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Minimizing Stark Law Execution Risks

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Agenda

- Introduction
- Fair market value pitfalls
- Practical safeguards against non-compliant arrangements
- Physician group practice structures
- Stark Law implications of losses and subsidies
- Consultant exception minefields
- Recent Stark Law changes
- Ethical quandaries for in-house counsel

Program Purpose: Equip In-House Counsel to Meet Professional Obligation to Provide Competent Stark Law Advice

- The overriding purpose of this program is to enable attendees to fulfill their ethical and professional obligations to provide competent representation under the Illinois Rules of Professional Conduct when providing Stark Law advice.
  - Rule 1.1 stipulates that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
  - Accordingly, attorneys who provide Stark Law advice must be knowledgeable regarding the intricacies of the highly complex Stark Law regulations and spot issues requiring expert advice.
  - This program will highlight Stark Law pitfalls and recent changes to enable attendees to meet this requirement.
  - We also will discuss some of the ethical quandaries that arise in the provision of Stark Law advice and implementation of physician arrangements.

FMV

...the value in arms length transactions, consistent with the general market value. "General market value" means the price that an asset would bring, as the ***result of bona fide bargaining*** between well-informed buyers and sellers who are ***not otherwise in a position to generate business for the other party***; or the compensation that would be included in a service agreement, as the result of bona fide bargaining between well-informed parties to the agreement who are ***not otherwise in a position to generate business for the other party at the time of the service agreement***. Usually, the fair market price is…the compensation that has been ***included in bona fide services agreements with comparable terms*** at the time of the agreement …where the…compensation has ***not been determined in any manner that takes into account the volume or value of anticipated or actual referrals***.

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FMV/GMV

- Included in definition:
  - Result of bona fide bargaining
  - Not in a position to generate business
  - Bona fide arrangements with comparable terms
  - Does not take into account the volume or value of referrals
- Because part of definition, will ask valuators to address
- How do you demonstrate?

FMV Challenges

- Losses and “subsidies” – do they always result in an FMV problem?
- Limited duration of FMV opinions.
- At what time is fair market value determined?
- Comparables for value-based payments and non-productivity.
- The “opportunity cost” problem.
- MGMA and surveys – contain data not comp systems
- Definition of FMV – doesn’t take into account the volume or value of referrals.

Government and the Courts

- Key cases:
  - Bradford
  - Tuomey
  - Halifax
- What are the takeaways?

Bradford: Fixed Payment Can Take into Account Volume or Value

"A fixed payment compensation arrangement such as the one in this case may be considered as taking into account the volume or value of referrals — if that fixed payment is in excess of fair market value."

"We conclude that the compensation arrangement between BRMC and the doctors is inflated to compensate for the [doctors] ability to generate other revenues. Specifically, we find that the amount of the compensation arrangement was arrived at by taking into account the anticipated referrals from the doctors. We therefore conclude that the compensation arrangement between BRMC and the doctors is not — fair market value under the Stark Act."

Tuomey: Anticipating Volume or Value Can Run Afoul of FMV

"Our analysis of these sources, set forth below, yields the conclusion that compensation arrangements that take into account anticipated referrals do implicate the volume or value standard."

"It stands to reason that if a hospital provides fixed compensation to a physician that is not based solely on the value of the services the physician is expected to perform, but also takes into account additional revenue the hospital anticipates will result from the physician's referrals, that such compensation by necessity takes into account the volume or value of such referrals."

"Thus, it is for the jury to determine whether the contracts violated the fair market value standard by taking into account anticipated referrals in computing the physicians' compensation."

Halifax: Source of Funds – Varies Based on Volume or Value

"The Incentive Bonus was not a 'bonus **based on** services personally performed' by the Medical Oncologists, as the exception requires. Rather, as described by the Defendants themselves, this was a bonus that was **divided up** based on services personally performed by the Medical Oncologists. The bonus itself was based on factors in addition to personally performed services -- including revenue from referrals made by the Medical Oncologists for DHS. The fact that each oncologist could increase his or her share of the bonus pool by personally performing more services cannot alter the fact that the size of the pool (and thus the size of each oncologist's bonus) could be increased by making more referrals." (emphasis original)

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Is FMV Always Needed?

