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Medical Profession—Anti-Kickback Statute: Licensed Medical Practitioners May Not Receive Financial Benefits from Referral of Patients or Sale of Medical Supplies to Patients.—Day v. Inland Empire Optical, Inc., 76 Wash. Dec. 2d 566, 456 P.2d 1011 (1969); RCW ch. 19.68 (1969)

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MEDICAL PROFESSION—ANTI-KICKBACK STATUTE: LICENSED MEDICAL PRACTITIONERS MAY NOT RECEIVE FINANCIAL BENEFITS FROM REFERRAL OF PATIENTS OR SALE OF MEDICAL SUPPLIES TO PATIENTS.—*Day v. Inland Empire Optical, Inc.*, 76 Wash. Dec. 2d 566, 456 P.2d 1011 (1969); RCW ch. 19.68 (1969).

The five defendant ophthalmologists and defendant Inland Empire Optical, Inc., whose stock was wholly owned by these doctors, occupied the same building.[1] Inside the waiting rooms of the doctors' offices were three strategically placed signs which informed patients of the presence of the optical shop on the floor below. Plaintiff doctors and a corporate optical firm brought suit to enjoin this cooperative practice, alleging a violation of Washington's anti-kickback statute.[2] Upon defendants' appeal from a superior court decree granting the injunction, the Washington Supreme Court affirmed as modified. *Held*: Ophthalmologists are entitled to own stock in a dispensing optical company, but only if they neither directly nor indirectly refer their

1. Inland occupied the bottom floor, and the doctors operated their clinic above. Inland's main entrance way faced a parking lot. This entrance way contained no markings to indicate the nature of the business within. The only other entrance to Inland's premises was from a stairway leading down from the reception hallway of the doctor's offices.

2. Plaintiffs contended that defendant doctors were acting in violation of WASH. REV. CODE § 19.68.010 (1969) by receiving a rebate in the form of an appreciation in the value of their Inland Empire Optical, Inc. stock, allegedly caused by referral of their patients to Inland Empire Optical. Twenty other doctors of various specializations intervened; the Eye and Ear Physicians' Council of Washington State filed an amicus brief; and the Attorney General entered as a friend of the court at the request of the Washington State Medical Disciplinary Board. The superior court held that there had been a rebate from Inland to defendant doctors and that this rebate had resulted from patient referrals. In dictum the superior court judge expressed the view that WASH. REV. CODE § 19.68.010 (1969) made it illegal for doctors to hold stock in a corporation that dispenses medical supplies, or to charge for any other medical services besides those personally performed.

WASH. REV. CODE § 19.68.010 (1969) provides:

> It shall be unlawful for any person, firm, corporation or association, whether organized as a cooperative, or for profit or non profit, to pay, or offer to pay or allow, directly or indirectly, to any person licensed by the state of Washington to engage in the practice of medicine and surgery, drugless treatment in any form, or dentistry, and it shall be unlawful for such person to request, receive or allow, directly or indirectly, a rebate, refund, commission, unearned discount or profit by means of a credit or other valuable consideration in connection with the referral of patients to any person, firm, corporation or association, or in connection with the furnishings of medical, surgical, or dental care, diagnosis, treatment or service, on the sale, rental, furnishing or supplying of clinical laboratory supplies or services of any kind, or any other goods, services or supplies prescribed for medical diagnosis, care or treatment.
>
> Any person violating the provisions of this section is guilty of a misdemeanor.

patients to it. *Day v. Inland Empire Optical, Inc.*, 76 Wash. Dec. 2d 566, 456 P.2d 1011 (1969).

A number of cases filed in 1948 by the Department of Justice against some 4000 doctors provided the stimulus for anti-kickback statutes such as Washington's R.C.W. ch. 19.68.[3] *United States v. American Optical Co.*,[4] for example, involved a class action by the Department of Justice against approximately 2000 physicians who were accused of sharing profits from the sale of optical equipment with the defendant American Optical. The defendants were charged with conspiring to influence patients to have their prescriptions filled at American Optical, which added extra charges for fitting fees and then split half the consumer price with the doctors. Defendants were enjoined from receiving payments under these arrangements. The court expressed the view that such rebate arrangements should be eliminated since they tended to monopolize the optical trade.[5]

In response to the *American Optical* decision the Federal Trade Commission promulgated its own anti-kickback rules,[6] prohibiting the payment by a dispenser to a doctor of any funds or other valuable consideration for the sale of optical equipment to a patient of the doctor. The Washington legislature[7] and the legislatures of several other states[8] followed the lead of the F.T.C. and passed remedial legislation.

