

perspectives

June 2014

A publication from
Benesch Friedlander
Coplan & Aronoff LLP

MY BENESCH MY TEAM

Trends and topics in not-for-profit management

Not-for-Profit Spotlight



JOSEPH'S HOME

A Ministry of the Sisters of Charity Health System

In 1995, the Sisters of Charity of St. Augustine recognized that many medically fragile homeless individuals are frequently caught in a tragic situation. They are unable to find housing because of their health problems, but they are unable to find care for their health problems because of their lack of housing.

The Sisters took on the task of addressing this unmet need, and as a result founded Joseph's Home in 2000.

Today, Joseph's Home is the only organization dedicated to providing home health care to homeless men in Northeast Ohio.

All Joseph's Home clients have severe medical problems that require ongoing care. Some have just undergone surgery. Many have additional conditions such as diabetes or high blood pressure, which cause serious complications if not monitored and controlled.

Joseph's Home provides residents with food, shelter, clothing and warm beds in a clean, safe building. A full-time staff nurse ensures they receive the care they need. Program staff members work with each man to help him find adequate income and suitable housing.

Each resident arrives at Joseph's Home with three primary goals:

- Medical stability
- Financial stability
- Housing stability

Residents typically stay at Joseph's Home for 3–6 months. Their lengths of stay vary based on the time they need to stabilize their health.

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Staying in Compliance While Giving or Receiving Electronic Health Record Systems



Katherine Frech

An Electronic Health Record (EHR) offers many benefits to patients and providers. The prime advantage of an EHR is the ability to share a patient's record with multiple providers across various health care organizations and locations. EHRs allow providers to create one comprehensive electronic medical record as opposed to multiple paper records in various locations, each containing different information. EHRs improve the quality of care by improving the accuracy of diagnoses. Providers can see a patient's entire medical history instead of relying on patient memory. This care coordination also increases efficiency by preventing duplicate services from being provided.

For all of these reasons, in 2004, President Bush called for the widespread adoption of EHRs by 2014. Since many providers were concerned with the cost of implementing an EHR system, multiple initiatives were started to encourage the use of EHRs, including a financial incentive program for "meaningful use" of EHRs.

Many larger health care providers, such as large hospitals and health systems, wanted to donate EHR technology to smaller providers, like physician offices. The providers were concerned, however, that such donations would run afoul of the federal physician self-referral prohibition (often referred to as the Stark Law) and the federal Anti-Kickback Statute (AKS). The Stark Law prohibits a physician (or a physician's immediate family member) that has a financial interest in an entity from making a referral to that entity for a designated health service for which payment may be made under Medicare or Medicaid. Since the definition of a "financial relationship" is very broad, the donation of an EHR system from a health care entity to a physician could trigger the Stark Law prohibition. The AKS prohibits anyone (individuals or entities) from knowingly and willfully offering, paying, soliciting or receiving anything of value for inducing or rewarding referrals for items or services that may be reimbursable by any federal health care program. Given the breadth of the statute, the donation or receipt of EHR technology between referring providers could implicate the AKS, resulting in criminal liabilities.

To address this concern, in August of 2006, the agencies that enforce the Stark Law and AKS, the Center for Medicare and Medicaid Services (CMS) and the Office of Inspector General (OIG), published final regulations creating an exception to the Stark Law and a safe harbor for the AKS relating to the donation of EHRs. The rules were scheduled to expire on December 31, 2013.

By the end of 2013, about 60% of all providers were using EHRs. While the percentage continues to increase, there is still not "widespread" adoption of EHR systems. Therefore, on December 27, 2013, CMS and the OIG published final rules in the federal register extending the Stark Law exception and AKS safe harbor until December 31, 2021. The final rules also made amendments to the requirements of the exception and safe harbor including deleting a requirement that donated software contain an electronic prescribing component and adding a requirement that the donation not be from a laboratory company. CMS and the OIG made additional amendments with the intent of clarifying requirements involving interoperability.

