

# CCH Healthcare Compliance LETTER

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## Avoid the common pitfalls of complying with anti-fraud laws

by **Catherine Hubbard, MA, Contributing Editor**

Health care entities often are surprised to find conduct that's legal in other settings may subject them to a lawsuit. "For the unwary, doing business in this industry can result in substantial liabilities," said Linda Baumann of Reed Smith LLP, Washington, D.C., during a recent audio conference sponsored by the American Bar Association.

Entities need to know when the health care fraud and abuse laws apply, including the anti-kickback statute (AKS), Stark Law and the False Claims Act, Baumann said. "This is an area you need to be very sensitive to and look into in detail if you're involved in any transaction that touches the health care industry."

**Anti-kickback rules.** Courts have interpreted the AKS broadly. In particular, they have adopted a "one purpose" test, which means the statute is violated when one purpose of the payment in question was to induce referrals. "Even if your motives are pure 99 percent of the time, that one percent can make you a violator," she cautioned.

There are criminal penalties under the AKS for people who knowingly and willfully engage in kickback arrangements for goods and services the government pays for through its health care programs. "It is a very broad statute. Almost any action you take that involves federal health care programs can make you subject to the anti-kickback prohibitions if you have a proper intent," Baumann said.

Fortunately, Congress provided a few exceptions to the law. For example, properly disclosed discounts or other price reductions, payments to bona fide employees and certain payments to group purchasing organizations are allowed. The Health and Human Services Department also has provided more than a dozen safe harbors, that cover, for instance, investments in certain large or small entities, investments in entities in underserved areas and space and equipment rentals.

The key to falling within a safe harbor is to limit transactions to those that are reasonable and fairly priced and to create a paper trail to back up your efforts. "Make sure that you have commercially reasonable items and services that are being received for fair market value," Baumann advised. She also suggested providers keep documentation that will support that contention. "That is the underpinning of the safe harbors and the way to avoid violating the AKS," she said.

Moreover, Baumann advised companies to set their aggregate compensation in advance for at least one year. "This is where a lot of arrangements don't fit the safe harbors," she said, noting that percentage compensation arrangements are

commonly used in the industry. “You’re safer if you have a flat, annual fee for the transaction,” she added.

**Stark prohibitions.** The Stark Law prohibits physicians from referring Medicare and Medicaid patients to an entity for furnishing certain designated health services if the physician has a financial relationship with the entity. Therefore, if a physician has any type of arrangement with an entity that provides certain designated health services, that physician cannot refer patients or designated health services to the entity unless the arrangement meets an exception, Baumann said. Phase II regulations created several new exceptions including those related to services furnished under certain payment rates, related to professional courtesy and to charitable donations by a physician, she noted.

Baumann reminded practitioners that Stark is a strict liability statute. “Your intent doesn’t matter. If your transaction implicates the law, you have to meet an exception,” she said. While some exceptions apply to ownership arrangements, others apply to compensation arrangements or both types of financial relationships. Exceptions applicable to ownership arrangements include rural providers and hospitals in Puerto Rico. Exceptions applicable to compensation arrangements include office space or equipment rentals and bona fide employment relationships.

In addition, there are 11 designated health services that cover a large part of the industry, including inpatient and outpatient hospital services, clinical laboratory services and radiology. “If you’ve got a physician involved in the deal, it’s pretty likely you’ve got some concerns about Stark,” Baumann said.

Baumann further cautioned that Stark applies both directly and indirectly. “You really have to know the parties involved in the transaction and their affiliates back several layers to make sure you’re not violating the Stark Law,” she said. Stark applies even if the company involved employs a physician, is owned by a physician or is owned by another holding company that’s owned by a physician. “Make sure you don’t have a direct or

indirect financial relationship at issue. If you do, then start looking at the exceptions,” she advised.

Adding to the confusion, AKS and Stark have both overlapping and contradicting areas, Baumann said. But the government has made it clear that companies must comply with both laws. “You can’t assume that by complying with the AKS, that you don’t have a Stark problem,” she said.

“There are very few bright line rules in this area,” said Baumann. “There is a tremendous amount of gray,” she said, adding, “You can fit in a safe harbor and that’s about as safe as you get, but there’s no guarantee.”

