



ALABAMA STATE BOARD OF MEDICAL EXAMINERS

LARRY D. DIXON, EXECUTIVE DIRECTOR

P.O. BOX 946
MONTGOMERY, ALABAMA 36101-0946
848 WASHINGTON AVE.
MONTGOMERY, ALABAMA 36104

TELEPHONE: (334) 242-4116
E MAIL: ldixon@albme.org

October 24, 2005

Richard L. Sharff
Bradley Arant Rose & White, LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203-2119

Dear Mr. Sharff:

This will acknowledge receipt of your recent correspondence requesting a Declaratory Ruling from the Alabama State Board of Medical Examiners concerning the application of Ala. Code §34-24-360(10) to a contractual arrangement between a group of pathologists and a group of urologists. In your request for declaratory ruling you have provided the following factual background:

FACTUAL BACKGROUND

1. My client, which I will refer to as "Group A," is a professional association that is comprised exclusively of physicians licensed to practice medicine in Alabama and specializing in pathology. These physicians provide pathology services to hospital patients and patients of physicians in private practice.

2. Group A has been approached by a professional association of urologists licensed to practice medicine in Alabama ("Group B") about entering into a written professional services agreement (the "Proposed Arrangement") under which Group A would make Group A's pathologists available to provide certain anatomic pathology services (the "Services") to Group B's patients. The material terms of the Proposed Arrangement would be as follows:

- Group A would make its pathologists available to Group to the extent necessary to ensure that Group B received adequate coverage for the Services needed by Group B's patients.

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- Group A would be responsible for scheduling its physicians to provide the Services under the Proposed Arrangement. Group A would have the discretion to select which of its physicians provides the Services. It is anticipated that no Group A physician would devote 100% of his time to providing the Services. In other words, all of Group A's physicians would continue to provide pathology services to hospital patients and patients of private physician groups other than Group B.

- The "technical" component of the clinical laboratory tests would be purchased by Group B from a local hospital. Group A's pathologists would then provide the necessary interpretation of the test. These professional services would be provided in the offices of Group B.

- Group B would bill third party payors and patients for both the technical component of the test and the Services, and Group B would retain 100% of the collections from those bills. The patients would be Group B's patients, and Group B would maintain the patients' medical records.

- As compensation for its services, Group A would be paid a flat monthly fee. The parties would negotiate that fee based upon the anticipated workload for Group A and Group A's regular charges to payors and patients for the Services, discounted by a factor designed to account for the cost savings to Group A associated with, among other things, performing the Services at Group B's offices and not having to bill and collect for the Services. Provided that the parties' good faith estimate of the volume of the Services is not materially low, then Group A's compensation under the Proposed Arrangement would exceed its cost to provide the Services (which is essentially nothing more than the value of the pathologists' time). The flat monthly fee could be renegotiated, but not more often than annually.

In addition to the factual background stated above, you have provided the Board with additional information concerning the manner in which the compensation under the contractual agreement with the pathology group is to be calculated. As we understand the explanation, the parties will use historical data on the volume of services provided to estimate an expected level of annual collections for professional services and the monthly flat fee paid to the pathologists would be 70% of that amount.

ANALYSIS

For the reasons outlined below, the Board concludes that the compensation arrangement between Group B (the urology group) and Group A (the pathology group) as described in your request would not violate §34-24-360(10) which prohibits physicians from splitting or dividing fees received for professional services in exchange for referring a patient. The Board reached this conclusion based in part upon the fact the payment for the services of pathology group is based upon

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a flat rate contractual amount and is not dependent upon the number of patients for services to pathology group. To the extent that this is a negotiated rate based on historical data, it appears to represent the parties' assessment of the current fair market value of the pathologists services.