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JOSEPH'S HOME

A Ministry of the Sisters of Charity Health System

Not-for-Profit Spotlight

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In order to graduate, a resident must achieve all three primary goals and complete a series of life-skill classes. In a typical year, 40–45 men are served.

Joseph's Home also strives to help residents prepare for a productive, fulfilling life. Residents learn financial management, participate in group and individual counseling and work to achieve self-determined goals such as learning to use a computer, obtaining a GED or reconnecting with family.

Additional programming, such as addiction recovery and legal aid, is provided for those who need it.

Joseph's Home has one of the highest effectiveness rankings of all programs reviewed by the Office of Homeless Services. Other agencies that have recognized its facilities and effectiveness include the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Veterans Affairs (VA).

Most importantly, the more than 400 men served at Joseph's Home since its founding have a remarkable track record of success:

- In a typical year, at least 70% of men admitted achieve all three primary goals.
- Joseph's Home graduates have a dramatically reduced likelihood of returning to homelessness.

Joseph's Home is partially funded by grants from HUD, the Ohio Department of Development and the VA. But financial contributions and donations of clothing and household items from individuals and community organizations help to ensure that the residents of Joseph's Home have continuing access to the programs and services they need to heal.

For more information about Joseph's Home, click [here](#) to visit the Joseph's Home website or click [here](#) to view the Spring 2014 Joseph's Home Newsletter.

Staying in Compliance While Giving or Receiving Electronic Health Record Systems

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The Stark Law exception and AKS safe harbor were purposely drafted to closely mirror each other. There is, however, a difference in the regulations' applicability. Since the AKS applies to everyone, while the Stark Law applies only to physicians, the AKS safe harbor is broader in scope than the Stark Law exception. To qualify for the Stark Law exception, the donation must be from an entity to a physician. To qualify for the AKS safe harbor, the donation must be to an individual or entity engaged in the delivery of health care from either an individual or entity that provides services covered by federal health care programs or a health plan.

The regulations offer protection from the Stark Law and AKS if certain requirements are met:

1. The items and services (in the form of software, information technology or training services) provided must be necessary and used predominantly to create, maintain, transmit and receive EHRs. The regulations do not cover donations of hardware.
2. The items and services are provided by an entity that is not a laboratory company.
3. The software must be interoperable at the time it is donated. (Interoperable means that the software is able to communicate [exchange and make use of information] with other information systems.) The rule now states that if the software has been certified by an agency authorized by the National Coordinator for Health Information Technology to meet EHR certification criteria when it is given to the provider, the software will be deemed interoperable.
4. The donor may not take any actions to limit or restrict the use, compatibility or interoperability with other EHR systems (including, but not limited to, health information technology applications, products or services).
5. The receipt of the items and services is not a condition of doing business with the donor.
6. Neither the eligibility to receive a donation nor the amount or nature of the donation is determined in a manner that takes into account the volume or value or referrals or other business generated between the parties.
7. The arrangement is set forth in writing, is signed by the parties, covers all EHR items and services provided by the donor to the recipient, and specifies the items and services being provided, the cost of those items and services, and the amount of the recipient's contribution.
8. The donor does not have actual knowledge, reckless disregard or deliberate ignorance of the fact that the recipient already has the items or services being provided by the donor.
9. The donor does not restrict or limit the beneficiary's ability to use the items or services for any patient (regardless of payor).
10. The items and services do not include staffing the recipient's office and are not used primarily to conduct personal or unrelated business.
11. Before receiving the items or services, the recipient pays 15% of the donor's cost for the items or services. The donor may not finance or loan funds to the recipient for this purpose.
12. The donor does not shift the cost of the items or services to any federal health care program.
13. The transfer of the items and services occurs, and all conditions have been satisfied, on or before December 31, 2021.

For additional information on the donation of EHR items or services please contact [Katherine Frech](#) at kfrech@beneschlaw.com or (216) 363-4636, or contact any member of the Benesch Health Care Practice Group.

