

American Health Lawyers Association

Summary of Maryland Fraud And Abuse Statutes, Regulations, Cases & Other Guidance

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Please use these links to access the page for each section
(you may need to scroll down the page after clicking the link).

[ANTI-KICKBACK](#)

[PROHIBITIONS ON SELF-REFERRAL](#)

[FALSE CLAIMS/FRAUD & ABUSE](#)

[GENERAL WHISTLE-BLOWER PROTECTIONS](#)

[HELPFUL LINKS](#)

[ANTI-KICKBACK](#)

Maryland Health Occupations Article, §14-404(a)(15) (Maryland Physician Fee-Splitting Statute)

Permits the Maryland Board of Physicians to reprimand any licensee, place any licensee on probation, or suspend or revoke a licensee's medical license, if the licensee pays or agrees to pay any sum to any person for bringing or referring a patient or accepts or agrees to accept any sum from any person for bringing or referring a patient.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=14-404&ext=html&session=2013RS&tab=subject5>

83 Opinions of the Attorney General 142 (1998)

A hospital's purchase, through its corporate affiliate, of a professional medical corporation owned by physicians at a purchase price determined by an appraisal by an outside consultant based on the revenue historically generated by each of the corporation's physicians at the professional medical corporation over a set period of time does not appear to involve any payments based on a percentage of earnings by the physicians after the sale, and therefore does not implicate the Maryland fee-splitting statute.

There are circumstances in which the sale of a physician practice can amount to fee-splitting (e.g., the sale of a practice by one physician or group of physicians to another for a percentage of the future income of the practice over a period of years).

Where a physician or practice pays a set percentage of the physician's or practice's professional fees to a separate entity for services provided by that entity to the physician's or practice's patients, the Maryland fee-splitting statute requires that the percentage charged must reasonably reflect the value of the services provided to patients in the aggregate, not on a patient-by-patient basis. That aggregate may include some patients on whose behalf no services are provided, but the inclusion of a large, identifiable group of such patients would raise fee-splitting problems.

<http://www.oag.state.md.us/Opinions/1998/83oag142.pdf>

**Maryland Criminal Law Article, §§ 8-508, 8-511 through 8-512, 8-516 through 8-517
(Medicaid Fraud)**

Applies to the Maryland Medicaid Program; insurers, HMOs, MCOs, healthcare cooperative or alliance, or other persons that contract with the Medicaid Program to provide health care services reimbursable by the Medicaid Program; and their subcontractors (each a "State health plan").

Prohibits a person who provides to another individual items or services for which payment wholly or partly is or may be made from federal or State funds under a State health plan, from soliciting, offering, making, or receiving a kickback or bribe in connection with providing those items or services or with making or receiving a benefit or payment under a State health plan.

Prohibits a person from soliciting, offering, making, or receiving a rebate of a fee or charge for referring another individual to a third person to provide items or services for which payment wholly or partly is or may be made from federal or State funds under a State health plan.

Provides for the following criminal penalties:

- (1) A violation resulting in the death of an individual constitutes a felony subjecting a convicted offender to imprisonment not exceeding life or a fine not exceeding \$200,000 or both.
- (2) A violation resulting in serious injury to an individual constitutes a felony subjecting a convicted offender to imprisonment not exceeding twenty years or a fine not exceeding \$100,000 or both.
- (3) A violation involving money, health care services, or other goods or services worth \$500 or more in the aggregate constitutes a felony subjecting a convicted offender to imprisonment not exceeding five years or a fine not exceeding \$100,000 or both.
- (4) Any other violation constitutes a misdemeanor subjecting a convicted offender to imprisonment not exceeding three years or a fine not exceeding \$50,000 or both.
- (5) An association, firm, institution, partnership, or corporation violating this statute is subject to a fine not exceeding \$250,000 for each felony and \$100,000 for each misdemeanor.

Provides for civil penalties in an amount not more than three times the amount of the overpayment, in addition to any other penalty provided by law and any right the victim may have to restitution under the Maryland Criminal Procedure Article.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcr§ion=8-508&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcr§ion=8-511&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcr§ion=8-512&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcr§ion=8-516&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcr§ion=8-517&ext=html&session=2013RS&tab=subject5>

Maryland Health Occupations Article, §2-314(23) (Audiologists, Hearing Aid Dispensers, Speech-Language Pathologists)

Permits the Maryland Board of Examiners for Audiologists, Hearing Aid Dispensers, and Speech-Language Pathologists to deny a license or limited license to any applicant, reprimand any licensee or holder of a limited license, place any licensee or holder of a limited license on probation, or suspend or revoke a license or limited license if the applicant, licensee, or holder pays or agrees to pay any sum to any person for bringing or referring a patient.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=2-314&ext=html&session=2013RS&tab=subject5>

Maryland Health Occupations Article, §3-313(15) (Chiropractors)

Permits the Maryland Board of Chiropractic Examiners to deny a license to any applicant, reprimand any licensee, place any licensee on probation, with or without conditions, or suspend or revoke a license, or any combination thereof, if the applicant or licensee pays or agrees to pay any sum to any person for bringing or referring a patient.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=3-313&ext=html&session=2013RS&tab=subject5>

Maryland Health Occupations Article, §11-313(13) (Optometrists)

Permits the Maryland Board of Examiners in Optometry to deny a license to any applicant, reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the applicant or licensee splits or agrees to split a fee for optometric services with any person for bringing or referring a patient.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=11-313&ext=html&session=2013RS&tab=subject5>

Maryland Health Occupations Article, §12-313(b)(12) (Pharmacists)

