

# Radiology Administrator's Compliance & Reimbursement Insider

A P R I L 2 0 0 1

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## Four Tips for Avoiding Compliance Problems When Structuring 'Overread' Arrangements

Many radiologists have arrangements with family practices, multispecialty clinics, or other treating physicians who aren't radiologists, to provide "overreads" of films. That's when the treating physician does the initial interpretation of films, but has a radiologist read questionable films to confirm the diagnosis. The treating physician usually owns the equipment and employs the technologist. So the treating physician bills for the professional component and the technical component as part of a global fee and pays the radiology practice a fee for the overread. The overread is essentially a consultation service the radiologist provides to the treating physician.

These overread arrangements are great for patients—and benefit treating physicians and radiologists, too. But there's a risk of compliance problems if you're not careful how you structure these arrangements, warns Virginia health care attorney Thomas W. Greeson.

We'll point out the compliance pitfalls and give you four tips to help you structure your overread arrangements in a way that will keep your practice out of hot water. We'll even give you a Model Letter that you can adapt to document your overread arrangements (see p.3).

### Beware of Two Common Compliance Problems

There are two potential compliance problems associated with overread arrangements, Greeson notes.

**Improper inducement.** The more likely way for a radiology practice to get into trouble with overread arrangements is when the arrangement is, or appears to be, an improper inducement to encourage referrals. If the radiologist provides overreads to a treating physician for less than the fair market value of the service, and in return, the treating physician sends the radiologist patients for services not covered by the overread arrangement—say, CAT scans and MRIs—that's a violation of the antikickback law. The OIG is always looking out for arrangements that appear to be agreements to trade business, Greeson says. The OIG is concerned that referrals for services will be based more on the business arrangement between the physicians and less on the convenience and medical needs of the patient, he explains.

It's easy for legitimate overread arrangements to be construed this way, Greeson remarks. That's why it's so important to set up any overread arrangement in a way that will stand up to government scrutiny, he observes.

**Interpretation disguised as overread.** Another problem arises when the treating physician may not have interpreted the film before asking the radiolo-

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## OVERREAD ARRANGEMENTS (continued from p. 1)

gist for the overread, but bills the service as if he had. The claim the treating physician submits could be considered insurance fraud or a false claim under the federal False Claims Act (FCA), Greeson says. And the penalties for a false claim or insurance fraud can be severe.

Although a treating physician's violation of the FCA won't necessarily lead to false claims charges against a radiologist, a case that the federal government recently prosecuted provides cause for concern. The government charged an orthopedic group with violating the FCA, even though the group didn't submit any claims for services it didn't provide and didn't miscode claims. Instead, the orthopedic group had a prohibited lease arrangement with a hospital, and the hospital made a false certification of compliance with all federal laws and regulations. The government charged the hospital and the orthopedic group with FCA violations on the basis of the flawed lease arrangement and the hospital's incorrect certification of compliance.

Using the same legal reasoning, suppose a radiologist and a treating physician have an overread arrangement, but the radiologist winds up doing primary interpretations. The radiologist could face FCA charges if the treating physician's claim indicates he personally interpreted the film. The radiologist doesn't have to know for sure how the treating physician was billing, says Greeson. Acting in "willful ignorance" or "reckless disregard" of the facts is enough to lead to liability under the FCA, he cautions.

## Setting Up an Overread Arrangement


Despite the potential for complicated compliance problems, it's not hard to set up an overread arrangement that will benefit everyone involved. Greeson suggests you follow these four tips to ensure you set up your overread arrangements the right way.

✓ **Make sure treating physician has read the film first.** It's important to be able to prove that you're really doing an overread and not a primary interpretation, Greeson explains. To verify that the treating physician interpreted the film first, ask her to send her interpretation to you, along with the film, and don't do overreads for physicians who refuse to do this. In your interpretative report, make a note of the treating physician's interpretation and specify how yours differs or that it doesn't, Greeson suggests.


