

DOBSON, JONES, BALL, PHILLIPS & BRIDGES, P.A.

ATTORNEYS AT LAW

(864) 271-8171
Fax (864) 235-2866
attorney@dobsonlaw.com
dobsonlaw.com

1306 South Church Street
P.O. Box 1923 (29602)
Greenville, SC 29605

Robert A. Dobson, Jr.
(1910-1981)

Richard A. Jones, Jr.*
David W. Ball*
Virginia M. Phillips+
Michael Barnard Bridges++

* Certified Tax Specialist
+ Also admitted in GA
++ Also admitted in NC and FL

ACTION ALERT FOR HEALTH CARE CLIENTS AND FRIENDS

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PHYSICIANS AND PHYSICAL THERAPISTS: SLOAN MAKES CLEAR THAT IN SOUTH CAROLINA THE GROUP PRACTICE EXCEPTION WILL NOT PROVIDE PROTECTION

The South Carolina Supreme Court handed down its 3-2 split decision in the closely watched case of Sloan, et al. vs. SC Board of Physical Therapy Examiners, et al. on September 25, 2006. The case concerned the interpretation of a state statute, Sec 40-45-110(A)(1) that allows the Board to suspend, restrict or revoke the license of a South Carolina Physical Therapist (PT) or PT Assistant (PTA) who "requests, receives, participates or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration, including, but not limited to, wages, an unearned commission, discount, or gratuity with a person who referred a patient, or with a relative or business associate of the referring person."

The Court held that a PT employed by a physician who refers patients to the therapist is, in essence, dividing, transferring or assigning "fees received for professional services or profits" with the referring physician. The Court noted that the statute specifically lists "wages".

The significance of the case for the physician-PT relationship is shown by the parties who joined in the suit, including the South Carolina Chapter of the American Physical Therapy Association and the American Association of Orthopaedic Surgeons.

While federal legislative, regulatory and enforcement

efforts have made it much more difficult for physicians to profit from referrals of patients, it has long been acceptable under such federal laws, and under most state laws, to operate ancillary services within a group medical practice. Further, while the definition of a group practice for purposes of the federal Stark law is rather complex and detailed, it is not difficult for a typical medical group practice to satisfy the definition and qualify as a group practice. Thus, many practice arrangements for ancillary services have been structured in ways that will allow them to qualify as being within the group practice, and this has typically been a rather simple way to avoid the difficulties presented by the various anti-referral laws.

In Sloan, the SC Supreme Court concluded that, although it lacked "the benefit of any legislative history explaining the Legislature's specific motivation for enacting this statute, it is no great stretch to conclude the statute was passed for the same reasons which prompted enactment of the state Provider Self-Referral Act and the federal Stark laws- to protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest."

Unless physicians are successful in convincing the state legislature to provide them with relief on this issue, the Court's decision in Sloan is almost certainly the final word on the matter. Group medical practices employing PTs and PTAs need to make immediate

arrangements to terminate these employment relationships in light of Sloan.

There are a variety of alternative arrangements that can be structured to provide PT services to medical group practices in ways that will not violate Sloan, including fair market value independent contracting, leasing and management services arrangements.

We have worked with practices on many such arrangements and believe that they can be very helpful to all of the parties affected by the new Court decision, including not only the medical practices, but also the patients and the PTs. Please call us to discuss this further.

**OWNING THE PRACTICE REAL ESTATE-
AVOIDING THE PITFALLS**

Many health care practices own their own office or clinic space. There are many advantages in doing so, including the potential for appreciation in value, control over the workspace environment and tax benefits. However, as with any investment, there are potential risks and pitfalls that should be carefully considered and taken into account in structuring the arrangement. Here are a few pointers:

*Place ownership in a separate entity from that of the practice. This helps to segregate the liability, potentially gives additional tax benefits and gives greater flexibility regarding issues such as buy in and buy out and ownership terms. LLCs are a commonly used vehicle for this purpose.

*Shop around and negotiate on the financing terms. With the availability of the internet and the large number of new banks it makes even more sense to comparison shop on the financing terms. Even a small percentage difference on interest rates will compound to a large cost to you when spread over a long term.

*Negotiate the loan terms. It is surprising to us how often a practice will ask us to review or prepare documents for small or relatively routine matters and yet sign a bank note and mortgage for millions of dollars without any legal review at all. There is a widely held

perception that the bank terms are a "standard" or required part of the deal and not negotiable as such. This is not the case. At a minimum, you should have legal counsel review and advise with regard to items such as personal guarantees, default provisions and remedies. While the bank will not typically agree to completely forego these terms, often the bank will agree to cut back on such terms, for example, apportioning the debt guarantee among the owners, phasing out the debt guarantee as the debt is paid down and reducing penalties and allowing additional grace periods if the loan is in default.

Bear in mind that as respected health care professionals you are the type of customer the bank wants. Call us if we can help in structuring a new debt relationship or in restructuring an existing debt relationship.

