

## **SELF-REFERRAL ACT ADVISORY OPINION**

**RE: Application of Procreate Fertility Center of Virginia, PLLC**

### **REQUEST**

On November 17, 2017, Procreate Fertility Center of Virginia, PLLC, a Virginia professional limited liability company (the "Practice"), submitted an application for an advisory opinion to the Board of Health Professions ("Board"). The purpose of the application is to seek clarification of the definition of "referral" under the Virginia Practitioner Self-Referral Act ("Act"). The Practice, and its sole member, Christian Perez, M.D. ("Dr. Perez"), seeks to determine whether Dr. Perez and Ms. Duey, L.N.P. ("Providers"), by informing patients that Fertility Pharmacy of America, LP, a Tennessee limited partnership (the "Pharmacy"), is an option to fill fertility-related prescriptions, will qualify as a "referral" under the Act and violate Virginia Code § 54.1-2411, which prohibits referrals from a practitioner to another entity with whom the practitioner, or immediate family member, has an investment interest. Further, if it is determined that the Providers are making a referral, the Practice and Dr. Perez request that the Board make a determination whether the Practice is sufficiently involved in the ongoing care of the patients, as these prescriptions are being filled to meet the "office practice" exception of the Act. This opinion does not address Virginia Code § 54.1-2964, as it is outside the scope of the Board of Health Professions' Advisory Opinions on the Practitioner Self-Referral Act.

### **FACTS**

Dr. Perez is a physician licensed by the Virginia Board of Medicine who specializes in treating patients with infertility issues through the Practice. Dr. Perez currently owns one

hundred percent of the membership interests in the Practice and currently practices medicine exclusively through the Practice. Ms. Duey is a Women's Health Nurse Practitioner licensed by the Virginia Boards of Nursing and Medicine who also specializes in treating patients with infertility issues. Although she works in the practice, she has no ownership or beneficial interest in it and will not receive any compensation based, directly or indirectly, on the volume or value of prescriptions written for the Practice's patients, whether or not such prescriptions are filled by the Pharmacy.

The Pharmacy is a specialized pharmacy dedicated to providing patients with fertility-related pharmaceutical products. No such pharmacies specializing in fertility-related pharmaceutical products are currently operating in Virginia. RX Partners, LLC, a Tennessee limited-liability company ("RX Partners"), owns a two percent partnership interest in the Pharmacy and serves as its general partner. The remaining ninety-eight percent of the partnership interests in the Pharmacy are owned by physicians, either in their individual capacities or through their medical practices (each, a "Pharmacy Partner" and collectively, the "Pharmacy Partners"). Each Pharmacy Partner is a limited partner of the Pharmacy and receives partnership distributions in proportion to his limited partnership interest in the Pharmacy. The Pharmacy has a brick and mortar presence in Nashville, Tennessee, and ships prescriptions all over the country, including filling prescriptions that are prescribed by Pharmacy Partners. The Pharmacy bills and collects payment for all inventory that it sells to patients and does not submit any claims to federal payors for reimbursement.

Dr. Perez desires to become a Pharmacy Partner by purchasing a limited partnership interest in the Pharmacy. Dr. Perez would fund the purchase of such interest in the

Pharmacy solely from his personal funds. The Practice would not have any financial relationship with, or ownership interest in, the Pharmacy.

In the course of providing infertility treatments to the Practice's patients, the Providers will prescribe certain fertility related medications or other pharmaceutical products, many of which are only readily and regularly available through specialized fertility pharmacies like the Pharmacy. The Providers will not direct or affirmatively send their patients to fill their prescriptions through the Pharmacy. Rather, they will provide their patients with a written list of pharmacies through which the prescription can be filled and such list will include the name of the Pharmacy as one of those options. Any effort by the Providers to provide patients with information about the Pharmacy will not outweigh efforts to provide information about other pharmacies, as all of the pharmacy options shared with patients will be included on a single list.

### **VIRGINIA PRACTITIONER SELF-REFERRAL ACT**

Under the Act, a health care practitioner is prohibited from referring patients to an entity outside the referring practitioner's office or group practice if the practitioner, or an immediate family member, is an investor in such entity.

The following pertinent terms are defined by the Act:

"Investment interest" means the ownership or holding of an equity or debt security, including, but not limited to, shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments, except investment interests in a hospital licensed pursuant to Article 1 (Section 32.1-123 et seq.) of Chapter 5 of Title 32.1.

"Investor" means an individual or entity directly or indirectly possessing a legal or beneficial ownership interest, including an investment interest.

"Practitioner" means any individual certified or licensed by any of the health regulatory boards within the Department of Health Professions, except individuals regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

"Referral" means to send or direct a patient for health services to another health care practitioner or entity outside the referring practitioner's group practice or office practice or to establish a plan of care which requires the provision of any health services outside the referring practitioner's group practice or office practice.

### QUESTION

**Do the proposed actions of the Providers meet the definition of "referral" under the Virginia Self-Referral Act if they recommend the Pharmacy for filling fertility-related prescriptions with a list of other pharmacies that may be used by the patients?**

Dr. Perez will have an investment interest in the Pharmacy by purchasing a limited partnership interest in the Pharmacy. Since Dr. Perez will be an investor in the Pharmacy, it must be determined whether the Providers are making a referral under the Act. The Act defines "Referral" as a physician sending or directing a person to a particular physician or entity. Virginia Code § 54.1-2410. Merriam-Webster defines "send" as "to tell *or cause* (someone or something) to go to a place." Further, "direct" is defined as "*to cause* (someone or something) to turn, move, or point in a particular way" or "to cause (someone's attention, thoughts, emotions, etc.) to relate to a particular person, thing, goal, etc." Merriam-Webster Dictionary 1071(9<sup>th</sup> ed. 1991). The Act thus requires a practitioner to affirmatively send or direct a patient to a particular provider or entity in order to classify as a referral. Therefore, merely including the Pharmacy on a list with other pharmacy options does not meet the definition of a "referral" under the Act.

The application states that the Providers will not direct or affirmatively send their patients to fill their prescriptions through the Pharmacy. Rather, they will provide their patients with a written list of pharmacies through which the prescription can be filled, and such list will include the name of the Pharmacy as one of those options. Further, any effort by the Providers to provide patients with information about the Pharmacy will not outweigh

efforts to provide information about other pharmacies, as all of the pharmacy options shared with patients will be included on the same list. Informing patients that the Pharmacy is one pharmacy option among several pharmacies for filling fertility-related prescriptions does not meet the definition of a “referral.”

As long as the Providers provide patients with information about the Pharmacy as a pharmacy option in a way that does not outweigh efforts to provide information about other pharmacies, the actions of the Providers will not constitute a “referral” under the Act. Since the actions of the Providers do not constitute a referral under the Act, the Board will not address the issue related to the ongoing care of the patients while the prescriptions are being filled by the Pharmacy as it relates to the “office practice” exception. Further, as stated above, this opinion does not address the proposed disclosure under Virginia Code § 54.1-2964, as that is beyond the scope of the Board of Health Professions.

### **CONCLUSION**

For the reasons set forth above, the agency subordinate, pursuant to 18 VAC 75-20-60(E), recommends the following disposition to the Board of Health Professions:

If the Providers follow the procedures stated in the application, as well as in this Opinion, the providers will not make a referral to the Pharmacy within the meaning of the Act.