

## APPLICATION OF VISTAR EYE CENTER, INC.

### FACTS

On May 3, 2000, Vistar Eye Center, Inc. ("Vistar"), submitted an initial application 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"). On May 26, 2000, Vistar submitted an addendum to the original application modifying the factual issues presented for consideration.

Vistar is a Virginia corporation that provides health services in Virginia. Vistar is a group practice comprised of thirteen physician shareholders, the majority of whom are ophthalmic surgeons, and the remainder of whom are non-surgical ophthalmologists. Vistar provides services at several locations throughout the Roanoke Valley, including primary offices in Roanoke City, Roanoke County, Salem and Bedford, and satellite offices in Rocky Mount, Wytheville and Blacksburg. The members of the group practice are permitted to practice at any of the Vistar locations and regularly practice at the group's different offices as scheduling and patient needs dictate.

In addition, Southwest Virginia Ambulatory Surgery Center, L.L.C. ("Southwest"), a Virginia limited liability company in which all of the Vistar shareholders are members, has obtained a certificate of public need from the Virginia Department of Health approving the construction and operation of an outpatient surgical hospital or ambulatory surgery center with one operating room. While the ambulatory surgery center will be constructed in the same building, it will nevertheless be separate and will adjoin the group's Salem office. Each of the surgeon members of Vistar is expected to provide services at the ambulatory surgery center on a regular basis.

**VIRGINIA PRACTITIONER SELF-REFERRAL ACT**

The Act prohibits generally referrals where the practitioner or any of the practitioner's immediate family has an investment interest in a health services entity. Specifically, Section 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 . . . . "

Section 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" 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.

"Entity" means any person, partnership, firm, corporation, or other business that delivers health services.

"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.

"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.

Based upon the foregoing definitions, Vistar physician members will be shareholders in Southwest, and as such, will have an investment interest in Southwest. As a result, any intra-group patient referrals by Vistar members to another physician member of Vistar that may cause the referred patient to have health services rendered at Southwest are prohibited except to the extent that the referring physician has a group or office practice at Southwest. This opinion will address the applicability of the group and office practice exceptions.

### QUESTIONS

1. **Is an intra-group referral from a non-surgeon member of Vistar to a surgeon member of Vistar for surgical service to be performed at Southwest, co-located at Vistar's Salem**

**location, permissible under the Act where both physicians co-manage post-surgical care?**

The non-surgeon and surgeon members of Vistar, having an investment interest in Southwest, and contemplating the referral of patients to surgeon members of Vistar, may refer a patient for surgery at Southwest provided the referring member has a group practice at Southwest. In light of the definition of group practice, in order for the referring member to have a group practice at Southwest, and therefore to have a permissible referral to Southwest, the referring member must demonstrate that he provides a full range of services within his scope of practice at Southwest using Southwest's office space, facilities, equipment, or personnel.

The information contained in the application regarding the likely referrals from Vistar to Southwest describes a practice arrangement where all referrals to Southwest will be for only ophthalmologic surgery and not for general non-surgical ophthalmologic health services. Based on this description, a non-surgeon member of Southwest does not appear to provide a full range of services within his licensed scope of practice at Southwest using Southwest's office space, facilities, equipment, or personnel, and, therefore, will not have a group practice at Southwest. A surgeon member of Southwest who can demonstrate that he provides a full range of services within his scope of practice at Southwest using Southwest's office space, facilities, equipment, or personnel will have a group practice at Southwest.

Since all members of Vistar do not have a group practice at Southwest, any member who does not have a group practice at Southwest may still make a

referral provided they have established an office practice at Southwest. The Act defines an office practice as the facility or facilities at which a practitioner, on an ongoing basis, provides or supervises the provision of health services to consumers. To establish an office practice and therefore to be able to make referrals, a Vistar member must demonstrate that he provides or supervises the provision of health care "on an ongoing basis" at the ambulatory surgical center.

The phrase "on an ongoing basis" is not defined by the Act. For purposes of this advisory opinion and in the absence of a statutory definition of the phrase "on an ongoing basis," the Board will adopt the accepted rule of statutory construction that common sense should be applied in interpreting words contained in a statute and that the words be given their usual, commonly understood meaning. There are no reported Virginia court decisions defining "on an ongoing basis." However, 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>

The information contained in the application regarding the referrals from a non-surgeon member to a surgeon member describes a practice arrangement where all referrals to Southwest will be for only ophthalmologic surgery and not for general non-surgical ophthalmologic health services. Based on this

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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 . . ."

description, a non-surgeon member will not be providing health services at Southwest and, therefore, will not have an office practice at Southwest.