✗ **Don't reassign your right to payment to the treating physician.** If your arrangement includes reassigning the right to collect payment for an interpretation from Medicare (or any other payor), that's a clear signal that you're providing the primary interpretation, Greeson says. A reassignment is fine if the treating physician is buying your interpretation and following Medicare reassignment rules for purchased professional components, but it's not appropriate in an overread arrangement, he cautions.

An overread isn't a primary interpretation; it's a service you're providing to the treating physician by confirming his or her diagnosis. The treating physician should pay you directly. The patient shouldn't pay you, directly or indirectly (through reassignment, for instance) for an overread. Greeson suggests you set up a flat per-film fee for overreads and insist that the treating physician pay you promptly.

**Insider Says:** For more information on selling primary interpretations to a treating physician who bills globally for the technical component and interpretation, see "How to Comply with Reassignment Rules When Billing Technical and Professional Components," *Insider*, April 2000, p. 9.

 **Charge fair market value for overreads.** If you charge too much for overreads, the likelihood that an investigator will assume you're doing the primary interpretations is increased. But if you charge too little, the arrangement could be construed as an improper inducement to get referrals. There are cost savings involved in doing overreads. For instance, there's no need to spend time getting precertifications from the patient's insurer; less chance of bad debt, since you're billing only the treating physician; and no need to pay billing and coding personnel to prepare an invoice for every patient, since you can bill all your overreads on a single invoice to the treating physician. So your fee for doing an overread can be discounted from your normal fee for a professional interpretation, Greeson says.

Contact your state or county specialty society, Greeson suggests, and see if it has any historical fee data that it will share with you. Some societies collect this information, which can help you determine what a fair market value for a given service is in your area, he says.

 **Document the arrangement thoroughly.** Make sure your overread arrangement is in writing, Greeson advises. You don't need a long contract. A letter that both parties sign will be fine in most cases, he says. Your letter, like our Model Letter, should do the following:

- Say that the treating physician will send you films and his interpretation when he wants a consultation;
- Say that you'll review the films

and the interpretation and then do your own report;

- Explain how you'll communicate your findings to the treating

physician, particularly in cases where your interpretation differs from the treating physician's;

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## MODEL LETTER

### Document Your Overread Arrangements

To avoid compliance problems in your overread arrangements, get the arrangement in writing, says health care attorney Thomas W. Greeson. A letter is usually sufficient to document an over-

read arrangement. Just have someone representing each party—your practice and the treating physician's practice—sign the letter, and then make sure both sides adhere to its terms.

April 2, 2001

XYZ Family Practice  
789 Main St.  
Anytown, Anystate 12345

Dear Doctor X, Doctor Y, and Doctor Z:

This letter will set forth the terms of the agreement between XYZ Family Practice (Treating Physician) and ABC Radiology (Radiologist), under which Radiologist will perform overreads and generate interpretive reports of films of Treating Physician's patients, upon the request of Treating Physician, as a consultative service to Treating Physician.

1. Treating Physician will provide Radiologist with a film and interpretation. Radiologist will not overread any film unless it is accompanied by Treating Physician's interpretation.
2. Radiologist will review the film and the interpretation and will prepare a report, confirming or disputing the diagnosis. Radiologist's report will specifically reference Treating Physician's interpretation.
3. Radiologist will directly communicate any discrepancy to Treating Physician. When Radiologist's interpretation differs materially from Treating Physician's interpretation, Radiologist will inform Treating Physician or his representative, by phone or by fax, of the discrepancy and explain the discrepancy in writing promptly.
4. No Physician-Patient relationship exists between Treating Physician's patient and Radiologist. Radiologist is providing the overread as a consultative service to Treating Physician. Diagnosis, care, and treatment of the patient remain the sole responsibility of Treating Physician.
5. Treating Physician will pay Radiologist \$[insert amount] per film overread. This payment was calculated on the basis of Radiologist's usual and customary fee, less a discount reflecting the administrative economies associated with this arrangement. Radiologist and Treating Physician agree that this payment represents fair market value for services provided. Radiologist will submit invoices on a monthly basis, due and payable within ten (10) business days.

