

Conference Speaker Article

Radiologists and Their Business Significant Others: Underappreciated Traps in Stark

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Many radiologists labor under the misperception that the Stark statute has little meaning to them in their business relationships. While it is true that Stark exempts from its prohibitions a referral by a radiologist for radiology services pursuant to a consultation request, relationships between radiology practices and non-radiology practices are implicated in the operational realities of the Stark statute.

The statute and regulations prohibit a physician from referring a Medicare or Medicaid patient to an entity with which the physician or an immediate family member has a financial relationship when the referral is for “designated health services,” unless the relationship meets one of the many specified exceptions. Imaging services including MRI, CT, and ultrasound are designated health services (DHS). The specific list of what qualifies as DHS changes periodically. The current list is enumerated explicitly by CPT code in a document that is posted on the Web as it is updated at <http://www.cms.hhs.gov/medlearn/refphys.asp>.

Because of the sweep of the Stark statute and regulations, it reaches into the internal operations of physician group practices that seek to bill for imaging services, whether technical components or professional components. In addition, the Stark statute draws into its implications the overall Medicare reimbursement rules. For radiologists, one of the primary applications of Stark arises with respect to how radiologists can make their services available to physician groups that otherwise would simply refer to them. The two most common forms of these relationships are:

- ✧ Performing interpretations for a non-radiology group that will bill for them.
- ✧ Sharing time on imaging equipment, such as MRI or CT.

Physician Services

Many people believe that the Stark statute only applies to referrals for the technical components of diagnostic services. In fact, this is wrong. The first exception in the statute is for referral to another physician who is “in the same group practice” as the referring physician. Because the definition of a group practice requires a unified business where all of the physicians use the group’s facilities, the referral must be to a physician who is using the group’s facilities when they are performing designated health services.

This requirement implicates the ability of a treating physician group to contract with an off-site independent contractor radiologist to read studies by teleradiology or otherwise when the radiologist remains in his own office. Under those circumstances, the radiologist would not be “in the same group practice” while he is performing those interpretations, because he is not using the billing group's facilities. The mechanism by which the non-radiology group bills for the services of the independent radiologist is under the reassignment rules - the rules that establish under which limited circumstances Medicare will cut a check to someone who did not literally perform the service. It is these rules that permit a Medicare check to be paid in the name of the professional corporation that employs a physician or in which they are a shareholder or partner. Since 1993, one of the reassignment rules has prohibited a group that ordered an imaging service to buy the professional component from a radiologist who is not part of the group. Freestanding imaging centers could purchase these professional components from independent radiologists because those centers don't order the services.

In the Medicare Modernization Act, Congress enacted a provision that would allow reassignment in the context of any contractual relationship between a physician and the entity to which he is contracted, as long as the physician had access to the data submitted in claims on his behalf, and both the billing entity and the physician

accepted joint and several liability for any overpayments. This reimbursement change, however, did not change the Stark rule that requires the radiologist to perform those interpretations on the group's premises if the group expects to bill for them.

In-Office Ancillary Services

The second major exception in Stark is for a physician referral for services that meet the definition of in-office ancillary services. This is the exception that addresses technical components. To be allowed under Stark, these services must be performed personally by the referring physician, by a physician who is a “member of the same group practice,” or by individuals who are “directly supervised” by the physician or by another physician “in the group.” Independent contractors meet the definition of “another physician in the group practice,” and therefore can conduct the relevant supervision. Consequently, the radiologist who is performing the interpretations at the group’s offices could also provide the requisite supervision to the extent that such supervision is necessary. The level of supervision must meet the standards that otherwise generally apply in Medicare. Under the Medicare reimbursement rules, there are three levels of supervision that are established by CPT code for diagnostic tests. These are (1) general supervision, which means an overall supervision and control without a physician on premises; (2) direct supervision, meaning a physician in the group is in the office suite and immediately available to assist; and (3) personal supervision, which means the supervising physician is present in the same room with the patient.

The second criterion for in-office ancillary services is that these services be provided either in a centralized location over which the group has control 24/7, or where the facilities are shared, a physician who is a member of the same group furnishes physician services unrelated to the designated health services at that location. These rules establish specified numbers of hours of operation by the referring physician group practice in the location where the designated health services are being provided. There are three different levels of involvement at the additional location. These rules are complex and directly implicate shared facilities transactions. Even if the referring/billing group can meet the onsite other services standards, there are still other pitfalls.

When radiology group practices seek to share their facilities and equipment, they often lease the technical personnel to the sharing group as well. Although the Stark regulations permit “per-click” lease arrangements, a per-click lease for shared facilities would run afoul of the Medicare reimbursement prohibition against the markup of a purchased technical component.

That rule, which has been on the books since 1988, permits a physician to purchase a technical component, but does not allow the purchasing physician to mark up the purchase price. The billing group is limited in its reimbursement from Medicare to the actual acquisition cost or the fee schedule amount, whichever is less. As a result, when a radiology group leases time on its machine and its technician to a referring physician group on a per-click basis, there is a real risk that the transaction could be seen as a purchased technical component. The penalty for violation of this rule is a \$2,000 civil money penalty for each inappropriate claim.

Where the other requirements can be met, the referring group could lease the facilities for defined periods of time on a fair market value fixed-rate basis (e.g., \$2,000 for Wednesday and Friday afternoons from 1-4 p.m.). There is no case law nor other interpretation of the purchased technical component rules, so in the absence of contrary guidance, some referring group practices choose to take the risk that this approach will not violate the purchased technical component rules. Of course CMS, the OIG, or a court could rule differently at some point.

Conclusion

The Stark statute is unwieldy and complex. The regulations are highly technical. There is a lot of advice circulating about how to avoid problems under Stark. While many attorneys believe they can read the Stark regulations and offer safe guidance, unless they are familiar with the equally arcane rules of Medicare reimbursement, their guidance will not be complete. Although radiologists in many ways enjoy preferred status under Stark, as they struggle to maximize their business opportunities they need to consider these potential pitfalls.

Alice G. Gosfield, Esq. presented the session Quality & Clinical Culture: The Critical Role of Physicians in Accountable Healthcare Organizations at the Radiology Business Management Association's meeting, Managing a Radiology Business from the Top: Physicians and Administrators Partner for Success '05. She is the Principal of Alice G. Gosfield and Associates, PC, and may be reached at 2309 Delancey Place, Philadelphia, PA 19103; 215-735-2384; www.gosfield.com; agosfield@gosfield.com. For more information about the Radiology Business Management Association, call 888.224.7262 or go to www.rbma.org.