employees.

(d) Except as specifically provided herein, the PA and the Corporation agree that the Corporation shall not pay or be responsible for any expenses of the PA, including but not limited to expenses related to professional liability insurance, continuing medical education, professional journals or meetings, automobile expenses, entertainment and business development, and other similar expenses.

6. Malpractice Insurance. The PA shall obtain and maintain, at its sole expense, professional liability insurance in accordance with the laws of the State of Florida to insure the acts and omissions of the PA under this Agreement. The PA agrees to provide proof of such professional liability insurance coverage to the Corporation.

7. Term. Subject to the provisions of termination as hereinafter provided, the term of this Agreement shall begin as of \_\_\_\_\_, 1999 and terminate on \_\_\_\_\_ 2000.

8. Termination. Either party may voluntarily elect to terminate this Agreement, with or without cause, by delivering to the other party, at least thirty (30) days prior to the date upon which termination is desired, written notice of such intention to terminate.

9. Referrals. Under this Agreement, neither party shall refer patients to the other.

10. Confidentiality.

(a) Except for the limited amount of information necessary for the purposes of obtaining payment from third party payors and arranging for patient care by providers outside the Facility, each party agrees to keep in strict secrecy and confidence any and all information relating, directly or indirectly, to the practice of the other party, including but not limited to its patients, payors, records, etc., if such information has not been publicly disclosed and is not a matter of common knowledge in the fields of work of the parties; provided however, that the parties shall comply with legally sufficient subpoenas and court orders requiring disclosure of specified information.

(b) This Section 10 shall remain in full force and effect for five years following termination or expiration of this Agreement or any renewal hereof. The parties agree that in the event of a breach or threatened breach of this Section 10, in addition to any other relief to which the non-breaching party may be entitled, such non-breaching party shall be entitled to enforce this Section 10 by injunctive or other equitable relief ordered by a court of competent jurisdiction.

11. Notice. All notices which either party is required to give to the other in conjunction with this Agreement shall be in writing, and shall be given by addressing the same to such other party at the address set forth below, by certified mail, return receipt requested, or by delivering the same personally, or by courier or Federal Express (or comparable overnight courier) to such other party, or by facsimile (with confirmation by any other method accepted herein). Any notice given by certified mail shall be deemed to have been received three (3) United States Post Office delivery days following the date of mailing. If hand delivered or delivered by same day or overnight courier or by facsimile, such notice shall be deemed to have been received on the date of delivery to the party being noticed. Either party may change the address for the service of notice upon it by written notice given to the other in the manner herein provided for the giving of notice.

12. Applicability to Staff. The PA and the Corporation agree that the terms of this Agreement shall bind the employees, agents and officers of both parties.

13. Supervening Law. The parties recognize that this Agreement at all times is subject to state, local and federal law and regulations. The parties further recognize that this Agreement shall be subject to amendments of such laws and regulations and to new legislation, such as federal or state economic stabilization programs or health insurance programs. Any provisions of law that invalidate or otherwise are inconsistent with the terms of this Agreement or would cause one or both of the parties to be in violation of law shall be deemed to have superseded the terms of this Agreement; provided, however, that the parties shall exercise their best efforts to accommodate the

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terms and intent of this Agreement to the greatest extent possible consistent with the requirements of law.

14. Attorneys' Fees. In the event that either party is required to engage the services of legal counsel to enforce the terms and conditions of this Agreement against the other party, regardless of whether such action results in litigation, the prevailing party shall be entitled to reasonable attorneys' fees, costs of legal assistants, and other costs from the other party, which shall include any fees or costs incurred at trial or in any appellate proceeding, and expenses and other costs, including any accounting expenses incurred.

15. Miscellaneous. The invalidity or unenforceability of a particular provision of this Agreement shall not affect the other provisions hereof, and the Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted. The provisions of this Agreement are severable and the invalidity of any one or more of such provisions or any part thereof does not affect or limit the enforceability of the remaining provisions or parts thereof of this Agreement. This Agreement contains the entire agreement between the parties. No change, amendment, supplement or modification of this Agreement shall be valid unless the same be in writing and signed by the parties hereto. This Agreement shall be construed and regulated under and by the laws of the State of Florida, and shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns, provided, however, that the Employee may not assign, delegate or otherwise transfer any rights or obligations arising hereunder without the prior written consent of the Corporation. No failure on the part of either party hereto at any time to require the performance by the other party of any term of this Agreement shall be taken or held to be a waiver of such term or in any way affect such party's right to enforce such term, and no waiver on the part of either party of any term of this Agreement shall be taken or held to be a waiver of any other term hereof or the breach thereof. The provisions of this Agreement which, by their express or implicit terms, are intended to survive the termination or expiration of this Agreement, shall survive such termination or expiration and be enforceable.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the day and year first above written.

\_\_\_\_\_, INC.

REW. ROGERS & SILVER, M.D.'S, P.A.

By: \_\_\_\_\_

By: \_\_\_\_\_  
(Title)