

ETHICS IN TREATMENT: MARKETING

By: Jeffrey C. Lynne, Esq.
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AGENDA

- ▶ 1. What are the current laws governing marketing and marketers?
- ▶ 2. What are the public policies behind these laws and how do they impact regulation of marketing?
- ▶ 3. What does a provider do when best patient practices conflict with the laws governing health care provision?

1 ISSUE DRIVING FRAUD AND ABUSES IN SUD INDUSTRY: HOW TO GET PATIENTS?



HOW TO MATCH SERVICES WITH DEMAND?

- ▶ Reputation (Goodwill)
- ▶ Advertising
 - ▶ Internet SEO = \$\$\$\$\$
 - ▶ Print advertising? (develops brand)
 - ▶ Billboards – overwhelming # of patients from out of town.
 - ▶ Call Centers
 - ▶ On-the-ground marketers (B2B)
- ▶ Patient Delivery Services (“Marketers”)
- ▶ Hospitals regulated by AHCA (have CON process)
- ▶ Medical Health Care vs. Behavioral Health Care
- ▶ In-Network vs. Out-of-Network patient population

ABUSES IN INDUSTRY

- ▶ Demand for patients drives opportunity to create supply.
- ▶ Housing providers moonlighting as “marketers” (sober homes).
- ▶ What is “Treatment”?
- ▶ Transportation (flights).
- ▶ Urinalysis testing.
- ▶ Patients are equally to blame.

POLICY OF HEALTH CARE LAW

- ▶ Written by insurance companies.
- ▶ Want patients to make health care decisions for themselves.
- ▶ Most SUD patients do not self-elect to go into treatment.
- ▶ Next of kin unable to distinguish between providers.
- ▶ Very little in-network benefits.
- ▶ Insurance refuses to pay for necessary care (Parity Act).

THE **BU\$INESS** OF RECOVERY



A Dose of Reality

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WE DON'T WANT INVESTORS TO KNOW WHAT WE'RE DOING.



ARE WE BAD PEOPLE?

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WE'RE GOOD PEOPLE WHO HAVE BEEN INFLUENCED BY A CORRUPT CORPORATE CULTURE.



OH, OKAY. CARRY ON.



LAWS GOVERNING MARKETING



ANTI-KICKBACK STATUTE

- ▶ Section 456.054, F.S.
- ▶ Florida's anti-kickback statute ("AKS") prohibits any health care provider or any provider of health care services from offering, paying, soliciting or receiving a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.
- ▶ Violation of this statute is considered a criminal violation and is punished under the terms of Florida's Patient Brokering Act.
- ▶ Does not apply – Ch. 397 entities not "health care providers."

PATIENT SELF-REFERRAL ACT

- ▶ Section 456.053, F.S.
- ▶ Florida's Patient Self-Referral Act of 1992 prohibits a health care provider from referring a patient for the provision of certain designated health services, or any other health care item or service, to an entity in which the health care provider is an investor or has an investment interest.
- ▶ The Act defines "designated health services" as: clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic-imaging services and radiation therapy services.
- ▶ Does not apply – Ch. 397 entities not "health care providers."

FEE-SPLITTING STATUTE

- ▶ Section 458.331, F.S.
- ▶ Florida's Fee-Splitting Statute prohibits a physician from paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split-fee arrangement in any form whatsoever with another physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services (this includes, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies).
- ▶ Does not apply – Ch. 397 entities not “physicians.”

CLINICAL LAB REBATES

- ▶ Section 483.245, F.S.
- ▶ Prohibits any person to pay or receive any commission, bonus, kickback, or rebate or engage in any split-fee arrangement in any form whatsoever with any dialysis facility, physician, surgeon, organization, agency, or person, either directly or indirectly, for patients referred to a clinical laboratory licensed under Part I of Chapter 483, F.S.
- ▶ Applies in those situations where treatment center owns a lab, but only admin. penalty and only applies to lab, not treatment center.

FLORIDA'S PATIENT BROKERING ACT OF 1996 (THE "BROKERING ACT")

- ▶ Section 817.505. Fla. Stat.
- ▶ Unlawful for any person to offer, pay, solicit or receive any commission, bonus, rebate, kickback or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in exchange for patient referrals to a health care provider or health care facility.

