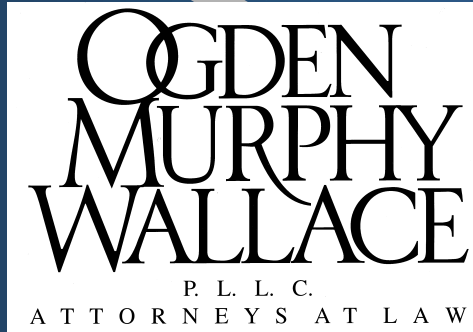




*2001 Annual Governing Board
Education Dinner:*
PHYSICIAN COMPENSATION
& RECRUITING

Presented by

Donald W. Black and
Wesley Watson, Jr.





AGENDA

- The Rules:
 - IRS Guidelines
 - The Stark Law
 - Anti-kickback Statute
 - Public Hospital District Issues
- What Can Hospitals Do?
- Two Case Studies
- Questions and Answers (hopefully)

Tax-Exempt Organization Rules



- Provide Inurement: no part of an exempt organization’s “net earnings” can inure to the benefit of an “insider.”
- Private Benefit: an outsider cannot benefit from the activity of an exempt organization unless the “private benefit” is merely “incidental” to the “public benefits” derived from the activity.

Tax-Exempt Organization Rules



– Intermediate Sanctions (subset of Private Inurement rule):

- Excess benefit transactions with “disqualified persons” are subject to unwinding and excise taxes of 25% and 200% on the disqualified person receiving the excess benefit, not the entity.
- The entity, its directors and officers are subject to penalties equal to 10% of the excess benefit or \$10,000, whichever is less, per occurrence.

Tax-Exempt Organization Rules



- Applies to:
 - Tax exempt organizations
 - Physicians or physician group having financial relationships with exempt organization
- Importance:
 - Disgorgement on excise tax penalties imposed upon physicians under Intermediate Sanctions provisions (includes physicians who are employees)

STARK LAW a/k/a ETHICS IN PATIENT REFERRAL ACT



- Rule:
 - Unless an exception applies, a physician or immediate family member of a physician may not refer Medicare/Medicaid patients for “designated health services” (or DHS) to an “entity” with which the physician (or immediate family member of the physician) has a “financial relationship.”

STARK LAW: Designated Health Services



- clinical laboratory services
- P/T, O/T, and speech language pathology
- radiology and certain other imaging services
- radiation therapy services and supplies
- DME equipment and supplies
- parenteral and enteral nutrients, etc.
- prosthetics and orthotics
- home health services
- outpatient prescription drugs
- inpatient and outpatient hospital services

STARK LAW a/k/a ETHICS IN PATIENT REFERRAL ACT



- Financial Relationship
 - Ownership Interest
 - Direct
 - Indirect
 - Compensation Arrangement
 - Direct
 - Indirect

STARK LAW a/k/a ETHICS IN PATIENT REFERRAL ACT



- Selected Exceptions (vs. Safe Harbors)
 - Equipment and Space Rentals
 - Bona Fide Employment Relationships
 - Personal Service Arrangements
 - Fair Market Value
 - Recruiting
 - Medical Staff Incidental Benefits
 - Compliance Training
 - Non-Monetary Compensation < \$300
 - Indirect Compensation

STARK LAW a/k/a ETHICS IN PATIENT REFERRAL ACT



- Advisory Opinions
- Regulations
 - Phase I Published on January 4, 2001
(three years after proposed regulations)
 - Lots and lots of changes
 - Phase II will be out “shortly”
 - Answers some questions but raises more

STARK LAW a/k/a ETHICS IN PATIENT REFERRAL



- Important Changes in Final Rule
 - “Set in Advance” Requirement
 - No percentage compensation arrangements

STARK LAW a/k/a ETHICS IN PATIENT REFERRAL ACT



- Importance/Risks:
 - Penalties are civil in nature
 - Denial of payment
 - Refunds of amounts paid
 - Civil monetary penalties up to \$15,000 for each claim for a service a person knows is prohibited

STARK LAW a/k/a ETHICS IN PATIENT REFERRAL ACT



- Importance/Risks- Cont'd
 - Civil monetary penalties up to \$100,000 for each arrangement which physician or entity knows the principal purpose is to circumvent the statute
 - Potential liability under the False Claims Act

Federal Anti-Kickback Statute: Rule



- A person may not knowingly or willfully
- Offer, pay, solicit or receive
- Any remuneration
- In return for, or to induce, referrals or ordering of items or services reimbursed by federal or state funded health care programs

Federal Anti-Kickback Statute



- Key is whether there is an intent to induce referrals
- 5th Circuit - One Purpose Test (majority rule)
- 9th Circuit - specific intent to violate the statute

Federal Anti-Kickback Statute



- Enforced and Interpreted by Office of Inspector General for the Department of Health and Human Services - the OIG
- The OIG interprets the statute very strictly
- Advisory Opinions are offered

