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Ratting on the Competition

Sleep Review - May-June 2006

by Daniel B. Brown, JD

Be careful or the trap you spring could snare you instead.

As if health care was not competitive enough, you may find that some providers try to get ahead by playing on—or over—the edge of the law. Should you try to level the field by turning them in? Consider the following hypothetical situation.

Our hero, Jim, manages a six-bed sleep laboratory. A long-time business guru, Jim runs a clean laboratory. He is good with the numbers and is a people person to boot; Jim's laboratory has gone 28 straight months without any staff turnover.

Jim's bosses, Drs Stephens and Marshall, are pulmonologists who opened the laboratory as part of their practice 3 years ago. Business is good. The waiting list dipped to 8 nights after the recent two-bed expansion. Wait times now hold steady at 10 nights.

Jim has just finished briefing the evening staff and is on his way out the door when Dr Stephens' new nurse, Linda, asks if he has a second. Linda recently moved to town from Capital City, where she worked for Moonlight, a sleep laboratory management company.

You know,Linda says, "at Moonlight, the focus was on filling the beds. They would put a few salespeople directly in a referring doctor's office. The sales people would hand out brochures, answer questions, and then, once the doctor prescribed the test, they would prescreen the patient, schedule the test, and work through insurance issues.

"And they let you know they appreciated you," she adds. "Once the office referred 15 tests a month, Moonlight bought lunch for the doctor's entire staff. If they hit 25 in a month, there would be free tickets to the touring Broadway series plays or gift certificates to the fancy restaurants in town. I'm sure they made it worth the doctor's while, too. Don't you think we could do some of that here?"

"Listen, Linda," Jim replies, "that's not really our style, but I'll mention it to Dr Stephens. I'm off to the physicians' monthly meeting right now."

That night Jim learns that Moonlight is coming to town to open a new sleep laboratory. Moonlight has signed on with the main competitors to Jim's practice, a seven-physician pulmonology group that has been anxious to open its own sleep laboratory for some time.

Jim approaches Dr Stephens to discuss Moonlight's tactics. "You know," Dr Stephens says, "that sounds kinda fishy. Call our lawyer and see what he says about it. Maybe we can cut these guys down before they even get started.

"And, hey," he continues, "my daughter announced she's expecting our first grandchild. So I'm going

to set up my son-in-law in the medical supply business to make sure things go well for them, if you know what I mean. I'm going to prescribe all the lab's CPAP to his new shop, and I want you to make sure that the staff tells all our patients to get their CPAP prescriptions filled there once it opens. Understand?"
Jim nods his head and goes home to an uncomfortable sleep.

Throwing Stones Can Sometimes Cause A Funny Bounce
Attacking a competitor on the legality of their operations can be a risky business strategy. Like a wounded animal, an attacked company can thrash back in some unexpected ways. If your facts are wrong, then your allegations about your foe could come back as a defamation suit. You could be liable for damages if it can be proved that your competitor's business suffered due to your wrongful comments. If your allegations cause vendors or patients to change their terms with the potentially illegal operator, then you could face liability for wrongful interference with business relationships.

Still, in certain situations it may be possible to level the playing field if you believe a competitor is not playing by the rules. The first step is to consult with knowledgeable legal counsel to assess the legality of the suspect behavior and advise you on the best course to bring the competitor in line.

For example, in the hypothetical above, Jim's legal advisor would likely consider whether Moonlight's aggressive marketing conduct violates the federal anti-kickback law. The anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursed by a federal health care program. If the Capital City doctors bill Medicare for any tests, and if Moonlight's marketing activity involves remuneration paid purposefully to induce or reward referrals of items or services payable by a federal health care program, then the anti-kickback statute is violated. For purposes of the anti-kickback statute, "remuneration" includes the transfer of anything of value, not only cash but gifts or in-kind items as well.

Violation of the statute constitutes a felony punishable by a maximum fine of $25,000, imprisonment of up to 5 years, or both. Conviction also leads to automatic exclusion from federal health care programs, including Medicare and Medicaid.