Permits the Maryland Board of Pharmacy to deny a license to any applicant for a pharmacist's license, reprimand any licensee, place any licensee on probation, or suspend or revoke a license of a pharmacist if the applicant or licensee provides remuneration to an authorized prescriber for referring an individual to a pharmacist or pharmacy for a product or service to be provided by that pharmacist or pharmacy.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=12-313&ext=html&session=2013RS&tab=subject5>

Maryland Health Occupations Article, §13-316(9) (Physical Therapists)

Permits the Maryland Board of Physical Therapy Examiners to deny a license or restricted license to any applicant, reprimand any licensee or holder of a restricted license, place any licensee or holder of a restricted license on probation, or suspend or revoke a license or restricted license if the applicant, licensee, or holder pays or agrees to pay any sum to any person for bringing or referring a patient.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=13-316&ext=html&session=2013RS&tab=subject5>

Maryland Health Occupations Article, §16-311(a)(14) (Podiatrists)

Permits the Maryland Board of Podiatric Medical Examiners to deny a license or a limited license to any applicant, reprimand any licensee or holder of a limited license, impose an administrative monetary penalty not exceeding \$50,000 on any licensee or holder of a limited license, place any licensee or holder of a limited license on probation, or suspend or revoke a license or a limited license if the applicant, licensee, or holder pays or agrees to pay any sum to any person for bringing or referring a patient.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=16-311&ext=html&session=2013RS&tab=subject5>

PROHIBITIONS ON SELF-REFERRAL

Maryland Health Occupations Article, §§ 1-301 through 1-307 (Maryland Self-Referral Law)

Prohibits any physician or other health care practitioner licensed under the Maryland Health Occupations Article from referring a patient, or directing an employee or contractor of the practitioner to refer a patient, to a health care entity if any of the following is true, unless the beneficial interest or compensation arrangement meets a specific exemption in the statute: (1) the practitioner or the practitioner in combination with his or her immediate family owns a beneficial interest in the entity, or (2) the practitioner's immediate family owns a beneficial interest of 3% or greater in the entity, or (3) the practitioner, the practitioner's immediate family, or the practitioner in combination with the practitioner's immediate family, has a compensation arrangement with the entity.

Prohibits a health care entity or a referring health care practitioner from presenting or causing to be presented to any individual, third party payor, or other person a claim, bill, or other demand for payment for health care services provided as a result of a prohibited referral.

Prohibits any arrangement or scheme, including a cross-referral arrangement, which the health care practitioner knows or should know has a principal purpose of assuring indirect referrals that would be in violation of the statute if made directly.

Defines “health care practitioner,” “health care entity,” “referral,” “beneficial interest,” “compensation arrangement,” “immediate family member,” “in-office ancillary services,” “direct supervision,” “faculty practice plan,” and “group practice”. Definition of “compensation arrangement” excludes certain types of arrangements meeting defined criteria (e.g., bona fide employment agreement, independent contractor arrangement, practitioner recruitment agreement, space or equipment lease, and sale of property or health care practice). (Additional definitions are contained in COMAR 10.01.15, discussed below.)

Defines “in-office ancillary services” as expressly excluding MRI, radiation therapy, and CT scan services for all physician groups or offices except for those consisting solely of one or more radiologists, effectively limiting the availability of the in-office ancillary services exemption for these services exclusively to radiology practices. Maryland Attorney-General opinions and a Declaratory Ruling by the Maryland Board of Physicians (discussed further below) have interpreted two other statutory exemptions without an express MRI/radiation therapy/CT carve-out (the “group practice exemption” [§1-302(d)(2)] and the “direct supervision exemption” [§1-302(d)(3)]) as being unavailable to non-radiology medical practices wishing to provide MRI, radiation therapy, and CT scan services directly to their patients.

Provides certain specific exemptions from the self-referral prohibition, including:

- In-office ancillary services exemption similar to federal Stark exception (*See discussion below of Maryland Board of Physicians Declaratory Ruling 2006-2 for interpretation of this exemption.*)
- Referral to another practitioner in the same group practice (*See discussion below of Maryland Board of Physicians Declaratory Ruling 2006-1 and Maryland Board of Physicians Declaratory Ruling 2006-2 for interpretation of this exemption.*)
- Referral for health care services or tests performed personally by or under direct supervision of the referring practitioner (defines “direct supervision”) (*See discussion below of Maryland Board of Physicians Declaratory Ruling 2006-1 and Maryland Board of Physicians Declaratory Ruling 2006-2 for interpretation of this exemption.*)
- Referrals of end-stage renal disease patients to dialysis facility
- “Whole hospital” ownership interests where the physician-owner is authorized to provide services at the hospital

Requires a health care practitioner with a beneficial interest in a health care entity who makes a referral to the entity utilizing certain of the statutory exemptions to disclose the existence of the

beneficial interest to each referred patient and to display a written notice of the beneficial interest in the practitioner's office.

