

Is Your Rental Arrangement Structured Correctly?

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Being a doctor complicates certain “business as usual” arrangements; where a typical business owner may enter into a lease with a tenant, rental arrangements between doctors are often not so simple because any such arrangement must meet specific criteria to pass scrutiny if reviewed by a regulatory authority.

To simplify some of the criteria required in such a rental arrangement, the transaction must be set forth in advance, in writing, and at fair market value, so as not to take into account any volume or value for referrals that may pass between the parties. In order to illustrate how papering transactions incorrectly can lead to regulators finding an impermissible kickback or referral let us use the example of an ophthalmologist moving his general practice into the office of a colleague’s office, who has a thriving LASIK practice. If the two determined that an employment or partnership arrangement is not on the table, and they prefer to maintain separate and autonomous practices, they may consider a rental arrangement. Because there is a high likelihood of referrals passing between the two practices, it is imperative that any arrangement between them conform with the above stated criteria, as well as additional requirements. Should the two begin referring between them but fail to set the rental arrangement compensation at fair market value, the arrangement would not be in compliance with applicable kick-back/self-referral laws. Ensuring that patient referrals are not taken into account in financial transactions between the parties is not difficult if established at the inception of the relationship, and done in the correct manner.

The first step in setting up a rental arrangement is identifying the correct structure of the arrangement you are looking to enter into. The two most commonly used and accepted structures are a lease arrangement or a

license arrangement. The difference between the two arrangements, while both are typically utilized in association with property, is that a license is a contractual right to do something on a property (for instance, operate a medical practice in a set space, with the assistance of personnel and equipment), whereas a lease is a property interest that includes possession of the property. For instance, if the ophthalmologist is responsible for her own equipment, personnel and supplies, a lease agreement would, most likely, be the appropriate document to paper the relationship, as her only interest at the space is her right to use the leased property. However, if the LASIK practice provides equipment, supplies and/or personnel to the ophthalmologist (including but not limited to a furnished exam room and office, and scheduling and phone answering services) a typical lease agreement would not adequately describe the arrangement; instead, a license agreement would better describe the arrangement, as the ophthalmologist would have a right to use the licensed space, equipment and personnel.

The second step in setting up a rental arrangement is determining fair market value of the arrangement. The standard for determining fair market value is whether the arrangement is “commercially reasonable and legitimate” even if there were no referrals between the parties. Determining fair market value may be done in a number of ways; determining appropriate rent for a space is performed by looking at similar spaces in the area and seeing what the cost is for a rental of comparable size and location, similar for the rental of equipment. Determining fair market value for personnel is also a calculation of salary and time allocated to your practice. For complex arrangements we highly recommend hiring an expert, either an independent health care accountant or health care valuation specialist, to perform your fair market value determination.

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An example of an improper rental arrangement is exhibited in *USA ex rel. Kosenski, MD*, where an anesthesiology group entered into an exclusive service arrangement with a hospital and the group received equipment, personnel, and services that was not accounted for under an agreement. The Third Circuit Court of Appeals found the arrangement to be a violation of both the Stark and Anti-Kickback Laws and the matter has been sent back to the lower courts for further adjudication. No determination as to the consequences of the violation in this matter for failure to comply has been made at this time; however, the ramifications of violating self-referral/kickback laws carry hefty potential civil and criminal penalties.

In sum, if you take the time to structure your rental arrangement appropriately before commencing, you will not only be protected if a business dispute arises, but will also be able to rest assured that your practice is compliant with all of the federal and state regulations. However, please be advised that the elements discussed herein do not constitute an exclusive list of required criteria for an appropriate rental arrangement. The purpose of this article was to highlight some of the intricacies

that come into play for doctors when structuring an appropriate arrangement. The best way to set up an appropriate rental arrangement for your practice is to contact a healthcare attorney to assist you. The risk you run by requesting assistance of a lawyer that does not specialize in healthcare rental arrangements is that lawyer's failure to identify exposure under self-referral laws. For additional information on this topic, or for assistance with a rental arrangement or other general practice questions, contact Jennifer Kirschenbaum at (516) 747-6700 ext. 308 or Jennifer@Kirschenbaumesq.com.

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DOH Practitioner Notification Program

The NYS Department of Health's Bureau of Narcotic Enforcement recently automated its Practitioner Notification Program to allow prescribers to have secure online access to certain of their patient's recent controlled substance prescription histories. Physicians can now view controlled substance prescription information through their Health Commerce System account if the patient has received controlled substances prescriptions from two or more practitioners and filled them at two or more pharmacies during the previous calendar month. DOH believes that providing secure access to this information will allow practitioners to better evaluate patients' treatment with controlled substances and determine whether there may be abuse or non-legitimate use.

Accessing the online Drug Utilization Report is voluntary and physicians are not required to report suspected cases of abuse. Please note that only the prescriber may use the Online Practitioner Notification Program to search for his/her patient. Office staff and other personnel are not authorized to search these records.

Additional information about the Program as well as instructions for establishing an HCS account can be found at www.health.state.ny.us/professionals/narcotic/practitioners/online_notification_program/2010-04-05_practitioner_letter.htm.