If Jim's counsel believes Moonlight's actions are suspect, Jim can take a variety of actions. A simple and anonymous tactic is to notify the Office of Inspector General (OIG) using its "hotline." (See "Think Fraud Is Afoot?" on page 90.) The OIG is the part of the US Department of Health and Human Services charged with enforcing the health care fraud and abuse rules.

However, this low-level contact may not be very effective, according to Marc Raspanti, a nationally recognized white-collar defense lawyer at Miller, Alfano & Raspanti PC in Philadelphia. "While the hotline principle sounds great," Raspanti says, "in reality, hotline tips are rarely detailed enough to result in a meaningful investigation."

Raspanti, who served as lead qui tam plaintiff's counsel in the government's case against SmithKline Beecham Clinical Laboratories in February 1997, added that health care fraud and abuse cases are just too fact intensive for cursory and anonymous reporting services.

A more involved and public method is to become a relator or "whistleblower" under the growing state or federal False Claims Acts. The False Claims, or "whistleblower," laws encourage people to step forward with their knowledge of health care fraud by sharing the government's recovery with the whistleblower

The rewards can be sizable. Each fraudulent bill presented by a sleep laboratory or doctor to a Medicare carrier or Medicaid office can be subject to as much as a $33,000 statutory penalty. Recent case law links violations of the anti-kickback law or patient self-referral laws to the presentation of fraudulent claims. So, if a six-bed sleep laboratory bills 40 Medicare tests a week at the same time its referral practices violate the law, then the laboratory's maximum false claims exposure can run to more than $1,300,000 a week.

But being a whistleblower can be a 4- to 6-year emotional roller-coaster ride. Many do not get the big rewards for their efforts. "The whistleblower may spend years convincing the government to take over his or her case," Raspanti says, "and then spend years fighting with the putative defendant to get paid."

Protecting Your Own

Because there may be a potential whistleblower in your own operation, it is wise to think about protecting your facility against allegations from within. The best way to do that is to adopt a corporate compliance plan applicable to your line of business.

The purpose of a compliance plan is to sensitize an organization to the laws applicable to its operation in order to detect, report, and resolve noncompliant behavior. Compliance plans set forth formal procedures for employee training, vetting arrangements with referral sources, and reporting issues and processes for resolution of compliance issues. The OIG has published guidance on what a compliance plan should contain for medical supply companies and group physician practice, among others.

If our hypothetical hero Jim's radar is properly tuned, he will know to ask his counsel about Dr Stephens' proposal to set up his son-in-law in the medical supply business. That is because Dr Stephens' plan is a bald violation of the federal patient self-referral or "Stark" law.

The Stark law prohibits physician referrals of designated health services, such as durable medical equipment, for Medicare or Medicaid beneficiaries to entities with which the referring physician, or members of their immediate family, have a financial relationship, unless an exception applies. The Stark II regulations define "immediate family member" to include a son-in-law or daughter-in-law. Because CPAP is an item of durable medical equipment, Dr Stephens' planned referral of his patients to his son-in-law's supply company for the device will become a Stark violation the instant the supply company submits an invoice for the CPAP to the applicable durable medical equipment regional carrier (DMERC). No exception to the Stark law would apply in this situation—even if the physician could prove that the son-in-law provided superior service at a lower cost. The law perceives the parties' conflicting interests as the evil to be remedied without regard to the actual health care behind the service.

The Stark Law carries significant civil sanctions for violations. These range from denial of payment for the CPAP to mandatory refunds of amounts collected in violation of the statute. The statute also imposes a civil money penalty of up to $15,000 for each bill or claim a person knows or should know is for a service that follows a prohibited referral. If the physician or entity knows or should know that a referral scheme had a principal purpose of assuring referrals, which, if directly made, would be in violation of the statute, then violators face a civil money penalty of up to $100,000 for each device sold on the basis of the prohibited referral.

Like an insurance policy, keeping your own practices safe from attack can bring about its own rewards. Consider a legal audit of your practices and the adoption of a corporate compliance plan. That way, you, and Jim, can work on a good night's rest.

Normal Version