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## MEMORANDUM

TO: EMS Clients and Friends

FROM: Paul Gillan, JD, EMT-B  
Iseman Cunningham Riestler & Hyde LLP

DATE: April 25, 2006

RE: Town/Squad Billing and Reimbursement Issues

Quite a few ambulance companies have received a letter recently which begins by stating, boldly, “YOUR BILLING INCOME IS AT RISK!” The letter, mass-mailed to ambulance companies statewide, states that “two recent opinions of the New York State Comptroller will put an end to the ability of an ambulance company to bill patients and to then retain those fees if the ambulance contracts with a municipality.” The letter offers no explanation as to how or why this might be the case. Ambulance companies are urged to register for a conference call, for a fee of \$15, to find out more. The urgent tone of the letter is unmistakable.

The letter should be understood for what it is, and also for what it is not. The statement “your billing income is at risk” is not a well-reasoned legal opinion based upon analysis of the facts and circumstances particular to your situation. It is, instead, a rather purposeful overstatement intended to encourage the recipient to register for the conference call. Unfortunately, the letter includes next to no information that would permit the recipient to judge whether his or her ambulance company’s billing income is indeed at risk, or even whether it is really necessary (as the letter specifically states) to participate in the call.

The Comptroller's Opinions in question are in fact nothing new. They break no new legal ground, and are based upon principles that have been articulated in many previous Comptroller's Opinions in prior years and upon laws that have not changed in decades. The statements in the opinions are not particularly alarming, except perhaps to towns and ambulance companies who may have misinterpreted the existing law when drafting their ambulance service contracts.

The Comptroller is an elected state official. As the chief fiscal officer of the state, the Comptroller is responsible for overseeing the state's finances and managing the state's assets. The Comptroller also has oversight over the finances of local municipalities such as towns and cities. In that role, the Comptroller provides advice and guidance to local municipalities in the form of opinion letters. If a city corporation counsel has a question regarding the propriety of municipal license fees, for example, he or she can write a letter to the Comptroller asking for an opinion, and the Comptroller will write back. The discussions in the opinion letters are helpful because they apply the Comptroller's expertise, and to that end they are very persuasive. The Comptroller's opinion, however, is not binding upon any court.

In December 2005 the Comptroller issued an opinion addressing the ability of a municipality to set ambulance fees in excess of costs.<sup>1</sup> Our firm happened to be directly involved in the controversy that resulted in that opinion. The city at that time was looking for a revenue source to address budgetary shortfalls. The city fire department urged the common council to initiate an ambulance service under the municipal CON process, with the aim of using ambulance billing revenues as additional revenue for the general city budget. The fire department used financial projections provided by a billing service to show that the city could earn tens of thousands of dollars in "profit" by starting its own ambulance service.

Our client, a local not-for-profit ambulance company that would have been adversely affected by the city's decision, argued that the proposed scheme was unlawful and urged the city corporation counsel to obtain an opinion from the Comptroller. As it turned out, the Comptroller agreed with our position. The idea, however, was nothing new: in the absence of express statutory authority, a municipality may not impose a user fee designed to generate revenue in excess of the cost of providing a service for the purpose of offsetting the general cost of government. There are Comptroller's Opinions on this point dating to at least 1992, and cases decided in New York courts from at least 1978.

The December 2005 opinion dovetails with another Comptroller's opinion, released in February 2005,<sup>2</sup> which also concerned ambulance fees. In the February opinion, the Comptroller

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<sup>1</sup> <http://www.osc.state.ny.us/legal/2005/op2005.8.htm>

<sup>2</sup> <http://www.osc.state.ny.us/legal/2005/op2005-1.htm>

addressed the question of whether an ambulance provider who has contracted with a municipality may retain, as its own monies, the user fees imposed by the town for the emergency medical services provided. The answer was no, because when a municipality contracts out for ambulance services the municipality sets the fees and the fees belong to the municipality. This, again, is nothing new. Section 122-b of the General Municipal Law permits a town that has contracted out for ambulance services to fund the service by imposing a property tax, or by imposing user fees, or both. If fees are imposed, the fees technically (and properly) accrue to the benefit of the town regardless of who collects them. Comptroller's Opinions on this point stretch back to 1969. Under the same law, the town (or other municipality) also has the right to set rules and regulations for the use of the ambulance, including the collection of fees.