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**“You really have to know the parties involved in the transaction and their affiliates back several layers to make sure you’re not violating the Stark Law.”**

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**False Claims Act.** Government enforcement actions in this area have increased dramatically, as have lawsuits brought by whistleblowers under the *qui tam* provisions of the act, said Baumann. Since whistleblowers get part of the award in a successful case, the number of FCA cases is likely to keep increasing, she predicted. The penalties under the FCA can be very large. The law provides for treble damages, plus an additional penalty of \$5,500 to \$11,000 for each “false claim” filed, she noted.

**Myth v. Fact.** Baumann provided a list of common myths in the fraud and abuse area. She noted the myths often arise when practitioners don’t keep up with ever changing fraud and abuse laws and related interpretive materials. “It is critical to be fully informed of the current legal provisions as well as the guidance documents usually published by the Office of Inspector General or Centers for Medicare & Medic-

aid Services,” she said. “This is a necessary, but daunting, task,” she concluded.

**Myth:** If the arrangements don’t relate to patients whose health services are paid for by the federal government, there’s no problem.

**Fact:** Trying to carve-out federal health-care beneficiaries from arrangements can reduce some risks, but can create others related to prohibited “swaps” particularly under the anti-kickback statute.



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Unless otherwise noted, all paragraph references are to the CCH Healthcare Compliance Reporter.

## Fraud & Abuse (cont.)

**Myth:** If you're not dealing in health care supplies or services, the fraud and abuse laws won't apply to your transactions.

**Fact:** Health care providers are reimbursed by the federal government for a wide range of expenditures. "You may be selling widgets to a hospital and that is what implicates the federal fraud and abuse laws," she said.

**Myth:** When you have a transaction, and neither party is a physician, you don't have to worry about the Stark Law.

**Fact:** The Stark Law (like the anti-kickback statute) applies to both direct and indirect relationships. "If you have a doctor anywhere in the picture—an owner, employee, independent contractor—you can have the Stark Law implicated," she said.

**Myth:** If a company violates the anti-kickback statute or Stark Law, it will only have to pay the penalties prescribed under the specific law at issue.

**Fact:** Prosecutors and whistleblowers have increasingly been trying to use the FCA to attack conduct that violates other laws such as the anti-kickback statute or the Stark Law.

**Myth:** When one company purchases another that had compliance problems, the health care operator doesn't have to worry about the resulting penalties, since the problems occurred before the acquisition.

**Fact:** The liabilities go along with provider number. "If you assume that provider number, you assume those liabilities," she said. "Due diligence is key if you assume that provider number."

**Myth:** Paying marketers based on the number of patients they get to come to a clinic is the best way to provide an incentive for them to do their job.

**Fact:** Marketing practices are subject to particular scrutiny by the OIG, particularly when aggregate compensation is not set in advance, which is the case when compensation is paid on prospective results, per item or per patient.

**Myth:** Providers are not subject to prosecution if they did not intend to violate the law.

**Fact:** The definition of improper intent has varied from case to case and some statutes, such as Stark, are strict liability.

**Myth:** You should provide health care product samples to patients at no cost,

to show them the quality of your merchandise and encourage them to come back.

**Fact:** Providing free goods or services can implicate civil monetary penalties, relating to beneficiary inducements and can violate the AKS, Baumann said. She recommended that companies wanting to provide free services do it with extreme caution. "That's a real red flag. It typically cannot be done in the health care industry," she said. ■

*CCH Washington Bureau, April 9, 2004*

### Letters to the Editor

The CCH Healthcare Compliance team welcomes comments or questions regarding articles published in the CCH Healthcare Compliance Letter. Send comments to Sharon Sofinski, Coordinating Editor, at [sofinsks@cch.com](mailto:sofinsks@cch.com). For more information about the CCH Healthcare Compliance Portfolio visit our online store at <http://health.cch.com>.

### Correction to Stark II Phase II interim final rule

The Centers for Medicare & Medicaid Services (CMS) has posted a correction to the interim final rule on physician referrals to health care entities with which they have financial relationships (Stark II, Phase II) in the April 6, 2004 *Federal Register*.

Two sections from the preamble of the interim final rule—"Section IX. Reporting Requirements" and "Section X. Sanctions"—were omitted from the original March 26, 2004 posting in the *Federal Register*.