This letter represents the full and complete agreement between the parties. No other agreements between the parties exist, and any amendment to this agreement must be in writing and signed by both parties.

Signed and Agreed

ABC Radiology \_\_\_\_\_

XYZ Family Practice \_\_\_\_\_

### OVERREAD ARRANGEMENTS (continued from p. 3)

■ State that no physician-patient relationship exists between the treating physician's patient and you and that diagnosis, care, and treatment of the patient remain the responsibility of the treating physician;

- Set the amount you'll be paid; and
- State that the amount represents fair market value for the service.

**Insider Says:** Before you sign the letter, it's probably a good idea to run the arrangement past your malpractice insurer. You want to verify that

you'll be covered if a patient whose film you overread decides to sue you, Greeson cautions. ■

#### Insider Source

**Thomas W. Greeson, Esq.:** Reed Smith Hazel & Thomas, LLP, 3110 Fairview Park Dr., Ste. 1400, Falls Church, VA 22042; <tgreeson@reedsmith.com>

## GETTING PAID

# Send Tough Warning Package to Payor to Speed Claims Processing

Private payors have little incentive to turn your claims around quickly. Even when you call and complain about delays, they often stall, saying that they didn't receive your claims, or that the paperwork was incomplete. If you're like many practices, you're looking for ways to get private payors to process your claims faster.

The *Insider* has learned of an aggressive tactic that can speed up processing of delayed claims. You mail a copy of your original claim with a note that specifies a deadline by which you expect payment or denial and warns that you'll submit a complaint to your state insurance commission. To give your warning teeth, you also include an excerpt from a court ruling saying that a payor's delay in paying claims justified a large award against the payor. We'll tell you how one practice has used this tactic successfully to speed claims payment. And we'll give you the steps to take to put this tactic to use in your own battles with slow payors.

### Phone Calls Not Enough

Many practices contact payors by phone when claims are delayed. But phone calls can be frustrating and ineffective, says Carol Blonar, admin-

istrator and Director of Nursing for Sagamore Surgical Services in Indiana. "Phone calls take up a lot of time," says Blonar, citing automated phone-answering devices that put you on hold for as much as 45 minutes. "Then, when you finally get to talk to someone, the person is likely to tell you they haven't received the claim and ask you to resubmit it." Of course, if you agree to resubmit the claim, you give the payor a brand new 15- or 30-day time period in which to delay payment or deny your claim.

### Practice Collects \$220,000 in Aged Claims

If phone complaints don't solve your payment delay problems, try the warning package option, says Frank Meyers, a health care reimbursement expert with U.S. Seminar Corp. who sells health care management tools. After the time for disposition of your original claim has passed (usually 30, 45, or 60 days, depending on state law and your contract), send a written warning to the payor. Sending a warning often prompts immediate action on your claims, says Meyers. Here's how Blonar's practice has used this approach with great success.

Blonar was tired of getting the same old excuses from payors. So she

followed Meyers' advice and started sending late payors hard copies of the original claims with warning labels attached, promising to send a written complaint to the Indiana State Insurance Commissioner if the claim was unreasonably delayed. Result? "We reduced our aged receivables by \$220,000 in just two and a half months," says Blonar. "After receiving my 'warning' package, payors began to call and say, 'We received your claim and will process it for you in 15 days.'" And they did.

### How to Structure Warning Package

When you're writing to a payor to complain about a late payment, include a warning package that contains the following three elements:

**1) Copy of original claim.** Print out a copy of your original claim, says Meyers. Don't submit a new claim. Submitting a new claim could restart the time period for payment, giving the payor another opportunity to delay.

**2) Warning note.** Attach a brightly colored note to your claim, says Meyers. Write two things on the note. First, give the payor a deadline by which it must either pay or deny your claim. You want them to make a

decision one way or the other, says Meyers. "As long as the claim is in limbo," she adds, "the payor may delay for as long as it likes." Second, tell the payor that you'll complain to your state insurance commission if the payor doesn't pay or deny the claim by the deadline. So, for example, your note could say:

If this claim is not paid or denied within 30 days, we will file a formal written complaint with the [insert name of state] Insurance Commission.

