FEE-SPLITTING PROHIBITION:
Implications for Physicians & Mental Health Providers

WHITTED TAKIFF LLC

Introduction

We are often consulted by our healthcare professional clients with respect to contractual arrangements into which they have entered with other professionals, hospitals, healthcare networks and PPO's. Generally, the most significant and scrutinized provision in these contractual arrangements concerns compensation, payment and/or fees in exchange for the services rendered thereunder. Time and again, a contract's compensation provision will include that payment is based on a percentage of collections and/or a percentage formula for the division of fees. For example, in consideration for Contractor providing services to the clients of Organization, Contractor will be paid 60% of fees collected. This type of payment schedule, and similar arrangements, would likely be considered *fee-splitting*.

Whether intentionally or unintentionally committed, fee-splitting is prohibited conduct for many professionals, including those practicing generally in the areas of medicine, law, optometry and mental health.[1] Professional regulatory bodies, such as the Illinois Department of Financial and Professional Regulation ("IDFPR"), consider fee-splitting to be grounds for discipline. The pervasive view in state and federal legislation and the administrative regulations, as well as in the courts, is that fee-splitting by professionals in the areas of medicine, optometry and law is against public policy.

A review of the relevant Illinois and federal laws all seem to point to one conclusion: fee-splitting is unlawful and any arrangement that may be considered 'fee-splitting' is inadvisable.

Professionals Prohibited From Fee-Splitting

Below please find laws and regulations[2] that pertain to fee-splitting prohibitions for various health and mental health professionals. Please be advised, this is not meant to be an exhaustive list of all professionals who are prohibited from engaging in fee-splitting.

Clinical Psychologists

The fee-splitting prohibition pertaining to clinical psychologists is addressed under the statutory grounds for discipline found in Section 15 of the *Illinois Clinical Psychologist Licensing Act*, 225 ILCS 15/1 *et seq.* This Section states:

> *The [Illinois Department of Financial and Professional Regulation] may refuse to issue, refuse to renew, suspend, or revoke any license, or may place on probation, censure, reprimand, or take other disciplinary action deemed appropriate by the Department, including the imposition of fines not to exceed $10,000 for each violation, with regard to any license issued under the provisions of this Act for any one or a combination of the following reasons:*

[1] Licensed professionals should refer to their specific licensing acts and the implementing regulations to determine whether fee splitting is prohibited in their profession.

[2] *Note:* Each profession may also have a specific code of conduct that includes guidance and limitations on fee-splitting or fee-sharing arrangements. Health providers are encouraged to review their profession's ethics code and the relevant provisions regarding fee-splitting.

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> *(12) Directly or indirectly **giving or receiving** from any person, firm, corporation, association or partnership **any fee**, commission, rebate, or other form of compensation for any professional service not actually or personally rendered. Nothing in this paragraph (12) affects any **bona fide independent contractor or employment arrangements among health care professionals**, health facilities, health care providers, or other entities, except as otherwise prohibited by law. Any employment arrangements may include provisions for compensation, health insurance, pension, or other employment benefits for the provision of services within the scope of the licensee's practice under this Act. Nothing in this paragraph (12) shall be construed to require an employment arrangement to receive professional fees for services rendered.*

225 ILCS 15/15(12) (Emphasis added.) The implementing regulations of the *Clinical Psychologist Licensing Act* also prohibit fee-splitting. Section 1400.80 of Title 68, Part 1400, Unethical, Unauthorized, or Unprofessional Conduct, states:

> *The Division[3] may suspend or revoke a license, refuse to issue or renew a license or take other disciplinary action, based upon its finding of "unethical, unauthorized, or unprofessional conduct" within the meaning of Section 15(7) of the Act, which is interpreted to include, but is not limited to, the following acts or practices:*
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> > *f) Directly or indirectly giving to or receiving from any person, firm or corporation any fee, commission, rebate or other form of compensation **for any professional services not actually rendered**; . . .*

