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State of California

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OPINION	:	No. 79-920
	:	
of	:	<u>February 8, 1980</u>
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SUBJECT: “PROFESSIONAL COURTESY SERVICES”—The provision of “professional courtesy services” by clinical laboratories to a physician or his family or to his physician-patients or their families violates Business and Professions Code section 650 only where such services are provided as compensation or inducement for referring patients to the clinical laboratory.

The Honorable John T. Knox, Assemblyman, Eleventh District, has requested an opinion on a question which we have rephrased as follows:

Does the provision of “professional courtesy services” by a clinical laboratory, whether owned or operated by a hospital, physician or any other person, to a physician or his family, or to his physician-patients or their families, violate section 650 of the Business and Professions Code?

CONCLUSION

The provision of “professional courtesy services” by clinical laboratories to a physician or his family or to his physician-patients or their families violates Business and

Professions Code section 650 only where such services are provided as compensation or inducement for referring patients to the clinical laboratory.

ANALYSIS

The question presented involves so-called “professional courtesy services” rendered by a clinical laboratory. For purposes of the request, the requester has defined such services as “the provision of laboratory services without charge to a referring physician where his patient is the physician himself, a member of his family or office staff, or other physicians or members of his family.” We are asked whether the provision of such services by a clinical laboratory, whether owned or operated by a hospital, physician, or any other person or entity, violates section 650 of the Business and Professions Code.¹

Clinical laboratories and their personnel are licensed pursuant to section 1200 *et seq.* “Any person conducting or operating a clinical laboratory may accept assignments for tests only from and make reports only to persons licensed under the provision of law relating to the healing arts or their representatives.” (§ 1228.)

Section 650 provides:

“Except as provided in Chapter 2.3 (commencing with Section 1400) of Division 2 of the Health and Safety Code the offer, delivery, receipt of acceptance, by any person licensed under this division of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest or coownership in or with any person to whom such patients, clients or customers are referred is unlawful.

“Except as provided in Chapter 2.3 (commencing with Section 1400) of Division 2 of the Health and Safety Code and in Section 654.1 it shall not be unlawful for any person licensed under this division to refer a person to

¹ All section references are to the Business and Professions Code unless otherwise indicated. The requester also inquired as to whether the provision of such services would violate any other provision of California law. No other laws have been suggested or occur to us which are applicable to the limited facts presented in the question. With additional facts the law on criminal conspiracy (see Penal Code section 182 and 16 Ops. Cal. Atty. Gen. 18, 27); the Cartwright Act (section 16700 *et seq.*); the Unfair Practices Act (section 17000 *et seq.*); and the law governing unfair competition (section 17200 *et seq.*) might become applicable.

any laboratory, pharmacy, clinic, or health care facility solely because such licensee has a proprietary interest or coownership in such laboratory, pharmacy, clinic, or health care facility; but such referral shall be unlawful if the prosecutor proves that there was no valid medical need for such referral.

“‘Health care facility’ means a hospital, nursing home, medical care facility, or private mental institution licensed by the State Department of Health Services.” (Emphasis added.)²

A violation of section 650 is a misdemeanor. (§ 652.5.)

The emphasized portion of section 650 is pertinent to our inquiry herein. Also, with the exception that the word “unearned” appeared as a modifier both before the words “rebate” and “consideration,” the emphasized portion sets forth section 650 as it was initially enacted as part of Chapter 899, Statutes of 1949. Thus, it is seen that section 650 as originally enacted, and now, defines an offense which contain five elements:

- (1) An offer, delivery, receipt or acceptance,
- (2) by any person licensed under “this division,”
- (3) of consideration to any person,
- (4) as compensation or inducement for,
- (5) referral of patients, clients or customers.

The 1949 enactment added sections 650–654 to the Business and Professions Code. The purpose for that enactment was set forth in the First Report of The Senate Committee on Vocational And Professional Standards And Procedures (2 Appen. to Sen. J. (1949 Reg. Sess.)) at page 6, as follows:

² Chapter 2.3 (commencing with Section 1400) of Division 2 of the Health and Safety Code provides for the licensing of referral agencies, that is “a private, profit or nonprofit agency which is engaged in the business of referring persons for remuneration to any extended care, skilled nursing home or intermediate care facility or a distinct part of a facility providing extended care, skilled nursing home care, or intermediate care.” (§ 1401.)

Section 654.1 essentially prohibits physicians and dentists from referring patients to clinical laboratories in which they have a proprietary interest without written disclosure of such interest and notice that the patient is free to choose whatever laboratory he or she may desire to perform the referred work.

