

ID # 14607
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RENE GUERRA



RQ-301

January 3, 1992

The Honorable Dan Morales
Attorney General of the State of Texas
Supreme Court Blvd.
P.O. Box 12548
Austin, Texas 78711-2548

Received
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Opinion Committee

Re: Request for Legal Opinion

Dear General Morales:

Our city's only hospital, Edinburg Hospital, is a "Hospital Authority" created pursuant to Chapter 262, Health and Safety Code, Vernon's Texas Code Annotated.

In general, the institution is an acute care hospital providing, among other things, emergency room services (hereinafter "E.R.").

The typical hospital E.R. is staffed by nurses, who are usually employees of the hospital, and physicians who may or may not be on the active medical staff of the hospital. The principal responsibility of E.R. physicians is to evaluate and stabilize the patient. If the medical condition of the E.R. patient requires admission to the hospital, the patient's family physician, any specialist brought in by the family physician, and the patient will determine whether the patient will be admitted to a hospital setting.

If the E.R. patient had no meaningful relationship with another physician, the patient will be admitted to the hospital, if necessary, by a physician on the active medical staff of that hospital.

Like most hospitals in Texas, Edinburg Hospital has contracted with a local medical firm to provide for E.R. - physician coverage at the hospital. However, because the members of this firm are not on the active medical staff of Edinburg Hospital and are retained solely to provide services in the emergency room, they are unable to admit patients to Edinburg Hospital.

ACCOMPANIED BY ENCLOSURES -
FILED SEPARATELY

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Accordingly, the hospital must recruit physicians from its active medical staff to be available at E.R. for the sole purpose of admitting patients who have no meaningful relationship with another physician and taking charge of their follow-up care.

Further, because Edinburg Hospital finds it difficult to recruit and retain physicians on its active medical staff, it proposes to compensate its physicians for the aforementioned services.

I believe section 306(f) of the Medical Practices Act, Article 4495b, Vernon's Texas Civil Statutes, authorizes such payments. Section 306(f), enacted by S.B. No. 516, provides, in part:

Nothing in this Act shall be construed to prohibit a county or municipal corporation or a hospital district or authority from contracting with a physician to provide services at a hospital owned and operated by... the Hospital District or authority, from paying the physician a minimum guarantee to assure the physicians availability...
[Emphasis added; copy enclosed]

The hospital is mindful, however, of the Medicare Anti-fraud provisions of 42 U.S.C., Section 1320a-7b(b) and the parallel provisions Sections 161.091, Health and Safety Code, Vernon's Texas Civil Statutes, which prohibit payment or other remuneration for securing or soliciting patients.

For that reason, the hospital proposes to pay compensation to physicians to be available to admit E.R. patients be made on a flat fee or per diem basis, and that it reflect fair market value for the services to be performed.

Further, in order to meet the federal standards established by "Safe Harbor" regulations for personal service contracts, the hospital proposes that any agreement to pay its physicians as aforementioned will be done under the following conditions:

- (1) be set out in writing and signed by the parties;
- (2) specify the services to be provided by the physician;
- (3) specify the schedule for delivery of such services; and
- (4) cover a period of not less than one (1) year.

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The hospital believes that by paying for such services of a flat fee or a per diem basis, there will be no link between payment to its physicians and the volume or value of the business generated by those admissions.

Accordingly, the hospital believes this arrangement would be lawful under Health and Safety Code Section 161.091(e)

(e) This section shall not be construed to prohibit remuneration for advertising, marketing, or other services that are provided for the purpose of securing or soliciting patients consistent with the fair market value of the services, and is not based on the volume or value of any patient referrals or business otherwise generated between the parties.
[Emphasis added]

Therefore, your opinion is requested on the following:

May Edinburg Hospital Authority pay its physicians, on a flat fee or per diem basis, to be on call to admit E.R. patients to the Hospital without violating Section 161.091, Texas Health and Safety Code, which prohibits remuneration for securing or soliciting patients or patronage.

Respectfully submitted,



Rene Guerra
Criminal District Attorney
Hidalgo County

ATTACHMENTS:

SB#516
SB#7
42 CFR 1001, ET. SEQ.

CERTIFIED MAIL RECEIPT NO. P 556 917 978