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OIG Shoots Down Neurological Contractual Joint Venture and Creates Tidal Wave in Anesthesia and Other Referral Based Specialties

A recent negative OIG Advisory Opinion (No. 23-05) proves once again that you can't make a silk purse from a pig's ear: A convoluted kickback is still a kickback.

Although Adv. Op. 23-05 addresses a proposed business arrangement involving intraoperative neuromonitoring ("IONM"), counterpart arrangements already exist in the context of other referral-based specialties, notably in regard to anesthesia in the ambulatory surgery setting. Whether prosecutions and whistleblower actions follow is anyone's guess, but an educated guess is that it's simply a matter of time.

The Proposed Arrangement

The entity requesting the Advisory Opinion ("Monitoring Company") contracts with various hospitals and ASCs for IONM, which involves a technical component performed by a neurophysiologist and a "live", but often remote, monitoring of the test results and waveforms by a neurologist.

Currently, the Monitoring Company employs neurophysiologists and has a management services agreement with a physician practice ("Practice") that employs and/or subcontracts with neurologists. Surgeons schedule IONM services for their surgical cases by making a referral to the Monitoring Company. The Monitoring Company then schedules one of its neurophysiologists to perform the technical component and contacts with Practice to assign a neurologist to perform the professional component. Generally, the Monitoring Company bills the hospital or ASC at which the case is performed for the technical component, and Practice bills the surgical patient or insurer, as applicable, for the professional component.

The "Proposed Arrangement" involves a contractual joint venture in which the referring surgeons would profit from their referrals. Specifically, the Monitoring Company would assist surgeons ("Surgeon Owners") who request IONM monitoring with the formation and operation of a turnkey physician-owned entity ("Newco") that would perform IONM services.

The Surgeon Owners would form the Newco and would set the terms of their respective ownership interests and the methodology for the distribution of profits amongst themselves. Neither the Monitoring Company nor the Practice would have ownership in Newco.

After formation, the Surgeon Owners would have limited participation in Newco's day-to-day business operations and would instead contract with the Monitoring Company and Practice for the performance of the following business operations:

1. Pursuant to a billing services agreement between the Monitoring Company and Newco, the Monitoring Company would provide to Newco billing, collection, and certain other administrative services in exchange for a fee from Newco (the "Billing Services Agreement").
2. Pursuant to a personal services agreement between Practice and Newco, Practice would provide to Newco the services of its neurologists and the services of neurophysiologists (which Practice would lease from the Monitoring Company under the management services agreement between the Monitoring Company and Practice) in exchange for a fee from Newco (the "Personal Services Agreement").

The Monitoring Company certified that the services provided by the Monitoring Company and Practice under these contracts would constitute virtually all of the day-to-day requirements of an IONM business. The Monitoring Company does not expect that Newco would need to hire any dedicated employees because the Monitoring Company and Practice would provide all necessary services for Newco.

Newco would contract with various hospitals and ASCs under an IONM services agreement that would govern Newco's provision (or arranging for the provision) of the technical and professional components of IONM services for surgeries at such facilities. Generally, Newco would bill the hospital or ASC for the technical component and would bill the surgical patient or insurer, as applicable, for the professional component.

Although Newco's billing would be handled by the Monitoring Company under the Billing Services Agreement, the Monitoring Company would take direction from the Surgeon Owners regarding the amounts to be billed for services.

Why Would Monitoring Company Do This?

Why would the Monitoring Company want to do this? It's because other IONM companies are engaging in the scheme, and surgeons, seeking to profit from IONM referrals, are demanding it.

In its request to the OIG, the Monitoring Company stated that it seeks to retain business from its existing surgeon clients that otherwise would be lost to competing IONM companies willing to engage in the scheme, and certified that it would adopt the Proposed Arrangement only as required in specific situations where its existing surgeon clients wish to own their own IONM company and may not continue to do business with Requestor otherwise.

Although Newco would pay a fee to the Monitoring Company under the Billing Services Agreement and would pay a fee to Practice under the Personal Services Agreement, the Monitoring Company anticipates that Newco would achieve substantial profits from the Proposed Arrangement (*i.e.*, the difference in fees paid to the Monitoring Company and Practice under the services agreements and reimbursement received from third parties) and anticipates that Monitoring Company and Practice would earn substantially less profit under the Proposed Arrangement than under their current business model.

