

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
BOARD OF MEDICINE

Final Order No. AHCA-95-00693 Date 5-16-95

FILED

Agency for Health Care Administration
AGENCY CLERK

R.S. Power, Agency Clerk

By: Brenda S. Moore
Deputy Agency Clerk

IN RE: THE PETITION FOR DECLARATORY
STATEMENT OF CHARLES H. WINGO, M.D.
AND TALLAHASSEE ORTHOPEDIC CLINIC, P.A.

FINAL ORDER

This cause came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on April 8, 1995, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Charles H. Wingo, M.D. (hereinafter Petitioner). The Agency for Health Care Administration (hereinafter AHCA) appeared before the Board for the purpose of addressing the interpretation to be made by the Board of Medicine. AHCA also filed a Notice of Agency Objections that the Board treated as a motion to intervene and granted. Having considered the petition, the arguments submitted by counsel for the Petitioner, counsel for AHCA, and counsel for the Board of Medicine, the applicable law, and being otherwise fully advised in the premises, the Board of Medicine makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes, and practices medicine full-time as one of the members of the group

practice, Tallahassee Orthopedic Clinic, P.A. (hereinafter TOC) in Tallahassee, Florida.

2. The facts asserted by Petitioner are as follows:

(a) TOC is a Florida professional corporation owned wholly by eight (8) practicing orthopedic surgeons, including Petitioner, and one (1) family practice physician. In addition, TOC employs two (2) orthopedic surgeons, one (1) family practitioner and eighty-five (85) support personnel.

(b) All of the owners and employed physicians, including Petitioner, are full-time employees of TOC under employment contracts with TOC.

(c) All physician services provided by the physicians employed by TOC, including Petitioner, are billed under a global or unified system.

(d) All of the overhead expenses and income related to services provided through TOC are distributed among the owner/members of TOC pursuant to a predetermined formula approved by TOC's owner/members.

(e) With the exception of surgery performed by TOC employed surgeons at various hospitals and out-patient surgery centers, substantially all of the services rendered by TOC employees are performed at TOC's principal place of business. TOC's principal place of business is a sixty thousand (60,000) square foot building constructed for the primary purpose of housing all of TOC's physicians, staff, and support personnel.

3. The entity in which Petitioner practices, TOC, meets the definition of "group practice" as that term is defined in Section 455.236(3)(f), Florida Statutes.

4. TOC has ordered a diagnostic imaging system (hereinafter MRI) for installation on its premises for the use and benefit of the patients of its employee physicians, including the patients of Petitioner. The use of such an MRI system would be the provision of "designated health services" as defined in Section 455.236(3)(c), Florida Statutes.

5. There are presently two (2) diagnostic imaging systems in the Tallahassee area. One is based on a fonar technology (Damadian) and the other is a General Electric system (1.5 tesla magnet with a 55cm boar).

6. Tallahassee is the home of two (2) major universities. Each university has substantial athletic programs. Some of the athletes involved in those programs weigh in excess of three hundred (300) pounds. The existing diagnostic imaging systems in the Tallahassee area are limited in their ability to handle patients of that size.

7. Many of the practicing physicians in the Tallahassee area who are likely to have a regular need for diagnostic imaging services for their patients either are or were involved in the ownership of the General Electric system in Tallahassee.

8. The lack of local alternatives to the two (2) existing diagnostic imaging systems often requires patients of local physicians to either delay for significant periods of time before receiving such services and/or travel to other locations where such services are either more readily available or capable of the type of service needed.

9. Local physicians in the Tallahassee area have approached TOC to request access to the MRI system TOC plans to install.

10. TOC is willing to allow access to its planned MRI system for the medical community and the general population on the same fee basis as the patients of TOC's employee physicians. If TOC is permitted to allow such access, TOC will not receive any cross-referrals, split-fees, or kickbacks from non-member physicians.

11. AHCA did not dispute any of the factual assertions set forth by Petitioner in his Petition or in his presentation before the Board of Medicine. Neither the Petitioner nor the intervenor or any other interested person have requested a Section 120.57, Florida Statutes, hearing and the Board has not conducted a Section 120.57, Florida Statutes, hearing.