### 3) Excerpt from court ruling.

Meyer recommends that you show the payor that you're willing to take strong action, by including a copy of language from a court decision in the case *Alsobrook v. National Travelers Life Ins. Co.* (see box, right), where a judge ruled that a payor had to pay punitive money damages for unreasonably delaying claims processing.

### Complain to State Insurance Commission if Payor Doesn't Meet Deadline

Don't just hurl empty threats. If you threaten to complain to your state insurance commission after a certain amount of time has passed, do so, says Blanar. Why? Three reasons.

**1) Commission can pressure payor to pay.** The insurance commission will contact the payor to find out why your claim has been delayed. Getting a call from a state regulator puts a lot of pressure on the payor to pay, says Blanar. And many state insurance commissions keep records of the number of complaints lodged against payors, and rank payors by number of complaints. Payors don't want to appear on these lists, says Meyers.

**2) Payor pays faster in the future.** If the state insurance commission investigates the payor's handling of your claim, it's likely that the payor will remember you as "the

squeaky wheel," says Blanar. They'll respond more rapidly to your claims in the future.

**3) Empty threats lead to more delays.** If you threaten to complain and don't follow through, the payor may simply ignore your threats in the future. Result: Your payments will continue to be delayed. ■

#### Insider Sources

**Carol Blanar:** Administrator and Director of Nursing, Sagamore Surgical Services, 2320 Concord Rd., Ste. B, Lafayette, IN 47909.

**Frank Meyers:** Quality Assurance Supervisor, U.S. Seminar Corp., 7260 University Ave., La Mesa, CA 91941; (619) 668-4757.

### ► Unreasonable Delay Costs Insurer \$100,000 in Punitive Damages

In *Alsobrook v. National Travelers Life Ins. Co.*, an appeals court upheld a trial court's award of \$100,000 in punitive damages, \$20,000 for failing to deal fairly and in good faith, and \$6,239 under the policy against an insurer for unreasonably delaying payment of health insurance claims. Here's what the judge said:

The essence of...bad faith is the insurer's unreasonable, bad faith conduct, including the unjustified withholding of payment due under a policy. The obligation of an insurance company is not for the payment of money only, it is the obligation to pay the policy amount immediately upon receipt of proper proof of loss or to defend in good faith and to deal fairly with its insured. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability.

## IN THE NEWS

### HCFA Introduces Toll-Free Help Lines

Physicians will no longer have to pay for the phone calls they make to carriers and intermediaries when they have questions. In a program memorandum issued on Sept. 11, 2000, HCFA told carriers and intermediaries that it intends to convert all existing customer service lines over which carriers and intermediaries field questions from providers to toll-free status.

According to HCFA, the object of the conversion is to reduce providers'

cost of doing business with Medicare. It said that it's committed to the "principle that no Medicare provider...should have to pay to talk to" its Medicare contractor. HCFA also said it will monitor the number of calls and the topics raised, and work to "eliminate the reasons for them through education and training activities" and by posting information on the HCFA Web site.

There is a different toll-free num-

ber for each carrier. You can find out the number for your carrier from the latest carrier bulletin, or on the Web at <[www.hcfa.gov/medlearn](http://www.hcfa.gov/medlearn)>.

**Insider Says:** You can find the HCFA program memo (AB-00-84) announcing the program on HCFA's Web site at <[www.hcfa.gov](http://www.hcfa.gov)>. Click on "Plans and Providers," then search "Program Transmittals and Memoranda." ■

# What You Need to Know About New E-SIGN Law

On Oct. 1, 2000, the *Electronic Signatures in Global and National Commerce Act*—also called E-SIGN—went into effect. E-SIGN makes it legal to use electronic signatures—also called “e-signatures”—in agreements, contracts, and records involving interstate or foreign commerce. The purpose of E-SIGN is to promote electronic commerce by allowing e-signatures on many documents that traditionally have required handwritten signatures. E-SIGN should reduce paperwork and streamline operations for businesses, so it could create significant cost savings.