When Donations Cross the Line



Kelly J. Skeat

Many not-for-profit health care providers maintain a charitable foundation that can accept tax-deductible gifts. These foundations typically fund activities such as research, indigent patient care or other worthwhile causes related to the

provider's mission. As with any other charity, the foundations solicit support from across the community, including current and former patients, employees, businesses and the general public.

Health care providers, however, must be especially careful when it comes to soliciting support from those with whom they do business. This is because such charitable donations can potentially implicate the federal Anti-Kickback Statute (AKS). The AKS is a federal criminal law that prohibits anyone from knowingly or wilfully soliciting, offering or receiving remuneration in exchange for arranging for a good or service for which payment may be made under a government health care program, such as Medicare or Medicaid.

Many people mistakenly think that the AKS only applies to clearly improper exchanges, such as when providers pay someone in cash every time that person refers a patient to them for health care services. However, this is not the case. The AKS is extremely broad in scope. It covers many types of behavior that are ordinary business practices outside of the health care industry. Courts have taken the position that if one purpose behind an otherwise legitimate business practice is to solicit or accept remuneration in exchange for goods or services that are funded by government health care programs, the AKS has been violated. This is true even if there are other, legitimate reasons behind the transaction.

How does this apply in the context of charitable donations? Believe it or not, the government has taken the position that soliciting donations for a health care provider's related charitable foundation can be construed as soliciting

remuneration in exchange for selecting a particular provider for services or goods that are reimbursable under a federal health care program. Similarly, making donations to potential referral sources can be considered offering remuneration in exchange for referrals of health care business.

For instance, if a hospital were to solicit charitable contributions from different pharmaceutical suppliers, and then use the size of the donation to determine which company would be granted a lucrative supply contract, the AKS may have been violated. This is true even if the money was used to fund indigent patient care and the contract was otherwise a good business decision for the hospital. Both the hospital and the supplier—and the employees involved in the decisions to solicit or make the donation—could face civil and criminal fines and other penalties, even if the pharmaceutical supplies were used for medically necessary services and the hospital was reimbursed by Medicare and Medicaid at rates that would have been the same whether or not the donation had been made.

This does not mean that organizations can never make or accept donations from referral sources or vendors. Through advisory opinions and other guidance, the government has laid out steps foundations and other not-for-profits can take to protect themselves and still accept bona fide charitable contributions that are not tied to the purchase of goods and services, or the referral of health care business. Not-for-profits that accept charitable donations from those with whom they have business relationships should consider the following:

- No donation should ever be tied to any requirement that the donor and the donee maintain a business relationship. Both formal and informal communications between the not-for-profit and the donor should be very clear that donations are in no way tied to business decisions. There should be no casual "hints" that a donation will help the donor secure business from the not-for-profit.
- Gifts that are restricted for a particular purpose should not be tied to the services offered by the donor.

- Solicitations should be made to as broad a group of people as possible. Soliciting all local businesses for donations to an indigent care fund, for example, including both those who do and do not do business with the health care provider, is a much better practice than targeting the solicitation request to only those companies with whom the provider does business.
- The foundation should be as independent as possible. If the not-for-profit is large enough, it should have separate directors and managers whose purpose is to further the foundation's mission (i.e., charitable care or research) and who play no role in the business operations of the not-for-profit. Even if that is not possible, charitable fundraising activities should be separated from the business activities of the not-for-profit. The people soliciting donations should not be the same people making business decisions. For instance, the group selecting a new vendor through a bid process should not include anyone who was recently involved with soliciting any of those vendors for charitable donations.