Establishes restrictions on purchasing, marking up, and billing payors for anatomical pathology services. (§1-306) Such services must be performed (1) by the billing health care practitioner who directly or indirectly charges, bills, or otherwise solicits payment for the anatomical pathology services, (2) under the direct supervision of the billing health care practitioner, and (3) in accordance with "the provisions for the preparation of biological products by service in the federal Public Health Service Act." If the physician or medical group obtains certification for its anatomical pathology laboratory under the Clinical Laboratory Improvement Amendments of 1988 ("CLIA") section of the Public Health Service Act, it appears that this third criterion will be satisfied. Exceptions from the statutory restrictions exist for a referring laboratory that must send specimens to another clinical laboratory for histologic processing or anatomical pathology consultations, and for a health care practitioner who takes a Pap test specimen from a patient and orders but does not supervise or perform an anatomical pathology service on the specimen. *(This amendment to the Maryland Self-Referral Law was passed in 2008 by the Maryland General Assembly to prevent physicians or medical groups who perform no portion of an anatomical pathology service from purchasing the service from a pathology group or lab, marking up the price, and billing the patient or third party payors the marked-up rate.)*

A health care practitioner who fails to comply with any provisions of the statute is subject to disciplinary action by the appropriate regulatory board. The health care entity, referring practitioner, or other person furnishing a health care service pursuant to a prohibited referral is jointly and severally liable to the payor for any reimbursement received for the service, if the health care entity, referring practitioner, or other person knew or should have known of the violation. (Payor remedies are also covered under Maryland Health Insurance Article § 15-110 and Maryland Health-General Article § 19-712.4, discussed below.)

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-301&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-302&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-303&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-304&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-305&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-306&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-307&ext=html&session=2013RS&tab=subject5>

COMAR 10.01.15 (Maryland Self-Referral Law Regulations)

Describes the procedure whereby a health care practitioner may request an exemption and renewal of exemption from the statutory self-referral prohibition from the Secretary for the Maryland Department of Health and Mental Hygiene. Requires the requesting health care practitioner to show:

- (1) that the practitioner's beneficial interest is essential to finance and to provide a health care entity; and
- (2) that the health care entity is needed to ensure appropriate access for a community to the services provided by the health care entity. Requires the Secretary to request, in writing, the advice of the Executive Director of the Maryland Health Care Commission concerning whether the beneficial interest is needed to ensure appropriate access for the community to the services provided by the health care entity.

Interprets the following definitions and terms: "group practice" (incorporating portions of the federal Stark law definition), "health care service," "members of the group," "patient care services," "personally supervised," "referring health care practitioner," "area of concentration," "essential," "health care entity," "health care practitioner," "MHCC," "Secretary," "specialty," and "rental or lease of office space" (to include rental of equipment and staff).

<http://www.dsd.state.md.us/comar/getfile.aspx?file=10.01.15.01.htm>
<http://www.dsd.state.md.us/comar/getfile.aspx?file=10.01.15.02.htm>
<http://www.dsd.state.md.us/comar/getfile.aspx?file=10.01.15.03.htm>
<http://www.dsd.state.md.us/comar/getfile.aspx?file=10.01.15.04.htm>
<http://www.dsd.state.md.us/comar/getfile.aspx?file=10.01.15.05.htm>
<http://www.dsd.state.md.us/comar/getfile.aspx?file=10.01.15.06.htm>
<http://www.dsd.state.md.us/comar/getfile.aspx?file=10.01.15.07.htm>

Maryland Insurance Article, § 15-110

Permits insurers and nonprofit health service plans that issue or deliver individual or group health insurance policies in the State of Maryland to (1) seek repayment from a health care practitioner of any moneys paid for a claim, bill, or other demand or request for payment for health care services that the appropriate regulatory board determines were provided as a result of a referral prohibited by Maryland Health Occupations Article §1-302, and (2) seek a refund of a payment made for a claim, bill, or other demand or request for payment that is subsequently determined to be for a health care service provided as a result of a prohibited referral.

Requires each individual and group health insurance policy that is issued for delivery in Maryland by an insurer or nonprofit health service plan and that provides coverage for health care services to include a provision that excludes payment of any claim, bill, or other demand or request for payment for health care services that the appropriate regulatory board determines were provided as a result of a prohibited referral.

Requires insurers and nonprofit health service plans that issue or deliver individual or group health insurance policies in the State of Maryland to report to the Commissioner and the appropriate regulatory board any pattern of claims, bills, or other demands or requests for payment submitted for health care services provided as a result of a prohibited referral within thirty days after the entity has knowledge of the pattern.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gin§ion=15-110&ext=html&session=2013RS&tab=subject5>

Maryland Health-General Article, § 19-712.4

Permits HMOs to (1) seek repayment from a health care practitioner of any moneys paid for a claim, bill, or other demand or request for payment for health care services that the appropriate regulatory board determines were provided as a result of a referral prohibited by Maryland Health Occupations Article §1-302, and (2) seek a refund of a payment made for a claim, bill, or other demand or request for payment that is subsequently determined to be for a health care service provided as a result of a prohibited referral.

Requires each HMO individual and group subscriber agreement to include a provision that excludes payment of any claim, bill, or other demand or request for payment for health care services that the appropriate regulatory board determines were provided as a result of a prohibited referral.

Requires HMOs to report to the Commissioner and the appropriate regulatory board any pattern of claims, bills, or other demands or requests for payment submitted for health care services provided as a result of a prohibited referral within thirty days after the entity has knowledge of the pattern.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=19-712.4&ext=html&session=2013RS&tab=subject5>

79 Opinions of the Attorney General 285 (1994)

The term “referral” as used in the Maryland self-referral statute includes: (1) a pediatrician’s recommendation that parents obtain a presently needed medical service for their child at an off-hours facility separate from the pediatrician’s daytime medical practice, and (b) a pediatrician’s presentation of information about the off-hours facility in such a manner as to encourage parents to use the services of the facility when the need for acute care during off-hours arises in the future. The term “referral” does not include a pediatrician’s provision of neutral information about the off-hours facility, along with comparable information about other sources of off-hours acute care. *[The statutory language defining “referral” at Maryland Health Occupations Article §1-301(l) reads as follows: (1) “Referral” means any referral of a patient for health care services. (2) “Referral” includes: (i) The forwarding of a patient by one health care practitioner to another health care practitioner or to a health care entity outside the health care practitioner’s office or group practice; or (ii) The request or establishment by a health care practitioner of a plan of care for the provision of health care services outside the health care practitioner’s office or group practice.]*

The term “health care services” embraces a future series of diagnostic or treatment services so that if a patient has a condition that will likely call for recurrent medical services of some kind, and if a practitioner describes the availability of such services at a facility outside the practitioner’s office or group practice, as a practical matter the pediatrician-investor will have established a “plan of care” for those anticipated, specific services.

