Dynamic Chiropractic

CHIROPRACTIC (GENERAL)

If It Seems Too Good to Be True, It Probably Is

Louis Sportelli, DC

Since my last article, several doctors have requested I write on the scams cleverly disguised as providing better service to patients, but really designed to enhance a doctor's income. There are many federal statutes relating to illegal activity of this nature: the Stark Self-Referral Act, laws concerning fee-splitting, and the Medicare-Medicaid Anti-Fraud and Abuse Amendments. Their language is rather clear:

"Whosoever knowingly and willfully offers or pays any remuneration (including any kickbacks, bribe, or rebate), directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person……to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this title…shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000, or imprisoned for not more than five years, or both."

I hope many of you have read the news stories on the indictments of doctors using phony billing scams, illegal kickbacks and mail fraud schemes - cleverly executed (at least for a while) as diagnostic testing done by companies willing to come to your office when you are not using the facility. Their ads claim that medical doctors will read the reports, attorneys have reviewed the legality, and - with the downturn in the economy and managed care - why not enhance and increase your income? Additionally, there are no dollars-out-of-pocket for the doctors, because the equipment can be easily leased and payments can be made based upon potential income. What could be easier?

Not a month goes by when a solicitation does not arrive at my office attesting: "This new program for the (insert the name of any diagnostic test here) has many benefits for the patient and, of course, income for the doctor." The diagnostic benefits tout early detection; convenience for the patient; additional credibility in court; board-certified MDs (insert any specialty here) reading the results; yadda, yadda, yadda. And by the way, you can add $100,000 to $255,000 dollars per year to your income.

The economic lure is powerful, particularly in today's climate. The slick promotional materials imply the program is legal and has been reviewed by the company attorney, and the doctor can legally bill for the test. "The devil is in the details" holds true in this instance. The language in the final lease document is often confusing and conflicting. In one such arrangement I reviewed, language in the lease clearly indicated that the amount charged for equipment was consistent with fair market value. The document stated there was no agreement between the parties to refer or generate business between themselves. Finally, the coups de grace statement: "No patient shall be treated pursuant to this agreement whose care is reimbursed, in whole or in part, by Medicare, Medicaid, or any other state or federal health care program."

I now engaged the old "smell test." Did the document pass? There was conflicting information about who was in control. In one part of the document it said the DC was in direct control; later it stated there was no control by the DC. Which is it?

The testing ranges from vascular to EMG; from cardiac to mobile MRIs, and every other kind of testing known to humankind. To doctors contemplating such programs, I invite you to contact your national or state associations, or the Department of Health and Human Services' Office of the Inspector General. You will soon discover the "safe harbors" under the federal anti-kickback provisions (oig.hhs.gov/fraud/safeharborregulations.html), and the "exceptions" to the Stark federal self-referral provisions. Often the language is unclear or ambiguous, for example: "Failure to meet the requirements of a "safe harbor" does not necessarily mean one has violated federal law, only that such arrangements will be subject to scrutiny by the OIG office." As for the Stark requirements: "Failure to come within the exception and assuming the item or services is billed to Medicare or Medicaid, means one has violated the Stark self-referral restrictions." With this kind of unclear language, coupled with the clever promotions, it's no wonder doctors are confused.

Most of the time, however, doctors are lured into these programs by the slick marketing efforts of the diagnostic groups, equipment manufacturers, or those just determined to make money and perhaps plead ignorance to the illegality of the programs. It is rather difficult to understand that there are doctors in today's enlightened, internet-savvy world who would jeopardize their licenses to participate in a clearly gray area.

Can some of these programs be legal? Yes, some are clever enough in their language and meet every technical letter of the law. The problem usually comes when the lines blur and the economic lure becomes stronger than the clinical need. The result is that good doctors are enticed to sign on. Many jurisdictions have conflicting and contradictory case law that only adds to the confusion and inconsistency. Additionally, some federal appellate courts have held opposite interpretations of the same issue.

Some companies undoubtedly are attempting to meet the basic qualifications of the Medicare Act and the Stark regulations. It is, however, not to the companies who try to sell these programs that this column is directed, but the doctors who participate and rely upon poor advice, no advice, or bad advice to enter into arrangements they know or "should have known" to be illegal. "Should have known" is a powerful statement. It places responsibility clearly on the shoulders of the doctor.

These programs for profits can ultimately become "prophets of doom" for those practitioners who blindly believe the advertising promotions and slick sales pitches of company representatives. The best approach to these programs is to follow your instincts. If you decide to enter into one of these arrangements, be certain it is cleared by your attorney, your state and federal association, and your business advisor. There is simply too much to lose.

The "Stark" reality is quite simple: There is no "free lunch," and "if it seems too good to be true, it probably is!"

Louis Sportelli,DC
Palmerton, Pennsylvania

MAY 2002