

September 2008

Re: **Recent OIG Advisory Opinion Concerning Physician Joint Ventures**

Dear Sir or Madam:

The Department of Health and Human Services' Office of Inspector General (the "OIG") recently published Advisory Opinion No. 08-10, which evaluates a proposed arrangement whereby physician group practices proposed to provide space, equipment and personnel to other physician group practices through block lease arrangements. As summarized below, the OIG opined that such arrangements may run afoul of the Federal Anti-Kickback Statute.

The Proposed Arrangement

The Advisory Opinion concerns a physician group practice (the "Requestor") that provides cancer treatment in an ambulatory care facility (the "Facility"), which provides services that include intensity-modulated radiation therapy ("IMRT"), a modality frequently used to treat prostate cancer. Patients with prostate cancer who receive IMRT at the Facility are referred to the Requestor by area urologists. The Requestor proposed to enter into an arrangement (the "Arrangement") with some of these urology groups, which participate in Medicare and which "neither provide IMRT as part of their practices nor own facilities that provide IMRT." The urology groups would lease the Facility from the Requestor on a block-time basis (for example, for 4 hours on Tuesday and 6 hours on Friday). The lease would include the lease of space, equipment, and personnel services necessary to perform IMRT. Some of the urology groups currently refer most of their prostate patients to the Requestor, and some refer primarily to a competing facility.

Key points of the Arrangement:

- The Arrangement was structured to comply with the in-office ancillary services exception under the Stark Law.
- The Arrangement was structured so that every element of the Arrangement complied with one or more applicable anti-kickback safe harbors, which the OIG did not dispute.

The Law

The Federal "Anti-Kickback" Statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. For purposes of the anti-kickback statute, "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

19 Microlab Road
Suite A
Livingston, NJ 07039
t 973.535.1660
f 973.535.0650

°Daniel B. Frier
•°Jonathan E. Levitt

Theresa M. DiGuglielmo
°Michelle L. Greenberg
***Todd Mizeski
****John E. Morrone

Of Counsel
Harold L. Gechtman
Keith A. Singer

°NY & NJ Bars
***NY, NJ & DC Bars
****NY, NJ & CT Bars
•Certified by the Supreme
Court of New Jersey
as a Civil Trial Attorney

275 Madison Avenue
Suite 1100
New York, NY 10016
t 212.981.1660
Please respond to New Jersey Office

The OIG's Analysis

The OIG opined that the Arrangement exhibits several elements which make it a suspect joint-venture. Elements of concern to the OIG include:

- The urology groups would be expanding into a related line of business, IMRT, which is dependent on referrals from urologists.
- The urology groups would contract out substantially all IMRT operations, including the professional services necessary to provide IMRT.
- The urology groups would commit little financial or human resources to IMRT.
- The urology groups would be in a position to ensure the success of the business, not only by referring to the Requester for IMRT, but by choosing IMRT over other available therapies for prostate cancer.
- The urology groups would use the premises, equipment and staff of the Requester to serve their own patient base – the very patients some of the urologists have historically referred to the Requester.
- Because the various agreements could be tailored to fit the historical pattern of referrals by the urology groups, so might the income to the Requester.
- The Requester (and its individual Radiologists engaged as independent contractors by the urology groups) and the urology groups would share in the profits of IMRT.

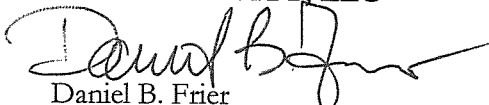
Practical Application of this Advisory Opinion

The Advisory Opinion is a confirmation of the OIG's earlier guidance regarding physician joint ventures – specifically, the OIG's 1989 Special Fraud Alert on Joint Venture Arrangements and the Special Advisory Bulletin on Contractual Joint Ventures, and it serves as an important reminder that an arrangement may generate illegal remuneration in violation of the Anti-Kickback Statute even when all of the agreements (i.e., lease agreements) related to the arrangement appear to meet a safe harbor to the Anti-Kickback Statute.

If you have any questions about this matter, please feel free to contact our office.

Very truly yours,

FRIER & LEVITT, LLC


Daniel B. Frier