The April 6 *Federal Register* is at [http://www.access.gpo.gov/su\\_docs/fedreg/a040406c.html](http://www.access.gpo.gov/su_docs/fedreg/a040406c.html).

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# Beyond bylaws and ethical codes: An interview with a corporate accountability expert, Part I

by Judith A. Tichenor, JD, LCSW

*With the advent of the Enron and MCI Worldcom corporate scandals, not to mention the congressional response to such activities, known as the Sarbanes-Oxley Act of 2002, concerns about cleaning up the corporate books and restoring investor confidence abound. But are accounting and investing practices really the only matters for concern here? What about the ethics, or lack thereof, that drove the executives and board members to act like corporate raiders in the first place? Beyond ethics, is there another way to comprehend the term “accountability,” one that lies just beneath the surface of our daily corporate, professional, and personal conduct? One man, and the corporate accountability experts he leads, says, “Absolutely.” That man is Mark Samuel, founder and president of Impaq Corporation, a leading consulting firm specializing in corporate accountability and leadership coaching for companies all across America.*

CCH first saw Samuel at the Annual Conference for the American Society for Healthcare Human Resources Administration (ASHHRA) in August 2003. Samuel spoke on the importance of corporate and professional accountability in leadership. At that time, he presented a unique model for assessing the challenges to effective team relationships, ethical business practices, and the success that a corporation would enjoy based upon sound communication, assumption of personal responsibility for follow-through, and conscientious human relations. CCH took the opportunity to delve more deeply into these and other concepts, as conceived by Samuel, and the following interview, presented in two parts, is the result.

**CCH:** How did you get involved in this work?

**Samuel:** In 1986, I ran my own organizational development firm and I was working with a union group of a major auto manufacturer. I began to notice a real “blame game” going on, with everyone blaming each other for problems between the union and management. In trying to move that to a successful outcome, I got frustrated and developed the model that we at Impaq currently use that describes the “Victim” approach and the “Accountable” approach, and the choices that people have to make. That personal accountability model has been the foundation for our accountability work ever since. Since that time I discovered that when organizations were implementing change, the one major flaw was that they didn’t really have a way or system for people to be accountable to each other with any support. They never developed an environment where people could count on each other. That environment is really the key for organizational accountability, and for company success. Now, we’ve had

organizations that have been using our accountability system for as much as 13 years, some for 10 years and 7 years, so we’re not talking about something that comes and goes as a flash in the pan. It has actually become a foundational piece for many organizations, and even has become benchmarks for these organizations.

**CCH:** So Impaq actually goes into companies and organizations and works from the top down to create a structure or culture of accountability?

**Samuel:** Yes, well, we actually work in different ways. We’ll work with top management, or middle management, to create accountability. Sometimes we’re working with a division and sometimes we’ll even get called in to work with a particular department that is having trouble and we’ll implement accountability there. It’s always fun to do that, because that department goes from being the worst to the best and becomes the role model for the rest of the company.

**CCH:** Are you often called back again to come in and do the same thing for the rest of the company?

**Samuel:** Yeah, many times it begins as a grassroots effort that way.

**CCH:** Do you see your focus as helping support compliance, including regulatory and legal aspects of corporate responsibility?

**Samuel:** Oh, absolutely.

**CCH:** How does it do that?

**Samuel:** When the culture moves toward greater accountability, it also will, by definition, move toward greater integrity. To me, integrity is a real key piece in having both open and honest sharing of views. So where you have a situation like Enron or NASA, where major breakdowns are occurring, the

problem is not that breakdowns occur or even that people are doing things that are illegal. The problem is that no one is open to hearing about that going on. People are going to make mistakes, even ethical or legal ones. The real issue of accountability is openness to hearing feedback when you don't agree with it, or don't want to hear it because it is upsetting or painful.

**CCH:** Give me an example.

**Samuel:** For instance, in NASA and the explosion of the Columbia, people knew there were problems, people were saying that there were problems, but everyone was trying to hide. In an accountable culture, nobody hides, and we take people's feedback seriously, we do the investigations, and we have a recovery system in place so that when we get off track, whether it is strategically, ethically, or legally, we can get back on track as quickly as possible. What people confuse with accountability that causes so much trouble is perfection. Everyone wants perfection out there. Then when perfection doesn't show up, we then find someone to blame, and call that action "holding them accountable." Well that's not accountability.

