New Indictments Raise Old Questions about Physician Recruitment Agreements

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A federal grand jury in San Diego issued an indictment of a hospital CEO in June, and a separate indictment of the hospital and its parent entity in July, charging that physician recruitment agreements which benefited existing practice groups violated the federal Anti-Kickback Statute. The grand jury alleges that a portion of the $10 million in benefits the hospital paid in connection with physician relocations were disguised kickbacks to the practice groups the recruited physicians joined. These charges carry potential penalties of imprisonment, major fines, and exclusion from the Medicare program.

Hospitals all over the United States conduct physician recruitment programs under which payments are made, directly or indirectly, to existing physician practice groups. The OIG's narrow "safe harbor" regulation for certain recruitment arrangements says they must "not directly or indirectly benefit any person (other than the practitioner being recruited) or entity in a position to make or influence referrals to the entity providing the recruitment payments or benefits."

Many physicians relocating to another community want the stability of an existing practice as their base. Many relocations will not occur unless the recruiting hospital takes some action which benefits an existing practice group in some direct or indirect way. Hospitals, of course, tend to work with practice groups they know well in structuring such deals.

The new San Diego case differs in certain material respects from the famous Kansas City case several years ago in which several hospital executives, physicians, and lawyers were indicted, and some, but not all of the defendants were found guilty. The jury ultimately found that some but not all of the executives were judged to have paid kickbacks to two physicians under sham medical director agreements. In the Kansas City case, the physicians were indicted. The hospital was not indicted. It had paid $17 million earlier in the process to be let out. Two lawyers were indicted but were released from the case by the judge at the end of the trial.
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In San Diego, it appears, at least at this point, that neither the physicians nor the lawyers have been indicted and the hospital entity and its parent have not found a way out. They, along with the CEO, are facing the potential "death penalty" of Medicare exclusion.

This column noted in the August 2002 edition of Medical News that the Anti-Kickback Statute is so broadly worded, and its meaning has been so expansively construed by the courts, that any hospital benefit conferred on a member of its medical staff can be the subject of an indictment unless it is covered by a safe harbor regulation or an advisory opinion. The San Diego hospital cannot have the benefit of the limited safe harbor because it worked with local practice groups in structuring its recruitment program. News reports do not indicate the hospital is claiming it received an advisory opinion. Thus, the bottom line is that the San Diego defendants appear to have substantial legal exposure.

We all must hope that the resolution of this important case will show that either (a) a prosecutor has pressed too hard and the parties, with or without the direct aid of the court, find a way to resolve the matter far short of the potential penalties under the Anti-Kickback Statute, or (b) the hospital's actions were so over the top in paying for referrals that indictments were the only reasonable alternatives for the grand jury and a guilty verdict is the only just result.

Anything in between will only add to the painful uncertainty that many health care providers face as they structure reasonable business arrangements under the shadow of the Anti-Kickback Statute.

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