

MARKETING ARRANGEMENTS

The Wrong Compensation Arrangement Can Lead to Serious Trouble

**Roger W. Calton
Attorney At Law
Calton & Burns, LLP
30131 Town Center Drive,
Suite 177
Laguna Niguel, CA 92677
(949) 495-3350**

Marketing arrangements between a doctor and a marketer or marketing firm can be beneficial, but if improperly structured, can lead to serious trouble. Both California law and the Federal law contain broadly worded prohibitions relating to kickbacks for the referral of patients. While the federal laws apply to claims submitted to federal programs (primarily Medicare and MediCal), the California State laws are much broader in their application. Here, we will focus upon California law.

The California Anti-Kickback Statute -Business and Professions Code 650

California's anti-kickback statute is found at Business and Professions Code Section 650. The prohibition is broadly worded, prohibiting the payment or receipt any compensation, direct or indirect, in return for referring patients to any person. While the statute is used to prosecute cappers (people who refer patients to doctors and lawyers for money) the prohibitions go much further. The statute provides:

“...The offer, delivery, receipt or acceptance, by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest or co ownership in or with any person to whom these patients, clients or customers are referred is unlawful.”

The Penalties Are Severe

The Penalty for Violation of Section 650: Imprisonment of up to one year or by a fine not exceeding \$50,000, or both.

In addition, actions which violate this law can also be grounds for disciplinary action against the doctor's license. California Board of Chiropractic Rule 317(s) and (t).

If there is a conviction for violation of Section 650, the criminal conviction is additional grounds for discipline. California Board of Chiropractic Rule 317(g)

And, if there are two or more counts in such a conviction, the law provides for revocation of the doctor's license for ten years. Business & Professions Code Section 1003.

Relevant California Cases and Attorney General Opinions

Business & Professions Code 650 is the law typically used to prosecute doctors who form relationships with marketers, attorneys, and other referral sources and who have structured the compensation in such a way as to "pay for referrals".

For example:

A doctor hires a marketer, and pays that person an amount per person for each new patient referred to the office.

or

A doctor hires a marketer, and pays that person a percentage of the revenue generated from treatment provided to patients referred by the marketer to the doctor.

or

A lawyer seeks to be paid \$300 for each new patient the lawyer refers to the doctor's office.

Each of these would violate Section 650.

But, the schemes are often more complicated. The following is directly from a case decided by the California Supreme Court:

"Defendants Norton Hering, M.D., and Jose Fermin were convicted of violating Business and Professions Code section 650 and Insurance Code section 750 by offering rebates on medical fees as inducement for the referral of patients. The charges arose from an undercover investigation by the Orange County District Attorney's office into illegal activity by medical clinics and attorneys primarily specializing in personal injury cases. As part of this operation, district attorney investigator Frank Lopez posed as Frank Rios, the administrator of a fictitious law firm.

In April 1992, Lopez mailed a letter of introduction to the Jefferson Medical Group, owned and directed by defendant Hering, seeking a meeting to discuss the possibility of developing a working relationship. In response, defendant Fermin, the administrator of the Jefferson Medical Group, met with Lopez at the ostensible law office. Their conversation was video and audio tape-recorded. During that conversation, Lopez inquired whether "if we're referring people to you, do you do any kind of a reimbursement to us for the referrals or do you wait." Fermin commented that kickbacks were illegal, but later stated, "we can give 15 to 20% of the bill." Although he indicated he would first have to speak with Hering, he generally confirmed, "We'll do something if we are going to be in business."

About two months later, Lopez met with both Fermin and Hering at the medical group office and audiotaped the conversation. Lopez asked Hering "what kind of arrangement" he normally had with attorneys. Hering responded that "20% is deducted at the end of our bill when the case is settled." For example, "let's assume that we have a three or four thousand dollar bill and the case settled for fifteen. And therefore we expect our bill to be paid, normally we ask you to deduct 20% at the end of that bill.... [¶] And then just send us the difference."

The Supreme Court upheld the convictions. People v. Hering, 20 Cal. 4th 440, 442-443, 976 P.2d 210, 211 (1999)

Other cases and Opinions from the California Attorney General indicate that this law extends even further, demonstrated by the following:

Mason v. Hosta, 152 Cal. App. 3d 980 (1984), California Court of Appeals, Second District.

A medical doctor contracted with a hospital administrator. The administrator was to contact fellow hospital administrators on behalf of the medical doctor and persuade them to contract with the medical doctor for their emergency room services. In return, the administrator was paid \$250 per month for each hospital client signed up with the medical doctor.

The Court held the agreement to be unlawful, in violation of B&PC 650. The administrator argued that the agreement did not involve the referral of patients, because at the time of his actions, there was no relationship between the patient and the hospital or the patient and the doctor. The Court held that, no matter how subtly disguised, or ingeniously interpreted, the contract violated the law.