Two primary objectives of such laws were protection of the public

3. *See* Comment, *Physician Ownership of Pharmacies*, 41 NOTRE DAME LAWYER 49, 65 (1965), for a more detailed account.

4. 97 F. Supp. 66 (N.D. Ill. 1951).

5. *Id.*

6. Now embodied in 16 C.F.R. § 192.7 (1968).

7. *See* Wash. Att'y Gen., Memorandum No. 651, *as reprinted in* Brief for Respondent at A-1, Day v. Inland Empire Optical Inc., 76 Wash. Dec. 2d 566, 456 P.2d 1011 (1969) [hereinafter cited as *Inland*].

The Attorney General of Washington commented that the "practice of a few licentiates of the healing arts . . ." who were receiving rebates was the major cause for the enactment of WASH. REV. CODE ch. 19.68 in 1949. This was apparently also the case with the California statute. *See* note 8 *infra*.

8. *E.g.*, CAL. BUS. & PROF. CODE, § 650 (West 1962) provides:

> The offer, delivery, receipt, or acceptance, by any person licensed under this division of any unearned rebate, refund, commission, preference, patronage dividend, discount, or other unearned considerattion, 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, propriety interest or co-ownership in or with any person to whom such patient, clients, or customers are referred is unlawful.

See note 26 *infra* for citations to statutes in other jurisdictions.

from hidden rebates and charges, and the elimination of a potential motive to make unnecessary prescriptions.[9] The American Medical Association realized this when it declared such practices unethical,[10] and threatened expulsion of anyone entering into such arrangements. However, the various state legislatures apparently determined that expulsion from the A.M.A. was not a sufficient deterrent, and consequently, appropriate legislation was enacted to provide stiffer penalties for those entering into such arrangements.[11]

Such was the origin of R.C.W. ch. 19.68.[12] Yet, despite the fact that twenty years had passed since the enactment of R.C.W. ch. 19.68, *Inland* was the first case in which the Washington court addressed itself to that statute. The court had to base its decision, therefore, on its own interpretation of the statute.[13]

9. Wash. Att'y Gen., Memorandum No. 651, *supra* note 8, at A-9; 16 OP. CAL. ATT'Y GEN. 18 (1950). The dubious nature of such kickback arrangements was summed up by the Fourth Circuit Court of Appeals in Lilly v. Commissioner of Internal Revenue, 188 F.2d 269, 271 (4th Cir. 1951):

> The evil we find in these kickbacks is the receipt by the physician of secret profits through dealings with his patients. Surely the doctor is assuming an utterly inconsistent position when he recommends an optician without disclosing that he is being paid for the recommendation. This corrupt practice obviously involves or tends to promote serious evils: (1) the prescription by the doctor of glasses where not actually necessary; (2) more expensive lenses than really needed; (3) recommendation of an inferior optician; (4) artificial increase in cost of glasses by inclusion of the physician's commission for which the physician affords no value to the patient.

10. It should be well known by this time that the traditional interpretation of the Principles of Medical Ethics by the various Judicial Councils in the history of the Association has been that the doctor may receive no profit whatever from his patient other than payment for rendered medical services. Hence it would be apparent that no rebate of any kind, in any form or from any source can be accepted. This applies also to rebates coming from agents or owners of optical companies. They are, in every case, absolutely unethical.

AMER. MED. ASSOC., JUDICIAL COUNCIL, OPINIONS AND REPORTS, REBATES FROM SALE OF MEDICINES OR APPLIANCES, 55 (1960).

11. *See* note 26 *infra* for exemplary citations.

12. In 1965, WASH. REV. CODE ch. 19.68 was amended since there appeared to be considerable question concerning the validity of a title as broad as the 1949 title. The 1965 amendment changed the title to "An Act Relating to the Practitioners of the Healing Professions and Prohibiting Certain Practices Thereto." Also some minor changes were made in various sections of the statute.

