

Part B Insider (Multispecialty) Coding Alert

Fraud & Abuse: No Good Gift Goes Unpunished - If It's Too Good

Feds aren't the 'pizza police,' but too much caviar could set off their alarms

If you don't give presents to other providers you may feel like Ebenezer Scrooge. But if you give too generously, you could be visited by the Ghost Of Fraud Investigations Future.

While the feds aren't trying to outlaw generosity, they also don't want you to reward other physicians or providers for sending you business during the past year - or encourage them to send you more patients in the new year.

So small gifts should be okay, especially if you give them without regard to the amount of referrals a provider has sent you or may send you. In other words, "We are not the pizza police," as **James Sheehan**, Associate U.S. Attorney for the Eastern District of Pennsylvania, famously said.

"Nobody's going to get hysterical over a bottle of liquor," says attorney **Alice Gosfield** with **Alice Gosfield & Associates** in Philadelphia. "If you give them two tickets to the Superbowl, people will get hysterical about that." The Stark physician self-referral regulations have made the rules for gifts to physicians easier to figure out: each individual gift can't be more than \$50 and the annual limit is \$300.

And you can't combine those numbers, notes attorney **Denise Bonn** with **Schmeltzer Aptaker & Shepard** in Washington. In other words, you can't give a gift worth \$900 to a group of three physicians. The \$300 limit will increase according to the rate of inflation starting in 2005.

The Stark regulations state explicitly that as long as you stay within these dollar limits and don't violate the anti-kickback statute, gifts should be fine, says attorney and physician **James Bromberg** with **Kroger Myers Frisby & Hirsch** in Houston. However, there's a catch - the anti-kickback statute doesn't give explicit guidance on gifts, especially how much is too much.

Don't Give Rolex Watches To Top Referral Source

The "fundamental policy" behind the anti-kickback statute is to avoid distorting referral patterns, Bromberg notes. So if the gifts provide someone with a huge incentive to send patients your way, then that's a problem. But nobody's going to change their referral patterns because they received a plastic bobble-head.

"I'm not a real big fan of gifts," says Bonn. "If you do it wrong it's fraught with problems." But "if there's a social situation behind the gift I doubt that would be a problem."

For example, if you organize a Christmas party and invite people, that's not a gift, it's a social event. You can take every one of your referral sources to the theater as long as you go along yourself.

It also makes a difference if you plausibly can claim to have a social relationship with the person you're giving gifts to. A home health agency or other ancillary provider will have a harder time claiming a social relationship with a doctor than would two doctors who may be part of the same medical staff or serve on the same committees. If a physician has developed a friendly relationship with an ancillary provider over time, "it's only because you're giving them a lot of business," Gosfield cautions.

"The gifts can't be selective, can't be of varying values, can't be given to people who have certain referral patterns," says Bromberg, who encourages you to send "the same gift basket to everybody." If a physician does work for your

organization on a routine basis, then it's okay to provide meals regularly. There's a special exception for providing meals during the rendition of services.

The feds will claim that if one purpose of a gift is to induce referrals, then the gift is automatically a kickback, notes Bonn. Given that the feds can't read minds, they'll look at the overall circumstances to judge intent.

Bottom line: A Christmas gift, by itself, probably won't get you in hot water, says Bromberg. But if the feds notice something else fishy in your dealings, then they might seize on any suspicious facts - such as an increase in referrals from several doctors after you sent them 50-year-old bottles of single malt whiskey.

When you're wrapping up your gift, the "reasonable test" should be to ask yourself, "What do you want to be testifying about?" Gosfield says.