But E-SIGN raises many questions for health care organizations. For example, you may not be sure whether it applies to your organization or whether it conflicts with the standard for e-signatures in the proposed HIPAA security regulations. With the help of our health information experts, we'll answer common questions about E-SIGN to help you clarify what E-SIGN does, how it affects health care organizations, and how it interacts with HIPAA and state law.

## What Does E-SIGN Do?

E-SIGN doesn't require anyone to use e-signatures, but rather, makes it legal to use them, says health care attorney Linda Abdel-Malek. E-SIGN says that an electronic signature's “legal effect, validity, or enforceability” can't be denied simply because the signature is in electronic rather than handwritten form. This means that, with some exceptions, an e-signed document is as legal and binding as a document with a traditional handwritten signature, she explains.

## What's an E-Signature?

E-SIGN defines an e-signature as “an electronic sound, symbol, or pro-

cess, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” It doesn't say what technology must be used to create the e-signature. So, based on the broad definition, an e-signature could include anything from a single key stroke or special password to an elaborate set of security procedures, or even a retina scan.

## When Does E-SIGN Apply?

E-SIGN, with some exceptions, lets you use e-signatures in “any transaction in or affecting interstate or foreign commerce.” But you must comply with its provisions only if your organization is among the growing number of businesses that choose to use e-signatures in their transactions.

To see if E-SIGN applies to a particular transaction, ask these two questions:

**Is this a transaction, as defined by E-SIGN?** A transaction, as defined by E-SIGN, includes any action “relating to the conduct of business, consumer, or commercial affairs between two or more” individuals, companies, governmental agencies, etc. In other words, the law applies to almost any business or consumer transaction that normally requires a handwritten signature, such as the purchase of goods, services, or real estate.

**Is the transaction “in or affecting interstate or foreign commerce”?** Given today's global economy, the answer to this question is most often yes, notes Abdel-Malek. If you plan on using e-signatures, it's smart to treat all your transactions as if they involve interstate or foreign commerce—and comply with E-SIGN's requirements, plus the requirements of any state e-

signature laws that apply. Here are two examples of transactions that may seem local, but are interstate:

*Example #1:* An individual lives in Philadelphia and completes an enrollment application for coverage by a health plan located only in Pennsylvania. But the plan has employees and plan members living in New Jersey, and the plan covers health care services that are provided out of state. If an e-signature is used by the individual to complete the application, E-SIGN probably applies.

*Example #2:* A doctor in Atlanta prescribes an antibiotic to a patient who lives in Atlanta and who fills the prescription there. But the antibiotic is manufactured in Ohio and is transported across state lines. If an e-signature is used by the doctor to authorize the prescription, E-SIGN probably applies.

## What Are the Exceptions to E-SIGN?

E-SIGN lists several exceptions when it doesn't apply—and an electronic signature can't substitute for a handwritten one. For example, E-SIGN doesn't apply to wills, codicils to wills, testamentary trusts, documents in adoption and divorce proceedings, official court documents, notices of cancellation of utility services, notices of foreclosure or eviction from an individual's primary residence, product recalls, and cancellations of health or life insurance benefits.

## How Is E-SIGN Useful for Health Care Transactions?

There are a number of areas in the health care industry that are natural candidates for e-signature technology. For example:

- Health care organizations could use e-signatures to streamline much of the contracting they do with man-

aged care organizations, vendors, consultants, suppliers, and others;

- Health care providers could use e-signatures for medical orders, prescriptions, patient registration, consent to treatment forms, and consent to release of medical records; and

- Health plans could use e-signatures to simplify the member application process and to distribute plan materials.

E-SIGN can be used for transactions in these and other health care areas, even if they involve confidential health information or informed consent, such as advance directives and powers of attorney. E-SIGN doesn't make exceptions for these transactions despite the exceptions noted above for wills and the like.

Aside from the paperwork saved and the time- and cost-saving benefits, using e-signatures could help to reduce the incidence of health care fraud, suggests Abdel-Malek. For example, provider names, signatures, and numbers are relatively easy to find out, so they're easy to forge. But using secure e-signature technology could make forgery less common—and easier to track if it does occur. Just keep in mind that forgery would still be possible despite e-signature technology—for example, through abuse of passwords—and health care organizations will have to institute appropriate safeguards, warns Abdel-Malek.