Whether a health care practitioner has made a referral by requesting or establishing a plan of care for the provision of health care services outside the practitioner’s office or group practice depends on the extent to which the practitioner steers the patient (or the patient’s parents, in the case of a pediatric patient) to the outside facility.

<http://www.oag.state.md.us/Opinions/1994/79OAG285.pdf>

83 Opinions of the Attorney General 142 (1998)

Because of the absence of an isolated transaction or similar applicable compensation arrangement exemption in the Maryland self-referral statute, the purchase by a hospital affiliate of a professional medical corporation owned by primary care physicians would render all referrals by the primary care physicians to the hospital illegal under the Maryland self-referral statute (assuming that the relationship between the hospital and its affiliate was such that a compensation arrangement with the affiliate would be treated as a compensation arrangement with the hospital). *[NOTE: This decision pre-dates the amendment of the Maryland self-referral statute to include an express exemption for the sale of a health care practice.]*

A compensation arrangement which is between a managed care company and independent contractor specialist physicians who refer patients to physician-employees of the managed care company, and which is for practice billing and administrative services provided by the managed care company to the referring physicians in return for a percentage of the professional fees collected by the managed care company on behalf of those physicians, satisfies the following requirements of the Maryland self-referral law's independent contractor exemption: that the arrangement be for identifiable services and that the amount of the compensation not be determined in a manner that takes into account, directly or indirectly, the volume or value of any referrals by the physicians. No determination can be made on the facts as to whether it is consistent with fair market value or is commercially reasonable even in the absence of referrals. The same analysis would apply where the independent contractor specialist physician also serves as Medical Director of a PHO and controls all referrals by the PHO to participating and non-participating physicians, and therefore can direct patients to the specialty care physicians who have agreements with the managed care company. *[NOTE: It is unclear from this opinion whether the AG views the Maryland self-referral law's independent contractor arrangement exception as applying only to situations where the practitioner is the contractor receiving the compensation, and therefore believes this exception applies to the above-described compensation arrangement because the services provided by the managed care company constitute remuneration creating the compensation arrangement. The express language of the statutory exception does not appear to preclude its application to a situation in which the referring practitioner is the payer of the compensation and recipient of the services.]*

The Maryland self-referral statute's exemption [§1-302(d)(1)] for referrals by a physician when treating a member of a HMO, if the physician does not have a beneficial interest in the entity to which the referral is made, would also permit referrals of HMO patients by the specialist physicians to the managed care company's employed physicians as described above because the referring specialist physicians do not have a beneficial interest in the managed care company. *[The AG's reasoning in reaching this conclusion is not clear.]*

<http://www.oag.state.md.us/Opinions/1998/83oag142.pdf>

89 Opinions of the Attorney General 10 (2004)

The term "referral" under the Maryland self-referral law encompasses in-office as well as out-of-office referrals.

The Maryland self-referral law bars a physician in any non-radiology medical practice from referring patients for tests on an MRI machine or CT scanner owned by that practice, regardless of whether the services are performed by a radiologist employee or member of the practice or by an independent radiology group. Neither the in-office ancillary services exemption [§1-

302(d)(4)] nor the exemption for referrals within a group practice [§1-302(d)(2)] is applicable to such an arrangement so as to permit such referrals.

<http://www.oag.state.md.us/Opinions/2004/89oag10.pdf>

91 Opinions of the Attorney General 49 (2006)

The Maryland self-referral law bars a physician in any non-radiology medical practice from referring patients for tests on an MRI machine or CT scanner owned or leased by that practice, even if all of the scans were performed by or under the direct supervision of the referring practitioner. The State law exemption for referrals of a patient to a health care entity for health care services or tests, if the services or tests are personally performed by or under the direct supervision of the referring health care practitioner [§1-302(d)(3)], is not applicable to such an arrangement so as to permit such referrals. This exemption was intended to create an exemption for referrals of a patient for services or tests to a health care entity that is outside of the referring practitioner's practice, not for referrals within the same entity or practice.

The term "health care service" as used in the Maryland self-referral law includes, but is not limited to, the ordinary medical activities performed by a physician in the course of treatment for the specific specialty (e.g., setting a broken arm for an orthopedist; performing an EKG for a cardiologist, etc).

<http://www.oag.state.md.us/Opinions/2006/91oag49.pdf>

Attorney General Advice Letter to Delegate Peter A. Hammen, December 9, 2005

Interprets the Maryland self-referral law group practice exception ([Maryland Health Occupations Article, §1-302(d)(2)], direct supervision exception [Maryland Health Occupations Article, §1-302(d)(3)], in-office ancillary services exception [Maryland Health Occupations Article, §1-302(d)(4)], and independent contractor arrangement exception [Maryland Health Occupations Article, §1-301(c)(2)(iii)] as applied to two different factual scenarios involving a histology laboratory owned by a urology group.

