

# The State of South Carolina



## Office of the Attorney General

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November 29, 1989

The Honorable Herbert Kirsh  
Member, House of Representatives  
Post Office Box 31  
Clover, South Carolina 29710

Dear Representative Kirsh:

By your letter of September 13, 1989, you have asked for the opinion of this Office on the following question:

Is it legal for a State agency to transfer to a public charity/private foundation, without the approval of the General Assembly, a portion of the fees charged for services performed by State employees on State time?

We are advised that you are referring to the transfer of funds generated by the University of South Carolina School of Medicine's Private Practice Plan to the Richland Memorial Hospital/University of South Carolina School of Medicine Foundation; you are inquiring as to the legality of the arrangements.

A proviso in the 1989-90 Appropriations Act, Act No. 189 of 1989, states in part:

Notwithstanding other provisions of this act, funds at State Institutions of Higher Learning derived... from approved Private Practice plans may be retained at the institution and expended by the respective institutions only in accord with policies established by the institution's Board of Trustees. ...1/

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1/ This proviso is silent as to who approves Private Practice plans.

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Proviso No. 129.3 of Act No. 189 of 1989.

The Plan

Clinical faculty members who participate in the Clinical Faculty Practice Plan (the "Plan") are those who are

appropriately appointed and approved members of clinical departments by U.S.C. and Medical Education Departments of Richland Memorial Hospital which utilize Richland Memorial Hospital as a major base of remunerative practice. These faculty members are persons in those departments whose salary is derived in whole or part from the University of South Carolina and/or one or more of the U.S.C. affiliated hospitals and/or institutions.

Part I of the Plan. Participants in the Plan are required to report all professional income and report all fees generated by professional services. Part II, C and D. According to Part IV, certain professional earnings such as honoraria and royalties are excluded from the Plan.

Income which is subject to the Plan is as stated in Part IV:

Income included in the Practice Plan is comprised of patient care income and other professional income. Fees for medical-legal consultation and expert witness testimony by the participating physician(s) shall be reported as clinical income. ...

The Plan calls for the employment of a business manager and establishes a billing procedure.

Disbursement of funds is governed by Section V of the Plan, which provides in part:

All professional monies deposited to the individual department accounts are defined as gross receipts. From gross receipts a required departmental RMH/USC Foundation contribution will be 5% of the first \$300,000 gross receipts and 10% of all departmental gross receipts over \$300,000. ...

The remaining funds are to be available to the various departments to pay operating expenses, which include compensation of physician-

members. According to Section VII of the Plan, the Richland Memorial Hospital/University of South Carolina School of Medicine Foundation (referred to as RMH/USC Foundation) was established "to accept and disburse monies exclusively for education, research and developmental purposes." The Plan further provides that payments made to the Foundation are not to inure to the benefit of any private shareholder or individual.

#### Appropriations Act

Having established the foregoing as background, we turn to consideration of Proviso No. 129.3 of Act No. 189 of 1989. The portion of this proviso preceding the earlier cited provision states:

The University of South Carolina... shall remit all revenues and income, collected at the respective institutions, to the State Treasurer according to the terms of Section 1 of this Act, but all such revenues or income so collected, except fees received as regular term tuition, matriculation, and registration, shall be carried in a special continuing account by the State Treasurer, to the credit of the respective institutions, and may be requisitioned by said institutions, in the manner prescribed in Section 129.1 of this Act, and expended to fulfill the purpose for which such fees or income were levied. ...

Then, an exception is created, as recited earlier, for, inter alia, funds from approved Private Practice plans.

It is noted that the fees generated under the Plan are not being received by the University of South Carolina. The fees are billed and collected in accordance with a plan established by the business manager in conjunction with the Plan's executive committee and are not remitted to the University. Thus, the administrators of the Plan rather than the University (as a state agency) are transferring the funds to the RMH/USC Foundation. Assuming that the Plan has been approved by the University's Board of Trustees as required by Proviso 129.3, such a transfer is being made as permitted by the proviso. The proviso relative to Private Practice plans does not require oversight or approval of the General Assembly, as it presently exists.

Reading together the overall provisions and the express exceptions contained in Proviso No. 129.3, as must be done to carry out the whole purpose of the law, Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939), it appears that the General Assembly intended to

treat differently fees generated under an institution's Private Practice plan as opposed to other fees accruing to the benefit of the institution. It would appear that the General Assembly thus established certain policy with respect to fees generated by Private Practice plans; in so doing, the General Assembly would be presumed to have had knowledge of how such plans were intended to work. South Carolina State Hwy. Department v. Barnwell Bros., 303 U.S. 177 (1938). It would be within the province of the General Assembly to change the policy or revise the proviso.

