



ALAN WILSON
ATTORNEY GENERAL

May 20, 2011

Sheridon H. Spoon, Esquire
Assistant General Counsel
South Carolina Department of Labor, Licensing and Regulation
Post Office Box 11329
Columbia, South Carolina 29211-1329

Dear Mr. Spoon:

We received your letter requesting an opinion of this Office on behalf of the South Carolina Board of Medical Examiners (the "Board") concerning TC/PC anatomic pathology arrangements in South Carolina. Primarily, you ask that we address legality of such arrangements under State and federal law and in particular sections 44-132-10 et seq. of the South Carolina Code. In addition, you ask that we also address "the issues of fee-splitting, patient care, credentialing, financial incentives, turnaround time and technical processing that these described arrangements present."

Law/Analysis

Included with your letter, you provided us with a copy of a letter from Jane Pine Wood and Steven M. Harris of the law firm of McDonald Hopkins LLC addressed to the Board on behalf of the South Carolina Society of Pathologists (the "Wood/Harris Letter"). The Wood/Harris Letter describes the TC/PC arrangement as follows:

[R]eferring physician practices (both urology and gastroenterology practices) contract with a pathologist on a part-time basis for the provision of the professional pathology interpretation services. We are uncertain as to whether the pathologist is hired as an independent contractor or an employee of the referring practice, and this distinction is critical in terms of compliance with our review of applicable state law, as explained in more detail below. In this arrangement, the professional pathology interpretations are billed by the referring physician practice, which in turn pays the

pathologist a markedly reduced fee for his or her professional pathology services.

It is the understanding of the South Carolina Society of Pathologists that the professional fee is shared between the referring practice and the pathologist on an approximately 70/30 basis, with the referring practice receiving 70 percent of the professional pathology fee in exchange for its referral, and the pathologist retaining only 30 percent of the professional fee. In exchange for this fee splitting arrangement, the pathologist's laboratory within the state receives the specimen for processing. The pathologist's laboratory either bills patients/payors directly for the technical component services, or sells the technical component services to the referring physician practices, which re-bill the purchased services to patients/payors with a mark-up in price.

You also included a letter written to the South Carolina Board of Medical Examiners by Henry L. Parr, Jr. of Wyche Burgess Freeman and Parham, written on behalf of two pathologist involved in TC/PC arrangements (the "Parr Letter"). In this letter, Mr. Parr describes two types of TC/PC arrangements.

Scenario 1. A medical practice consisting primarily of urologist or gastroenterologists also employs a pathologist as a part time employee to analyze slides of specimens obtained by other physicians in the practice from patients. The services of the employee pathologist are the professional component of the pathology series to the patients. The practice contracts with an independent laboratory to prepare the slides of the tissue specimens. The treating physician in the group, urologist or gastroenterologist, submits specimens to the independent lab and orders the slides. The services of the independent laboratory are the technical component of the pathology services. The laboratory bills and collects for the technical component. The practice bills the patient and collects for the professional component of the pathology services based on the amounts approved for that component by Medicare or the appropriate payor if the patient is not covered by Medicare. The part time employee pathologist has no relationship with the independent laboratory. The compensation of the employee pathologist is negotiated based on fair market value. As a result, the employee pathologist receives

compensation equal to somewhere between 35% and 30% of the total professional component that the practice receives for the pathology services. This rate of compensations is comparable to what employee pathologists have historically received for comparable services to many other practices.

Scenario 2. This scenario is the same as scenario 1, except that the employee pathologist has an ownership interest in the independent laboratory that prepares the slides and receives the technical component. Like the employee pathologist in Scenario 1, the employee pathologist's compensation is based on fair market value and is similar to that historically received by other employee pathologists who have no connection to an independent lab.

You ask that we analyze these arrangements under State and federal law. As we noted in a recent opinion, "as a matter of policy, this Office does not opine on questions of federal law." Op. S.C. Atty. Gen., July 24, 2009. However, we will attempt to address the legality of these types of TC/PC arrangements under State law. We understand you are particularly concerned with whether the arrangements described above violate the provisions in chapter 132 of title 44 of the South Carolina Code. Section 44-132-10 of the South Carolina Code (Supp. 2010) provides:

Except as provided in Section 44-132-20, no person licensed to practice in this State as a physician, surgeon, or osteopath, a dentist or dental surgeon, a nurse practitioner, or a physician's assistant shall charge, bill, or otherwise solicit payment for outpatient anatomic pathology services unless the services were rendered personally by the licensed practitioner or under the licensed practitioner's supervision.

