Physicians Beware of Referrals for Home Care and Potential Fraud Charges

By Diane S. Robben, JD, with Denise Bloch, JD

The provision of home health care in the United States is on the rise and accounts for a significant cost to Medicare. Low-income beneficiaries have seen an increase in the provision of such services for chronic disease management. While it may be less expensive to care for post-acute illness patients in the home to reduce costs in the long-run, providing such services for the chronically ill and those with deteriorating health conditions not expected to improve has come under scrutiny in the past several years. The Affordable Care Act required the secretary of Health & Human Services to conduct a study on the costs of home health care. With this increased scrutiny on cost containment, the government is also looking to crack down on inappropriate referral patterns, to offset the financial burden.

The five most important federal fraud and abuse laws that apply to physicians are the False Claims Act (FCA), the Anti-Kickback Statute (AKS), the Physician Self-Referral Law (Stark law), the Exclusion Authorities and the Civil Monetary Penalties Law (CMPL). Government agencies, including the Department of Justice, the Department of Health & Human Services Office of Inspector General (OIG) and the Centers for Medicare & Medicaid Services (CMS), are charged with enforcing these laws. As physicians continue to navigate the complexities of regulations affecting their practice, it is crucial to understand these laws not only because following them is the right thing to do, but also because violating them could result in criminal penalties, civil fines, exclusion from federal health care programs, or loss of your medical license from the state medical board.

In the arena of home health care referrals, we have a recent example of a physician arguably unwittingly getting into trouble. On Feb. 10, 2015, the Seventh Circuit U.S. Court of Appeals decided the matter of U.S. v. Kamal Patel, No. 14-2607, upholding the conviction of a physician for violating the Anti-Kickback Statute. By way of background, the Anti-Kickback Statute prohibits the payment of remuneration to a health care provider in exchange for referrals.1 Dr. Patel is a Chicago-area internal medicine physician who commonly prescribes home health care services for his patients. The physician’s patients selected the home care services provider after being given brochures for an array of various providers by the physician’s medical assistant. Dr. Patel argued that neither he nor his assistants directed which home health care provider the patient chose, and therefore, he claims he did not personally “refer” patients to a particular home health care provider.

However, one home care provider paid the physician each time he signed a Form 485 certifying a new admission and for each signed recertification for that provider.2 The government viewed this as an impermissible kickback to the physician for referring new patients. The physician was sentenced to eight months imprisonment and ordered to forfeit $31,900 of kickback payments. The court held the doctor was the gatekeeper and even though it seemed the home care was medically necessary, the purpose of the Anti-Kickback Statute is to prevent Medicare and Medicaid fraud. Because the physician received payment each time he signed a Form 485, the danger of fraud at the certification and recertification stages was apparent with the potential both for increasing cost of care and undermining patient choice. The Court held this was the type of conduct Congress intended to criminalize by enacting the Anti-Kickback Statute.

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