This situation is similar to one analyzed by the Board of Medical Examiners in an April 25, 2005 opinion clarifying its declaratory ruling of August 5, 2004. In the April, 2005 opinion the Board distinguished the earlier opinion based upon the fact that the patient's treating physician provides the patient with diagnostic imaging services which are billed to the patient or to the patient's insurer under a global fee intended to reimburse for both the technical component and the professional interpretation of the results. The billing

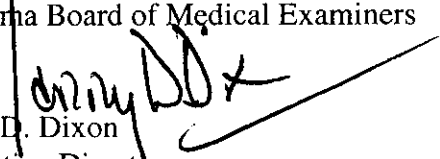
physician, in turn, contracts with a radiologist to provide an interpretation of the diagnostic imaging test for a set fee which may or may not be less than the professional component of the service if it were billed separately. In that opinion, the Board concluded that the August 5, 2004 declaratory ruling should not be interpreted to apply to the allocation of a global fee between the patient's treating physician and a radiologist engaged by the treating physician to provide interpretation of diagnostic tests.

CONCLUSION

Based upon the foregoing factual background and analysis, the Board of Medical Examiners concludes that the contractual arrangement between the pathology group and the urology group described in this request for declaratory ruling does not violate Ala. Code §34-24-360(10). The Board notes the additional request that the Board clarify its interpretation of how §34-24-360(10) would apply to a billing arrangement in which the pathology group would be paid a fix percentage of the urology groups collections for the pathology groups services. In light of the reasons upon which this opinion is based, the Board respectfully declines to issue an opinion on this additional request.

This opinion is not binding on the Medical Licensure Commission.

Sincerely,
Alabama Board of Medical Examiners


Larry D. Dixon
Executive Director

Enclosure



ALABAMA STATE BOARD OF MEDICAL EXAMINERS

LARRY D. DIXON, EXECUTIVE DIRECTOR

P.O. BOX 946
MONTGOMERY, ALABAMA 36101-0946
848 WASHINGTON AVE.
MONTGOMERY, ALABAMA 36104

TELEPHONE: (334) 242-4116
E MAIL: ldixon@albme.org

April 25, 2005

Michael R. Hess, Esquire
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
Southtrust Tower
420 Twentieth Street, North, Suite 1600
Birmingham, Alabama 35203

RE: Request for Clarification

Dear Mr. Hess:

This will acknowledge receipt of your recent correspondence requesting clarification from the State Board of Medical Examiners concerning the application of a August 5, 2004 Declaratory Ruling to certain billing arrangements engaged in by radiologists. According to the information provided, your client is a radiology group concerned as to whether the Board's Declaratory Ruling concerning the practice of "account" or "client" billing for pathology services would also be applied to the purchase of radiology interpretations from a radiologist for a set fee which may be either more or less than the professional component of the global fee for that diagnostic imaging service.

Initially, I should like to point out that the August 5, 2004 Declaratory Ruling, is expressly limited to the factual situation stated in the ruling and is not intended by the Board of Medical Examiners to apply to other factual situations unrelated to the billing of pathology services in the manner described in the opinion.

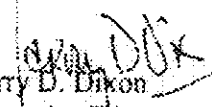
Under the facts as stated in your correspondence, the patient's treating physician (usually not a radiologist) provides the patient with a diagnostic imaging service such as an x-ray or ultrasound test which service is billed to the patient (or to the patient's insurer) under a global fee which is intended to reimburse for both the technical component and the professional interpretation of the results. The billing physician, in turn, contracts with a radiologist to provide an interpretation of the diagnostic imaging test for a set fee which may or may not be less than the professional component of the service if it were billed separately. Under this arrangement, the billing physician has provided a service to the patient which includes both a technical and a professional component.

The Board believes that this fact distinguishes the payment arrangement between the **billing** physician and the radiologist from the conclusion reached in the August 5, 2004 Declaratory Ruling in which the Board found that "... the amount of the discount represents an additional payment to the physician for which he or she provided no service to the patient."

