ALERT

TO: WT Clients and Friends

FROM: Whitted Takiff LLC

DATE: July 5, 2017

RE: FEE-SPLITTING PROHIBITION IMPLICATIONS FOR PHYSICIANS & MENTAL HEALTH PROVIDERS

*** Last year we updated our memorandum on the "fee-splitting" prohibition in Illinois. Below is a 1-page summary for your information. You can find the full memorandum on our website at www.whittedtakifflaw.com under the "For Professionals" section. We recommend that you review your contractual arrangements on a regular basis to ensure compliance with Illinois law and your profession's ethics code. ***

Fee-Splitting Prohibition: A Brief Summary

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. 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.

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Fee-splitting is a prohibited practice amongst many professions, 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." 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 professional licensing statutes, which we discuss thoroughly in our memo, 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. 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.

Other recommendations include limiting the term of agreements containing fee arrangements to one-year, which provides professional practices the opportunity to evaluate the arrangement and make changes as deemed necessary on an annual basis. Additionally, the case law we discuss in our full memo and the opinion from the Attorney General on this topic, in particular, demonstrate the importance of including severability language in employment and independent contractor 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, should the need arise or be required by a court of law, so long as the agreement as a whole is not in violation of the law or public policy.

Please see the full memo on our website, www.whittedtakifflaw.com, to learn more.

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