Terms of exception	In-office ancillary services [1877(h)(4); §411.352]	Bona fide employment [1877(e)(2); §411.357(c)]	Personal services arrangements [1877(e)(3); §411.357(d)]	Fair Market Value [§411.357(1)]
Must compensation be "fair market value"?	No	Yes – 1877(e)(2)(B)(i).	Yes – 1877(e)(3)(A)(v).	Yes - §411.357(1)(3).
Must be "commercially reasonable"?	No.	Yes (remuneration) – 1877(e)(2)(C).	Yes (aggregate services reasonable and necessary) – 1877(e)(3)(A)(iii).	Yes (arrangement) - §411.357(1)(4).
Must compensation be "set in advance"?	No	No.	Yes – 1877(e)(3)(A)(v).	Yes - §411.357(1)(3).
Scope of "volume or value" restriction.	DHS referrals – 1877(h)(4)(A)(iv).	DHS referrals – 1877(e)(2)(B)(ii).	DHS referrals or other business – 1877(e)(3)(A)(v).	DHS referrals or other business - §411.357(1)(3).
Scope of productivity bonuses allowed.	Personally performed services and "incident to" plus indirect – 1877(h)(4)(B)(i).	Personally performed services – 1877(e)(2).	Personally performed services - §411.351 ("referral") and §411.354(d)(3).	Personally performed services - §411.351 ("referral") and §411.354(d)(3).
Are overall profit shares allowed?	Yes – 1877(h)(4)(B)(i).	No.	No.	No.
Written agreement required?	No.	No.	Yes , minimum 1-year term.	Yes (except for employment), no minimum term.
Physician incentive plan (PIP) exception for services to plan enrollees?	No, but risk-sharing arrangement exception at §411.357(n) may apply.	No, but risk-sharing arrangement exception at §411.357(n) may apply.	Yes, and risk-sharing arrangement exception at §411.357 may also apply.	No, but risk-sharing arrangement exception at §411.357(n) may apply.

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Employment v. In-Office

- Scope of productivity bonuses
- Profit-sharing bonuses
- Fair market value
- Commercial reasonableness

Group Practice
75% Test

- Why is the group practice definition important?
- The history/purpose of the 75% test: GPWWs and OWAs.
- The test: “Substantially all of the patient care services of the physicians who are members of the group (that is, at least 75 percent of the total patient care services of the group practice members) must be furnished through the group and billed under a billing number assigned to the group, and the amounts received must be treated as receipts of the group.” 42 C.F.R. §411.352(d).
- Similarly, “Members of the group must personally conduct no less than 75 percent of the physician-patient encounters of the group practice.” 42 C.F.R. §411.352(h).

Group Practice
75% Test *cont'd*

- What are "patient care services":
  - "[A]ny task(s) performed by a physician in the group practice that address the medical needs of specific patients or patients in general, regardless of whether they involve direct patient encounters or generally benefit a particular practice."
  - "Patient care services can include, for example, the services of physicians who do not directly treat patients, such as time spent by a physician consulting with other physicians or reviewing laboratory tests, or time spent training staff members, arranging for equipment, or performing administrative or management tasks."

Group Practice
75% Test *cont'd*

- How are patient care services measured:
  - Only applies to members, not "physicians in the group practice."
  - Look at the total time each member spends on patient care services documented by any reasonable means, or . . .
  - Use any alternative measure that is reasonable, fixed in advance of the performance of the services being measured, uniformly applied over time, verifiable, and documented.
  - NOTE: requires 75% of the total, not of each member.
  - Must maintain data and supportive documentation, and be prepared to make it available to the Secretary.

Group Practice
75% Test *cont'd*

- Test does not apply to group practices located solely within a health professional shortage area ("HPSA"), and . . .
- For a group practice located outside of a HPSA, any time spent by a group practice member providing services in a HPSA should not be used to calculate whether the group practice has met the test.
- Temporary exception for the "start up period" of a new group practice.
  - Exception is not generally available when the group practice admits a new member or reorganizes.
- Limited, temporary for the addition to an existing group practice of a new member who would be considered to have relocated his or her medical practice under the "physician recruitment exception" (42 C.F.R. §411.357(e)(2)) if it would result in the existing group practice not meeting the test.
  - The group practice will have 12 months following the addition of the new member to come back into full compliance.
  - For the 12-month period the group practice must remain fully compliant with the test if the new member is not counted as a member of the group practice.
  - The new member's employment with, or ownership interest in, the group practice must be documented in writing no later than the beginning of his or her new employment, ownership, or investment.