Michael R. Hess, Esq.
April 25, 2005
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The Board of Medical Examiners has therefore concluded that the August 5, 2004 Declaratory Ruling applicable to the billing of pathology services should not be interpreted to apply to the allocation of a global fee between the patient's treating physician and a radiologist engaged by the treating physician to provide interpretation of diagnostic tests. This opinion is not binding on the Medical Licensure Commission.

Yours sincerely,


Larry D. Dixon
Executive Director



ONE FEDERAL PLACE
1519 FIFTH AVENUE NORTH
BIRMINGHAM, AL 35203-2119
205 521.8000 FAX 205.521.8000
WWW.BRADLEYARANT.COM

Richard Sharff

Direct Dial: (205) 521-8524
Direct Fax: (205) 488-6524
rsharff@bradleyarant.com

October 18, 2005

**VIA REGULAR MAIL and
FASCIMILE (334) 269-5200**

Wendell R. Morgan, Esq.
General Counsel
Alabama Medical Association
19 South Jackson
Montgomery, AL 36104

Dear Wendell:

As you requested, I am writing this letter to you to follow-up on our conversation last week, when you asked me a question about my September 1, 2005 request for clarification from the Board concerning the application of the Board's August 5, 2004 Declaratory Ruling and Ala. Code § 34-24-360(10) to a particular contractual arrangement between a group of pathologists and a group of urologists.

Your specific question was whether the urologists would make a profit from the arrangement. The short answer to that question is that they might, but they might not. Because the compensation to be paid to the pathologists would be a flat monthly fee, regardless of the amount of services provided, the profitability of the arrangement for the urologists would be dependent on several factors, including the volume of tests and the expenses incurred by the urologists in administering and obtaining payment for the tests. To some extent, those factors would be within the urologists' control, but not completely. In this regard, it may be important for the Board to understand that approximately 95% of the pathology services involved in this arrangement would be biopsies of the prostate gland. My understanding is that these procedures are only ordered upon a finding of an enlarged prostate on exam, and that they are relatively painful and invasive. Thus, they are not the type of procedure that is particularly subject to overutilization (like, for example, an MRI). Generally speaking, the volume of the tests will be dependent on the overall volume in the urologists' practice.

I would also like to clarify the information provided about the basis for the flat fee. The parties used historical figures for the biopsies to estimate an expected level of annual collections for the professional services. The monthly flat fee paid to the pathologists would be 70% of that amount, with the rationale being to account generally for costs to be incurred by the urology group, such as utilization of staff, storage trays and cabinets, office space dedicated for use by the pathologists, billing and collection costs, and long term storage of the slides prepared and read. The parties believe that this approach results in compensation to the pathologists in an amount that would be consistent with the fair market value of the pathologists' services. As noted in my original letter, unlike the arrangement reviewed in the 2004 Ruling, this flat fee

Wendell R. Morgan, Esq.

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arrangement would not involve a "split" of any particular fee, and is, instead, akin to an employment arrangement.

Thank you for your consideration of this additional information.

Sincerely,


Richard Sharff

RLS/cca



ONE FEDERAL PLACE
1819 FIFTH AVENUE NORTH
BIRMINGHAM, AL 35203-2110
205.521.8000 FAX 205.521.8800
WWW.BRADLEYARANT.COM
Richard L. Sharff

Direct Dial: (205) 521-8524
Direct Fax: (205) 488-6524
rsharff@bradleyarant.com

September 1, 2005

VIA FACSIMILE AND REGULAR MAIL

Alabama State Board of Medical Examiners
Larry D. Dixon, Executive Director
848 Washington Avenue
Montgomery, AL 36104

Dear Mr. Dixon:

In an August 5, 2004 Declaratory Ruling (the "2004 Declaratory Ruling"), the Alabama State Board of Medical Examiners (the "Board") concluded that "a discount for professional services provided to a patient's attending physician by a company offering pathology services under a billing arrangement which permits the treating physician to bill the patient (or the patient's third party payor) an amount greater than that actually paid by the attending physician for which no additional services were provided constitutes the division of fees or an arrangement to split or divide fees for professional services for bringing or referring a patient within the meaning of Ala. Code Section 34-24-360(10)." This letter requests clarification from the Board concerning the application of the 2004 Declaratory Ruling and § 34-24-360(10) to a different contractual arrangement between a group of pathologists and a group of urologists.

