



LEGAL Corner

Contractual Joint Ventures Now Under the OIG Microscope

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far greater legal risks than would otherwise be prudent. Unfortunately, it is all too common for a physician to realize the level of his/her risk only when it is too late; when the joint venture has attracted the attention of federal or state regulatory or law enforcement agencies

In an attempt to supplement their incomes, many physicians are taking greater interest in joint venture opportunities. In too many instances, however, physicians are becoming entangled in joint venture relationships that carry

and civil or criminal sanctions are no longer theoretical possibilities. In many of these cases the cost of resolving these state or federal investigations and prosecutions is greater than the return the participating physician anticipated from that joint venture.

In a Special Fraud Alert issued by the Department of Health and Human Services Office of Inspector General (“OIG”) last April, this agency identified a number of so-called “risk factors” as indicia of fraudulent or abusive contractual joint ventures. These factors include, but are not necessarily limited to, the following:

- Physicians or other health care providers expanding into other lines of business that can be readily marketed to their existing patients.
- Health care providers who establish new businesses that are intended to service their own patients.

- Businesses in which there is little or no bona fide financial risk; i.e. there is little or no capital investment required or the primary contribution is the referral of patients or other business.

- The party retained to manage the business would otherwise be a competitor.

- The broader the scope of services provided by a third party who is retained to manage the business, the greater the likelihood (at least in the OIG’s view) that the joint venture has no bona fide business purpose beyond capturing the owner’s referrals.

- Arrangements that result in the business’ owner being in a position to bill patients and third party payers for items and services that the party retained as Manager otherwise would be billing.

- Restrictive covenants that inhibit the compe-

Viewed in their totality, the risk factors identified by the OIG in this Special Fraud Alert can be boiled down to two questions:

- 1** Does the parties' arrangement make business sense in the absence of referrals by the parties to the business?
- 2** Does each party assume a legitimate bona fide business risk as a result of its participation in the venture?

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- 2.** Does each party assume a legitimate bona fide business risk as a result of its participation in the venture?

It is somewhat ironic that the OIG would issue a Special Fraud Alert that can be reduced to these two questions. In the "good old days", before the first so-called "Safe Harbors" were adopted, these were the factors most frequently considered in evaluating the risk of any health care joint venture being viewed as a violation of the federal or state illegal remuneration/kickback/fee-splitting prohibitions. Despite the

adoption of various Safe Harbors, these questions continue to constitute the "smell test" many participants in the health care industry use in evaluating whether various business and compensation arrangements involve payments or relationships that may raise questions if reviewed by the OIG or any of the other federal or state agencies responsible for investigating allegations of fraudulent or abusive practices. In this Special Fraud Alert, the OIG has reaffirmed the value of common sense in evaluating business and compensation arrangements.

As the OIG noted, the presence of one or more of these risk factors does not mean that the parties' contractual joint venture constitutes an illegal arrangement. Unfortunately, however, the absence of the risk factors identified in this Special Fraud Alert does not mean that the parties to a particular contractual joint venture are relieved of any concern about whether their arrangement violates the federal illegal remuneration/kickback prohibition. Rather, each contractual joint venture relationship needs to be analyzed in order to evaluate the likelihood of the OIG viewing it as "questionable".

The Special Fraud Alert focusing on contractual relationships involving physicians who seek to expand into related areas of business by contracting with an existing provider of that business- the types of joint ventures many physicians are seeking to enter in order to supplement their incomes- is a clear indication of how seriously the OIG views this issue. For a physician who is presented with opportunities to participate in various joint venture arrangements the lesson is clear: If the answer to either of the two questions set out above is "no", the physician should seriously question the wisdom of participating in that arrangement. The assistance of legal counsel who is experienced in analyzing health care ventures can be invaluable assistance in making this determination and reflects the old adage that "an ounce of prevention is worth a pound of cure."

The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about the contents of this article, please contact the author at (305) 789-2783 or stephen.siegel@ruden.com. (Copyright 2003, Ruden, McClosky, et al. and Stephen H. Siegel)

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