Scenario 1: A urology group sets up a small histology laboratory in its office and contracts with an independent pathology group to staff the laboratory and produce histology slides (the "technical component" of a pathologic examination), and provide a pathologic diagnosis (the "professional component") on the prepared slides. The urology group bills the patient for the technical component, which is performed in its laboratory, and the pathology group bills the patient for the professional component, whether performed in the laboratory or elsewhere. This scenario assumes that a urologist has the expertise to determine whether a biopsy should be done and how many samples should be taken and to perform the procedure, but does not have the expertise to perform a pathologic examination

The group practice exception does not apply because the pathologists are not members of the urology group practice; they are members of their own independent group practice and a substantial portion of their professional services (the professional component of the histology lab services) are billed separately from the urology group practice.

The direct supervision exception does not apply because (1) neither the technical nor the professional component of the examination is being performed by the referring practitioner, and (2) since the urologists do not have the expertise to perform pathology examinations, they could not provide the necessary supervision of those examinations to fall within the direct supervision exception. In order to satisfy the “direct supervision” requirement, the supervising physician must not only be present on the premises where the services are being performed, but also must be personally qualified to perform such services.

The in-office ancillary services exception does not apply because (1) it is not clear that pathology examinations are “basic services” or are “routinely provided” in the offices of physicians, and therefore may not qualify as “in-office ancillary services”, (2) they do not meet the “furnishing” requirement of the exception because they are not being personally furnished by the referring practitioner, or by a practitioner in the same group practice as the referring practitioner (the pathologists are not members of the urology group practice), or by an individual who is employed and personally supervised by the referring health care practitioner or a practitioner in the same group practice as the referring practitioner (the contracting pathologists are not employees of the urology practice and the urologists are not qualified to supervise the pathology examinations).

Scenario 2: The urology group submits the specimen to an independent commercial laboratory to perform the technical component of the pathology examination, and the commercial laboratory bills the patient directly. The prepared slides are then sent to the urology group, which contracts with a pathologist to perform the professional component on the prepared slides for a set fee. The group pays the pathologist and bills the patient for the service. The urology group might contract with the pathologist for a fee that is below the standard diagnostic rate and bill the patient at the standard rate.

The below market rate charged by the pathologist to the urology group takes this arrangement out of the independent contractor arrangement exception because the compensation is not at fair market value and the acceptance of such a discount by the pathologist presumably reflects the value and volume of the referrals.

For the same reasons discussed under Scenario 1 above, the group practice, direct supervision, and in-office ancillary services exceptions also do not apply to this scenario.

http://www.oag.state.md.us/Opinions/Advice2005/hammen_dec9.pdf

Maryland Board of Physicians Declaratory Ruling 2006-1, December 20, 2006 [*This Ruling was upheld by the State Circuit Court in Montgomery County and by the Maryland Court of Appeals – see discussion below.*]

Interprets the meaning of three exemptions to the Maryland self-referral law as applied to a referral by an orthopedic physician for an MRI to be performed on or by an MRI machine owned or leased by the orthopedic practice of which the physician is an owner.

- (1) The exemption for a referral of a patient by a health care practitioner to another health care practitioner in the same group practice [Maryland Health Occupations Article, §1-302(d)(2)] was intended to create an exception where the referral transfers a patient, permanently or temporarily, from one health care practitioner in a group practice to another, not where the referring practitioner continues treating the

patient as his or her own patient and simply orders specific "tests" or "services" from another member of the group. Consequently, this exemption does not apply to the above-described referral.

- (2) The second exemption exempts a referral of a patient by a health care practitioner with an ownership interest in a health care entity to that entity for health care services or tests personally performed by or under the direct supervision of the referring health care practitioner [Maryland Health Occupations Article, §1-302(d)(3)]. This exemption was intended to create an exemption for referrals of a patient for services or tests to a health care entity that is outside of the referring practitioner's practice, even if the referring practitioner holds an ownership interest in the outside entity, so long as the referring practitioner is personally present within the treatment area when the service is performed and either personally providing the service or directly supervising that service. The term "health care entity" in this exemption does not include the referring practitioner's own group practice, and therefore this exemption does not apply to the above-described referral.
- (3) The above-described referral is not exempted from the Maryland self-referral prohibition under the in-office ancillary services exemption [Maryland Health Occupations Article, §1-302(d)(4)] because MRI services are expressly carved out of that exemption under the law.

The above-described referral would still violate the Maryland self-referral law even if the referring physician obtains a signed Maryland Uniform Consultation Referral Form from the patient's primary care physician after the physician determined that the MRI was necessary, but before the MRI was actually conducted, if the primary care physician does not, between the time that the referring physician determines that the MRI is necessary and the time that the MRI was accomplished, see the patient for the purpose of determining if the MRI is necessary, and does not exercise independent medical judgment as to whether the MRI is appropriate or necessary.

The above-described referral would still violate the Maryland self-referral law even if the referring physician names the primary care physician as the "referring physician" in the Health Insurance Claim Form.

The Maryland Board of Physicians will not take any disciplinary action against any physician for self-referrals ruled illegal under this Declaratory Ruling based on any referrals made prior to the date of the Ruling.