12. This Petition was noticed by the Board of Medicine in Vol. 21, No. 13, dated March 31, 1995, of the Florida Administrative Weekly (p. 1990).

CONCLUSIONS OF LAW

1. The Board of Medicine has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code. The Board is aware of the prohibition against using a declaratory statement as a vehicle for the adoption of broad agency policies as discussed in Florida Optometric Association v. DPR, Board of Opticianry, 567 So. 2d 928 (Fla. 1st DCA 1990). However, the Board is unable to readily envision a set of circumstances under the statute at issue in

this cause that would be so unique as to not apply to any other licensee or group of licensees. Furthermore, the statute clearly directs the Board to encourage and answer declaratory statement petitions precisely like that pending in this matter for the purpose of clarifying the application of this statute. The Board therefore finds itself compelled by the specific mandate in Section 455.236(4)(b)4., Florida Statutes, to accept and answer the petition in this matter.

2. The Petition for Declaratory Statement is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code.

3. In reviewing the "Patient Self-Referral Act of 1992" (Section 455.236, Florida Statutes), it is clear to the Board of Medicine that the Legislature intended to prohibit certain referrals of patients by physicians for the provision of certain designated health services (for the purposes of this Final Order diagnostic imaging services) when such referral would ultimately result in the flow of fees from the patient to the referring physician through the entity that accepted the referral. It is equally clear to the Board of Medicine that the Legislature did not intend to discourage the ownership of diagnostic imaging systems by group practices.

4. The Board of Medicine recognizes that Section 455.236, Florida Statutes, is not a model of clarity concerning certain types of referrals and therefore, the Board of Medicine is required to apply general rules of statutory interpretation.

Where a statute is highly regulatory or penal in nature or in derogation of common law, it must be construed strictly and narrowly and in a light most favorable to the restricted class or persons. Under such a standard and in light of the intent of Section 455.236, Florida Statutes, to prohibit the return flow of fees back to referring physicians, the Board concludes that Subsection 455.236(4), Florida Statutes, setting forth those referrals that are prohibited, does not contain any prohibition against a group practice accepting referrals for diagnostic imaging services from physicians that have no financial interest in the group practice. Furthermore, the Board of Medicine concludes that Subsection 455.236(3)(m)3.f., Florida Statutes, merely provides a definition of what is not a referral and nothing therein can, under the aforementioned standard of statutory construction, be interpreted to prohibit the acceptance of referrals from physicians that have no financial interest in the group practice.

5. The Board of Medicine takes note of the suggestion by AHCA that the prohibition and definition should be read together to create a prohibition against a group practice referring its own patients to an MRI owned by the group practice while at the same time accepting referrals from outside physicians for MRI services. However, the Board of Medicine does not believe that such a construction is either permissible or reasonable in light of the clear intent of Section 455.236, Florida Statutes.

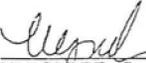
WHEREFORE, the Board of Medicine hereby determines that under the specific facts of the Petition for Declaratory

Statement, the proposed purchase of an MRI system by TOC and its use for patients of both TOC's employee physicians, including Petitioner, and at the same time the patients of physicians who have referred their patients to TOC but are not employed by TOC and who have no investment interest in or with TOC is not prohibited under Section 455.236, Florida Statutes.

This Final Order takes effect upon filing with the Clerk of the Agency for Health Care Administration.

DONE AND ORDERED this 3 day of May, 1995.

BOARD OF MEDICINE


MARGARET S. SKINNER, M.D.
VICE-CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS MAY BE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES REQUIRED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Charles H. Wingo, M.D. and Tallahassee Orthopedic Clinic, P.A. c/o Thomas W. Lager, Attorney at Law, 354 Office Plaza, Tallahassee, Florida 32301 and by hand delivery to Larry G. McPherson, Jr., Chief Attorney, Agency for Health Care Administration, 1940 North Monroe Street, Tallahassee, Florida 32399-0792, this _____ day of _____, 1995.

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Charles H. Wingo, M.D. and Tallahassee Orthopedic Clinic, P.A., 3334 Capital Medical Boulevard, Suite 400, Tallahassee, Florida 32308-4624 and Thomas W. Lager, Esquire, 354 Office Plaza, Tallahassee, Florida 32301, and by interoffice delivery to Larry G. McPherson, Chief Medical Attorney, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-0792, at or before 5:00 p.m., this 10 day of May, 1995.

