STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF CHIROPRACTIC,	)	
Petitioner,	)	
vs.	)	Case No. 99-5011
DANIEL PIA,	)	
Respondent.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tampa, Florida, on March 15, 2000.

APPEARANCES

For Petitioner: Wings S. Benton, Senior Attorney
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STATEMENT OF THE ISSUE

The issue is whether Respondent is guilty of violating the prohibitions against soliciting patients or paying kickbacks.

PRELIMINARY STATEMENT

By Amended Administrative Complaint dated May 24, 1999, Petitioner alleged that Respondent, a licensed chiropractor, engaged in a practice in which, through the efforts of a third party, he obtained patients through solicitation, as defined by Rule 59N-15.002, Florida Administrative Code, in violation of Sections 455.237(2) and 460.413(1)(l), (v), and (q), Florida Statutes.

At the hearing, Petitioner called six witnesses and offered into evidence 21 exhibits. Respondent called seven witnesses and offered into evidence seven exhibits. All exhibits were admitted except Petitioner Exhibits 14, 15, 20, and 21. Petitioner withdrew Petitioner Exhibits 20 and 21.

The court reporter filed the Transcript on April 13, 2000.

FINDINGS OF FACT

1. Respondent has been a licensed chiropractor in Florida for over 40 years. Respondent has operated the Albany-Sligh Clinic since 1964. In 1965 and 1985, Respondent was the president of the Hillsborough County Chiropractors Association. He has been the Secretary of the Florida Chiropractic Association. Respondent has not previously been disciplined.

2. Respondent attributes part of the success of his chiropractic practice to the use of consultants, such as Singer Consultants in Clearwater. Respondent has also attended the lectures of Dr. Peter Fernandez. Practicing chiropractors may

pay sizable sums--one reported pay $15,000--for the advice of professional consultants.

3. Respondent obtains his patients from other patients and advertising in the telephone yellow pages. Essentially, Respondent has always allowed free initial consultations, as he cancels the account balance of anyone who does not pay for the initial office visit, provided there have been no additional visits.

4. In late 1991, Susan Prebeck visited Respondent. She introduced herself as the wife of a chiropractor and explained that she and her husband were thinking of moving from Colorado to Florida, specifically the Tampa Bay area.

5. During lunch, Ms. Prebeck stated that it was legal in Colorado for third parties to call prospective patients and conduct health surveys. She stated that she was performing this service for other chiropractors in Colorado.

6. Respondent replied that she could do telemarketing with a group, but she could not charge a fee for the patients obtained by this means. Respondent knew that paying a fee to a third party for obtaining a patient was illegal, and he told Ms. Prebeck that he would never do such a thing.

7. A couple of years later, in late October 1993, Ms. Prebeck came by Respondent's office and asked that he agree to

meet with her and her husband. One or two weeks later, Respondent met Glenn Prebeck and Ms. Prebeck at a prearranged time.

8. The meeting lasted one to one and one-half hours. During this time, Dr. Prebeck explained what he could do to enhance Respondent's practice. Among other things, Dr. Prebeck explained the complex mechanics by which Respondent could expand into other clinics and various means of educating one's staff in matters such as insurance.

9. During the meeting, Respondent gave Dr. Prebeck a $1000 check drawn on Respondent's professional account, dated October 14, 1993, and payable to Prebeck Consultants, Inc., a corporation controlled by Dr. Prebeck. The check states that it is a refundable deposit for 30 days' consulting services from Dr. Prebeck.

10. On November 22, 1993, Respondent, on behalf of his professional association, signed a Community Service/Pilot Program Agreement (Community Service Agreement). Although unsigned by the Florida Physician's Care Center--an entity controlled by Dr. or Ms. Prebeck--the agreement was honored by the Florida Physician's Care Center. The Community Service Agreement provides that, as "part of its community service functions," Florida Physician's Care Center would contact injured persons and inform them that Respondent would provide them a free consultation and examination. The Community Service Agreement

states that both parties are providing these services as a "community service" and that "no compensation shall be paid by [Respondent] to the Center for such service."

11. The following day, Respondent, on behalf of his professional association, signed a Consulting Agreement with Physicians Consultant, Inc., for which Dr. Prebeck signed. This agreement provided that the Physicians Consultant, Inc. would provide one-on-one consulting on a variety of topics in return for which Respondent would "pay for such services by a fee to be determined by the amount of consulting service rendered."

12. By check dated November 23, 1993, Respondent paid Prebeck Consultants an additional $2000. Subsequently, Respondent delivered three more checks, each in the amount of $3150, to Prebeck Consultants; these checks are dated March 24, April 3, and May 27, 1994.

