

Online Long-Term Care Referral Sites: Increasing
Access to Health Care or Violation of Federal Anti-
Kickback Statutes?

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I. INTRODUCTION

As the baby boomers age, access to long-term care is increasingly important.¹ Historically, individuals seeking care relied on their medical provider to direct them toward the care provider best suited to meet their individual needs.² However, the Internet now allows patients to assume greater responsibility and freedom in finding care by increasing access to medical information, medical advice, and online support groups.³ The expansion of the Internet led to the creation of online referral service sites.⁴ These websites use patient needs assessments to connect patients seeking care with providers that best suit their needs.⁵

Free online referral services allow patients to identify and locate care providers that can meet their needs.⁶ Online referral services assist patients seeking long-term care by conducting needs assessments in order to determine the level of care a patient needs and the patient's budget for

1. Susan D. James, *Baby Boomers Fuel Thriving Health Industry*, ABC NEWS (July 17, 2008), <http://abcnews.go.com/Business/story?id=5389800&page=1#.UGDNEsWTZI6> (last visited Sept. 24, 2012).

2. Pearl Jacobson, *Empowering the Physician-Patient Relationship: The Effect of the Internet*, 2 PARTNERSHIP: THE CANADIAN J. OF LIBR. & INFO. PRAC. & RES., May 2007 at 3.

3. *Id.*

4. *See, e.g.*, CARE PATHWAYS, <http://www.carepathways.com/LTC-match.cfm> (last visited Oct. 28, 2012).

5. *See, e.g.*, YEARS AHEAD, <http://www.yearsahead.com/content/provider/> (last visited Sep. 24, 2012).

6. *See, e.g.*, A PLACE FOR MOM, <http://www.aplaceformom.com/> (last visited 11/1/2012).

medical expenses.⁷ After the needs assessment the patient is presented with qualified care provider options that meet the patient's needs and then the care provider is connected with the patient.⁸ However, problems arise as some patients who use online referral services may also rely on the government to subsidize their long-term care costs through either Medicare or Medicaid.⁹ While these services may be increasing patients' access to health care options, these services may also violate the federal Anti-Kickback Statute (AKS) and potentially be at risk for imposition of administrative sanctions by the Office of the Inspector General ("OIG").¹⁰ However, if online referral services follow certain safeguards, the OIG is not likely to take enforcement action in certain factual circumstances as evidenced by previous advisory opinions, allowing the online services to continue to expand access to health care services which is essential in the pursuit for universal health coverage.

This paper will begin with a discussion of AKS and the referral safe harbor provisions. Next, this paper will provide an overview of various OIG advisory opinions relating to online referral service providers. Furthermore, this paper will discuss what online referral services can do in order to protect themselves from OIG enforcement. Lastly, this paper will address how online referral services drive down health care costs and increase health care quality while expanding access to long-term care in addition to arguing that the OIG should not take enforcement action when

7. *Id.*

8. *Id.*

9. David Nardolillo, *HHS OIG Finds Potential Anti-Kickback Violations in Online Referral Service*, THE HEALTH L. SIDEBAR, <http://healthlawsidebar.com/?p=366> (last visited Sept 25, 2012) (noting the use of Medicare and Medicaid by patients who use online referral services poses the question of whether online referral services violate the federal Anti-Kickback Statute.).

10. Advisory Op., Off. Inspector Gen., HHS No. 11-06, 6 (May 13, 2011) [hereinafter Advisory Op. 11-06].

the online referral sources follow certain safeguards.