**Insider Says:** Health care providers may be better off not using e-signatures when a patient's mental capacity is an issue, warns Abdel-Malek. If you decide to go ahead, then before allowing the use of an e-signature to consent to or refuse medical treatment or on an advance directive, you may first want to ensure that there's adequate verification of the patient's competency and/or the legal guardian's identity and consent, she says.

### What Consumer Protections Are Required?

E-SIGN includes some very detailed consumer protections. If you plan on using e-signatures with your patients, plan members, or individual customers, you'll need to know about these protections. E-SIGN defines a consumer as "an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual." Because this definition is so broad and health care services aren't specifically excluded, there's a valid argument that the definition includes patients and health plan members, says Abdel-Malek.

If you decide to conduct business transactions with patients using e-signatures, you must provide protections that include the following:

- Get the patient's consent to the use of e-signatures before they're used;
- Give the patient a statement of his rights concerning electronic records;
- Tell the patient the hardware and software requirements for electronic transactions;
- Get the consent electronically to show that the patient can access information electronically; and
- Allow the patient to withdraw consent if hardware or software changes are needed.

### Must I Also Worry About the Proposed HIPAA Electronic Signature Standard?

The short answer to this question is no. Here's why:

**The HIPAA e-signature standard will likely be delayed.** While an e-signature standard was included in the proposed HIPAA security regulations released in 1998, HHS has since indicated that the final regula-

tions, due out soon, won't include an e-signature standard, says health information consultant David G. Sweigert. And a HCFA representative speaking at a recent national HIPAA conference in Washington, D.C., confirmed that the e-signature standard would be dropped from the final security regulations.

The reason for this reversal, Sweigert says, is that there's no universally accepted e-signature standard in use in health care today and the government agencies, vendors, and health care organizations involved can't reach a consensus. The HIPAA e-signature standard will likely be delayed until an e-signature standard for the health care industry emerges through use over time, suggests Sweigert.

**E-SIGN has a different focus from HIPAA.** Even if the proposed HIPAA e-signature standard is adopted eventually, at this point E-SIGN doesn't conflict with it, says Abdel-Malek. The two laws are similar because they both permit the use of e-signatures, but don't require it.

The laws differ in several respects, including the fact that HIPAA applies only to specifically defined health care organizations while E-SIGN applies to any business. Another difference—though not a conflict—is that HIPAA requires any e-signature to be digital. A digital signature must have three features:

- 1) Message integrity (to ensure that the message's form, format, and content are the same when received as when sent);
- 2) Nonrepudiation (to prevent the sender or receiver from denying the message's origin or delivery); and
- 3) Authentication (to ensure that the user is who he says he is).

E-SIGN doesn't include these features and doesn't mandate the use

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**NEW E-SIGN LAW** (continued from p. 7)

of digital signatures. It lets the parties decide what e-signature format and technology to use.

**Will E-SIGN Affect the Proposed HIPAA Privacy Regs?**

E-SIGN may affect how you comply with the proposed HIPAA privacy regulations, suggests Abdel-Malek. These regulations require a health care organization to give individuals written notice of its information-sharing practices—that is, how the organization uses and discloses protected health information. E-SIGN would allow an organization to provide the required notice in an electronic form if the individual consents to its use and the other consumer protections are in place, says Abdel-Malek.

**How Does E-SIGN Affect State Law?**

Most states have either passed their own e-signature laws (among them

Illinois, New York, Oregon, and Texas) or adopted the Uniform Electronic Transactions Act (UETA) (for example, Arizona, California, Florida, Maryland, and Pennsylvania).

UETA is a model law recommended for enactment by the National Conference of Commissioners on Uniform State Laws. Many of the remaining states are in the process of taking one of these steps.