68 Ill. Admin. Code 1400.80 (Emphasis added.)

Licensed Clinical Social Workers & Licensed Social Workers

The above fee-splitting limitation language is mirrored in the *Illinois Clinical Social Work and Social Work Practice Act*, 225 ILCS 20/1 *et seq.*, and applies to both licensed clinical social workers and licensed social workers. Section 19, which pertains to the grounds for disciplinary action, includes the fee-splitting prohibition, which states:

> *(1) The Department[4] may refuse to issue, refuse to renew, suspend, or revoke any license, or may place on probation, censure, reprimand, or take other disciplinary or non-disciplinary action deemed appropriate by the Department, including the imposition of fines not to exceed $10,000 for each violation, with regard to any license issued under the provisions of this Act for any one or a combination of the following reasons:*

[3] "Division" refers to the Illinois Department of Financial and Professional Regulation ("IDFPR").
[4] "Department" refers to the Illinois Department of Financial and Professional Regulation ("IDFPR").

* * * *

(l) directly or indirectly giving to or receiving from any person, firm, corporation, partnership, or association any fee, commission, rebate or other form of compensation for any professional service not actually rendered. Nothing in this paragraph (l) affects any bona fide independent contractor or employment arrangements among health care professionals, health facilities, health care providers, or other entities, except as otherwise prohibited by law. Any employment arrangements may include provisions for compensation, health insurance, pension, or other employment benefits for the provision of services within the scope of the licensee's practice under this Act. Nothing in this paragraph (l) shall be construed to require an employment arrangement to receive professional fees for services rendered; . . .

225 ILCS 20/19(1)(l). The implementing regulations of this licensing act, found at Title 68, Part 1470, provide as follows:

(a) The Division[5] may suspend or revoke a license, refuse to issue or renew a license or take other disciplinary action based upon its finding of "unethical, unauthorized, or unprofessional conduct" within the meaning of Section 19 of the Act, which is interpreted to include, but is not limited to, the following acts or practices:

* * * *

6) Directly or indirectly giving to or receiving from any person, firm or corporation any fee, commission, rebate or other form of compensation for any professional services not actually rendered. Social workers shall not participate in illegal fee-splitting arrangements, nor shall they give or accept kickbacks for referrals. ***However, it is not unethical for social workers to utilize referral services for which a fee is charged, nor to participate in contractual arrangements under which they agree to discount fees****; . . .*

68 Ill. Admin. Code 1470.96(a)(6) (Emphasis added.) It appears that slight leeway has been granted to social workers, explicitly allowing them to utilize referral services for a fee and agree to discount fees as part of a contractual agreement. However, *true* fee-splitting is prohibited for social workers, and fee arrangements based on a percentage of collections are unadvisable.

Licensed Professional Counselors & Licensed Clinical Professional Counselors

Similar to the fee-splitting prohibition language found in both the licensing acts for clinical psychologists, licensed social workers and licensed clinical socials workers, the *Illinois Professional Counselor and Clinical Professional Counselor Licensing and Practice Act*, 225 ILCS 107/1

[5] See Footnote 3.

et seq., provides a similar prohibition. The relevant section as part of the grounds for discipline states:

> *(a) The Department[6] may refuse to issue, renew, or may revoke, suspend, place on probation, reprimand, or take other disciplinary or non-disciplinary action as the Department deems appropriate, including the issuance of fines not to exceed $10,000 for each violation, with regard to any license for any one or more of the following:*
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> *(12) Directly or indirectly giving to or receiving from any person, firm, corporation, partnership, or association any fee, commission, rebate or other form of compensation for any professional service not actually rendered. Nothing in this paragraph (12) affects any bona fide independent contractor or employment arrangements among health care professionals, health facilities, health care providers, or other entities, except as otherwise prohibited by law. Any employment arrangements may include provisions for compensation, health insurance, pension, or other employment benefits for the provision of services within the scope of the licensee's practice under this Act. Nothing in this paragraph (12) shall be construed to require an employment arrangement to receive professional fees for services rendered.*

