



STATE OF NEW YORK DEPARTMENT OF HEALTH

Coming Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Dennis P. Whalen
Executive Deputy Commissioner

April 26, 1999

Robert Schneider, Esq.
Law Office of Robert Schneider
1600 Stewart Avenue
Westbury, New York 11590

Dear Mr. Schneider:

I am responding to your January 11, 1999 letter to Joel Isaacson. You ask whether a proposed lease arrangement between two physicians violates the New York State self-referral prohibition, commonly known as the state Stark law, codified at Public Health Law (PHL) article 2 title II-D. The facts you present are insufficient for us to reach a conclusion.

The Facts:

Two physicians, one a psychiatrist (Dr. A) and the other an orthopedist (Dr. B) propose to enter into an arrangement whereby Dr. B will sublease office space, equipment, and services from Dr. A. The nature of the leased equipment is unclear. In particular, it is unclear if x-ray or imaging, clinical laboratory, pharmacy, or radiation therapy equipment is being leased.

The premises and equipment are sublet by Dr. A from a management company. We do not have copies of the lease arrangement between the management company and the owner, or of the agreement between the management company and Dr. A, or of the proposed agreement between Dr. A and Dr. B. Nevertheless, it is clear from the facts you present that each lease involves more than merely the rental of space, and that both Dr. A and Dr. B will use the space and equipment. It is unclear if both physicians are present in the office space at the same time, or exactly how the space and equipment are shared.

The physicians refer patients to each other.

Discussion:

PHL § 238-a(1)(a) prohibits a physician from referring to a provider of four categories of designated health services if the physician or a member of the physician's immediate family has a financial relationship with the provider. The four categories of designated health services are clinical laboratory, x-ray and imaging, pharmacy, and radiation therapy. The self-referral prohibition is not implicated if a referral is made by a physician to a financially related provider of services which do not fall within the four categories of designated health services. Physical therapy is not a designated health service. Therefore, a financially related physician may refer to a provider of physical therapy services without violating the state self-referral prohibition.

If the referrals that are made between the physicians do not involve x-ray or imaging, pharmacy, radiation therapy, or clinical laboratory services, then it does not appear that the statute is implicated, with the following caveat. The statute broadly defines "referral". See PHL § 238-a(6). Therefore, if a referral is made to Dr. B by Dr. A and it is reasonably foreseeable that Dr. B will provide any of the designated health services, then the referral is prohibited. For example, if the leased equipment includes an x-ray device, and Dr. A refers to Dr. B who provides x-ray services, then, since there is a financial relationship between the two physicians established by the proposed sub-lease arrangement, the referral is prohibited. Note that the proposed sublease arrangement does not meet the statutory exception for rental of office space set forth at PHL § 238-a(5)(b)(i) because equipment is also being rented. Therefore, there is a compensation arrangement or financial relationship between the two physicians.

We cannot reach a definitive conclusion as to whether the statute is violated since the nature of the leased equipment is unclear.

Additionally, note that if a referral is made by Dr. A to Dr. B, and Dr. B refers the patient for clinical laboratory testing at a facility with which Dr. B has a financial relationship, we could conclude that Dr. A, who has a direct financial relationship with Dr. B, has an indirect financial relationship with the clinical laboratory to which the referral has been made, thereby violating the statute.

Please see PHL § 238-d which requires practitioner disclosure in order to make referrals to providers of health and health related items or services which do not fall within the PHL § 238-a(1)(a) prohibition.

I suggest you also consult the federal self-referral prohibition, commonly known as Stark II, which is codified at 42 USC § 1395nn. Stark II contains eleven categories of designated health services, including physical therapy services.

If you have questions regarding the above, please call me at 518-486-1336.

Sincerely,

- 3 -

Harriet S. Bougen
Senior Attorney