HEADNOTE: A medical professional service corporation of orthopedists, which leases MRI equipment, employs a radiologist to read HRIs, and contracts with an employment agency to provide an MRI technician, does not meet the in-office ancillary exception [Public Health Law section 238-a(2)(b)] to the self-referral ban because the technician must be an employee of the group practice. (3/3/95)

March 3, 1995

Mr. Gregory J. Naclerio, Esq.
Ruskin, Moscou, Evans & Faltischek, P.C.
170 Old Country Road
Mineola, New York 11501-4366

Dear Mr. Naclerio:

I am responding to your letter dated February 22, 1995. You inquire as to whether the statutory exception to the self-referral ban for in-office ancillary services, [Public Health Law (PHL) §238-a(2)(b)], is met by certain arrangements entered into by a medical professional corporation referring for MRI services. Under the circumstances you describe, the statutory exception is not met. Therefore, the P.C. is subject to the PHL §238-a(1)(a) self-referral prohibition.

The Facts:

Orthopedic P.C. is a professional corporation consisting of two orthopedists practicing out of two offices. Although referrals for MRI services have thus far been made to providers in which the P.C. has no financial interest, Orthopedic is now contemplating arrangements which will create a financial interest in the MRI provider to which it wishes to refer. Specifically, Orthopedic will enter into a contract pursuant to which space, MRI equipment and office personnel will be leased from another P.C. consisting of radiologists. Orthopedic will have exclusive use of the rental for forty hours per month at a fixed amount. The landlord P.C. will lease the facility to other entities when it is not used by Orthopedic or will itself operate the MRI facility during such times. The facility is located midway between Orthopedic's two offices. Implicit in your facts is that the leased facility will be the only location to which Orthopedic refers for MRI services.

In addition to the lease of space, equipment and office personnel, Orthopedic will enter into an employment contract with a licensed radiologist who is a member of the landlord P.C., pursuant to which the radiologist, working part-time, will interpret and report on the referred MRI services. The radiologist will be paid a flat fee per interpretation/report and the patient will be billed directly by Orthopedic.

A third and final arrangement will be between Orthopedic and an employment agency for the provision of a trained MRI technician on an as-needed basis for a fixed hourly rate. You refer to this arrangement as Orthopedic's "lease" of the technician, and state that the technician provided is also an employee of the landlord P.C.

Discussion:

PHL §238-a(1)(a) prohibits a practitioner from making a referral for MRI services to a provider in which the practitioner is financially interested. The landlord P.C., its member radiologist employed by Orthopedic, the technician hired through the employment agency, and the employment agency, are all providers of MRI services. See PHL §238(6). The lease between Orthopedic and the landlord P.C., the employment contract between the radiologist member of the landlord P.C. and Orthopedic, and the contract between the employment agency and Orthopedic for use of the technician, create compensation arrangements [see PHL §§ 238(3), 238-a(5)], sufficient to invoke the self-referral ban. Therefore, absent a statutory exception, Orthopedic may not refer to the landlord P.C., the employee radiologist, or the technician supplied by the employment agency. PHL §238-a(2)(b) is a statutory exception applicable in the case of in-office ancillary services. For Orthopedic to meet this exception, it must satisfy four criteria.

First, Orthopedic must be a group practice as that term is defined at PHL §238(5). The facts presented are insufficient to reach any conclusion on this issue. This discussion proceeds on the assumption that Orthopedic is such a practice in order to reach the issue of whether the contractual arrangements you describe meet the in-office ancillary exception.

Second, the MRI services must be provided "in another building which is used by the group practice for the centralized provision of such items or services of the group." See PHL §238-a(2)(b)(i). This criterion is met because the MRI services are offered at a location which is different from where the group practices, and which is the sole location for MRI services.

Third, the services must be billed by the group practice or an entity wholly owned by that practice. See PHL §238-a((2)(b)(ii). This criterion is met because the radiologist, technician and landlord will be paid by Orthopedic, which will bill for all components of the services.

Fourth, the services must be provided either personally by a member of the group practice, or by individuals employed by the group practice and supervised by a member of that practice. See PHL §238-a(2)(b)(i). Both the radiologist and the technician must be employees of the group practice and supervised by one of its members. The reasons for this dual requirement are to ensure oversight by a practitioner of those who furnish the services, and to fix responsibility and liability on the group practice.

The radiologist is an employee of Orthopedic. Further, it is permissible for the orthopedist to supervise the radiologist in order to satisfy the statute. Such supervision could be minimal since the radiologist is a practitioner so that the requirements for adequate supervision are met.

The technician, however, is not an employee of Orthopedic. The usual and customary arrangement with employment agencies which provide technical personnel, is that the agency is the employer and is responsible for the acts and omissions of its employees. Such responsibility arises from the employer/employee relationship. Liability and responsibility are with the employment agency, and not with the group practice. This is contrary to the statute which fixes responsibility and liability for ancillary services on the practice by requiring that the technician be Orthopedic's employee. Although it is unclear exactly what is meant by "leasing" the technician, any arrangement which falls short of an employer/employee relationship would be unacceptable. The statutory language reflects the legislative choice of such a relationship as the means of accomplishing the desired result that the practice is responsible and liable for ancillary services. Anything less signifies that the services are not ancillary. Therefore, because the technician is not an employee of Orthopedic, the arrangements you describe do not satisfy the in-office ancillary exception. Orthopedic is fully subject to the self-referral prohibition.

Sincerely,

Harriet Katz
Acting General Counsel

HK:HBO:kls