



**Steingart,
McGrath &
Moore, P.A.**

Attorneys and Counselors at Law

3300 Edinborough Way, Suite 601
Minneapolis, Minnesota 55435
Phone: (952) 835-3939
Fax: (952) 835-5959

*James M. Lehman, Esq., Of Counsel
Thomsen & Nybeck, P.A., Of Counsel*

Terrance W. Moore
Direct: (952) 831-7100
terry@steingart.com

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Dr. Wayne Dahl
604 N. Lilac Drive
Golden Valley, MN 55422

Dear Dr. Dahl:

You have asked our law firm to provide you an opinion regarding the potential legal exposure you would be subject to as a chiropractor if you enter into a contract with a mobile MRI provider. The purpose of this letter is to provide you that opinion. You provided me a proposed contract and an opinion from attorney Todd Crabtree dated February 14, 2005. Please review the following and contact me with your thoughts.

In my opinion, the described relationship with the mobile MRI provider puts the chiropractor at serious legal risk. The purpose of the arrangement is to increase income for the chiropractor in exchange for referring patients to the mobile MRI provider. This is a presumptively illegal arrangement. Any chiropractor entering into such an arrangement is at risk of legal consequences.

We do not get comfort from Mr. Crabtree's letter. His analysis ignores Minnesota's anti-kickback statute. Mr. Crabtree relies on a cost model instead of Fair Market Value, which is the appropriate legal standard. Finally, the mobile MRI contract you provided to me is not the same arrangement analyzed by Mr. Crabtree. Each of these areas creates material legal exposure for you as a chiropractor. Accordingly, my opinion is that entering into the mobile MRI lease exposes you to legal risk.

I. Mr. Crabtree Ignores Minnesota law.

Minnesota law extends the Federal Anti-Kickback Statute to all persons in Minnesota, not just beneficiaries of Medicare and Medicaid (Minn. Stat. Sec. 623.23) (Factors and Incentives Driving Investment in Medical Facilities; MN Dept. of Health, February, 2007, p. 18). Mr. Crabtree's opinion letter ignores the Minnesota law and states that because the mobile MRI provider does not perform scans for Medicare and Medicaid patients, the Federal Stark Law ("Anti-Kickback Statute") does not apply. The Minnesota law will apply whether or not the mobile MRI provider takes Medicare or Medicaid.

The Anti-Kickback Statute¹ makes it unlawful if anyone either:

(b)(1)...knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind –

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or services for which payment may be made. . . [or]

(b)(2) ... knowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person –

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or services for which payment may be made ...

Mr. Crabtree acknowledges that his scheme includes chiropractors who refer patients for financial gain; stating “One chiropractor may be strongly influenced to make a referral for a small financial gain while another may not be compelled to make a referral even if they were to receive a large windfall.” (Crabtree letter, P.2). Such payment is a violation of Federal and Minnesota law. If any chiropractor refers patients and gets a financial gain, that chiropractor is at legal risk.

Mr. Crabtree acknowledges that the referral is for money, but approves of it because the mobile MRI provider does not take Medicare. However, because Minnesota prohibits kickbacks for any referral, not just Medicare, the subject scheme is illegal in Minnesota and puts chiropractors in jeopardy.

There are further issues regarding disclosures required by Minnesota law² that are not addressed by Mr. Crabtree. A chiropractor with a financial or economic interest in or contractual arrangement that limits referral options with a diagnostic imaging facility (including a mobile MRI provider), is prohibited from referring a patient to that facility or an affiliate unless the health care provider discloses in writing to the patient, in advance of the referral, the existence of such or arrangement. Minnesota law also has specific posting requirements that apply to these situations. Any chiropractor in such an arrangement must follow these disclosure requirements or risk legal action.

II. Mr. Crabtree’s Model is based on Cost, not on Fair Market Value

Mr. Crabtree and the mobile MRI provider’s scheme is further flawed because it is based on a “cost” model. In short, it assumes that an average chiropractic clinic costs \$455.60 per day to operate. He states that a clinic would not agree to the rental of its facilities by the mobile MRI

¹ Social Security Act, § 1128(B) [42 U.S.C. 1320a-7b; adopted by Minnesota in Minn. Stat. § 62J.23.

