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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

March 30, 2004

The Honorable Daniel B. Verdin, III
Senator, District Number 9
604 Gressette Building
Columbia, South Carolina 29202

The Honorable Ronnie W. Cromer
Senator, District No. 18
501 Gressette Building
Columbia, South Carolina 29202

Dear Senators Verdin and Cromer:

You note that, pursuant to S.C. Code Ann. Section 40-45-110(A)(1), "a licensed physical therapist may be disciplined by the State Board of Physical Therapy Examiners for participating in the division of fees received for professional services with a person who referred a patient." By way of background, you provide the following information:

> [t]he General Assembly enacted this clause in 1998 when it amended the South Carolina physical therapy practice act. See Act No. 360, 1998 Acts 2103. ... We have reviewed a letter dated February 25, 2004 from the General Counsel of the American Physical Therapy Association to the President of the South Carolina Physical Therapy Association, a copy of which is enclosed. That letter concludes that the statute does prohibit employment in both situations. The letter appears to be well reasoned and based on relevant South Carolina law.

You have thus asked the following questions:

1. Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist from working for pay for a licensed physician or group of physicians when the physician (or a member of the group) refers a patient to the physical therapist for physical therapy services?

2. Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist from working for pay for a professional corporation owned by one or more

licensed physicians when a physician owner or employee of the corporation refers a patient to the physical therapist for physical therapy services?

Law / Analysis

It is our opinion that the answer to both of your questions is "Yes."

In 1998, the General Assembly enacted Act No. 360 which constituted a major revision of the laws governing the licensing and regulation of physical therapists. Act No. 360 was codified as S.C. Code Ann. Section 40-45-5 et seq. The Act defines the "practice of physical therapy" and prohibits such practice without a license issued by the Board of Physical Therapy Examiners. In addition, the Act empowers the Board to enforce the provisions thereof through the suspension, revocation and restriction of licenses on the grounds enumerated in § 40-45-110(A).

Specifically, the Board may take disciplinary action against a therapist who, "in the absence of a referral from a licensed medical doctor or dentist, provides physical therapy services beyond thirty days after the initial evaluation and/or treatment date without referring the patient to a licensed medical doctor or dentist." See, § 40-45-110(A)(4). Moreover, as part of its comprehensive revision, the General Assembly enacted § 40-45-110(A)(1) which

> (A) In addition to other grounds provided for in Section 40-1-110, the board, after notice and hearing may restrict or refuse to grant a license to an applicant and may refuse to renew the license of a licensed person, and may suspend, revoke, or otherwise restrict the license of a licensed person who:
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> > (1) requests, receives, participates, or engages directly or indirectly in the dividing, transferring assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, an unearned commission, discount or gratuity with a person who referred a patient, or with a relative or business associate of the referring person ... .

It is this provision and its meaning with which you are concerned. We begin by noting that a number of principles of statutory construction are relevant to your inquiry. First and foremost, it is a cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Additionally, a statute will be construed to avoid an absurd result. Any statute must be interpreted with common sense to avoid unreasonable consequences. United States v. Rippetoe, 178

S.C. 735 (4th Cir. 1949). A sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

In addition, this Office has stated that "the granting of a license to practice certain professions is the method taken by the State, in the exercise of its police power, to regulate and restrict the activity of the licensee. He takes the same, subject to the right of the State, at any time, for the public good to make further restrictions and regulations." Op. S.C. Atty. Gen., October 3, 1986, citing Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, 187 (1956). Moreover, we have previously observed that a licensing statute is remedial in nature and should be construed liberally in order to effectuate the Legislature's purpose. Op. S.C. Atty. Gen., June 14, 1982, referencing S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978).

The obvious purpose of § 40-45-110(A)(1) is the protection of the consumer against conflicts of interest. Such prohibition and protection is designed to guard against excessive health care costs, attempting to insure that referrals are based solely upon the patient's best interest rather than a desire by a professional to increase profits. 79 Ops. Cal. Atty Gen. 225 (Op. No. 96-517, September 16, 1996). In this instance, the Legislature was concerned that the physical therapist not engage in "fee splitting" or in having a financial relationship with the physician who refers a patient to him/her. The question which must be answered is the precise breadth of § 40-45-110 (A) (1) and whether this Section proscribes a physical therapist from treating a patient which has been referred to him or her by a physician who is that therapist's employer or who owns or is employed by a professional corporation which employs that physical therapist. We conclude that the statute prohibits this conduct.