II. ANTI-KICKBACK AND REFERRAL SERVICE SAFE HARBOR

The federal AKS is a criminal, intent-based statute that states anyone who knowingly and willfully receives or pays anything of value to influence the referral of a federal health care program is guilty of a felony.¹¹ Violators of the law are subject to up to five years in prison, criminal fines of \$25,000, and exclusion from participation in federal health care programs.¹² According to this rule, online referral services and care providers featured on online referral websites may be subject to penalties if Medicare and Medicaid beneficiaries use online referral services to find care providers.¹³

With respect to the AKS provisions, the OIG has established a safe harbor which address referral services.¹⁴ Safe harbor provisions permit certain payment and business practices that may otherwise be implicated by the AKS.¹⁵ A major element of the referral safe harbor provision requires that payment to the online referring service be based only on the cost of operating the referral service and not on the volume or value of any referrals for which payment is made under Medicare or Medicaid.¹⁶ This safe harbor is violated by pay-per-lead online referral services when an individual on Medicare or Medicaid uses the online referral service to find a care provider.¹⁷ Pay-per-lead transactions occur when an online referral service is paid money by a care provider on a per lead basis for potential

11. Pub. L. No. 92-603, 86 Stat. 1329 (codified as amended at 42 U.S.C.A. § 1320(a)-27(b) (2000)); *see also* 73 Fed. Reg. 56841 (Sept. 30, 2008).

12. *See* Pub. L. No. 92-603, *supra* note 11.

13. Nardolillo, *supra* note 9.

14. 42 C.F.R. § 1001.952 (2007).

15. *See id.*

16. *See id.*

17. *See, e.g.*, 73 Fed. Reg. 56841 (Sept. 30, 2008).

patients.¹⁸ Because the online referral service receives remuneration for each lead it generates, pay-per-lead online referral services may violate this element of the safe harbor.¹⁹

III. OIG ADVISORY OPINIONS ON ONLINE REFERRAL SERVICES

A service's failure to fit within the safe harbor provisions does not necessarily mean violation of the AKS and it is the responsibility of the OIG to bring enforcement action.²⁰ The OIG usually focuses on the following factors in determining whether to take action against the parties involved: (1) whether the arrangement has potential to interfere with clinical decision-making; (2) whether the arrangement has the potential to increase costs to Federal Health Care Programs; (3) whether the arrangement has the potential to increase the risk of overutilization or inappropriate utilization; and (4) whether the arrangement raises patient safety or quality of care concerns.²¹ The OIG has not stated whether pay-per-lead online referral service providers violate AKS, but OIG advisory opinions give some guidance as to how the OIG might apply AKS.²² Advisory opinions are only binding on the parties requesting the opinion, but can provide advice on OIG sanctions and the application of AKS.²³

In 2008 the OIG approved a pay-per-lead arrangement through an Internet advertiser for chiropractor services.²⁴ When potential patients visited the advertiser's website, patients provided a zip code and received a

18. Advisory Op., Off. Inspector Gen., HHS No. 08-19, 1, (October 29, 2008) [hereinafter Advisory Op. 08-19].

19. *See id.*

20. Advisory Op. 11-06, *supra* note 10, at 5.

21. *See, e.g.*, 73 Fed. Reg. 56841 (Sept. 30, 2008).

22. *See* 42 C.F.R. § 1008.1.

23. *See* 42 C.F.R. § 1008.53.; *see also* OFFICE OF INSPECTOR GEN., *Advisory Opinions*, <https://oig.hhs.gov/compliance/advisory-opinions/index.asp> (last visited 11/1/2012).

24. Advisory Op. 08-19, *supra* note 18 at 2.

list of subscribing chiropractors in the area.²⁵ Each chiropractor who subscribed to the Internet advertiser paid the Internet advertiser on a pay-per-lead basis.²⁶ The OIG analyzed the case as an advertising arrangement instead of a referral service and concluded that despite concerns with the pay-per-lead model, certain reasons minimized the risk of abuse.²⁷ The reasons that minimized risk included that the Internet advertiser was not a health care provider, was not affiliated with the health care industry, and did not collect healthcare information such as payer information and medical history.²⁸ The Internet advertiser's service was available to the general public, did not target federal health care programs, and the referral fees were charged regardless of whether the patient utilized the chiropractor's services.²⁹ Furthermore, the arrangement did not encourage the Internet advertiser to steer patients to particular chiropractors because the service used a patient's zip code to dictate where to send the patient.³⁰ Consequently, the OIG decided not to seek sanctions under the AKS.³¹