13. The court was also faced with the issue of whether or not the decision of the Washington State Medical Disciplinary Board was controlling in the case. The Washington State Medical Disciplinary Board did not find defendants guilty of any unethical practice. The appellants contended that the decision of the Board should be final. The court ruled that, while the Disciplinary Board could discipline the members of the medical profession for unethical activities, only the courts may interpret, apply, and enforce a statute which provides criminal sanctions.

The court also held that the respondents had standing to bring this suit to enjoin defendants' operation for two reasons: (1) to prevent unfair competition, and (2) to force other physicians to abide by the laws regulating the practice of medicine. This

Appellant Inland Empire Optical, Inc. cited statutory authority for its position that an ophthalmologist may employ or have a licensed optician working in his office dispensing optical equipment,[14] and collect compensation for his services.[15] The court agreed that an ophthalmologist may employ or have a licensed optician associate with him in his office, and that compensation can be received for this employee or associate's services. It held, however, that the statutes relied upon by the optical company did not apply to the facts of this case, since there was a lack of "personal and immediate direction and supervision" by the ophthalmologist of the licensed optician's work, and since the spatial relationship between the offices of the doctors and those of Inland was such that patients would not readily perceive that Inland was operating under the direction of the doctors.[16]

Since the laws did not explicitly authorize the arrangement attacked in this case, the court turned to the anti-kickback statute, R.C.W. ch. 19.68,[17] to determine whether there had been a violation. The statute prohibits the furnishing of medical supplies to patients, or the referral by physicians of patients to a medical supply company, in return for,[18]

> directly or indirectly, a rebate, refund, commission, unearned discount, or profit by means of a credit or other valuable consideration . . . .

aspect of the decision is beyond the scope of this note. *See* Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932); State v. Boren, 42 Wn. 2d 155, 253 P.2d 939 (1953); and Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wn. 2d 697, 251 P.2d 619 (1952) (members of a profession may bring suit to enjoin other members from violating statute regulating the profession). *Cf.* Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn. 2d 317, 324 P.2d 1099 (1958) (conditions necessary to obtain an injunction against the harmful conduct of another).

14. WASH. REV. CODE § 18.34.010 (1957).

15. WASH. REV. CODE § 19.68.040 (1957).

16. The test for such supervison as applied by the court in *Inland* is:

> [w]hether a patient of ordinary understanding and reasonable prudence should reasonably understand that eyeglasses dispensed by the ophthalmologist's dispensing optician are in fact under not only the personal and immediate direction and supervision of the ophthalmologist, but at his responsibility as well. If the circumstances are such that the answer to this query is in the affirmative, then the ophthalmologist, we think, is within his statutory rights under RCW 19.68. If, however, the relationship between ophthalmologist and optician is so remote, indirect or distant that [he] is not under the immediate, personal supervision of the ophthalmologist, or their offices and laboratories are so physically separated that a patient of ordinary understanding would not readily assume that the optician is working for and under the physician's personal direction—and on the latter's responsibility—then the test of the statute is not met . . . .

76 Wash. Dec. 2d at 578-79, 456 P.2d at 1019 (1969).

17. *See Inland*, 76 Wash. Dec. 2d at 577, 456 P.2d at 1018 (1969).

18. WASH. REV. CODE § 19.68.010 (1969) (text set out in full in note 2 *supra*).

Appellant doctors argued that they received only the appreciation of the value of the stock. The court noted, however, that as long as the physician benefited from the referrals, it did not matter whether or not he received the benefit in the form of an actual cash dividend or an appreciation in the value of the stock.[19]

The key to the *Inland* decision was the question of referral. The court saw nothing wrong with either the doctors' ownership of a medical supply company, or their receipt of profits from its operations.[20] It is only when the physician *refers* the patient to such a medical supply company that he violates the provisions of R.C.W. § 19.68.010.[21] In *Inland*, the spatial relationship between the doctors' offices and the optical supply company, along with the three strategically placed signs,[22] constituted the referral necessary for violation of the statute. The locations of the offices resulted in the channeling of patients from the doctors' offices through the optical company, thus limiting in effect the patient's freedom of choice as among the firms which could fill his prescription. Out of convenience it was not practical to go elsewhere.[23]

Although the Washington court stated that it was not going to provide a "general juridical catalog of basic rules for the ethical practice of medicine and its allied arts,"[24] it did establish some basic guidelines for medical practitioners under R.C.W. ch. 19.68 and § 18.34.010. These guidelines are important, not only to ophthalmologists, but to any other persons[25]

> licensed by the state of Washington to engage in the practice of medicine and surgery, drugless treatment in any form, or dentistry. . . .