Section 44-132-20 of the South Carolina Code (Supp. 2010) states:

A person who is licensed to practice medicine in this State or the professional legal entity of which the person is a shareholder, partner, employee, or owner, may submit a bill for outpatient anatomic pathology services only to:

- (1) the patient directly;
- (2) the responsible insurer or other third-party payor;

(3) the hospital, public health clinic, or nonprofit health clinic; or

(4) the referral laboratory or the primary laboratory.

As you mentioned in your letter, in 2006, this Office issued an opinion addressing the ability of physicians to bill for anatomic pathology services. Op. S.C. Atty. Gen., September 26, 2006. That opinion primarily dealt with the interpretation of section 44-132-40 of the South Carolina Code (Supp. 2010). That provision states: "The provisions of this chapter do not prohibit billing between laboratories for anatomic pathology services in instances where a sample or samples must be sent to another specialist." S.C. Code Ann, § 44-132-40. The requester asked that we determine whether or not this provision allows dermatopathologists to refer a pathological sample to another pathologist for a consultation and then bill for the services of the consulting pathologist. Op. S.C. Atty. Gen., September 26, 2006. We concluded as follows:

Section 44-132-10 clearly prohibits a licensed practitioner who does not personally perform or supervise the performance of anatomic pathology services from billing a patient for those services. Furthermore, in those instances only the laboratory performing such services may bill the patient or the patient's insurance company. However, section 44-132-40 clarifies that should a laboratory receive a sample for the performance of anatomic pathology services, it may "refer" the sample to another specialist. Section 44-132-20 reinforces the ability to refer samples between laboratories by allowing one licensed to practice medicine or their office to bill the laboratory from which the referral initiated. Thus, given the plain language of these provisions and in reading section 44-132-40 in conjunction with section 44-132-20, we believe the Legislature intended for a laboratory receiving a sample from another laboratory to be able to bill the "referral" or "primary" laboratory and for the referral or primary laboratory to be able to bill the patient for both its performance of anatomic pathology services, as well as, those performed by the laboratory to which it referred the sample. However, under the wording of these statutes, we do not believe a licensed practitioner who does not perform or supervise the performance of anatomic pathology services may bill a patient for the performance of such services by a laboratory.

Id.

While this opinion did not address TC/PC arrangements, we emphasized that section 44-132-10 requires that billing physicians either perform or supervise the performance of the anatomic pathology services. The TC/PC arrangements described in both the Wood/Harris Letter and the Parr Letter discuss employing a pathologist on a part time basis to work alongside another physician (whether it is an urologist or a gastroenterologist). However, neither of these letters indicates the degree of supervision the employing physician will have over the pathologist. Moreover, the question of whether or not a particular pathologist is being supervised by another physician is a question of fact. On numerous occasions, we stated that “this Office cannot make determinations of fact as ‘investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court.’” Op. S.C. Atty. Gen., December 15, 2010 (quoting Op. S.C. Atty. Gen., September 14, 2006). Therefore, this Office cannot opine as to whether a particular TC/PC arrangement satisfies the supervision requirement under section 44-132-10. Nonetheless, according to the plain language of section 44-132-10, so long as employing physician supervises the work of the pathologist, we believe a court would find employing physician could bill for the pathologist’s services.

Section 44-132-10 does not address situations in which a pathologist owns an interest in an outside lab. Nonetheless, section 44-132-10 does not specifically prohibit such an arrangement. Thus, a court could find that such arrangements are permissible. However, we caution that we have not reviewed whether such a situation is permissible under federal law.

The Wood/Harris Letter mentions a distinction is made under State law if a part time pathologist is employed as an independent contractor or an employee. Sections 44-132-10 et seq. does not appear to make such a distinction. However, we recognize that one element that courts typically examine to determine whether or not an employer-employee relationship exists is whether or not the employer has the right and authority to control and direct the person employed. See Kilgore Group, Inc. v. South Carolina Employment Sec. Comm’n, 313 S.C. 65, 437 S.E.2d 48 (1993) (concerning whether or not a person is an employee or independent contractor for purposes of unemployment taxes); Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009) (concerning whether or not a person is an employee or an independent contractor for purposes of workers compensation coverage). As we previously mentioned, section 44-132-10 essentially provides that if the anatomic pathology services are not performed by the licensed practitioner, they must be performed by a person “under the licensed practitioner’s supervision.” S.C. Code Ann. § 44-132-10. Thus, in order to comply with section 44-132-10, we would assume that the billing practitioner has a significant level of control over the person performing the pathological services. Therefore, we presume a court would necessarily find that the person performing the pathological services is an employee

rather than an independent contractor, but section 44-130-10 does not specify that the type of relationship is necessary.