Factual Background

My client, which I will refer to as "Group A," is a professional association that is comprised exclusively of physicians licensed to practice medicine in Alabama and specializing in pathology. These physicians provide pathology services to hospital patients and patients of physicians in private practice.

Group A has been approached by a professional association of urologists licensed to practice medicine in Alabama ("Group B") about entering into a written professional services agreement (the "Proposed Arrangement") under which Group A would make Group A's pathologists available to provide certain anatomic pathology services (the "Services") to Group B's patients. The material terms of the Proposed Arrangement would be as follows:

Group A would make its pathologists available to Group B to the extent necessary to ensure that Group B received adequate coverage for the Services needed by Group B's patients.

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• Group A would be responsible for scheduling its physicians to provide the Services under the Proposed Arrangement. Group A would have the discretion to select which of its physicians provides the Services. It is anticipated that no Group A physician would devote 100% of his time to providing the Services. In other words, all of Group A's physicians would continue to provide pathology services to hospital patients and patients of private physician groups other than Group B.

• The "technical" component of the clinical laboratory tests would be purchased by Group B from a local hospital. Group A's pathologists would then provide the necessary interpretation of the test. These professional services would be provided in the offices of Group B.

• Group B would bill third party payors and patients for both the technical component of the test and the Services, and Group B would retain 100% of the collections from those bills. The patients would be Group B's patients, and Group B would maintain the patients' medical records.

• As compensation for its services, Group A would be paid a flat monthly fee. The parties would negotiate that fee based upon the anticipated workload for Group A and Group A's regular charges to payors and patients for the Services, discounted by a factor designed to account for the cost savings to Group A associated with, among other things, performing the Services at Group B's offices and not having to bill and collect for the Services. Provided that the parties' good faith estimate of the volume of the Services is not materially low, then Group A's compensation under the Proposed Arrangement would exceed its cost to provide the Services (which is essentially nothing more than the value of the pathologists' time). The flat monthly fee could be renegotiated, but not more often than annually.

Analysis

We submit that the Proposed Arrangement would not violate § 34-24-360(10). That statute prohibits physicians from splitting or dividing fees received for professional services in exchange for referring a patient. Previously, the Board has opined that in order to constitute a violation of the fee-splitting prohibition, an arrangement must involve a payment that is related to or in some manner dependent upon the referral of a patient. See March 31, 1988 letter to W. M. Hughes; April 8, 1987 letter to William S. Brewbaker III.

In this case, Group B would be compensating Group A for legitimate and necessary services provided by Group A, at a flat monthly rate that would be negotiated at arm's length and designed to provide fair compensation to Group A based upon the anticipated volume of work. That fixed fee would be set in advance and would not vary with the number of tests ordered or fees received for the Services by Group B. Thus, the parties would not be "splitting or dividing fees," much less splitting fees in exchange for

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patient referrals. As structured, the Proposed Arrangement should fit within the "safe harbor" protecting professional services agreements from scrutiny under the federal Anti-Kickback Statute. See 42 C.F.R. § 1001.952(d).