² M.S.A. § 144.6521 subds. 1 and 2.

provider unless there was a profit to be made on it and he opines that a payment of \$600 by the mobile MRI provider, leaving \$144.40 in "profit", is reasonable. His approval of a logical profit for referrals is wrong.

The Anti-Kickback Statute is violated if any part of the purpose for the payment is to induce future referrals, even if the payments were also intended to compensate for professional services. U.S. v. Lahue, 261 F.3d 993, 1003 (10th Cir. 2001); U.S. v. Kats, 871 F.2d 105, 108 (9th Cir. 1989). "Profit" under Mr. Crabtree's opinion is simply another word for money offered to generate referrals- a clear violation of Minnesota law.

Mr. Crabtree's "cost" model analysis is the wrong analysis under the law. In order to avoid a violation of the Anti-Kickback Statutes, and consequently of Minn. Stat. § 62J.23, the compensation paid must be "consistent with the fair market value in arm-length transactions and is not determined in a manner that takes into account the volume or value of any referrals." U.S. v. Neufeld, 908 F.Supp. 491, 499 (S.D. Ohio 1995). Mr. Crabtree provides no analysis or advice regarding the Fair Market Value ("FMV") of the services the mobile MRI provider is "purchasing", including rental of parking lot space, rental of waiting room space and compensation for staff time.

Mr. Crabtree does not analyze the payment from a Fair Market Value standpoint. Even if his assumptions regarding the operating costs of a chiropractic clinic are correct, his approach is inconsistent with the provisions of the Anti-Kickback Statute. The analysis must be approached as a fair market valuation. This will be unique for each clinic.

Crabtree's approach, based on "average cost" is wrong because both "average" and "cost" are irrelevant to the unique FMV of each clinic. The "average" of all clinics does not inform us as to the FMV of any particular clinic. If the FMV rent of one chiropractor's space is \$10.00/sq. ft., he can not rent it out for more than that, even if the "average" of all clinics is \$50/sq.ft. As discussed above, legal rent is the FMV of the space, not a percentage over the "cost".

Further, there is no room for "profit" under the anti-kickback statutes. Any amounts paid in excess of the FMV of the services are considered a kickback and expose the chiropractor to liability under both Minnesota and Federal law.

III. The mobile MRI provider Scheme Being Used Is Not The Same Scheme Approved By Mr. Crabtree.

Mr. Crabtree's approval of the mobile MRI provider scheme is based on several important assumptions and calculations. He states that "[a]ny deviation from these assumptions may alter my opinions." The arrangement you described to me deviates from these assumptions in several material ways.

First, the opinion and profit calculations are based on an "average" clinic's revenue and operational costs. Crabtree's generalization with averages and assumptions will not be a defense to a chiropractor in an enforcement action under 62J.23. Violations will be dealt with on a case-by-case basis. The FMV of the unique space and services provided to the mobile MRI provider will be evaluated for each individual clinic.

Second, Mr. Crabtree assumes that the clinic will shut down its normal operations while the mobile MRI provider is there, thereby committing all clinic resources to assisting the mobile MRI provider. This means that, while the mobile MRI provider is at the clinic, the clinic will be offering no services whatsoever, including chiropractic, massage therapy or physical therapy. If the clinics are not shutting down all other operations while the mobile MRI provider is onsite, Mr. Crabtree's analysis fails. In fact, the contract offered by the mobile MRI provider does not require you to shut down your clinic.

Third, part of the payment being made to the clinic is for the rental of parking lot space and the use of the reception area of the clinic. Unless you own your parking lot, you can not rent this space. Likewise, you may have no right to sublease your lobby. Unless he has the right to lease out his parking lot, lobby and employees, a chiropractor in this scheme will likely be found to be taking money for referrals, not for leasing what he can not legally lease.

IV. Conclusion

If you choose to enter into a relationship with a mobile MRI provider as you have described it, you are at risk of breaking the law. You run the risk of being the subject of enforcement action that could lead to action against your license and potential criminal liability.

Thank you very much for your consideration of this opinion. This opinion is for your use only and does not constitute legal advice to any other party. Each situation is unique and should be considered individually. I can be reached at the number above. I look forward to hearing from you.

Very truly yours,



Terrance W. Moore

TWM/kjt