

How to Spot and Avoid a Stark Violation

Stark violations are increasingly becoming an item of discussion and analysis. A loophole in the law may be causing referrals to dry up.

I was recently involved in potential transactions that featured a local hospital, traditionally the source of referrals to the local O&P community, thinking of “opening up” or buying an O&P facility and capturing the revenue stream. The transaction also involved an orthopedic practice with more than 20 doctors

and their own physical and occupational therapies and durable medical equipment practice one floor below. You can imagine where all the referrals went.

Local O&P communities in such situations feel threatened, angry, intimidated and powerless, because even though legislation was passed to prevent such happenings,

they still exist, and the trend is increasing as businesses try to harness all the reimbursement dollars they can. It is the 21st century’s version of Monopoly, as one-stop shopping takes center stage.

This article will review the Stark regulations as they apply to the O&P profession. The origin of Stark is the Federal Ethics in Patient Referrals Act (the “Stark Act”). The title tips the reader to the objective — make sure that a referring physician or group does not receive any form of payment or kickback from a facility, such as an O&P practice, which provides certain designated health services reimbursable by Medicare or Medicaid, if the referring physician or

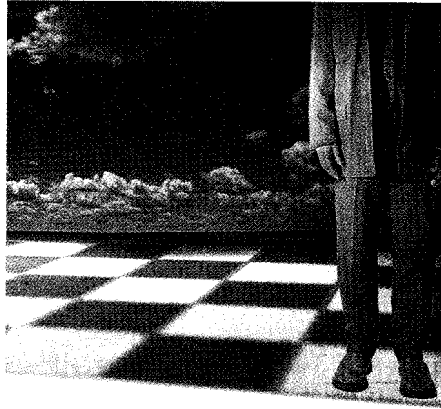
By Barry Smith, JD

a member of the physician's family has a financial relationship with that entity.

Like all statutes, the devil is in the details, and it is to those details that we now turn.

Relationships under Stark

What is a relationship under Stark? It includes either an outright ownership interest in the entity to which business is referred (whether this ownership is manifested by debt or equity) and/or any form of compensation relationship where money or something of value is paid to the referral source. This language anticipates cash, checks, higher than market rent, golf fees, equipment leases, etc. Anything of value that the referring physician receives can trigger a violation. The regulations anticipate the usual flow of coffee mugs, pens, prescrip-



Anything of value that the referring physician receives can trigger a Stark violation.

tion pads with no problem.

The referring physician not only must have such a financial relationship but the referral must be for a Medicare or Medicaid reimbursable item which includes, but is not limited to:

- Prosthetics and orthotics
- Durable medical equipment
- Physical, occupational and speech therapy, and
- Home health services.

In-office ancillary services exception

There is an enormous loophole within Stark, deliberately put there to accommodate the medical lobby. There is no violation if certain tests are met, and the requirements are not onerous – tricky, but not onerous. All of the following tests must be satisfied to fall within the exception:

Take the Stark regulation quiz

How much do you already know about the Stark regulation? Take the following short quiz and see how you do. The answers appear at the end.

	<u>TRUE</u>	<u>FALSE</u>
1. Physicians cannot refer to O&P facilities in which they own an interest.	_____	_____
2. Physicians can refer to O&P facilities provided they receive no form of compensation.	_____	_____
3. O&P providers should never compensate a referring physician. Period.	_____	_____
4. So long as you do not do business with Medicare/Medicaid, Stark does not apply to you.	_____	_____
5. The Stark DME provisions differ somewhat from the O&P provisions, making it easier for referring physicians to own DME businesses.	_____	_____

Answers:

1. False. The exception to Stark described in the article provides ample room for a referring physician to be compensated.
2. True. But the question suggests that compensation is always improper – see question #1.
3. False. The best rule to follow is no compensation to the referral source. If compensation is envisaged, you must fall within the ancillary services exception.
4. True. The origin of Stark was partly to prevent the government from paying the same referral source for multiple services.
5. False. The provisions differ somewhat but the testing is similar.

Source: Barry Smith, JD

• **Supervision test:** to satisfy this component of the exception, the services rendered must be performed by either the referring physician, an associate (in the same group) of the referring physician or an individual under the supervision of the referring physician.