19. *Inland*, 76 Wash. Dec. 2d at 576, 456 P.2d at 1017.
20. *Id.* at 579, 456 P.2d at 1019.
21. *Id.*
22. The signs read:

FOR GLASSES
We have an optical shop downstairs
for your convenience.
However, please feel free to take your
prescription to the optician of your choice

Inland, 76 Wash. Dec. 2d at 571, 456 P.2d at 1015 (1969).
23. The record indicated that 85 to 90 percent of the doctors' patients had their eyeglass prescriptions filled by Inland Empire Optical. 76 Wash. Dec. 2d at 571, 456 P.2d at 1015 (1969).
24. *Id.* at 568, 456 P.2d at 1013.
25. WASH. REV. CODE § 19.68.010 (1969).

They might apply, for instance, to the "referral" of patients by a general practitioner to a pharmacy, or by a surgeon to a retailer of therapeutical braces, or by a dentist to an orthodontist, or by an ear specialist to a hearing aid company. They could also help in the future construction of the "furnishings" provision, which applies in cases where the physician himself distributes clinical supplies to his patients. Against the background of the potentially broad applicability of the *Inland* guidelines, the first two following sections of this note analyze the basic requirements for a violation of R.C.W. ch. 19.68—(1) a rebate or profit, and (2) either a referral or the furnishing of prescribed supplies. The third section discusses the employee exception to the statute.

I. REBATES AND PROFITS

The Washington legislature believed that illegal benefit to physicians could occur in many different forms. R.C.W. § 19.68.010 prohibits a physician from receiving in certain cases a[26]

> rebate, refund, commission, unearned discount or profit by means of a credit *or other valuable consideration*. . . .

There is no doubt that the statute would cover the kind of direct benefit involved in the leading case of *American Optical*,[27] which involved a cash rebate on glasses equal to the difference between (1) the prescription price plus fitting fees and (2) the price collected from the patient. *Inland* makes it clear that stock appreciation is likewise sufficient. Other state courts and the F.T.C. have ruled that such things as stock dividends[28] and rent on a percentage of sales[29] are

26. WASH. REV. CODE § 19.68.010 (1969) (emphasis added).
The anti-kickback statutes of other states have similar catch-all phrases, such as "otherwise" or just the general term "rebate."
Those state statutes using the catch-all term "otherwise" are: N.M. STAT. ANN. ch. 67, § 5-9C (1953), CAL. BUS. & PROF. CODE § 650 (West 1950), ARK. STAT. ANN. ch. 70, § 307 (1947). Those state statutes using "rebate" as the catch-all term in their anti-kickback statutes are: ARIZ. REV. STAT. ANN. ch. 13, § 32-1401(f) (1956), IOWA CODE ANN. ch. 147, § 147.56(4) (1939), OKLA. STAT. ANN. ch. 24, art. 59, § 944 (1963).

27. 97 F. Supp. 66 (N.D. Ill. 1951) (discussed at notes 4 & 5 and accompanying text *supra*).

28. *See* the letters from the Department of Justice to various doctors in response to inquiries concerning the rules, *as cited in* appendix to 16 C.F.R. § 192.0-192.21 (Supp. 1970).

29. Magan Medical Clinic v. California State Board of Medical Examiners, 49 Cal. App. 2d 124, 57 Cal. Rptr. 256, 262 (1967).

rebates. As a general rule, then, whenever the physician will benefit financially[30] in any way by receipt of either a rebate for the referral of his patients to a dispenser of medical supplies or services, or a profit from the sale by him of medical supplies to his patients, that financial benefit will constitute a violation.

The superior court in *Inland* had construed the statute to flatly prohibit all physician ownership of a medical service or supply operation.[31] A reading of R.C.W. § 19.68.010 alone indicates how the superior court reached its conclusion. That section states in part that it is illegal for a physician to receive:[32]

> . . . [V]aluable consideration in connection with the referral of patients to any person, firm, corporation or association, *or in connection with the furnishings of medical, surgical, or dental care, diagnosis, treatment, or service,* on the sale, rental, furnishing or supplying of clinical laboratory supplies or services of any kind, or any other goods, services or supplies prescribed for medical diagnosis, care or treatment.