**CCH:** What is accountability?

**Samuel:** Accountability involves the presumption that we are human beings first, and we are going to make mistakes. There are times when we all have bad judgment, some as minor as eating that piece of cake when we're on a diet, to lying on a corporate tax report, believing that no one will notice. Then there is the more extreme case where people concluded in the NASA/Columbia instance: "Gee, it was mostly safe." That's not good enough. But, the issue is not perfectionism, even in that case, but rather, do we have the recovery plan that includes listening to people's communication, opinions, viewpoints, and analyses that might say we're off track and then doing something about it? In an accountable culture, I might make a mistake and one of my coworkers might say: "Listen, Mark, that really doesn't match your integrity. I think we need to be more customer oriented, or I think we need to spend more time and money on making the product safer." That is the issue.

**CCH:** How do you help organizations see where accountability fits in?

**Samuel:** One of the things I talk to organizations about is, it's not the organization that performs the best that wins. It is the organization that recovers the fastest that wins. Anyone can have a good year. But sustaining it over and over again is based in the ability to have breakdowns, to have new challenges, and get the group together and be able to deal with them quickly, primarily because you

have an open system in place that operates easily in facing such challenges.

**CCH:** So regroup and respond. How about an example?

**Samuel:** This one doesn't deal with legal issues, but it illustrates what I'm talking about. I was working with a healthcare organization that was trying to consolidate two units from the second floor onto the fifth floor. The consolidation would save money, provide better patient care, etc. This was a big change for the staff. They planned it and the two units were moved. One unit functioned great; the other did not function at all. The nurses got together, and instead of complaining and moaning, they did an analysis of why it wasn't working. I made recommendations about what we could do differently by moving the unit back to the second floor, instituting some of the new ideas and setting up a different plan for moving back to the fifth floor within three months. So the nurses acted very accountably. They

then gave their recommendations to management. Management responded and actually agreed with their moving back to the second floor. The amazing part is: from the time they initially moved, did the analysis, gave the recommendations to management, moved back to the second floor, it took all of two weeks.

**CCH:** Really! Two weeks from start to finish?

**Samuel:** Yeah! Now that's what I call fast recovery! They had been using accountability methodology and values for five years. So they were already in a position of openness, of taking the accountable path instead of the victim path of blame. How many times in other settings would it have just stopped with the nurses complaining and moaning? Or taken management meeting after meeting, avoiding making a decision because no one wants to be wrong—even after the nurses made the recommendations. These are the types of things that did not happen at Enron, NASA, and Worldcom.

**CCH:** Why won't people listen when employees are trying to tell them that things are going wrong?

**Samuel:** Whenever we take the victim path, most often the root cause is fear. We're afraid of what people are going to think, we're afraid of making a mistake, afraid of looking bad in front of other people. That's why people hide, that's why people blame others. The most frequent conversation in organizations is: "I'm afraid to tell anyone I made a mistake because I'm going to get fired." The funny part about it is, those are the very organizations where nobody fires anybody. They don't even deal with nonperformance because managers are afraid to do that. We've become a very fearful society; we're afraid of being sued, especially in health care. If the patient does not sue us, we're afraid of being sued by the

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**"The real issue of accountability is openness to hearing feedback when you don't agree with it, or don't want to hear it because it is upsetting or painful."**

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## On The Front Lines (cont.)

employee for unfair practices. Suddenly, letting an employee go for nonperformance “isn’t fair.” It’s just human nature to be fearful of being wrong.

**CCH:** Sounds like embarrassment or shame accompanies fear also. And we’re afraid of being fired for being the one who says something about a bad practice or questionable activity?

**Samuel:** Right! Or we’re afraid of hurting someone else’s feelings, so we don’t deal with conflict. We’re afraid of that, too, so we don’t deal with nonperformance. It takes a lot of courage for people to speak out at an Enron or a NASA because they are afraid of losing their jobs. Yet, many speak out anyway. Then they encounter the fearful upper manager who has to make this million-dollar-plus project work or else face discharge. Or, there is fear that “my name gets in the paper” if, all of a sudden, there is a major issue. So, we don’t say anything.

