OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

March 5, 2002

FILE NO. 02-005

LICENSED OCCUPATIONS:
Prohibited Fee-Splitting in
Preferred Provider Contract

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The Honorable Charles A. Hartke
Assistant Majority Leader
House of Representatives
2044-J Stratton Building
Springfield, Illinois 62706

Dear Representative Hartke:

I have your letter wherein you inquire whether the provisions of the standard preferred provider agreement utilized by HealthLink, Inc., a preferred provider organization based in St. Louis, Missouri, are violative of the fee-splitting prohibition set out in subsection 22(A)(14) of the Illinois Medical Practice Act of 1987 (225 ILCS 60/22(A)(14) (West 2000)), with respect to participating Illinois licensed physicians. For the reasons hereinafter stated, it is my opinion that an Illinois physician may not enter into the agreement as structured without

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violating subsection 22(A)(14) of the Medical Practice Act, a circumstance which will render the contract void.

Subsection 22(A)(14) of the Medical Practice Act of 1987 provides, in pertinent part:

> "Disciplinary action.
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> (A) The Department may revoke, suspend, place on probationary status, or take any other disciplinary action as the Department may deem proper with regard to the license or visiting professor permit of any person issued under this Act to practice medicine, or to treat human ailments without the use of drugs and without operative surgery upon any of the following grounds:
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> * * *
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> (14) Dividing with anyone other than physicians with whom the licensee practices in a partnership, Professional Association, limited liability company, or Medical or Professional Corporation any fee, commission, rebate or other form of compensation for any professional services not actually and personally rendered. * * * Nothing contained in this sub-section shall abrogate the right of 2 or more persons, holding valid and current licenses under this Act, to each receive adequate compensation for concurrently rendering professional services to a patient and divide a fee; provided, the patient has full knowledge of the division, and, provided, that the division is made in proportion to the services performed and responsibility assumed by each.
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> * * * "

The section includes exceptions for the practice of medicine in partnership or in corporate form, if authorized by pertinent Illinois law, but none of those exceptions appears to be applicable to the present circumstances.

The information you have provided quotes the language of section 3.7 of the HealthLink standard agreement with participating providers as follows:

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> * * *
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> 'In consideration of the services provided hereunder by HealthLink, each PHO Participating Provider shall pay HealthLink an administrative fee equal to five percent (5%) of the amounts allowed to the PHO Participating Provider under the Rate Schedule for the provision of Medical Services to Members by the Participating Provider; provided, however, that the foregoing fee shall not be payable on amounts paid to a PHO Participating Provider for the provision of such services if payment for all or any portion of such service is made by or under certain state or federally funded programs designated by HealthLink from time to time (which include, among others, Medicare and Medicaid), and evidence of such payment is provided to HealthLink.'
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> * * *
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> "

Several opinions handed down by the Illinois Appellate Court in recent years have construed subsection 22(A)(14) to prohibit payments by physicians for management or other services based upon a percentage of professional income. In the earliest

of these cases, E & B Marketing Enterprises, Inc. v. Ryan (1991), 209 Ill. App. 3d 626, a marketing firm agreed to promote the name and practice of a physician engaged in private practice in return for a consulting fee of 10% on all billings collected by the physician in connection with such referrals. The marketing was targeted primarily at insurance carriers. The court held that the agreement was a fee-splitting contract, in violation of subsection 22(A)(14) of the Medical Practice Act, and that the agreement was therefore void as against public policy. The fact that the contracting physician collected the fees from insurance companies, rather than from individual patients, had no effect upon the illegality of the underlying fee-splitting contract. E & B Marketing Enterprises, Inc. v. Ryan (1991), 209 Ill. App. 3d 626, 629-30.

Subsequently, in Practice Management, Ltd. v. Schwartz (1993), 256 Ill. App. 3d 949, appeal denied, 155 Ill. 2d 575 (1994), certain optometrists and ophthalmologists entered into a partnership arrangement whereby the optometrists, who were not licensed physicians, would refer patients in need of ophthalmology services to the licensed physicians. The partnership also provided management, administrative and other business functions to the ophthalmologists, in return for which the partnership was paid a management fee, calculated on the basis of the ophthalmol-

ogists' gross receipts less all salaries, bonuses and professional liability insurance premiums. The partnership's net profit was split on a 50-50 basis. The court held that the arrangement violated subsection 22(A)(14) because it resulted in fee-splitting. The physicians were required to share their net profit with the optometrists, without regard to whether the optometrists actually provided any services to particular patients.