Some online referral services function in a similar way to the pay-per-lead arrangement approved by the OIG in the 2008 opinion.³² However, other online referral services are distinguishable from the advisory opinion because the usual online referral services play a more significant role in determining which facilities receive referrals for potential patients.³³ Online referral services typically conduct a needs assessment to determine

25. *Id.*

26. *Id.* at 3.

27. *Id.* at 5.

28. *Id.* at 6.

29. *Id.*

30. *Id.* at 7.

31. *Id.*

32. *A Place For Mom*, *supra* note 6.

33. *Id.*

the level of care a patient needs and their budget.³⁴ The online model is different from the arrangement in the advisory opinion where the referral service company's role was limited to providing the patient with contact information and did not collect patient health-related information.³⁵

Contrary to the 2008 OIG opinion, a May 2011 opinion by the OIG condemned an arrangement in which an online referral service was used by hospitals to identify post-acute care providers for the hospital's patients.³⁶ The hospital paid a fee to the online referral service, but the amount paid was not tied to the value or volume of referrals and the revenue generated by the online referral service exceeded the cost of providing the service.³⁷ Post-acute care providers who do not choose to pay a fee were listed on the online system, but received hospital referral requests via fax as opposed to electronically.³⁸ Hospitals referred patients to post-acute care providers on a first-come basis and those post-acute care providers who were paying for electronic access were at a significant advantage due to a quicker response time.³⁹ The OIG concluded that because acute-care providers paying for electronic access were more likely to get patients due to their payments and not due to superior care, the arrangement violated AKS. Additionally, the OIG found that because providers could face pressure to recoup the electronic access fees by ordering unnecessary services (which would increase costs to federal health care programs) the arrangement could also violate AKS in this respect.⁴⁰

Similar to the May 2011 advisory opinion, some believe that online

34. *Id.*

35. Advisory Op. 08-19, *supra* note 18, at 3.

36. Advisory Op. 11-06, *supra* note 10, at 5.

37. *Id.*

38. *Id.* at 3.

39. *Id.* at 5.

40. *Id.*

referral services give preference to those care providers that pay a fee to be listed on the website because the online referral services revenue model is based on care providers paying a fee to be connected with individuals seeking care.⁴¹ However, the May 2011 advisory opinion deals with a hospital dictating which service provider patients used based on the referral service recommendation and those care providers subscribing to the service had a significant competitive advantage.⁴² The May 2011 arrangement is unlike general online referral services, which are not affiliated with the health care industry and allow patients to decide which care provider to use. Some believe online referral services are used as a place to start one's search for a care provider.⁴³ Since the patient is in total control of which service provider to use, the care provider is not chosen based solely on payments to the online referral service.

The most recent advisory opinion where the OIG found the arrangement to potentially violate AKS, but did not impose sanctions was issued in November of 2011.⁴⁴ In this case, an Internet service provider wanted to electronically prepare and transmit referral orders between health care practitioners to assist them with tracking their patients' services with other health professionals on a pay-per-click basis.⁴⁵ The OIG concluded it would not impose administrative sanctions under AKS, even though the

41. Paula Span, *A Helping Hand, Paid on Commission*, THE NEW OLD AGE N.Y. TIMES BLOG (Sep. 2, 2011), <http://newoldage.blogs.nytimes.com/2011/09/02/a-helping-hand-paid-on-commission/> (last visited Sept. 24, 2012).

42. Advisory Op. 11-06, *supra* note 10, at 5.

43. Span, *supra* note 41.

44. *See generally* Advisory Op., Off. Inspector Gen., HHS No. 11-18, 2, (November 30, 2011) [hereinafter Advisory Op. 11-18].