Federal Anti-Kickback Statute



- Penalties for Violation
 - Criminal Sanctions - \$25,000/5 years
 - Civil Sanctions - \$50,000 per act plus assessment of not more than 3X amount of remuneration received
 - Exclusion from Medicare/Medicaid
 - Liability Under False Claims Act

Federal Anti-Kickback Statute



- Exceptions and Safeharbors
- Exceptions:
 - Bona Fide Employees
- Safeharbors
 - Space/Equipment Rentals
 - Personal Services/Management Agrmts
 - Recruitment

Washington State Anti-Kickback & Stark Laws



- RCW 74.09.240
 - Medicaid a/k/a Medical Assistance
 - Stark and Anti-Kickback
- RCW 51.48.280
 - Workers Compensation
 - Anti-Kickback Only

Public Hospital District Issues



- Washington State Article VIII, Section 7
 - CREDIT NOT TO BE LOANED.
 - No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

Public Hospital District Issues



- Constitutional Issue Cont'd
 - Impact on Income Guarantees
 - Bonus Compensation Not “Set in Advance”
 - Joint Venture - Entities
 - For-profit corporations - prohibited
 - Non-profit corporations - OK
 - LLC - probably OK

Public Hospital District Issues



- Recruiting Expenses for Physician Spouses (RCW 70.44.060(9))
 - On-going issue with State Auditor and Asst. Attorney General

Requirements For Physician Recruitment



(taken from the Stark Law, 42 USC 1395nn(e)(5); and the Anti-Kickback regulations 42 CFR § 1001.952(n))

- Physician must relocate to hospital's service area and join the medical staff
- Compensation cannot take into account the volume or value of referrals
- Amounts paid must be paid to physician
- Physician must be liable for default of promissory note under an income guarantee

Requirements For Physician Recruitment



Requirements Cont'd.

- Physician free to join other medical staffs
- Physician free to make referrals as appropriate
- Meet all other regulations or requirements
- 75% of practice revenues must be from patients in HPSA or MUA (Anti-kickback only)
- Physician can't join existing group (Anti-kickback only)

Requirements For Physician Recruitment



- IRS 501(c)(3) Issues
 - Written, signed agreement
 - Documented Community Need and or Benefit
 - Free to obtain privileges at other hospitals
 - Income guarantee within documented range of regional or national salaries
 - Income guarantee forgiveness acceptable in certain circumstances
 - Guarantee periods of up to three years

Requirements For Physician Recruitment



- IRS 501(c)(3) Rules Cont'd.
 - Approved by Hospital Board or designated committee
 - Physicians may be recruited to existing practices

Requirements for Employment Relationships



- Employment must be for identifiable services
- Compensation consistent with fair market value
- Compensation cannot take into account volume or value of referrals
- Hospital may require referrals to the Hospital except where:
 - a patient expresses a different choice;
 - payor determines provider; or
 - referral is against best judgment of physician
 - In that case, compensation must be “**set in advance**”

Requirements for Personal Services Arrangements



- Set out in writing, signed by the parties
- Specifies all of the services covered
- Aggregate services are reasonable and necessary for legitimate business purposes
- Term of agreement is at least one year
- Caveat: Parties can terminate for cause in less than one year under certain circumstances (applies to Rental arrangements as well)
- Compensation is set in advance at FMV

Requirements for Personal Services Arrangements



Cont'd.

- Compensation does not take into account the volume or value of referrals or other business generated between the parties, i.e., do percentage compensation
- Services cannot involve the counseling or promotion of a business activity that violates state or federal law
- Anti-kickback Safe Harbor requires that aggregate compensation be set in advance

Rental of Equipment



- Lease in writing, signed, and specify equipment covered
- Lease must be for legitimate business purpose
- Term of at least one year
- Rent is set in advance, consistent with FMV
- Rent cannot take into account the volume or value of referrals or other business generated
- Lease is commercially reasonable
- Per use rental arrangements can be OK

Lease of Office Space



- Lease in writing, signed by the parties, specify premises covered
- Space leased cannot exceed what is reasonable and necessary for legitimate business purposes
- Premises must be for exclusive use of leasee during periods of lease (except common areas)
- Time based leases are OK
- One year minimum term

Lease of Office Space



Cont'd.

