Top 9 Things Every New Practitioner Should Know

UT Southwestern Obstetrics and Gynecology Residency Program

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Top 9 Things Every New Practitioner Should Know

1. Shift to Quality-Based Payments
2. Hospital Employment
3. Recruitment
4. Employment
5. Practice-Building (Development of a Patient Base)
6. Ancillary Services
7. Practice Management/Billing and Coding
8. Stark Law and Anti-Kickback
9. Government Enforcement

The End of Fee-For Service?

- Shift to Quality-Based Payments/Penalties
  - Value-Based Purchasing
  - Hospital Readmission Penalties
  - Hospital-Acquired Infections

- Hospital/Physician Alignment
  - Medical Directorships
  - Co-Management Agreements
  - Pay for Quality Arrangements
  - Accountable Care Organizations/Clinically Integrated Networks
  - Hospital Employment

The Struggle to Remain Independent

- Rising Costs
- Increased Administrative Time
- Diminishing Reimbursement
- Hospital Employment
- Non-Competes
  - Estimated that over 50% of new physicians will change jobs within the first 2 years.

Recruitment

- Signed written agreement
- Not conditioned on referral of patients to the hospital
- Not determined on volume or value of referrals
- If leaving established practice, at least 75% of revenue must be from new patients
- Moves practice at least 25 miles into geographic area served by the hospital

Employment

Key Provisions of Employment Agreements

- Compensation/Benefits (salaried vs. productivity-based compensation)
- Malpractice Insurance (requirement to purchase tail coverage?)
- Call Requirements
- Non-Competes
- Partnership Eligibility
- Termination Provisions
- Expenses

Practice Building and Ancillary Services

Practice Building:

- Business Development (starting from scratch or over flow)

Ancillary Services:

- PODs
- Pharmacies
- Cosmetic-Type Procedures
- Laboratories

Practice Management/Billing and Coding

- ICD-10
- Importance of a good practice administrator

The Stark Law

42 USC § 1395nn

The Stark Law

- Prohibition
  - If a **physician**, or a member of the physician's **immediate family**, has a **financial relationship** with an **entity**, then the physician is prohibited from making a **referral** to the entity for the provision of a **designated health service** paid for by Medicare, and the entity is prohibited from billing for such service, unless an **exception** is satisfied

- Designated Health Services
  - Include (but are *not limited to*) laboratory services, radiology and certain other imaging services, inpatient/outpatient hospital services, outpatient prescription drugs, DME, prosthetics/orthotics, PT/OT, parenteral and enteral nutrients, equipment and supplies, home health, radiation therapy services and supplies

The Stark Law

- **Penalties:**
  - Denial of payment
  - Civil monetary penalties of up to $15,000 for *each* offense
  - False Claims Act prosecution, and
  - Exclusion from Medicare and Medicaid programs

- **Strict Liability Statute:** Intent is *not* required

The Stark Law

- Simple enough, but as is often the case, the "*devil is in the details*"
- Stark is all about ***EXCEPTIONS***.
- If an exception under Stark is met, it is **permissible** for the physician to make a referral of DHS to a DHS entity with which the physician (or the physician's immediate family member) has a financial relationship

The Stark Law

- Stark Law exceptions require **strict compliance with every element of an exception**…very little wiggle room

- Commonly used exceptions to the Stark Law involving contracts with referring physicians include:
  - Fair Market Value Compensation Exception
  - Personal Service Arrangements Exception
  - Whole Hospital Exception
  - Rental of Equipment Exception
  - Space Leases
  - Physician Recruitment
  - Employment
  - Non-Monetary Compensation

The "Anti-Kickback" Statute

(State and Federal)

Anti-Kickback Statute

- Prohibition: It is a FELONY to **knowingly and willfully** offer, pay, solicit, or receive any **"remuneration"** in order to induce referrals of items or services reimbursable by any Federal or State health care programs.
  - Federal Statue: applies to services for which payment may be made in whole or in part under a Federal health care program.
  - State Statute: mirrors the federal statute, but applies to all payors.

