

New Ambulance Service Related Advisory Opinion.

By G. Christopher Kelly

In a new advisory opinion, number 04-10, issued on August 4, 2004, the Department of Health and Human Service's ("DHHS") Office of Inspector General ("OIG") has concluded that it would not impose penalties against a County or its related entities for an arrangement between first responders and secondary transporters. The OIG is the office of DHHS that, among other duties, monitors healthcare providers for violations of the Anti Kick-Back Act related to Medicare and other federal healthcare benefit funds. The advisory opinion was requested by an unnamed County.

The Anti Kick-Back Act ("AKA") makes it a criminal offense to intentionally give or receive anything of value in exchange for the referral of Medicare patient business. Violation of the statute is a criminal felony punishable by a fine of up to \$25,000 and/or imprisonment of up to five years. A conviction of an AKA crime will also lead to exclusion from the Medicare, Medicaid, and other federally funded health benefit programs, meaning that the provider can no longer bill these insurance programs. There can further be civil liabilities under the AKA through the False Claims Act or other similar laws which would require all funds received as part of the illegal activity to be returned to the government, along with additional heavy penalties. Because violations of the AKA can be very subjective, the OIG issues these "advisory opinions" to give medical providers the opportunity to have a course of action approved prior to engaging in something that could later lead to severe liabilities.

The County's proposed arrangement was for their fire rescue units to respond to all 911 calls and provide any necessary first-responder services, then call for a second responder in cases that require transportation. The County wanted to open bidding up to ambulance services to provide for the second responder portion of the arrangement. The winning bidder would be the ambulance service who agreed to pay the County the highest rate for the first responder services (including dispatch service) performed by the County.

As first responders, the County fire and rescue will not be able to bill insurance programs such as Medicare for the services rendered to patients who are transported by another entity. Therefore the transporting entity (the "second responder") will be billing for the service and receiving payment. They will then in turn pay the first responder for their services. The theory is that it was a team effort, but since there is only one payment it should be divided among the team. This however begs for kick-back violations! In the worst light, the County is soliciting a kick-back (i.e. a direct payment of cash, possibly more cash than the value of the County's first responder services) in exchange for granting an ambulance service an exclusive opportunity to bill for all of the emergent transports in the County. The OIG acknowledged that this arrangement could raise kick-back violations, but they stated they would not impose sanctions against the County for proceeding with the arrangement. The OIG listed five factors that they found were in favor of allowing the County's proposal.

First the arrangement was proposed by a local government entity who was trying to provide adequate medical services to its community through a comprehensive EMS

program. Second, the County anticipates that the payment for first responder services will in fact be less than the cost of providing those services, so they will be getting *underpaid* for their services, which would not be a kick-back. It was also noted that Medicare allows for payments from ambulance services to first responders. Third, the number of individuals with federal healthcare benefits who need transports will not be affected by the arrangement, so the cost to the government will not be increased because of the way the County chooses to run EMS. Fourth, while there will be an exclusive contract, the open bidding process will allow for competition. And fifth, the money going to the County that could be considered a “kick-back” is actually going into the County’s treasury to be used for the good of the public. Kick-backs are usually designed to benefit a private individual, therefore there is little concern for a true “kick-back” where the money is going to another government entity.

As with any advisory opinion, the OIG stated that the opinion was based on the information given to it by the requesting County, and therefore was dependent on its full and truthful disclosure of facts. As with all advisory opinions, the opinion can not and should not be relied upon by parties other than the one specifically requesting the opinion. The OIG and the federal government are not bound by this opinion and reserve the right to change their position in the future. Specific facts often lead to very different results (for example the IOG expressly did not give an opinion as to the propriety of the bidding process itself, and clearly if the amount received by the County was more than the value of their services the opinion might have been not to allow the arrangement), therefore, you should consult an attorney before beginning any course of action that you have questions about. For the same reasons, nothing in this article is intended by the author to be construed as legal advice.

The author has given a summary of the contents and provided some editorial comments on this advisory opinion. To view the entire opinion, go to:

<http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao0410.pdf>

Other advisory opinions can also be found at the OIG’s web site.

G. Christopher Kelly is an attorney practicing in Atlanta, GA. Chris focuses on federal laws and regulations as they relate to the health care industry and specifically to the ambulance industry. Chris lectures and advises ambulance company clients across the U.S. He can be reached at gck@hsbw.com or (404) 881-1200. For help with or questions on HIPAA, go to www.emshipaa.com.