

**PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS - BOARD OF MEDICINE - GENERAL STANDARDS OF PRACTICE — PRACTITIONER SELF-REFERRAL ACT — OPTOMETRY.**

**Subject to exception for division of fees among members of organized partnerships of surgeons or physicians, licensed medical doctor is prohibited from receiving fee from another licensed medical doctor for referral of patient. Assuming absence of any fee splitting or other illegal fee arrangement, primary care physician who refers patient to licensed physician for surgery is not prohibited from receiving payment from third party for postoperative care. Board of Optometry is authorized to revoke/suspend license or reprimand optometrist who splits or divides fee with person other than legal partner or co-member of company practicing optometry. Act prohibits practitioner from referring patient for health services to another entity in which practitioner or immediate family member is investor, subject to certain exceptions granted by Board of Health Professions.**

Mr. John W. Hasty

Director, Department of Health Professions

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You ask several questions regarding the application of § 54.1-2962 of the *Code of Virginia* to a medical doctor's referral of a patient to another medical doctor. First, you ask whether § 54.1-2962 prohibits a licensed medical doctor who refers a patient to another licensed medical doctor from receiving a fee from the doctor for the referral.

Section 54.1-2962 provides, in part:

No surgeon *or physician* shall directly or indirectly share any fee charged for a surgical operation or medical services *with a physician* who brings, sends or recommends a patient to such surgeon for operation, *or such physician* for such medical services; and no physician who brings, sends, or recommends any patient to a surgeon for a surgical operation or medical services shall accept from such surgeon or physician any portion of a fee charged for such operation or medical services. [Chapter 29 of Title 54.1]<sup>[1]</sup> shall not be construed as prohibiting the members of any regularly organized partnership of such surgeons *or physicians* from making any division of their total fees among themselves as they may determine or a group of duly licensed practitioners of any branch or branches of the healing arts from using their joint fees to defray their joint operating costs. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor. [Emphasis added.]

Section 54.1-2962 clearly prohibits the division of fees when a physician refers a patient to a surgeon for a surgical operation or medical services,<sup>2</sup> excludes from the prohibition the division of

fees among the members of an organized partnership of surgeons or physicians, and charges violators with a misdemeanor offense.

An accepted rule of statutory construction is that the provisions of a statute are to be construed as a whole, with effect given to each word.<sup>3</sup> To conclude that the statute applies only when a physician refers a patient to a surgeon and not when a physician refers a patient to another physician for medical services would be contrary to this rule. To give effect to the language in the first sentence of § 54.1-2962 quoted above, the statute must be construed to encompass both referrals to surgeons and to other physicians. This interpretation is supported by the language in the next sentence of § 54.1-2962, providing that the chapter does not prohibit partnerships of surgeons or physicians from dividing their total fees among themselves. The use of the disjunctive word "or" rather than "and" indicates that partnerships consisting of physicians may make referrals within the partnership.<sup>4</sup> This exclusion would be unnecessary if the prohibition did not apply to referrals among physicians.

Statutes that impose criminal sanctions must be narrowly construed to encompass only the conduct clearly proscribed.<sup>5</sup> A careful reading of § 54.1-2962 resolves any ambiguity as to the conduct proscribed by that statute. Accordingly, it is my opinion that, subject to the exception for the division of fees among the members of organized partnerships of surgeons or physicians, § 54.1-2962 prohibits a licensed medical doctor who refers a patient to another licensed medical doctor from receiving a fee from the doctor for the referral.<sup>6</sup>

You next ask whether it is lawful for a primary care medical doctor to receive payment for postoperative care from a third party after having referred the patient to another licensed physician for surgery. Assuming the absence of any fee splitting or other illegal fee arrangement, it is my opinion that neither § 54.1-2962 nor any other provision of Title 54.1 would prohibit a primary care physician from receiving payment from a third party for providing such care.

You ask also whether the answers to either of the above questions would be different if a licensed optometrist refers a patient to a licensed medical doctor. Section 54.1-2962 applies only to physicians licensed by the Board of Medicine. An optometrist is not a physician licensed by the Board, and, thus, is not encompassed within § 54.1-2962.<sup>7</sup> An optometrist who obtains a fee for referring a patient to a licensed medical doctor could, however, be in violation of § 54.1-3215(8) or (14). Section 54.1-3215(8) prohibits the "[o]btaining of any fee by fraud or misrepresentation." Section 54.1-3215(14) prohibits "[s]plitting or dividing a fee with any person or persons other than with a licensed optometrist who is a legal partner or co-member of a professional limited liability company formed to engage in the practice of optometry." Section 54.1-3215 authorizes the Board of Optometry to "revoke or suspend a license or reprimand the licensee" for a violation of any of the provisions of the statute.

You also question what effect the Practitioner Self-Referral Act<sup>8</sup> might have on such referrals. The definition of "practitioner" in § 54.1-2410 of the Act encompasses both physicians and optometrists. Section 54.1-2411(A) of the Act prohibits a "practitioner" from referring a patient for health services only to another "entity" in which the practitioner or any member of his immediate family is an "investor";<sup>9</sup> however, § 54.1-2411(B) permits the Board of Health Professions to grant exceptions to the prohibition under certain circumstances. Whether any referral would violate the prohibitions of the Act will depend on the particular facts.

<sup>1</sup>Sections 54.1-2900 to 54.1-2993, entitled Medicine and Other Healing Arts.

<sup>2</sup>See 1992 Op. Va. Att'y Gen. 147, 148. While neither § 54.1-2962 nor any other section in Title 54.1 defines "surgeon," a logical interpretation for purposes of the statute is a physician who specializes in the practice of surgery. See Merriam Webster's Collegiate Dictionary 1186 (10<sup>th</sup> ed. 1996).

<sup>3</sup>See Jones v. Conwell, 227 Va. 176, 314 S.E.2d 61 (1984); Gallagher v. Commonwealth, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); Op. Va. Att'y Gen.: 1996 at 26, 27; 1994 at 93, 95; 1985-1986 at 177, 178.

<sup>4</sup>See 1A Norman J. Singer, Sutherland Statutory Construction § 21.14, at 129 (5<sup>th</sup> ed. 1993) ("or" usually separates words in alternate relationship, indicating that either of separated words may be used without other); see *also* 1989 Op. Va. Att'y Gen. 228, 229.

<sup>5</sup>See Graybeal v. Commonwealth, 228 Va. 736, 324 S.E.2d 698 (1985); Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); 1995 Op. Va. Att'y Gen. 170, 175-76.

<sup>6</sup>You ask also whether the conduct would violate § 54.1-2962.1. That section prohibits a practitioner's receipt of remuneration in return for referring an individual to an institution, as defined in § 37.1-179, or a hospital, as defined in § 32.1-123, and is inapplicable to your specific inquiry.

<sup>7</sup>Chapter 29 of Title 54.1, §§ 54.1-2900 to 54.1-2993, applies to the health care practitioners regulated by the Board of Medicine. Pursuant to Chapter 32 of Title 54.1, §§ 54.1-3200 to 54.1-3224, optometrists are regulated by the Board of Optometry.

<sup>8</sup>Sections 54.1-2410 to 54.1-2414.

<sup>9</sup>Section 54.1-2400 defines "practitioner" as "any individual certified or licensed by any of the health regulatory boards within the Department of Health Professions, except individuals regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine"; "entity" as "any person, partnership, firm, corporation, or other business that delivers health services"; and "investor" as "an individual or entity directly or indirectly possessing a legal or beneficial ownership interest, including an investment interest."