



New Jersey Board of Medical Examiners Proposed Emergency Rule

On January 9, 2008, the New Jersey Board of Medical Examiners ("BME") proposed an emergency rule to provide relief from the recent holding in the Garcia v. Wayne Surgical Center case. In Garcia, the Bergen County chancery court held that a physician's referrals to a surgery center in which the referring physician possesses an ownership interest violates New Jersey's law against self-referrals, known as the "Codey" law.

The Codey law, which prohibits referrals to an entity in which the referring physician has an ownership or other financial interest, recognizes an exception that permits referrals within the same "medical office" as the referring physician. Historically, the BME has viewed a surgery center as an extension of a physician's medical office, but the Garcia case found that the regulations do not permit this interpretation. The emergency rule would revise the definition of "medical office" to permit certain referrals to a surgery center in which the referring physician has an ownership interest.

The BME proposes the following "medical office" exception language to the Codey law to allow physicians to refer to a surgery center in which they have an ownership interest:

1. The practice site is operated in a business form authorized by the BME for the practice of medicine (as set forth at N.J.A.C. § 13:35-6.16(f));
2. Referring practitioners participate in governance so as to ensure that the referring practitioner can fulfill its obligations promulgated by the BME (as set forth in N.J.A.C. § 13:35-6.16(b)), with respect to the hiring and retention of professional staff, the quality of care provided and the maintenance of all professional practice standards;
3. The referring practitioner personally performs the procedure on the patient he or she referred;
4. Disclosure of the referring practitioner's financial interest is made to the patient in writing, accompanied by a list of the full names of all other practitioners who have an interest in the practice site and, if applicable, disclosure that certain component parts of the bill for the service may be handled by payors differently (for example, the professional fee may be in-network and the facility or technical fee may be out-of-network);
5. All of the ownership interests in the practice site are held by investors who are referring practitioners, referring practitioners in combination with other non-referring

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practitioners, closely allied licensed health care professionals or a licensed hospital; and

6. Ownership interests are not related to previous or expected volume of referrals, services furnished, or the amount of business otherwise generated by or anticipated from that investor to the entity, and the amount of payment returned to an investor is directly proportional to the amount of the capital investment (including the fair market value of any services rendered prior to the operational date of the entity) by that investor, unrelated to the volume of business generated.

The requirement regarding ownership by referring practitioners will be deemed to have been met if the practitioner and other investors can document that within 120 days of the effective date of the rule they have commenced bringing the practice site into compliance. The above rule remains subject to review by the BME and must be approved by the Governor before it becomes effective. In the event the Governor does not approve the rule as an emergency rule, the BME will propose the rule in accordance with normal rulemaking procedures, which permits the submission of written commentary from the public.

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If you have any questions regarding the proposed emergency rule, do not hesitate to reach out to your regular contact at GWT.

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