The committee took particular cognizance of the charges involving rebating or kickbacks. The committee reports such activities are confined to a small minority of licentiates. At public hearings the committee found that every single professional association openly and forcefully expressed its opposition and condemnation of such practices. However, professional societies and associations lack enforcement powers other than the right to expel from membership.

“The issue of right or wrong of rebates and kickbacks transcends any consideration of professional ethics and directly affects the general public.

“To maintain high standards in California and to protect the public from deceit and fraud, positive statutory assistance must be given to the activities of professional boards to stamp out rebating and kickback practices. Therefore, the committee has prepared and will introduce a stringent bill on this subject making such practices a criminal offense and subjecting any licensed offender to disciplinary action by his licensing board, requiring suspension or revocation of the license to practice. With such a positive enactment this pernicious practice should cease.”

Since the enactment of section 650, this office has issued a number of opinions, both published and unpublished, construing the section. For example, in 16 Ops. Cal. Atty. Gen. 18 (1950) we considered a series of factual situations and determined which situations did or did not violate section 650. In so doing we quoted and relied upon the language of the Senate Committee report quoted above (*Id.*, at p. 21). Not too long thereafter, the court in *Mast v. State Board of Optometry* (1956) 139 Cal. App. 2d 78, 91, described the provision as having been “designed to protect the public and to prohibit all unearned rebates, refunds, commissions and the like among licentiates engaged in the healing arts for the referral of patients.”

Subsequently in a published opinion of this office, 53 Ops. Cal. Atty. Gen. 117, 118 (1970), we explained the purpose of section 650 as follows:

Briefly, section 650 prohibits the paying or receiving of rebates by licensees in the healing arts for the referral of patients. The unsavory aspects of this practice are manifold: first, the patient usually pays more for the combined services of the referring person and the person to whom he is referred than he would if no rebate were involved; second, the patient actually pays the referring person more than he is aware of paying for that person’s services; third, the referring person is tempted to suggest or prescribe extra, more expensive services by the person to whom the patient

is referred because the referring person's income is a function of the business he generates by referral; fourth, the person paying for the referral is usually a willing party to such an agreement because he can pass the cost on to his customer and because there is a prospect of increased volume of business."

In the most recent opinion of this office with respect to section 650 (Attorney General's Unpublished Opinion I.L. 78-112, at p. 5) we determined what type of discounts are prohibited by section 650. We discussed the section's purpose therein as follows:

"... the purpose of this section is closely related to the purpose of section 654, which was discussed in *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners* (1967) 249 Cal. App. 2d 124. As the court in that case noted, the evil to be proscribed by this statute is not just the payment for the referral, but also any relationship where the referral may be induced by considerations other than the best interests of the patient"³

Where a clinical laboratory provides "professional courtesy services" as the requester has defined the same there would be no "rebate," "refund," "commission" or "discount" involved in the usual sense within the meaning of section 650 since no money changes hands. Remaining, however, are proscribed "preference[s]," "patronage dividend[s]" or "other consideration." Free clinical laboratory services provided a physician would clearly constitute "consideration" under section 650. It would also constitute a "patronage dividend" in appropriate circumstances. In 16 Ops. Cal. Atty. Gen. 18, 24-25 (1950), *supra*, an excellent example of a "patronage dividend" was set forth and analyzed as one of the number of situations presented in that opinion.

Returning to the five elements of the offense proscribed by section 650, we see that the providing of "professional courtesy services" would satisfy three of those elements, that is (1) the offer, delivery, receipt or acceptance (2) by any person licensed under "this division" (3) of consideration to any person. Therefore, the critical question inheres in the remaining two elements, that is, whether the "professional courtesy services" are provided (1) as compensation or inducement for (2) referral of patients.

If a clinical laboratory were to render "free" services to a physician-patient, his family, or other physician-patients of his or their families "as compensation or inducement for referring [other paying] patients," section 650 would clearly be violated. The

³ Section 654, as amended by Statutes of 1979, Chapter 688, essentially prohibits physicians from having a financial interest in a dispensing optician business. Prior to such amendment it also contained a prohibition against physicians having a financial interest in a pharmacy, in this regard, see now section 4080.5 as added by Statutes of 1979, Chapter 688.

consideration or “kickback” would be in the form of free services to the physician himself, his family, his physician-patients or their families. (*Cf.* example set forth above from 16 Ops. Cal. Atty. Gen. 18, 24–25.) See also, e.g., Attorney General’s Unpublished Opinion No. I.L. 78–112, *supra*, at p. 6:

“... we conclude that ... under section 650, discounts which compensate or induce a referral so that the referral may be made for any reason other than the individual patient’s best interest are unlawful.”