Beck v. American Health Group International, Inc., (1989), 260 Cal. Rptr. 237. California Court of Appeal, Second District.

Dr. Beck, a psychiatrist, entered into a contract with defendant hospital which provided for Dr. Beck to be the medical director of mental health at the Hospital. He would admit patients to the hospital. His compensation for being medical director was fixed at 10% of the room and board charges of all of the Hospital's psychiatric patients for each month of the agreement.

The Court held that his compensation formula links his compensation to the number of psychiatric inpatients at the hospital, thereby providing an inducement for plaintiff to refer his patients to the Hospital. Dr. Beck argued that there is no violation, because the contract contemplates payment for medical services, not patient referrals (relying on Blank v. Palo Alto-Stanford Hospital Center). The Court held his position to be without merit. The Court cited specifically a 1971 amendment in Section 650 which deleted the word "unearned" before the words "rebate" and "consideration". That material change in the language shows an intention on the part of the legislature to change the meaning of the statute. Accordingly, for purposes of applicability

of Section 650, it is immaterial that the referring physician earns compensation by performing services if that compensation is subject to increase by referral of patients. The Court held Dr. Beck's contract to be void and unenforceable.

Attorney General Opinions¹

63 Ops. Cal. Atty. Gen 89 (1980)

Conclusion. The provision of "professional courtesy services' by clinical laboratories to a physician or his family or to his physician-patients or their families violates B&PC 650 only where such services are provided as compensation or inducement for referring patients to the clinical laboratory.

The opinion recognizes five elements to the offense created by Section 650:

- (1) An offer, delivery, receipt or acceptance.
- (2) by any person licensed under 'this division'
- (3) of consideration to any person
- (4) as compensation or inducement for,
- (5) referral of patients, clients or customers.

The opinion describes the motivation behind Section 650 as follows:

"The issue of right or wrong of rebates and kickbacks transcends any consideration of professional ethics and directly affects the general public. To maintain high standards in California and to protect the public from deceit and fraud, positive statutory assistance must be given to the activities of professional boards to stamp out rebating and kickback practices."

The opinion recognizes that while there is no money changing hands, in the case of professional courtesy services, there may still be "consideration" which, if tied in any way to the referral of patients, would violate Section 650.

¹ Note that Attorney General Opinions are not binding on the Courts. Technically, they bear no more weight in Court than the opinion of any qualified attorney. However, they may be given weight by a state agency or an administrative law judge, and should therefore be considered carefully.

The opinion states that "Section 650 in no way requires that actions must be taken clandestinely, or with intent to defraud or deceive, that a 'quid pro quo' in fact be found to exist, or that there in fact be an obvious increased cost to patients".

84 Ops. Cal. Atty. Gen. 25 (2001)

In this Opinion, the Attorney General holds that chiropractors are prohibited by Business and Professions Code §650 from participating in an internet marketing plan in which they agree to promote naturopathic products of an internet company when they refer their patients to the company's website in exchange for fees equaling 20 percent of the price of the products purchased by their patients from the company.

A copy of this Opinion is attached.

82 Ops. Cal. Atty. Gen 225 (1999)

The question presented was whether a physician could lawfully enter into an agreement with an outside group of licensed professionals to perform work hardening and rehabilitation services for patients, where the physician would control the scope of the services by prescription, bill and obtain payment from a workers' compensation insurance carrier for the services, and retain a portion of the fee after compensating the group.

The opinion holds that this arrangement would violate Business and Professions Code §650.

CONCLUSION

Whenever a marketing program involves the referral of patients to a doctor's office, the arrangement must be structured carefully, paying close attention to the method of compensation. With the penalties for violation of Business and Professions Code §650 being so severe, we urge you to exercise great caution in this area, and to avoid those arrangements which are questionable.

So that arrangements are clear, and terms are definite, we suggest that marketing arrangements be evidenced by a written agreement, signed by all parties. The agreement should be prepared by an attorney experienced with these particular areas of the law.

Roger W. Calton
Calton & Burns, LLP
30131 Town Center Drive, Suite 177
Laguna Niguel, CA 92677
(949) 495-3350

THIS MEMORANDUM CONTAINS A GENERAL DISCUSSION OF LEGAL PRINCIPLES APPLICABLE IN CALIFORNIA AS OF JANUARY 1, 2010. IT SHOULD NOT BE TAKEN AS SPECIFIC LEGAL ADVICE. PRACTICE STRUCTURE AND OPERATIONAL ISSUES HAVE BECOME LEGALLY COMPLEX DUE TO SIGNIFICANT AMOUNTS OF GOVERNMENTAL REGULATION. WE URGE EACH DOCTOR TO CONSULT WITH A COMPETENT HEALTH CARE ATTORNEY ON THESE AND OTHER ISSUES AFFECTING THE PRACTICE OF THE HEALTH PROFESSIONS.

Copyright Calton & Burns, LLP 2010