The Attorney General of Delaware has construed a statute which is virtually identical to § 40-45-110(A)(1) to prohibit the acceptance of a referral from the physician or group of physicians or from the professional corporation owned by a physician or physicians who employ that physical therapist. In Del. Op. Atty. Gen., Op. No. 02-IB25 (October 10, 2002), the Delaware Attorney General noted that the "main purpose" of the statute "is the protection of the public from unnecessary referrals to physical therapists which are based upon financial gain." The Delaware Attorney General analyzed the Delaware statute as follows:

> [t]he plain meaning of the words of a statute are controlling if the language of the statute is unambiguous. Ingram v. Thorpe, Del.Supr., 747 A.2d 545, 547 (2000). The first sentence of 24 Del. C. 2616 (a) (8) can be divided into two clauses which address the limitations placed on physical therapists. The first clause states that a physical therapist may be disciplined if the physical therapist "engages directly or indirectly in the division, transferring, assigning, rebating, or refunding of fees received for professional services." 24 Del.C. § 2616(a)(8). This first clause is controlled by the verb "engages." Id. The plain meaning of the words provides that a physical therapist may not divide fees or convey fees from the physical therapist to the referring person. A physical therapist may not: 1) transfer his/her fees in trust to

> the referring person; make a deduction from his/her fee; give back or return fees to the referring person. A physical therapist is prohibited from sharing the proceeds received for rendering professional services with the referring person.
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> Similarly, the second clause addresses limitations placed on physical therapists. The second clause states, "who profits by means of a credit or other valuable consideration such as wages, an unearned commission, discount or gratuity." Id. This second clause of the sentence is controlled by the verb, "profits." Id. Applying the plain meaning of the words, a physical therapist may not receive a recompense or payment having monetary value from the referring person. A physical therapist may not receive from the referring person, money that is paid for his/her services nor an additional fee paid for transacting business or performing a service. A physical therapist may not profit from a tip or money beyond the obligation due for service from the referring person. This clause prevents a physical therapist from profiting by the receipt of a credit, valuable consideration, wages, an unearned commission, discount, or gratuity from the referring person.
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> The persons prohibited from compensating a physical therapist for a referral are any person who referred a patient, or any relative or business associate of the referring person. This modifying clause specifies the persons with whom the physical therapist are prohibited from splitting fees or otherwise sharing compensation as expressed above. There is no other reasonable interpretation of this modifying clause.

The Delaware Attorney General also noted that a number of other states, including South Carolina, had adopted provisions similar to the Delaware statute. In that regard, the Attorney General referenced Medical Assn. of State of Alabama v. Schoemake, 656 So.2d 863 (Ala. Civ. App. 1995) where a provision similar to the Delaware statute had been challenged. In Shoemake, the Alabama Court had concluded that physicians had standing to sue for a claim that a rule virtually identical to § 40-45-110(A)(1) which had been promulgated by the Board of Physical Therapists of Alabama was invalid. The Court, in so ruling, interpreted the proposed rule as one prohibiting "a physical therapist from being employed by, or from otherwise participating in a professional financial arrangement with a referring physician." 656 So.2d at 864. Thus, in the opinion of the Attorney General of Delaware,

> [w]e conclude that physical therapists cannot accept referrals from any person (including a physician with whom they divide, transfer, assign, refund or rebate fees. 24 Del. C. § 2616(a)(8) bars a physician-owned practice or group practice from referring their own patients to an in-house physical therapist in their employ. We also conclude that a physical therapist cannot accept pecuniary gain in the form of a credit, wages, discount, commission, or gratuity from persons who have referred patients to them.

Moreover, in an opinion of the Missouri Attorney General, it was concluded that a Missouri statute which prohibited a physician from making a referral to an entity for furnishing physical therapy services when such entity had a financial relationship with that physician was violated when a physician who owned his own medical practice made a referral to his physical therapist employee. 1995 WL 702246, Op. No. 104-95 (November 27, 1995). The Attorney General of Missouri concluded that the word "referral" encompassed "the situation ... of the physician directing a patient to the employee of the physician." Moreover, the Missouri Attorney General also reasoned that "[t]he physician who refers a patient to his physical therapist employee is, in fact, referring the patient to a business entity – his own sole proprietorship." Accordingly, the Missouri statute was deemed to be violated.

