

PRACTITIONER SELF-REFERRAL ACT ADVISORY OPINION
RE: VASCULAR ACCESS, LTD.

FACTS

On April 19, 2005, with an addendum provided by letter dated September 16, 2005 (“Addendum Letter”), Vascular & Transplant Specialists, P.C., (“VTS”), a practice group of Virginia physicians, submitted an application to the Board of Health Professions (“Board”) for an advisory opinion under the Virginia Practitioner Self-Referral Act, Sections 54.1-2410 through 54.1-2414 of the Code of Virginia (1950), as amended (the “Act”).

VTS seeks to join together with Tidewater Kidney Specialists to establish a separate business entity under the name Vascular Access, Ltd. (“Vascular”). Vascular would “provide access services primarily for dialysis patients.” (Application, Attachment I). The individual physicians in the two practice groups would own Vascular, with VTS contributing \$30,000 and Tidewater Kidney Specialists contributing \$20,000 to Vascular’s formation. (Addendum Letter). According to the application, “[a]ll but possibly two of the physicians” from VTS would practice at Vascular “on a regular basis.” Additionally, “[m]ost, if not all, of the physicians [from Tidewater Kidney Specialists] would also practice on a regular basis at the new facility on the days when [VTS] was not using the facility.” (Application, Attachment I).

QUESTIONS

- 1. Does a practitioner violate the Practitioner Self-Referral Act if he refers a patient to an entity in which he is an investor, and he then provides the care at that entity?**

A practitioner may freely refer patients to an entity in which he is an investor and that is outside his group or office practice, if the practitioner will be personally involved with providing care to the patient. Section 54.1-2411(A) of the Act states that even if a practitioner or an immediate family member is an investor in an entity, he may refer patients to that entity if he

“directly provides health services within the entity and will be personally involved with the provision of care to the referred patient.”

If a physician refers a patient to Vascular and then directly provides the treatment to the patient at Vascular, there is no violation of the Act because the referring physician is also the treating physician.

2. If a practitioner refers a patient to an entity in which he is an investor, but does not provide the care at that entity, does he violate the Practitioner Self-Referral Act?

If a practitioner does not directly provide care to the referred patient at the entity in which the practitioner or an immediate family member is an investor, he may still legally refer the patient to the entity if one of the statutory exceptions applies.

Under Section 54.1-2411(A) of the Act, the Board itself may grant an exception to the Act. Additionally, there is an exception to the Act when the referral is to a publicly traded entity in which the referring practitioner, or immediate family member, is an investor. Section 54.1-2411(D) sets out a number of conditions that must be met to qualify for the publicly traded entity exception to the self-referral prohibition.

VTS has not requested an exception to the Act from the Board pursuant to Section 54.1-2411(A), nor has it represented that Vascular will be a publicly traded entity meeting the requirements of Section 54.1-2411(D) of the Act. In the absence of an applicable statutory exception, the referral is only permissible if it is to an entity that is part of the practitioner’s group or office practice.

a. Do referrals to Vascular qualify as referrals within the referring practitioner’s group practice?

Under Section 54.1-2410 of the Act, a group practice involves “two or more health care practitioners who are members of the same legally organized” entity. In its application, VTS

states that Vascular would be a separate business entity from the practices establishing it. (Application, Attachment I). Therefore, referrals to Vascular fall outside the practitioner's group practice, and would violate the Act unless Vascular is part of the referring physician's office practice.

b. Do referrals to Vascular qualify as referrals within the referring practitioner's office practice?

A practitioner may refer patients to facilities that qualify as part of the practitioner's office practice and not violate the Act. According to Section 54.1-2410 of the Act, an office practice includes those facilities where a "practitioner, on an ongoing basis, provides or supervises the provision of health services to consumers."

The Act does not define the term "ongoing basis." However, in previous advisory opinions, such as Vistar Eye Center, Inc., and InVision Healthcare, Inc., the Board has given the phrase its common meaning. These opinions referenced court decisions in other states defining the term as "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." (InVision Healthcare, Inc., Advisory Opinion, p. 5, citing Vistar Eye Center, Inc., Advisory Opinion, p. 5).

According to VTS, almost all of the physicians in the two practice groups would "practice on a regular basis at the facility." (Application, Attachment I). If a practitioner in fact regularly provides or supervises the provision of health services at the Vascular facility, the facility is part of his office practice. The application states, however, that not all of the physicians in the two practice groups would regularly practice at the Vascular facility. (Application, Attachment I). Those physicians who do not regularly practice or supervise

services at Vascular, given that they have an investment interest in Vascular, would not be permitted to refer patients to Vascular unless they are personally providing the health services.

RECOMMENDATION

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

(1) if a physician refers a patient to Vascular and then provides the patient services at Vascular, there is no violation of the Act;

(2) Vascular does not qualify as part of the referring physician's group practice because Vascular is a separate legal entity from the physician's practice group, from which he is referring patients;

(3) Vascular qualifies as part of the referring physician's office practice if he provides or supervises the provision of health care services to patients on an ongoing basis at the Vascular facility.