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October 10, 2002

PLEASE REPLY TO :

New Castle County/Civil Division

Philip N. Barkins, P.T.
Chairperson
State Examining Board of Physical Therapists
Division of Professional Regulation
Cannon Building
861 Silver Lake Boulevard
Dover, Delaware 19904

RE: Referrals Prohibited to Physical Therapists pursuant to 24 Del. C. § 2616 (a) (8)

Dear Mr. Barkins:

You have asked for an interpretation of Title 24 Del. C. Section 2616 (a) (8) which restricts the practice of physical therapy in Delaware. Specifically, you have asked:

- I. Does this statutory provision prohibit a physical therapist from working for a physician or group of physicians (group practice) when the physician refers his/her patients to the physical therapist for physical therapy services?
- II. Does this statutory provision amount to an anti-physician-owned practice law (anti-POP) for physical therapy services? Does it matter how the physician or group practice is

organized under the law (corporation, limited liability corporation, partnership, limited liability partnership etc.)?

- III. Would anti-trust or restraint of trade concerns bar the enforcement of this provision?
- IV. Does the last sentence of this paragraph operate as a "grandfather" clause? Does it allow those physical therapists or athletic trainers who were employed by physicians at the time the statute was passed to continue to work in this capacity?

ANSWER

We conclude that physical therapists cannot accept referrals from any person (including a physician) with whom they divide, transfer, assign, refund, or rebate fees. 24 *Del. C.* § 2616 (a) (8) bars a physician-owned practice or group practice from referring their own patients to an in-house physical therapist in their employ. We also conclude that a physical therapist cannot accept pecuniary gain in the form of a credit, wages, discount, commission, or gratuity from persons who have referred patients to them. The main purpose of 24 *Del. C.* § 2616 (a) (8) is the protection of the public from unnecessary referrals to physical therapists which are based upon financial gain. Although certain financial relationships with referring persons (including physicians) are prohibited, physical therapists and athletic trainers may utilize any legally recognized business entity in the State of Delaware, as long as they do not violate the referral provisions of 24 *Del. C.* § 2616 (a) (8). Anti-trust or restraint of trade provisions do not bar the enforcement of this statutory provision. The last sentence of 24 *Del. C.* § 2616 (a) (8) does operate as a grandfather clause which exempts those positions which were in existence at the time of the enactment of the statutory provision from the referral prohibitions provided in the

statute. Please be cautioned that this opinion is not offered in response to a specific fact scenario, and it is impossible and impractical to anticipate every factual determination that could be relevant to the application and enforcement of 24 *Del. C.* § 2616 (a) (8). A specific request should be made if a particular case occurs in which the Board needs guidance.

I. Referral Prohibitions

Chapter 26 of Title 24 of the *Delaware Code* is the physical therapy practice act. The State Examining Board of Physical Therapy may suspend or revoke the license of a physical therapist who:

Engages directly or indirectly in the division, transferring, assigning, rebating or refunding of fees received for professional services or who profits by means of a credit or other valuable consideration such as wages, an unearned commission, discount or gratuity with any person who referred a patient, or with any relative or business associate of the referring person. Nothing in this paragraph shall be construed as prohibiting the members of any regularly and properly organized business entity recognized by Delaware law and comprised of physical therapists or athletic trainers from making any division of their total fees among themselves as they determine by contract necessary to defray their joint operating costs. This paragraph shall not apply to physical therapist or athletic trainer positions currently held by physical therapists or athletic trainers employed by licensed medical and osteopathic physicians.

24 *Del. C.* § 2616 (a) (8).

The plain meaning of the words of a statute are controlling if the language of the statute is unambiguous. *Ingram v. Thorpe*, Del. Supr., 747 A.2d 545, 547 (2000). The first sentence of 24 *Del. C.* § 2616 (a) (8) can be divided into two clauses which address the limitations placed on physical therapists. The first clause states that a physical therapist may be disciplined if the physical therapist “engages directly or indirectly in the division, transferring, assigning, rebating,

or refunding of fees received for professional services.” 24 *Del. C.* § 2616 (a) (8). This first clause of the sentence is controlled by the verb “engages”. *Id.* The plain meaning of the words provides that a physical therapist may not divide fees or convey fees from the physical therapist to the referring person. A physical therapist may not: 1) transfer his/her fees in trust to the referring person; 2) make a deduction from his/her fees; or 3) give back or return fees to the referring person. A physical therapist is prohibited from sharing the proceeds received for rendering professional services with the referring person.

