# Eli's Hospice Insider

## JOINT VENTURES: Exercise Caution in Forming Joint Ventures or Risk Scrutiny

Nursing home/hospice ventures prove especially tricky.

Pooling resources with a nursing home or other provider to create a new hospice venture might seem like a great way to capitalize on your expertise and expand your business.

But if you aren't careful, you could easily find yourself running afoul of federal anti kickback laws.

Opportunities Raise Risks

More and more providers want to get involved in the hospice business, but don't know how to get started. In most industries, one investor with the money plus one investor with the business know-how equals an ideal partnership, but not so in hospice, said **Robert Markette, Jr.** with Gilliland & Markette in Indianapolis during the Eli-sponsored audio conference "Hospice Business Vebtures: How to Seize Opportunities and Stay Compliant."

According to the Office of Inspector General (OIG), these joint ventures are also a great way to disguise fraud and abuse violations, Markette said.

The inspiration for a joint venture can occur innocently enough: A provider in another market has patients who receive hospice services. The provider realizes that it could increase revenues by offering hospice services.

The problem: "The OIG has repeatedly stated that it will carefully scrutinize joint ventures involving investors who are in a position to refer federal health care program business to the venture or to coinvestors," Markette said.

Get the Facts Before Starting a Joint Venture

"No remedy for fraud and abuse problems will be as good as avoiding them in the first place," Markette said. So, before entering into a joint venture, it's best to be aware of the many ways you could potentially stir up trouble with the OIG.

Safe harbor: Structuring a joint venture by following the eight standards included in safe harbor guidelines can help keep you free from the appearance of wrongdoing. But in hospice, it's hard to meet all eight guidelines, Markette said.

1. The 60-40 rule: The first standard of safe harbor requires the business to have no more than 40 percent interested investors. Interested investors are those investors who can make referrals, provide items or services, or otherwise generate business. The remaining 60 percent should be passive investors.

Unfortunately, many would-be hospice joint ventures find themselves out of safe harbor right at this first standard, Markette said.

For example: A nursing home wishes to form a joint venture with your hospice agency. The nursing home can refer patients, so it is an interested party. You will provide nurses, administrators, the knowledge of how the hospice benefit works, and the know-how to provide hospice services, so your agency is also an interested investor. So now you have 100 percent interested investors. In order to meet this first safe harbor standard, you would need to have a passive, third party put up 60 percent of the funds, Markette said.

2. Fair shares: The second safe harbor standard holds that you must give interested investors and other investors the same terms for investing.

***CPT® 2023 American Medical Association. All rights reserved.***

For example, you can't prevent a prospective investor from buying shares in your venture on the grounds that he can't refer patients, Markette said.

3. No special deals. To be in safe harbor, you cannot offer differing investment deals based on the investor's ability to provide referrals, items, or services, or the amount of business they may generate.

For example, you couldn't offer shares at $100 each to general investors, but allow a nursing home to buy in at $50 a share because they will refer patients.

This arrangement shows the intent to create the joint venture as a way to reward referrals, Markette said. When you start paying out dividends, the nursing home would get their full share of the profits even though they invested at a reduced rate.

4. Passive investors stay passive. You cannot require investors to make or influence referrals, furnish services or items to the business, or otherwise generate business as a condition for remaining investors.

In the past, the OIG has seen joint venture investors asked to divest because they aren't providing referrals or other services, Markette said.

5. No sweetheart deals. To remain in safe harbor, you can't market or furnish your services to passive investors differently than noninvestors.

6. 40-percent rule. No more than 40 percent of your venture's gross revenue can come from referrals or business otherwise generated from the investors. This is an area that's especially tricky for hospice/nursing home joint ventures, Markette said. Look for ways to tap the nursing home's referrals at a rate under 40 percent until you build up other referral sources.

7. Nix shares for referrals. Don't loan funds or guarantee a loan to a potential referring investor who will use those funds to buy shares in your venture. You can't allow an investor to pay off his buy in with money earned by future referrals.

8. Proportional returns. The amount of payment to an investor in return for the investment interest must be directly proportional to the amount of the capital investment of that investor. For example, say your investor owns 20 percent of the company but refers 60 percent of your business. He should still only receive 20 percent of the profits.

There's still hope: Just because your joint venture doesn't meet the standards for safe harbor doesn't mean you're in violation of fraud and abuse laws, Markette said. Your best bet is to seek the advice of legal counsel to make sure you have structured your business properly so it won't appear to be a mechanism for rewarding referrals.

***CPT® 2023 American Medical Association. All rights reserved.***