<http://www.mbp.state.md.us/forms/2006-1.pdf>

Maryland Board of Physicians Declaratory Ruling 2006-2, December 29, 2006

Interprets the meaning of several different exemptions to the Maryland self-referral law as applied to two different factual scenarios involving a histology lab owned by a urology group:

- (1) A urology group sets up a small histology laboratory within its office and contracts with an independent pathology group to staff the laboratory and perform the professional and technical components of the pathology services. Members of the urology group refer patients (or specimens from patients) to the lab. The urology group then pays the pathology group a set fee for each slide prepared and bills the patient for the technical

component. The pathology group bills separately for the professional component. The group practice exemption [Maryland Health Occupations Article, §1-302(d)(2)] does not apply because the contracted pathology group is independent and not a member of the same group practice as the referring urologists. The direct supervision exemption [Maryland Health Occupations Article, §1-302(d)(3)] does not apply because neither the referring urologist, nor a practitioner within his or her group practice, is performing or supervising the preparation of the histology slides (the performance and supervision are being performed by the outside pathology group) and because the referral for the pathology services is not to an entity outside of the referring urologist's office or group practice, but to a lab located within the referring urologist's office and group practice. "Direct supervision" for purposes of this exemption requires supervision, not merely physical presence on the premises.

- (2) A urology group submits a biopsy specimen to an independent commercial laboratory which prepares the slides and bills the patient directly for the technical component of the pathology examination. The prepared slides are then sent to the urology group's office. The urology group contracts with a pathologist to perform the professional component, pays the contracted pathologist a set fee per slide that is below the market rate for this professional component, and then bills the patient at the market rate for the professional component. This compensation arrangement does not fit within the self-referral law's independent contractor exception [Maryland Health Occupations Article, §1-301(c)(2)(iii)] because the compensation is not at fair market value. It also does not fit within the in-office ancillary services exception [Maryland Health Occupations Article, §1-302(d)(4)] because the pathology examinations are not being personally furnished by or personally supervised by the referring practitioner or a member of the referring practitioner's group. The pathology examinations are being performed by the outside pathologists, who are not members of the referring practitioner's group practice.

<http://www.mbp.state.md.us/forms/2006-2.pdf>

IN BOARD CASE NO. 2006-1, Case No. 277833-V, Circuit Court for Montgomery County, Maryland (October 18, 2007) *[This decision was appealed by petitioner to the Maryland Court of Appeals, which affirmed the decision. See discussion below.]*

Petitioner, a coalition of non-radiology physician practices, each of which provides MRI services directly to its patients, asked the Court to review and overturn the Maryland Board of Physicians Declaratory Ruling 2006-1 interpreting the meaning of three exemptions to the Maryland self-referral law as applied to a referral by an orthopedic physician for an MRI to be performed on or by an MRI machine owned or leased by the orthopedic practice of which the physician is an owner.

The Court upheld the Maryland Board of Physicians interpretation of all three exemptions, ruling as follows:

- The "ancillary services exception" [Maryland Health Occupations Article, 1-302(d)(4)], does not permit orthopedist referrals for MRI or CT scans because the definition of "ancillary services" specifically excludes MRI and CT scans for all doctors except radiologists.

- While the “group practice exception” [Maryland Health Occupations Article, §1-302(d)(2)] is plain on its face and on its face permits orthopedists to refer patients for MRI or CT scans within the same group practice, such an interpretation is inconsistent with and would render meaningless the “ancillary services exception”. Reading the statute as a whole, the Court concurred with the Board's Ruling that the "group practice exception" is limited to referrals that transfer the professional responsibility of a patient's continued care from one health care practitioner to another in the same group practice.
- While the “direct supervision exception” [Maryland Health Occupations Article, §1-302(d)(3)] is plain on its face and on its face permits an orthopedist to refer patients for MRI or CT scans within the same group practice if the referring orthopedist directly supervises the scans, such an interpretation is inconsistent with and would render meaningless both the “ancillary services exception” and the “group practice exception”. Reading the statute as a whole, the Court concurred with the Board's Ruling that the "direct supervision exception" is limited to referrals outside the group practice when the referring doctor is physically present.

POTOMAC VALLEY ORTHOPAEDIC ASSOCIATES, ET AL. v. MARYLAND STATE BOARD OF PHYSICIANS, ET AL. COURT OF APPEALS OF MARYLAND, 417 Md. 622; 12 A.3d 84; 2011 Md. LEXIS 9 (January 24, 2011).

Appellant, a coalition of non-radiology physician practices, each of which provides MRI services directly to its patients, asked Maryland's highest court to overturn a lower court ruling upholding the Maryland Board of Physicians Declaratory Ruling 2006-1 interpreting the meaning of the Maryland self-referral law as applied to a referral by an orthopedic physician for an MRI to be performed on or by an MRI machine owned or leased by the orthopedic practice of which the physician is an owner.

The Court upheld the lower court ruling and the Maryland Board of Physicians interpretation of all three exemptions, ruling as follows:

- The Maryland Board of Physicians Declaratory Ruling 2006-1 was not premised upon an erroneous conclusion of law, and the judgment of the Circuit Court is affirmed.
- The Maryland Board of Physicians was correct in ruling that:
 - The “group practice exception” [Maryland Health Occupations Article, §1-302(d)(2)] does not permit an orthopedic surgeon to refer his or her patient for a MRI or CT scan to be performed by another member of the orthopedic surgeon's practice group.
 - The “direct supervision exception” [Maryland Health Occupations Article, §1-302(d)(3)], which is limited to referrals to "outside" entities, requires that the referring physician be personally present within the treatment area when the service is performed and either personally providing the service or directly supervising that service.

<http://mdcourts.gov/opinions/coa/2011/18a08.pdf>

FALSE CLAIMS/FRAUD & ABUSE

Maryland Health-General Article §§ 2-501 through 2-505 (Health Program Integrity and Recovery Activities)

Defines “abuse,” “claim,” “employee,” “fraud,” “program,” “provider,” “recipient,” and “recovery.”

