Confused About "Group Practices" and Physician Ancillary Services?

BY LAURA PODOLSKY AND HARRY NELSON

AS PRIVATE PRACTICE physicians have seen insurance reimbursement drop lower and lower, many have looked to ancillary revenue sources – such as diagnostic imaging and laboratory services – to make up the difference. But while ancillary services can improve the bottom line, they also raise tricky legal issues.

Among the most confusing of these issues are the federal and state self-referral laws. Most physicians have heard of the federal Stark law and California's Speier Act (Business and Professions Code Section 650.01, also known as PORA), but don't understand their details. Both laws prohibit a physician from making certain kinds of referrals from which the physician (or his or her immediate family) stand to benefit. Stark, however, applies only to federal health programs, including Medicare and Medi-Cal, while the Speier Act applies to these programs and to private insurance and cash-paying patients. These laws and regulations are also often confused with the related but distinct topic of anti-kickback laws, which prohibit compensation relationships that induce referrals. To further confound matters, each of these–Stark, Speier, and the anti-kickback laws– has its own distinct and complicated exceptions and "safe harbors."

In future issues, we will focus on the Speier Act (which has been the subject of legislative consideration for amendment), the anti-kickback laws, and anti-markup laws. For now, we want to address one of the most widely misunderstood exceptions to the Stark law: the "In-Office Ancillary Services" (IOAS) exception and its availability to physicians who utilize ancillary diagnostic testing in general and laboratories in particular.

Although the Stark law generally prohibits physicians from referring to laboratories (among other "designated health services") that they own or receive compensation from, the IOAS exception enables a physician to profit from the referral when the lab is in the physician's office, in the same building or in a centralized building (as defined in federal regulations). The analysis is the same for the other categories of designated health services, such as diagnostic imaging, but for the sake of simplicity, we will focus on labs here.

The most common misconception we encounter is the notion that as long as the physician's office and the lab are in the same building, the arrangement is permissible under the IOAS exception, so that the physician may legally refer to the lab and bill for the lab fees. Co-location, however, is only one of the requirements. The IOAS exception also requires that the services be performed or supervised (and billed) by the referring physician him or herself, or another member of the same group practice. And "group practice" has a specific definition: It means that the physician members perform "substantially all"–defined as at least 75%–of their services through the entity.

Unfortunately, many physicians have unwittingly entered into noncompliant arrangements that don't meet these legal requirements. We regularly encounter physicians who form agreements to share expenses and revenues associated with a lab to which they refer, believing they are protected by the IOAS exception. Sometimes the lab is in the same office, building or complex; other times, the lab is in a different location. Typically, the physician mistakenly believes that his or her co-ownership arrangement means that the lab qualifies as an extension of her office (and so services performed there are "in office"), or that multiple physicians who co-own lab equipment but otherwise practice separately qualify a "group practice."

These arrangements are problems waiting to happen. Often the problems are discovered in the course of audits by Medicare, Medi-Cal or the private insurance companies. In addition to violating federal and state law self-referral prohibitions, inappropriately structured shared labs raise other legal issues, such as noncompliance with California's anti-markup provision for labs (Business and Professions Code 655.5) and violations of anti-kickback statutes. Equally seriously, physicians are submitting inaccurate billing forms representing lab services as having been performed in their own offices. Such inaccuracies can spur allegations of healthcare fraud, a criminal offense.

The misunderstanding of the IOAS exception is just one of several problems related to physician lab services. The good news is that the problem can be fixed by ensuring that group practice arrangements meet Medicare requirements or by establishing distinct and separate labs that are under the physician's direct control. Without attention to the detailed statutory requirements, however, these arrangements raise serious risks for the physicians involved.

Harry Nelson is the managing partner of Nelson Hardiman, LLP, and can be contacted at hnelson@nelsonhardiman.com.

Laura Podolsky is an associate at Nelson Hardiman, LLP, and can be contacted at lpodolsky@nelsonhardiman.com.