13. There is no dispute that the Prebecks engaged in criminal activity through the solicitation of insurance clients. There is no dispute that Respondent had no familial or prior professional relationship with the patients referred to him. Although Respondent disputes the point, the evidence is clear and convincing that a significant motive, in accepting referrals for free initial office visits, is the pecuniary gain that follows from the establishment of a patient/doctor relationship.

14. The issue in this case is whether Respondent solicited patients through the efforts of the Prebecks. The Prebecks have

generally testified that their deal with Respondent was a straightforward exchange of money for referrals. Respondent has generally testified that their deal was an exchange of money for consultation services, and Ms. Prebeck freely chose to send him patients as part of her self-declared "community service," which actually consisted of a scripted telemarketing scheme to find injured persons with third party payors and send them to a participating chiropractor, such as Respondent.

15. The Prebecks booked the money paid by Respondent as payments for patients. The first payment of a $1000 deposit and $2000 balance bought ten referrals. The price then increased, and the next three payments of $3150 bought a total of 30 more referrals.

16. It is difficult to find the correspondence between the total sum paid, $12,450, and the 56 referred patients. The resulting average of $2223 per 10 patients is considerably below the stated prices, according to the Prebecks. The Prebecks did not explain this discrepancy. However, the Prebecks supplied early referrals for free to another chiropractor before asking her to agree to pay for the patients whom they had shown they could produce.

17. However, it is more difficult to document the consultations. Respondent testified that he no longer has the notes that he made from the consultations. Respondent's office

manager and junior chiropractor saw little, if any, evidence of these consultations, for which Respondent paid over $12,000.

18. The fact that Respondent signed the Community Service Agreement and Consulting Agreement only one day apart suggests a link between the two contracts. Also, even though Ms. Prebeck, not Dr. Prebeck, was involved in the "community services," Dr. Prebeck presented both contracts for Respondent to sign.

19. Much more indicative of a link between the two contracts is a letter dated March 21, 1994, from Respondent to Dr. Prebeck. Occasioned by the renewal of "my contract," which, from the context is clearly the Consulting Agreement, Respondent's letter begins by expressing satisfaction with the consultation services that he has received from Dr. Prebeck. Mentioning the statutory prohibition against paying for patients, the letter declares: "It is my understanding, and has been from the beginning, that the services for which I am paying you are strictly consultation."

20. Getting to the point, the letter continues:

> I have been delighted that you have been able to recommend me to Community Services pilot program, wherein I am giving free screenings to patients who have been recently involved in automobile accidents. It enables patients to have an opportunity to find out if they have subluxations leading to disability, otherwise would probably never have known.
>
> However, I want to make certain, by your signature below, restating what you told me upon our initial contact, that Community Services is not owned by you, or in any way has any bearing on our consulting contract.

> I say this because I want to make certain that I am paying only for your consulting services, and it is in no way tied into the occasional patients that we receive from Community Services, a pilot program that I understand is separate from your consulting services.
>
> Please sign below confirming same, since that is the only issue that is in question. Otherwise, I am delighted with the consulting services, and I feel that the three thousand dollars paid on November 23, 1993, was well worth it for the numerous personal and telephone consultations we have had, and advice I have received.
>
> I, Dr. Glen Prebeck, hereby confirm with my signature below that the above facts are true, and that Dr. Pia's payment is strictly for my consulting services. Fees for consulting services go only to me, and in no way are related to the free screenings done by Dr. Pia through Community Service.

21. Respondent signed the March 21, 1994, letter, but his copy does not bear the signature of either Prebeck or any other signatory for Prebeck Consultants. Although Dr. Prebeck was ambivalent about numerous aspects of his dealings with Respondent--such as testifying that he might have provided consultant services, but later testifying that he did not provide such service--Dr. Prebeck was positive that he had never seen this letter. Coupled with the fact that the prudence that would have dictated the letter's preparation would also have dictated obtaining a signature and safekeeping of the signed copy, the fact is that the letter was a self-serving document never signed, and possibly never presented, to either Prebeck.

22. Obviously, the same concerns that Respondent expressed to Ms. Prebeck during their first meeting persisted through the first four months of his arrangements with the Prebecks. Despite these reservations and the failure to obtain even the signature of Dr. Prebeck to his self-serving letter, Respondent paid Dr. Prebeck three more checks--the first three days after the date of the letter.

23. Objectively, the reality of the arrangement between Respondent and the Prebecks was that Respondent would not receive the referrals unless he paid Dr. Prebeck. This reality was, of course, clear to the Prebecks from the start. The question, though, is the extent, if any, to which Respondent understood the reality of the arrangement.

24. Respondent was aware that Ms. Prebeck had charged for referrals outside of Florida, that to do so in Florida was illegal, and that the formal arrangement that he had with the Prebecks was a matter of concern because, if the two Prebeck organizations were treated as one, Respondent was paying for referrals.

