



Testimony
Submitted on Behalf of
The Pennsylvania Orthopaedic Society

Pennsylvania House Insurance Committee

June 8, 2010

The Pennsylvania Orthopaedic Society (POS) thanks Chairman Anthony DeLuca for this opportunity to provide written testimony to the House Insurance Committee regarding HB 2522. Please give our views serious consideration as you continue your review of this legislation.

In many ways, this new iteration of physician self-referral legislation is an improvement over previous bills. We thank Chairman DeLuca for moderating many provisions in HB 2522. The POS, however, must respectfully disagree with the underlying premise that physicians and physicians only, should be regulated in this manner while hospitals and health systems engage in the exact same conduct that some legislators find objectionable.

As we understand it, the basic premise of this and other legislative efforts seems to be that physicians who own and operate ancillary services have an economic interest in prescribing **unnecessary** diagnostic and treatment services, and then referring patients to physician owned facilities simply to generate more revenue. This premise is countered by two facts: first, all payors, whether commercial or governmental, will only reimburse for medically necessary tests and procedures. Any physician who orders unnecessary tests or procedures risks incurring the expense of such services without receiving reimbursement for those services rendered. And in the case of government payors, physicians who order unnecessary services can be subject to fines and penalties as well as non-payment for those services. These are risks most private practice physicians are unwilling to take. It is simply not in a private practice physician's economic interest to incur expenses with no reasonable expectation of payment and potentially be subject to prosecution.

Second, if this "economic interest" argument is to be applied to physicians, it must also be applied to hospitals. If private practice physicians have an incentive to order unnecessary tests and procedures simply to generate more revenue, then hospital administrators and employed physicians must have the same incentive to direct patients to hospital-owned services simply to generate more revenue. Yet the various legislative proposals do not prohibit what can be termed as "hospital self-

referral". In fact, the bills before this committee seemingly accept that "hospital self-referral" is appropriate while physician self-referral is somehow tainted.

Two recent cases demonstrate the problem of hospital self-referral. The first involves Carlisle Regional Medical Center (CRMC) and its predecessor in Carlisle, Pennsylvania. In this federal litigation, CRMC had allegedly developed a scheme by which CRMC would receive hospital referrals from a pain management physician group to which CRMC provided office space, equipment and personnel services at no cost. Seemingly, CRMC's sole purpose in this financial arrangement was to generate referrals from this physician group to hospital services. The Third Circuit Court of Appeals ruled that, on remand to the District Court, CRMC must prove that its financial arrangement with the physician group falls under a federal Stark and Anti-Kickback statute exception. HB 2522 would not prevent this type of "hospital self-referral" strategy. (see U.S. ex rel Kosenske v. Carlisle Regional Medical Center)

The second case involved the Health Alliance of Greater Cincinnati (HAGC) and one of its member hospitals, The Christ Hospital. On May 21, 2010, the United States Justice Department announced that HAGC agreed to pay \$108 million to settle claims that it had violated the federal Anti-Kickback Statute and False Claims Act. The Justice Department alleged that The Christ Hospital limited the opportunity to work at its Heart Station (an outpatient cardiac testing unit) to only those cardiologists who referred cardiac patients to The Christ Hospital. The Justice Department further alleged that cardiologists whose referrals contributed at least two percent of the hospital's yearly gross revenues were rewarded with a corresponding percentage of time at the Heart Station, where they had the opportunity to generate additional income by billing for the patients they treated at the unit and for any follow-up procedures that these patients required. In announcing the settlement, Assistant General Attorney for the Civil Division Tony West stated, "We will not allow hospitals to put profits ahead of sound medical decision-making."

The above cases are clear examples of hospitals engaging in the type of activities that HB 2522 seeks to regulate in physicians. Yet HB 2522 does not regulate hospital self-referral in any way. If the Committee truly believes that “self-referral” is inherently mired with conflict and abuse, then the logical conclusion would be to prohibit all self-referral and allow patients to choose the venue in which they wish to seek services. While the POS is opposed to any type of self-referral ban, a regulatory scheme that applies to all providers will at least level playing field and patients will control their own medical destiny.

The POS has a better solution. We believe that private practice physicians, employed physicians and hospitals should provide patients written disclosures of any and all ownership interests they may have in any healthcare facility to which they make a referral. The transparency this disclosure would provide better serves patients needs and the public interest. With full disclosure by all physicians and hospitals, patients may make informed decisions and make healthcare choices based upon their own needs and preferences. This is a better way to accomplish HB 2522’s goals without giving one type of provider, hospitals and their employed physicians, an advantaged over another type of provider, private practice physicians.

The POS would also like to point out that other licensed professionals in Pennsylvania are not prohibited from referring clients to other services they may own. Certified public accountants, architects, dentists and realtors may all own subsidiary services, but are not banned from making client referrals to those subsidiaries. Although the House Insurance Committee does not have jurisdiction over those licensed professionals, please understand that HB 2522 proposes to regulate physicians in a more restrictive manner than other similar professions.

Thank you for the opportunity to provide this written testimony. The POS looks forward to working with the House Insurance Committee on this and other pending legislation.