



PHYSICIANS LEGAL ISSUES CONFERENCE

Structuring Physician Super Groups: Key Regulatory Issues and Challenges

Jayme R. Matchinski

Greensfelder, Hemker & Gale, P.C.

Hayden S. Wool

Garfunkel Wild, P.C.

This presentation and outline are limited to a discussion of general principles and should not be interpreted to express legal advice applicable in specific circumstances



June 7-9, 2018

The Intercontinental, Chicago, IL



PHYSICIANS LEGAL ISSUES CONFERENCE

In light of the constantly changing health care environment and increased government scrutiny enforcement actions, this session will:

- utilize a hypothetical scenario to look at the movement towards the formation of Super Groups;
- explore the process from a regulatory, operational, and business vantage point; and
- provide an overview of the key regulatory compliance issues related to patient referrals and the performance of ancillary services by Super Groups.



PHYSICIANS LEGAL ISSUES CONFERENCE

This session will focus on the following topics:

- Overview of Physician Consolidation
- Structural Challenges
- Regulatory Compliance Issues



PHYSICIANS LEGAL ISSUES CONFERENCE

Hypothetical Scenario

Three (3) physicians (Drs. Moe, Larry, and Curly) are owners and employees of an orthopedic group practice (“Orthos-R-Us”). The group also employs three (3) other part-time physicians. The group has three (3) offices, each of which includes simple x-rays, and currently offers physical therapy at one (1) location. The practice is interested in adding a magnetic resonance imaging (MRI) machine in one (1) of its offices because the physicians often order MRI scans for their patients, including Medicare patients. However, the physicians remain concerned as to sufficient volume to make the MRI profitable. The physicians are also interested in contracting with a radiologist (Dr. Adams) as an independent contractor to interpret the MRI images. Dr. Adams is willing to do the reads, but wants to do them from his own office on a limited part-time basis as in independent contractor.



PHYSICIANS LEGAL ISSUES CONFERENCE

Hypothetical Scenario

Dr. Harpo owns and operates a five (5) physician group of neurologists and neurosurgeons in the same area. The group has two (2) offices, one of which is in the same building as one of the offices of Orthos-R-Us. Dr. Harpo and Dr. Moe, long time friends and colleagues, meet for dinner one night and discuss the possibility of coming together as a single group. Dr. Harpo also points out that there is a brand new MRI office which had opened in their shared building, but the owner had hit the lotto and was looking to exit. Dr. Harpo indicated that his group's MRI volume, while impressive, would not justify an MRI alone but, perhaps together, the two (2) groups could support it.



PHYSICIANS LEGAL ISSUES CONFERENCE

Hypothetical Scenario

Dr. Harpo and Dr. Moe also agreed that they would speak to their good friend, Dr. Zhivago, a pain management specialist who owns a group of eight (8) physicians (including Dr. Zhivago), six of which are part-time physicians, who specialize in pain management. When they approach Dr. Zhivago, he is very interested and suggests they consider an in-office lab that, among other things, can provide quantitative urine analysis for drug screening. The lab could be expanded to include other services.



PHYSICIANS LEGAL ISSUES CONFERENCE

Benefits of Consolidation

- Increase clinical practice quality and efficiencies, improve care coordination, and reduce healthcare costs through clinical transformation;
- Clinical integration and delivery strategies to initiate value based delivery models and bundled payment arrangements;
- Improve ability to negotiate and align – yes, *ALIGN*—with health plans;
- Develop and offer ancillary services and business lines, including diagnostic imaging, clinical laboratory and pathology, and accumulation and processing of practice data for pharma and payor usage;
- Hiring of executive and specialized management expertise;
- Ability (and necessity to) upgrade infrastructure and office technology;
- Investment in compliance, risk management and billing/collection resources;
- Improved lifestyle standards and better on-call coverage sharing;
- Promote recruiting efforts and assists the creation of a viable exit strategy or succession plan; and
- Internal Referrals – Groups can guide internal referrals to both other MDs in the group as well as ancillary providers.