This is primarily because, as the Monitoring Company certified: (i) reimbursement for the professional component of IONM can far exceed the cost of providing the service; and (ii) Practice would charge Newco less than it could bill a third-party payor for the same services under the Monitoring Company's and Practice's current business model because competing IONM companies marketing similar arrangements to surgeons have aggressively discounted their charges for such services.

The Underlying Law

The federal anti-kickback statute (AKS) prohibits the offer of, demand for, payment of, or acceptance of any remuneration for referrals of Medicare or Medicaid patients. There are exceptions, most notably regulatory "safe harbors," that describe certain arrangements not subject to the AKS because they are unlikely to result in fraud or abuse.

Broad OIG Guidance

The OIG has issued two fraud alerts applicable to the analysis of joint venture model deals: its 1989 Special Fraud Alert on Joint Venture Arrangements, which was republished in 1994, and a 2003 Special Advisory Bulletin on Contractual Joint Ventures.

Note that the term “joint venture,” as used by the OIG in the alerts, is not limited to the creation of a legal entity; rather, it covers any arrangement, whether contractual or involving a new legal entity, between parties in a position to refer business and those providing items or services for which Medicare or Medicaid pays.

The OIG has made clear that compliance with both the form and the substance of a safe harbor is required in order for it to provide protection. The OIG demands that if even one underlying intention is to obtain a benefit for the referral of patients, the safe harbor would be unavailable, and the AKS would be violated.

Although each alert is illustrative of the regulatory posture of the OIG, the 2003 Special Advisory Bulletin is particularly on point in connection with analyzing structures such as presented in regard to IONM as well as other “popular” arrangements designed to capture referral profits.

In it, the OIG focuses on arrangements in which a health care provider in an initial line of business (for example, a surgeon) expands into a related business (e.g., IONM or anesthesiology) by contracting with an existing provider of the item or service (e.g., neurophysiologist, neurologists, anesthesiologists, or nurse anesthetists) to provide the new item or service to the owner’s existing patient population.

The 2003 bulletin lists some of the common elements of these problematic structures in general terms, with bracketed examples inserted by the author:

- The surgeon expands into [IONM or an anesthesia business] that is dependent on direct or indirect referrals from, or on other business generated by, the owner’s existing business [such as the surgeon’s practice or ASC].
- The surgeon does not operate the [IONM or anesthesia] business—the [IONM provider or anesthesiologist] does— and does not commit substantial funds or human resources to it.
- Absent participation in the joint venture, the [IONM provider or anesthesiologist] would be a competitor [of the surgeon’s IONM or anesthesia company], providing services, billing and collecting [for the IONM company’s or the anesthesiologist’s own benefit].
- The [surgeon] and the [IONM company or anesthesiologist] share in the economic benefit of the [surgeon’s] new [IONM or anesthesia] business.
- The aggregate payments to the [surgeon] vary based on the [surgeon’s] referrals to the new [IONM or anesthesia] business.

OIG’s Opinion

The OIG determined that the Proposed Arrangement would involve several forms of remuneration, including, but not limited to: (i) discounts under the Personal Services Agreement provided by Practice to Newco; (ii) the opportunity for Newco to generate a profit through the difference between the fees paid by Newco to each of the Monitoring Company and Practice under the services agreements and the reimbursement Newco would receive for such services from third parties; and (iii) returns on investment interests in Newco to the Surgeon Owners. These streams of remuneration could induce the Surgeon Owners to make referrals of IONM services for which payment could be made by a Federal health care program.

