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The State of South Carolina

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November 2, 1993

The Honorable Ernie Passailaigue
Senator, District 43
P.O. Box 299
Charleston, SC 29402

Dear Senator Passailaigue:

You have requested the opinion of this Office regarding questions arising from the following factual situation.

> "A" desires to form a corporation wherein the shareholders consist of "A" and "Doctor B". The corporation's sole purpose will be to provide Occupational Health Services, including, but not limited to, drug testing, DOT testing, pulmonary function testing, non-smoking classes and consultation of diet and exercise. This corporation, hereinafter referred to as "Corporation #1", will not engage in the practice of medicine. "Corporation #2" will have "A" as its sole shareholder.
>
> It is anticipated that "Corporation #1" will interact with "Corporation #2", as medical corporation formed to provide medical services. Also, "Corporation #2" will obtain the services of "Doctor B" and potentially other doctors who will all be independent contractors for the purpose of medical treatment. "Doctor B" will not be a shareholder in "Corporation #2."
>
> Although "Corporation #1" and "Corporation #2" will interact with one another through the natural course of business, neither will be restricted from interaction with other companies and or individuals for the purposes as set forth in their corporate nature.

(1) You have first asked whether it is inappropriate for "Doctor B" to be a shareholder in "Corporation #1." Generally, there is no prohibition of which we are aware against a physician being a shareholder in a corporation. However, the nature of "Corporation #1" might make the Provider Self-Referral Act of 1993 (Act No.71, 1993 S.C. Acts 156) applicable if "Doctor B" were to refer patients to "Corporation #1" for any of its described services.

Effective May 17, 1993, the Act prohibits referrals to entities in which a health care provider is an investor or has an investment interest. An investment interest includes, among other things, shares of stock in a corporation such as you describe, with one exception being "an investment interest acquired before June 15, 1993." S.C. Code Ann. §44-113-20 (10) (d).

S.C. Code Ann §44-113-30(A) states:

> (A) Except as provided in this section and other provisions of this chapter, a health care provider may not refer a patient for the provision of designated health services to an entity in which the health care provider is an investor or has an investment interest. However, this prohibition does not apply to:
>
> (1) an investment interest where the health care professional directly provides the health care services within the entity or will be personally involved in the provision, supervision, or direction of care to the referred patient.
>
> (2) the provider's investment interest is in registered securities purchased on a national exchange or over-the-counter market and issued by a publicly-held corporation:
>
> (a) whose shares are traded on a national exchange or on the over-the-counter market; and
> (b) whose total assets at the end of the corporations' most recent fiscal quarter exceeded fifty million dollars; or
>
> (3) with respect to an entity other than a publicly-held corporation described in subsection (A)(2) and a referring provider's investment interest in the entity, [if] each of the following requirements are met:
>
> (a) no more than fifty percent of the value of the investment interests are held by investors who are in a position to make referrals to the entity;
> (b) the terms under which an investment interest is offered to an investor who is in a position to

make referrals to the entity are no different from the terms offered to investors who are not in a position to make referrals;
(c) the terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are not related to the previous or expected volume of referrals from that investor to the entity;
(d) there is no requirement that an investor make referrals or be in a position to make referrals to the entity as a condition for becoming or remaining an investor.

(C) No claim for payment may be presented by an entity to an individual, third party payor, or other entity for a service furnished pursuant to a referral prohibited under this section.

(D) If an entity collects any amount that was billed in violation of this section, the entity shall refund the amount on a timely basis to the payor or individual, whichever is applicable.

(E) A health care provider who makes a referral prohibited by this section or who fails to disclose information required by §44-113-40(A) or presents or causes to be presented a bill or a claim for service for which payment may not be made under subsection (D) is subject to a civil penalty of not more than five thousand dollars for each such service to be imposed and collected by the appropriate board.

(F) A health care provider or other entity that enters into an arrangement or scheme which the health care provider or entity knows or should know has a principal purpose of assuring referrals by the health care provider to a particular entity which, if the health care provider directly made referrals to the entity would be in violation of this section, is subject to a civil penalty of not more than twenty-five thousand dollars for each

circumvention arrangement or scheme to be imposed and collected by the appropriate board.

(G) A violation of this section by a health care provider constitutes grounds for disciplinary action to be taken by the applicable board....

S. C. Code Ann. §44-113-40 states:

(A) A health care provider may refer a patient to an entity in which the health care provider is an investor if the referral is permitted under §44-113-20(10)(d) or §44-113-30(A)(3) <u>if before the referral</u> the provider furnishes the patient with a written disclosure form informing the patient of:

(1) the existence of the investment interest;
(2) the name and address of each applicable entity to which a referral is made in which the referring health care provider is an investor;
(3) the patient's right to obtain the item or services for which the patient has been referred at the location or from the provider or supplier of the patient's choice, including the entity in which the referring provider is an investor;
(4) the names and addresses of at least two alternative sources of these items or services available to the patient;
(5) a schedule of typical fees for items or services usually provided by the entity or, if impracticable because of the nature of the treatment, a written estimate specific to the patient.

(B) The referring provider must obtain the patient's signature that the information required under subsection (A) has been provided to the patient. (Emphasis added.)

(2) Regarding your question whether it is inappropriate for "Doctor B" to be an independent contractor of "Corporation #2," there does not appear to be any prohibition against that relationship provided "Doctor B" strictly complies with the Provider Self-Referral Act. This presumes that "Doctor B" and any other doctors will retain the unfettered discretion to make medical decisions they deem appropriate to the patient's care without restraint or restriction by "Corporation #2".

(3) As to your question whether the purpose of "Corporation #2" violates any regulatory laws, please be advised that there appears to be no general prohibition in current State law against physicians being employed by corporations as independent contractors for the purpose of medical treatment.

(4) Finally, you asked whether the interaction between "Corporation #1" and "Corporation #2" violates any corporate regulations and is subject to a piercing of the corporate veil. The question appears to involve factual issues that are beyond the scope of opinions of this Office. (Op. Atty. Gen., 12/12/83; see also Op. Atty. Gen., 10/12/79). In particular, whether a violation has occurred which might permit the corporate veil to be pierced would necessarily depend upon the specific facts involved in a particular situation.

Obviously, the factual situation presented cannot possibly encompass all of the facts which might be considered relevant by a court upon review. We are attempting to provide as much assistance as possible given the very general nature of the facts presented. Depending on how the facts develop in a particular circumstance other issues may arise and bring about a different result. Whether and the extent to which the Provider Self-Referral Act is applicable to the circumstances you describe could be determined only after thorough evaluation of all relevant facts and circumstances.

I trust the preceding discussion adequately answers your questions. However, if you have any questions, please do not hesitate to contact me.

Very truly yours,

Richard P. Wilson
Assistant Attorney General

REVIEWED AND APPROVED:

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Executive Assistant for Opinions