PHYSICIANS LEGAL ISSUES CONFERENCE

Pitfalls of Standing Still

- It is increasingly more difficult to operate in the private physician practice environment as a solo provider or small practice group.
- Reimbursement from insurance companies and payors are declining, and are typically slow to arrive, while the cost to provide clinical services and care to patients is increasing. This places significant financial pressure on many professional practices.
- Hospitals, providers of all types, and health plans have consolidated and evolved into sophisticated businesses with substantial financial and technological resources to meet the rapidly evolving healthcare environment.
- As a result, professional practices face increased competition from hospitals, health systems and other clinical service providers.



PHYSICIANS LEGAL ISSUES CONFERENCE

Structural Considerations of Operating in the Physician Practice World

PHYSICIANS LEGAL ISSUES CONFERENCE

Unified Business Establishment of a Super Group

- One way that a physician practice may deal with the identified challenges is to consolidate with other similarly situated practices and form a “Super Group.”
- This Super Group can either be an existing or newly formed entity (the “Consolidated Entity”) that would facilitate the consolidation of identified medical practices (“Practices”) through the merger, consolidation, acquisition or lease of each Practice's fixed assets (and staff) by the Consolidated Entity (a “Consolidation”).
- Substantial consideration must be given to the corporate, tax, and regulatory elements and consequences, and to the operational and technological factors to develop and create the Consolidated Entity in the most effective form.
- Lengthy delays in reimbursement cannot be experienced during the Consolidation ramp up.
- Depending upon the form of the Consolidation, the physicians who own the Practices (the “Participating Physicians”) will receive an equity interest in the Consolidated Entity in the form of either an exchange or a purchase of such equity.



PHYSICIANS LEGAL ISSUES CONFERENCE

Due Diligence Concerns

Due diligence must be undertaken by each Practice to review and analyze the following items with respect to each other Practice:

- (a) clinical delivery initiatives, i.e., do the Practices share the same vision concerning the management and delivery of clinical services, and the willingness to implement cutting edge clinical transformation strategies;
- (b) integration of operating systems, billing systems, and electronic medical records;
- (c) staffing, human resources, payroll processing and payment, and accounts payable;
- (d) current managed care issues, including, without limitation, participation versus non-participation, and whether the reimbursement rates secured by a Practice may be available for use by the other Practices once the consolidation occurs;
- (e) insurance (general liability, professional liability, property, directors and officers, and errors and omissions, and other necessary protections);
- (f) employment benefit plans; and
- (g) pension and retirement plans.



PHYSICIANS LEGAL ISSUES CONFERENCE

Governance of Consolidated Entity

The Consolidated Entity must operate as one unified, integrated, centralized business for purposes of governance and management, and should include, without limitation:

- (a) centralized decision-making by a managerial body that maintains effective control over the Consolidated Entity's affairs and business operations, and compensation; and
- (b) consolidated billing, accounting and financial reporting.

The Consolidated Entity's managerial body (the “Board”) must possess the authority to establish the overall business policy and direction of the Consolidated Entity and will ordinarily consist of representatives designated by each Practice (and then, following the consolidation, by the Divisions). **CANNOT BE A SHAM.**



PHYSICIANS LEGAL ISSUES CONFERENCE

Consolidated Entity Operated As One Business Division or Multiple Divisions

- The Consolidated Entity's business can be operated as either a single business division or through multiple separate divisions (each a "Division").
- In the event that the multiple division model is chosen, operational decisions internal to a specific Division that do not affect the Consolidated Entity as a whole can be reserved to such Division and its Participating Physicians, subject to the review (for, among other things, compliance with applicable law) and final approval by the Consolidated Entity's Board.
- Shared Expenses/ Division Expenses

Will There be Internal Referrals and/or Ancillary Designated Health Services (“DHS”) Included?

- If **YES** – Our Super Group must meet the definition of a “Group Practice” under the Federal Stark Law (and other relevant State laws)
- This is a **KEY CONSIDERATION** in consolidation.
- One often hears of meeting the “Group Practice” exception under Stark because it is a definition that allows you to meet certain “global” exceptions.



PHYSICIANS LEGAL ISSUES CONFERENCE

Federal Anti-Referral Proscription ("Stark Law")

- The Stark Law provides that a physician may not make a referral to an entity with which the physician (or an immediate family member of a physician) has a financial relationship with for the furnishing of designated health services ("DHS") for which payment is made by the Medicare Program. 42 U.S.C. §1395nn(a)(1).
 - Violation of the Stark Law potentially subjects the Consolidated Entity and the Participating Physicians to civil monetary penalties, refund of payment related to such referrals, exclusion from federal healthcare program participation, and false claims liability exposure.