• **Location test:** this test can be satisfied if the services provided are provided in the same building where the following criteria apply:

• **Principle location:** the referring physician or his group practice has an office that is open daily to provide medical services; and the physician or his group does provide such services.

• **Satellite practice:** The patient receiving O&P services usually receives medical services from the referring physician, and the referring physician owns or leases an office that is normally open to patients at least 8 hours a week, and the referring physician is regularly practicing medicine and providing services at least 6 hours a week. There is an alternate satellite test where the referring physician is present and orders the O&P service during a patient visit.

• **Stark-related services** can also be provided in the same location used for the provision of medical services — i.e., in a central-

ized location or locations.

• **Billing test:** Finally, in addition to the supervision and location requirements, a billing test must be satisfied. The O&P services provided must be billed out by the supervising physician, the group practice, a wholly owned billing entity or a third-party billing company acting for the physician.


All of the above tests must be met if an O&P practice with a financial relationship to a referring physician wants to avoid Stark violations. The increase in the number of physician-owned O&P clinics is a tribute to the adage “Where there is a will, there is a way.”

Changing landscape

The traditional delivery model for O&P services is beginning to change. Competition is emerging in the form of manufacturers’ stock and bill programs, as well as hospitals and physician groups seeking new revenue streams to offset declining reimbursement. Competition is also coming from O&P facilities owned by non-traditional entities. National contracts by large providers over time may cause referrals for the local O&P provider to dry up. That may not be the intent, but it may be the result. Additionally, declining revenues for all sectors in the health care

field, coupled with the increased costs of doing business, result in a re-examination of referrals and lost opportunities.

As these trends gain momentum, the threat posed to traditional O&P looms large on the horizon. Stark (and its potential violations) will, increasingly, become an item of discussion and analysis.

What is the moral to the story? I think there are at least two. First, do not be closed-minded when a referral source inquires about somehow getting into your business. Embrace change and explore the opportunity. By doing this you may well be able to discourage a future competitor from entering your space. The grass always looks green when viewed by a referral source, and part of your job is to educate and explain how challenging O&P has become. Second, position your business with as diverse a referral base as possible, so that you cannot be decimated by inevitable change, and no single referral source will be able to dictate your future. 



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Anti-kickback law prohibits any payments to induce referrals

Kickbacks can distort medical decision-making, cause overutilization, increased costs and result in unfair competition by freezing out competitors who are unwilling to pay kickbacks. Kickbacks can also adversely affect the quality of patient care by encouraging physicians to order services or recommend supplies based on profit rather than the patients’ best medical interests.

Section 1128B(b) of the Social Security Act prohibits knowingly and willfully soliciting, receiving, offering or paying anything of value to induce referrals of items or services payable by a federal health care program. Both parties to an impermissible kickback transaction are liable. Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to 5 years, or both. The Office of Inspector General may also initiate administrative proceedings to exclude persons from federal health care programs or to impose civil money penalties for fraud, kickbacks and other prohibited activities under sections 1128(b)(7) and 1128A(a)(7) of the act.

If you have information about fraud and abuse against Medicare or Medicaid programs, contact a regional office of the OIG as listed below:

Boston: Massachusetts, Vermont, New Hampshire, Maine,

Rhode Island, Connecticut (617) 565-2664

New York: New York, New Jersey, Puerto Rico, Virgin Islands (212) 264-1691

Philadelphia: Pennsylvania, Maryland, Delaware, West Virginia, Virginia, District of Columbia (215) 861-4586

Atlanta: Georgia, Kentucky, North Carolina, South Carolina, Florida, Tennessee, Alabama, Mississippi (404) 562-7603

Chicago: Illinois, Minnesota, Wisconsin, Indiana, Ohio, Iowa (312) 353-2740

Dallas: Texas, New Mexico, Oklahoma, Arkansas, Louisiana, Colorado, Utah, Wyoming, Montana, North Dakota, South Dakota, Nebraska, Kansas, Missouri (214) 767-8406

Los Angeles: Arizona, Nevada, Southern California (714) 246-8302

San Francisco: Northern California, Alaska, Hawaii, Oregon, Idaho, Washington (415) 437-7961

Persons or entities may be either suppliers or providers.

Source: *Special Fraud Alert: Rental of Space in Physician Offices by Persons or Entities to Which Physicians Refer*, Office of the Inspector General, February 2000.