



# STATE OF NEW YORK DEPARTMENT OF HEALTH

Coming Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Antonia C. Novello, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

November 19, 1999

Lloyd A. Gura, Esq.  
Mound, Cotton & Wollan  
One Battery Park Plaza  
New York, New York 10004-1486

Dear Mr. Gura:

I am responding to your letter dated November 11, 1999. You ask whether "the referral of patients by a New York medical professional corporation to another location for MRI exams" would violate Public Health Law (PHL) § 238-a(1)(a), the New York State self-referral prohibition, commonly known as the state Stark law. For the reasons which follow, we conclude that the referral arrangement would violate the self-referral prohibition.

## The Facts

"A medical professional corporation agrees, in writing, to lease office space, equipment, and personal services from a MRI facility for a fixed monthly fee that does not vary based on the volume or value of referrals....The MRI exams are performed by technicians (whose services are leased under the lease agreement) during the times reserved by the medical professional corporation under the lease agreement. The medical professional corporation's own physicians read and interpret the scan and the medical professional corporation (not the MRI facility) bills the patients directly for the MRI exams." The lease agreement states, at section 1(a)(4) and section 4(b), that the technicians are the employees of the lessor and not of the medical professional corporation.

## Question

Do referrals by the physicians who own, are employed by or otherwise hired by the medical professional corporation to the MRI facility, under the facts presented, constitute a violation of the self-referral prohibition?

Answer

Yes, unless a statutory exception applies.

Discussion

PHL § 238-a(1)(a) prohibits a physician from making referrals for, inter alia, x-ray or imaging services, to a provider of such services if the physician or a member of the physician's immediate family, has a financial relationship with the provider. Financial relationship is broadly defined at PHL § 238(3) to include an ownership or investment interest or a compensation arrangement. A compensation arrangement is defined at PHL § 238-a(5)(a) to include any remuneration, in cash or in kind.

Under the terms of the lease, space, equipment and personnel are being rented for compensation paid by the medical practice to the MRI facility. Therefore, there is a direct financial relationship arising out of the lease arrangement between the medical professional corporation and the MRI facility. It follows that there is an indirect financial relationship between the physicians who own, are employed or otherwise hired by the medical professional corporation and the MRI facility. This financial relationship prohibits any of those physicians from making referrals to the MRI facility for imaging services.

Nor does the compensation arrangement exception for a lease set forth at PHL § 238-a(5) (b)(1) apply. This is because the exception is for the rental of space only and under the terms of the lease, in addition to space, equipment and personnel are being rented.

Nor does the in-office ancillary services exception apply. In order to meet that exception, the MRI services would have to be personally performed by the referring practitioner, or by a practitioner who is a member of the same group practice as the referring practitioner, or personally by individuals who are employees of such practitioner or group practice. Under the facts you present, the MRI services are performed by employees of the MRI facility who are leased to the medical professional corporation.

We do not agree with your contention that a referral has not been made to the MRI facility since the facility, when used by the medical practice, including the equipment and personnel, is the property of the medical practice. Under the self-referral prohibition, at PHL § 238-a(6)(a), a "referral" is merely "a request by a practitioner" for any service which falls within four categories of designated health services, one of which is x-ray or imaging services.

You have also requested the department's "assistance in identifying the type of relationship that is acceptable under the PHL." I would be glad to review any arrangements which you are contemplating.

If you have any questions, please call me at (518)486-1336.

Sincerely,

Harriet S. Bougen  
Senior Attorney