E-SIGN says that it doesn't supersede state law if the state has adopted the UETA without change or the state otherwise permits the use of e-signatures in a way that's consistent with, and doesn't undermine, E-SIGN. But E-SIGN supersedes state law if the law doesn't recognize an e-signature's validity.

You'll need to check your state's e-signature and e-commerce laws to determine if they contain additional requirements that you must meet. For example, even though many states have adopted the UETA, they may have modified it or added standards

for the use of e-signatures that are more stringent than those in UETA or E-SIGN. Consult your attorney to determine which laws prevail and what standards you must meet.

**Insider Says:** You can view a copy of E-SIGN at the Library of Congress's THOMAS Web site <<http://thomas.loc.gov>>. Under the Legislation section, click on "Public Laws by Law Number—106th." Then search for E-SIGN by its Public Law number, which is 106-229. The site also provides a summary of the law, its sponsors, and related legislation. ■

**Insider Sources**

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## Check Out Business Partners to Protect Your Practice from Others' Misconduct

Recent prosecutions by the federal government show that, to avoid legal trouble, a medical practice must do more than just ensure its own compliance. To stay out of the range of government prosecutors, it must make sure that other health care providers and health care-related businesses it does business with are in compliance, too. That's why it's important for practices to do "due diligence"—which is the name attorneys and accountants use for the process of investigating a person or

organization with which you plan to do business. If you turn up something bad, you can drop out of the business deal before it begins. Even if your investigation shows nothing, your attempt to discover any problems may help you deal with government investigators or prosecutors if any problems turn up later.

To help you understand why it's important to do due diligence, we'll explain how your relationship with a hospital or other health care business partner can get you into trouble. Plus

we'll give you some tips on how to conduct due diligence so you can make an effort to protect yourself from your business partners' wrongdoing.

**Why Do Due Diligence?**

The government has been taking a very aggressive stance in enforcing laws against health care fraud and abuse and false claims, explains New York health care attorney Jay Silverman. One tactic is to force health care providers to be each other's keepers by making them responsible

for the actions of others that they do business with. That means you need to make a clear and obvious effort to find out how health care providers and related businesses you propose to have a relationship with are conducting themselves, so that you can avoid being tarred with the same brush if they get into trouble.

Here's a recent example. The government accused a hospital and a physician group of filing false claims, even though there weren't any allegations that the physicians or the hospital billed Medicare for services that weren't performed, or coded services incorrectly. The false claims charges were based on the fact that the physician group and hospital were parties to a lease that wasn't based on fair market rent, which violates Stark II, Silverman explains. The hospital certified in its cost report that it complied with all applicable laws and regulations. But since the lease violates Stark II, the government says that certification is false. So the hospital's Medicare claims are false claims. Since the physician group sent patients to the hospital for services reimbursed by Medicare, the government charged the physician group with false claims act violations, too.

This is a scary development for physician practices, warns Silverman. The government is basing false claims charges on the allegedly incorrect certification in the hospital's cost report. And the physician group was charged even though it had no reason to know what the hospital included in its cost report, and never saw the report.

This kind of prosecution brings home the point that physicians must take steps to ensure that the hospitals and other health care providers and health care-related businesses they deal with are staying on the right side of the law, Silverman says. Time and

money spent on due diligence now can save tremendous expense and anguish later, he points out.

### How Much Diligence?

There's no standard form of due diligence to use for health care business partners. The best guide is common sense and a healthy fear of the government's enforcement authorities. And get expert help—an experienced health care attorney, an accountant who's familiar with health care reimbursement issues, or a health care consultant may be appropriate to assist you in conducting your due diligence. But because the stakes are so high, it's crucial that whoever does your due diligence be thorough and *document everything*.

At a minimum, before you agree to an employment or independent contractor relationship, set up an office or equipment rental agreement, or sign any sort of business contract with a health care provider

or business, Silverman suggests that you conduct appropriate due diligence that includes the following:

#### **Verify appropriate licensing.**

You need to make sure that your health care business partner has all the licenses it needs to operate legally. A hospital and any associated off-site clinics will be subject to state licensing requirements. There may be additional city or state requirements regarding, for example, the handling of radioactive materials or the disposal of medical waste. If you plan to establish a relationship with a hospital, imaging center, or other health care provider, you're responsible for knowing before you begin the relationship that it has all the licenses it needs to conduct its business.