#### Other Jurisdictions

Apparently the implementation of private practice plans at medical schools for the benefit of the faculty and the school itself is a widespread practice. According to dicta in Kountz v. State University of New York, 437 N.Y.S. 2d 868 (1981) "almost 85 percent of the medical schools in the United States have clinical practice plans. This statement was supported by a report prepared by the Association of American Medical Colleges surveying these plans." 437 N.Y.S. 2d at 871. <sup>2/</sup> See also Adamsons v. Wharton, 771 F.2d 41 (2d Cir. 1985), which involves but does not describe the practice plan in effect at Downstate Medical Center College of Medicine of the State University of New York.

The practice plan in effect at Meharry Medical College, a private medical school in Nashville, Tennessee, was described in Tarleton v. Meharry Medical College, 717 F.2d 1523 (6th Cir. 1983):

All full-time faculty members of the College who engaged in the private practice of medicine were required to be members of the Plan. All fees collected by the participating faculty members had to be endorsed to the college. These fees in turn were to be used to pay the expenses of delivery of health care services, including salaries of the participating faculty members, salaries of medical support personnel, cost of billing and collection, malpractice insurance premiums, cost of supplies, rental of occupied space, and other overhead expenses.

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<sup>2/</sup> The decision in Kountz later stated that by uncontroverted documentary evidence, it was established "that almost 85% of the medical schools in the United States, both public and private, utilize clinical practice plans with income limitations on the doctor's private practice fees." Id., 437 N.Y.S. 2d at 872.

The plan of the Downstate Medical Center College of Medicine of the State University of New York only mentioned in Adamsons v. Wharton, is described in part in Kountz.

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Compensation of faculty member participants in the Plan is based on a guaranteed salary component and an incentive component. The guaranteed salary is based on the history of collections from private practice generated by the individual participant. This component is paid regardless of revenues generated in the present year. The incentive component is based upon a percentage of revenues generated in the present year after guaranteed salary and support costs are paid. If a particular department generates revenues sufficient to cover all guaranteed salaries and support costs for the department, the office of the Dean of the School of Medicine and the department divide the excess funds. ...

...Each participant establishes his own fees and reports these fees to the business office of the Plan, which in turn conducts all billing and collection services. ...

Id., 717 F.2d at 1526. But for the provision for funds going to the RMC/USC Foundation and the University being a publicly-supported educational institution, the private practice plans of the University and Meharry Medical College are very similar. The Tarleton case is also instructional in another respect, as well: the interplay of other entities vis a vis the private practice plan is discussed. The federal Department of Health, Education and Welfare (which provided 60 percent of Meharry's funding) and the Board of Accreditation of the American Association of Medical Colleges apparently had certain requirements that a medical practice plan be instituted, at the risk of Meharry losing funding or accreditation if it failed to do so. 3/

The Attorney General of Ohio has examined the medical practice plan concept with respect to the University of Cincinnati and Ohio State University medical schools in an opinion dated June 25, 1986. After reviewing statutes relative to powers of the respective university board of trustees in hiring faculty members and establishing their compensation, the opinion stated:

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3/ This Office would have no way of knowing what standards may be imposed upon a medical school seeking accreditation or federal funding, with respect to a private practice plan. Undoubtedly, university officials are aware of such standards or requirements and would be a better source of information if questions relating thereto should arise.

In employing physicians to serve as faculty members in the Universities' colleges of medicine, it seems reasonable to infer that the trustees may negotiate, as a term and condition of the physicians' employment contracts, the use of university medical facilities by those physicians for their own private medical practices. [Footnote omitted.] As institutions of higher education, ... Ohio State University and the University of Cincinnati have as their primary purpose the inculcation of higher learning. ... This, undoubtedly, is also the purpose of the colleges of medicine of those two institutions, and the employment of physicians competent and experienced in their particular fields of medicine to serve as instructors within the colleges of medicine surely advances that purpose. It is, therefore, understandable that the Universities, motivated by a desire to attract and employ physicians who are well-qualified, competent, and preeminent in their individual areas of medical specialization, would offer to those physicians, as an incentive to become faculty members, the opportunity to maintain their own medical practices on university property, making available to them university facilities, personnel, and services in conjunction therewith. ...