Establishes an Office of the Inspector General in the Maryland Department of Health and Mental Hygiene.

Authorizes such Office to investigate fraud, waste, and abuse of Departmental funds.

Requires such Office to cooperate with and coordinate investigative efforts with the Medicaid Fraud Control Unit, departmental programs, and other State and federal agencies.

Authorizes such Office, in collaboration with the appropriate departmental program, to take necessary steps to recover any mistaken claims paid or payments obtained in error or fraudulent claims paid to or obtained by a provider, and to recover the cost of benefits mistakenly paid or obtained in error, or fraudulently paid to or obtained by a recipient.

Provides immunity from civil liability for any person making a report in good faith of fraud, waste, or abuse, or participating in any investigation related to fraud, waste, or abuse.

Protects employees from retaliatory actions by employers when the employee discloses, provides information, or refuses to participate in a suspected violation by an employer of the statute. Requires employers to display notice of and inform employees of these protections. Provides employees with a right to civil action if the employer does engage in retaliatory actions.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-501&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-502&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-503&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-504&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-505&ext=html&session=2013RS&tab=subject5>

Maryland Health-General Article §§ 2-601 through 2-611 (False Claims Against State Health Plans and State)

Establishes a state civil false claims act. Defines “claim,” “documentary material,” “employee,” “employer,” “knowing/knowingly,” “material,” “obligation,” “provider,” “public body,” “retaliatory action,” “State health plan,” “State health program,” and “supervisor.”

Prohibitions. Prohibits a person from doing any of the following:

(1) knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval;

(2) knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim;

(3) conspiring to commit such a violation;

(4) having possession, custody, or control of money or other property used by or on behalf of the State under a State health plan or a State health program and knowingly deliver or cause to be delivered to the State less than all of that money or other property;

(5) (i) being authorized to make or deliver a receipt or other document certifying receipt of money or other property used or to be used by the State under a State health plan or a State health program; and (ii) intending to defraud the State or the Department of Health and Mental Hygiene by making or delivering a receipt or document knowing that the information contained in the receipt or document is not true;

(6) knowingly buying or receive as a pledge of an obligation or debt publicly owned property from an officer, employee, or agent of a State health plan or a State health program who lawfully may not sell or pledge the property;

(7) knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay or transmit money or other property to the State;

(8) knowingly concealing, or knowingly and improperly avoiding or decreasing, an obligation to pay or transmit money or other property to the State; or

(9) knowingly making any other false or fraudulent claim against a State health plan or a State health program.

Definition of Claim. "Claim" is defined as a request or demand, under a contract or otherwise, for money or other property, whether or not the State has title to the money or property, that is:

(1) Presented through a State health plan or a State health program to an officer, employee, or agent of the State; or

(2) Made to a contractor, grantee, or other recipient, if the money or other property is to be spent or used on the State's behalf or to advance a State interest through a State health plan or State health program, and the State (a) provides or has provided any portion of the money or other property requested or demanded; or (b) will reimburse the contractor, grantee, or other recipient for any portion of the money or other property that is requested or demanded.

Civil Penalties. Provides for civil penalties of \$10,000 per violation plus treble damages. Total civil penalty owed for a violation may not be less than amount of the actual damages. These penalties are in addition to any criminal, civil, or administrative penalties provided under any State or federal statute or regulation.

Criteria for Assessing Penalties. Establishes criteria for determining severity of the civil penalties to be assessed, including number, nature and severity of violations; history of previous

violations; degree of loss suffered by the State health plan or program; history of billing compliance; whether the violator has a compliance plan in place; corrective action already taken; extent of harm to patients; whether the violator self-reported. Requires that the following be considered in weighing the above factors: size, operations, and financial condition of the violator as it may have affected these factors, and the extent to which such size, operations, and financial condition may affect the violator's ability to provide care and continue operations after payment of damages and fines.

Whistleblower Action and Protections. Provides for *qui tam* action and award of between 15% - 25% of proceeds of action or settlement if State intervenes. Creates statute of limitations of later of six years after occurrence of violation, or three years after date when facts material to the right of action are known by the relator. Prohibits retaliation against whistleblowers, and requires employers to display notices of such protections and employer obligations, and to use any other appropriate means of informing employees of such protections and obligations.

Annual Reports to General Assembly. Requires annual reports to the General Assembly regarding civil actions filed under the statute.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-601&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-602&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-603&ext=html&session=2013RS&tab=subject5>

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<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-611&ext=html&session=2013RS&tab=subject5>

Maryland Criminal Law Article §§ 8-508 through 8-517 (Medicaid Fraud)

Applies to the Maryland Medicaid Program; insurers, HMOs, and MCOs that contract with the Medicaid Program to provide health care services reimbursable by the Medicaid Program; and their subcontractors (each a "State health plan"). Defines "false representation," "health care service," "representation," and "serious injury."

Prohibits a person from: (1) knowingly and willfully defrauding or attempting to defraud a State health plan in connection with the delivery of or payment for a health care service; (2)

knowingly and willfully obtaining or attempting to obtain, by means of a false representation, money, property, or anything of value in connection with the delivery of or payment for a health care service that wholly or partly is reimbursed by or is a required benefit of a State health plan; (3) knowingly and willfully defrauding or attempting to defraud a State health plan of the right to honest services; or (4) with the intent to defraud, making a false representation relating to a health care service or a State health plan.

