

March 3, 1995

Robert D. Stone, Esq.
198 Westchester Drive South
Delmar, New York 12054

Dear Mr. Stone:

This letter responds to your inquiry dated January 19, 1995. You ask whether physicians practicing in different specialties, including radiology, who have formed a group practice which meets the Public Health Law (PHL) §238(5) definition, can make intra-group referrals for x-ray or imaging services without violating the self-referral prohibition of PHL §238-a(1)(a). Under the circumstances presented, the intra-group referrals fall within the PHL §238-a (2)(a) exception for practitioners' services, and are permissible, with the cautionary note that this conclusion is limited to the particular facts described.

Discussion:

The Facts:

East Hudson Radiologists, P.C. is a professional corporation of radiologists. The group proposes to expand and become a multi-specialty group with a new name, East Hudson Community Care Physicians, P.C., practicing at numerous sites.

East Hudson leases and operates x-ray and imaging equipment at four locations. The equipment at Samaritan and Leonard Hospitals is owned by a company in which East Hudson Radiologists or its shareholders have a financial interest.

The practice plan for the new group states, "physicians who are shareholders or employees of East Hudson Radiologists P.C. presently render medical imaging services, using x-ray, computed tomography, magnetic resonance imaging and ultrasound" at the four locations. It is unclear if the physicians provide the services personally, or supervise those who do.

The plan also states that, as to the multi-specialty group, "substantially all of the services of the members of the group practice will be provided through the group and will be billed in the name of the group and amounts so received will be treated as receipts of the group. Overhead expenses and income of the group practice will be distributed in accordance with an agreement previously determined by the group".

The plan further states that physician members of the multi-specialty practice will make referrals for the services of other physicians in the group which will be provided personally by the physician or under his or her supervision. Members of the group will also make referrals to other members for in-office ancillary services, including x-ray or imaging services, to be provided personally by or under the supervision of the group member to whom the referral is made.

Finally, it is anticipated that a member physician who provides services unrelated to x-ray or imaging will provide his or her services at each of the four x-ray and imaging locations. However, at one location, Child's Hospital, the x-ray and imaging equipment will be in the main hospital building while the non-radiologist physicians will practice in the Child's Hospital Professional Office Building, which is part of the hospital complex and has an entrance approximately twenty-five feet from an entrance to the main hospital building.

Legal Analysis:

PHL §238-a(1)(a) prohibits a practitioner from making a referral for x-ray or imaging services to a provider of such services where the practitioner has a financial interest in the provider. This prohibition does not apply to referrals for "practitioners' services", defined at PHL §238-a(2)(a) as "services provided personally by, or under the supervision of, another practitioner in the same group practice as the referring practitioner". Group practice is defined at PHL §238(5). Based on the facts presented, the multi-specialty group practice meets the statutory definition of a group practice. Absent this conclusion, the intra-group referrals about which you inquire would not be permissible.

A member of the group practice making a referral for x-ray or imaging services has the option of making the referral to a member radiologist. This is because a radiologist will have to read the film in any event, and since there is a radiologist in the group practice the referral for x-ray or imaging services could be made to the group member at the outset. If the referral

is made to the member radiologist and he or she performs the referred services personally or personally supervises a technician, then the referral satisfies the exception set forth at PHL §238-a(2)(a) because it is for intra-group practitioners' services. If the radiologist does not personally perform the referred services but uses a technician, the degree of personal supervision provided by the radiologist must, at a minimum, meet the requirements of 10 NYCRR §89.4.

PHL §238-a(2)(b) provides another exception to the self-referral ban. With regard to a group practice, this exception applies when a referral is made by one group member for ancillary x-ray or imaging services to be provided personally by another group member or by a supervised employee, in a building which is either used by the group for its centralized provision of x-ray and imaging services, or used by a practitioner for the provision of services unrelated to x-ray and imaging. If the answer to your present inquiry depended upon the in-office ancillary services exception, then use of the equipment at Child's Hospital would not be permissible because the equipment is in a building which is neither the centralized locus for the provision of the group's x-ray and imaging services, nor where a practitioner provides non x-ray and imaging services. The main building of Child's Hospital and the Professional Building are clearly two separate buildings. However, the in-office ancillary exception need not be relied upon because the multi-specialty group practice includes radiologists. Because of this fact, the referral for x-ray or imaging services is a referral to the member radiologist for that practitioner's services, and so falls within the PHL §238-a(2)(a) exception to the self-referral ban.

It is immaterial for purposes of the self-referral ban whether the group has a financial interest in the company from which it leases the x-ray and imaging equipment. The group is not making a referral to the company. The only referrals at issue are intra-group.

The facts which are crucial to this opinion are that radiologists are members of the multi-specialty practice, that the practice is in fact a group practice under the statutory criteria, and that adequate personal supervision is provided by the member radiologist if that radiologist does not himself or herself provide the referred x-ray or imaging services. The absence of any one of those three crucial facts results in the failure to meet the requirements of the PHL §238-a(2)(a) exception to the self-referral prohibition.

You have asked whether the department objects to East

Hudson filing a proposed certificate of amendment to its certificate of incorporation changing its name and corporate purpose. Department approval is not necessary for such an amendment. While we have no objection to the amendment, Business Corporation Law (BCL) §805(6) requires a statement of the manner in which the amendment was authorized, and such a statement is not included in your proposed amendment.

You have also inquired as to whether the intra-group referrals are permissible under the federal self-referral ban, Stark II, codified at 42 USC §1395nn. I suggest you contact the appropriate federal agency for an answer to your inquiry because Stark II and the state self-referral prohibition are not identical. For example, the definition of group practice is different under Stark II [see 42 USC §1395nn(h)(4)], and it is unclear whether the multi-specialty group practice will meet the federal requirements.

Sincerely,

Harriet B. Oliver
Attorney

HBO:kls