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Group Practice
75% Test *cont'd*

- When you don't need to meet the test.
- Common examples of when the test can create problems.
  - Remember the history/purpose of the test.
- Part time *versus* full time members.
- The larger the group practice, the greater the practical flexibility, but also the greater chance for slip-ups in compliance.
- Implications of "moonlighting."
- Need mechanism to monitor/update compliance.

Physician in the Group Practice Definition

- Why is the definition important?
- Includes each member of the group practice.
- Also includes an independent contractor of the group practice:
  - But only during the time the independent contractor is furnishing patient care services for the group practice under a contractual arrangement directly with the group practice to provide services to the group practice's patients in the group practice's facilities.
  - The contract must contain the same restrictions on compensation that apply to members of the group practice pertaining to the volume of value of referrals or the contract must satisfy the requirements of the personal service arrangements exception.
  - The independent contractor's arrangement with the group practice must comply with the reassignment rules.
- In all instances, requires the existence of a group practice.

Physician in the Group Practice Definition
cont'd

- The contract must be directly with the physician.
  - What did previous regulatory language allow.
  - Now there needs to be a direct nexus.
- Remember the "only during the time" requirement.
- Also remember the "in the group practice's facilities" requirement.
- If using a physician in the group practice for supervision, there may be other Medicare requirements or limitations applicable to the physician.
  - Example of self-disclosure and disgorgement where definition was satisfied, but supervision requirements were not satisfied.

Group Practice Definition Execution Risks

- Single legal entity operating primarily for the purpose of being a physician group practice in any organizational form recognized by the State in which the group practice achieves its legal status.
- 75% test.
- Productivity-based compensation, what it can be based upon, and how it can be calculated.

In-Office Ancillary Services Exception Execution Risks

- It's much more difficult for solo practitioners, and for physician practices that don't satisfy the group practice definition, to then meet the requirements of the in-office exception.
- Who performs and/or supervises the service.
  - Note the roles of a member of the group practice or a physician in the group practice.
  - Both need a group practice to exist.

In-Office Ancillary Services Exception Execution Risks *cont'd*

- Same building:
  - Be careful about "single street address as assigned by the U.S. Postal Service."
  - If a full-time office (35 hrs./30 hrs.), easier to satisfy the exception.
  - If a part-time office (8 hrs./6 hrs.), then there is less flexibility under the exception.
- Centralized building:
  - Be careful about the full-time and exclusive requirement.

In-Office Ancillary Services Exception Execution Risks *cont'd*

- Who bills for the service?
- Special rules for DME.
- Possibility that another entity, in addition to the referring physician/group practice, furnished the designated health service.
  - See below re "entity" definition.
- Disclosure requirement for certain imaging services.

Group Practices & PODS

- PODS – subsets of a group practice on which compensation is based on profits from DHS
- Definition of group practice
  - Element (g) is volume or value of referrals
  - Element (i) is special rule for productivity bonuses and profit shares
- Noncompliance affects definition and, thus, all physicians in the group practice
- Compliance measured at time of referral

Pooled Productivity/Equal Share

- Example:
  - 3 physicians of the same specialty
  - All wRVUs personally performed by the physicians are pooled and multiplied by a conversion factor
  - Each physician receives an equal share of the resulting pool (*i.e.,* one-third)
- Does this comply with a Stark Law exception?

Pooled Productivity/Equal Share

- Three potentials:
  - MD #1 – paid more than the average
  - MD #2 – paid at the average
  - MD #3 – paid less than the average
- MDs #1 and #2 paid on 100% or less of their productivity, but what about MD #3?

Pooled Productivity/Equal Share

- "The amount of the remuneration . . . [e]xcept as provided in paragraph (c)(4) of this section, is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician . . . ."
- Do professional services personally performed by MDs #1 and #2 take into account the volume or value of MD #3's referrals?
- What about fair market value?