The Proposed Arrangement is also materially different from the arrangement analyzed in the 2004 Declaratory Ruling. First, the Proposed Arrangement does not distinguish between federal healthcare program business and other business. The flat rate covers all Services provided by Group A physicians to all Group B patients. Second, the payment to Group A is a fixed monthly fee, not a per claim amount. Third, the Proposed Arrangement is a services agreement, not just a billing arrangement. For example, Group A physicians will provide the Services at Group B's offices, and Group B will be responsible for maintaining those facilities and the patients' medical records. Fourth, Group A is not proposing to offer Group B a per claim "discount" that is greater than Group A's actual cost of providing the Services. As noted above, while the fixed monthly fee would subject both parties to the risk that their estimates of the pathologists' workload are inaccurate, the monthly rate would otherwise be negotiated in good faith to fairly compensate Group A for its physicians' time in providing the Services.

In an October 23, 1987 opinion letter to John T. Mooresmith, the Board opined that "a physician may be properly compensated for actual services rendered provided that such compensation is not depende[nt] upon or related to referrals made by or to the physician." The Board then stated that compensating a physician for actual services rendered at a daily or hourly rate would not violate § 34-24-360(10).

In a March 31, 1988 opinion letter to W. M. Hughes, the Board approved an independent contractor arrangement between an ophthalmology group and a pediatric ophthalmologist. Under that arrangement, the pediatric ophthalmologist provided medical services to the group's patients and assigned all billings to the group, which furnished facilities, patient billing and record-keeping services. For his services, the pediatric ophthalmologist was paid a fixed percentage of the group's collections for his services. The Board opined that as long as the percentage retained by the group was reasonably related to the cost of furnishing facilities and services to the independent contractor physician, then the arrangement would not violate § 34-24-360(10).

The Proposed Arrangement is similar to the arrangement approved in the March 31, 1988 letter. Indeed, the fact that the Proposed Arrangement involves a fixed fee rather than a percentage of collections should make it even easier for the Board to conclude that the Proposed Arrangement does not violate § 34-24-360(10).¹ Like the

¹ To be fair, under the facts presented in the March 31, 1988 letter, neither party was obligated or expected to make referrals of patients to the other party, and few such referrals were anticipated. In the Proposed Arrangement, while Group B physicians will not be required to use Group A for the Services, Group B physicians will "refer" patients to Group A whenever they order tests requiring interpretations from Group A's pathologists. Nevertheless, nothing in the March 31, 1988 letter indicates that the favorable opinion hinged on the low number of referrals. Moreover,

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daily or hourly rate approved in the October 23, 1987 opinion, the monthly rate under the Proposed Arrangement would be a fixed payment that compensates Group A for actual services rendered.


Finally, the Alabama Medical Licensure Commission has long taken the position that the employment of a licensed physician by a corporation does not constitute fee splitting within the meaning of § 34-24-360(10). See Declaratory Ruling of the Medical Licensure Commission, Oct. 28, 1992. In that ruling, the Commission stated that the fee splitting prohibition is not intended to apply to salaries paid to physicians under bona fide employment agreements. While the Proposed Arrangement involves an independent contractor group receiving a fixed monthly fee rather than an individual employed physician receiving a salary, the two arrangements should be analogous for purposes of applying the intent and letter of § 34-24-360(10).

Additional Request

In light of the Board's March 31, 1988 opinion letter discussed above, in which the Board approved an independent contractor arrangement under which the physician group paid the contracting physician a fixed percentage of the fees that the physician generated, we respectfully request that the Board also clarify its interpretation of how § 34-24-360(10) would apply to the Proposed Arrangement as described in the Facts section above, but with the following difference: Instead of being paid a fixed monthly fee, could Group A be paid fixed percentage of Group B's collections for Group A's services, if the percentage "retained" (*i.e.*, the amount by which Group A's percentage is less than 100%) is reasonably related to Group B's cost of furnishing facilities, support staff, and billing, collection, record-keeping and other services in relation to the Services, without violating 34-24-360(10)?

My client and I appreciate very much the Board's consideration of this request. I am available to answer any questions or provide any clarification.

Sincerely,

Rich Sl 
Richard L. Sharff

under the Proposed Arrangement, Group A's payment is not related to the number of tests ordered by Group B's physicians.