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Anti-Kickback Statute

Penalties

- **Criminal**
  - Fine of up to $25,000 per violation and/or
  - Imprisonment for up to 5 years
- **Civil**
  - Civil fines in the amount of $50,000 per violation
  - Plus damages of not more than 3 times the total amount of remuneration offered, paid, solicited or received
- **Exclusion From Federal/State Programs**
- **False Claim Actions**

Anti-Kickback Statute

- Intent-Based Statute
  - If even just **One Purpose** is to induce referrals = Anti-Kickback Statute violation
  - Intent may be inferred from circumstances surrounding the arrangement
- What is "Remuneration"?
  - Any type of cash
  - Provision of free items or services
  - Conferring a benefit
- Generally, no *de minimis* exception

REMUNERATION = ALMOST ANYTHING!
e.g., return on investment, compensation and cost savings

Anti-Kickback Statute

Safe Harbors

- Safe Harbor = Payment in certain instances is not considered "remuneration"

- Must meet **all** of the requirements of a particular safe harbor to qualify for safe harbor protection

- BUT, if you do not meet all the requirements, the transaction is not necessarily illegal (*intent* still required)
  - Facts and Circumstances
  - Fair Market Value is Important

Anti-Kickback Statute

Safe Harbors

- Commonly used Safe Harbors to AKS involving contracts with referring physicians include:
  - Personal Services and Management Contracts Safe Harbor
  - Investment Interests Safe Harbor
  - Ambulatory Surgery
  - Space Rental Safe Harbor
  - Equipment Rental Safe Harbor
  - Employees
  - Sale of Practice

RECENT ENFORCEMENT ACTIONS

Qui Tam/Enforcement Actions

- 62 healthcare qui tam actions filed from 1987 to 1992.
- In 2011 alone, there were 471.
- In 2012, there were 412.
- FCA awards 15-30% of the recovery to whistleblowers.
- Medicare Incentive Reward Program:
  - CMS can pay whistleblowers an additional 10%.
  - Proposed Rule would expand the amount to 15% up to the first $66 million received (potential $9.9 million recovery for whistleblower).

Qui Tam/Enforcement Actions 2013 and 2014

- 752 new *qui tam* matters filed in 2013.
- Total federal health care recoveries under the FCA exceeded $2.5 billion in 2013 and $2.3 billion in 2014
  - 2014 was the 5th consecutive year FCA recoveries from health care fraud exceeded $2 billion.
- Total rewards paid to *qui tam* relators in health care cases was $345 million in 2013 and $435 million in 2014.

Qui Tam/Enforcement Actions

- Most relators are employees (more than 75% according to most recent surveys).

- Some are employed or affiliated with competitors.

- According the HHS' Health Care Fraud and Abuse Program Annual Report released in February 2014, for every dollar spent on health care-related fraud and abuse in the last three years, the government recovered $8.10.

Qui Tam/Enforcement Actions

• Just in September, an Assistant US Attorney for the DOJ's Criminal Division, announced that the DOJ will be stepping up its review of False Claims Act (FCA) qui tam complaints.

• All new qui tam complaints are shared by the Civil Division with the Criminal Division as soon as the cases are filed for immediate review.

• The Criminal Division will use criminal investigative tools (e.g., search warrants, wire taps, undercover operations and confidential informants) that it will be able to contribute to FCA cases.

• "Cases involving fraud by executives at health care providers, such as hospitals, are a high priority"

Recent OIG Statistics

OIG Action	FY09	FY10	FY11	FY12	FY13	Total
Criminal Actions	671	647	723	778	960	**3,779**
Civil Actions	394	378	382	367	472	**1,993**
Exclusions	2,556	3,340	2,662	3,131	3,214	**14,903**
HHS Investigative Receivables	$3.0 Billion	$3.2 Billion	$3.6 Billion	$4.3 Billion	$4.0 Billion	**$18.2 Billion**
Non-HHS Investigative Receivables	$1.0 Billion	$576.9 Million	$952.8 Million	$1.7 Billion	$1.03 Billion	**$5.2 Billion**
Total Investigative Receivables	$4.0 Billion	$3.8 Billion	$4.6 Billion	$6.0 Billion	$5.0 Billion	**$23.5 Billion**

Statistics are for cases in which there was a settlement with or judgment for the United States, and in which the OIG's Office of Investigations was involved.

HEAT Strike Force Activity

The Health Care Fraud Prevention and Enforcement Action Team (HEAT) was started in 2009 by HHS and DOJ to strengthen programs and invest in new resources and technologies to prevent and combat health care fraud, waste, and abuse. Hallmarks include data-driven analyses and interagency collaboration.