Productivity v. Profit Share

- Using a pool of funds to then pay a bonus based on productivity
- When the source of funds is DHS revenues or profits, is it a productivity bonus or is it a profit share?
- Source or funding of the pool v. allocation of the pool

Source of Funds

- Typically, arises:
  - In diversified systems/multi-corporation structures
  - Payments to physician group from entity other than employer
  - Trying to characterize as productivity bonus
- Translates to “takes into account volume or value of referrals” – thus, you should be attuned
- This is Halifax
- DOJ now thinks any funds ***originating*** at hospital takes into account volume or value

Consultation Exception to Referral Definition

- Why is the exception important?
- History of the exception.
- The Stark Law applies to referrals, but "referral" does not include a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services, by a radiologist for diagnostic radiology services, and by a radiation oncologist for radiation therapy or ancillary services necessary for, and integral to, the provision of radiation therapy," if:
  - The request results from a consultation initiated by another physician (whether the request for a consultation was made to a particular physician or to an entity with which the physician is affiliated); and
  - The tests or services are furnished by or under the supervision of the pathologist, radiologist, or radiation oncologist, or under the supervision of a pathologist, radiologist, or radiation oncologist, respectively, in the same group practice as the pathologist, radiologist, or radiation oncologist.

Consultation Exception to Referral Definition *cont'd*

- "Consultation means a professional service furnished to a patient by a physician if the following conditions are satisfied:
  - (1) The physician's opinion or advice regarding evaluation or management or both of a specific medical problem is requested by another physician.
  - (2) The request and need for the consultation are documented in the patient's medical record.
  - (3) After the consultation is provided, the physician prepares a written report of his or her findings, which is provided to the physician who requested the consultation.
  - (4) With respect to radiation therapy services provided by a radiation oncologist, a course of radiation treatments over a period of time will be considered to be pursuant to a consultation, provided that the radiation oncologist communicates with the referring physician on a regular basis about the patient's course of treatment and progress."

Consultation Exception to Referral Definition *cont'd*

- Exception only applies to certain type of services ordered by certain types of physician specialists.
- Must result from a consultation initiated by another physician.
- Consultation definition requires a lot of things to occur:
  - Documentation.
  - Written report to physician who requested the consultation.

Consultation Exception to Referral Definition *cont'd*

- If the "consulting physician" never returns the patient to the care of the physician who requested the consultation, query whether a consultation occurred?
- The relevant types of physician specialties are not defined in the regulations, *e.g.*, who qualifies as a "radiologist" and under what circumstances.
- Query how the exception applies to "interventional radiologists" and ancillary testing ordered by interventional radiologists that are ancillary and necessary to interventional radiology procedures.
  - On the one hand, the plain language of the regulations seems to indicate that the exception could apply, if you carefully comply with the express requirements of the exception
  - On the other hand, preamble language potentially indicates the contrary. 72 Fed. Reg. 5102, Sept. 5, 2007.
  - Must drill into how the interventional radiologists practice: regional and sometimes generational differences can impact the analysis.

Entity Definition and Under Arrangements

- What does it mean to “perform” the designated health service?
- How this impacted certain type of “under arrangement” deals, but . . .
- It did not do away with all under arrangement deals.

Isolated Transactions Exception and Earn-Outs

- Exception applies to "[i]solated financial transactions, such as a one-time sale of property or a practice, if all of the following conditions are met: The amount of remuneration under the isolated transaction is . . . Not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician or other business generated between the parties."

Isolated Transactions Exception and Earn-Outs *cont'd*

- This makes typical earn-outs highly problematic if they are calculated based on designated health services.
- They could be based on just physician services personally performed by the referring physician.
- The exception allows for commercially reasonable post-closing adjustments that do not take into account (directly or indirectly) the volume or value of referrals or other business generated by the referring physician.

2016 STARK LAW UPDATES

Major Changes to Stark Law

- New Exceptions:
  - Largely limited in scope
- New Interpretive Guidance
  - Significant flexibility
  - Prospective *and* retroactive application
- Signals future changes
  - Value-Based Payment & Gainsharing
- Other “Clean-up” Changes

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Exception for NPP Support Payments

- Recruitment of Non-Physician Practitioners (NPPs):
  - 42 C.F.R. § 411.357(x)
  - Covers payments from a **hospital**, **FQHC**, or **RHC** to a **physician** to assist in the physician's employment of an NPP in the **hospital's geographic area**.
  - Applies to physician's group via "stand in the shoes" requirements (80 Fed. Reg. 41910).
  - Both employed & contracted NPPs (80 Fed. Reg. 71305).

