STATE OF NEW YORK
DEPARTMENT OF HEALTH
Corning Tower The Governor Nelson A Rockefeller Empire State Plaza Albany, New York 12237

David Axelrod M D
Commissioner

March 27, 1989

Dear

This is in response to your letter of February 17, 1989 regarding a proposed arrangement for the provision of magnetic resonance imaging ("MRI") services. According to your letter, the owners of , a professional corporation that is limited to the practice of radiology, propose to form a limited partnership to be known as . The limited partnership is being formed for the purpose of acquiring MRI equipment, either by purchase or lease. This equipment will then be leased to a medical professional corporation to be known as . The premises where the equipment is to be located will be leased by and subleased to .

The partners of will include: , as both a general and limited partner; a for-profit corporation affiliated with , as a limited partner; and a not-for-profit corporation affiliated with , as a limited partner. Some of the owners of will be the owners of .

You asked that we review this plan. We think this proposal raises several issues which are discussed below.

The first issue involves the propriety of , participating in the ownership and operation of ." The State Education Department has taken the position that Education Law §1506 prevents a professional corporation from engaging in activities ancillary to its professional services despite the fact that such ancillary services may be related to the practice of the profession involved.

Under the proposed plan, will be the general partner in and will have full responsibility and authority for managing and operating the partnership business. This business involves the acquisition and leasing of both MRI equipment and the premises in which such equipment is located. Since these activities do not involve the actual practice of medicine, this type of activity may not be allowed.

Another issue is the relationship of , with and the potential problems it creates. Since some of the same people own both companies, referrals by to Empire raise the issue of unprofessional conduct. According to 29 NYCRR §29.1, unprofessional conduct includes "exercising undue influence on the patient or client, including the promotion of the sale of services, goods, appliances or drugs in such manner as to exploit the patient or client for the financial gain of the practitioners or of a third party." In addition, Education Law §6509-a prohibits certain unprofessional conduct which involves fee-splitting or kickback arrangements. (See enclosed opinion dated July 23, 1986.)

Your letter makes reference to Article 38 of the General Business Law. This article deals with the prohibitions against relationships between health service purveyors and clinical laboratories or other health service purveyors, when such arrangements involve referral fees or other types of fee splitting. Based on an opinion of the Attorney General (copy enclosed), the Department of Health does not have authority to enforce directly Article 38 of the General Business Law. However, this law may also effect your proposal, and we no longer render opinions on its applicability.

You have also submitted a copy of a letter to various hospitals regarding fees for MRI services. As this letter guarantees fees to the hospitals, rather than the patients, it appears to imply a contractual relationship whereby will be providing medical services for the hospitals to the hospitals' patients. If this is the case, each hospital would have to receive Department approval in accordance with 10 NYCRR §710.. and Article 28 of the Public Health Law since the hospitals would be adding defacto a licensable service (i.e. "MRI"). A contract between and the hospitals would also have to conform to the requirement of 10 NYCRR §400.4.

We also need additional information concerning and two of the limited partners of . To the extent that these two entities are controlled by the hospitals whose patients will be treated by Empire, an additional nexus is created which suggests that the hospitals are involved in the acquisition of equipment and/or the provision of a service subject to certificate of need review under Article 28. In order to determine the relationship between the hospitals and the subsidiaries, please submit a copy of the subsidiaries' respective certificates of incorporation and bylaws as well as a detailed explanation of how each is related to the hospital they are affiliated with.

Sincerely,

Peter J. Millock
General Counsel

Enclosure