Prohibits a person who has applied for or received a benefit or payment under a State health plan for the use of another individual from knowingly and willfully converting all or any part of a State health plan benefit or payment to a use that is not for the authorized beneficiary.

Prohibits a person who provides to another individual items or services for which payment wholly or partly is or may be made from federal or State funds under a State health plan, from soliciting, offering, making, or receiving a kickback or bribe in connection with providing those items or services or with making or receiving a benefit or payment under a State health plan.

Prohibits a person from soliciting, offering, making, or receiving a rebate of a fee or charge for referring another individual to a third person to provide items or services for which payment wholly or partly is or may be made from federal or State funds under a State health plan.

Prohibits a person from knowingly and willfully making, causing to be made, inducing, or attempting to induce the making of, a false representation with respect to the conditions or operation of a facility, institution, or State health plan in order to help the facility, institution, or State health plan qualify to receive reimbursement under a State health plan.

Prohibits a person from knowingly and willfully obtaining, attempting to obtain, or aiding another individual in obtaining or attempting to obtain, a drug product or medical care, the payment of all or a part of which is or may be made from federal or State funds under a State health plan, by: (1) fraud, deceit, false representation, or concealment; (2) counterfeiting or alteration of a medical assistance prescription or a pharmacy assistance prescription distributed under a State health plan; (3) concealment of a material fact; or (4) using a false name or a false address.

Prohibits a person from knowingly and willfully possessing a medical assistance card or a pharmacy assistance card distributed under a State health plan or the Maryland Medical Assistance or Pharmacy Assistance Program without the authorization of the person to whom the card is issued.

Provides for the following criminal penalties:

- (1) A violation resulting in the death of an individual constitutes a felony subjecting a convicted offender to imprisonment not exceeding life or a fine not exceeding \$200,000 or both.
- (2) A violation resulting in serious injury to an individual constitutes a felony subjecting a convicted offender to imprisonment not exceeding twenty years or a fine not exceeding \$100,000 or both.
- (3) A violation involving money, health care services, or other goods or services worth \$500 or more in the aggregate constitutes a felony subjecting a convicted offender to imprisonment not exceeding five years or a fine not exceeding \$100,000 or both.

- (4) Any other violation constitutes a misdemeanor subjecting a convicted offender to imprisonment not exceeding three years or a fine not exceeding \$50,000 or both.
- (5) An association, firm, institution, partnership, or corporation violating this statute is subject to a fine not exceeding \$250,000 for each felony and \$100,000 for each misdemeanor.

Provides for civil penalties in an amount not more than three times the amount of the overpayment, in addition to any other penalty provided by law and any right the victim may have to restitution under the Maryland Criminal Procedure Article.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcr§ion=8-508&ext=html&session=2013RS&tab=subject5>

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GENERAL WHISTLE-BLOWER PROTECTIONS

Maryland Health Occupations Article §§ 1-501 through 1-506 (“Health Care Worker Whistleblower Protection Act”)

Prohibits any employer from taking or refusing to take any personnel action as reprisal against an employee licensed or certified by any board established under the Maryland Health Occupations Article because the employee discloses or threatens to disclose to a supervisor or board an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation; provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule, or regulation by the employer; or objects to or refuses to participate in any activity, policy, or practice in violation of a law, rule, or regulation.

This whistleblower protection applies only if:

- (1) The employee has a reasonable, good faith belief that the employer has, or still is, engaged in an activity, policy, or practice that is in violation of a law, rule, or regulation;

(2) The employer's activity, policy, or practice that is the subject of the employee's disclosure poses a substantial and specific danger to the public health or safety; and

(3) Before reporting to the board:

(a) The employee has reported the activity, policy, or practice to a supervisor or administrator of the employer in writing and afforded the employer a reasonable opportunity to correct the activity, policy, or practice; or

(b) If the employer has a corporate compliance plan specifying who to notify of an alleged violation of a rule, law, or regulation, the employee has followed the plan.

The whistleblower may institute a civil action against the offending employer in the county where the violation occurred, in the employee's county of residence, or in the county where the employer maintains its principal offices in Maryland. The action must be brought within one year after the alleged violation, or within one year after the employee first became aware of the alleged violation. Remedies available to the employee include an injunction to restrain continued violations; reinstatement of the employee to the same, or an equivalent position held before the violation; removal of any adverse personnel record entries based on or related to the violation; reinstatement of fringe benefits and seniority rights; compensation for lost wages, benefits, and other remuneration; and reasonable attorney's fees and other litigation expenses. If the court determines that the action was brought by the employee in bad faith and without basis in law or fact, the employer may recover its attorney's fees and expenses. In any action brought under this statute, it is a defense that the personnel action was based on grounds other than the employee's exercise of any rights protected under the statute.

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-501&ext=html&session=2013RS&tab=subject5>

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-502&ext=html&session=2013RS&tab=subject5>

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<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gho§ion=1-506&ext=html&session=2013RS&tab=subject5>

Maryland Health-General Article § 2-505

Extends to employees who are not State employees or licensed health care practitioners, similar whistleblower protections to those found in the Health care Worker Whistleblower Protection Act (discussed above).

<http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=ghg§ion=2-505&ext=html&session=2013RS&tab=subject5>

HELPFUL LINKS

Maryland Department of Health and Mental Hygiene
<http://www.dhmf.maryland.gov/SitePages/Home.aspx>

Maryland Board of Physicians
<http://www.mbp.state.md.us/>

Maryland Attorney General
<http://www.oag.state.md.us/>