Limitations on Exception for NPP Support Payments

- "NPP" definition extremely limited;
- Substantially all services provided by NPPs to patients of physician must be "primary care services";
- Upper cap on support payment for a given NPP;
- Compensation not based on volume or value of referrals by physician, group, *or* NPP;
- Limits on frequency of use;
- May not violate AKS or any Federal or State law governing billing or claims submission;
- Formal requirements (writing, FMV, document retention).

Timeshare Exception

- 42 C.F.R. 411.357(y)
- Allows use of office space & equipment without a formal lease in place.
- Set out in writing signed by parties specifying items/services;
- Between *hospital or physician organization* and *physician*
- Restricted to E/M services
- Equipment timeshares:
  - Located in E/M office suite;
  - Only incident to physician services;
  - Not advanced imaging.
- Not conditioned on referrals
- Formal requirements consistent with other Stark exceptions.
- Cannot apply to arrangements that transfer control over the premises
- Cannot be based on per-unit or percentage based compensation

Interpretive Guidance

- Background:
  - Beginning in 2011, CMS assumed more active role in settling Stark Law violations through Self-Referral Disclosure Protocol ("SRDP");
  - Agency became more aware of the nature of many technical violations;
- New guidance to "reduce burden" and "improve clarity"
- CMS characterizes most as "statements of existing policy," meaning these apply *retroactively* as well.

Writing Requirement

- Single "formal" written contract no longer necessary to show an agreement is "set out in writing" for compensation exceptions:
  - "Facts and circumstances . . . must be sufficiently documented to permit the government to verify compliance with the applicable exception." (80 FR 71314).
  - "[T]here is no requirement under the physician self-referral law that an arrangement be documented in a single formal contract." (Id. at 71315).

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Writing Requirement in Practice

- Contemporaneous documents evidencing course of conduct may satisfy “writing” requirement. (80 FR 71315).
- Would the **available contemporaneous documents** permit a **reasonable person** to verify compliance with an **applicable exception** at the **time a referral was made**?

Examples of Documents Evidencing a "Writing"

- Board meeting minutes or other documents authorizing payments;
- Written communication (hard copy or electronic);
- Fee schedules for specified services;
- Checks, check requests, or invoices;
- Time sheets;
- Call coverage schedules;
- Accounts payable or receivable records documenting date, payment, & reason
- **"This list of examples is not exhaustive."**

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Writing Requirement in Practice *cont'd*

- **Other elements of exception must be met.**
- Signature:
  - Still required on *one* contemporaneous writing that "clearly relates" to others in collection.
- Set in Advance:
  - Documents showing course of conduct will not protect referrals *prior to* documents
  - Documents must evidence agreement on compensation *prior to* referrals, payments, items, or services passing between parties;
- Specifying items/services to be provided.

Term Requirement

- No requirement for single document to specify minimum term (80 FR 71317);
- “An arrangement that lasts as a matter of fact for at least 1 year satisfies this requirement.”
- Parties must demonstrate that arrangement:
  - Lasted for one year (as evidenced by writings); or
  - If terminated in < 1 year, was not renewed
- “Term” replaced with “duration” in many exceptions.

Holdover Requirements

- Previously, holdover up to 6 months allowed.
- Now, **indefinite** holdovers allowed, if arrangement satisfies exception at time of expiration.
- Limitations:
  - Must continue on same terms and conditions as original arrangement;
  - Any change = new arrangement that must fully satisfy an exception;
  - Parties bear the risk of ensuring arrangements remain fair market value.
- Fair market value exception no longer limited to arrangements <1 year.