PHYSICIANS LEGAL ISSUES CONFERENCE

Stark Self-Referral Laws

- Penalties/Sanctions
 - Denial of payment.
 - Refunds of amounts collected for services performed in violation of the statute.
 - Civil money penalty of up to \$15,000 for each bill or claim for a service person knows or should know is for a service for which payment may not be made under the statute.
 - Civil money penalty of up to \$100,000 for each arrangement or scheme which the physician or entity knows or should know has a principal purpose of assuring referrals which, if directly made, would be in violation of the statute.
 - Exclusion from the Medicare, Medicaid and/or other federally funded health care programs.



PHYSICIANS LEGAL ISSUES CONFERENCE

“Group Practice” Definition

- The term “group practice” is defined as a group of two (2) or more physicians legally organized as a single entity operating primarily for the purpose of being a physician group practice.
- A “member” of a group practice generally includes (a) a physician with a direct ownership interest in the practice; or (b) a full or part time physician-employee of the practice.
- Operational requirements must be satisfied to qualify as a “group practice” for purposes of the Stark Law:



PHYSICIANS LEGAL ISSUES CONFERENCE

“Group Practice” Definition

- a) Each of the members of the practice must provide substantially the full range of patient care services that he or she routinely provides using the group's resources, such as office space, facilities, equipment and personnel;
- b) Substantially all of the services of the members must be provided through the group, billed under the group's billing number, and any reimbursement received must be treated as receipts of the group, which means that members of the group practice must personally conduct no less than seven-five percent (75%) of the physician-patient encounters of the group practice (stated differently no more than twenty-five percent (25%) of group practice's patient encounters can be performed by independent contractors); and which must be demonstrated by establishing that at least seventy-five percent (75%) of the average of the group practice member's patient care service time is rendered on behalf o the group practice.



PHYSICIANS LEGAL ISSUES CONFERENCE

“Group Practice” Definition

- c) The group practice must operate as a unified business, meaning that it has (i) centralized decision-making by a body representing the practice that maintains control over the group practice's assets and liabilities, and (ii) consolidated billing, accounting, and financial reporting.
- d) The overhead expenses of, and income from, the group practice must be distributed according to methods that are determined prior to receipt of payment for the services; and
- e) No member may receive, directly or indirectly, compensation based on the volume or value of the physician's DHS referrals, except through a permitted profit sharing or productivity bonus arrangement (as further provided in the regulations).



PHYSICIANS LEGAL ISSUES CONFERENCE

Distribution of DHS Profits – Special Rule for Productivity Bonuses and Profit Shares

- A physician in a group practice may be paid a share of overall profits of the group, provided that the share is not determined in any manner that is directly related to the volume/value of DHS.
 - “Overall profits” means the group’s entire profits derived from DHS payable by Medicare/Medicaid OR the profits derived from DHS payable by Medicare/Medicaid of any component of the group practice that consists of at least 5 MDs.
- A physician in the group may be paid a productivity bonus based on services s/he has personally performed or services “incident to” such personally performed services.
- All distributions must be done in a Stark Law compliant manner.



PHYSICIANS LEGAL ISSUES CONFERENCE

Back to Our Hypo: Orthopedic Group “Orthos-R-Us”

- 3 owners/employees (Drs. Moe, Larry and Curly)
- 3 part-time employees (2 of which work nowhere else; one who works 50% for Orthos-R-Us and 50% elsewhere)
- 3 offices
 - Imaging services at each office currently
 - PT services at one location
- Wants an MRI
- Wants Dr. Adams to do the MRI reads (and he wants to do them part-time in his own office).



PHYSICIANS LEGAL ISSUES CONFERENCE

Back to Our Hypo: Dr. Harpo's Neuro Group “Duck Soup Neurology and Neurosurgery”

- Dr. Harpo is owner and employee
- 4 other full-time employees: Drs. Groucho, Chico, Gummo and Zeppo
- 2 offices
 - Some ancillary services including imaging (e.g., Dopplers)
 - 1 office is in the same building as Ortho-R-Us
- MRIs done in the same building that is for sale.



