

## Outpatient Facility Coding Alert

### Compliance: Marketing Your Surgery Center? Don't Stumble Over These Healthcare-Specific Statutes

**Avoiding kickbacks, or just the appearance, a top concern when creating a marketing strategy.**

A well-thought-out marketing program, even if it's basic, can help you pull ahead of your competition, enticing both patients and surgeons to utilize your facility. But, before you start experimenting with marketing strategies, you'll need to navigate a myriad of legal challenges stemming from healthcare-specific laws and regulations like the Health Insurance Portability and Accountability Act (HIPAA), fraud and abuse statutes, and even consumer protection laws.

Many providers "may not realize that a lot of the things that you can do in other industries, you simply can't do in the healthcare industry," said attorney **Kim C. Stanger** in his recent webinar for Holland & Hart, LLP.

If you want your ASC to stand out in a crowded market, you can't afford to ignore marketing. You also can't afford to make mistakes, even inadvertent ones that lead to statute violations, fines, and other legal troubles. Here's some help:

#### **Know When Patient Authorization is Necessary**

The HIPAA Privacy Rule details how covered entities may use and disclose patient Protected Health Information (PHI). The Health Information Technology for Economic and Clinical Health (HITECH) Act is a separate but related law that, among other things, broadens the HIPAA privacy and security protections.

Under HIPAA, a patient authorization is required for any use or disclosure of PHI for marketing purposes, including prior to sending marketing communications to patients. HIPAA defines marketing in the following two ways:

- "Oral or written communication about a product or service that encourages the recipient of the communication to purchase or use the product or service. This includes digital communication."
- "The disclosure of PHI to a third party in exchange for direct or indirect payment so that the third party can communicate about its product or service to encourages recipients of the communication to purchase or use that product or service."

**Rule of thumb:** If you are receiving either direct or indirect payment from a third party to communicate with patients about that third party's product or service, you need an authorization. That authorization must disclose that you're receiving remuneration.

You do not need an authorization for the following types of marketing, regardless of whether any third-party remuneration is involved:

- Face-to-face communication between providers and patients about a product or service your facility offers
- Promotional gifts of nominal value (such as coffee mugs and notepads)
- Refill reminders for medication that is currently being prescribed for that patient.

**Don't forget:** If you contract with an outside company to help with marketing efforts that involve PHI, you'll need a business associate agreement (BAA). Marketers must ensure that PHI stored in their systems is protected.

#### **Ensure Joint Marketing Avoids Self-Referral Slipups**

The Stark Law "applies any time you're doing any kind of a marketing arrangement in which you are benefitting a physician or a member of a physician's family," Stanger says. It can be a tricky area for ASCs because the surgeons who

are shareholders in the ASC often also have their own private practices.

"Stark Law is a 'conflict of interest' statute," adds **Mary I. Falbo, MBA, CPC**, CEO of Millennium Healthcare Consulting, Inc. in Lansdale, Pennsylvania.

Under Stark, a physician may not refer a patient to receive services at an entity that has a financial relationship with that physician or a member of their immediate family. That makes it a legal no-no for an ASC to pay for advertising on behalf of its physicians. It could appear as remuneration to physicians in return for bringing their cases to the center.

Watch your step when creating marketing materials that feature or promote your center's surgeons. Why? It could be construed that you're not marketing your ASC, but you're actually marketing the surgeon, said attorney **Mary Jean Geroulo** at the Ambulatory Surgical Center Association's 2017 annual meeting.

Geroulo suggests that you either mention all the physicians or just the center itself. The idea is to make sure you're presenting all of the physicians equally and not appearing to direct the patient to any particular provider.