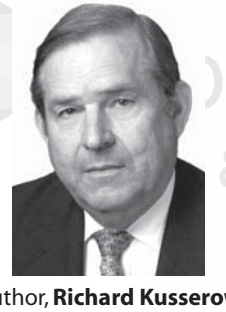
RICHARD KUSSEROW

Forgotten Issues in Physician Arrangements



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Hospitals Need to Document Why a Position is Medically Necessary and Why a Physician is Selected

Over the last year, I have written several articles about arrangements with physicians. This is an area of highest enforcement interest by the Department of Health and Human Services (HHS) Office of Inspector General (OIG). All one has to do is look at *qui tam* actions and settlement agreements to realize just how large a high-risk area this has become.

Our firm continues to be engaged by law firms and hospitals to conduct independent reviews of arrangements to identify any weaknesses that need to be addressed by legal counsel or management, and I have received many inquiries concerning arrangements with physicians. I now realize that there is one area relating to this subject that appears to be a blind spot for a great many hospitals. It lays not with the physician agreement document itself but the process that led up to the agreement.

The legal concerns of the OIG and the Department of Justice (DOJ) is that contracts with physicians to be medical directors or advisors and who make referrals of business or who are in a position to make referrals might be disguised "kickback" arrangements. As such, the provider community and their legal counsel are taking great care to establish "fair market value" (FMV) in determining pay rates for physician services. They also address the "commercially reasonable" standard arising from the Stark laws. Special attention also is given to ensuring proper evidencing of performance by physicians under these agreements.

What we are commonly finding in our reviews is that the hospital has not taken the time or effort to evidence why the positions are medically necessary in the first place. The government has made it clear that

it has been and continues to be a medical necessity to maintain quality control over the medical services at hospitals, and utilizing physicians on a part-time basis to do this is reasonable.

That does not mean that a hospital can establish an unlimited number of medical advisors or directors without proper cause. If the valid reason for having such a position is related to medical necessity, then it should be evidenced. When we are engaged at a hospital, however, and ask for that evidence, in most cases it does not exist. "It is obvious that we need that position" is the common refrain.

A related issue is a situation in which the decision is made regarding the need for the medical director/advisor position and how the decision is made to engage a certain physician for that position. When we inquire as to the reason that the physician under agreement was selected, often our answer is a blank stare. The government's concern is whether the individual selected was the most qualified among the available physicians or was the one who brought the most business to the hospital.

Before there is a collective groan on this issue, let it be known that this is not difficult to address. The easiest way is to use the chief medical officer and the credentialing committee to first define in writing why there is a medical need for the position. Using the same people, the hospital can explain why it is that the physician selected was the most qualified — and not because of all the referrals made to the hospital. This comes under the old adage: "An ounce of prevention is worth a pound of cure."

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