It is possible to read that section as prohibiting (1) the referral of patients for valuable consideration to any person, firm, corporation, or association, and then also prohibiting (2) the receipt of valuable consideration by the doctor in connection with the furnishing of ancillary services and supplies by anyone. But under this interpretation, the latter prohibition would apply to any physician-owned stock in an optical supply corporation, even if *no* patients of the doctor had ever patronized it, and even if the doctor only owned several shares in a large, publicly-owned corporation.

The supreme court, however, thought that the statute did not prohibit physician ownership of a medical supply operation, or the receipt of compensation for such ownership, as long as the physician did not also *refer* his patients to that operation.[33] R.C.W. ch. 19.68, when

30. The term "financial benefit" is used because, in each of the cases cited in this note, the kickback was either in the form of money, or could be converted into money, or had resulted in a saving of money.

31. Brief for Rockwood Clinic as Amicus Curiae at 5, *Inland*, 76 Wash. Dec. 2d 566, 456 P.2d 1011 (1969).

32. WASH. REV. CODE § 19.68.010 (1969) (emphasis added). The section is quoted in full in note 2 *supra*.

33. *Inland*, 76 Wash. Dec. 2d at 579, 456 P.2d at 1019 (1969).
The court may have been influenced in part by the potential harm which the superior

construed as a whole,[34] supports such an interpretation, as Parts II and III of this Note will show.

II. REFERRALS AND FURNISHINGS

A. Referrals

> The statute prohibits a rebate or profit[35]
> in connection with the referral of patients to any person, firm, corporation or association . . . on the sale, rental, furnishing or supplying of clinical laboratory supplies. . . .

The referral may be a direct instruction to a patient, in either verbal[36] or written[37] form, to seek the supplies or services of another. The referral may also be given indirectly, as was the case in *Inland*. While the *Inland* court did not provide explicit criteria for the physician to follow in order to avoid the elusive "indirect referral," it did state that[38]

> [the] patient [must] have free and untrammelled access and exit to and from the doctors' offices without having to pass into or through the optical company's offices. . . .

court decision could have had. The effect of a broader rule on the integrated medical clinics of the state, for example, would have been rather burdensome. Many of these clinics would have had to modify their present operations, and many services now provided to the patient would have suffered. Amicus Brief for Rockwood Clinic, *supra* note 31, at 6. See also Brief for Eye and Ear Physicians' Council of Washington State as Amicus Curiae at 2, *Inland*, 76 Wash. Dec. 2d 566, 456 P.2d 1011 (1969).

34. This approach to deciding legislative meaning is consistent with past Washington decisions. It has been held that the intention of the legislature in the enactment of a regulating measure must be determined from consideration of all its provisions, and that it is the duty of the court to adopt a construction that is not only reasonable, but also furthers the obvious and manifest purpose of the legislature. *See, e.g.*, State v. Lee, 62 Wn. 2d 288, 382 P.2d 491 (1963).

Construction of a statute as a whole must be done in order to avoid unlikely, strained, or absurd consequences which could result from literal readings. Alderwood Water Dist. v. Pope and Talbot Inc., 62 Wn. 2d 319, 382 P.2d 639 (1963). *See also* Krystad v. Lau, 65 Wn. 2d 827, 400 P.2d 72 (1965).

35. WASH. REV. CODE § 19.68.010 (1967).

36. In the *American Optical* case, 97 F. Supp. 66 (N.D. Ill. 1951) (*see* notes 4 & 5 and accompanying text *supra*), it was contended that after writing the prescription the doctor would then orally instruct the patient to take his prescription to American Optical.

37. In Mast v. State Board of Optometry, 139 Cal. 78, 293 P.2d 148 (1956), the patient was given a slip of paper with his prescription on it. At the top were the words "Referred to Dr. A. R. Mast"; the patient almost invariably went to Dr. Mast for his prescription glasses.

38. *Inland*, 76 Wash. Dec. 2d at 579, 456 P.2d at 1019 (1969).