Neither will the co-management of the post-surgical care by a non-surgeon member create an office practice arrangement unless it can be demonstrated that this type of care is an element of the actual surgical care at Southwest, and the care is actually performed at the ambulatory surgical center at Southwest. The factual description in the application of the post-surgical care does not demonstrate that the co-management of the post-surgical care by a non-surgeon member is the supervision of the surgical care, since the care will follow the actual surgery. Further, the application does not discuss if the actual post-surgical care will be performed at the ambulatory surgical center at Southwest. Based on the information contained in the applications, the non-surgeon member will not provide health services at Southwest on an ongoing basis. Therefore, the office practice exception will not apply to referrals by non-surgeon members to surgeon members, and any such referrals are not permitted under the Act.

- 2. Is an intra-group referral from a surgeon member of Vistar to a specialized surgeon member of Vistar for surgical service (e.g., retina care) likely to be performed at Southwest, co-located at Vistar's Salem location, permissible under the Act where both physicians co-manage post-surgical care?**

The information contained in the application regarding the referrals from a surgeon member to a surgeon member describes a practice arrangement where the surgeon members of both Vistar and Southwest provide surgical services at Southwest on a regular basis. The proposal describes a referral where a Vistar

surgeon member, who may perform ophthalmologic surgery on an ongoing basis at the Southwest location, decides to refer a patient to another Vistar surgeon member with a specialized competence (e.g., retina care). This surgeon member likely will perform the specialized service at Southwest, an entity outside the referring surgeon member's group practice. Although this is a referral under the Act, the surgeon members of Vistar may be within an office practice arrangement if both surgeon members perform surgeries on a regular basis at Southwest. Therefore, if the referral is between two surgeon members who can demonstrate that they provide health services on an ongoing basis at Southwest, an office practice arrangement will exist between the Vistar surgeon members.

The co-management of the post-surgical care by both surgeon members will not expand the office practice arrangement described above unless it can be demonstrated that the co-management of post-surgical care is an element of the actual surgical care at Southwest, and is actually performed at the ambulatory surgical center at Southwest. As stated above, the factual description of the post-surgical care in the application does not demonstrate that the co-management of the post-surgical care by a surgeon member is the supervision of the surgical care, since the care will follow the actual surgery. Further, the application does not discuss if the actual post-surgical care will be performed within the ambulatory surgical center at Southwest.

- 3. If the intra-group referrals stated above are not permitted under the Act, would the referrals described above be permitted if the ambulatory surgery center was organized as an integral part of Vistar and not as a separate limited liability company?**

So long as the ambulatory surgical center is organized as integral part of Vistar, the ambulatory surgical center will be a part of the Vistar entity. This business entity is a group practice, and Vistar members may send or direct a patient to another Vistar member without the patient leaving the group practice. Therefore, under this proposed description, referrals are permissible under the Act.

### **RECOMMENDATION**

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

- (1) the Vistar physician members, as shareholders in Southwest, will have an investment interest in Southwest. As a result, any intra-group patient referrals by Vistar members to another Vistar member that may cause the referred patient to have health services rendered at Southwest are prohibited except to the extent that the referral is within the referring physician's group or office practice;
- (2) a Vistar member must demonstrate that he provides a full range of his services within his scope of practice at Southwest using Southwest's office space, facilities, equipment, or personnel to have a group practice at Southwest;
- (3) the office practice exception will not apply to referrals from non-surgeon members to surgeon members since the non-surgeon member does not provide health services at Southwest on an ongoing basis;
- (4) a Vistar surgeon member may maintain an office practice and may refer to another surgeon member if the referring surgeon member can demonstrate that he performs surgery on a regular basis at Southwest;

(5) the co-management of the post-surgical care by non-surgeon members and/or surgeon members will not establish an office practice arrangement unless it can be demonstrated that the co-management of post-surgical care is an element of the actual surgical care, or the supervision of the provision of surgical care at Southwest, and is actually performed at the ambulatory surgical center at Southwest; and

(6) if the ambulatory surgical center is organized as an integral part of Vistar, the ambulatory surgical center will be a part of the Vistar entity. This business entity is a group practice, and under the Act all Vistar members may refer a patient to other Vistar members.