FLORIDA'S PATIENT BROKERING ACT OF 1996 (THE "BROKERING ACT")

- ▶ Criminal statute.
- ▶ Any person, including an officer, partner, agent, attorney, or other representative of a firm, joint venture, partnership, business trust, syndicate, corporation, or other business entity, who violates any provision of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
- ▶ Explicitly includes treatment centers (Ch. 397).

SAFE HARBOR: SUBSTANCE ABUSE INFORMATION SERVICE (“MARKETING”)

- ▶ Payments by a health care provider or health care facility to a health, mental health, or substance abuse information service that provides information upon request and without charge to consumers about providers of health care goods or services to enable consumers to select appropriate providers or facilities, provided that such information service:

SUBSTANCE ABUSE INFORMATION SERVICE (“MARKETING”)

- ▶ 1. Does not attempt through its standard questions for solicitation of consumer criteria or through any other means to steer or lead a consumer to select or consider selection of a particular health care provider or health care facility;

SUBSTANCE ABUSE INFORMATION SERVICE (“MARKETING”)

- ▶ 2. Does not provide or represent itself as providing diagnostic or counseling services or assessments of illness or injury and does not make any promises of cure or guarantees of treatment;

SUBSTANCE ABUSE INFORMATION SERVICE (“MARKETING”)

- ▶ 3. Does not provide or arrange for transportation of a consumer to or from the location of a health care provider or health care facility; and

SUBSTANCE ABUSE INFORMATION SERVICE (“MARKETING”)

- ▶ 4. Charges and collects fees from a health care provider or health care facility participating in its services that are set in advance, are consistent with the fair market value for those information services, and are not based on the potential value of a patient or patients to a health care provider or health care facility or of the goods or services provided by the health care provider or health care facility.

SAFE HARBOR: DOESN'T VIOLATE FEDERAL ANTI-KICKBACK STATUTE

- ▶ (3) This section shall not apply to:
 - ▶ (a) Any discount, payment, waiver of payment, or payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder.
- ▶ Exception – bonuses paid to employees.
 - ▶ Must be W-2 employees.
 - ▶ Cannot simply “deliver patients.”
 - ▶ Must do actual marketing.

SAFE HARBOR: DOESN'T VIOLATE FEDERAL ANTI-KICKBACK STATUTE

- ▶ *United States v. Crinel*, 2015 U.S. Dist. LEXIS 77773, *23 (E.D. La. June 16, 2015):
“If an employee refers a patient who is actually eligible for Medicare and receives medically necessary services, the employer may provide appropriate compensation in the form of a referral fee.”

SAFE HARBOR: DOESN'T VIOLATE FEDERAL ANTI-KICKBACK STATUTE

- ▶ *United States v. Luis*, 966 F. Supp. 2d 1321, 1330 (S.D. Fla. 2013): “For either safe-harbor provision to apply, the remuneration must have been made to the employee for furnishing or providing covered items or services or for items or services payable under Medicare, not simply for referrals.”

SAFE HARBOR: DOESN'T VIOLATE FEDERAL ANTI-KICKBACK STATUTE

- ▶ *United States v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011) (finding as long as some portion of a payment is for referrals, the safe-harbor provisions will not apply).

SAFE HARBOR: DOESN'T VIOLATE FEDERAL ANTI-KICKBACK STATUTE

- ▶ Therefore, the employees must be doing something above and beyond simply referring patients. They must be actively “marketing” the company and getting paid fair market value for those services. Paying only minimum wage with a bonus as commission may be viewed as trying to circumvent this requirement.

WHAT IS MARKETING?

- ▶ **“Marketing” is a verb.**
- ▶ **A “Marketer” is not a patient delivery service.**

POLICY BEHIND LAWS

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eth·ics (eth'iks)
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of right conduct
of life.

POLICY BEHIND HEALTH CARE LAWS

- ▶ **Assumptions - Financial incentives:**
 - ▶ Skew a physician's judgment,
 - ▶ Increasing utilization,
 - ▶ Undermine competition; and
 - ▶ Potentially compromise quality.
- ▶ Physicians are in a position of trust and that patients themselves cannot be expected to safeguard against overutilization or the other purported dangers of self-referral.
- ▶ Desire for patients to make health care decisions for themselves.

POLICY BEHIND HEALTH CARE LAWS

- ▶ Ex. physician owns an imaging company, he or she will use more imaging services, over-utilize and harm patient.
- ▶ Question – who does excessive urine testing hurt?

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