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“Clean Up” Changes

- Remuneration
  - Items used “solely” to collect, transport, process, or store specimens for providing entity, or to communicate results to providing entity.
  - Treatment of “split billing”
    - No remuneration where physician bills separately;
    - Remuneration where DHS entity or physician bills *non-Medicare* payor on global basis
- Unified use of terms:
  - Volume or value
  - “Arrangement”

Ethical Dilemmas Faced by In-House Counsel in Stark Law Counseling: Relevant Rules of Professional Conduct

- Several Rules of Professional Conduct govern the provision of legal advice by in-house counsel and how to handle ethical quandaries that can arise, including:
  - Client Compliance with Law (Rule 1.2(d))
  - Organization as Client (Rule 1.13)
  - Terminating Representation (Rule 1.16)
  - Role as Advisor (Rule 2.1)
  - Alteration and Concealment of Evidence (Rule 3.4)
  - Advocate in Non-Adjudicated Proceedings (Rule 3.9)
  - Misconduct (Rule 8.4)

Client Compliance With Law (Rule 1.2(d))

- A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is ***criminal*** or ***fraudulent***, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of law.

Organization as Client (Rule 1.13)

- A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or ***a crime, fraud or other violation of law*** that reasonably might be imputed to the organization, and that is likely to result in ***substantial injury to the organization***, then the lawyer ***shall*** proceed as is ***reasonably necessary in the best interest of the organization***.
  - Normally, this involves referral to a higher authority within the organization.
  - However, referral may not be necessary if a constituent had an innocent misunderstanding of law and reconsiders action on advice of counsel.
  - If highest authority within organization refuses to address action that is clearly a ***crime*** or ***fraud***, lawyer ***may*** reveal information reasonably necessary to prevent substantial injury to the organization but ***not*** if information arose from lawyer's involvement in an investigation or defense of client.
- In dealing with an organization's directors, officers, employees or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- A lawyer representing an organization may also represent any of its directors, officers, employees, or other constituents, subject to Rule 1.7 on joint representation.

Terminating Representation (Rule 1.16)

- Withdrawal is appropriate when:
  - Representation would violate the Rules of Professional Conduct or law.
  - The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.
  - The client has used the lawyer's services to perpetrate a crime or fraud.
  - The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

Role as Advisor (Rule 2.1)

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors that may be relevant to the client's situation.

Alteration and Concealment of Evidence (Rule 3.4)

- A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.
- A lawyer shall not counsel or assist another person to do any such act.

Advocate in Non-Adjudicated Proceedings (Rule 3.9)

- A lawyer representing a client before a legislative body or administrative agency (*e.g.*, as a lobbyist) in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.
- Rule 3.3 requires "candor toward the tribunal."
- Rule 3.4 precludes falsification of evidence and assisting a witness in giving false testimony.
- Rule 3.5 bars *ex parte* communications unless authorized by law or court order, as well as seeking to influence an official by unlawful means.

Misconduct (Rule 8.4)

- Among other things, it is professional misconduct for a lawyer to:
  - Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.
  - Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
  - ***Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation***.
  - State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules or other law.
  - Present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.
  - Violate an anti-discrimination law.

Ethical Quandary #1

- You know that the executive in charge of physician outreach and development is entering into above-market compensation arrangements with key physicians, but he does not seek your counsel. What should you do?

Ethical Quandary #2

- A VP asks you to develop a medical director contract for a key physician based on a term sheet he has already negotiated with the physician. You believe that the hourly rate exceeds FMV and know that the job does not require (and that the physician will not put in) the 15 hours per week that the term sheet calls for. What are your ethical obligations under the Rules of Professional Conduct?

Ethical Quandary #3

- You are working with physician group representatives to develop a medical director and call coverage arrangement. The group is very frugal and has declined to have its own legal counsel. They request your advice on structuring certain specific aspects of the arrangement to comply with the Stark Law and AKS, including the compensation formula, length of term and hours expectation. How should you handle?

Ethical Quandary #4

- You advise the executive team that the current structure of the physician group/practice subsidiary does not comport with the Stark Law "group practice" definition and that your investigation indicates that the profit distribution methodology does not comply with the Special Rules. You recommend self-disclosure under the SRDP. The executive team asks you to quantify the risks of non-disclosure. Can you do this? What should you do if the CEO specifically instructs you not to pursue self-disclosure or refund? What if the refund recommendation is adopted but certain execs drag their feet in supplying needed background information?

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