Businesses in the health care industry who are considering making donations to a not-for-profit health care provider should also have policies regarding how they select charitable donation recipients. Considerations include the following:

- Donations should be part of a comprehensive giving strategy that is set in advance and clearly communicated across the organization.
- Donations should in no way be tied to the organization's business relationships. The individuals in charge of deciding who will receive donations should not be the same people who manage business relationships with referral sources.
- Donations should be made on an unrestricted basis. For instance, a pharmaceutical company should not make a donation that can only be used to buy prescription drugs, even if for indigent patients. In such a situation, the nexus between the donation and the benefit to the donor could raise concerns that the donation is an impermissible kickback.

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When Donations Cross the Line

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- The amount of a donation should in no way be linked to the volume of business generated by a particular donee. For instance, if an organization decides to donate to two area hospitals, it should not make a larger donation to the hospital with whom it has a business relationship.
- Donations should be made in response to generalized solicitations and not in response to specific requests from existing or prospective referral sources that may appear to be tied to obtaining or maintaining the relationship.

Not-for-profits should have clear policies and make sure employees are informed about the correct way to raise money, benefit the community and stay in compliance with the law. Educating employees is essential to avoid well-intentioned mistakes that could lead to costly penalties and negative media coverage. Organizations making donations should also adopt and follow clear policies that allow them to support their community through bona fide charitable contributions. When both sides play by the rules, everyone can win.

For additional information, please contact **Kelly J. Skeat** at kskeat@beneschlaw.com or (216) 363-4182.

House Bill 296 Signed into Law to Increase Access to Epinephrine Autoinjectors in Camps and Schools



Heather E. Baird pictured with Ohio Governor John R. Kasich.

On May 16, 2014, Governor Kasich signed a bill into law that increases the availability of epinephrine autoinjectors (commonly referred to as "Epi-Pens") for Ohio camps and schools. This bill exempts camps and schools electing to procure epinephrine autoinjectors in accordance with the act from licensure as terminal distributors of dangerous drugs in Ohio. The bill also exempts camps and schools that procure epinephrine autoinjectors from prohibitions on the sale, donation and possession of dangerous drugs that would otherwise apply. Camps and schools electing to procure, maintain and administer epinephrine in anaphylactic emergencies must create and adhere to a protocol that is consistent with the act, as well as comply with reporting requirements related to epinephrine autoinjector procurement and use.

Additionally, the act provides qualified immunity for epinephrine autoinjector-related activities to all camps and schools electing to procure autoinjectors, as well as to their governing authorities, employees and contractors.

In summary, this means that camps and schools are now permitted to procure, maintain and administer epinephrine to children suffering from anaphylactic shock, but do not carry autoinjectors, and that the camps, schools and their agents will receive some liability protection for doing so. Camps and schools electing to maintain and use epinephrine autoinjectors are responsible for putting in place appropriate policies and procedures, as set forth in the act.

For additional information, please contact **Heather E. Baird** at hbaird@beneschlaw.com or (614) 223-9368.

How To Identify and Protect Your Organization's Trademarks and Copyrights



Lindsey N. Rothrock

Do we have rights in our website? How do we protect our brand? What is the difference between trademarks and copyrights? As an intellectual property attorney, I am often asked these types of questions. And it is

always refreshing to hear them, as it gives me the opportunity to assist clients in identifying and protecting important assets that many times are overlooked. Below is a summary of the differences between a trademark and a copyright, as well as some ways to protect your not-for-profit organization's trademarks and copyrights.

Trademarks

A trademark is a word, phrase, symbol, logo or design that identifies and distinguishes the source of your organization's goods or services from those of others. In general, as soon as a trademark owner begins using a distinguishable trademark, the trademark owner establishes what is called "common law" trademark rights in the geographic area in which it is using the trademark.

Accordingly, your organization has likely already established rights in the trademarks that it has continuously and consistently used in connection with its goods or services. Such rights generally give your organization priority to continue to use the trademarks in the geographic area in which it is using the marks, therefore giving the organization the right to prevent third parties who have lower priority from using the same or similar trademarks in that same area.