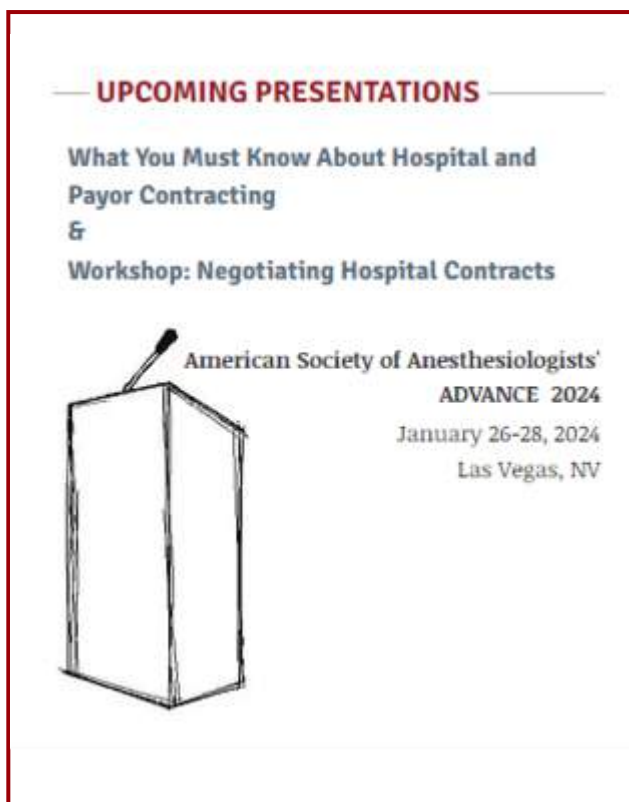
The OIG found that there was no safe harbor protection for the Proposed Arrangement’s streams of remuneration, and that it would have many of the indicia of suspect contractual joint ventures about which the OIG has longstanding and continuing concerns.

The Proposed Arrangement would present a host of risks of fraud and abuse under the Federal anti-kickback statute, including patient steering, unfair competition, inappropriate utilization, and increased costs to Federal health care programs. The OIG stated that it is possible that the Proposed Arrangement could enable the Monitoring Company and Practice to do indirectly what they could not do directly: pay the Surgeon Owners a share of the profits from their referrals for IONM services that could be reimbursable by a Federal health care program.

Even if the Monitoring Company could ensure that no IONM services reimbursable by a Federal health care program would ever be referred to Newco, the remuneration to Newco under the Proposed Arrangement could induce the Surgeon Owners to refer their IONM services reimbursable by a Federal health care program to the Monitoring Company and Practice, thereby disguising remuneration for Federal health care program beneficiary referrals through the payment of amounts purportedly related to non-Federal health care program business.

The Essential Takeaways for You

1. Contractual joint venture arrangements are fraught with kickback danger for all parties involved.
 2. Just because “everyone is doing it” is no defense from AKS prosecution any more than the fact that dozens of people are selling crack on street corners is a defense to drug charges.
 3. Just because the facts of the Proposed Arrangement involve IONM doesn’t lessen the value of the opinion as an indication of the OIG’s position vis-à-vis other joint venture scams, such as the role played by so-called anesthesia management companies in helping gastroenterologists to set up and manage captive anesthesia companies for endoscopy ASCs.
 4. Each situation must be analyzed carefully as there is a high chance of an AKS violation leading to criminal fines, civil penalties, whistleblower lawsuits, exclusion as a provider, and even imprisonment.
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Wisdom. Applied. 177: The Fortune Teller

From down the street I could see the fortune teller's shop. Did she see me coming?

All Things Personal

We drove down the street looking for the trendy new spot in an industrial neighborhood. That is, until we couldn't find it. Until, by quirk, we did.

The nondescript building without signage and no apparent door could be accessed only from an alley that ran behind it, the valet parking sign the only giveaway.

While the number is not zero, very few of my readers are in the restaurant business. So, what I'm getting at has nothing to do with forks and knives, although it does have something to do with scalpels.

Although it might, just might, work in the trendy restaurant business, for healthcare providers, being hard to find, both physically and virtually, as on the Internet (actually, as in *not* on the Internet at all, or, as is the case with the surgery center that I looked for this week, on the Internet but without any clue as to its address – go figure) can't be good for your business.

Are you making it easy for people to contact you? To find your office or facility? To pay you?

Despite what you hear on network news, the economy appears to be accelerating toward free fall. Why accelerate your participation in the recession if you don't have to?

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Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one in which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s your medical group’s governance structure that’s holding you back. In fact, it’s very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy [here](#).

Whenever you're ready, here are 4 ways I can help you and your business:

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- 2. Be a guest on “Wisdom. Applied. Podcast.”** Although most of my podcasts involve me addressing an important point for your success, I’m always looking for guests who’d like to be interviewed about their personal and professional achievements and the lessons learned. [Email me](#) if you’re interested in participating.
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