PHYSICIANS LEGAL ISSUES CONFERENCE

Back to Our Hypo: Dr. Zhivago's Pain Management Practice

- 2 physician owners and employees
- 6 other physician employees (part-time)
- Time spent on behalf of the Practice:
 - 2 physician employees – 75%
 - 2 physician employees – 50%
 - 2 physician employees – 25%
- Wants an in-office lab to do qualitative urine test analysis for drug screening



PHYSICIANS LEGAL ISSUES CONFERENCE

So Are We a “Group Practice”?

- Ortho-R-Us?
- Duck Soup Neurology and Neurosurgery Practice?
- Pain Management Practice?
- **WHAT ABOUT AS A SUPER GROUP?**



PHYSICIANS LEGAL ISSUES CONFERENCE

Applying the Test to See If We Meet the Definition of a “Group Practice”

- Do we have 2 or more physicians legally organized as a single entity for the purpose of being a physician group practice?
- Does the practice operate as a unified business?
- Are overhead expenses of (and income of) the practice distributed according to methods that are determined prior to receipt of payment?
- Does each member provides substantially the full range of patient care services that s/he routinely provides using the group’s resources?

PHYSICIANS LEGAL ISSUES CONFERENCE

Applying the Test to See If We Meet the Definition of a “Group Practice” (con’t)

- Are substantially all of the services of the members provided through the group, billed under the group’s billing number, and reimbursement is treated as receipts of the group?
 - Basically, do members of the practice personally conduct no less than 75% of the physician-patient encounters of the group practice?
- Does any member receive (directly or indirectly) compensation based on the volume or value of his/her DHS referrals (except through permitted profit sharing or productivity bonus arrangement)?



PHYSICIANS LEGAL ISSUES CONFERENCE

PHYSICIAN	PERCENTAGE (FTE)	PERCENTAGE (PTE)
Dr. Moe (Ortho-R-U)	100	
Dr. Larry (Ortho-R-U)	100	
Dr. Curly (Ortho-R-U)	100	
MD #1 (Ortho-R-U)		100
MD #2 (Ortho-R-U)		100
MD #3 (Ortho-R-U)		50
Dr. Harpo (Duck Soup Neuro)	100	
Dr. Groucho (Duck Soup Neuro)	100	
Dr. Chico (Duck Soup Neuro)	100	
Dr. Zeppo (Duck Soup Neuro)	100	
Dr. Gummo (Duck Soup Neuro)	100	
Dr. Zhivago (Pain Mgmt.)	100	
MD #1 (Pain Mgmt.)	100	
MD #2 (Pain Mgmt.)		75
MD #3 (Pain Mgmt.)		50
MD #4 (Pain Mgmt.)		50
MD #5 (Pain Mgmt.)		25
MD #6 (Pain Mgmt.)		25
MD #7 (Pain Mgmt.)		75



PHYSICIANS LEGAL ISSUES CONFERENCE

Is it a “Group Practice?”

Orthos-R-Us

5 @ 100% and 1@ 50% =
91.6% → **PASS**

Duck Soup Neuro.

5 @ 100%
100% → **PASS**

Pain Mgmt.

2@ 100%
2@ 75%
2 @50%
2@ 25%
500 / 8 = 62.5% → **FAIL**

COMBINED AS A SUPER GROUP

12@100%
2@ 75%
3 @ 50%
2 @25%

1550/ 19 = 81.58 → **PASS**



PHYSICIANS LEGAL ISSUES CONFERENCE

In-Office Ancillary Services Exception

- 3 Questions to Ask
 - **WHO** provides the DHS?
 - **WHERE** is the DHS performed?
 - **HOW** is the DHS billed?

PHYSICIANS LEGAL ISSUES CONFERENCE

In-Office Ancillary Services Exception – Who May Furnish/Supervise DHS

- Referring MD;
- MD who is a member of the same group practice as the referring MD; or
- Individuals supervised by the referring MD or another MD in the same group practice.
- “Member of the same group practice” includes:
 - MD with a direct/indirect ownership or investment interest in the practice
 - F/T or P/T physician employee
 - Locum tenens MD
 - Physician who provides on-call services for other members
- Independent contractors/leased MDs are not “members” of a group practice.