While common law trademark rights afford a trademark owner protection, federal registration of a trademark provides several additional advantages. Perhaps one of the greatest advantages is that a federal registration gives a trademark owner a legal presumption of ownership of the mark on a nationwide basis. A federal registrant is given nationwide priority, as of the application filing date, to use the registered mark. Thus, a federal registrant's

rights are not limited to just the geographic area in which it currently uses its mark. If a registrant wants to use its mark in new geographic U.S. markets, it can claim its nationwide priority date in those markets; other parties who began using the same or similar marks after that priority date can be precluded from using their marks in those markets (even if they started using their marks before the registrant entered into those markets).

If you have a federal registration, it is crucial to use the official registration symbol (®) with your trademark. If you do not have a registered trademark, place the "™" after your trademark to alert the public that you are claiming trademark common law rights. Such notice may help to deter others from using a trademark the same as or similar to your organization's trademark.

Carefully monitor the use of your trademark by other parties. Professional "watching" services are available to monitor federal and/or state trademarks, or you can monitor the mark yourself through periodic Internet searches and reviews of industry publications. Failure to stop unauthorized use of your trademark may lead to confusion with your brand and may limit your ability to stop the use of your mark by others later on. If you learn that another company is using a trademark similar to your organization's trademark, contact your legal counsel immediately so that you and your counsel can determine the most effective strategy to protect your organization's rights.

Copyrights

Copyright protects authors' "original works of authorship," including literary, dramatic, musical, artistic and certain other intellectual works such as marketing materials, computer software and website content. Copyright protection attaches to a work of authorship as soon as it is fixed in a tangible medium of expression. For example, an author acquires copyright rights in a literary piece as soon as it is written onto a piece of paper. The owner of a copyright is given the exclusive rights to do or to authorize others to do such things as reproduce, prepare derivative works based on, distribute copies of, and perform and display publicly the copyrighted work.

If your organization's employees create, within the scope of their employment, original works of authorship for the organization, such as brochures or website content, then your organization is automatically the author of such works. However, if the organization hires a third-party independent contractor to create a work of authorship for your organization, then such independent contractor generally owns the copyright in that work unless there is a written agreement that the work is deemed a "work made for hire" or that the contractor has assigned its interest in the work to your organization. Make sure you have written agreements regarding ownership of intellectual property with all independent contractors who will create or develop technology, logos, designs, advertising, websites, brochures or other intellectual property for your organization.

While your organization has copyright protection for its original works without registration, if such works are vital to your organization, then copyright registration with the U.S. Copyright Office is an easy and inexpensive (\$35 filing fee per application) way to obtain invaluable protection. A U.S. copyright registration is required before a copyright owner can commence an infringement lawsuit, and if registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorneys' fees will be available to the copyright owner in court actions.

To alert the public of your organization's copyrights, place the copyright notice (© followed by the year of first publication and the copyright owner's name) on all of your organization's works of authorship, whether registered or not, including designs, websites and written material. Although U.S. law no longer requires the use of the copyright notice, use of such notice grants benefits that may be unavailable otherwise.

For additional information, please contact **Lindsey N. Rothrock** at lrothrock@beneschlaw.com or (317) 685-6135.

Events

Ohio Association of Nonprofit Organizations (OANO) Workshop

From Strategy to Sustainability: A toolkit to help chart a course to sustainable success with limited resources

It is important as an organization to be able to describe your strategy for the future. This OANO workshop will give you the tools to build the momentum and resources needed to get there.

Join Matt Gardner of Centric Consulting and Joel Kessel of Kessel Communications, both of whom serve on the Advisory Board of Directors for the Ohio Chapter of the Association for Strategic Planning, for a focused education program on developing a strategy for your not-for-profit organization.

At the end of the program you will walk away with:

- The tools, resources and knowledge on how to develop a plan that helps you realize your vision and fulfill your mission.
- A sharp understanding of the approach to executing a strategic planning process at your organization.
- The clarity, competence and confidence to influence and impact your organization's future success.

Who should attend:

Not-for-profit leaders who are interested in learning best practices in leading the strategic planning process for their not-for-profit organization.