Conversely, if the “professional courtesy services” at issue herein are not provided as an inducement for patient referrals, or as consideration for past or future referrals, there would be no violation of section 650. Section 650 does not prohibit a clinical laboratory from providing free services to other licentiates of the healing arts if they are, in fact, free.⁴ *Cf.* Attorney General’s Unpublished Opinion No. IL. 78–76, at p. 2:

“In the instant case [a clinical laboratory competitively bidding for laboratory work from institutions such as county hospitals] the element of inducement for referrals is missing. The laboratory would be merely submitting a bid to provide a service. It would not be offering or receiving a form of rebate or ‘kick-back.’ Therefore, section 650 would not be applicable since the activity involved is not the activity prohibited by the statute.” (Emphasis added.)

Whether or not “professional courtesy services” are provided as consideration or an inducement for patient referrals is, in our view, a question of fact to be determined in each case. For example, it is possible that the motivation for providing the services may be completely unrelated to the exchange of consideration for, or an inducement for, patient referrals. Thus, if laboratory services are provided free solely to induce medical practitioners to reciprocate by providing free medical services to the laboratory owners,

⁴ We deem it immaterial that section 650, as originally enacted in 1949, contained the descriptive modifier “unearned,” whereas such was deleted in future versions of the section. As we stated in 16 Ops. Cal. Atty. Gen. 18, 25 (1950), *supra*:

“It is apparent that the Legislature used the ‘word ‘unearned’ in order to more effectively stress the fact that the vicious practice of rebating forces the payment of a hidden fee, in that the patient is unknowingly paying to the physician an additional fee which clearly is unearned. In other words, money, or other consideration which is rebated, is ‘unearned’ because it does not represent any sum due to the physician and surgeon for services that he has tendered to the patient, but rather represents a sum which is unknowingly paid because the physician and surgeon has made a referral.”

In short, the modifier “unearned” was essentially redundant, and placed there for emphasis.

their employees and families, then the referral of patients would not be the inducement, and section 650 would not be violated. The relative value of the “reciprocal services” would affect the credibility of such a claim. Likewise, it is possible that a close personal relationship might exist between the physician and the laboratory owner which might act as the inducement for the providing of the “professional courtesy services” by the laboratory. Again, there would be no violation of section 650 in such case.

In short, we cannot say as a matter of law whether the provision of the “professional courtesy services” under consideration herein by a clinical laboratory would or would not constitute a violation of section 650. Each situation would have to be examined and resolved on its own facts. We realize that this conclusion may not provide a satisfactory rest for clinical laboratories with respect to providing “professional courtesy services.” However, the problem is one which inheres in and arises from the manner in which section 650 is drafted.

In so concluding, we are aware of the fact that section 650 was enacted in a setting of “rebates” and “kickbacks” which perpetrated deceit and fraud upon an unsuspecting public. We are also aware of the fact that some prior opinions of this office have emphasized these matters, and other matters, such as the fact, that section 650 was enacted to prevent hidden or increased costs to the patient. We are also aware of the fact that prior opinions of this office may have relied upon the existence of a definitely ascertainable “quid pro quo” in finding a violation of section 650.

However, section 650 in no way requires that actions must be taken clandestinely, or with intent to defraud or deceive, that a “quid pro quo” in fact be found to exist, or that there in fact be an obvious increased cost to patients. The section prohibits by its clear language the provision of services where the intent is merely to induce patient referrals. As noted by this office in our most recent opinion relating to section 650 “. . . the evil to be proscribed by this statute is not just the payment for the referral, but also any relationship where the referral may be induced by considerations other than the best interests of the patients.” (Attorney General’s Unpublished Opinion I.L. 78–112, *supra*, at p. 5.) Essentially, it is the potential for harm to patients as well as actual harm to them that is proscribed by section 650. This is evident from the fact that the Legislature has proscribed the offering or providing of free or discounted services given merely to induce referrals.

The anticipated or hoped-for referrals might never be realized. However, if they are realized as the result of a clinical laboratory having provided free “professional courtesy services” to the physicians, those referrals may well have been induced by considerations other than the best interest of the patients. The very thing section 650 was intended to prevent would then have occurred.⁵

⁵ We view the question of the ownership of the clinical laboratory as immaterial where it is not shown that a prohibited “joint venture” has been established. Compare 53 Ops. Cal. Atty. Gen. 117 (1970) with 55 Ops. Cal. Atty. Gen. 103 (1972); lease agreement between hospital and licentiate based upon “gross profits” may be legal, but not so when based upon “net profits” since in the latter situation the hospital and the licentiate are essentially joint venturers; accordingly, a necessary correlation would exist between hospital referrals and hospital income. See also 16 Ops. Cal. Atty. Gen. 18, 24–25 (1950).

The problems of referrals and “ownership” are generally regulated by section 650 itself and 654.1. See text in section 650, paragraph two, and note 2, *supra*.