PHYSICIANS LEGAL ISSUES CONFERENCE

In-Office Ancillary Services Exception – Where DHS May Be Furnished

- Same building OR Centralized Building
- “Same building” in which the referring MD (or another group practice member) furnishes physician services unrelated to the furnishing of the DHS
 - 3 scenarios (full-time/part-time)
 - Structure with a single street address (some exclusions)



PHYSICIANS LEGAL ISSUES CONFERENCE

In-Office Ancillary Services Exception – When Furnished in “Centralized Building”

- Includes all or part of a building that owned or leased on full-time basis (24/7) by group practice, and used exclusively by the group practice (includes mobile vehicles, vans, trailers)
- Block leases do not qualify as centralized location for purposes of the In-Office Ancillary Services Exception.



PHYSICIANS LEGAL ISSUES CONFERENCE

In-Office Ancillary Services Exception – How DHS Must Be Billed

- By the MD performing or supervising the DHS
- By the group practice of which the MD is a member, employee or independent contractor under the practice billing number
- By an entity that is wholly owned by the MD or group practice
- By an independent 3rd party acting as a billing agent



PHYSICIANS LEGAL ISSUES CONFERENCE

And Remember . . . They Want Dr. Adams to Do the Radiology Reads

- Part-time employee versus 1099
- Would do the reads in his own office or at a group location
- Federal Anti-Markup Rule may be implicated!
 - Applies to all diagnostics tests (not just DHS)



PHYSICIANS LEGAL ISSUES CONFERENCE

The Anti-Mark-Up Rule Only Applies if the Physician Performing the TC or PC of the Diagnostic Test Does Not “Share a Practice” With the Ordering Physician

Alternative 1 – “Shared Services” Test. If the performing physician, who is the physician that supervises the TC or performs the PC or both, furnishes substantially all (at least 75%) of his or her professional services through the billing physician or other supplier, none of the physician’s diagnostic testing service will be subject to the anti-markup payment limitation.

Alternative 2 – “Site of Service” Test. If the arrangement does not meet the “Share Services” test, then the physician performing the TC will be deemed to share a practice with the billing entity if the performing physician (who is the supervising physician in the case of the TC) supervises the test in the “office of the billing physician or other supplier.”



PHYSICIANS LEGAL ISSUES CONFERENCE

Anti-Mark-Up Rule

- “Office of the billing physician or other supplier” means any medical office space in which the ordering physician or other ordering supplier regularly furnishes patient care (which may include space where the billing physician or other supplier furnishes diagnostic testing) if the space is located in the same building in which the ordering physician or other ordering supplier regularly furnishes patient care.
- If the billing physician/supplier is a "physician organization", such as medical group, the term "office" means space in which the ordering physician provides substantially the full range of patient care services that the ordering physician provides generally.

