



# STATE OF NEW YORK DEPARTMENT OF HEALTH

Coming Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

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March 21, 2006

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DOH GC Opinion No. 06-01  
Billing for Services Performed in Physicians' Offices

Dear Mssrs. Iselin and Moy:

It has been reported to this Department that certain billing practices have occurred which may indicate the operation of unlicensed clinics, the illegal corporate practice of medicine, illegal fee-splitting, or perhaps fraud. I write to you in your capacities as counsels to the Health Plan Association and the Medical Society of the State of New York, respectively, to clarify the Department's position on these reported practices and to provide guidance to providers who wish to comply with their legal obligations.

The practices are reportedly widespread and have been described to us as follows. A physician who has performed services, such as cosmetic surgery, in the physician's office, which is not licensed as a diagnostic and treatment center (DTC) or other "hospital" or facility licensed under Public Health Law (PHL) Article 28, bills a payor for those services, doing so in the name of the physician or a professional corporation. Although some payors are willing to pay an additional or enhanced fee for the physician's costs to perform those services in an office setting, the physician does not bill for those office-based costs, at least not in the name of the physician or a professional corporation. Instead, a business corporation, not bearing the physician's name and not licensed under Article 28, bills the payor for the office-based costs. Some payors have been induced to pay for those office-based costs at rates they would pay for the costs incurred by Article 28 facilities, and in excess of the additional or enhanced fee they would pay for the costs incurred in a physician's office. Some of these business corporations retain a portion of the fees received

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for the costs incurred in the physician's office. In some cases, the business corporation performs no functions for the physician, professional corporation or patient, except to bill for the office-based costs.

Pursuant to the Department's regulations at 10 NYCRR § 600.8, a business corporation, which purports to provide medical or health care services, especially, but not necessarily, one using a name other than the name of one or more of the practitioners providing such services, is presumed to be a DTC. If that business corporation is not licensed as a DTC, it is subject to civil and criminal penalties for violation of PHL §§ 12 and 12-b. If it has practiced medicine without a license, it is subject to criminal penalties for violation of Education Law § 6512. See also, 1963, Op. Atty. Gen. 50. If it bills for medical services which it did not perform while representing that it actually performed them, or if it otherwise misrepresents itself to a payor, thereby inducing the payor to pay to it money that the payor would not otherwise pay, it might be guilty of civil or criminal fraud.

Of course, a physician who aids or abets a violation of law by such a corporation, may be subject to criminal prosecution or professional discipline as the facts may warrant. A physician who creates or uses a corporation for the purpose of billing for office-based costs as if they were incurred in an Article 28 facility might be practicing the profession fraudulently in violation of Education Law § 6530(2). A physician who permits a business corporation, not licensed under Article 28, to control the facilities or activities for which the corporation bills payors might be permitting, aiding or abetting an unlicensed professional to perform activities requiring a license in violation of Education Law § 6530(11). Such a physician might be delegating professional responsibilities to a person when the physician knows or has reason to know that such person is not qualified by training, experience, or licensure, to perform them, in violation of Education Law § 6530(25). A physician who shares with a business corporation a portion of an additional or enhanced fee for the physician's costs to perform professional services in the physician's office might be sharing fees in violation of Education Law § 6530(19).

The foregoing statements are necessarily general. The wide variety of possible fact patterns must be analyzed on a case-by-case basis before specific conclusions can be reached about the criminal, civil or disciplinary consequences of particular conduct by corporations or physicians.

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Please advise your respective members of this Department's position so that - after consultation with their own legal counsel - they may be guided accordingly. Thank you

Very truly yours,



Donald P. Berens, Jr.  
General Counsel

cc: Audrey Samers, General Counsel, NYS Department of Insurance  
William Comiskey, Deputy Attorney General, Medicaid Fraud Control Unit  
Kimberly O'Connor, Medicaid Inspector General  
David Wollner, Director, Office of Health Systems Management  
Kathleen Shure, Director, Office of Managed Care