Similarly, the second clause of the sentence addresses limitations placed on physical therapists. The second clause states, “who profits by means of a credit or other valuable consideration such as wages, an unearned commission, discount or gratuity.” *Id.* This second clause of the sentence is controlled by the verb, “profits”. *Id.* Applying the plain meaning of the words, a physical therapist may not receive a recompense or payment having monetary value from the referring person. A physical therapist may not receive, from the referring person, money that is paid for his/her services nor an additional fee paid for transacting business or performing a service. A physical therapist may not profit from the act of a deduction from the referring person. A physical therapist may not profit from a tip or money beyond the obligation due for service from the referring person. This clause prevents a physical therapist from profiting by the receipt of a credit, valuable consideration, wages, an unearned commission, discount, or gratuity from the referring person.

The persons prohibited from compensating a physical therapist for a referral are any person who referred a patient or any relative or business associate of the referring person. This

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modifying clause specifies the persons with whom the physical therapist are prohibited from splitting fees or otherwise sharing compensation as expressed above. There is no other reasonable interpretation of the meaning of this modifying clause.

Similar Provision in Delaware

Chapter 53 of the *Delaware Code* is the practice act for the Board of Massage and Bodywork. It contains a similar provision to 24 *Del. C.* § 2616 (a) (8). The provision, 24 *Del. C.* § 5313 (a) (7), relates to the grounds for discipline for massage or bodyworks therapists and massage technicians and was enacted after 24 *Del. C.* § 2616 (a) (8). The first two sentences of 24 *Del. C.* § 5313 (a) (7) are identical to the first two sentences of 24 *Del. C.* § 2616 (a) (8). The synopsis to Senate Amendment No. 2 to Senate Substitute No. 1 for Senate Bill 74 of the 139th General Assembly states:

An additional ground for discipline would be added, similar to language in the physical therapy Act, which would prohibit the licensed massage therapist from engaging in fee splitting from any referral, or fee splitting with the employing medical or osteopathic physician or chiropractor.

This synopsis makes a direct reference to the legislative intent in enacting the provision regarding physical therapy, 24 *Del. C.* § 2616 (a) (8). It establishes that the General Assembly intended to prohibit physical therapists from engaging in fee splitting with persons who refer patients to them or with the physicians who employ them. *Carper v. New Castle County Board of Education*, Del. Supr., 432 A.2d 1202, 1205 (1981).

Similar Provisions in Other States

In *Medical Association of State of Alabama vs. Shoemake*, 656 So.2d 863 (Ala. Civ. App. 1995), the court considered a provision similar to 24 *Del. C.* § 2616 (a) (8) that was promulgated by the Board of Physical Therapists of Alabama. A group of physicians claimed that a proposed amendment to a rule for physical therapists would interfere with their practices. The proposed amendment to Alabama rule 700-X-3-.02 recommended disciplinary action for a physical therapist who:

[r]equests, receives, participates, or engages directly or indirectly in the division, transferring, assigning, rebating or refunding of fees received for professional services or . . . profits by means of a credit or other valuable consideration such as wages, an unearned commission, discount or gratuity with any person who referred a patient, or with any relative or business associate of the referring person. Physical therapists employed by licensed medical and osteopathic physicians and dentists will be allowed six months, from the effective date of this rule, to comply.

Shoemake, 656 So.2d at 864. The court interpreted the proposed amendment to prohibit "a physical therapist from being employed by, or from otherwise participating in a professional financial arrangement with, a referring physician." *Id.*

Several states have enacted physical therapy legislation which is very similar to 24 *Del. C.* § 2616 (a) (8): *See, e.g.*, Arizona (*Ariz. Rev. Stat. Ann.* § 32-2044), Arkansas (*Ark. Code Ann.* § 17-93-308), Florida (*Fla. Stat. Ann.* § 486.125), Louisiana (*La. Rev. Stat. Ann.* 37:2413), South Carolina (*S.C. Code Ann.* § 40-45-10), Tennessee (*Tenn. Code Ann.* § 63-13-312) and Wyoming (*Wyo. Stat.* § 33-25-11). All of these provisions are contained in statutory sections delineating the grounds for discipline of physical therapists.

II. Business Entity

The second sentence of 24 *Del. C.* § 2616 (a) (8) clarifies whether physical therapists may belong to legally recognized business entities in the State of Delaware, given the referral prohibitions on the practice of physical therapy enumerated in the first sentence. The second sentence of 24 *Del. C.* § 2616 (a) (8) states that “[n]othing in this paragraph shall be construed as prohibiting the members of any regularly and properly organized business entity recognized by Delaware law and comprised of physical therapists or athletic trainers from making any division of their total fees among themselves as they determine by contract necessary to defray their joint operating costs.”

