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## NEW DEVELOPMENTS REGARDING ANCILLARY SERVICES

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The purpose of this memorandum is to update you on recent legal developments impacting in-office referrals by physicians as well as referrals to entities in which the referring physicians have a financial interest. The term “in-office referral,” as used in this alert, means an order for tests, goods or supplies provided by an individual working with the ordering physician, but which are not provided by the physician. You should be aware of the following federal and state developments, each of which requires physicians to identify alternative providers for their patients.

### New Disclosure Requirements For MRI, CT and PET Services

The recently enacted Patient Protection and Affordable Care Act (the “Act”) amended the Stark Law to require that a physician provides patients with a written notice when the physician refers patients for MRI’s, CT’s or PET scans to an entity with which the referring physician has a financial relationship (as defined by the Stark Law).

The new law requires that the written notices inform the patients that they can obtain the services from other suppliers. The physician is also required to give patients a written list of suppliers who can furnish such services in the area in which the patient resides.

**Complying With the Law.** To comply with this new requirement, please note the following:

- The notice must be written.
- The notice must be **given to** patients. The new statutory language suggests that it is insufficient to put the notice in an area where patients are likely to see it and take a copy if interested.

- Some providers may choose to document in the patient’s medical record that the notice was given.
- Providers may choose to have the notice pre-printed on their order forms.
- The law refers to alternative “suppliers.” The term “**supplier**” is defined by Social Security Act Section 1861 (codified at 42 U.S.C. 1395x) as including physicians, other practitioners, facilities, and other entities, but excluding “**providers**” of services. Providers include hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies and hospice programs (See, 42 U.S.C. 1395x(u)). Thus, the listing of alternative suppliers need not include hospital imaging departments, but must include other suppliers.
- The statute does not specify how many suppliers must be on the list, but it must include suppliers in the area where the patient resides.
  - We suggest that the listing be sufficiently inclusive so as to provide meaningful alternatives.
  - Physicians may wish to provide a disclaimer highlighting the independence of the alternative providers. Care should be taken in drafting such a disclaimer.
  - Physicians who customarily treat out-of-area patients should take note that the listing is to include suppliers in the area where the patient resides.

**Effective Date.** The Act states that the new requirement applies to services furnished on or after January 1, 2010, but note that the law was not signed by the President until March 23, 2010. The effective date is an open question, nevertheless, we suggest that physicians impacted by this new rule move forward with all due speed.

### **A Recent Washington Case Also Requires Disclosures With Respect To Internal Referrals**

On March 18, 2010, the Washington Supreme Court decided *Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C., et al.*, \_\_\_ P.3d \_\_\_, 2010 WL 964068 (Wash. March 18, 2010), clarifying the application of Washington’s Consumer Protection Act to in-office referrals. This case applies to services beyond those impacted by the Act discussed above. *Columbia* was a lawsuit brought by a physical therapy practice against a medical practice.

Although the Court in *Columbia* rejected many of the legal theories advanced by the physical therapists, the Court found that the physicians engaged in deceptive acts when they referred patients to physical therapists employed by the doctors without disclosing that alternative providers could service the patients. The facts, as considered by the Court were as follows:

- A physician advised patients that they could only receive physical therapy from the physician's employed therapist.
- On one occasion a patient asked a physician where the patient could go for his physical therapy referral. The physician pointed to the physician's physical therapy facility.

The Court found that, if proven, each of the actions described above would violate the Consumer Protection Act (the "CPA"). The CPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *RCW 19.86.020*.

*Columbia* suggests that referring physicians must advise patients about alternative providers in certain situations. Unfortunately the decision does not identify when this information is required. For example, are physicians only required to identify alternative providers if the patient asks for this information? Does the referral requirement apply to all types of care or only care which is often provided outside of a physician's office or may generate a separate charge?

We suggest that physicians disclose to patients the option of using an alternative provider in the following situations where in-office services are offered:

- Any time the patient asks (specifically or not), suggests, or hints, that he/she wants to receive information about alternative service providers.
- Where the services are not provided (1) by the physician directly, or (2) in his/her presence and under his/her supervision, and a separate charge is billed for the services.
- When the services are within the scope of practice of a different type of provider and services of that type are often provided outside of a doctor's office.
  - For example: flu shots, physical therapy services, glasses and contacts, laboratory services, home health services.
- When the physician is selling goods, *i.e.*, skin preparations and dermatology items, orthodontics, DME, medications, etc.

## Suggested Action

Practitioners should be alert to further developments on this topic. To help you comply with these requirements, you may want to consider the following language:

Your physician has ordered \_\_\_\_\_ for you. You can receive that care here in our office, but you are free to receive it elsewhere. On the reverse of this notice, we have listed alternative suppliers located in the vicinity. We cannot provide you with detailed information about these other suppliers and how their practices operate. Please feel free to contact them with your specific questions. Of course, we have great faith in our own staff and facilities and would be happy to schedule an appointment here for you. If you decide to have this service provided outside of our office, please rest assured your relationship with your physician will not be harmed.



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