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HOUSE OF REPRESENTATIVES
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FILE # ML-45031-06
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OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General
Office of the Attorney General - State of Texas
P. O. Box 12548
Austin, TX 78711-2548

RQ-0542-GA

Dear General Abbott:

Please find attached a request for opinion regarding the authority of Angleton-Danbury Hospital District to house a private imaging business in the District's hospital facility and to manage that private entity imaging business.

I greatly appreciate your prompt consideration of this request.

Sincerely,

Dennis Bonnen

Dennis Bonnen
District 25



October 16, 2006

The Honorable Greg Abbott
Attorney General
Office of the Attorney General State of Texas
Post Office Box 12548
Austin, TX 78711-2548

Re: Request for Opinion Regarding Authority of Hospital District

Dear General Abbott:

I request your opinion as to whether Angleton-Danbury Hospital District (the "District") has the authority to house a private imaging business in the District's hospital facility and to manage that private entity imaging business, in order to obtain an imaging capacity it would not otherwise have. Set forth below is an outline of the factual background, and my understanding of the legal analysis.

Background

Angleton-Danbury Hospital District exists under, and its authority is derived from, Chapter 1002 of Special District Local Laws Code. The District operates a 64-bed, general hospital known as Angleton Danbury Medical Center. The District has received a proposal from a private entity whereby the private entity will obtain an advanced computerized axial tomography (CT) scanner, house that scanner and its operation (in essence a single modality imaging center) on hospital premises (specifically in the hospital's imaging department), and have the hospital manage the CT imaging center. The private entity will pay the hospital a fee for space usage and management services. The exact nature of the District services has not been determined, but it is presently anticipated such services will include generally the management of the day-to-day operations of the CT imaging center including patient scheduling and registration, marketing, provision of a full-time administrator, billing, arranging for supplies, and the maintenance and repair of the scanner. Hospital management concluded this arrangement will permit the hospital's service area to have the availability of an advanced CT scanner that the hospital would not otherwise acquire at this time.

Though not necessarily relevant to your consideration, we note that the lease and the management agreement would be structured so that the arrangement will be in compliance with [the space rental and personal services safe harbors under] the federal illegal remuneration law, [the safe harbor being set forth at 42 C.F.R. §1001.952; the illegal remuneration statute underlying those safe harbors is] set forth at 42 U.S.C. 51320a-7a, and the space rental and services exceptions under the "Stark law," set forth at 42 U.S.C. §1395nn with regulations thereunder at 42 C.F.R. §411.351, et seq. The arrangement will also be in compliance with the state law that is similar in application to the federal illegal remuneration law (specifically, Section 101.102 of the Texas Occupations Code). One of the owners of the private entity is a physician.

I recognize that, as a general matter, political subdivisions in Texas, such as the District, are deemed to have only authority expressly granted to them, and implied and incidental powers are narrowly construed. The necessary analysis is (a) to determine if the proposed activity fits within the authority granted to the District in its governing statute, and (b) then, even if the statute does provide or imply the authority, to consider the constraints imposed by the Texas constitution.

It appears clear that the hospital has the statutory authority to house the CT imaging center on its premises. It also appears that the hospital has the statutory authority to manage the CT imaging center. In particular, the Special District Local Laws Code provides that:

- Under Section 1002.101, the District "has full responsibility for providing medical and hospital care for the district's needy residents" (emphasis added);
- Under Section 1002.103(a), the board of the District "has all powers necessary, convenient, or incidental to carry out the purposes for which the District was created";
- Pursuant to Section 1002.103(b), the board of the District "has the complete management and control of all the business of the District, including the power ... to construct and equip a hospital system, to operate and maintain a hospital or hospitals ..." (emphasis added);
- Under Section 1002.104(a), the District is to "provide health care services to [district residents] by ... [acquiring] buildings and improvements ... and administering the buildings and improvements for hospital purposes" (emphasis added); and
- Pursuant to Section 1002.104(b) the District "may include any facility or equipment the board considers necessary or appropriate for providing health care services, including . . . ancillary support"¹ (emphasis added).

Thus, the District has broad authority to obtain equipment and provide all the attributes of a hospital system and to allow it to provide medical, hospital and health care services, in any way

¹ Among other listed functions including outpatient clinics and preventive care services.

it sees fit, and this proposed arrangement is simply another way to accomplish that goal. In the agreement governing the arrangement, the District will require that the CT scanner be available for service in the same manner that other imaging modalities are available for service in the hospital's imaging department. In essence, the District will be allowing the private entity to house a CT scanner and its imaging center on a hospital premises provided the CT scanner is made available to the District's residents on the same basis as if the District owned the CT scanner itself.

An imaging function, however obtained, is clearly contemplated within medical and hospital care and healthcare services. In fact, imaging is a customary part of hospital care. In particular, I note that, in the general hospital licensure statute, at Texas Health and Safety Code §241.003, the definition of "general hospital" describes a hospital as an establishment that maintains diagnostic x-ray services. In common practice, hospitals maintain on site various imaging modalities, such as magnetic resonance imaging and CT. In implementing the hospital licensure requirements, the Texas Department of Human Services regulations require that hospitals provide diagnostic radiological services "according to the needs of the patients" and sets standards for CT scanning. Medicare hospital conditions of participation also require diagnostic radiology service as needed for patient care. Regulatory references are attached as Exhibit A. The hospital has concluded that CT scanning is necessary to be able to meet the accepted standard of care for service that Texas hospitals need to provide.²

Further, as noted above, Section 1002.104(a)(3) authorizes the District to administer its buildings and improvements for hospital purposes. The management services cited above constitute administration of a portion of the hospital, medical and/or healthcare services that it provides. Through the managing arrangement, the District will monitor and control the scheduling and availability of the CT scanner.

