

Summary of OIG Advisory Opinion 11-12
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On August 29, 2011, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) issued favorable Advisory Opinion [11-12](#) relating to a health system's provision of neuro emergency clinical protocols and immediate consultations with stroke neurologists via telemedicine technology to certain community hospitals. Although the proposed telemedicine arrangement potentially implicates the Anti-Kickback Statute (AKS), OIG concluded that it would not subject the health system (Requestor) to administrative sanctions under AKS.

The Requestor is an operating division of a nonprofit corporation that provides nationally ranked neuroscience care through its flagship hospital. Under the proposed telemedicine arrangement, the Requestor would provide, at its own expense, the following items and services to certain community hospitals in the Requestor's service area: (1) neuro emergency telemedicine technology; (2) neuro emergency clinical consultations; (3) acceptance of neuro emergency transfers; and (4) neuro emergency clinical protocols, training, and medical education. The proposed arrangement aims to reduce the mortality and morbidity rates of stroke in the Requestor's metropolitan area and lower the costs associated with the transfer of stroke cases that could be managed at the local community hospitals.

Under the proposed arrangement, the Requestor would enter into a written agreement with each participating hospital that sets forth all of the services to be provided by each party under the program. In recognition of the Requestor's investment of time and capital in the proposed telemedicine program, participating community hospitals must agree not to participate in any other neuro emergency telemedicine service without the Requestor's prior approval for the length of the agreement. Neither the continued transfer of stroke patients to the Requestor nor the value or volume of any other business generated between the parties would be a condition of participation. Neither the Requestor nor the participating hospitals would bill any patient or third-party payor for the cost of the telemedicine technology.

OIG acknowledged that the proposed arrangement potentially implicates AKS because the Requestor and the participating hospitals are potential sources of referrals for federal healthcare program business to one another. Moreover, the safe harbor for personal services and management contracts is not applicable because use of the telemedicine program would be on an as-needed basis. Nonetheless, for the following reasons, OIG concluded that it would not subject the Requestor to administrative sanctions under AKS:

First, the Requestor would be unlikely to generate appreciable referrals through the proposed arrangement. Neither the participating hospitals nor their physicians would be required or encouraged to refer patients to the Requestor's hospital as a condition of participation.

Second, neither the volume or value of a hospital's previous or anticipated referrals, nor the volume or value of any other business generated between the parties, would be a condition of program participation.

Third, the primary beneficiaries of the proposed arrangement would be the stroke patients who can be treated at the participating hospitals' emergency departments through the

telemedicine program. Such treatment will be more timely and effective than transferring these patients to a comprehensive stroke center.

Fourth, neither the Requestor nor any participating hospital would be required to engage in any marketing activities, and each party would be responsible for the costs associated with its own marketing.

Finally, the telemedicine program is unlikely to result in increased costs to the federal healthcare programs because few, if any of the consultations provided would be billable to Medicare. Moreover, the program is designed to reduce the volume of transfers of stroke patients to the Requestor's hospital, and the costs associated with these transfers should correspondingly decrease.

The scope and thrust of this advisory opinion are similar to previous Opinions addressing telemedicine services, including Opinions 04-07, 99-14, and 98-18.

**The Fraud and Abuse Practice Group Leadership would like to thank Advisory Opinions Task Force members Julie E. Kass, Esquire (Ober Kaler, Baltimore, MD), and Heather Deixler, Esquire (Morgan Lewis & Bockius LLP, San Francisco, CA) for respectively writing and reviewing this summary.*