QUALIFIED RETIREMENT PLAN LAW CHANGES

Major new retirement plan law changes were approved and signed into law recently. The new law will require amendment of all 401(k) plans this year and will require a number of operational changes. One significant change will be the so-called default provision that will provide for an asset allocation mutual fund approach, sometimes called a target mutual fund, for employees who fail to make other investment selections in their participant directed accounts. If we handle the legal work for maintaining your plan we will be contacting you later about necessary amendments and other changes.

**AVOIDING "TURN KEY" ANCILLARY SERVICES
ARRANGEMENTS**

Many companies approach physician practices with a business model to develop an ancillary service line within the physician practice. Frequently these are "turn key" arrangements in which the contracting company provides all of the staff, equipment and means to perform the ancillary service and the

physician practice has little or no business risk and simply provides the patients. In the government's view such arrangements may be little more than an arrangement to reward the physicians for the referral of patients that would violate the federal anti-kickback statute.

While these arrangements can be beneficial to patients and the practice, it will be necessary to proceed carefully in light of the government attention.

What should you do in structuring these arrangements to avoid legal problems?

1. Legitimate service lines will necessarily involve some business risk to the physician practice. The physician group should have some financial stake in developing and maintaining the service line. This can take the form of monetary or in kind contributions.
2. The service line should be integrally related to the group's existing practice as an extension of that core practice.
3. The service line should be an expansion of the existing services of the practice. If the arrangement is only a reshuffling of existing services in a way that eliminates business risk to the practice and rewards the practice for referrals of patients, it is more likely to be viewed as a means of inducing and rewarding referrals in violation of the law.

Please give us a call if you are considering adding a service line to your existing practice offerings or if you are considering contracting out for the management of an existing service line.

MEDICARE INCREASES REIMBURSEMENT FOR FACE TO FACE VISITS

Effective January 1, 2007, Medicare will pay physicians more for the time they spend talking with patients and will pay for a broader range of preventive services. The final rule, issued on November 1, 2006, increases significantly the work component on the E & M codes. For example, the work component on an intermediate office visit, the most frequently billed physician service, is increasing by 37%. The work component for an office visit requiring moderately complex decision-making and for a hospital visit

require moderately complex decision-making are increasing by 29% and 31% respectively. Both of these services rank in the top 10 most frequently billed physicians' services.

MEDICARE PROPOSES EXPANSION TO ASC APPROVED PROCEDURES

Medicare has proposed a significant expansion to the approved list of procedures that may be performed in an ASC. The proposed expansion includes all surgical procedures, other than those that pose a significant safety risk or generally require an overnight stay. The proposed change is consistent with the long term trend to move procedures out of the hospital setting. This change would generally take effect on January 1, 2008.

Also included are a number of current office based procedures but these would be capped at the office based reimbursement rate to prevent any shifting of these procedures to an ASC solely for reimbursement reasons. However, shifting of these patients to an ASC will make it easier for physicians to schedule more of their patients at the ASC, help physicians comply with the ASC Anti-Kickback Safe Harbor (by increasing the volume of cases performed at the ASC) and may in the long run reduce the number of office surgical suites which are not regulated in the same way or to the same degree that an ASC is regulated.

THE NEW SOUTH CAROLINA TRUST CODE

The South Carolina Trust Code was passed and signed into law in 2005 and took effect on January 1, 2006. In general, this legislation applies retroactively. We view this as a very favorable piece of legislation that provides a number of positive changes for estate planning and asset protection planning. One important change permits a settlor (a person who creates a trust) the ability to reform an irrevocable trust to correct mistakes or to achieve the settlor's tax objectives.

Another important and helpful asset protection change is that a settler now has the ability to provide additional protection against creditors for certain beneficiaries. Whether you are a settlor or a beneficiary, we recommend that you consider creditor protection options to prevent predators from thwarting

an estate plan. We would be glad to discuss these issues with you.

OUR NEWS

Sean Thacker recently came to work with us as a paralegal, joining Phyllis Mitchell, E.A. who has been our paralegal for many years. Sean is a recent graduate of the Greenville Tech Paralegal Program and previously worked in industry.

E-MAIL COMMUNICATIONS

If you would like to receive future Action Alerts and other communications from us by e-mail please tell us by e-mailing Teri Carter at tcarter@dobsonlaw.com and typing Action Alert in the subject line.

Also, you can e-mail our attorneys at the following e-mail addresses:

Dick Jones at rjones@dobsonlaw.com
Dave Ball at dball@dobsonlaw.com
Ginger Phillips at gphillips@dobsonlaw.com
Mike Bridges at mbridges@dobsonlaw.com

Our paralegals can be e-mailed at pmitchell@dobsonlaw.com or sthacker@dobsonlaw.com. All of our staff at DJBP&B can also be reached directly by e-mail. You can also check out our website at www.dobsonlaw.com and link to our e-mail addresses via the website.

As always, we appreciate the opportunity to be of service to you and wish you a prosperous and happy 2007.

David W. Ball, J.D., LL.M, Editor

The information contained in this Action Alert should not be construed or relied upon as specific legal advice in any circumstance. You should consult with an attorney before reaching a conclusion and acting with regard to any of the matters discussed herein.

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