Further, in Lieberman & Kraff, M.D., S.C. v. Desnick (1993), 244 Ill. App. 3d 341, appeal denied, 152 Ill. 2d 561 (1993), the court invalidated a contract for the sale of a medical practice which provided for compensation for the sale based upon a percentage of the purchaser's gross revenue from the practice over a 20 year period. The court held that the contract was an illegal fee-splitting agreement in violation of subsection 22(A)(14), regardless of the fact that the purpose behind the contract was benign.

Most recently, in TLC The Laser Center, Inc. v. Midwest Eye Institute II, Ltd. (1999), 306 Ill. App. 3d 411, appeal denied, 186 Ill. 2d 590 (1999), a service contract was held to violate subsection 22(A)(14) because it provided, in part, for an annual fee to be paid to an unlicensed corporation, in addition to specific reimbursements. Although the fee was not calculated

on a straight percentage, there was clearly a direct relationship between the revenues generated by the practice and the fee the physicians were required to pay. (TLC The Laser Center, Inc. v. Midwest Eye Institute II, Ltd. (1999), 306 Ill. App. 3d 411, 428, appeal denied, 186 Ill. 2d 590 (1999).) With respect to the fee-splitting prohibition, the court observed:

> " * * *
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> * * * The policy reasons behind the prohibition are the danger that such an arrangement might motivate a nonprofessional to recommend a particular professional out of self-interest, rather than the professional's competence. In addition, the judgment of the professional might be compromised, because the awareness that he would have to split fees might make him reluctant to provide proper (but unprofitable) services to a patient, or, conversely, to provide unneeded (but profitable) treatment. [Citations omitted.]
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> * * * "
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> TLC The Laser Center, Inc. v. Midwest Eye Institute II, Ltd. (1999), 306 Ill. App. 3d 411, 427, appeal denied, 186 Ill. 2d 590 (1999).

The appellate court, in each of the last three cases cited, referred to and specifically disagreed with Practice Management Associates, Inc. v. Orman (Fla. Dist. Ct. App. 1993), 614 So. 2d 1135. In Practice Management Associates, Inc. v. Orman, the Florida court construed subsection 22(A)(14) of the Illinois Medical Practice Act of 1987 to prohibit fee-splitting

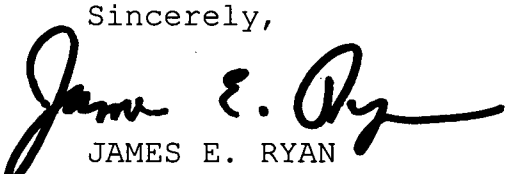
only in the context of patient referrals, and held that it did not preclude physicians from agreeing to pay a percentage of their profits to a nonprofessional in exchange for marketing and management services provided by that nonprofessional. That interpretation has clearly been rejected by the Illinois Courts.

In each of the cases discussed above, the action was brought to enforce a contract, not for disciplinary purposes under section 22 of the Medical Practice Act. Subsection 22(A)(14) was, in each case, interposed as a defense, resulting in a holding that the contract in question was void as against public policy. The discussion in the cases suggests that any compensation to a non-physician based directly upon the compensation received by a physician for provision of medical care is unenforceable as a violation of subsection 22(A)(14), regardless of the purpose of the compensation.

Section 3.7 of the HealthLink agreement requires each participating physician to pay HealthLink an administrative fee equal to 5% of the amounts allowed in HealthLink's rate schedule for services provided to members by the physician, except for amounts paid by Medicare or Medicaid. Clearly, this agreement requires the physician to pay a portion of his fee from each patient visit to HealthLink, in violation of subsection 22(A)(14) of the Illinois Medical Practice Act of 1987. As was stated in

E & B Marketing Enterprises, Inc. v. Ryan (1991), 209 Ill. App. 3d 626, the fact that the fee is received from an insurance company rather than the patient directly has no effect upon the validity of the underlying fee-splitting contract under the plain language of subsection 22(A)(14), which prohibits the receipt of any fee or commission, directly or indirectly, for professional services not actually rendered by the recipient, regardless of the fact that no direct solicitation of patients is involved. It is my opinion, therefore, that section 3.7 of Healthlink, Inc.'s preferred provider agreement is violative of subsection 22(A)(14) of the Medical Practice Act of 1987, and is void under Illinois law.