Mam Harris

-DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

IN RE: TALLAHASSEE ORTHOPEDIC CLINIC, INC.
AND CHARLES H. WINGO, M.D., Petitioners

PETITION FOR DECLARATORY STATEMENT

Petitioners, TALLAHASSEE ORTHOPEDIC CLINIC, INC., hereinafter "TOC," and CHARLES H. WINGO, M.D., hereinafter "Dr. Wingo," seek a declaratory statement pursuant to § 21M-18.003, Florida Administrative Code, and state:

1. Petitioner, TALLAHASSEE ORTHOPEDIC CLINIC, INC., is a Florida corporation whose principal place of business is 3334 Capital Medical Boulevard, Suite 400, Tallahassee, Florida 32308. TOC is engaged primarily in the business of providing medical care and treatment to the general public. Dr. Wingo is a Board Certified Orthopedic Surgeon whose business address is 3334 Capital Medical Boulevard, Suite 400, Tallahassee, Florida 32308. Dr. Wingo is one of the principal shareholders of TOC.

2. The agency affected by this petition is the Florida Board of Medicine.

3. The Florida law which declaratory statement is sought is that section of the Florida Statutes known as "The Patient Self Referral Act of 1992," § 455.236, Fla.Stat.

4. Petitioners seek a declaratory statement by the Florida Board of Medicine regarding whether the Act prohibits or permits Petitioners from accepting persons for a designated "health service," to-wit: diagnostic imaging services when such persons are referred by physicians or entities who are not employed by, affiliated with nor have an investment interest in Petitioner, TOC.

FACTS

5. Petitioner, TOC, is a Florida corporation wholly owned by eight (8) practicing orthopedic surgeons and one (1) family practice physician. Substantially most of the Petitioner's medical business and practices are carried on in Leon County, Florida. With the exception of actual surgery, the business is conducted in a 60,000 square foot building built for the primary purpose of housing all of TOC's physicians, staff and support personnel. TOC employs ten (10) orthopedic surgeons, two (2) primary care physicians and numerous physician assistants, nurse practitioners, nurses, technicians and administrative support personnel. Negotiations are pending to add one (1) additional family practitioner and two (2) neurologists. TOC's future plans include adding other disciplines to complement its overall health care goals. With the exception of services performed by TOC surgeons at various hospitals and outpatient surgery centers, predominantly all of its services are provided at its principal place of business. All of TOC's employees' (surgeons and physicians) services are billed under a global or unified system. All receipts are collected by TOC and dispersed for cost expenses, salaries, bonuses and the like. All physicians and surgeons are under employment contracts.

Petitioner, TOC, meets the definition of "group practice" as defined in § 455.236(3)(g), Fla.Stat.

TOC's physicians are the primary physicians for the athletes at Florida State University and Florida A&M University. Many of the football players of these universities are large physical specimens exceeding in some cases 300 pounds. In addition, TOC physicians provide treatment and care to many claustrophobic patients and non-athletic patients in excess of 300 pounds.

There are presently two (2) imaging systems available in the Tallahassee, Leon County, area. One is based on the fonar technology and the other is a general electric system owned by the Tallahassee Diagnostic Imaging group. The General Electric system is a 1.5 Tesla magnet with a 55 cm bore. This unit cannot accept many of the TOC patients plus some of the football players of the universities due to the weight restrictions and size of the bore. Petitioner historically has requested approximately 300 diagnostic images (MRI) per month.

Because of the internal need for providing its patients quality and expeditious medical care, to include the athletes referenced herein, TOC has ordered a diagnostic imaging system that will better serve its patients' needs. The imaging system will handle larger patients and reduce claustrophobic concerns of patients. The imaging system will be located on the TOC's premises. It will be administratively and otherwise handled as any other piece of equipment owned or leased by TOC.

TOC has been requested by non-group physicians for access by their respective patients to the TOC diagnostic imaging equipment. Due apparently to the lack of number of diagnostic imaging facilities, the scheduling (turn around time) is not satisfactory to the requesting physicians. TOC is willing to provide this service to the medical community and general population on the same fee basis that it charges its own patients. There certainly would be no kickback or remuneration of any type to a non-group referring physician or any cross-referral agreements. Simply put, it would be an arms length case-by-case transaction.

