

## OIG Finds Block Lease Arrangement Could Violate Anti-Kickback Statute

On August 19, 2008, the Office of Inspector General (“OIG”) issued Advisory Opinion No. 08-10 regarding a proposed arrangement in which a physician practice group would lease space, equipment and personnel on a part-time basis to other physician groups for the provision of certain radiation therapy treatments to their patients. The physician group requesting the advisory opinion had structured the lease documents to comply with exceptions under the Stark statute and safe harbors under the federal anti-kickback statute. However, the OIG found that the proposed arrangement could still potentially generate prohibited remuneration under the anti-kickback statute and could be cause for administrative sanctions.

### The Proposed Arrangement

The advisory opinion was requested by a physician group that provided cancer treatment services in a free-standing facility that provided chemotherapy and radiation therapy, including intensity-modulated radiation therapy (“IMRT”). Under the proposed arrangement, the physician group would enter into a series of lease arrangements with urologist groups under which the urologist groups would lease, on a part-time basis,

the space, equipment and personnel services necessary to perform IMRT for patients of the urologists. Each urologist group would also lease examination and treatment rooms at the facility for fixed periods of at least eight hours per week in the same space where the physician group provided IMRT. The urologist groups would lease equipment and personnel necessary to provide their patients with IMRT and the physician group would provide the urologist groups with radiation supplies and billing services. Individual radiologists who currently perform services billed by the physician group would enter into contracts with the urologist groups, as independent contractors, to supervise the IMRT procedures.

In exchange for the space, equipment and services, the urologist groups would pay the physician group rent for the use of the space and equipment, and fixed expenses for the personnel and administrative services provided. The compensation under the leases would be fixed amounts that were set in advance, and the amounts would not vary with the use of the space, equipment or services. The physician group certified that the leases would be at fair market value pursuant to a fair market value



Hancock, Daniel, Johnson & Nagle, PC (HDJN) provides assistance and guidance to healthcare providers in virtually all legal matters affecting healthcare. Generally, these include corporate, employment, administrative, and transactional matters; litigation; and governmental relations.

study prepared by an independent third party.

Under the proposed arrangement, the professional and technical components of the IMRT would be billed to Medicare using billing numbers assigned to the urologist groups. The urologist groups would pay the amounts owed under the proposed arrangement regardless of the number of patients referred to the facility and regardless of whether the urologist groups collected fees for the procedures from Medicare or other payors.

### **OIG Analysis**

In analyzing the proposed arrangement, the OIG states that the proposed arrangement is in effect a contractual joint-venture between the physician group and the urologist groups and that it exhibited several common elements of suspect joint-ventures, as described in the OIG's 2003 Special Advisory Bulletin on Contractual Joint Ventures (the "Special Advisory Bulletin"). In the Special Advisory Bulletin, the OIG described a health care provider that contracted out substantially the entire operation of a line of business to a potential competitor in return for a share of the profits of the business as remuneration for the competitor's referrals.

Under the proposed arrangement, as in the Special Advisory Bulletin, the urologist groups would be expanding into a related line of business, IMRT, which is dependent on referrals from the urologist groups. The urologist groups would not actually be involved in performing the IMRT. Instead, the urologist groups would contract out to have substantially all of the IMRT operations performed by others. The OIG stated that the urologist groups would commit little in the way of financial, capital or human resources to the IMRT and, accordingly, would

assume little real business risk. The urologist groups would be in a position to insure the success of the business, not only referring patients to the facility for IMRT, but by the choice of the IMRT over other available therapies for prostate cancer.

The OIG found that the proposed arrangement also exhibited the following suspect elements identified in the Special Advisory Bulletin:

- The physician group is an established provider of the same services that an urologist group would provide via the proposed arrangement and is in a position to directly provide the IMRT in its own right, billing Medicare in its own name, and retaining all available reimbursement.
- An urologist group would use the premises, equipment and staff of the physician group to serve its own patient base – the very patients some of the urologist groups have historically referred to the physician group or other outside suppliers for the same services.
- The aggregate income to the urologist groups under the proposed arrangement would vary with referrals from the urologist groups to the facility, and, because the various agreements could be tailored to fit the historical pattern of referrals by the urologist groups, so might the income to the physician group.
- The physician group (and its individual radiologists engaged as independent contractors by the urologist groups) and the urologist groups would share in the economic benefit of IMRT.

Based on these concerns, the OIG stated that it could not exclude the possibility that the relationship was



HDJN is one of the largest Virginia law firms primarily focusing its practice on the needs of the healthcare industry.

structured to pay the urologist groups a share of the profits generated from the IMRT referrals. Importantly, the OIG comments that the opportunity to generate a fee is itself remuneration that may implicate the anti-kickback statute. In other words, an agreement by the physician group to lease equipment, space and personnel to the urologist groups could itself potentially constitute illegal remuneration under the anti-kickback statute, even if the lease fees paid by the urologist groups were at fair market value.

For more information about Advisory Opinion No. 08-10 and its potential impact on current lease arrangements between health care providers, please contact Bill Hall or Harold Han at (804)967-9604, or by email [bhall@hdjn.com](mailto:bhall@hdjn.com) or [hhan@hdjn.com](mailto:hhan@hdjn.com). Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at [www.hdjn.com](http://www.hdjn.com).

*The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel, Johnson & Nagle, PC, is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel, Johnson & Nagle, PC be liable for any direct, indirect, or consequential damages resulting from the use of this material.*

<p><b>Richmond</b> 4701 Cox Road Suite 400 Glen Allen, VA 23060 PO Box 72050 Richmond, VA 23255-2050 ☎ (804) 967-9604</p>	<p><b>Fairfax</b> 3975 Fair Ridge Drive Suite 475 South Fairfax, VA 22033 ☎ (703) 591-3440</p>
<p><b>Harrisonburg</b> 3210 Peoples Drive Harrisonburg, VA 22801 ☎ (866) 967-9604</p>	<p><b>Virginia Beach</b> One Columbus Center 283 Constitution Drive Suite 301 Virginia Beach, VA 23462 ☎ (757) 321-6555</p>