

1980 WL 120691 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 28, 1980

***1 Re: Professional Practice Plan**

Larry W. Propes, Esquire
General Counsel
South Carolina Department of Mental Health
Post Office Box 485
Columbia, South Carolina 29202

Dear Mr. Propes:

You have asked whether the William S. Hall Psychiatric Institute's method of handling physician's fees constitutes price fixing, in violation of state or federal antitrust laws. It is the opinion of this office that there would be no basis for such a suit.

A. The Professional Practice Plan

As we understand the Institute's practice, all treating physicians are salaried employees of the Hall Institute, a division of the Department of Mental Health, and all are required to be members of the Institute's Professional Practice Plan. Pursuant to the terms of the Plan, each physician receives an annual salary and is allowed to supplement that income with outside practice, up to some percentage of his or her base salary. Each physician's salary and supplement percentage is negotiable with the Institute. This Plan has been approved by the State Budget and Control Board and is the same concept used at the Medical University of South Carolina.

Pursuant to [Code § 44-23-1110](#), patients are charged for all services rendered at State mental health facilities, at a rate based upon the per capita costs per day. The Institute charges set rates for particular services, rather than varying them from physician to physician based on qualifications, etc. Presently the Institute chooses to set those rates equal to the prevailing Blue Cross-Blue Shield rate, for administrative ease.

B. Institute Patients

In the situation of patients treated at the Hall Institute, the professional charges are set by the Department of Mental Health, probably with an eye on what those services cost the Department in the way of salaries, facilities, etc. The individual professional people are not concerned with what rate is charged, since their salaries are independent of the charges. Therefore, there is no conspiracy to set prices, as would have to be shown to establish the fact of price fixing.

Even if the Department and the physicians worked together to establish the charges for professional services, and the physicians, such an agreement would not violate the state or federal antitrust laws because an employer and its employees cannot conspire when they promote the employer's business. [State v. National Linen Service Corp.](#), 225 S.C. 232, 81 SE2d 342 (1954). [Kendall Elevator Co., Inc. v. LBC&W Associates of South Carolina, Inc.](#), 350 F.Supp. 75 (D.C. S.C., 1972). Here, by way of [Code § 44-23-1110](#) the Legislature has told the Department that part of its business is to see that it is reimbursed for its expenses. As long as Department officials and employees restrict any agreements to those necessary for the benefit of the Department, there is no illegal conspiracy.

C. Outside Patients

As the Professional Practice Plan is now set up, employee-physicians are allowed to have a limited outside practice. They are allowed to charge whatever fee they wish, but with an annual ceiling. As outlined in the preceding section, any employer-employee agreement cannot be a conspiracy if done for the benefit of the employer's business. In the area of outside practice, any price fixing would not be done for the employer's benefit but for the employees'. However, it does not appear that the Department or the Institute in any way influence rates charged for outside practice. Theoretically, a physician will attempt to earn his annual supplement limit in as few hours work as possible and so will set his or hourly rate very high. In actuality, each physician will set his or her hourly charge at a level competitive with the private marketplace (that is, based on what private practitioners of equal professional standing are able to charge).

*2 It is worth noting here that the Department, the Institute, or their employees, could find themselves in an illegal conspiracy if they came to any agreements with private practitioners. This office has no evidence of such agreements, but we wish to alert you to the fact that such agreements could be found per se illegal if they involved prices. Even if such agreements did not directly affect prices, they could still be found illegal if they unreasonably impeded competition. A good rule of thumb would be to avoid any and all agreements and understandings with the private sector. The Department should remain alert to the effect of contact between its staff and the private sector, to avoid any anticompetitive results.

D. Summary

It is the opinion of this office that the Department of Mental Health and Hall Institute Professional Practice Plan, as we understand it, would not be found to constitute price fixing in violation of any state or federal antitrust laws because it does not involve any conspiracy.

Please do not hesitate to contact this office if you have any further questions.

Sincerely,

Frank L. Valenta, Jr.
Staff Attorney

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