**CCH:** In keeping with this theme just a little longer, regarding lawsuits, as an attorney, I might argue that, at one time, lawsuits were a way of trying to hold people accountable. For example, professional licensure boards, whether we’re talking about state medical licensure boards or the SEC, weren’t policing themselves and letting the worst members of their professions deliver awful care or steal Mom’s nest egg. Without an internal accountability system, doctors started getting smacked with lawsuits. Pretty soon, it wasn’t just doctors who were guilty of gross malpractice, but doctors who were making human mistakes being sued every whipstitch. Is the lack of an internal accountability system partly responsible for how we’ve gotten ourselves into these expensive fixes?

**Samuel:** Oh, absolutely! Whenever we aren’t accountable, then the only thing we think of doing is administering a punishment. We think that the way to get people accountable is to punish them. Here’s the problem with that: When you punish people, they don’t necessarily learn. Look at prisons, with an 80 percent recidivism rate, because they are being punished, but they are not necessarily learning how not to do the behavior that is wrong in the first place.

**CCH:** Does punishment just create new victims?

**Samuel:** Well, absolutely. That’s where the victim and the punishment only breed more victimization, not accountable conduct. For example, have the physicians learned more from being sued? Not necessarily. Have we developed better systems of accountability? Yes, but we could do more true accountability, holding people accountable, and have consequences to their actions. Consequences are different than punishment. One is natural and the other is not. For example, a natural consequence of poor performance might be letting someone know that they are not in the right field or profession. “If you don’t hold to these standards, it’s not that you’re not a nice person, but you have to do what it takes to be a member of this profession.” That’s not necessarily punishment, that’s just all up front consequence.

**CCH:** Doesn’t mean that the consequence doesn’t hurt, though.

**Samuel:** Sure, but that’s what accountability is—it’s about learning and growing and taking action on our learning, on the

organizational level, the team level, and the personal level. Not just insight or awareness alone, but actually taking action on the insight, learning or awareness to get better results. If we would be committed to that, there would be a lot less punishment going on. And people would be growing a lot more, recovery systems would be in place, and results would improve dramatically.

**CCH:** How would recovery methods help us on the point of learning and growing?

**Samuel:** Too often we’re doing things that are brand-new for us—we’re acting as pioneers and we’re trying to get it right the first time. That’s what’s wrong with perfectionism. Pioneers had recovery mechanisms in place in case of change. We develop new technologies and systems and expect them to go perfectly. That’s ridiculous! Our whole basis should be recovery plans. Every time we’ve worked with an information technology department and told them to develop recovery plans, they’ve actually accomplished higher rates of success, and faster than departments without the recovery plan mentality.

**CCH:** At the ASHHRA conference, you said, “Plan for failure.” Is that the recovery model you’re talking about?

**Samuel:** Yes, like the nurses. They had a plan to reconvene to discuss things that were going wrong with their plan to move back to the second floor. They had a scheduled time, and they openly discussed, without blame, what worked and what didn’t. Most people wait until there is a crisis, then try to convene to figure out what happened. Some organizations get so good at crisis management, they can’t do it any other way anymore. I did a major restructuring for an organization that took only four months instead of a year because we had recovery plans based on reconvening at the one-week, six-week, and three-month marks. Everyone had a set plan for the kinds of changes to expect and accept at these stages, so they would submit their changes and make sure it is within the intentions of the plan. The focus is not on coming back with a complaint that means we have to go back to the old way. Rather, it is on, “How are we going to accomplish the direction of this change in a different way?” The nurses didn’t come and say, “Hey we need to go back to the second floor and do things the way we used to do them.” They said, “We’re going to move back to the second floor, but we’re going to do things consistent with the changes we need to make until we can get back to the fifth floor.”

**CCH:** What about when you have a company or healthcare organization that has gotten so entrenched with “the way we do things” that they can’t even imagine what you’re talking about? It’s all victim-thinking, all blame-gaming, and as soon as anyone tries to bring in a breath of fresh air, the response is: “That’s not how we do it here.” What do you do to break into that culture?