A number of Attorney General Opinions address questions of statutory and constitutional authority for hospital districts to enter into arrangements for related services. Under those authorities, the District can undertake a particular activity, assuming it is authorized under its governing statute if it fulfills a public purpose, with any private benefit or private purpose being only incidental and if the District receives a sufficient return benefit. For example, in a response to the Corrigan Hospital District, your office concluded that District was authorized to build a nursing home facility in light of the conclusion that geriatric care was a component of hospital

² As noted above the broad language of Section 1002.104 authorizes the hospital system operated by the District to include any equipment the District board considers necessary or appropriate. The reference to ancillary support, and other references in Section 1002.104, would seem broad enough to include imaging services including CT scanning, in addition to that service being an accepted part of hospital care. See further references to Attorney General Opinions and applicable regulations below.

The Honorable Greg Abbott
October 16, 2006
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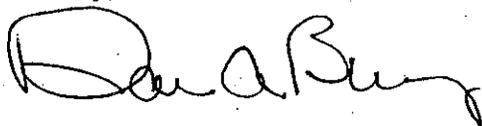
care. Similarly, Opinion Number DM-131, your office agreed with the conclusion that Chambers County Hospital District could house an adolescent drug treatment center operated by a group of private physicians. Further, in Opinion DM-66, your office concluded that the Valverde Hospital District could construct a building for lease to a physician to operate a dialysis center. The expansive references in the statute, as recited above and those AG opinions lead me to believe that the CT imaging functions would be considered both health care services and a hospital function as contemplated in the statute.

Further I think the CT imaging function would be considered to further a hospital purpose for purposes of the constitutional limitations, provided the function is available to needy hospital district residents. To achieve this end, I am informed that the District, for example, intends to require that the private entity adopt and follow the indigent care guidelines and policies of the District, not discriminate against Medicare and Medicaid patients, and provide a certain level of indigent care (and, as noted, those standards would be implemented by the District in its administration of the CT scanner under the management arrangement).

The District's management services seem to enhance the proper constitutional purpose. In particular, the District will thereby control more closely the operations of the CT imaging center and will be able to ensure that the hospital purpose of providing medical and other healthcare services to the District's population, including specifically the needy population, would be satisfied.

Please let me know if you agree with the foregoing conclusions. I look forward to receiving your response as promptly as possible, thank you.

Sincerely,



David A. Bleakney
CEO/Administrator

DAB/dml

Exhibit A

Texas Hospital Licensing Rules:

25 Tex. Admin. Code 133.41(s)(1)

The hospital shall maintain, or have available, diagnostic radiologic services according to needs of the patients. If therapeutic services are also provided, the services, as well as the diagnostic services, shall meet professionally approved standards for safety and personnel qualifications. In a special hospital, portable X-ray equipment may be acceptable as a minimum requirement. Policies and procedures shall be adopted, implemented and enforced which will describe the radiology services provided in the hospital and how employee and patient safety will be maintained.

25 Tex. Admin. Code 133.163(l)(1)(A)(i)

Each hospital shall have a diagnostic radiographic (X-ray) room convenient to emergency, surgery, cystoscopy, and outpatient suites. When additional diagnostic imaging services such as fluoroscopy, mammography, tomography, computerized tomography scanning, ultrasound, magnetic resonance, angiography, and other similar techniques are provided, room(s) sizes shall be in compliance with the manufacturer's recommendations.

25 Tex. Admin. Code 133.163(l)(1)(D)

Computerized tomography (CT) scanning. When CT services are provided, the CT room(s) size shall be in compliance with the manufacturer's recommendations.

(i) A control room shall be provided with a view window permitting view of the patient. The control room shall be located to allow convenient film processing.

(ii) A separate computer room shall be provided to accommodate the equipment.

(iii) A patient toilet shall be provided conveniently to the procedure room. When directly accessible to the scan room, the toilet shall be arranged so that a patient may leave the toilet room without having to re-enter the scan room. The toilet room shall have a hand washing fixture with hands-free operable controls.

25 Tex. Admin. Code 133.163(l)(1)(F)

Magnetic resonance imaging (MRI). When MRI services are provided, the room shall be of sufficient size to house equipment but no less than 325 square feet of clear floor area exclusive of built-in shelves or cabinets.

(i) A control alcove shall be provided with a view window designed to provide full view of the patient at all times.

(ii) A separate computer room shall be provided to accommodate the equipment.

(iii) When cryogen is provided, a storage room or closet shall have a minimum clear floor area of 50 square feet for two large dewars of cryogen. A storage room or closet shall be required in areas where service to replenish supplies is not readily available.

Medicare Hospital Conditions of Participation:

42 C.F.R. 482.26(a)

The hospital must maintain, or have available, diagnostic radiologic services. If therapeutic services are also provided, they, as well as the diagnostic services, must meet professionally approved standards for safety and personnel qualifications. The hospital must maintain, or have available, radiologic services according to needs of the patients.