In other words, the patient must have relative freedom to choose whomever he wants to fill his prescription. Thus, the "indirect referral" can be almost any act of the physician which interferes with the patient's free choice of a supplier of "clinical laboratory supplies" and which tends to make him a captive consumer.[39]

The spatial relationship between the doctors' offices and the optical company in *Inland* was such that a patient attempting to reach his car in the parking lot would have no choice but to go through the optical company's waiting room. The resulting temptation to buy as a matter of convenience effectively conditioned the consumer's freedom of choice.[40] There would have been no "referral," however, had the offices of the doctors been unconnected by doors with the offices of the optical company.[41] Other examples of indirect referral would be where the doctor writes out his prescription in code and only one pharmacy knows the code, or where the name of one pharmacy is printed on the top of the prescription.[42]

B. Furnishings

R.C.W. § 19.68.010 provides that a physician may not request or receive a profit[43]

> . . . in connection with the furnishings of medical, surgical or dental care, diagnosis, treatment or service . . .

when such profit is[44]

> . . . on the sale, rental, furnishing or supplying of clinical laboratory supplies. . . .

In *Inland* the defendants were guilty of profiting on their referrals, and the court dealt specifically with this violation. For this reason,

39. *See* Comment, *Physician Ownership of Pharmacies*, 41 NOTRE DAME LAWYER 49, 53 (1965).
40. *See* note 23 *supra.*
41. While this is not expressly stated by the court, it is inferred from the language used. *Inland*, 76 Wash. Dec. 2d at 576, 456 P.2d at 1018 (1969). A similar conclusion was reached in *In re* Sanchick's Petition, 347 Mich. 620, 81 N.W.2d 357 (1957), where the doctor's office was located next door to the optical company.
42. *See* Comment, *Physician Ownership of Pharmacies*, 41 NOTRE DAME LAWYER 49, 53-54 (1965).
43. WASH. REV. CODE § 19.68.010 (1969).
44. *Id.*

the court did not consider the problem of illegal "furnishings." There is a prohibited "furnishing" whenever the doctor furnishes the patient with medical supplies[45] and benefits financially as a result.[46]

The "furnishings" provision has two important functions. For one, the referral prohibition discussed above was partly aimed at halting unnecessary prescriptions in order to get a rebate; it would be of no value if physicians could make the same gains by in-office sales. For another, the patients have a right to be protected from professional fees disguised as the cost of materials prescribed.[47]

In *Inland*, if the doctors had been selling optical supplies from their office at a profit they would have been in violation of the "furnishings" provision. Alternatively, if the optical company had sold optical supplies for a profit to the doctors who in turn had sold them at "cost," this too would have been a violation because, as stockholders of the optical supply corporation, the doctors would have profited indirectly from dividends or stock appreciation. The same result could arguably be reached if the doctor only owned a few shares in a public corporation. The difference between selling optical goods bought from a wholly physician-owned corporation and sales of goods produced by a company in which they owned only 10% of the stock seems to be one of degree only. There would be no such violation, however, as long as the doctors did not sell those supplies to their patients.

In sum, the "furnishings" prohibition does not preclude physician ownership of a medical supply corporation. All it requires is that the physician either not sell any of the products from that operation to his patients, or, if he does, that he sell them at cost—that is, not the price paid to the supplier, but the cost to the supplier in manufacturing or purchasing the item.

45. For example, when the physician sells the glasses made by the optician which WASH. REV. CODE § 18.34.010 (1957) allows the physician to employ in his office. There is no violation, however, if no profit is made on the sales.

46. Physician ownership of a medical supply operation does not by itself violate the "furnishings" requirement of WASH. REV. CODE § 19.68.010, because the "furnishings" have to be by the doctor, just as the "referral" impliedly has to mean a referral by the doctor. A physician-owned corporation, therefore, cannot violate the "furnishings" requirement unless the doctor sells the supplies distributed by the corporation to his patients. In sum, the doctors can run an optical supply corporation, and profit by it, but must do so without the kind of referral-by-location that was enjoined in *Inland*.

47. WASH. REV. CODE § 19.68.040 (1957) provides:

> . . . that persons so licensed shall only be authorized by law to charge or receive compensation for professional services rendered if such services are actually rendered by the licensee and not otherwise.