The second sentence of Section 2616 (a) (8) does not expressly mandate that the organized business entities must be comprised solely of physical therapists and athletic trainers. According to the principles of statutory construction, words of substance and effect such as “solely,” “only,” or “exclusively” which have not been included in the statute by the legislature can not be read into the statutory language when construing its meaning. *See General Motors Corp. v. Burgess*, Del. Supr. 545 A.2d 1186, 1191 (1988). If a statute is unambiguous, there is no room for interpretation and the plain meaning of the words controls. *Rubick v. Security Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000). Therefore, the plain meaning of Section 2616 (a) (8) does not preclude physical therapists and athletic trainers from making arrangements to be members of any properly organized business entities recognized by Delaware law in order to defray their joint operating costs provided that the referral prohibitions in the first sentence of Section 2616(a)(8) are not violated.

III. Anti-trust Concerns

There are no anti-trust or restraint of trade concerns that would bar the enforcement of the paragraph at issue. The Sherman Anti-Trust Act is inapplicable to this case under the state action doctrine espoused in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. See *Southern Motor Carriers Rate Conference, Inc., et. al. v. United States*, 471 U.S. 48 (1985), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *California Retail Dealers Assn. vs. Midcal Aluminum*, 445 U.S. 97 (1980). In exempting states from the anti-trust provisions of the Sherman Anti-trust Act, the U.S. Supreme Court observed that the Act "was [not] intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351; see also *Del. Op. Atty Gen.* 88-IO12 at 1. The challenged restraint to the practice of physical therapy is "clearly articulated and affirmatively expressed as state policy" through the enactment of legislation by the Delaware General Assembly. See *Midcal*, 445 U.S. at 105. The state has also demonstrated that it will "supervise actively any private anti-competitive conduct," through the creation of a state board which has been charged with regulating and supervising the practice of physical therapy and athletic training in the State of Delaware. See *Southern Motor Carriers*, 471 U.S. at 57. In fact, the legislature expressly stated that one of the purposes of the Examining Board of Physical Therapy is to "protect the public . . . from occupational practices which tend to reduce competition or to fix the price of services rendered." 24 *Del. C.* § 2601.

IV. Grandfather Clause

The last sentence of 24 *Del. C.* § 2616 (a) (8) operates as a grandfather¹ clause according to a previous opinion, *Del. Op. Atty. Gen.* 89-IO12, issued by this office. The referral prohibition in Section 2616(a)(8) does not apply to certain physical therapist and athletic trainer positions which existed at the time of the enactment of the section. 24 *Del. C.* § 2616 (a) (8). However, that a physician may not sell or transfer a physical therapist position pursuant to 24 *Del. C.* § 2616 (a) (8). *Del. Op. Atty. Gen.* 89-IO12 at 1. Thus, the interpretation offered in *Del. Op. Atty. Gen.* 89-IO12 is consistent with the interpretation espoused in this opinion, that all other physical therapists or athletic trainers cannot be employed by physicians from whom they receive referrals.

CONCLUSION

A physical therapist is prohibited from participating in certain financial relationships with a referring person. Physical therapists cannot share fees with persons who have referred patients to them. Physical therapists are also prohibited from accepting monetary gain from persons who have referred patients to them for professional services. Physical therapists and athletic trainers may belong to lawful business entities in the State of Delaware so long as they do not enter into the prohibited fee splitting financial relationships with referring persons as specified in 24 *Del. C.* § 2616 (a)(8). The physical therapist and athletic trainer positions that existed at the time of

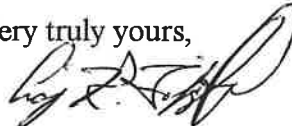
¹ Provision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. An exception to a restriction that allows those already doing something to continue doing it even if they would be stopped by the new restriction. *Black's Law Dictionary* 699 (6th ed.1990).

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enactment of 24 *Del. C.* § 2616 (a) (8) may continue to accept referrals from physicians who employ them.

If you have any further questions, please do not hesitate to contact us.

Very truly yours,

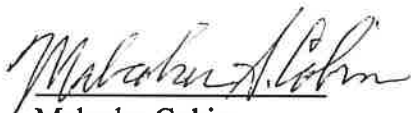


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