In addition to addressing whether or not the TC/PC arrangements described in the Wood/Harris Letter and the Parr Letter are permissible under State law, you also ask that we address issues related to fee-splitting, patient care, credentialing, financial incentives, turnaround time and technical processing that these types of arrangements present. The Wood/Harris letter argues that the American Medical Association takes the position that TC/PC arrangement described in the letter violates the AMA's ethics guidelines. The interpretation of a private organization's ethical rules is beyond the scope of an opinion of this Office. Therefore, we are unable to comment on whether or not the TC/PC arrangements you are concerned with violate AMA rules.

Furthermore, we understand that you are concerned with whether the TC/PC arrangements described in the Wood/Harris Letter raises concerns over patient care. Specifically, this letter states that pathologist participating in the arrangements described may be able to avoid the credentialing requirements of hospitals. The Wood/Harris Letter points out that these pathologists may not have the same training and experience as pathologist affiliated with hospitals. In addition, the Wood/Harris Letter argues that such arrangements decrease the turnaround time to process pathological samples. To the contrary, the Parr letter argues that these types of TC/PC arrangements could be beneficial to patients.

Whether or not the TC/PC arrangements described above are beneficial to patients is clearly a question of fact. As we previously mentioned, this Office does not have the ability to make factual determinations. Op. S.C. Atty. Gen., March 16, 2011. Furthermore, whether or not these arrangements are beneficial to patients is a matter of policy. Currently, State law does not address this issue. However, we presume that in enacting the provisions contained in section 44-132-50 *et seq.*, the Legislature's aimed to protect patients. Nevertheless, the Legislature has not mandated that the particular arrangements between physicians and pathologist must prove to be beneficial to patients in order to be valid. Accordingly, the issue of whether TC/PC arrangements are beneficial to patients does not involve a question of State law that can be answered in an opinion of this Office.

Conclusion

Section 44-132-10 of the South Carolina Code requires that in order for a physician or other medical professional to bill for anatomic pathological services, that physician or medical professional must either perform the services him or herself or directly supervise the person performing the service. Therefore, we believe that if the part time pathologist in the arrangements described above is directly supervised by the billing physician, such an

arrangement is permissible under section 44-132-10. We do not believe this determination would change with regard to section 44-132-10 if the pathologist involved also owns an interest in the laboratory preparing the pathological sample. Furthermore, while section 44-132-10 does not require that the relationship between the licensed practitioner and the person performing the anatomic pathology services be an employee-employer relationship, due to the supervision requirement under section 44-132-10, we believe a court would likely find such a relationship because of the level of control required by section 44-132-10.

Although we believe that TC/PC arrangements under certain circumstances may be legal under South Carolina law, we understand that the Board has concerns about such arrangements. Pursuant to section 44-132-30 of the South Carolina Code (Supp. 2010), the Board is responsible for enforcing the provisions contained in chapter 132 of title 44. Thus, we believe the Board must make decisions on whether or not individual licensees satisfy these provisions. These decisions are then reviewable by the Administrative Law Court pursuant to section 40-47-45 of the South Carolina Code (Supp. 2009). Therefore, the Board, and in some circumstances the Administrative Law Court, must ultimately make a determination as to the legality of TC/PC arrangements.

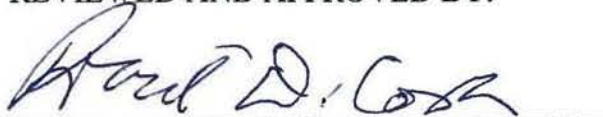
In addition to interpreting section 44-132-10, you asked us to evaluate issues involving fee splitting, patient care, credentialing, financial incentives, turnaround time, and technical processing involved in the TC/PC relationship described above. The fee splitting issue as described in the Wood/Harris Letter and the Parr Letter involves the application of an AMA ethics opinion, and thus, is beyond the scope of an opinion of this Office. The other issues all involve questions of fact and matters of policy. State law does not currently appear to address these issues. Therefore, we cannot comment these issues in this opinion. However, if the Board is concerned about these issues of policy, it should address those concerns to the Legislature.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General