III. THE EMPLOYEE EXCEPTION

R.C.W. § 18.34.010 indicates that a physician or optometrist may hire opticians to work under his personal supervision. And, although R.C.W. § 19.68.040 allows a physician ordinarily to charge only for his own professional services, it does permit doctors who work together as co-partners to charge for the services of both, and authorizes physicians to charge for the services rendered by the employees of the firm or association.[48] To fall within the "employee exception" to the anti-kickback provision, there must be immediate, direct, and personal supervision of the employee by the physician.[49] In other words, it must be obvious to the patient that the doctors have some control over what their employees are doing.

The "employee exception" is important in three respects. First, there is never a referral with regard to an employee. Second, the wages paid for work of an employee can be charged to a patient pursuant to R.C.W. § 19.68.040, although no profit can accrue to the doctors because it would violate the "furnishings" prohibition of R.C.W. § 19.68.010. Finally, a person who is *not* an employee of the doctors may profit from his sales to the public; in other words, by forming a corporation and making sure that its operations are not so closely related to the doctors' as to constitute a "referral," the doctors may benefit by appreciation of stock value or receipt of dividends.

CONCLUSION

The *Inland* court has provided some guidelines for the medical profession to use in the interpretation of R.C.W. ch. 19.68. It ruled that a "rebate" encompasses a wide variety of arrangements, and that nearly any financial remuneration to the physician can be a "rebate." However, it also settled that when the supplier is *not* an employee of a doctor, there is no violation of the statute unless there is a "referral." A "referral" would be found wherever there are indications that the patient's freedom of choice among suppliers is being restricted, either directly or indirectly.

48. *See Inland*, 76 Wash. Dec. 2d at 578, 456 P.2d at 1019 (1969). Thus, the legislature clearly intended to permit and encourage medical clinics.
49. *See* note 16 *supra*.

Yet, the *Inland* decision, necessarily limited to a particular fact pattern, did not comprehensively interpret the anti-kickback statute. This Note has attempted to take up where the court left off. In particular, the supreme court did not discuss the statute's "furnishings" provision. Under this provision, if a physician or his employee were furnishing items to a patient, it would seem that the statute would permit remuneration for the actual costs of materials and labor. But, given the reading of R.C.W. § 19.68.010 put forth in this Note,[50] if a physician is selling medical supplies for a profit, he is violating the "furnishings" provision. Although it is conceivable that there are physicians operating in violation of this code section, no action has as yet been taken to utilize the criminal sanctions of the statute. Perhaps this is so because the statute is ambiguous on its face.[51]

What is needed is a clear and concise amendment of R.C.W. § 19.68.010 which would specifically state that a doctor cannot receive financial remuneration for referral of a patient or for sale of any medical supplies to a patient. If such an amendment were passed and enforced, the patient would be better assured of obtaining proper medical attention, and the physician would know exactly what he could and could not do so far as both referrals and sales are concerned.[52]

50. *See* Section II.B. *supra.*

51. *See* note 2 *supra* for full text. The statute's ambiguity is demonstrated by the fact that the superior court and the supreme court arrived at different interpretations as to whether a physician may properly own stock in a medical supply operation. It should also be noted that neither the parties nor amici read the statute in the same way the supreme court did.

52. In the last year the question has been raised whether physicians should be permitted to sell eyewear at all. In the program *60 Minutes*, Volume II, No. 4, as broadcast over C.B.S. Television, Tuesday, October 28, 1969, 10:00-11:00 p.m. E.S.T., some doubt was expressed as to the correctness of this practice. In the report, C.B.S. sent one of their employees around the country to the offices of various ophthalmologists and optometrists. This reporter had 20/20 vision. In three of his twenty-eight visits he was informed that he needed glasses; one of these was an ophthalmologist's office. Two of these three also sold glasses; the C.B.S. employee purchased the prescribed glasses in the offices. The inference from these results seems to be that where glasses are being sold there may be a tendency on the part of some ophthalmologists and optometrists to find more wrong with one's eyes than there really is. As C.B.S. put it,

> If you ask someone for advice on whether or not you need some piece of equipment and the person you ask is in the position of making a profit by selling it to you, we all know it's highly unlikely that he will tell you you don't need it.

Transcript, *60 Minutes*, *supra.*