



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany New York 12242

DOH-100-100-100
10-11-88

October 25, 1988

Dear

This is in response to your September 28, 1988 request for an opinion as to whether the establishment of an electronic directory service providing a listing of physicians would violate §4501 of the Public Health Law (Medical Referral Service Business Prohibited). Section 4501(1) provides as follows:

No person, firm, partnership, association or corporation, or agent or employee thereof, shall engage in for profit any business or service which in whole or in part includes the referral or recommendation of persons to a physician, hospital, health related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition. The imposition of a fee or charge for any such referral or recommendation shall create a presumption that the business or service is engaged in for profit.

According to your letter, your client seeks to establish a directory based upon a questionnaire to be completed by each interested physician specifying his or her board affiliations, specialties, hospital affiliation, hours, location, fees, malpractice status and other relevant information. You state that each such physician would pay a listing fee, but you do not state whether any potential patient calling the directory to obtain a listing would have to pay a fee for the service. Your letter also states that the service would make no specific recommendations to callers and that the service may restrict the number of physicians in one or more categories but only on a first-come, first-served basis.

If your client proposes also to charge a fee to potential patients for the provision of this listing, we believe that the establishment and operation of such a directory would be prohibited by the above statute for the reasons set forth below.

The only case law regarding this statute is found in S.P.S. Consultants, Inc. v. Lefkowitz, 333 F. Supp. 1373 (S.D. N.Y. 1971) In that case, the court stated:

Section 4401 [now 4501] does not prohibit the plaintiffs from "disseminating information for a fee concerning the availability of health care facilities. It merely prohibits them from referring or recommending persons to a physician, hospital, health related facility or dispensary for any form of medical care or treatment. Accordingly, if the plaintiff supply lists of physicians and facilities [performing abortions], which lists are not so selective as to make actual recommendation or referral of a particular physician or facility a justifiable inference therefrom, their activities would not violate the statute. Id. at 1376.

If your client proposed to provide potential patients with a listing of all physicians practicing in the area encompassed by the directory in exchange for a fee, such activity would constitute the dissemination of information for a fee which would not be prohibited. Under the facts set forth in your letter, however, the listing would be restricted to those physicians who have paid a fee. A selective listing of this kind is viewed by the Department as tantamount to a de facto referral system, and the listing fee charged to the physician is viewed as a tacit referral fee. As you may be aware, in addition to the prohibition contained in §4501 of the Public Health Law, 8 NYCRR §29.1(b)(3) provides that unprofessional conduct includes "directly or indirectly offering, giving, soliciting, or receiving or agreeing to receive any fee or other consideration to or from a third party from the referral of a patient or client in connection with the performance of professional services."

A final element which weighs against a determination that the proposal does not violate Article 45 of the Public Health Law is the fact that the directory may restrict the number of physician listed in one or more categories. Such a restriction, even when done on a first-come, first-served basis, adds further support to the position that the listing constitutes a de facto referral system.

Thus, there are only two means by which your client can impose a fee of some sort for a directory of physicians without violating §4501. The first would be to provide a listing of all physicians in the area covered by the directory to potential patients in exchange for a fee to be paid by each potential patient for the list, and the second would be to charge a fee to each physician who wishes to be

listed (essentially an advertising fee) but make the listing available to potential patients for free.

I hope the above guidance is helpful to you.

Sincerely,


Peter J. Millock
General Counsel