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July 12, 1989

The Honorable Thomas L. Morrison
Idaho House of Representatives
340 14th Avenue West
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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Division of Professional Fees

Dear Representative Morrison:

You have requested an opinion whether physicians participating in certain preferred provider organizations (PPOs) are in violation of the Idaho Code prohibition against division of professional fees. The arrangement in question has been established by National Hearing Services (NHS). NHS has established a PPO to offer members audiological examinations, hearing aids and related services at reasonable rates. NHS contracts with a limited number of practitioners who become "preferred providers." Members of the PPO in need of hearing services select a practitioner from the list of preferred providers who participate in NHS.

The Preferred Provider Agreement used by National Hearing Services in contracting with physicians who participate in the PPO states as follows:

The Preferred Provider agrees to pay to NHS a monthly service fee equal to nine percent (9%) of the Gross Revenue (as

defined below) of the Preferred Provider. . . .

As used in this Agreement, the term "Gross Revenue" shall mean the actual gross revenue earned, derived or received by the Preferred Provider for each calendar month during the term of this Agreement from or in connection with services rendered and products sold to NHS Members, regardless of where rendered or sold, but excluding sales, use, service or excise taxes collected from NHS Members and paid to the appropriate taxing authority, and excluding refunds and adjustments.

One of the grounds for professional discipline of a physician in Idaho is:

(8) Division of fees or gifts or agreement to split or divide fees or gifts received for professional services with any person, institution or corporation in exchange for referral.

Idaho Code § 54-1814(8). Thus, the question presented is whether an agreement by a physician to pay a service fee to the PPO measured by a percentage of the gross revenue received from members of a PPO constitutes division of fees in exchange for referral within the meaning of Idaho Code § 54-1814(8).

This question has been considered generally in connection with fee splitting statutes and PPOs:

A fee-splitting statute might be violated by a PPO if, when paying the preferred provider, the PPO takes part of the provider's fee as payment for services rendered to participating providers by the PPO. This risk of fee-splitting liability can be minimized if the percentage or flat fee represents the reasonable value of

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legitimate services rendered by the PPO to the provider.

E. Rolph, P. Ginsburg, S. Hosek, J. Rich, K. Kennan & G. Getler, State Laws and Regulations Governing Preferred Provider Organizations, 63 (1986) (prepared for the Department of Health and Human Services and the Federal Trade Commission). Similarly, payment of a percentage of fees collected by attorneys to lawyer referral services has been approved. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1076 (1968); Law. Man. on Prof. Conduct 801:1605 (California), 801:3910 (Kentucky), 801:4306 (Maryland) (ABA/BNA). The Kentucky opinion states that "[s]uch payments constitute a contribution to administrative expenses and not a division of legal fees." Id. at 801:3910.

The NHS Hearing Plan Summary states: "Additionally, NHS is compensated for its sales, marketing, advertising, training and consulting endeavors by receiving nine percent of the Provider's monthly gross receipts generated by NHS patients." Thus, the service fee is designed to compensate NHS for administrative expenses; the service fee is not paid in exchange for referral of patients.

A further argument supports the position that a PPO percentage payment should not be considered fee splitting:

A fee splitting claim also typically relates to a misrepresentation. An individual patient doesn't know the reason he has been sent to a specific physician, and fee splitting creates the inference that there is some kickback involved. A PPO makes no such misrepresentation; instead, it consists of a contractual arrangement without a specific referral involved.

Attorneys & Physicians Examine Preferred Provider Organizations, 20 (J. Waxman ed. 1984).

The percentage service fee charged by NHS (9%) is relatively small and appears reasonably related to the services

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provided by NHS to the physician provider. Therefore, the arrangement proposed by NHS does not constitute fee splitting as prohibited by Idaho Code § 54-1814(8).

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division