25. Respondent's testimony is evidently self-serving and poorly documented. However, the Prebecks' testimony is also self-serving. Although their criminal cases have been resolved, they hope to shorten the terms of probation through their cooperation with the State of Florida in administrative proceedings, such as this case.

26. Respondent's many years of practice suggest that he should have been on inquiry notice that Ms. Prebeck's organization was merely a unscrupulous boiler-room operation. His 40 years' experience and long presence in the chiropractic community suggest that Respondent should have heard about the "community service" being performed by Ms. Prebeck, from someone other than one of the Prebecks. But Respondent conveniently ignored the absence of independent verification of the activity of Ms. Prebeck's organization, just as he ignored the strong suggestion of improper payments if the two transactions were collapsed into a single transaction, as, in reality, they were.

27. A preponderance of the evidence supports a finding that Respondent knew that he was, in reality, paying for referrals. This knowledge is established by the initial presentation by Ms. Prebeck that prompted an anti-solicitation warning from Respondent, the link between the two contracts and their presentation by Dr. Prebeck, the numerous "free" referrals from Ms. Prebeck that followed the payment of the "consultation" fees, the absence of proof of consultation services, Respondent's many years' experience, and, of course, the testimony of the Prebecks.

28. But the evidence in support of Respondent's knowledge of the purpose of the "consultation" payments is not clear and convincing. The Prebecks' credibility is impaired, although not destroyed, by their fraudulent criminal behavior and their current legal posture. The relationship between the payments and

referrals is imperfect. The retention of a consultant is a not uncommon practice. Respondent has practiced many years without discipline. These facts create sufficient doubt as to preclude a finding of clear and convincing evidence.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

30. Section 460.413(1)(l)(1993) provides that the Board of Chiropractic Medicine may impose discipline for "[s]oliciting patients either personally or through an agent . . .."

31. Rule 64B-15.002(2), formerly Rule 59N-15.002(2) prohibits the solicitation:

> in person or otherwise, a prospective patient with whom a chiropractor has no family or prior professional relationship, when a significant motive for such solicitation is the chiropractor's pecuniary gain. A chiropractor shall not permit employees or agents of the chiropractor to solicit in the chiropractor's behalf. A chiropractor shall not enter into an agreement for, charge, or collect a fee for professional services obtained in violation of this rule. The term "solicit" includes contact in person or by telephone.

32. Section 460.413(6) provides:

> In any administrative action against a chiropractic physician which does not involve revocation or suspension of license, the department shall have the burden, by the greater weight of the evidence, to establish the existence of grounds for disciplinary

> action. The department shall establish grounds for revocation or suspension of license by clear and convincing evidence.

33. The administrative action sought by Petitioner involves suspension, as reflected in Petitioner's proposed recommended order. However, as used in Section 460.412(6), "administrative action" means the actual imposition of discipline. The prosecution of this case and proposal of discipline--even revocation or suspension--is merely proposed administrative action.

34. Thus, for Petitioner to revoke or suspend Respondent's license, it must prove the relevant facts by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996), and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

35. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court defined clear and convincing evidence as:

> that a workable definition of clear and convincing evidence must contain both qualitative and quantitative standards. We therefore hold that clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

35.1 As noted above, per proved the material facts by a preponderance of the evidence, not clear and convincing evidence.

36. The difficulty of proving the facts of this case may suggest the need for consideration of the promulgation of an attribution rule, so that licensees paying certain minimum sums to certain classes of persons cannot accept referrals from persons within certain classes of relationships with the payor persons. Absent such a rule, Petitioner must prove that the licensee knowingly participated in an unlawful arrangement.

37. Rule 64B2-16.003(1)(t) sets a disciplinary range of $500 to one year's probation for a violation of Section 460.413(1)(v), which more specifically describes the acts and omissions of which Respondent is guilty than does Section 455.624(1)(q), which covers a violation of the anti-kickback statute, Section 455.657(2).

38. As Petitioner notes in its proposed recommended order, factors include in mitigation the length of time since the last violation and the length of time that Respondent has practiced without prior discipline. However, aggravating factors include the number of purchased referrals and the length of time over which Respondent participated in this scheme.

39. Section 460.413(2)(d) authorizes discipline in the form of a $10,000 administrative fine per offense. Sections 460.413(2)(e) and (f) authorize a reprimand and probation.

40. Given all of the circumstances, Petitioner should impose a fine of $5000 and a reprimand.

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order finding Respondent guilty of soliciting patients through an agent and imposing an administrative fine of $5000 and a reprimand.

DONE AND ENTERED this 26th day of June, 2000, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.