225 ILCS 107/80(a)(12). The implementing regulations for the licensing act pertaining to licensed professional counselors and licensed clinical professional counselors provides a non-exhaustive list of conduct considered to be unethical, unprofessional or unauthorized and grounds for discipline (*see* 68 Ill. Admin. Code 1375.225); however, the relevant regulation does not specifically include a fee-splitting prohibition. Yet, it is advisable that, in accord with the statute, licensed professional counselors and licensed clinical professional counselors not engage in fee-splitting.

Medical Doctors/Physicians

The fee-splitting prohibition is most elaborated in the *Illinois Medical Practice Act*, 225 ILCS 60/1 *et seq.*, which is applicable to all Illinois licensed medical doctors. Section 22.2 of the *Illinois Medical Practice Act* states:

> *(a) A licensee under this Act may not directly or indirectly divide, share or split any professional fee or other form of compensation for professional services with anyone in exchange for a referral or otherwise, other than as provided in this Section 22.2.*
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> *(b) Nothing contained in this Section abrogates the right of 2 or more licensed health care workers as defined in the Health Care Worker Self-referral Act[7] to each receive adequate compensation for concurrently rendering services to a*

[6] *See* Footnote 4.

[7] *See* 225 ILCS 47/1 *et seq.*

patient and to divide the fee for such service, provided that the patient has full knowledge of the division and the division is made in proportion to the actual services personally performed and responsibility assumed by each licensee consistent with his or her license, except as prohibited by law.

(c) Nothing contained in this Section prohibits a licensee under this Act from practicing medicine through or within any form of legal entity authorized to conduct business in this State or from pooling, sharing, dividing, or apportioning the professional fees and other revenues in accordance with the agreements and policies of the entity provided:

(1) each owner of the entity is licensed under this Act;

(2) the entity is organized under the Medical Corporation Act[8], the Professional Services Corporation Act[9], the Professional Association Act[10], or the Limited Liability Company Act[11];

(3) the entity is allowed by Illinois law to provide physician services or employ physicians such as a licensed hospital or hospital affiliate or licensed ambulatory surgical treatment center owned in full or in part by Illinois-licensed physicians;

(4) the entity is a combination or joint venture of the entities authorized under this subsection (c); or

(5) the entity is an Illinois not for profit corporation that is recognized as exempt from the payment of federal income taxes as an organization described in Section 501(c)(3) of the Internal Revenue Code and all of its members are full-time faculty members of a medical school that offers a M.D. degree program that is accredited by the Liaison Committee on Medical Education and a program of graduate medical education that is accredited by the Accreditation Council for Graduate Medical Education.

(d) Nothing contained in this Section prohibits a licensee under this Act from paying a fair market value fee to any person or entity whose purpose is to perform billing, administrative preparation, or collection services based upon a percentage of professional service fees billed or collected, a flat fee, or any other arrangement that directly or indirectly divides professional fees, for the administrative preparation of the licensee's claims or the collection of the licensee's charges for professional services, provided that:

(i) the licensee or the licensee's practice under subsection (c) of this Section at all times controls the amount of fees charged and collected; and

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[8] See 805 ILCS 15/1 *et seq.*
[9] See 805 ILCS 10/1 *et seq.*
[10] See 805 ILCS 305/0.01 *et seq.*
[11] See 805 ILCS 180/1-1 *et seq.*