**Evaluate past licensing difficulties.** In almost every state, it's a matter of public record if a hospital, physician, or other health care provider has been in trouble with the

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### ► *Periodically Recheck Business Partners*

You can't relax your vigilance once you've established a relationship with a health care business partner, Silverman cautions. Be alert for any problems that arise for a business partner. Suppose a hospital you contract with runs into trouble with your state's Medicaid office, it has financial difficulties, or an agreement the hospital has with another group is the subject of a Medicare investigation. If you hear about any potential issues like these, ask your partner about them directly, preferably in writing.

Even if you don't hear of any problems, reassess your relationship once a year, Silverman advises. Recheck and reevaluate, as needed. And reassess your partner's compliance commitment regularly, to make sure that no changes have occurred that might lead to problems.

And be prepared for problem situations, Silverman advises. Make sure all your contracts with health care business partners permit immediate termination if any of the following occurs:

- A license necessary to do business is restricted, suspended, or revoked;
- Medicare or Medicaid imposes a sanction;
- Your state's health department imposes restrictions, monitoring, or periodic reviews on your business partner's operations;
- Your business partner loses its medical malpractice insurance; or
- An accrediting body revokes or suspends your business partner's accreditation, or places your business partner on probation.

Any of these is a cue to consider terminating the relationship before you're dragged into the mess, Silverman says.

**CHECK OUT BUSINESS PARTNERS**

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licensing authorities. The government will assume you knew about any past problems, whether you actually knew or not. So you'd better check. If your potential business partner's license has a cloud on it, that doesn't necessarily mean you shouldn't go forward, says Silverman, but it should make you even more cautious. Make sure the trouble has been resolved, he advises, and that the partner has procedures in place to ensure the problem doesn't recur.

**Check for Medicare and Medicaid sanctions.** You want to be sure your potential business partner isn't in trouble with Medicare or Medicaid. HCFA posts a sanctions list on the OIG Web site, where you can check for your potential business partner. And most states have similar listings. Doing business with an individual or organization that has been sanctioned by Medicare endangers your own Medicare status, Silverman explains, so if you find a problem, it's best to turn down the arrangement with that partner, he advises.

**Ensure arrangement's viability.** You want proof that your potential business partner has the physical and

financial capability of doing what your proposed business arrangement requires of it. A hospital that's strapped for cash with a crumbling physical plant may not be able to provide you with the environment you need to practice the kind of radiology you want to practice. Silverman stresses the importance of knowing exactly what your proposed partner is bringing to the table. Not only will this affect your business, but businesses that are strapped are more likely to cut corners on compliance, he remarks.

**Analyze contracts carefully.** If you're signing a lease, equipment rental, or an employment or independent contractor arrangement with a hospital or another health care provider, it's crucial to have a health care attorney review the contract. You need to be sure the contract complies with the antikickback law, the federal anti-referral law known as Stark II, and any other relevant laws and regulations. Often physicians will rely on a hospital's attorney to tell them what's right, he says, and will assume that the hospital is compliant. That's a big mistake. It's crucial to get independent expert advice to make sure that the arrangement

with the hospital or another health care provider passes regulatory muster, Silverman emphasizes.

**Assess compliance commitment.** Most of all, says Silverman, you want to look into how your proposed business partner deals with compliance issues. Does the business have a compliance program? Is the program publicized and enforced? Or does your proposed business partner emphasize cost cutting and efficiency at the expense of strict compliance? If the proposed business partner has a genuine commitment to compliance, and has taken steps to ensure continued compliance, you can feel a little better about the risks of doing business with it, Silverman says. ■

*Insider Source*

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**SHOW YOUR LAWYER**

*Here are the court cases and/or laws referred to in this issue.*

- *Alsobrook v. National Travelers Life Ins. Co.*, 852 P.2d 768 (Okla. Ct. App. 1993).