- Executive directors
- Members of an executive leadership team
- Board members

When and Where:

10 A.M.–2 P.M.
June 11th, 2014
Chase Bank Building Conference Center
100 E. Broad St. 6th Floor
Columbus, OH 43215

The investment:

Begin charting a clear course to sustainable success for your organization for only \$347*.

**Price includes materials and up to two people per organization. Lunch will be provided.*

Value-added benefits:

As a value-added benefit to the program, each participant will be provided a password to an online portal to gain unlimited access to:

- Session materials
- Helpful articles and materials to further your education

To register, please click [here](#). You only need to register one person from your organization. OANO will contact you to register any additional attendees.

OANO and The Columbus Foundation Present: Giving USA 2014

With 50 years' worth of trend information, Giving USA provides a broad national picture of changes in funding patterns over time. It is an excellent source of data about charitable giving that estimates how much was given by four different types of donors—individuals, foundations, estates (bequests) and corporations. Giving USA also reports on estimated contributions for 10 different types of charities. These donations reflect the priorities and values of Americans who support not-for-profits.

The information you have been waiting for if...

Your work involves advising donors, fundraising for not-for-profits, researching charitable giving in the United States or providing access to material about how much Americans donate to charity. Specifically, this information proves useful for trustees, philanthropists, financial advisers, giving officers, volunteer not-for-profit leaders, executive directors and fundraising professionals, who will find this Giving USA briefing helpful in benchmarking fundraising expectations against long-term national trends.

Be among the first to learn the results!

CINCINNATI

June 17, 2014
8–10 A.M.: Program
Cincinnati Museum Center at Union Terminal
Cincinnati [Program Registration](#)

DAYTON

June 18, 2014
7:30 A.M.: Breakfast
8–10 A.M.: Program
Hilton Garden Inn Beavercreek
Dayton [Program Registration](#)

COLUMBUS

June 19, 2014
12:30 P.M.: Light refreshments
1–3 P.M.: Program
The Columbus Foundation
Columbus [Program Registration](#)

TOLEDO

June 20, 2014
9 A.M.: Breakfast
9:30–11:30 A.M.: Program
The Toledo Library
Toledo [Program Registration](#)

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Events (continued)

Association of Fundraising Professionals (AFP) Fundamentals of Fundraising Course

The Central Ohio AFP chapter will be presenting the **AFP Fundamentals of Fundraising Course**. This intensive program will provide an overview of skills, techniques and program components for individuals with zero to four years of fundraising experience.

Why should you attend? This course was developed by experienced fundraising professionals to meet the real-world needs and challenges not-for-profit organizations face every day. The program includes case studies and projects for groups and individuals, making the learning experience both substantial and enjoyable.

When: June 30–July 1, 2014

Where: Cavello Center at St. Charles Prep
2010 East Broad Street
Columbus, OH 43205

Registration: \$395 for AFP members; \$495 for nonmembers. Course is applicable for 16 CFRE International education points, and comes with a workbook and course materials valued at \$190. To register, visit the Fundamentals of Fundraising Course [webpage](#).

Course Registration deadline is June 20, 2014.

Need more information? Contact course chair Carrie Gram at cgram@pcj.edu or 614.985.2234

Save-the-Date for our Not-for-Profit Seminar in Indianapolis coming up in August

Please save the date for our annual Not-for-Profit Seminar in Indianapolis.

When: Tuesday, August 12
8:00 A.M.–12:00 P.M.

One American Square

Complete agenda and registration information coming soon.

Benesch's Not-for-Profit Team assists not-for-profit and tax-exempt clients in a broad array of matters, ranging from filing for nonprofit status and preparing federal and state tax exemption applications to training in not-for-profit regulatory compliance. Our not-for-profit attorneys are committed to protecting our clients' assets so that they can continue to drive the missions and goals of their organizations.

For more information regarding this edition or any not-for-profit issues, please contact:

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