> *(ii) all charges collected are paid directly to the licensee or the licensee's practice or are deposited directly into an account in the name of and under the sole control of the licensee or the licensee's practice or deposited into a "Trust Account" by a licensed collection agency in accordance with the requirements of Section 8(c) of the Illinois Collection Agency Act*[12].
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> *(e) Nothing contained in this Section prohibits the granting of a security interest in the accounts receivable or fees of a licensee under this Act or the licensee's practice for bona fide advances made to the licensee or licensee's practice provided the licensee retains control and responsibility for the collection of the accounts receivable and fees.*
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> *(f) Excluding payments that may be made to the owners of or licensees in the licensee's practice under subsection (c), a licensee under this Act may not divide, share or split a professional service fee with, or otherwise directly or indirectly pay a percentage of the licensee's professional service fees, revenues or profits to anyone for: (i) the marketing or management of the licensee's practice, (ii) including the licensee or the licensee's practice on any preferred provider list, (iii) allowing the licensee to participate in any network of health care providers, (iv) negotiating fees, charges or terms of service or payment on behalf of the licensee, or (v) including the licensee in a program whereby patients or beneficiaries are provided an incentive to use the services of the licensee.*

225 ILCS 60/22.2. Notably, the *Illinois Medical Practice Act* permits the use of percentage billing contracts as long as certain conditions exist (*see* 225 ILCS 60/22.2(d)) per the amendments made to the Act in 2009; however, no similar exception exists for the above-mentioned mental health professionals, *i.e.*, clinical psychologists, licensed clinical social workers, licensed social workers, licensed professional counselors and licensed clinical professional counselors.

Fee Splitting Prohibition Upheld by Illinois Courts

Unlike the fee-splitting provisions found in the licensing acts that pertain to mental health professionals (*i.e.,* clinical psychologists, licensed clinical social workers, licensed social workers, licensed professional counselors and licensed clinical professional counselors), the fee-splitting limitation found in the *Medical Practice Act* has been scrutinized and reviewed by Illinois courts. While the fee-splitting prohibition of the *Medical Practice Act* is inapplicable to non-physicians (i.e., psychologists, social workers, counselors, etc.), the courts' interpretation and application of the statute provides guidance to non-physicians attempting to understand how the fee-splitting prohibition may be applied and enforced in their professions. The review and analysis of the cases below is for the benefit of all providers, including physicians and non-physicians, who may have agreements in place that have fee-splitting implications.

[12] *See* 225 ILCS 425/1 *et seq.*

There have been several Illinois Appellate Court cases that prohibit payments by physicians for management or other services based upon a percentage of professional income. Specifically, courts have found that contracts calling for a marketing firm to "receive a consultant's fee of 10% on all billings collected by [a physician] in connection with such referrals," to be in direct violation of the Act.[13] The Court determined that, "[t]he [Medical Practice Act], in its plain terms, prohibits the receipt of any fee or commission, direct or indirect, for professional services not actually rendered."[14] Courts have also found strong public policy grounds in favor in striking down fee-splitting arrangements.[15] The First District Appellate Court has stated, "[t]here is a danger that a doctor, knowing that he had to split his fees with one who did not render medical services, might be hesitant to provide proper services to a patient. Conversely, unneeded treatment might be rendered just because of the need to split fees. In either case, the interests of the patient would be compromised."[16]

Similarly, an Illinois appellate court has struck down as void and unenforceable agreements between physicians and non-physicians, where the non-physician was to refer patients in need of medical services to the licensed physicians and, in exchange, the profits from this partnership would be split 50-50.[17] Though the non-physicians attempted to uphold the terms of the agreement in order to receive an accounting and argued that the arrangement did not violate Illinois law since the law only addressed fee-splitting in the context of patient referrals and the agreement here included legitimate management services, the Court stated, "although the [Medical Practice] Act clearly prohibits agreements which can be characterized as fee-splitting agreements, the reach of the statute is not limited to fee-splitting, but rather, ***prohibits all other fee sharing arrangements not specifically authorized by the Act***. . . . '[t]he language of our statute is very broad. Nothing in the statute indicates an intent to limit the prohibition on fee sharing to a referral context.'"[18] While the Court found that the arrangement between the parties included "some legitimate management services," the Court determined the method of payment for these services was improper, whereby the non-physicians were to be compensated through a percentage of the net profits generated by the physicians.[19] The non-physicians argued that if this payment arrangement constituted illegal fee sharing, then virtually every payment made by a doctor for supplies, electricity, etc. would constitute fee sharing since the payment would ultimately come out of the money received from patient fees.[20] The Court found plaintiff's argument not compelling, and stated,

