

Stark vs Anti-Kickback vs Fee-Splitting

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By Michael H. Cohen

In today's video, I'm going to speak extemporaneously about **Stark Law and Anti-Kickback Law**. Why? Because Stark and anti-kickback and fee splitting, also known generally as **fraud and abuse**, these issues come up again and again and again with every single healthcare venture.

Let's take Stark. So the **Stark Law** deals with self-referral... Oh, if you could please hold my helicopter up there. I guess it's going to pass overhead and land. Anyway, we'll just keep going. Stark generally deals with self-referral. For example, my financial interest in that helicopter, not an issue. But if you're a physician and you send somebody to a clinical lab or a certain other designated health services, also known as DHS, where you have a financial interest, that's a self-referral. That's what Stark Law prohibits. Typically where you have that kind of financial interest, you also have a kickback scenario.

A kickback involves giving or receiving a thing of value. In exchange, there's a referral. Now this gets very, very tricky. So let's say for example that you hire a marketing company and the marketing company does this job and they send you dozens of good referrals, good leads a month, and you're paying them. You're paying this marketing company \$2,500 a month to generate leads and essentially send you patients. Is that a kickback? Well, probably not. It's a flat fee. So flat fees are typically safer. And the thing is you're not paying for the referral. You're paying for the marketing company to do its services.

Now, what if every time the marketing company sends you a patient, now you give them \$100, they send you \$25 a month, that same \$2,500 but it's \$25 times 100 patients.

That's a kickback. I mean, that's the **essence of a kickback**.

You're actually paying for the referral. You're not paying necessarily for performance or for production. And what's happening is, another way of phrasing this is that the revenue fluctuates or varies by value or volume of referral. That's another way the kickbacks are typically defined.

Now if you've watched other of our videos, you'll notice that **self-referral** or Stark and the Anti-Kickback Statute, they have parallels in state laws. So I got this question just yesterday. What if there's no Medicare involved? What if there's no federal moneys being reimbursed? Well, then we're not under Stark and the federal Anti-Kickback Statute. However, you are going to fall within state law statutes, whether those are California or New York or Texas or some other states. Just look and you'll find these statutes and regulations that prohibit referrals where the physician and sometimes other healthcare licensees have a financial interest in kickbacks.

Now the next question we get is, what's **fee-splitting**? Fee-splitting is literally you take the professional fee, the \$100 that the physician gets from the patient. You split it, some of it goes to the physician, some of it goes to the business person. So how

do you stop fee-splitting? Well, you have to be careful that you're not splitting the professional fees. This can get very nuanced, especially in the age of digital healthcare, the age of internet Madison, the age of telehealth and telemedicine, e-health, mobile health, connected health, whatever name you give it. Basically what you've got is you're moving out of the brick and mortar where you go and visit your medical doctor in the office and you're paying somebody online for service and that service connects you to a medical professional.

In the old days, we were especially concerned about flow of payments because if the payment goes from the patient to the company and then to the physician, that can look like it's a kickback to the physician or it can look like moneys are coming and going one way and the referral is going in the opposite direction. So this triangular relationship between the three is very important.

Nowadays, we have different kinds of financial systems that can segment the payment. Maybe the payment goes there and then gets split up. We've got a lot more digital health, so the flow of payments I would say in my judgment is not in and of itself a red flag typically, the red flag is something else, but it can be an issue. And sometimes we try and structure these arrangements so they look more like MSO arrangements, like a business arrangement where the patient is essentially paying for the professional service and the professional service provider is paying the software company, the software platform, the app, the business provider for a management and marketing service. That's what we call legal fiction. We're actually stretching the law. We're not breaking the law. It's like Silly Putty. Like we're moving the boundaries of the law as industry continues pushing the envelope and that's what makes fraud and abuse so fascinating.

When you're dealing with physicians and Medicare and Stark, that case, it behooves us to pay attention to all of the exceptions and be extremely meticulous. Of course we'll be meticulous on the fee splitting and anti-kickback side as well, I would say though that when we're not dealing with Medicare, we're dealing with an internet startup, we're dealing with software. We're going to be looking at it with a somewhat different lens so that we can understand this place where you have compliance on one hand, the industry on the other.

So that's the last topic I'd like to address because people say, "*Well, what do you do? Do you do compliance?*" I suppose we do. I've said in the past that I find compliance a little bit less than exciting because compliance sounds like just checking the boxes in you. You have to comply. But what I would say is that you have this relationship between what you want to accomplish on one hand, and the compliance and the exactitude of the regulation on another. And somewhere in the middle, somewhere in between, you have to figure out your business model.

You can't be 1,000% percent compliant and not doing anything that's innovative. On the other hand, you can't play fast and loose with legal rules. So it takes a good savvy lawyer with good long run of healthcare law experience, especially in fraud and abuse, to understand how to structure these deals for digital health. We can talk more about these structures in another video, but for now I just wanted to give you that extemporaneous view of how industry is pushing the envelope and the law is not necessarily well pushing back in some places and other places. It's more about stretching the paradigm to accommodate the vicissitudes and the transformations in the industry.

I'm Michael H. Cohen, founding attorney at Cohen Healthcare Law Group. Hope you've enjoyed this video. Thanks for watching. We look forward to your healthcare venture success and to helping you with that success.

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