

Opinion No. 65-130

July 13, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: W. O. Conner, Jr., M.D. Member of the Board of Examiners in Polygraphy Medical Arts Square Albuquerque, New Mexico

QUESTION

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May a New Mexico polygrapher who receives fees for work undertaken in the practice of his profession pay a percentage of such fees to a referring sales agency?

CONCLUSION

No.

OPINION

{*219} ANALYSIS

In 1963 the Twenty-Sixth Legislature enacted Chapter 225, Laws 1963, regulating the practice of polygraphy. This Act is compiled as Sections 67-31-1, et seq., N.M.S.A., 1953 Compilation (P.S.). The Act, among other things, provides for the licensing of persons qualified under the provisions thereof to practice polygraphy. Section 67-31-10, supra, provides that a license to practice polygraphy may be suspended or revoked if a licensee is found guilty of "unprofessional conduct." A person may only practice polygraphy if licensed pursuant to the provisions of the Act.

"Unprofessional conduct" is defined in Section 67-31-11, supra, as including "fee splitting". No definition of "fee splitting" appears in this Act.

The legislature has defined unprofessional conduct in various other licensing acts, and where "fee splitting" is construed as such "unprofessional conduct", has defined this term. In Section 67-7-9 (1), N.M.S.A., 1953 Compilation, regulating Optometry, the term is used in the following manner: "Splitting" **or dividing** a fee with any other person or persons."

Section 67-5-9 (j), N.M.S.A., 1953 Compilation, in defining un professional conduct in the practice of medicine and surgery provides insofar as "fee splitting" is concerned, as follows:

"(j) Fee splitting, which is declared to be against public policy and shall be defined but not limited to because of enumeration; **the offering, the delivering,** receiving, or accepting any unearned rebate, {^{*220}} refund, commission preference, patronage dividend, discount or other unearned 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 (sic) interest,, or co-ownership in or with any person to whom such patients, clients, or customers are referred." (Emphasis added).

It is clear that the practice of paying a referring sales agency a percentage of fees earned for referring a patient, client or customer would constitute "fee splitting" within the definition of unprofessional conduct if the practice of medicine or surgery was in question.

We do not however, have in question the practice of "fee splitting" in the field of medicine and surgery. However we do have the question of revocation or suspension of a license which is similar to the question of revocation or suspension of a physician's license. Both acts concern licensing boards of this state and definitions of the term "fee splitting". Both statutes deal with the same general subject matter -- revocation or suspension of licenses by a licensing board of this state -- for endorsing the practice known as "fee splitting". The definitions contained in the earlier act may be examined in determining the meaning to be ascribed to the same words in later statutes.

It is stated in **Southerland Statutory Construction**, 3d Ed., Volume 2, p. 530, Section 5201, as follows:

"On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, it is held that in the absence of express repeal or amendment therein the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together. Provisions in an act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act when not inconsistent with its purpose."

See also **State ex rel., Maryland Casualty Co. v. State Highway Commission**, 38 N.M. 482. The case of **State v. District Court of Second Judicial District**, 45 N.M. 119, involved the question of service of summons and complaint upon a non-resident in an action arising out of an automobile accident in this state. The statute provided that the Secretary of State should be the agent upon whom "all lawful process" in such an action should be served. The term process was not defined and in defining the term the Court stated:

"It is entirely appropriate and perhaps necessary to examine statutes existing when chap. 127, Laws 1931, was enacted in order to determine what the legislature meant by 'process'."

The court then determined the meaning of the word "process" and in aid used the existing statutes in effect at the time of the passage of the act being construed. Similarly in the case here presented where the legislature did not again define the meaning of the term "fee splitting" we find it appropriate and perhaps necessary to examine statutes existing at the time when the act pertaining to polygraphy was adopted and which also deal with the similar problem as above set forth. It is presumed since no different meaning is set forth that the legislature intended that the same meaning be given the term as was given to it in the earlier comparable legislation.

Additionally in seeking to determine the meaning described to the term "fee splitting" we look {^{*221}} to **Words and Phrases**, Vol. 39A, p. 524, which defines the term as follows:

"Splitting of fees," occurs when a member of a profession divides the compensation he receives from a patient with another member of the same profession or any person who has sent patients to him or has called him into consultation. *Lieberman v. Conn., State Bd. of Examiners in Optometry*, 34 A. 2d 216, 130 Conn., 344. (Emphasis added).

Under the facts presented, the practice in question would therefore constitute "fee splitting" and would be unprofessional conduct under the terms of the applicable statutes.