45. *Id.* at 3 The internet service provider would assist healthcare providers in making referrals to other providers by: (1) sending the demographic, medical record, insurance, and billing information of a patient when the patient is seen by other providers; (2) issuing appropriate referral reminders; (3) tracking communications with other healthcare providers; and (4) exchanging information about orders, order results, and healthcare recommendations. *Id.*

proposed arrangement to provide the online service could generate prohibited remuneration under AKS if there was the requisite intent to induce or reward referrals of patients in federal healthcare programs.⁴⁶ According to the OIG, the per-click basis did not rely on whether the patient actually followed through with the referral, but the fees reflected the fair market value of the services and the services being available to anyone protected patient and provider freedom of choice, so the OIG did not impose sanctions.⁴⁷

Like the arrangement in the November 2011 advisory opinion, some online referral providers allow all individuals seeking care to access the service.⁴⁸ Additionally, some believe the online referral services do not limit the patient or provider's freedom of choice, because patients can choose to use the care provider they prefer.⁴⁹ This freedom of choice separates online referral services from more traditional referral services that violate the AKS.

IV. ONLINE SERVICE PROVIDER ANTI-KICKBACK ENFORCEMENT ACTIONS

The OIG and the Department of Justice are responsible for enforcing the AKS, yet neither of these agencies has brought enforcement action against an online service provider utilizing pay-per-lead models. However, the OIG did settle with a health company that utilized a pay per patient model with a marketing company.⁵⁰ The government has also taken action in AKS

46. *Id.* at 12.

47. *Id.* at 10-12.

48. CARE PATHWAYS, *supra* note 5.

49. *See, e.g.*, Span, *supra* note 41.

50. *See* "OIG Settles Largest Ever Civil Monetary Penalty Case: Lincare Pays \$10 Million and Signs 5-Year CIA to Resolve Allegations of Kickbacks and Self-Referral Violations," United States Department of Health and Human Services Office of Inspector General (May 15, 2006).

cases involving criminal and abusive pay per patient referral agreements.⁵¹ In *United States v. Starks*, employees of a state agency that counseled pregnant women about drug use were paid a fee by an owner of a drug treatment program for every patient referred to the program.⁵² The per-patient fees were exchanged in secret, were not based on a legitimate service, and the state employees would on occasion threaten the patients if the patients did not go to the specific drug treatment program.⁵³ The employees were convicted of violating the AKS and sentenced to varying prison sentences.⁵⁴

Similarly, the court in *Nursing Home Consultants, Inc. v. Quantum Health Servs., Inc.* held that volume-based commissions paid to third party marketers by care providers were in violation of the AKS.⁵⁵ This case is distinguishable because it involved a private contract dispute between the parties involved when one party sought to avoid contractual obligations by claiming that the contract violated the AKS.⁵⁶ Despite the existence of specific anti-kickback enforcement action against online referral service providers, there are several safeguards that online referral service providers should use.

V. SAFEGUARDS TO ENFORCEMENT ACTION

Based on the foregoing advisory opinions, the OIG should not take enforcement action against pay-per-lead arrangements when online referral services adhere to three specific safeguards. First, online referral services

51. See *U.S. v. Starks*, 157 F.3d 833, 835 (11th Cir. 1998).

52. *Id.* at 837.

53. *Id.*

54. *Id.* at 842.

55. See *Nursing Home Consultants, Inc. v. Quantum Health Servs., Inc.*, 926 F. Supp. 835, 850 (E.D. Ark. 1996).

56. *Id.* at 839.

referral fees should reflect the fair market value of the services provided to the participating care provider.⁵⁷ The independent value of these services distinguishes fees from payments for referrals.⁵⁸ Some online referral services use independent valuation experts to establish the price for referral services which assures fair market value is used.⁵⁹ Second, the referral fees charged by the online service provider should be fixed and assessed to all participating care providers.⁶⁰ Variable rate structures should be avoided because they can give the impression that the online service provider has an incentive to recommend certain care providers over others based on the amount paid in the referral fee, rather than on a needs basis.⁶¹ Third, the online service provider should base referral fees on the number of leads it creates, as opposed to the number of referred individuals who actually become patients of a participating care provider.⁶² This type of referral fee structure is distinguished from the fee structure that correlates compensation to a federally payable business.⁶³

