

Legal Q/A

by Bruce E. Wood, Esquire

Contractual Joint Ventures Draw Scrutiny From OIG

On April 23, 2003 the DHHS Office of Inspector General ("OIG") issued a Special Advisory Bulletin raising concerns about the legality, under the Federal Anti-Kickback Law, of certain contractual joint ventures—or business arrangements—between health care providers. The Bulletin is an extension of the OIG's 1989 Special Fraud Alert which addressed referrals of Medicare business to newly-formed joint venture entities by owners of the venture.

The Bulletin focuses on arrangements in which a health care provider ("Provider") in one line of business expands into a related health care business, primarily to serve the Provider's patients, by contracting with an existing provider of that service ("Supplier"). Under these arrangements, the Supplier not only manages the new line of business, but also may supply it with inventory, employees, space, billing and other services. In the OIG's view, the Provider's share of the profits from this arrangement constitutes remuneration for the referral of the Provider's Medicare/Medicaid patients and thus may violate the Anti-Kickback Law.

An example of a problematic contractual arrangement cited in the Bulletin is one in which a group of nephrologists formed a new company to provide home dialysis supplies to their dialysis patients. The nephrologists' company then contracts with an existing home dialysis supplier to operate the new company and provide it with all goods and services. According to the Bulletin, these "problematic contractual arrangements" have certain common features:

New Line of Business. The Provider expands into a related line of business that can serve the Provider's existing patient base.

Captive Referral Base. The new business primarily or exclusively serves the Provider's existing patient base.

Lack of Business Risk. The Provider's primary contribution to the new business is referrals and the Provider neither operates the new business nor commits substantial financial, capital or human resources. Instead, virtually all of the operations of the new business are provided by the Supplier, while the billing of insurers and patients is done in the name of the Provider.

Supplier is Competitor. In the absence of the business arrangement, the Supplier would be a competitor of the new line of business and would compete for the captive referrals.

Scope of Services. The Supplier provides certain key services, including day-to-day management, billing, equipment, personnel, office space and related supplies and services to the new business.

Remuneration. The Provider and the Supplier share in the economic benefit of the new business. The practical effect of the business arrangement is that the Provider has the opportunity to bill for services that would otherwise be provided independently by the Supplier. The remuneration to the Provider (profits from the venture) varies based upon the Provider's referrals to the new business.

Exclusivity. The parties may agree to a noncompetition arrangement, barring the Provider, the Supplier, or both

from offering the products or services of the new venture to the Provider's patients other than through the new venture.

Although the Special Advisory Bulletin is not the law, and does not really represent a change in the OIG's approach to referral-based joint ventures, it may signal the OIG's intention to be more aggressive in pursuing suspect contractual joint ventures under the Anti-Kickback Law. Business arrangements that have some, but not all, of the suspect attributes must be evaluated on an individual basis to determine

the level of risk involved. In addition to the Anti-Kickback Law, business arrangements between health care providers must comply with the Stark Law and its New York counterpart if the services constitute "designated health services" under those statutes. When evaluating proposed—or existing—business arrangements with other Medicare providers, physicians and their counsel must now consider the OIG's position on contractual joint ventures to fully assess the regulatory risks of the arrangement.

Bruce E. Wood, Esq., is a shareholder of Wood & Smith, P.C., a Syracuse based law firm concentrating its practice in the area of health law.