

**DISCLOSURE OF PHYSICIAN OWNERSHIP
IN
AMBULATORY SURGERY CENTERS**

By Emily R. Studebaker

In response to allegations of over-utilization, physician ownership of ambulatory surgery centers (“ASCs”) is increasingly the focus of attention at the state and federal level. Whether to require disclosure of physician ownership of ASCs is one significant issue in the current debate. Regardless of how this question ultimately gets resolved, understanding the issues is important to the lawful operation of an ASC. In particular, physician owners of ASCs should understand Washington’s anti-rebate statute, which addresses the circumstances under which disclosure of physician ownership of an ASC is required.

Washington’s anti-rebate statute is codified at Chapter 19.68 RCW and violating the statute is a gross misdemeanor and also is considered unprofessional conduct under Washington State law. Among other things, this statute prohibits a physician from receiving an “unearned profit” in connection with the referral of patients or in connection with the furnishing of medical or surgical care. *See* RCW 19.68.010(1).

A physician who owns an interest in an ASC may implicate the anti-rebate statute by referring his or her patients for procedures at the ASC. This is especially true where the ASC is a legal entity separate from the physician’s practice. When the physician refers a patient to the ASC and another surgeon at the ASC performs the patient’s surgery, a court could determine that the referring physician receives an “unearned profit”, such as a larger dividend, as a result of the referral. Fortunately, this does not mean that all such referrals are prohibited.

Chapter 19.68 RCW sets forth an exception to its prohibition for physicians who disclose financial interests in any entity to which they refer to their patients. *See* RCW 19.68.010(2). The statute enumerates specific requirements for the disclosure. In order to qualify for the exception, a physician who has an ownership interest in an ASC must do the following:

- Affirmatively disclose to the patient in writing, the fact that he or she has a financial interest in the ASC;
- Provide the patient with a list of effective alternative facilities;
- Inform the patient that he or she has the option to use one of the alternative facilities; and
- Assure the patient that he or she will not be treated differently by the physician if the patient chooses one of the alternative facilities.

While the anti-rebate statute does not create an affirmative duty for a physician to disclose his or her interest in an ASC, a physician who elects to disclose can avoid raising concerns under the

statute without pursuing further analysis to determine whether he or she potentially could receive an “unearned profit” as a result of a referral.

The scope of the anti-rebate statute’s exception is currently being litigated in a case captioned *Cascade Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associate, P.L.L.C.* At issue is the extent to which the exception is available to physicians referring patients for certain services, *e.g.*, services that do not involve a diagnosis. If the court considering the case construes the exception narrowly, then a physician referring patients to an ASC in which he or she has an ownership interest will need to reevaluate whether the exception remains available to them.

While the disclosure provision under Washington’s anti-rebate statute provides relief from the impact of the statute, physicians and other ASC owners should understand that it is different from, and additional to, other disclosure requirements that may apply to a particular ASC. For example, in order to qualify for safe harbor protection under the federal Anti-Kickback Statute, a physician with an ownership interest in an ASC to which he or she refers patients must “fully inform” the patients of his or her ownership interest. *See* 42 U.S.C. § 1320a-7b. Separately, if finalized in its current form, the proposed rule modifying conditions for coverage for ASCs issued by the Centers for Medicare & Medicaid Services on August 31, 2007 would require an ASC to “meaningfully disclose” a physician’s ownership interest in the ASC in writing and furnish it to the patient prior to the patient’s first visit to the ASC. An awareness and understanding of the existing rules and new developments involving disclosure of ownership interests to patients is important for both physicians and ASCs seeking to structure new relationships or simply to operate lawfully in the state of Washington.

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