Additionally, there are a few other actions that online referral services can take to avoid scrutiny under the AKS. The lower the referral fee charged by the online referral service, the better.⁶⁴ OIG is weary of higher fees because higher fees could lead to care providers charging higher service costs to patients in order to recoup the referral service costs.⁶⁵ Also, in order to eliminate the risk of claims of patient influence or steering, online referral service providers should not convey that it has any special

57. Advisory Op. 11-18, *supra* note 44, at 10.

58. *Id.*

59. YEARS AHEAD, *supra* note 5.

60. Advisory Op. 08-19, *supra* note 18, at 6.

61. Advisory Op. 11-06, *supra* note 10, at 5.

62. Advisory Op. 08-19, *supra* note 18, at 6.

63. *Id.*

64. Advisory Op. 11-06, *supra* note 10, at 5.

65. *Id.*

knowledge as to what makes a quality care provider.⁶⁶ Online referral services should also include disclaimers stating that care providers pay a fee to be included in the online referral services database.⁶⁷ The online referral service should disclose to patients using the referral service the way in which the online referral service selects its care providers, whether the patient will end up paying a fee to the care provider for using the online referral service, the relationship between the online referral service and care providers, and any restrictions that would not allow a patient seeking care to use the online referral service.⁶⁸ Following these safeguards, online referral service providers should not face risk of liability under the AKS.

These safe guards will help online referral services manage risk because the OIG should not bring enforcement against these services if these guidelines are followed. These guidelines ensure that online referral services are not inflating health care costs because prices are fixed and placed at fair market value. By having care providers pay on a per lead basis and not pay for the amount of individuals that actually become patients, potential patients have freedom to choose their care freely and online referral services lack an incentive to lead the patient to the most lucrative care provider. Also, the pay-per-lead approach ensures that quality of care is not sacrificed because patients make the decision of which care provider to use, creating an incentive for care providers to administer quality care. Finally, many online referral services are not health care providers and are not in any position to exert undue influence over patients. Online referral services are simply suggesting available options of care providers to patients.

66. Advisory Op. 08-19, *supra* note 18, at 6.

67. 42 C.F.R. § 1001.952.

68. *Id.*

Allowing online referral services to continue without OIG intrusion will lower health care costs and expand access to health care services, which is essential in the pursuit of universal health care. If the OIG allows online referral services to utilize these safeguards to avoid liability under the AKS, online referral services will serve a valuable role in expanding access to health care. Providing long-term care in an efficient manner is essential for universal health care. Finding long-term care can be difficult and the need for long-term care is only going to increase as people live longer. Online referral services grant patients greater access to choosing their own care options. Also, online referral services allow individuals who traditionally could not afford a variety of long-term care options to assess their individual needs, and find the long-term care option that best suits them. Giving patients access to more care provider options will create competition among long-term care providers, ultimately driving down long-term care costs while increasing the quality of care that is provided. Lowering health care costs, expanding access to care and improving the quality of care delivered is essential when pursuing universal health care.

VI. CONCLUSION

Online referral services make access to long-term care easier, more affordable, and more efficient. The online referral services allow individuals to access a greater amount of long-term care options that best serves the individual's need. Though it is unlikely that online referral services violate the AKS, in the interest of universal health care and creating a more efficient health system, it would be wise for the OIG to revise the referral safe harbor to protect online referral services because these services are providing tremendous benefit to the health care system. However, until action is taken to ensure protection of the online referral

services, specific safeguards should be utilized by the online services in order to establish the best defenses should enforcement action be brought.