



ATTORNEY WORK PRODUCT

MEMORANDUM

DATE	January 12, 2009
TO	Annemarie Del Mugnaio, Executive Officer Speech-Language Pathology & Audiology Bureau
FROM	Michael R. Santiago, Department of Consumer Affairs, Legal Office
SUBJECT	AARP/HearUSA

I. QUESTION PRESENTED

Whether a licensee who pays an annual fee of \$500 and a credentialing fee of \$100 every three years may participate in a hearing aid discount program sponsored by AARP Services Inc. ("AARP") and HearUSA wherein the licensee's name is added to a national directory of providers who offer a discounted hearing test evaluation for \$90 to AARP members, as well as certain products, with no obligation for the patient to pursue further testing or procedures.

II. SHORT ANSWER

No. A licensee would be in violation of Business & Professions Code Section 650 if the licensee participated in the AARP/HearUSA Program since it would be considered an unlawful referral to be on this national list of providers.

III. BACKGROUND

AARP Services Inc. is a wholly owned subsidiary of AARP that offers AARP members health products, travel and leisure products, and life event services. HearUSA is the network administrator of the program and is a company that contracts with health plans, employer groups, and subscriber organizations to market a provider's practice through provider directories and internet portals. (See www.hearusa.net) HearUSA is also the administrator of its own Hearing Care Network which is separate from the AARP Hearing Care Program.

AARP contracted with HearUSA for its Hearing Care Program to offer discounted services and products to AARP members. HearUSA is inviting audiologists and Board-certified Hearing Instrument Specialists to participate in this program and join their national network by paying a \$500 annual fee for each location they want listed on the provider directory, as well as paying a credentialing fee of \$100 per provider every three years. After the provider's name is placed on

the network list of providers participating in the Hearing Care Program, the provider could then offer discounted hearing aid products and services to AARP members who contact them.

The program states that a Hearing Care Program provider can offer a “basic/routine” evaluation for \$90 to an AARP member, with no obligation for the member to pursue further testing. This evaluation would include the following: hearing testing; patient assessment and history; hearing aid fitting and orientation; measurement of audibility and comfort levels; post assessment of hearing aid satisfaction; battery supply; aural rehabilitation component; and office visits, procedures and contacts. Audiology testing (testing under the direction of a physician) is outside the scope of this program.

The scant literature available about this program states that it is not a referral program since providers do not pay referral fees to HearUSA – the provider is contacted directly by AARP members. (*Id.*) The Hearing Care Program and products are scheduled to become available in Florida and New Jersey beginning December, 2008. HearUSA expects the Hearing Care Program to become available in all states starting in 2009.

IV. ANALYSIS

Business and Professions Code section 650 states in part:

“. . . the offer . . . by any person licensed under this division . . . 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.” (Emphasis added)

As noted in 70 Ops.Cal.Atty.Gen. 65, 67 (1987), the Legislature enacted section 650 to protect the public from excessive health care costs (*Mason v. Hosta* (1984) 152 Cal.App.3d 980, 986), as well as referrals based upon considerations other than the best interests of the patients (*Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1564; *Magan Medical Clinic v. Cal. State Bd. Of Medical Examiners* (1967) 249 Cal.App.2d 124, 132; 68 Ops.Cal.Atty.Gen. 28, 31 (1985)).

Although we do not have a classic referral scheme wherein a third party entity is paid to refer patients to a licensee, the Hearing Care Program would constitute the “referring of patients” according to B&P section 650. In 82 Ops.Cal.Atty.Gen. 1 (1999), the California Attorney General’s Office (“A.G.”) issued an opinion concerning a proposal involving a directory of physicians, plastic surgeons, dermatologists and other licensed health care providers who would perform certain medical procedures for the entity’s enrollees at discounted rates. The A.G. opined that under this type of program, the discount offered by a physician in the directory to an enrollee of the entity would constitute “consideration” to the referring third party entity for

purposes of B&P section 650. “The discount conferred upon an enrollee of the entity would enhance the entity’s economically advantageous relationship with the enrollee.” (*Id.*) The program, and the promise of discounted services, is essentially a marketing tool for the third party entity to use in soliciting new enrollees and to promote its health care service plans. Thus, the referrals would be induced by considerations other than the best interests of the patients. The A.G. concluded that this offer of a discount to the patient who is an enrollee of the third party entity is a proscribed “consideration” that is given as an “inducement” for the referring of patients.

In the case at hand, licensees who participate in the Hearing Care Program would offer discounted products and services to AARP-members. According to the opinion of the A.G., this would be unlawful under section 650 because the discount would be consideration given to AARP and HearUSA as an inducement for them to refer AARP-members as potential patients. (*Id.*) The Hearing Care Program would also be a marketing tool for AARP to solicit prospective members with the promise of discounted hearing aid services and products. It would also give HearUSA the opportunity to solicit its own Hearing Care Network to AARP-members.

Although AARP and HearUSA may argue that they do not select the provider for AARP-members, but merely allow AARP-members to access the list of all providers in the AARP-member’s geographical area, this alone would not make section 650 inapplicable. The A.G. has previously opined in several opinions that if the enrollee requests and receives “the referral agency’s entire list of professionals willing to [provide services at a discount], the referral would nevertheless be predicated upon considerations other than the best interests of the prospective patient.” Because HearUSA initially selects and credentials the providers they include in the Hearing Care Program directory of providers, making this directory available to AARP-members would in effect, constitute recommending each provider listed. (*See* 84 Ops.Cal.Atty.Gen. 113 (2001)).

Additionally, although AARP and HearUSA may argue that the Hearing Care Program is advertised and marketed as a “program” to help AARP-members find quality, yet affordable hearing aid services and products, this would not change the fact that it is still a directory of hearing aid professionals who provide certain hearing aid services and products at a set, discounted rate. The directory of providers is essentially purchased by AARP-members (by virtue of them paying yearly dues to AARP) for the purpose of identifying one or more providers willing to provide hearing aid services and products at a discount.

V. RECOMMENDATION

The Bureau should contact AARP Services Inc. and HearUSA and inform them that the Hearing Care Program would be contrary to California Business and Professions Code 650. The Bureau should also contact its licensees to alert them that participation in the Hearing Care Program would be unlawful according to section 650.

VI. CONCLUSION

A licensee of the Bureau would not be able to participate in the AARP/HearUSA Hearing Care Program since it would be unlawful according to section 650.

I hope that the foregoing is of assistance.

Sincerely,

DOREATHEA JOHNSON
Deputy Director
Legal Affairs

By: MICHAEL R. SANTIAGO
Staff Counsel