December 12, 1997

Donald R. Moy, Esq.
General Counsel
Medical Society of the
State of New York
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Dear Mr. Moy:

This is in response to your letter of June 26, 1997 requesting clarification of my April 17, 1997 opinion letter concerning compensation arrangements between physicians and billing companies or management service organizations. My letter stated that certain percentage compensation arrangements between physicians and billing companies constituted fee-splitting. In view of that opinion, you asked that we distinguish between percentage arrangements "where there is evidence of willful acts to commit fraud" and those arrangements where physicians act in good faith but are required to accept business practices established by billing companies. You indicated that such a distinction could be drawn based on the facts underlying the Appellate Division decision in Necula v. Glass, 231 A.D.2d 457 (1st Dept. 1996).

Your proposed distinction, however plausible, is not suggested by the Appellate Division's writing in Necula. While it is true that the management companies in Necula retained a high percentage of the physician's income or receipts, the court did not base its decision on the percentage amount. Rather, the language of the decision suggests the court relied solely on the fact that there was a percentage at all. The court stated: "This was illegal fee splitting...since petitioner's payments to the companies were a percentage or otherwise dependent upon his income or receipts." Necula, 231 A.D.2d at 457. This holding,

moreover, comports with the plain language of Education Law § 6530(19), which makes it professional misconduct for 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 personal services used by a licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice....

By its terms, section 6530(19) appears to prohibit arrangements which compensate a management service organization or billing company on the basis of a percentage of the income or receipts of a physician's practice. In addition, physicians and billing companies should be aware that courts have generally concluded that compensation arrangements between physicians and lay persons based upon a percentage of the income or receipts of a medical practice are void and unenforceable. See, e.g., Hartman v. Bell, 137 A.D.2d 585 (2d Dept. 1988); United Calendar Manufacturing v. Huang, 94 A.D.2d 176 (2d. Dept. 1983); Toffler v. Pokorny, 157 Misc.2d 703 (Sup. Ct. Nassau Co. 1993).

Of course, the legal enforceability of percentage compensation arrangements between physicians and billing companies presents a different question then the circumstances under which this department should take disciplinary action against physicians who enter into such arrangements. The latter question is currently being looked into by a subcommittee for the State Board for Professional Medical Conduct. I can assure you that, in performing its task, the subcommittee will be made aware of the Medical Society's views as expressed in your letter.

Very truly yours,

Henry M. Greenberg
General Counsel

HMG:JLD:cmm