- Rent is set in advance
- Rent is FMV
- If Hospital is lessor, hospital “may” take proximity into account in determining FMV
- Rent cannot take into account the volume or value of referrals or other business generated
- Lease must be commercially reasonable



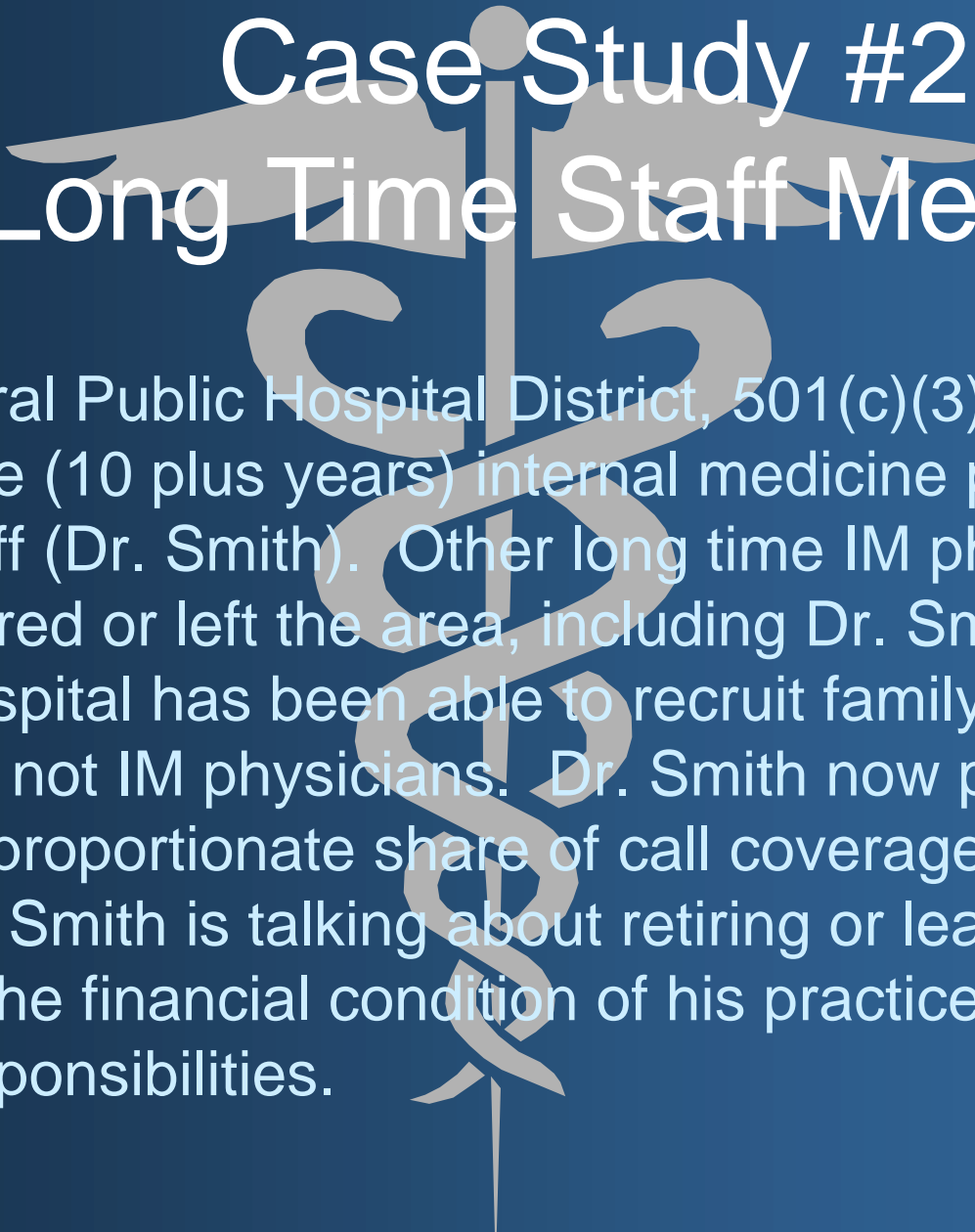
Joint Ventures

- Possible but difficult
- Clear Community Benefit
- Profit & Loss allocated based on equity
- No return based on referrals
- Have to fit in Stark Exception
- Can't be for-profit corporation

Case Study #1: New Primary Care Doc



Hospital was approached by physician group (“group”) in a rural community that is not designated as a health provider shortage area (HPSA) to assist it in attracting a primary care physician to the community to replace a physician who has stated his intention to retire in six months. Group asks hospital to provide income guarantee and relocation expenses.



Case Study #2: Long Time Staff Member

Rural Public Hospital District, 501(c)(3), has long-time (10 plus years) internal medicine physician on staff (Dr. Smith). Other long time IM physicians have retired or left the area, including Dr. Smith's partner. Hospital has been able to recruit family practitioners but not IM physicians. Dr. Smith now provides a disproportionate share of call coverage to Hospital. Dr. Smith is talking about retiring or leaving because of the financial condition of his practice and call responsibilities.

Case Study #2 Cont'd: Long Time Staff Member

- What can Hospital do for Dr. Smith?
 - Provide support services at FMV
 - Recruit another IM physician to practice
 - Employ Dr. Smith
 - Purchase Dr. Smith's practice
 - Lease office space from/to Dr. Smith (FMV)

Questions and Answers



- What's FMV? What can we rely upon?
- What's a HPSA/ MUA? Where are they? see <http://www.doh.wa.gov/hsqa/ocrh/default.htm/>



Thanks for Attending

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