Location	Criminal Actions	Indictments	Money*
Miami	622	796	$881,561,175
Los Angeles	60	135	$48,295,354
Detroit	111	217	$60,515,775
Houston	56	99	$20,529,564
New York	31	84	$112,298,203
Baton Rouge	43	83	$39,166,607
Tampa	30	42	$56,056,891
Dallas	17	57	$30,277,662
Chicago	9	53	$4,825,501
Total	**979**	**1,566**	**$1,203,526,733**

Statistics are for cases in which there was a settlement with or judgment for the United States, and in which the OIG's Office of Investigations was involved between 2009 and 2013.

Somewhat Recent Cases

Halifax - March 2014

- Background: a Compliance Officer at Halifax Health Medical Center filed a Qui Tam action alleging that the Hospital gave prohibited bonuses to least 6 doctors under employment agreements. It is alleged the amount of the bonuses increased when the doctors referred more patients to the Hospital.

- A Federal Court has ruled the case can proceed even though some of the claims were submitted to Medicaid and not Medicare.

- Government has intervened in the case and the parties reached a $85 million settlement on March 3, 2014.

Halifax (Cont'd)

- As a bonus, each oncologists would receive a portion of a total bonus pool that was equal to 15 percent of the "**operating margin**" of the overall medical oncology program

- "**Operating margin**" meant revenue minus direct expenses of the overall program, determined on a basis that included "designated health services," as defined by the Stark Law, including prescription drugs and outpatient services not personally performed by the medical oncologists themselves.

U.S. ex *rel*. Drakeford v. Tuomey

2013

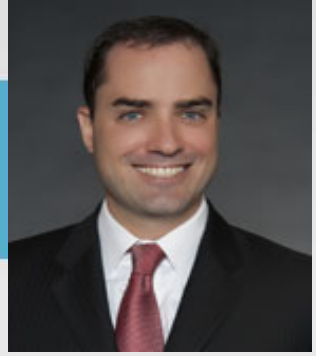
- Surgeons begin development of an ASC and Tuomey Health System was concerned about losing volume.

- Hospital hires surgeons as employees
  - Part-time employment during surgical procedures; surgeons maintained office practice separately
  - Compensation to physicians: fixed salary, plus 80% of collections, plus quality incentives
  - DOJ alleged that compensation exceeded 100% of actual collections (and was up to 140% of collections)

- Hospital internal documents projected losses on all employment agreements

U.S. ex *rel.* Drakeford v. Tuomey (Cont'd)

- DOJ argues that compensation is not FMV because "the hospital's motivation in entering into these part-time agreements was to avoid losing the referrals"
  - While Stark Law is strict liability, the DOJ looked at motivation of parties
- Hospital obtained multiple valuation analyses
- During the trial, the hospital argued reliance on advice of counsel.
- Jury found Tuomey submitted a total of 21,730 Medicare claims that were illegal due to the compensation arrangements
- Result: Hospital pays $237 million for false claims.



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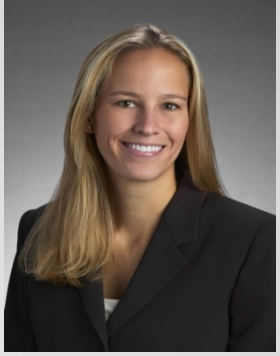

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Josh and Ashley provide counsel to health care providers on complex operational, transactional, and compliance issues. They have experience advising hospitals, ambulatory surgery centers, independent diagnostic testing facilities, laboratories, pharmacies, physicians, and other health care providers on various issues, including matters implicating the Federal Anti-Kickback Statute, the Physician Self-Referral ("Stark") Statute, the Texas Illegal Remuneration Statute, The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the False Claims Act, and the Emergency Medical Treatment and Active Labor Act ("EMTALA"), among many others. Josh and Ashley also advise clients with respect to reimbursement issues and payor audits. Their transactional experience includes drafting and negotiating a variety of health care contracts, including professional services agreements, physician employment agreements, asset purchase agreements, management and co-management agreements, business associate agreements, operating agreements, and equipment and space leases, among others. Josh and Ashley also assist clients in the formation and syndication of hospitals, ASCs, joint ventures, pharmacies, and laboratories.

Josh and Ashley are both Board Certified in Health Law by the Texas Board of Legal Specialization.

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