Sincerely,



JAMES E. RYAN
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

April 12, 2002

The Honorable Charles A. Hartke
Assistant Majority Leader
House of Representatives
2044-J Stratton Building
Springfield, Illinois 62706

Dear Representative Hartke:

Subsequent to the issuance of opinion No. 02-005, clarification was requested regarding whether the administrative fee provisions of Healthlink's standard provider agreement, which were determined to be violative of subsection 22(A)(14) of the Illinois Medical Practice Act of 1987 (225 ILCS 60/22(A)(14) (West 2000)), could be severed from the remaining provisions of the agreement pursuant to section 7.3 thereof, which provides:

> "Severability. In the event any term or provision of this Agreement is rendered invalid or unenforceable by any valid Act of Congress or Legislature of the state of competent jurisdiction, or by any regulation duly promulgated by officers of the United States or the state of competent jurisdiction acting in accordance with law, or declared null and void by any court of competent jurisdiction, the remainder of the provisions of this Agreement shall, subject to this Section, remain in full force and effect. In the event that a term or provision of this Agreement is rendered invalid or unenforceable or declared null and void, and its removal has the effect of materially altering the obligations of either Physician or HealthLink in such manner that, in the judgment of the affected party, (a) will cause serious financial hardship to such

party or (b) will cause such party to act in violation of its corporate organizational documents, the party so affected shall have the right to terminate this Agreement upon thirty (30) days prior written notice to the other party."

As a general principle, if a contract contains both valid provisions and invalid provisions, the valid provisions of the contract may be enforced, even in the absence of a severability clause. (Corti v. Fleisher (1981), 93 Ill. App. 3d 517, 533-34.) The inclusion of a severability clause in a contract, although not determinative of the issue, reinforces a finding of severability because it indicates that the parties intended for the valid portions of the contract to be enforced in the absence of the invalid portions. Abbott-Interfast Corporation v. Harkabus (1993), 250 Ill. App. 3d 13, 21.

With respect to the Healthlink agreement, it has not been suggested that the object of the agreement is violative of public policy, or that the services that Healthlink provides are improper in any way. The only aspect of the agreement found invalid in opinion No. 02-005 was the basis upon which the fees for the administrative services performed under the agreement are calculated. It is noteworthy that the issue of severability was apparently not raised in any of the cases cited in the opinion for the proposition that a contract in violation of subsection 22(A)(14) of the Illinois Medical Practice Act is void.

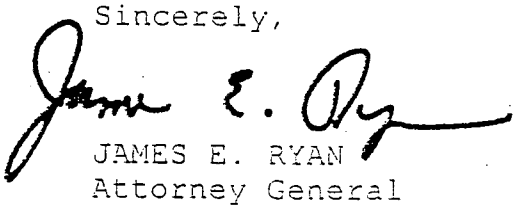
In the Healthlink agreement, the parties thereto agree to the inclusion of a severability clause providing that if any provision of the agreement is rendered invalid or unenforceable by legislation or regulation, or declared null and void by a court of competent jurisdiction, the remainder of the provisions will remain in full force and effect. (Although not specifically referenced in the clause, it would appear that an opinion of the Attorney General concerning the interpretation of a State law that he may enforce, being anticipatory of litigation, would logically be a finding upon which the severability clause could be invoked.) Section 7.4 further permits a party to terminate the agreement unilaterally if the invalidity of a provision will cause serious financial hardship to the party. Section 7.6 of

the agreement permits Healthlink to amend the agreement unilaterally in order to comply with State laws or regulations; under this provision of the contract, it appears that Healthlink could revise the fee provisions thereof to comport with State law.

It may safely be assumed that the finding of invalidity of the fee provisions of the agreement will have an adverse economic effect upon Healthlink. Consequently, it appears that Healthlink would be permitted under the terms of the agreement to revise those provisions or to opt out of the agreement altogether. Given the latitude of Healthlink to restructure the agreement, it appears that the valid provisions of the agreement can be given force and effect even if the invalid provisions are excised, because the invalid provisions can be revised or replaced unilaterally in order to bring them into compliance with State law. Given that the underlying purpose of the agreement is permissible, it does not appear that public policy would require that the agreement be voided altogether in these circumstances.

Finally, it has been suggested that there are other contracts extant containing fee provisions similar to that contained in the Healthlink contract. Opinions of the Attorney General are based upon the facts presented by the requestor. As part of this process, the Attorney General does not seek out facts or investigate to determine whether there might be other situations in which facts similar to those analyzed in the opinion might exist. This office would, of course, be in a position to advise on any questionable agreement submitted by an appropriate requestor. Any agreement along similar lines would certainly be subject to the same analysis and conclusions.

Sincerely,



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