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Money Talks, But Who's Listening?
Corridors Winter 2010

12.08.2010
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Money talks, and for hospitals and physicians this can become a real problem when negotiating a fair-market-value compensation arrangement. Hospitals and physicians negotiating compensation arrangements may have more people "listening into" their discussions than they may want or even realize. The federal case of *United States of America ex rel. Michael K. Drakeford, M.D. v. Tuomey d/b/a Tuomey Healthcare System*, C.A. No. 3:05-CV-2858-MJP, provides hospitals and physicians with insight into how the government views compensation under employment contracts. So, how do you keep yourself out of the trouble when negotiating and accepting a physician employment agreement?

In *Tuomey*, a physician, Dr. Drakeford, brought a federal lawsuit alleging that Tuomey's referrals from employed part-time physicians violated several federal statutes, from the False Claims Act to the Stark law, because of the allegedly excessive compensation offered by the hospital to referring physicians that polluted claims submitted by the hospital for reimbursement from Medicare and Medicaid. Dr. Drakeford owned the only orthopedic clinic in Sumter County when the hospital offered him a part-time employment agreement. Dr. Drakeford sought legal counsel over the propriety of the proposed arrangement (who expressed compliance concerns), who in turn with hospital counsel engaged an attorney who had formerly worked on issuing formal guidance to providers through fraud alerts and advisory opinions. The former government attorney discussed the proposed arrangement with attorneys for the hospital and for Dr. Drakeford and expressed concerns about the compensation and the valuation opinion received by the hospital. When Dr. Drakeford requested to meet with Tuomey's board about his concerns with the proposed arrangement, the hospital sent Dr. Drakeford a new policy regarding contact with the hospital board without any meeting or further discussion with him or his counsel.

What was going on in Sumter County, South Carolina that drove up compensation? For one thing, Tuomey is the only hospital located in the county and therefore the only provider of various surgical and other services in the county. This changed when a medical group was approved by the state to develop an ambulatory surgery center in the county, although, at nearly the same time, Tuomey was approved to develop an outpatient surgery center. Allegedly, Tuomey was concerned that procedures would shift away from Tuomey and its new outpatient surgery center to the competitor ASC, and approached various physicians in an effort to maintain their relationship. This fact, according to Dr. Drakeford and the government, led the hospital to enter into improper financial relationships (through an affiliated physician group) with 18 part-time physicians working in different specialties. Recruited physicians were paid a base salary and bonuses based on the dollar value of receipts that Tuomey received for that physician's services or on the number of procedures that physician performed.

Legally, what happened? Dr. Drakeford sued, the government intervened, and a jury found that Tuomey violated the Stark Law and owed the federal government almost $45 million before interest. Tuomey faces a new trial on whether the hospital violated the federal False Claims Act (which increases Tuomey's potential exposure by over $227 million, a charge that had previously been dismissed) because of the judge's decision to exclude certain testimony, particularly the testimony of the former government attorney and of Tuomey's chief operating officer. In late October 2010, Tuomey lost its appeal to the Fourth Circuit to have the appellate court entertain the order for a retrial on the False Claims Act (and prevent retrial). Tuomey has also appealed the $45 million verdict and maintains its innocence.

Which elements of the Tuomey part-time employment agreements concerned the government? The complaint, as amended, identified several questionable provisions, including:

- **Compensation**: Compensation was in excess of 130% of the physicians' net collections on the procedures performed and was significantly out of line for physicians in similar specialties.
- **Exclusivity**: Physicians were penalized if they did not refer to Tuomey for services. Outside counsel had suggested Tuomey revise the agreement to permit patient choice of another provider and referral where the patient's best interest would be met by receiving services from a different provider, but these changes were not made.
- **Non-Compete Clauses**: These provisions prevented the physicians from providing outpatient surgeries within a 30-mile radius of Tuomey during the agreement and for two years after the agreement's termination.

Perhaps one of the more problematic facts of the case was that the hospital's interest in the physicians arose after the approval of the competing ambulatory surgery center and a financial analysis by the hospital showed an appreciable revenue drop if certain services were performed at the ASC versus at Tuomey.

What lessons can be learned from this?

First of all, hospitals should establish appropriate policies relating to internal reporting of potential compliance issues. Such a policy should encourage discussion of concerns, involve appropriate investigation of expressed concerns, protect the person raising concerns from any adverse action, and foster an environment of compliance consciousness and proactive monitoring.

Second, failing to interact appropriately with a potential whistle-blower or concerned person, whether or not a policy is followed, can have grave legal and financial consequences. Working with a concerned person to identify and address a compliance concern is much less expensive in the long run than facing that person and the United States government in a lawsuit.

Third, hospitals cannot blindly rely on valuation opinions. Tuomey had received a valuation opinion that the compensation was fair market value, but the government said Tuomey's reliance on the opinion that 131% of net collections was fair market value was not reasonable. The valuator's own data in the opinion letters given to Tuomey showed similar physicians were paid 49% to 63% of net collections, substantially less than the proposed compensation. The underlying opinion did not pass the smell test.

Finally, remember, if something sounds too good to be true, it generally is, or at least the government will think it is! Approach all financial relationships between hospitals and physicians with an eye toward what is reasonable and fair market value and obtain appropriate counsel to review agreements.

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