And, in 79 Ops. Cal. Atty. Gen., supra, the California Attorney General found that the applicable California statute required "that a physician may not refer a patient to a physical therapy facility if his spouse has a 'financial interest' in the facility." Moreover, in State v. Abortion Information Agency, 69 Misc.2d 825, 323 N.Y.S.2ds 597 (1971), the Court concluded that the acts of an abortion referral agency which hired and paid doctors for performing abortions constituted an unlawful "splitting of fees" in violation of a New York statute. In the Court's view,

> [s]uch practices also constitute fee splitting which on its face violates section 6514 of the Education Law. Section 6514, subdivision 2(f) prohibits in a very broad sense the division of fees and covers the payment to another for referring a client to a physician.

323 N.Y.S.2d at 601. Contra, 1982 WL 188327, Opin. Wis. Atty. Gen., OAG 31-82 (April 14, 1982) [there is no violation of the "fee splitting" statute, Sec. 448.08(1) Stats., where a physician, through a service corporation owned of the physician, bills the patient for his own service, and that of physical therapist employed by the corporation, provided the billing states an accurate dollar figure for the respective services.]

Based upon the foregoing authorities, it is our opinion that § 40-45-110(A)(1) prohibits a physical therapist from working a physician who refers patients to the therapist or working for a professional corporation of which a referring physician is an owner and/or employee.[1] Section 40-45-110(A)(1) clearly empowers the Board to discipline any physical therapist employed by a referring physician or by a professional corporation of which a referring physician is an owner and/or employee. In such situation, the employer would, in essence, receive the fees from the work of the physical therapist. These fees would thus be "fees received for professional services" within the statute's meaning. Moreover, the physical therapist would be a "participant" in "dividing the fees"

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[1] South Carolina's professional corporation statute is contained in Chapter 19 of Title 33 of the Code. Section 33-19-150 requires a professional corporation to include in its name certain specified terms such as "P.C.," "PC," "P.A." or "PA."

with a "person who referred a patient." The referring physician as employer of the physical therapist or as owner and/or employee of the professional corporation would benefit from the revenue of the employee physical therapist's work.

Furthermore, the second clause of the statute bars a physical therapist from profiting "by means of a credit or other valuable consideration including ... wages ... with a person who referred a patient ... ."[2] The employer's payment of compensation to a physical therapist employee would here be the "means of "profiting" or dividing the professional fees within the meaning of § 40-45-110(A)(1). In short, we find the analysis provided by the Delaware Attorney General's opinion regarding a virtually identical statute to be well-reasoned and highly persuasive. Thus, in our opinion, S.C. Code Ann. § 40-45-110(A)(1) plainly empowers the Physical Therapy Examiners Board to discipline a physical therapist employed by a referring physician or by a professional corporation of which a referring physician is an owner and/or employee.

Conclusion

The answer to both of your questions is "Yes." S.C. Code Ann. § 40-45-110(A)(1) is a remedial statute and thus must be broadly construed to effectuate the Legislature's purpose. Here, the General Assembly clearly sought to bar the acceptance of a referral by a physical therapist from persons whom there exists a financial relationship such as employment. Accordingly § 40-45-110(A)(1) the S.C. Code Ann. § 40-45-110(A)(1) prohibits a physical therapist from working for pay for a licensed physician or group of physicians when the physician (or a member of the group) refers a patient to the physical therapist for physical therapy services. S.C. Code Ann. § 40-45-110(A)(1) also prohibits a physical therapist from working for pay for a professional corporation owned by one or more licensed physicians when a physician owner or employee of the corporation refers a patient to the physical therapist for physical therapy services.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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[2] Because the term "wages" here refers specifically to physical therapists, we do not address herein questions concerning the corporate practice of medicine. See, McMillan v. Durant, 312 S.C. 200, 439 S.E.2d 829 (1993); Wadsworth v. McRae Drug Co.,203 S.C. 543, 28 S.E.2d 417 (1943); Ezell v. Ritholtz, 188 S.C. 39, 198 S.E. 419 (1938); Op. S.C. Atty. Gen., September 8, 1982.