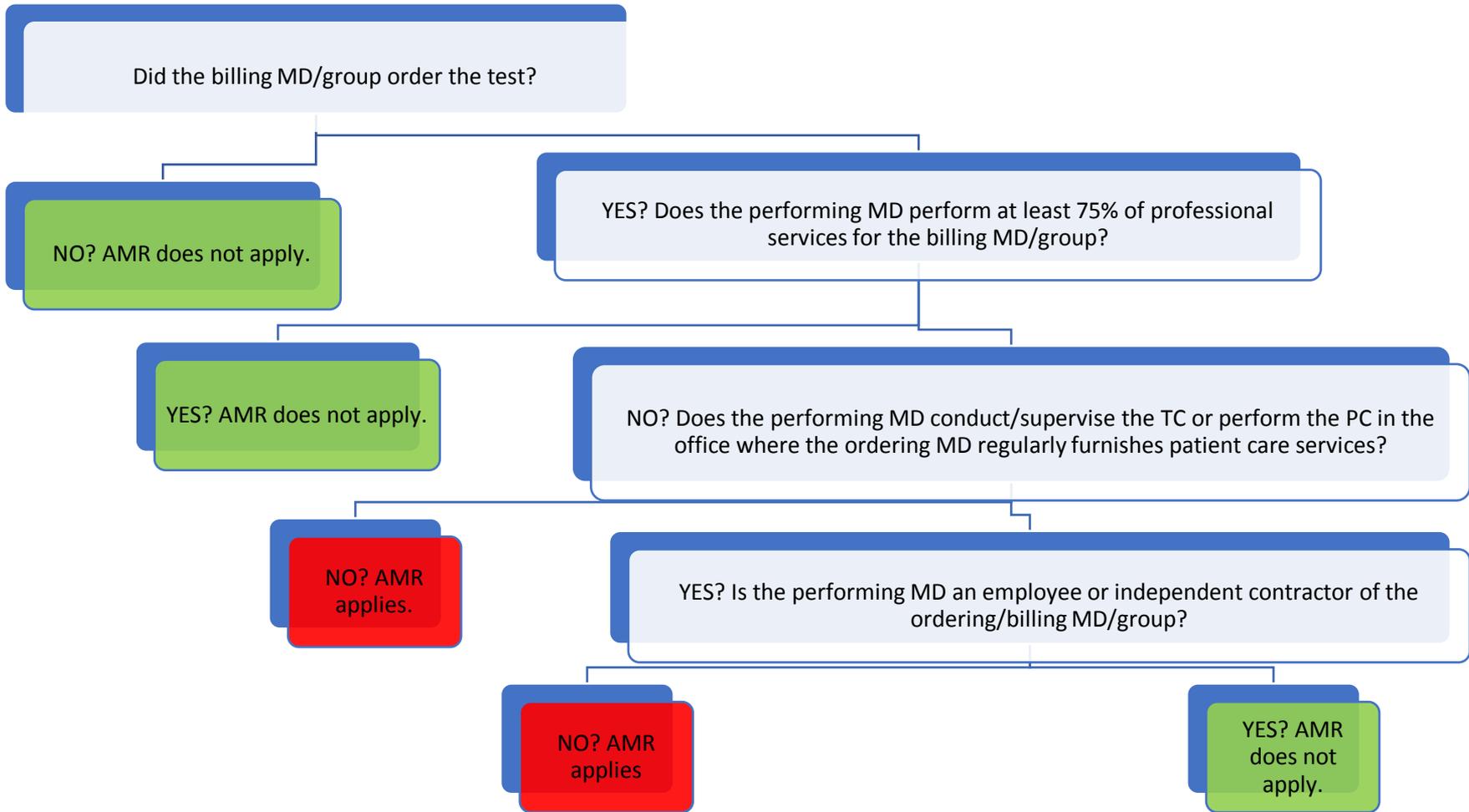


PHYSICIANS LEGAL ISSUES CONFERENCE

Anti-Mark-Up Rule

If the Anti-Markup Rule applies, then Medicare will pay the billing physician or other suppliers (less applicable deductibles and co-insurance) for the TC or PC billed by the billing physician at the lowest of:

1. the performing supplier's net charge to the billing physician or other supplier; or
2. the billing physician's or other supplier's actual charge; or
3. the fee schedule amount for the test that would be allowed if the performing supplier billed directly. (42 CFR §414.50(1)(1))





PHYSICIANS LEGAL ISSUES CONFERENCE

Additional Concerns Related to Other Services

- Physical Therapy
 - Supervision rules/ Incident-to rules
- Laboratory services
 - Recall our Hypo: They are considering setting up an in-office lab for drug screening tests....
 - Need to consider Federal Stark Law, whether the Anti-Markup Rule is implicated, etc.
 - And don't forget relevant State law – licensure, etc.



PHYSICIANS LEGAL ISSUES CONFERENCE

CONTACT INFORMATION

Jayme R. Matchinski
Officer
Greensfelder, Hemker & Gale, P.C.
200 West Madison Street
Suite 3300
Chicago, IL 60606
Phone: (312) 345-5014
Fax: (312) 419-1930
[*jmatchinski@greensfelder.com*](mailto:jmatchinski@greensfelder.com)
[*Linkedin.com/in/jaymematchinski*](https://www.linkedin.com/in/jaymematchinski)

Hayden S. Wool
Partner Director
Garfunkel Wild, P.C.
111 Great Neck Road
Suite 600
Great Neck, NY 11021
Phone: (516) 393-2232
Fax: (516) 466-5964
[*hwool@garfunkelwild.com*](mailto:hwool@garfunkelwild.com)