Fee Splitting

Fee Splitting: Implications for Physicians, Psychologists and Social Workers

Introduction

We are often consulted by healthcare clients with respect to contractual arrangements into which they have entered with hospitals, healthcare networks, PPO’s and the like. The agreements frequently provide that payment should be made based on a percentage of collections. We have attempted to set forth in this brief memorandum all of the relevant provisions in Illinois and Federally that point to a conclusion that fee splitting in any form is inadvisable.

Psychologists

Under the disciplinary provisions of the Illinois Clinical Psychologist Licensing Act, it is stated:

The Department [Illinois Department of Professional Regulation] may refuse to issue, refuse to renew, suspend, or revoke any license, or may place on probation, censure, reprimand, or take other disciplinary action deemed appropriate by the Department, including the imposition of fines not to exceed $5000 for each violation, with regard to any license issued under the provisions of this Act for any one or a combination of the following reasons:

12. Directly or indirectly giving or receiving from any person, firm, corporation, association or partnership any fee, commission, rebate or other form of compensation for any professional service not actually or personally rendered. (225 ILCS 15/15 (12);
The prohibition on fee splitting arrangements for psychologists can be found under the Rules for Administration of the Clinical Psychologist Licensing Act, Title 68, Chapter VII, Subchapter b, Part 400, Section 1400.80, Unethical, Unauthorized, or Unprofessional Conduct:

The Department may suspend or revoke a license, refuse to issue or renew a license or take other disciplinary action, based upon its finding of “unethical, unauthorized, or unprofessional conduct” within the meaning of Section 15(7) of the Act which is interpreted to include, but is not limited to, the following acts or practices:

f) Directly or indirectly giving to or receiving from any person, firm or corporation any fee, commission, rebate or other form of compensation for any professional services not actually rendered;...(emphasis added)

Physicians: The Prohibition Against Fee Splitting as a Public Policy Consideration

The prohibition against fee splitting arrangements is not limited to the profession of psychology. There is a pervasive view in state and federal legislation and administrative regulations that fee splitting violates the public interest in such areas as the practice of medicine, optometry, and law.

For example, in March 2002, the Illinois Attorney General issued an opinion that an insurance contract requiring physicians to provide 5% of revenues to a healthcare management company as a fee violates the Illinois Medical Practice Act of 1987, 225 ILCS 60/22(A)(14), with respect to Illinois licensed physicians. The Act states:
The Department may revoke, suspend, place on probationary status, or take any other disciplinary action as the Department may deem proper with regard to the license or visiting professor permit of any person issued under this Act to practice medicine, or to treat human ailments without the use of drugs and without operative surgery upon any of the following grounds:

Dividing with anyone other than physicians with whom the licensee practices in a partnership, Professional Association, limited liability company, or Medical or Professional Corporation any fee, commission, or other form of compensation for any professional services not actually and personally rendered...”(emphasis added)

There have been several Illinois Appellate Court cases that prohibit payments by physicians for management or other services based upon a percentage of professional income. In E & B Marketing Enterprises, Inc. v. Ryan, 209 Ill. App. 3d 626 (1991), a marketing firm promoted the name and practice of a physician in return for a consulting fee of 10% on all billings collected in connection with these referrals. This procedure was considered illegal fee splitting under the Illinois Medical Practice Act.

Similarly, an Illinois Appellate Court struck down a practice where optometrists and ophthalmologists entered into an arrangement where the optometrists would refer patients in need of ophthalmology services to the licensed physicians. Practice Management, LTD v. Schwartz, 256 Ill App 3d 949 (1993), appeal denied, 155 Ill 2d 575(1994) The court found that a danger of fee splitting arrangements is that they may motivate recommendations based on self-interest, rather than the competence of the professional.

In 1999, an Illinois Appellate Court found that a physician may argue that a contract was an invalid fee splitting
arrangement under the Illinois Medical Practice Act, even when the physician was at fault in negotiating and entering into the contract. *TLC Laser Ctr., Inc. v. Midwest Eye Institute, Ltd*, 306 Ill. App. 3d 411 (1 Dist. 1999).

Medicare/Medicaid Fraud and Abuse: Sobering Consequences

For a provider receiving federal dollars, the Medicare and Medicaid fraud and abuse statute provides a serious and sobering prohibition against fee splitting. Title 42 U.S.C. Section 1320a-7b states:

>Criminal penalties for acts involving Federal health care programs.

>(b) Illegal remunerations.

>(1) Whoever knowingly and willfully solicits or receives any remuneration...directly or indirectly, overtly or covertly, in cash or in kind –

>(A) in return for referring an individual to any person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program... shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years or both.

>(2) Whoever knowingly and willfully offers or pays any remuneration...directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person –

>(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program... shall be
guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years or both. (emphasis added)

Social Workers

Social workers appear to have been granted a slight leeway in their administrative rules:

Section 1470.96 Unethical, Unauthorized and Unprofessional Conduct:

(a) The Department may suspend or revoke a license, refuse to issue or renew a license or take other disciplinary action based upon its finding of “unethical, unauthorized, or unprofessional conduct” within the meaning of Section 19 of the Act, which is interpreted to include, but is not limited to, the following acts of practices:

(6) Directly or indirectly giving to or receiving from any person, firm or corporation any fee, commission, rebate or other form of compensation for any professional services not actually rendered. Social workers shall not participate in illegal fee splitting arrangements, nor shall they give or accept kickbacks for referrals. However, it is not unethical for social workers to utilize referral services for which a fee is charged, nor to participate in contractual arrangements under which they agree to discount fees; (Title 68, Professions and Occupations: Ch. VII, DPR Â§1470 – (emphasis added).

Social workers, however, are still subject to the fraud and abuse laws and should avoid fee arrangements that pay based on a percentage of collections.
**Conclusion**

Fee splitting arrangements for Illinois psychologists are prohibited by the Illinois Clinical Psychologist Licensing Act and its accompanying regulations. In addition, for providers receiving federal dollars, the Medicare and Medicaid federal programs prohibit fee splitting arrangements and impose both civil and criminal penalties. In general, many healthcare occupations consider fee splitting to be against public policy and therefore prohibit these types of arrangements.

**Suggestions/Recommendations**

We recommend that our healthcare clients renegotiate all contracts capable of interpretation as fee splitting arrangements. What should be suggested to the third party is a flat fee consulting agreement with a one year fairness or merit evaluation to determine whether the arrangement should be changed in any way. In this manner, the dollars received by the person who actually provides services are not based on a percentage of referrals, collections, etc. In addition, a reevaluation time term of one year is likely within the “safe harbor” of relevant law. Given potentially very serious civil and criminal consequences at the Federal level, we strongly encourage all providers to check their current contracts and be absolutely certain there is no fee splitting arrangement contained within them. If there is any ambiguity at all, the provider should immediately check with his or her legal counsel.