

California Anti-Kickback and Fee-Splitting Law for Smarties

January 15, 2020

By Michael H. Cohen

California **Anti-kickback and Fee-Splitting Law** for Smarties is the subject of today's video.

That's right, we're talking to the smarties, not the dummies. Dummies don't hire lawyers—well, not at first; they just copy stuff off the Internet and then wonder how they got in so much trouble, and *then after that* they hire lawyers. Smarties read statutes and they have a sense of what the law says; the problem, though, is that the law isn't written in English, it seems to be some code that you have to figure out, and even then.

That's where attorneys come in. We read the fine print, the big print, and everything in between, as well as the print that sends you all over the law looking for related legal rules and other content that interface with the rule of law that you're reading for reference.

And in the case of California's anti-kickback and fee-splitting laws, the rules can seem crazy-quilt, nonsensical, upside-down, or just plain contradictory.

As someone once put it, *"the Lord giveth, and the Lord taketh; but with lawyers, the one hand giveth, and the other hand taketh."*

Well, I don't know if that's exactly true, but let's go a little bit deeper into this anti-kickback law.

I'm Michael H. Cohen, founding attorney of the Cohen Healthcare Law Group. Since 1999, our law firm has counseled hundreds of healthcare industry clients every year on healthcare and FDA legal matters.

In this video, I'd like to clarify for you, California Business & Professions Code 650, the main anti-kickback and fee-splitting rule that California applies, as a state, to questions involving payments and compensation between medical doctors (or other licensed healthcare providers) and businesses, where the healthcare practitioner might have a financial interest in the referral.

We'll focus on three important sections of Business & Professions Code Section 650: subsection (a), (b), and (c).

Subsection (a) contains the prohibition—or as I like to say, in biblical language: Thou Shalt Not.

During my first year of law school, my Criminal Law Professor, used to refer to this as "TSN" for short: TSN, Thou Shalt Not. As in, for example, TSN (Thou Shalt Not) eat the fruit from the Tree of Life in the Garden of Eden.

Many statutes are framed this way, for example, section 650(a) says, essentially, Thou Shalt Not offer or receive a kickback

nor split the professional fee of a healthcare licensee (such as a medical doctor). That's it in a nutshell.

Here are the actual words of **Business & Professions Code Section 650(a)**:

"... [The offer, delivery, receipt, or acceptance by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest, or coownership in or with any person to whom these patients, clients, or customers are referred is unlawful.]"

Unlike federal anti-kickback law, this provision applies to "any person licensed" (as a healthcare licensee); however, there are other provisions under California law that mirror this basic anti-kickback provision and are broader, sometimes more specific.

Now, Section 650(b) is the section I call, "Thou Mayest." So, for example, "thou mayest eat any fruit in the Garden of Eden other than the fruit from the Tree of Life."

Section 650(b) provides an allowance—the thou mayest—for arrangements at fair market value:

"The payment or receipt of consideration for **services other than the referral of patients** which is based on a percentage of gross revenue or similar type of contractual arrangement shall not be unlawful if the consideration is commensurate with the value of the services furnished or with the fair rental value of any premises or equipment leased or provided by the recipient to the payer."

The idea here is that, if say the MD is paying your company a fee for management and marketing, and this fee is not based on the number of value of patients referred, then that is not a kickback or fee-splitting. And under California law, that fee can be based on a percentage of gross revenue.

For example, the medical practice has gross revenues of a million dollars a year, and pays the MSO (or management services organization), 25% of its gross revenues on a monthly basis for management and marketing services.

Here, clients often come to us with a proposed business structure and compensation arrangement, and they ask us whether, in our view, the proposed model is more likely to fall within 650(b), the allowance, or 650(a), the prohibition.

Now there's one more section I'd like to talk about. **California Business & Professions Code Section 650(d)** provides that, with specified exceptions:

"It shall not be unlawful for any person licensed under this division to refer a person to any laboratory, pharmacy, clinic ... or health care facility solely because the licensee has a proprietary interest or coownership in the laboratory, pharmacy, clinic, or health care facility, provided, however, that the licensee's return on investment for that proprietary interest or co-ownership shall be based upon the amount of the capital investment or proportional ownership of the licensee which ownership is not based on the number or value of patients referred."

In other words, if say you're a licensed medical doctor, if you refer your patient to a clinic or similar healthcare entity in which you have a financial interest, this is not necessarily a prohibited kickback (it might be prohibited under self-referral law), it's not a kickback as long as your financial interest is simply that of an investment, and you're getting paid not for the referral, but in accordance with your percentage investment.

Section 650(d) adds another sentence:

"Any referral excepted under this section shall be unlawful if the prosecutor proves that there was no valid medical need for the referral."

So, your referral has to be based on medical necessity.

Note that there is a whole separate statute which deals with the question of self-referral. Self-referral means you refer to an entity where you have a financial interest. Under federal law, we call that Stark. So we have to consult this statute as well: in California, it's called the **Physician Ownership Referral Act**, or PORA, and it's the California counterpart to the Stark law on the federal side.

But at least on the kickback front, a passive investment in a healthcare entity where you have a financial interest, is not automatically prohibited.

From here, we get lots of deep-in-the-weeds questions on specific arrangements. Because lots of healthcare entrepreneurs have creative ideas about arrangements where they want to recruit doctors to share in profits from an overarching enterprise that also sends back referrals, and that inevitably raises PORA and Business & Professions Code 650 issues.

We may address these in subsequent videos. For now, we wanted to give you the rudiments of 650(a), (b) and (d) as your basic building blocks in the world of California's prohibition against kickbacks and fee-splitting.

Thanks for watching. Here's to the success of your healthcare venture, we look forward to talking with you soon.

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