**Samuel:** When people are in this mode, not taking responsibility, you automatically have low morale. People don’t like being there, they’re frustrated, they’re cynical. In a way, that’s the good news. There is no better time to try and create change than when people are in pain. That’s when we diet, that’s when we look at doing things differently. The only thing people may agree with is: “it’s no fun to work here anymore.” The key is,

creating a new vision. There has to be a new direction, a new beginning. People have to be honest to do that, to be honest about what we have to do today. The leadership has to be honest about what's going on, and say, "You know what? The way we've been leading, and the way we've all been playing together, we're not doing well. Our numbers aren't good, our resources are continuing to get cut, you guys are upset and frustrated, we're frustrated and we need to make a change. This is what we're committed to." Management must draw a line in the sand and say: "What we want here is an environment where people can count on each other, where we're all working together, where we are supporting each other, where the environment is positive, and we're getting good performance results, and that's what we're moving to." Some organizations then go back to every individual employee and say: "Now, do you want to be part of this organization? Because this is now what it means. And if you don't, that's OK, we'll help you find another job somewhere else, because you're no longer a fit for a positive environment. This is not negotiable." In other words, the message must be: "There is no way we're going to change it without us all doing so all together."

**CCH:** What happens if the company wants to change this negative culture, but isn't clear about how?

**Samuel:** If management is not clear, and the company has a new direction, then the company becomes a member of the "Change of the Month" Club, doing all these activities—"let's set more metrics! Let's establish more improvement efforts!" But it's all fragmented, and people don't feel any sense of "buy-in" or ownership to the direction or the mission of the organization—"it's just one more 'Flavor of the Month' that I gotta get myself involved in." Accountability is first and foremost having clear intentions: Where are we going? What are we accountable for? We talk accountability, but most organizations are not clear about their intentions enough to even be accountable. The mistake they're making is thinking accountability is all about numbers. That doesn't work, because there is no clear intention about how we're going to function together to achieve those results.

**CCH:** So when you say, "Set a clear intention," you're talking about how we're going to function together to get those good results.

**Samuel:** Yes. Everything is about performance execution. Accountability is all about performance execution. You could have the best process in the world and if people are not carrying it out effectively, it's still not going to work. It's not a skill issue, because I can have the skill and still not execute it well. Because execution is the linkage between people. It's coordination, communication, what they call the "soft stuff." It's not at all soft. It's what every top-performing athletic team, music group, and dance company practice all the time. But they're not going to a class to practice it. You're not learning active

listening to better your communication on the baseball field. What you're doing is you're working out the process of how we coordinate with each other. That's what is breaking down in most corporations today.

**CCH:** So the baseball player who knows this "soft stuff" is not doing it to communicate better on the baseball field?

**Samuel:** Here's what I'm saying. If I'm at short stop, and I want to make a double play, the process of making a double play is: I get the ball, throw it to the second baseman, and after he covers second, he throws it to the first baseman. Now, the skills involved are being able to catch and throw the ball. If I do both well, does that mean I'm automatically going to throw a double play effectively?

**CCH:** No.

**Samuel:** Exactly. Even with great skills, the execution isn't just the collection of individual skills; it's team-linked. It's how well am I coordinating with the other second baseman to throw it with the right timing, not too hard, not too soft, too high, too low, etc. Execution will change as different players show up. We have to work all that out through the "soft stuff," with active listening, effective communication, not

learned off somewhere in a class, but on the job, through the leadership's vision, culture and communication.

*Mark Samuel is the President and Founder of IMPAQ and internationally acclaimed author of The Accountability Revolution, Achieving Breakthrough Results in Half the Time! (Zephyr, 2002). Samuel has been recognized by CNBC, Bloomberg, and Fortune Magazine, which cited him as a top authority on "how companies can end blame in the ranks and create a place where people want to work and get results." Samuel has inspired positive, profitable improvement in companies worldwide, including Chevron Corporation, American Express, Genentech, Mervyn's of California, Nissan Corporation, Hewlett-Packard Company, Universal Studios, Pacific Bell, The Royal Bank of Canada, Dura Pharmaceuticals, The University of California at Berkeley and PDVSA of Venezuela. Samuel holds a Bachelors Degree in Social Science from the University of California, Irvine; a Masters Degree in Management, with a special emphasis in Organizational Development, from the University of California, Irvine; and a Masters Degree in Applied Psychology from the University of Santa Monica, California. His second book, The Power of Personal Accountability: Achieve What Matters to You, is due out in May 2004.*

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## Hospital joint venture does not quash tax-exempt status

Before a jury in a U.S. district court, a community hospital recently proved that it was entitled to a tax exemption even though it operated in partnership with a for-profit health care company (*St. David's Health Care System, Inc.*, DC Texas). The jury decided that the hospital maintained its Code Sec. 501(c)(3) tax-exempt status since it had "sufficient" control in the partnership.

