

HEALTH CARE ISSUES

The Health Care Department at Murtha Cullina is pleased to provide clients and friends with information about topics of interest in the health care area.

If you have questions about the issues addressed in this newsletter, or any other matters involving health care legal issues, please feel free to contact the following attorneys:

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OIG 2008 ADVISORY OPINION DISAPPROVES ARRANGEMENT
BETWEEN PHYSICIAN PRACTICES AS A SUSPECT JOINT VENTURE



Elizabeth Neuwirth



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In an advisory opinion issued August 19, 2008, the Office of the Inspector General (the OIG) declined to approve a proposed arrangement between several urology practices and a physician-owned free-standing cancer treatment facility that provides, among other things, Intensity-Modulated Radiation Therapy (IMRT). A radiology group contracts with the facility to provide imaging services, and the facility bills for both the professional and technical components of the IMRT.

Prior to the proposed arrangement, the urology groups had been referring patients to this facility and to others in the area.

Under the proposed arrangement, each urology group would block-time lease from the facility everything necessary to perform an IMRT (space, equipment, personnel, billing services and radiation therapy and other supplies). Each group would be required to lease a minimum of eight (8) hours a week for a minimum of one (1) year, and would separately contract with a radiologist for imaging services. The urology lessees would bill for both the professional and technical just as the facility does at present.

The lease payments would be structured to satisfy the Anti-kickback Statute (AKS) safe harbors for leases of space and equipment, and the radiology agreement would satisfy the personal services exception. In an attempt to have the arrangement comply with Stark, the urologists would see patients at least six (6) hours a week in the building in order to meet the group practice in-office ancillary services exception (IOASE).

Despite the AKS safe harbor compliance, the OIG refused to find that the arrangement would be insulated against AKS enforcement action. The Proposed Arrangement would effectively create a joint venture between the facility and the referring physicians. Returning to the concerns it expressed in its Special Advisory Bulletin on Contractual Joint Ventures, published in 2003 (the SAB), the OIG commented that the proposed arrangement would allow the facility to “do indirectly what it cannot do directly” -- to pay the urologists for their IMRT referrals. The “spread” between the urologists’ reimbursement from payors and their payments to the facility and the radiologists would be retained by the referring physicians as profit they otherwise would have been denied. In this respect, the proposed arrangement is directly on point with the OIG’s warning in the SAB: “illegal remuneration can be the difference between

the money paid by a referral source to a manager/supplier and the reimbursement received by the referral source from the Federal health care programs.”

The OIG found the proposed arrangement similar to the suspect joint ventures in the SAB because the urologists would expand into a related line of business by contracting out the entire service to a competitor and “receiving in return the profits of the business as remuneration for its federal program referrals.” The physicians would assume minimal risk in the venture as they essentially control the flow of referrals for IMRT and need not commit much financial or human capital to the venture. The result is that the urologists would provide technical services to their own patients whom they otherwise would have had to “turn over” economically to the facility.

In addition, the urologists’ income would vary with the volume of their referrals to the facility, and because the block-time leases could be tailored to fit the historical pattern of referrals by the Urologist Groups, so might the income to the facility.

The OIG pointed out that while the SAB focused on joint ventures between physicians and other providers, “the same analysis applies equally to joint ventures involving physician groups of different specialties, where an arrangement would result in one physician group profiting from its referrals of patients for services to be performed by another.”

This Advisory Opinion demonstrates again that a joint venture arrangement that results in sharing the technical reimbursement can fit within the AKS safe harbors - and even satisfy Stark exceptions - and still not be “blessed” under the Anti-kickback Statute.

For more information on this topic, please contact Elizabeth Neuwirth or Kennedy Hudner.

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