OGDEN MURPHY WALLACE P.L.L.C. ATTORNEYS AT LAW

HEALTH LAW UPDATE

January 2003

Office of Inspector General Letter Addresses Malpractice Insurance Assistance

The Office of Inspector General for the Department of Health and Human Services ("OIG") published a letter on January 15, 2003 addressing the ability of hospitals to provide temporary financial assistance to members of their medical staffs to obtain professional liability insurance. The OIG wrote the letter in response to an unidentified hospital system (the "Requesting Hospital") inquiring about the legality of assisting physicians to obtain malpractice insurance in order to avoid the disruption of medical services. Unfortunately, the OIG's letter does not provide clear guidance to permit other hospitals to implement such an arrangement.

Before analyzing the Requesting Hospital's inquiry, the OIG first states that it has been historically concerned that malpractice premiums paid on behalf of potential referral sources, such as members of a hospital's medical staff, may be suspect under the anti-kickback statute. The OIG notes that the recruiting safe harbor to the anti-kickback statute may permit malpractice premium support by a hospital to physicians as part of a broader physician recruiting package. The OIG then acknowledges the existence of a "current disruption in the medical malpractice liability insurance market in some states." The letter states that this market disruption and the adverse effect on access to care are factors that the OIG will consider when exercising its "enforcement discretion." Although it is encouraging that that the OIG acknowledges its discretion, the letter ultimately does not provide clear guidance that would allow hospitals to provide malpractice assistance to members of their medical staffs.

The OIG identifies several safeguards in the arrangement proposed by the Requesting Hospital. However, these safeguards are not well defined and raise numerous compliance questions and issues. The first safeguard identified by the OIG is that the Requesting Hospital's financial assistance to physicians to "subsidize" insurance coverage will only be on an interim basis in states "experiencing severe access or affordability problems." Neither the Requesting Hospital nor the OIG define the threshold for demonstrating that a hospital is in a state with severe access or affordability problems. Second, the Requesting Hospital will offer assistance only to current medical staff members or physicians who are new to the locality. This safeguard is presumably intended to prevent the Requesting Hospital from offering malpractice assistance to local physicians who do not practice at the Requesting Hospital in order to induce these physicians to join the Requesting Hospital's medical staff and refer patients to the Requesting Hospital. The third safeguard is that the assistance will not be related to the volume or value of referrals. Fourth, the Requesting Hospital will require each physician receiving assistance to continue to pay at least as much as he or she

2100 Westlake Center Tower • 1601 Fifth Avenue • Seattle, WA 98101-1686
206.447.7000 • Fax: 206.447.0215 • E-Mail: omw@omwlaw.com

currently pays for malpractice insurance. In other words, the amount of any assistance is limited to future increases in malpractice insurance premiums and not as a subsidy for existing premiums.

The fifth safeguard imposed by the Requesting Hospital is the most difficult to apply in practice. In exchange for receiving the assistance, participating physicians must perform services for the Requesting Hospital and "give up certain litigation rights." The Requesting Hospital and OIG require that the fair market value of these services and the relinquished rights must be equal to the value of the insurance assistance. Presumably, giving up "litigation rights" means waiving cross-claims against the Requesting Hospital. Because some malpractice insurance policies prohibit such agreements, it is unclear if the physicians in this particular case or in general will be able to fulfill this requirement. Moreover, it will be difficult to ascertain the fair market value of the relinquished rights and the services. This fifth safeguard demonstrates that the OIG is not authorizing subsidies of malpractice premiums because the OIG is requiring that the physicians provide services and relinquish rights that are equivalent to the value of the assistance provided by the Requesting Hospital.

The value of the OIG's comments is further diminished because the OIG's letter is an informal response to the Requesting Hospital's inquiry and is not a formal advisory opinion issued under the process outlined in the federal regulations. Consequently, even the Requesting Hospital is not assured that the proposed arrangement complies with the anti-kickback statute.

Moreover, the OIG qualifies its statements by noting that the Department of Justice also has jurisdiction over the anti-kickback statute and that the Centers for Medicare and Medicaid Services ("CMS") has primary jurisdiction over Stark II issues. The proposed arrangement will likely fall under the Stark II regulations if CMS regards the assistance with malpractice premiums to be a compensation arrangement. The OIG cannot state whether other federal agencies or state agencies would approve of the proposed arrangement.

Similarly, if a hospital desiring to provide assistance with malpractice premiums is a nonprofit corporation, this raises issues of private benefit and inurement. The private inurement rule provides that no part of the net earnings of tax-exempt organizations can inure to the benefit of any individual considered to be an insider. In theory, physicians on a hospital's medical staff could be considered insiders if they are found to exercise substantial control or influence over the hospital. Prior to entering into any such arrangement, a hospital would have to ensure that the assistance with premiums did not constitute private inurement. Similarly, the rules for nonprofit corporations prohibit outsiders from deriving private benefit, other than reasonable compensation for services, from an activity of the corporation unless the private benefit is incidental to the public benefits derived from the activity. A hospital would have to establish that financial assistance to its medical staff did not create an impermissible private benefit.

If the hospital is a public hospital district, the hospital will also need to consider the prohibition under the Washington State

constitution against gifts of public funds and the lending of credit. The state constitution prohibits public entities, such as hospital districts, from giving away public funds or lending money to a private party except under very limited certain circumstances.

In conclusion, the OIG suggests that it would probably not institute an anti-kickback statute enforcement action against a hospital providing malpractice assistance as proposed by the Requesting Hospital. The proposed arrangement contains numerous safeguards, some of which may be difficult to apply in practice. The OIG's comments do not protect a hospital or its medical staff from enforcement action by other federal or state agencies or even from the OIG itself. Any hospital interested in providing such assistance to its medical staff must proceed cautiously.

The OIG's letter is available on the website of Ogden Murphy Wallace, PLLC at www.omwlaw.com. For more information, contact any member of OMW's Healthcare Practice Group: Douglas E. Albright, Kent C. Meyer, Donald W. Black, Wesley Watson, Jr., or Nick Beermann.