**Case history.** A nonprofit hospital with Code Sec. 501(c)(3) status partnered with a for-profit health care organization. The IRS determined that the hospital no longer qualified for tax-exempt status because it surrendered control of its operations to the for-profit entity.

The case went to a district court where the hospital prevailed. The IRS appealed to the Fifth Circuit Court of Appeals, which reversed and sent the case back to the district court to retry the case. In remanding the case, the appellate court ruled that there were outstanding issues regarding the hospital's level of control in the joint venture.

**Hospital wins again.** The hospital had the burden of proving that it was entitled to the tax exemption. The hospital had to show, by a preponderance of the evidence, that the operations with the partnership primarily furthered charitable purposes and only incidentally benefited the for-profit healthcare organization. The jury decided that the hospital proved that it was entitled to a tax exemption.

The hospital had originally argued that the issue relevant to its tax-exempt status was the partnership's continued charitable function, not which entity controlled the partnership. Nevertheless, it convinced the jury that it had sufficient control in the partnership.

**Jury's instructions.** The instructions given to the jury offer some insight as to how similar nonprofit/for-profit joint ventures may be viewed in the future. Jury instructions included the following:

- **Charitable purposes.** Providing free or below-cost health care services to eligible individuals in the community is a charitable and exempt purpose under the tax code.
- **Profit.** Operating the partnership as a profit does not preclude a finding that

the partnership's operations primarily further charitable purposes.

- **HCA's profit share.** The fact that the for-profit partner received a pro rata share of the capital and profits of the partnership is not an impermissible benefit to the for-profit partner and is not to be considered in determining whether the partnership's operations were more than an incidental benefit to it.
- **"Sufficient" control.** The jury also was instructed to consider whether the hospital had "sufficient" control in the partnership, not necessarily total control. Control may be demonstrated (1) by majority voting power on the governing board or (2) through the exercise of the hospital's rights and powers under the partnership agreement.

It is unclear whether the IRS will appeal the decision. The IRS agrees with the Fifth Circuit ruling (in favor the government) because, in the government's view, it gives clear guidance that the nonprofit organization must have control in the joint venture to maintain tax-exempt status. The IRS will likely issue more guidance on tax-exempt status in joint ventures. ■

*CCH Chicago Bureau, April 7, 2004*

## False Claims

### Tenet agrees to settle false claims charges

by Sharon Sofinski,  
Coordinating Editor

In the largest False Claims Act settlement the United States has recovered from a single hospital for alleged violations of the Stark Law, Tenet Healthcare Corporation has agreed to pay more than \$20 million to resolve false claims allegations.

Tenet and its North Ridge Medical Center in Fort Lauderdale, Florida are alleged to have entered into numerous prohibited financial relationships

with North Ridge doctors and to have billed Medicare for referrals from these doctors. The allegations arose from a whistleblower lawsuit filed by former Tenet executive Sal Barbera. Tenet will pay \$22.5 million to settle the charges.

Tenet has also agreed to pay \$8.25 million to resolve a federal transfer-discharge inquiry. The payment will settle all civil claims against Tenet hospitals in connection with the payment of Medicare claims for transfers of Medicare patients.

According to Tenet's general counsel, Peter Urbanowicz, "Our resolution of this

case should serve as a clear demonstration of our desire to establish a more cooperative and collaborative tone with our federal health program partners." Tenet has also entered into a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services to ensure compliance with healthcare laws and regulations.

For the Department of Justice press release on the Tenet case, see [http://www.usdoj.gov/opa/pr/2004/March/04\\_civ\\_183.htm](http://www.usdoj.gov/opa/pr/2004/March/04_civ_183.htm). Tenet's press release is at <http://www.tenethealthcare.com/TenetHealth/PressCenter/PressReleases>. ■

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