

## Remuneration for Referrals -- Part II

### TEXAS BACKGROUND INFORMATION

Effective September 1, 1991, the Texas Health and Safety Code put into effect a section which has the greatest potential for wreaking havoc with the way physician have practiced in Texas.

Section 161.091, under the Health and Safety Code, Title 2, states, "(a) A person licensed, certified, or registered by a health care regulatory agency of this state commits an offense if the person intentionally or knowingly offers to pay or agrees to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership or corporation for securing or soliciting patients or patronage."

The balance of this Section 161.091 goes on to say that this provision is not intended to apply to the advertising of services, or any other arrangement which is set forth in the "Stark Bill" statute or "Safe Harbor" regulations. This provision provides some much needed leeway in an otherwise burdensome statute.

One other interesting provision is found in Section 161.091(e), which states: "This section shall not be construed to prohibit remuneration for advertising, marketing, or other services that are provided for the purpose of securing or soliciting patients provided the remuneration is set in advance, is consistent with the fair market value of the services, and is not based on the volume or value of any patient referrals or business otherwise generated between the parties." (Emphasis added).

It appears that a referring health care provider affected by this provision is one who does not take any patients by referral whose health care services are reimbursed with any federal or state funds, and who owns the entity to which the patient is being referred, or has an equity interest in it. As long as the fees are based upon the fair market value, are established in advance without discrimination as to the source of compensation, and the practitioner does not receive a "bonus" based upon the volume of the patient referrals, then there is no violation of the Texas law. This is the case even if a profit is realized from the combined services provided by entity, whose profit is eventually paid to the owner or owners.

The major difference between the federal and state versions is that there is no qualifying provision limiting the applicability of the statute. From the plain language of the statute, it appears to apply across the board to every health care provider in every area of practice and in every business arrangement, excluding the very narrow federal regulations.

Due to the recent enactment of the Texas statute, there is simply no other supplementary information available to expound further on the law as it currently stands.

#### What the Future Holds for Texas Health Care Providers

There is an axiom within the legal profession that whenever a new law is passed in California, all states east of there will soon have virtually the same law on their books, and whenever Florida passes a new law, all states west of there will soon have the same rule on their books.

Florida just recently passed a statute which is far more restrictive than the current Texas law, and I am confident that it won't be very long before the Texas legislature will be taking another look at health care providers.

What are the "Key Questions" that you can ask yourself and your associates to see if you are in violation of any existing federal or state laws?

If you or your associates have to answer "yes" to any of the five following questions, then you should contact an attorney knowledgeable in this area of law to seek further specific counsel.

1. Are you involved in any partnerships or ventures such as MRI/CT centers, laboratories, or rehab centers to which you refer patients?
2. When you refer patients to any other doctor, a hospital, or any provider of goods or services, do you receive anything in return?
3. When you refer a patient to any provider of goods or services, do you receive any portion of the fee for those goods or services?
4. Do you pay anyone, in any way, for sending or referring patients to you?
5. Do you pay anyone based upon services provided to patients who were referred to you?

If you and/or your attorney determine that you are in violation or non-compliance with any of the federal or state statutes, but you are, in good faith, making an effort to remedy that situation and to come into compliance with the statutes, then those good faith efforts will be taken into account in determining whether or not to prosecute the violator.

Bottom Line:

There is a definite statutory trend to eliminate any possibility for a health care provider to be able to realize a profit from health care services where the patient is not actually treated by the practitioner, so prepare yourself and your practice accordingly.

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