Ambulance companies often do not like to hear the reality of this relationship. It is for this reason that I counsel my ambulance clients to find every means of weaning themselves from municipal monies. This is beneficial to the municipalities, too, because it permits them to lower their tax impositions. But the law has been this way for a long, long time, and the perceived urgency of this situation and the need for an immediate legislative solution is not immediately apparent.

In any event, in the overwhelming majority of circumstances, the technical issue of who the funds belong to becomes a non-issue in practice. Almost all local ambulance companies that contract with municipalities have operating budgets that far exceed their billing program revenues. That, in fact, is the very reason the ambulance company ends up contracting with the municipality to begin with. Most contracted ambulance companies are paid by a combination of billing program revenue and property tax impositions. Under those circumstances, all of the billing program revenues end up being applied to the ambulance company's expenses incurred in providing services under the contract, so the issue of who the funds "belong" to becomes a question of accounting and reconciliation.

The Comptroller's Opinions do not state that municipalities must perform all ambulance billing and collection services, and they do not state that an ambulance company must turn over all billing monies to the municipality. It is permissible under the law, and there are several Comptroller's Opinions which say so, including the February 2005 opinion, for a municipality to delegate to an ambulance company the responsibility for collecting fees. Most municipalities have no wish to engage in ambulance billing themselves, or to deal with ambulance billing service providers, and so they are happy to allow the ambulance company to bill for the services. When the fees constitute part of the consideration that the municipality has paid to the ambulance company, it is perfectly permissible for the ambulance company to receive the funds as long as the appropriate reconciliation and audit procedures are in place.

When both parties to a municipal ambulance contract have a cogent understanding of their relationship and the applicable law, and of the limitations that the law imposes, a productive

relationship is readily achieved. Many different kinds of arrangements are permissible under the current law, depending in large part on the squad's cash flow needs and, perhaps in larger part, on political relations between the municipality and the squad. That last point is an important one. If someone throws gasoline on the fire, so to speak, the ensuing conversation is not likely to be about the law at all, even if legal principles happen to be the topic of conversation. But in all cases, regardless of the specific arrangements, the key issues are that there be a means of reconciling the amounts paid by the municipality, the amounts received from billing activities, and the overall costs of providing ambulance service.

Further difficulties may arise when the contracted service provider serves multiple municipalities, or engages in both emergency and intra-facility transport services, or is some other type of provider (like a hospital) that provides ambulance service as a line of business but does not separate ambulance revenues from its general funds. The challenge in these kinds of cases is to ensure that municipal dollars (including the fees) are being used to serve the municipality, and not for servicing some other municipality, for subsidizing a profitable transport business, or for offsetting a general hospital's annual operating losses. These are all impermissible means of using municipal dollars anyway, and no amount of lobbying will change that.

Interestingly enough, a legislative "solution" to this perceived new crisis would not seem to advance the interests of independent ambulance providers. Under the present law, cities and towns may not make a profit off of ambulance services. If the law is changed to permit cities and towns to make a profit, every municipality in New York will be in a headlong rush to establish its own ambulance service under the municipal CON process, in hopes of using the excess revenue to alleviate its own budgetary pressures. It is difficult to see how a proliferation of municipal EMS departments would benefit independent ambulance companies, not-for-profit or otherwise; to the contrary, it would devastate them.

Comptroller's Opinions are freely available on the web at <http://www.osc.state.ny.us/legal/index.htm> The search box there may be used to locate everything the Comptroller has written about ambulance service fees since 1988.

This document may be freely distributed, and should be provided to your squad's legal counsel if it has one. I am available for questions at the above Albany number.

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