Contracting with Subspecialists: Nuts and Bolts

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* Financial Interest

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- Business and legal advisors to physicians
- Publishers of the Goodwill Registry, used in valuation of ophthalmology and other medical practices
- Handle and advise re: practice buy-ins, buy-outs, sales, mergers and valuations
Why Associate with Subspecialists?

- General oph practice can offer more “full service” menu
- This appeals to patients – one stop shopping
- Better coordination of treatment among eye providers
- Appropriate financial benefits

Two Basic Options

- Mere lease of space and support services to Subspecialist
  VS.
- Member of the “Team” – Subspecialist becomes a provider in General’s practice

Lease of Space and Services

- General makes space available to Subspecialist
- General may also offer support services: scheduling, check-in, check-out, chart pulling, loading patient room
- Subspecialist may develop own chart, or use General’s chart
Lease of Space and Services

- Subspecialist pays rent for use of General’s space, utilities and services
- Subspecialist bills and collects under his or her own provider numbers – and keeps 100% (net of rent)

Legal Considerations

- Stark applies because of “designated health services”, including injected retinal drugs, A-Scans, B-Scans, OCT, other ultrasound
- Anti-kickback rules apply because referrals are made to Subspecialist and $$ are paid to General

Stark Lease Rules

- Must be in writing with a contract term of at least one year
- Amount of space rented should be no more than necessary for Subspecialist’s legitimate business purposes
- Arrangements would be commercially reasonable even if no referrals were made
Stark Lease Rules

- Rent must be:
  - Set in advance
  - Fair market value
  - Not a percentage of receipts or charges generated by lessee Subspecialist
  - Not “take into account the volume or value of referrals or other business generated between the parties”

Anti-Kickback Lease Rules

- There is an AKS safe-harbor for rental arrangements
- Similar to Stark, but more stringent
- AKS safe-harbor: a part-time lease must specify “exactly the schedule of such [usage] intervals, their precise length, and the exact rent for such intervals.”

Is AKS Safe Harbor Doable?

- Remember that the stringent AKS standard is only a “safe-harbor”
  - If you fail to satisfy all of its requirements, you are not necessarily in violation of the law…
  - you are just not guaranteed immunity from government challenge
AKS Safe Harbor

- Health care attorneys advise their clients to come "as close as possible" to safe harbor compliance
- The reality is that few leases will fully comply with the "exact schedule" rule

Setting the Rent Rate

- Per Stark and AKS, rent may not be a percentage of Subspecialist’s collections
- Should be a fixed dollar amount per week, month, or year
- Ideally the dollar amount is fixed \emph{per month}, regardless of usage by Subspecialist (so as not to reflect "volume or value of referrals or other business generated between the parties")

Setting the Rent Rate

- Some leases are \emph{per diem} leases
- This is more aggressive, in terms of Stark and AKS compliance, because arguably the total rent will vary based on usage
Fair Market Value

- Per Stark and AKS, FMV rent for space must be based on the value of the property for “general commercial purposes (not taking into account its intended use.)”
- Also, fair market value cannot take into account the value to lessee of being near a referral source

On the other hand….

- It is reasonable to attribute some rent value to the low commitment nature of the sublease.
  Consider:
  - A short term lease is priced higher than a long term lease
  - Fully furnished space is priced higher than bare space
  - A small amount of space is likely more expensive to lease than a large amount of space, per foot

And furthermore….

- Pure space is not the only service being provided
- General may be providing extensive support services, utilities, and use of equipment
- The charge for these extra services is lumped into the per diem rate
**The Bottom Line**
- Lease arrangement may not be terribly profitable for the lessor/General oph
- But there are other considerations:
  - General bears no coding risk for subspecialist
  - And no malpractice risk
  - And no risk for drug inventory

**Member of the Team Alternative**
- Subspecialist is just another employee or contractor providing services in General’s practice
- General bills and collects, in General’s name, and keeps 100% of proceeds (less W-2 or 1099 pay to subspecialist)

**How to Compensate Subspecialist Contractor**
- ….. like any other provider in the Practice: salary/bonus, or percentage of collections, or per diem
- Most of the arrangements are % of collections. Range is generally 40-60%
- “Collections” should exclude drugs and injectables
Other Rules

- If Subspecialty surgery is needed, it should be done at General’s usual facilities, and billed and compensated in the usual fashion
- Subspecialist will not see patient at Subspecialist’s own office except in case of emergency
- Subspecialist is responsible for lining up appropriate coverage while on vacation or sick

W-2 or 1099

- The conservative approach: pay as W-2 employee – this averts any IRS penalty for failure to withhold payroll taxes
- But a reasonable position can be developed to treat the subspecialist as a contractor
- In fact most of these arrangements are structured as contractor deals
- General does not want Subspecialist on benefit plans

Other Payment Details

- Subspecialist may want the 1099 to go to his corporation (not to him personally)
- This is fine if specified in the contract
- Contract should be between General’s corp and Specialist’s corp
- Individual Subspecialist MD must personally assign benefits to General’s corp
The Bottom Line

- "Member of the Team" approach is generally more profitable for General than space/services lease
- But it comes with some risks
  - Billing/coding risk
  - Malpractice risk
  - Responsibility for drug costs

Malpractice Insurance

- Typically the subcontractor Subspecialist agrees, in his contract, to provide his own insurance
- Ask that General be named as an "additional insured" on subcontractor's policy
- General should consider advising his carrier what is happening

Restrictive Covenants

- This may be appropriate in a subcontracting arrangement
- Subspecialist will be seeing patients of General
- If Subspecialist leaves, or is terminated, General’s patients will want to follow Subspecialist for subspecialty care
- But General may want to replace the departing Subspecialist with a new Subspecialist
Other Provisions

- Charts/confidentiality clause: specifies that the charts belong to General, not to subspecialist
- Non-solicitation clause, barring Subspecialist from sending direct mail to General’s patients

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