THE LAW

6. The Florida legislature in expressing its legislative intent in enacting the Patient

Self Referral Act of 1992 stated:

"It is recognized by the Legislature that the referral of a patient by a health care provider to a provider of health care services in which the referring health care provider has an investment interest represents a potential conflict of interest." (emphasis added)

There are no physicians outside of the TOC group that have an investment interest in TOC, nor are there any persons or entities outside of the group physicians that have an investment interest in TOC. TOC is fully owned by its full-time practicing surgeons and physician.

The Legislature further stated:

"The Legislature finds these referral practices may limit or eliminate competitive alternatives in the health care services market..."

A contrary situation arises in TOC's offering imaging services to non-group physicians by creating a competitive market, but more important, creates a situation where patients due to availability can receive quality expeditious service.

As it pertains to the instant matter, the Act is broken down into two (2) material sections--definitions and prohibitions.

Section 455.236(3), Definitions, states in material part:

(d) "Designated health services" means...diagnostic imaging services...

This is the service that TOC intends to provide that is in question.

(e) "Entity" means...corporation...

TOC is a Florida corporation.

(g) "Group practice" means a group of two or more health care providers legally organized as a partnership, professional corporation or similar association:

(1) in which each health care provider who is a member of the group provides substantially the full range of services which the health care provider routinely provides, including medical care, consultation, diagnosis, or treatment, through the joint use of shared office space, facilities, equipment, and personnel;

(2) for which substantially all of the services of the health care providers who are members of the group are provided through the group and are billed in the name of the group an amount so received are treated as receipts of the group; and

(3) in which the overhead expenses of and the income from the practice are distributed in accordance with the methods previously determined by the members of the group.

All of the criteria stated above are applicable to TOC in that it is a legitimate group practice as contemplated by the Legislature.

(k) "Investment interest" means an equity or debt security issued by an entity, including, without limitation, shares of stock in a corporation, units or other interest in a partnership, bonds, debentures, notes, or other equity interest or debt instruments.

* * *

(l) "Investor" means a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust or another entity related to the investor within the meaning of 42 CFR, § 413.137, in an entity.

TOC is solely owned by its practicing surgeons and physician who are full-time in and under that entity. TOC does not have any outside ownership or investment interest by a third party. It is axiomatic that any non-TOC referring physician does not have an investment interest in TOC.

(m) "Referral" means any referral of a patient by health care provider for health care services, including, without limitation:

1. The forwarding of a patient by a health care provider to another health care provider or to an entity which provides or supplies designated health care services or any other health care item or service;

* * *

This is the situation that would be applicable to TOC, i.e., the referring of a patient by a health care provider to another health care provider.

The above constitutes all of the material definitions as they apply to the instant Declaratory Statement. Nothing in the above statutory definitions creates any prohibitions but are merely definitive creatures of statute.

Section 455.236(4), Fla.Stat., creates the prohibition wherein it states, "prohibited referrals and claims for payment.--except as provided in this section:"

The key and material section of this prohibition is found in § (a) which states:

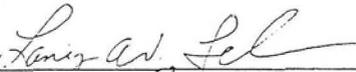
A health care provider may not refer a patient for the provision of the designated health services to an entity for which the health care provider is an investor or has an investment interest.

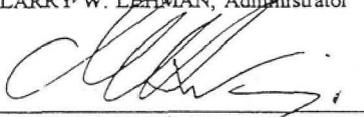
The remaining section of this prohibition provides exceptions for a health care provider who does or may have an investment interest.

CONCLUSION

The sum and substance of this entire Declaratory Statement is founded in two statements which are as follows: (1) TOC has no outside investors and under the law a non-investor is not prohibited from making a referral providing there are no kickbacks, cross-referrals or the like; and (2) TOC surgeons and physicians fit under the group practice exception allowing intra group referrals as some of these physicians do have an investment interest in the group.

TALLAHASSEE ORTHOPEDIC CLINIC, INC.

By: 
LARRY W. LEHMAN, Administrator


CHARLES H. WINGO, M.D.