PAY-PER-CALL MARKETING

TWENTY FIRST CENTURY MARKETING PROGRAMS IMPEDED BY TWENTIETH CENTURY RULES

by Jeffrey Segal, MD, JD and Michael J. Sacopulos, JD

Remember the days when a doctor took out a half page ad in the Yellow Pages – and we quaintly called that marketing. The world has changed. One 21st century marketing program, pay-per-call, is being embraced by doctors across the country.

Here's how it works. Internet marketing companies create a platform which either markets to patients (push) or serves as a magnet for prospective patients (pull). This might include an email blast to a proprietary list. Or a search-engine optimized web site with rich information.

Once a prospect is interested in the services being promoted, the company directs those prospects to health care providers participating in a designated geographic area. The provider pays a fee for each substantive lead – the lead being measured as a phone call to the doctor's office lasting longer than a few seconds. It's up to the office staff to convert the phone lead into an office appointment. Sounds great. A lead on the telephone is probably more valuable than an email inquiry. If the phone's ringing, what's not to like?

We hate to be the skunks at the garden party, but legacy statutes are not particularly supportive of 21st century marketing programs. The federal government has laws on its books which prevent "kickbacks" or fee-splitting. These laws predate pay-per-call marketing by many years, but these laws are still valid. The laws say a kickback is a payment designed to induce a referral for health care. On the surface, pay-per-call programs seem to contain the ingredients referenced in anti-kickback statutes.

Fortunately, there are safe harbors which don't trigger enforcement of fee-splitting penalties – such as when a doctor refers to another doctor in his multi-specialty practice – and they are both employees in the same facility. If they split profits at the end of the year, then, in a sense, the referral has generated extra fees split by all. As a safe harbor, this does not trigger any action.

On the other hand, if two unrelated doctors have a handshake agreement whereby referrals will be paid a cool $300 for every surgery – that's likely against the law. No safe harbor there. We should note that the federal anti-kickback rules apply only to Medicare-Medicaid providers. Those physicians they do not participate in Medicare-Medicaid are outside the scope of these laws. Also the laws apply to professional services. It may be possible to structure pay-per-call to fall outside the scope of federal law by limiting the scope of offers to products only. However, as these pay-per-call marketing plans typical operate, they would be in violation of federal law. Many states, though, have parallel statutes affecting fee-splitting; such as California Business and professional Code Section 650 which bars licensed physicians from offering or receiving any form of consideration in return for patient referrals.

WWDHHSD (or What Would Dept. Health and Human Services Do)…The Office of Inspector General for U.S. Dept. Health and

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Human Services ("OIG") issued an Advisory Opinion on a pay per call program. There, OIG concluded that a pay per lead program did indeed violate the plain language of the Anti-Kickback Statute. And, such a program did not qualify for any statutory safe harbor. That said, OIG concluded they would not enforce the statute against participants in those programs, because such programs did not promote the type of abuse the statute was meant to curtail. The federal government opined pay-per-call, as outlined in the Advisory Opinion, was kosher.

The policy is similar to choice the federal government exercises to "tolerate" medical marijuana purchases. Medical marijuana is legal under a number of state statutes. But, medical marijuana still violates federal law. Nonetheless, the current federal policy is to look the other way.

While helpful in giving a doctor comfort, a doctor making a decision whether or not to participate in a pay-per-call program must also pay attention to policies of their state professional licensing board. Most licensing boards have explicit prohibitions against "fee splitting."

It's unclear whether state licensing boards would follow the lead of the federal government, Would they acknowledge, as Dept. H.H.S. does, that such programs violate criminal statutes with no safe harbor – but opt against enforcement? Nobody knows. We can all agree that no physician wants to be the test case. The reality today is that many Board investigations are complaint-driven. So, if patients complain to the Board for any number of reasons, an investigation might broaden to include allegations fee-splitting. Doctors who want to test the waters with pay-per-call programs would be well advised to proactively lobby their licensing bodies to update their decades-old fee-splitting policies. Medical Justice can provide you with a template of model language for revising the policy.

JEFF SEGAL
Founder and CEO
Medical Justice Services
Contact Jeff at
jsegal@medicaljustice.com

MIKE SACOPULOS
General Counsel
Medical Justice Services
Contact Mike at
mike_sacopulos@sacopulos.com