

## **Application of Eye Doctors of Richmond, L.L.C.**

### **Findings of Fact**

On September 29, 1997, Eye Doctors of Richmond, L.L.C., ("Eye Doctors") submitted an application for an advisory opinion as to whether the physician members of Virginia Eye Institute ("VEI") have an ownership interest in Eye Doctors by virtue of the fact that their professional corporation is a part owner of Eye Doctors. Secondly, the question has been asked whether referrals from the VEI physicians to Steven Linas, O.D., a part owner of Eye Doctors, would be permissible referrals to the physician's "office practice" as that term is defined in the Practitioner Self Referral Act, as the Eye Doctors' location will be operated and designated under the VEI logo.

Eye Doctors is organized as a limited liability company owned by Eye Surgeons of Richmond, P.C., t/a Virginia Eye Institute and Dr. Linas for the purpose of providing professional optometry services. Eye Doctors' initial location is at Ironbridge Medical Park, 11601 Ironbridge Road, Chester, Virginia.

VEI currently operates an ambulatory surgery center, as well as other satellite locations in the Richmond metropolitan area, providing ambulatory surgery services and ophthalmic medical services.

Eye Doctors has a Management Services Agreement with VEI pursuant to which VEI will provide space, equipment, staff, administrative and billing services. The Management Services Agreement provides for a Management Services Fee of a percentage of net revenues equivalent to VEI's own overhead expenses.

In addition to his ownership interest in Eye Doctors, Dr. Linas is employed to provide optometry services primarily at the Ironbridge Road facility, but he may establish office hours in other VEI locations in the future.

VEI physicians, Drs. Wortham and McGehee, will initially practice out of the Ironbridge Road facility where they will provide ophthalmologic services in the same manner as in other VEI office locations. In addition, several VEI physicians may from "time to time"/"frequently" practice at the Ironbridge Road facility, while other VEI physicians may see patients there as schedules permit. VEI anticipates that the physicians and optometrists will be able to practice at any of the VEI offices depending on their preferences and the availability of space.

All the physicians in VEI are members of the same group practice. Dr. Linas will not be a member of this group practice but rather will be a member of the Eye Doctors of Richmond,

which consists of Eye Surgeons of Richmond, L.L.C., and one or more optometrists.

Eyeglasses, contact lenses and related products will be dispensed from an optical shop located within the Eye Doctors/VEI location.

The Virginia Practitioner Self-Referral Act, Virginia Code §§ 54.1-2410 through 54.1-2414 (the "Act"), generally prohibits referrals where the practitioner or any of the practitioner's immediate family has an investment interest in a health services entity. Specifically, Virginia Code § 54.1-2411(A) provides that "[u]nless the practitioner directly provides health services within the entity and will be personally involved with the provision of care to the referred patient, . . . a practitioner shall not refer a patient for health services to an entity outside the practitioner's office or group practice if the practitioner or any of the practitioner's immediate family members is an investor in such entity."

Virginia Code § 54.1-2410 contains definitions of the following pertinent terms:

"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 (§ 32.1-123 *et seq.*) of Chapter 5 of Title 32.1.

"Practitioner" is any individual certified or licensed by any of the health regulatory boards with 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 of 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.

"Group practice" means two or more health care practitioners who are members of the same legally organized partnership, professional corporation, not-for-profit corporation, faculty practice or similar association in which (i) each member provides substantially the full range of services within his licensed or certified scope of practice at the same location as the other members through the use of the

organization's office space, facilities, equipment, or personnel; (ii) payments for services received from a member are treated as receipts of the organization; and (iii) the overhead expenses and income from the practice are distributed according to methods previously determined by the members.

"Office practice" means the facility or facilities at which a practitioner, on an ongoing basis, provides or supervises the provision of health services to consumers.

The physician members of VEI have an investment interest, as that term is defined in Virginia Code § 54.1-2410, in Eye Doctors by virtue of the fact that their professional corporation is a member of Eye Doctors. Consequently, referrals for health care by the physician members of VEI are prohibited except to the extent that the referral is to a member of the referring practitioner's group or office practice.

Referrals from the VEI physicians to Dr. Linas, a member of Eye Doctors, would be permissible to the extent the Eye Doctors' practice arrangement may be construed as an "office practice." To qualify as an "office practice," a VEI physician must demonstrate that he provides or supervises the provision of health care "on an ongoing basis" at the Eye Doctors' facility.

Since the phrase "on an ongoing basis" is not defined, for purposes of this advisory opinion and in the absence of a statutory definition of the term "on an ongoing basis," the Board adopts an accepted rule of statutory construction wherein common sense should be applied in interpreting words contained in a statute and that the words be given their usual, commonly understood meaning. As there are no reported Virginia court decisions defining the term, a review of court decisions in other states suggests a definition consistent with the concept of services being available on "a continuing, day to day basis," "an exclusive, permanent and full time" basis or a "regular or regularly" scheduled basis.<sup>1</sup>

Based upon representations contained in the application, both Drs. Wortham and McGehee appear to satisfy the requirement that they practice at the Eye Doctors' Ironbridge Road facility "on an ongoing basis," as that term is construed by the Board.

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<sup>1</sup> A good example is *Tryc v Michigan Veterans' Facility*, 451 Mich. 129, 545 N.W. 2d 642 (1996 Mich.), a case involving a determination of whether the Veterans' Facility meets the hospital exception contained in the governmental immunity statute. In its consideration, the Court discussed the availability of medical care at the facility on an ongoing basis. It concluded that "an organized program of medical care . . . available on an ongoing basis. . . suggests that physicians are available to provide daily direction or supervision. . .".

Referrals to Dr. Linas from other VEI physicians, who may from "time to time"/"frequently" practice at the Ironbridge Eye Doctors/VEI location or those who may see patients there as schedules permit, do not satisfy the requirements for an office practice in that they do not provide or supervise the provision of health services "on an ongoing basis" at the Eye Doctors' Ironbridge Road facility.

For the purposes of determining whether the other VEI physicians are available "on an ongoing basis" at the Ironbridge facility in order to qualify for the "office practice" exception, the lack of a presence at the facility on a continuing, regularly scheduled basis is deemed to be conclusive indicia that these physicians may not avail themselves of the office practice exception and thus, may not refer patients to Eye Doctors for optometric care.

### Conclusions of Law

For the reasons set out hereinabove, the Committee shall recommend to the Board of Health Professions, pursuant to 18 VAC 75-20-60(E), that (1) the physician members of VEI have an investment interest, as defined in Virginia Code § 54.1-2410, in Eye Doctors by virtue of the fact that their professional corporation (VEI) is a member of Eye Doctors; and (2) referrals from the VEI physicians, currently Drs. Wortham and McGehee, to Dr. Linas, as a member of Eye Doctors, would be permissible since the practice arrangement, consistent with representations contained in the application, appear to satisfy the office practice requirement since they will see patients at the Ironbridge location "on a ongoing basis." The other VEI physicians, who are not practicing at the Ironbridge location "on an ongoing basis" as defined hereinabove, do not qualify for the "office practice" exception, since they will not be practicing at the facility on a continuing, regularly scheduled basis and as a result, may not refer patients to Eye Doctors for optometric care.

Alteration, addition or deletion to the documents submitted to the Committee will vacate the advisory opinion given by the Committee and the Board of Health Professions.

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