



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

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July 23, 2003

Ms. Cecilia A. Stearns
NYS Association of Licensed Midwives
7862 Byron Road
Byron, NY 14422

DOH GC Opinion No. 03-01 Fee Arrangements Between a Physician and Midwife

Dear Ms. Stearns:

This is in response to your letter of February 14, 2003, regarding the payment for a midwife's services to a physician with whom the midwife has a written agreement under Education Law § 6951(1). For the reasons that follow, the Department has concluded that the physician would be committing professional misconduct under the fact pattern you describe.

You specifically asked about an instance where a physician or payor is directing that the payment for the midwife's services go directly to the physician, even when the physician's only role was to enter into a collaborative agreement under Education Law § 6951(1) with the midwife, and the physician is keeping a portion of the midwife's fee, even though the physician has rendered no professional services. The Department's understanding is that no employment relationship exists between the midwife and the physician under the circumstances which you describe.

Making a referral for a fee is professional misconduct for physicians under the Education Law. Education Law § 6530(18) prohibits "[d]irectly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a patient or in connection with the performance of professional services."

Fee-splitting is also professional misconduct. Education Law § 6530(19) prohibits "[p]ermitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice medicine, or a legally authorized trainee practicing under the supervision of a licensee. This prohibition shall include any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice, except as otherwise provided by law with respect to a facility licensed pursuant to article twenty-eight of the public health law or article thirteen of the

mental hygiene law." Likewise, under Education Law § 6531, it is generally professional misconduct if a physician has "directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting, or refunding of a fee for, or has directly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity, in connection with the furnishing of professional care or service, including . . . any . . . goods, services, or supplies prescribed for medical diagnosis, care, or treatment under [the Education Law]."

Here, since the physician's only role was to enter into a collaborative agreement under Education Law § 6951(1) with the midwife, and the physician has rendered no professional services, if the physician keeps a portion of the midwife's fee, then the physician would be sharing in the fees for professional services and receiving a fee in connection with the furnishing of professional care or service by the midwife. Thus, the physician would be committing professional misconduct. Depending on the acts, the physician might also be committing professional misconduct by receiving a fee from a third party for referral of a patient.

Yours truly,

Donald P. Berens, Jr.
General Counsel