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## PHYSICIAN COMPENSATION ARRANGEMENTS: WHAT NOT TO DO

After ten years of investigation, losing at two jury trials, and making multiple appeals, the Tuomey Healthcare case reached final resolution with the [4<sup>th</sup> Circuit Federal Court of Appeals](#). Since it is rare for a hospital to take their case through the courts, this decision will likely prove to be a “landmark case” and the subject of discussion, analysis, and precedent for years to come. There is much to be learned from the Tuomey case relating to arrangements with referral sources. Importantly, the Tuomey case presents both red and yellow flag warning signals that can help others avoid investigation.

### Tuomey Agreement With Physicians

A number of physician practices told Tuomey of their intention to perform surgical procedures in-office instead of at their hospital. In an effort to avoid a reduction in surgical case volume, the hospital board decided to employ these physicians as part-time employees. Tuomey asserted that they relied upon the advice of legal counsel in developing the contracts and that there were no false claims since patients received care; the claims met Medicare standards; and there was no evidence of overbilling, up-coding or unnecessary services. However, the record of the case evidenced that Tuomey entered into the arrangements to prevent the practices from performing their services outside the hospital, in-office, or at ambulatory surgery centers. This was clearly one of several “red flags” which quickly drew the government’s attention.

### Tuomey “Red Flags”

- Fair Market Value (FMV) determination exceeded 90 Medical Group Management Association (MGMA) percentile (above NY, CG, other high cost areas at major medical centers);
- Record indicated Tuomey feared competition and used the agreements to block it;
- When advisors didn’t give Tuomey what they wanted, they shopped for others who would;
- Physician income dramatically increased under the agreement; and
- Compensation took into account the physicians’ actual or anticipated referrals to Tuomey.

The case presented a number of unusual elements in Tuomey’s physician arrangements that raised questions and inquiry. Individually, these elements may not have been sufficient to implicate the Stark Laws or Anti-Kickback Statute, but taken together they proved too much for Tuomey to defend.

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Furthermore, in the Tuomey opinion, the Court concluded that the jury had sufficient evidence to identify the prohibited referrals and penalties. The following are some of these unusual features:

#### Tuomey “Yellow Flags”

- Long term contracts, especially those spanning 10 years;
- Part-time, partial service contracts;
- Physicians guaranteeing total exclusivity to the hospital;
- Complicated compensation formula arrangements;
- Providing full-time benefits for part-time physician employees;
- Absence of identifiable work requirements defined in return for salary;
- Physician agreements for only out-patient services; and
- Incentive compensation provided before work starts.

The Tuomey case does not mean agreements between hospitals and physicians are not permissible, but warns that care must be taken to avoid implicating the Stark Laws and Anti-Kickback Statute. The following are suggestions when considering arrangements with physicians:

#### Tips to Avoid Problems

- Maintain a record of why contracted physician services are reasonably needed by the hospital;
- Never take into consideration the volume or value of referrals in any agreement;
- When questions are raised about an arrangement, investigate and resolve them immediately;
- Ensure consistency in arrangements, as deviations raise concerns and interest;
- Commercial reasonableness analyses must be thorough and supportable;
- Productivity bonuses should not begin until after work is performed;
- Compensation to physicians must be consistent with FMV;
- Independent FMV determination is needed as a safeguard, but must be defensible;
- Do not work backwards from what you want to pay to find FMV;
- FMV is difficult to determine when there are multiple levels compensation in the package;
- Those determining FMV must be independent and uninvolved in making agreements;
- Any FMV determinations should be supported by strong evidence;

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- Maintain documentation supporting FMV and how compensation was determined;
- Retain records of any surveys utilized and any opinion from a third party valuation firm;
- If reluctant to keep accurate records of deliberations on arrangements, consider redoing it;
- Do not “opinion shop” and disregard adverse legal and expert advice;
- If relying on “advice of counsel” defense, be prepared to open files in detail;
- Arrangements designed to reward loyalty are not defensible;
- If a deal doesn’t feel right, no matter what advisors say, reconsider going forward with it;
- Any unusual arrangement should be considered a warning signal and handled carefully;
- Settle cases as quickly as possible to avoid the sheer magnitude of potential damages;
- Huge damages in these types of verdicts are likely to permit a hospital to remain independent;
- Agreements must clearly define specific duties and services to be performed;
- Ensure all compensation contracts with physicians are in writing and signed by all parties;
- Once agreements are in force, verify performance before making payments; and
- Use [outside experts for ongoing auditing of arrangements](#) for compliance with laws.

*Source: Strategic Management Services, LLC*

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