Pain Physician, Volume 3, Number 1, pp 100-101
2000, Association of Pain Management Anesthesiologists®

Health Care News

Poorly Reasoned California Opinion Casts Doubt on Many Arrangements

William A. Sarraille, JD

Earlier this year, the California Attorney General's Office released a poorly reasoned opinion (No. 98-611) that casts doubt on the lawfulness of many arrangements under California's Anti-Kickback statute. Having attracted little attention, the scope and significance of the opinion is far from clear.

The opinion was requested by Ms. Liz Figueroa, a member of the California State Senate. The question posed by the requester was:

May a corporate entity licensed as a health care service plan enter into an agreement with a net work of providers of cosmetic medical services, a specialty not covered by any of the entity's health benefit plans, according to the terms of which the entity would (1) refer its enrollees to a participating provider, or to a provider selected by the enrollee from a directory of participating providers, for medical services at a discounted rate and (2) collect and forward to the provider the fees for such medical services after deducting an "administrative fee"?

In analyzing the request, the Attorney General's Office came to two conclusions. First the Attorney General concluded that a health care service plan under the state's managed care licensing law, the Knox-Kneene Act of 1975 (Health and Safety Code, § 1340, *et seq.*) may not enter into an agreement for services not covered by the plan because such an agreement is not authorized by the Knox-Keene Act. Second, The Attorney General concluded that the arrangement would constitute a violation of the state's anti-kickback statute, found at Business and Professionals Code 650.

The Attorney General's justification for its first conclusion is the fact that the proposed "cosmetic" services, which appear to have included plastic surgery, certain cosmetic dermatology procedures, and non-functional ophthalmic procedures, presumably including refractive procedures, were not to be "covered services" of the plan. Citing Section 1375.1 of the Knox-Keene Act, the Attorney General concluded that such a "supplemental personal purchasing program: is not consistent with the requirement that the plan "shall demonstrate...[that it has] assumed full financial risk on a prospective basis for the provision of covered health care services." Because the plan would not be responsible for the payment of the "supplemental" services, the Attorney General concluded that the plan was not authorized to enter into an agreement related to these services.

In our view, the Attorney General's analysis was incorrect. Section 1375.1 does not prohibit a plan from entering into supplemental purchasing options. Although Section 1375.1 does state that the plan must assume "Full financial risk" for *covered services*, it says nothing about non-covered services. Moreover, the proposed supplemental purchasing option is consistent with a variety of stated purposes of the Knox-Keene Act, including the purposes to "promote the delivery of health and medical care," "assure [e] that subscribers and enrollees are educated and informed of the benefits and services available to enable a rational consumer choice," and "helping to assure the best possible health care for the public at the lowest possible cost."

Having concluded, correctly or not, that supplemental purchasing options are not authorized by the Knox-Keene Act, the Attorney General then examined whether the proposed program would be violative of the California anti-kickback statute. Section 650 of the Business and Profession-

From Arent Fox Kintner Plotkin & Kahn, PLLC, Washington, DC. Mr. Sarraille is a partner in the Washington, DC and New York, NY law firm of Arent Fox. He serves as AOPMA's General Counsel. Address correspondence: William A. Sarraille, JD, Arent Fox, 1050 Connecticut Avenue, Washington, DC 20036

als Code prohibits, *inter alia*, the "offer...by any [physician] of any...discount or other consideration...as...compensation or inducement for referring patients...to any person." In a telling insight into the thinking at work in the Attorney General Opinion, the opinion states that it was based on an interpretation of the statute designed to "defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remediated by the statute." The Attorney General also stated that the Legislature enacted the anti-kick-back statute "to protect the public from excessive health care costs...[and] referrals based on considerations other than the best interests of the patients."

With these precepts in hand, the Attorney General appeared to conclude that the proposed program involved the offer of two forms of "consideration" under the statute to the plan by the physicians who proposed to offer the non-covered service. The first "consideration" was the "administrative fee" to be deducted by the plan after collecting the fees for the supplemental services. The second form of "consideration" to the plan was intangible. According to the opinion, the proposed discount to the enrollees would "confer upon" the plan "a marketing tool for the entity to use in soliciting new enrollees" and in strengthening the plan's "economically advantageous" relationship with its existing enrollees.

Despite the fact that "the enrollee...[would] select from a list of physicians," the Attorney General also concluded that the plan would be making "referrals" within the meaning of the law and that these referrals would be made because of the "consideration" provided to the plan in the form of the intangible benefits, rather than in the "best interests" of the enrollees. In discussing the violation it perceived under the California anti-kickback statute, the Attorney General did not discuss the "administrative fee."

Although the Attorney General's Opinion is clearly important and cannot be dismissed, it seems flawed for many reasons. The Attorney General's conclusion that the plan is making referrals by simply providing information about physicians who are willing to provide services at a discount is questionable. By extension, the telephone company would be making referrals for pay in violation of the statute by listing providers in the telephone book. The Attorney General's interpretation of the statute would lead to absurd results.

Equally curious is the opinion's failure to consider the "fair market value" provision of the California anti-kickback statute. Under that provision, the "payment or receipt of consideration for services other than the referral of patients...shall not be unlawful if the consideration is commensurate with the value of the Services furnished. Even if it is assumed that "intangible consideration" in the form of a "marketing tool" passes from the physicians to the plan in the proposed arrangement, the Attorney General's Opinion fails to determine if the "intangible consideration" and the "administrative fee" represent fair market value for the services that the plan provides under the agreement.

The opinion's suggestion that the proposed arrangement is not reflective of the "best interests" of the enrollees seems to betray a bias against the type of non-functional procedures at issue here. Unfortunately, if that was the motivation of the Attorney General's Office, it is unclear how the opinion could be limited to those facts. The opinion would appear to foreclose plans from negotiating on behalf of their enrollees for the best price on other non-covered services, such as outpatient prescription drugs, assisted living facility accommodations, or extended long-term care services. It is difficult to see how this is in the "best interests" of enrollees.

The scope of the "intangible" consideration argument contained in the Attorney General Opinion is difficult to assess as well. When an ophthalmologist rents space on a part-time basis from an optometrist, will the Attorney General take the position that the optometrist has received some "intangible" consideration from the ophthalmologist because of the ability to state that ophthalmic services are available at the ophthalmic location? Only time will tell.