> *[G]enerally, payments made to the electric company or members of a doctor's support staff do not depend on how much money the doctor earns. Such payments must be made regardless of whether the doctor makes or loses money that month. Under the agreement at issue here, [non-physicians] were to be compensated through a percentage of the net profits generated by the [*

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[13] *E & B Marketing Enterprises, Inc. v. Ryan*, 209 Ill. App. 3d 626, 627-30 (1st Dist. 1991).
[14] *Id.* at 629-30.
[15] *See id.* at 630.
[16] *Id.* at 630 (*citing Leoris v. Dicks*, 150 Ill. App. 3d 350 (1st Dist. 1986)).
[17] *See Practice Management, Ltd. v. Schwartz,* 256 Ill. App. 3d 949, 951 (1st Dist.1993).
[18] *Id.* at 953-54 (Emphasis added.) *See also Lieberman & Kraff v. Desnick,* 244 Ill. App. 3d 341 (1st Dist. 1993).
[19] *Id.* at 954-55.
[20] *Id.*

> *] physicians. If [the physicians'] patient billings failed to exceed the sum of salary, bonuses, and malpractice insurance premiums, plaintiffs would receive no compensation. However, if the patient billings exceeded the sum of the salary, bonuses and malpractice insurance plaintiffs would receive a 50% share. This is improper fee sharing regardless of the fact that legitimate management services may have been performed.*[21]

Notably, the above analysis of the Court is significant to all providers entering into agreements that may, on their face, seem legitimate, but in fact include a fee sharing arrangement where a percentage of fees collected is allotted to a party to the agreement. Further, this case is important in understanding that the fee-splitting prohibition is not limited to fee-splitting in the context of patient referrals. The Court here also looked to public policy considerations, and determined fee-splitting arrangements to be against public policy, "because the public is best served by recommendations uninfluenced by financial considerations."[22]

In March 2002, the Illinois Attorney General issued an opinion that a standard preferred provider agreement (insurance contract) that required physicians (participating providers) to pay the preferred provider organization "an administrative fee equal to five percent (5%) of the amounts allowed to the [Participating Provider] under the Rate Schedule for the provision of Medical Services to Members by the Participating Provider" violated the fee-splitting prohibition of the *Medical Practice Act*.[23] The Attorney General found that because the agreement clearly requires the physician to pay a portion of his/her fees from each patient visit to the preferred provider organization, the agreement was in violation of the fee-splitting prohibition for physicians.[24]

Most recently, in 2006, the Illinois Supreme Court had the opportunity to compare a flat fee arrangement to a percentage-based fee arrangement in determining whether fee-splitting existed in violation of the *Medical Practice Act*.[25] Notably, the percentage-based fee arrangement scrutinized by the Supreme Court in this case was the same fee arrangement examined by the Illinois Attorney General, and which the Attorney General found to be in violation of the *Medical Practice Act*. Specifically, this case involved participating physicians (psychiatrists) suing

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[21] *Id.*

[22] *Id.* at 953. *See also TLC The Laser Center, Inc. v. Midwest Eye Institute II, Ltd.*, 306 Ill. App. 3d 411, 426-30 (1st Dist. 1999) (service agreement between physicians and purchaser of the physicians' practice's assets was an illegal fee splitting arrangement, where a direct relation existed between the revenues generated by the practice and an annual fee physicians were required to pay the purchaser for administrative services, even where fee was not calculated on a straight percentage basis).

[23] *See* March 5, 2002 Opinion Letter, Office of the Illinois Attorney General, File No. 02-005.