In particular, the university trustees may appropriately characterize the utilization of university facilities, personnel, and services by the physicians in their private medical practices as a form of compensation, given in exchange for the various academic services the physicians provide as faculty members in the college of medicine. Such action on the part of the trustees would be in keeping with their statutory authority to hire and set the compensation of university employees. ... [I]f the trustees decide to offer these physicians the use of university facilities, personnel, and services in their private medical practices as compensation in kind, they should be careful to ascertain precisely the actual value of such resources utilized by each physician to ensure that it fairly and reasonably approximates the value of the services rendered the University by each physician.

If the trustees determine that the value of university resources provided a particular physician exceeds the actual amount which the University desires to set as compensation for the physician, they must then require the physician to reimburse the University the amount of the excess. ...

The Attorney General of Ohio noted that some of the excess funds were to be remitted to certain private, non-profit, tax-exempt foundations:

[I]t is my understanding that currently, certain faculty members pay, as reimbursement for the use of university facilities, a portion of their private income to private non-profit, tax-exempt foundations. All such sums remitted as reimbursement should be subject ultimately to the control and disposition of the University itself. By so providing, the trustees, in such a circumstance, should be able to alleviate any concern that they have acted imprudently or have otherwise abused their discretion by providing the physicians a consideration for which the University receives nothing in return.

#### Discussion

The foregoing judicial decisions and opinion of the Attorney General of Ohio offer considerations in addition to those advanced in the discussion of Proviso No. 129.3 of Act No. 189 of 1989. Concerns of the University of South Carolina would be similar to those of the universities in Ohio relative to attracting and compensating well-qualified physicians for the medical school faculty. Similarly, too, the University's Board of Trustees has been given the power to appoint or employ faculty members and to provide for their compensation, by Section 59-117-40(6), Code of Laws of South Carolina. Part of the Private Practice Plan is designed to partially compensate members of the medical faculty; such compensation is apparently viewed as in-kind, according to the Attorney General of Ohio, who views it as a permissible form of compensation.

To prevent an individual from reaping the benefits of private practice fees while serving as a medical school faculty member, the Ohio Attorney General suggested that the university trustees have ultimate control over use of the funds. In South Carolina this is accomplished by the requirement in Proviso No. 129.3 that the funds derived from the Private Practice plan be expended "only in accord with policies established by the institution's Board of Trustees."

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The RMH/USC Foundation which is the recipient of certain fees from the Private Practice plan is chartered by the Secretary of State as an eleemosynary corporation by charter issued July 30, 1980. The funds so transferred are to be used for research, education, and developmental purposes, and to provide additional financial resources to support the development of the University of South Carolina School of Medicine and Richland Memorial Hospital, according to the plan. Assuming for purposes of your question that the funds so generated are public funds, then such may be expended only for a public purpose. It would be within the province of the University Board of Trustees to ultimately determine that expenditure of these funds for the benefit of the RMH/USC Foundation would be for a public purpose.<sup>4/</sup> This Office has also opined previously that public funds may be given to an eleemosynary corporation which is non-sectarian and non-profit and if the corporation performs public functions or services. Op. Atty. Gen. dated April 13, 1971. Provision of hospital or medical services were found to be public functions in Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954); presumably such could include research and similar matters undertaken by hospitals and medical schools.

To summarize the foregoing, we advise that the situation posed by your inquiry is unique in that the typical state agency would not be in the position with respect to funding as the University of South Carolina School of Medicine with its Private Practice Plan. Due to the language of Proviso No. 129.3 of Act No. 189 of 1989, use of these funds must be approved by the University's Board of Trustees. Such approval could, of course, be modified by the General Assembly as it sees fit, by amending Proviso No. 129.3. As noted in Kountz v. State University of New York, supra, private practice plans are in effect in the vast majority of this nation's public and

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4/ A public purpose

has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation [i.e., relative to expenditure of funds] does not have to benefit all of the people in order to serve a public purpose. ...

Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43 (1975).

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private medical schools. As discussed by the Attorney General of Ohio, such plans are established to furnish in-kind compensation to attract competent, preeminent medical practitioners for medical school faculties; the medical school or university board of trustees should have the ultimate authority to approve expenditure of funds in excess of the funds generated for compensation of faculty members. This is the case in South Carolina, as established by Proviso No. 129.3 of Act No. 189 of 1989.

The foregoing addresses only the legal issues raised in this transaction and does not offer any comment as to whether such a transaction is wise or judicious, leaving such policy considerations to the Board of Trustees of the University of South Carolina or, ultimately, to the General Assembly. Of course, the General Assembly would have the right to oversee or monitor these operations.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

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Assistant Attorney General

REVIEWED AND APPROVED BY:

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