

RUTH D. WILLIAMS, MD

Referrals and Risk—Time to Reexamine Your Relationships With Optometrists

These are big numbers: \$17 million, \$3 million, \$1.1 million. Each is an amount that an ophthalmology group settled in an alleged kickback arrangement this year. All three cases involve allegations that the practice created financial incentives for optometrists to refer patients for cataract surgery.¹

Since many of us comanage cataract surgery with optometrists, how can ophthalmologists abide by established comanagement policy and health care fraud and abuse laws? How can we minimize legal risks with our optometry colleagues?

In response to this spate of lawsuits, Michael Repka, Academy medical director of Governmental Affairs says, “Many ophthalmologists have created relationships with optometric groups that include activities that, on the surface, seem reasonable and practical but that create significant legal risk. Practices need to revisit their relationships with optometrists and consider getting legal advice.”

David Glasser, Academy secretary for Federal Affairs, says, “Comanagement is for the benefit of the patient, not an arrangement to encourage referrals.”

The three settled cases involve the federal Anti-Kickback Statute (AKS) that makes it illegal to offer or pay any incentive (in any form) to induce or reward referrals for services covered directly or indirectly by Medicare, Medicaid, or any federally funded program.² In two of the cases, the practices were sued for providing expensive meals, tickets to sporting events, and free continuing medical education. In all three, the ophthalmology practices involved were accused of providing routine prearranged comanagement agreements with referring optometrists. Violation of the AKS is a felony crime, and it can also be enforced through the Federal False Claims Act, which allows anyone with knowledge of the alleged kickbacks to bring a “whistleblower” claim.

Many ophthalmologists have comanagement relationships with referring optometrists that benefit patients. The risk is when referrals are routine. The Academy’s 2016 Comprehensive Guidelines for Co-Management of Ophthalmic Post-operative Care state that there should be “no agreement or understanding between the operating ophthalmologist and a referring non-operating practitioner to automatically send patients back to the non-operating practitioner.”³ Dozens of societies cosigned this statement. Michael says referring practitioners can tell patients that they work closely with a

particular cataract surgeon, but they should make it clear that a patient can choose their own surgeon. This should be included in every practice’s comanagement informed consent document.

What about dinners out and continuing education? In two of the cases noted, providing expensive meals is considered a financial inducement. Occasionally hosting a modest meal for optometrists may be appropriate when there is a legitimate business purpose, but ophthalmology groups should obtain expert legal advice beforehand. Providing free continuing education, including travel expenses, to a referral source is also a significant legal risk and could be considered a violation of the AKS.

The riskiest of all arrangements is when an ophthalmologist shares a portion of the fee for premium cataract surgery. Any payment must be for specific services—including those not covered by Medicare or Medicaid if applicable—the optometric group renders and for a fair market value fee. It’s possible that the optometrist could provide a portion of the testing required for the premium channel, in which case there should be an itemized list of the services provided for the fee, but most ophthalmologists want to do testing themselves. So, given these recent settlements, it’s unlikely that a legal opinion would support sharing the fee for premium cataract surgery. The safest option: do not pay the optometrist.

Comanagement arrangements have existed for decades, but there is a recent spate of legal challenges to the practice. Prosecutors and potential whistleblowers will surely notice these large settlements and the public attention they garner and consider another case an “easy win.” Ophthalmologists need to review their relationships with referral sources, even long-standing interactions that seem within guidelines, and analyze the risk of violating the AKS.

David reminds us that ophthalmologists should “neither provide nor receive anything of value” in a comanagement arrangement. The legal system is defining exactly what that means, and ophthalmologists are reexamining their risk.

1 aao.org/kickback. Published online May 4, 2023.

2 <https://oig.hhs.gov/compliance/physician-education/fraud-abuse-laws/#:~:text=The%20AKS%20is%20a%20criminal,for%20Medicare%20or%20Medicaid%20patients>). Accessed June 5, 2023.

3 aao.org/postop. Accessed June 5, 2023.