[24] *Note:* Of note is that the majority of cases concern the enforcement of a contract that contain a payment schedule or fee structure resulting in fee-splitting, rather than an action for disciplinary purposes under a licensing act. To that end, the Attorney General noted that "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 the [fee-splitting provision of the Medical Practice Act], regardless of the purpose of the compensation." It should also be noted that for the purposes of determining the validity of an underlying fee-splitting provision in an agreement, the Attorney General found no distinction to be made by the courts between a fee that is received from an insurance company as opposed to one that is received from the patient directly.

[25] *See Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, (2006).

the operator of a network of health care providers, seeking a court declaration that a previously charged percentage-based fee for administrative services violated the fee-splitting prohibition of the *Medical Practice Act* and that a revised flat-fee arrangement also violated the Act.[26] The Supreme Court found that the agreement requiring participating physicians to pay the operator of a network of healthcare providers five percent (5%) of the amount allowed in the operator's rate schedule for services provided to members by the physician was in violation of the fee-splitting prohibition, consistent with the opinion of the Attorney General.[27] However, the Illinois Supreme Court found that the flat fee arrangement did not violate the fee-splitting prohibition.[28] In making this determination, the Supreme Court noted in its opinion, the operator's flat fee was "not based [on] or linked to revenue, gross receipts or billings collected. Instead it is based on the volume of claims that [the operator of the network] processed for a physician during the prior year and the physician's specialty."[29] The Supreme Court compared the flat fee arrangement in this case, which was based on *claims* volume to one based on *revenues* volume.[30] The Supreme Court held that since the monthly flat fee in this case "is based on the volume and complexity of the administrative services provided, the fee will *not* automatically increase as the revenue of the participating physician increases," thus, it did not constitute prohibited fee sharing.[31] The Supreme Court reasoned that unlike a percentage-based fee arrangement, the flat fee arrangement did not improperly influence the professional choices made by the participating physicians inasmuch as it did "not require a sharing of professional fees which would relate patient care to an increase or decrease in revenue."[32]

Based upon the survey of cases above, it seems evident that Illinois courts of relevant jurisdiction have struck down time and again agreements that include a fee-splitting provision or implicate percentage based fee sharing, where patient interests may be compromised in lieu of revenue generation. In the section below, 'Review & Recommendations', we summarize best practices when preparing agreements in order to avoid having an agreement found unenforceable based upon a fee-splitting arrangement.

Criminal Penalties for Acts Involving Federal Health Care Programs

Related to the fee-splitting prohibition of the *Illinois Medical Practice Act* and the licensing statutes of mental health providers, providers should also be reminded of the criminal penalties that exist for 'illegal remunerations' involving federal dollars, i.e., Medicare and Medicaid funds. Section 1320a-7b of Title 42, states in relevant part:

> *(b) Illegal remunerations*

[26] *Id.* at 279.
[27] *Id.* at 289.
[28] *Id.* at 294-95.
[29] *Id.* at 294.
[30] *Id.* at 295.
[31] *Id.*
[32] *Id* at 296.

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person--

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b (Emphasis added.) The above Medicare and Medicaid fraud and abuse statute provides a serious and sobering prohibition against fee-splitting. While there are exceptions found under subparagraph (3) (*see* 42 U.S.C. § 1320a-7b(b)(3)), for purposes of this memo, we limit our discussion of Medicare and Medicaid fraud to the above and encourage providers who receive federal healthcare dollars to carefully review any fee arrangements and/or agreements with providers they have in place that may be in violation of the forgoing federal statute.

Review & Recommendations

Fee-splitting is a prohibited practice amongst many professions, including those discussed above, and can lead to professional discipline, civil and criminal penalties. The prohibition stems from fee-splitting being against public interest and policy. The concern continues to be that "fee splitting arrangements may compromise the judgment of physicians [or providers], influencing them to provide unnecessary but profitable treatment, and may also cause non-physicians [or non-providers] to recommend physicians [or providers] out of self

interest."[33] Accordingly, referrals made out of self-interest rather than the competence of the professional being referred or the need of the patient to receive care is harmful to the public and compromises patient care.

While the above discussed licensing statutes provide exceptions where a "bona fide independent contractor or employment arrangement" exists, the determination of the existence of a *bona fide* independent contractor or employment arrangement is a fact-based inquiry and may be reviewed in the totality of circumstances by courts. Additionally, for physicians subject to the *Medical Practice Act*, percentage-based billing contracts may be permissible if the three elements exist.[34] Since it may be difficult to readily determine whether an exception applies to your fee arrangement, it is our recommendation that healthcare providers, including physicians and mental health providers, review and renegotiate, if necessary, all contracts capable of interpretation as fee-splitting arrangements. Any fee arrangement that is ambiguous and may be interpreted as fee-splitting, should be revised and legal counsel should be sought. The issue of fee-splitting is very complex in that it is unclear whether every revenue sharing arrangement providers engage in is seen as fee-splitting. Accordingly, the conservative approach is to avoid all percentage-based fee arrangements and, instead, utilize a flat-fee for service arrangement that ties payment to services rendered by the provider.

With regard to clinical psychologists practicing in Illinois, it should be noted that Standard 6.07 of the *American Psychological Association's Ethical Principles of Psychologists and Code of Conduct* ("APA Ethics Code"), primarily reflects the same prohibition against fee-splitting reflected in the applicable licensing act, stating specifically,

> *When psychologists pay, receive payment from, or divide fees with another professional,* ***other than*** *in an employer-employee relationship, the payment to each is based on the services provided (clinical, consultative, administrative, or other) and is not based on the referral itself.*

APA Ethics Code, Standard 6.07, Referrals and Fees (emphasis added.) The implementing regulations of the *Clinical Psychologist Licensing Act*, incorporates the standards of the APA Ethics Code. *See* 68 Ill. Admin. Code 1400.80(k). The significance of this is that in reading the relevant statute, regulation and APA Ethics Code standard together, the language may be interpreted to state that a clinical psychologist should only receive fees for services actually or personally rendered unless he/she is a *bona fide* employee of the practice, since Standard 6.07 **only** carves out a safe harbor for the employer-employee relationship. Again, the *bona fide* existence of the employer-employee relationship may be determined by a court of law, as mentioned above. However, we find that an argument can be made for the safe harbor protection of clinical psychologists who are engaged in a fee-splitting arrangement based upon a true employer-employee relationship, since the APA Ethics Code is incorporated by reference in the Illinois

[33] *Center for Athletic Medicine, Ltd. v. Independent Medical Billers of Illinois, Inc.,* 383 Ill. App. 3d 104, 112–13 (1st Dist. 2008).

[34] See 225 ILCS 60/22.2(d).

implementing regulations of the relevant licensing act. In an abundance of caution, we continue to advise that providers take the conservative approach and avoid all percentage-based fee arrangements. Nevertheless, with regard to clinical psychologists[35] who are in *bona fide* employer-employee relationships and partaking in a fee-splitting arrangement, arguably due to the safe harbor created by the APA Ethics Code and recognized by Illinois, so long as a court finds that a *bona fide* employer-employee relationship exists (*i.e.,* appropriate local, state and federal employment taxes are being paid, workman's compensation requirements, etc.), you will be exempt from adhering to the fee-splitting prohibition.

In addition to above, other recommendations include limiting the term of the agreement to one-year, which provides professional practices the opportunity to evaluate the arrangement and make changes as deemed necessary. Additionally, the above cases and the opinion from the Attorney General, in particular, demonstrate the importance of including severability language in agreements, and even reformation language. This essentially allows for the problematic fee-splitting provision to be severed from the remainder of the agreement in question, so long as the agreement as a whole is not in violation of the law or public policy.

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[35] *Note:* The guidance presented here is specific to clinical psychologists. You are encouraged to review your profession's specific code of conduct for guidance and limitations on fee-splitting or fee-sharing arrangements.