Issue Stories

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Be Creative and Be Careful

by Greg Thompson

With a strategic approach, third-party management firms can foster sleep joint ventures that boost business and improve patient care.

When does a joint venture become an adventure? For hospital-based physicians or those who do not own their own lab, the saga often begins as they repeatedly refer patients to hospital sleep laboratories with no financial benefit in sight. As they send the referrals and reimbursement goes to others, profit does not follow. It's a common gripe, but what can be done to maintain the best patient care, run a functional practice, and have appropriate reimbursement follow?

The good news is that many hospital administrators are willing to explore the idea of creative partnerships with sleep physicians. Hospital officials at Saint Thomas Health Services in Nashville, Tenn, sought out affiliated physicians for just such a venture. "They were willing to talk with sleep doctors about the possibility of different arrangements," says J. Michael Bolds, MD, staff physician at Saint Thomas Health Services, and a member of the Nashville Medical Group.

Since Stark laws do not govern diagnostic sleep services in most settings, anti-kickback statutes are often the primary concerns as joint ventures become more common. Attorneys who oversee these sorts of deals have their radar up right from the beginning. "There are certainly numerous ways joint ventures can be properly structured, but it is always troublesome when the beginning premise is that I, the referral source, need to find a way to make money off my referral," cautions Clay Stribling, JD, attorney with the Health Care Group of Brown & Fortunato, Amarillo, Tex. "That starts you off on the presumption that you are doing something inappropriate." The best premise to perhaps start with is high-quality patient care and the goal of developing a more functional practice.

Proposed joint ventures that include independent management companies have given all parties additional flexibility and opportunities. To avoid legal hot water, Stribling says the key is often for all entities to take on financial risk, with everyone taking at least some operational responsibility. "You can't get into a position where the management company, hospital, and physicians all go into this together and the management company says we are providing this as a turnkey service, and all you really have to do is provide us with patients," Stribling says. "In that model, the physicians get to share in the profits, and really all they are having to bring to the table is referrals."

In setting up this kind of arrangement, attorneys rely on guidance from as far back as 1989, but as recent as 2003, and there is much to consider when structuring the agreement under the anti-kickback statute. Joint ventures in sleep run the gamut from management company collaborations with physicians, to shared labs among different practice groups, to stand-alone labs owned in part by hospitals and local physicians. Each presents problems under federal and state laws. "The federal anti-kickback law makes it a felony if anybody pays anything of value to a person for referring, recommending, or arranging a service paid by a federal health care program," says Daniel B. Brown, JD, a health care attorney with Greenberg Traurig LLP, Atlanta. "This law is extremely broad. Dividends or profit distributions paid by a joint venture sleep lab to its physician owners who refer government patients to the lab, or to management company owners that market the lab, could be considered illegal ‘kickbacks' under the law."

Something has to give, and the soft spot can be found in so-called safe harbor exceptions. Brown explains that the safe harbors described by CMS, if followed exactly, will immunize payments from being considered illegal remuneration under the anti-kickback law. "The anti-kickback safe harbor usually applicable for joint venture sleep labs is the ‘small investment' safe harbor," Brown says. "That safe harbor has eight components. If each is met, then profit distributions from the joint venture entity won't be considered to be illegal kickbacks."

Navigating the legal waters and finding the all-important safe route largely depend on passing the 40% ownership test and the 40% revenue test. According to Brown, the 40% ownership test says that no more than 40% of the value of the investment interests may be held by persons who are in a position to generate business to the joint venture entity. Included in this 40% category are persons in a position to make or influence referrals to the entity, as well as persons who furnish items or services to the entity.

The 40% revenue test says that no more than 40% of the joint venture entity's gross revenue (that relates to health care items or services in the last 12 months) may come from referrals or business generated by the investors. "So even if referring physicians own less than 40% of the equity interests, but their referrals generate 80% of the entity's gross health care revenues in a year," Brown says, "then the arrangement still fails the small investment safe harbor."

THIRD PARTY AT THE TABLE

Both Bolds and Jason Dinger, vice president at Saint Thomas Health Services, ultimately took meticulous care in crafting their joint venture to meet all legal requirements. To help out with the business side, Dinger and the physicians he works with sought out the assistance of Nashville-based SOVA Inc, a management firm that partners with and helps to develop sleep centers for hospitals and physicians.

SOVA's main client is the hospital (Saint Thomas), which typically hosts the joint venture. According to Edward Giannotti, chief operating officer at SOVA, the hospital may choose to build a sleep center and sell shares in the joint venture. "The hospital would invite sleep physicians to purchase shares, and also would invite a firm like ours to buy shares and be involved in the management of that sleep center," Giannotti says. "Now you're ending up with a joint venture between the hospital, two or three physicians, and a management company. And this joint venture would incorporate and build the sleep center, and have SOVA manage it on an ongoing basis."

Daniel B. Brown, JD

Clay Stribling, JD

From the hospital point of view, Dinger's first goal was to ensure high quality for the entire operation. After that, he sought a way to properly align with physicians and give them a stake in the operation's success. "Being a standing member of a board of an entity that they can really set priorities and budgets for is a significant step in aligning with your medical staff," Dinger says. "Providing an opportunity for physicians to own a portion of that center helps to secure that relationship over time—as opposed to being a periodic medical director."

For hospitals looking to start a similar venture, Dinger encourages officials to find a good third-party partner. "A lot of hospitals think they are going to save themselves money [by not using a third party], but I have not seen it," Dinger says. "Bringing in a third party who has specific expertise in a sleep joint venture is a win-win-win because the hospital can outsource the management. Physicians have a role in managing both parties. And the third party is entirely aligned in ensuring that the center is successful."

In many communities, a hospital affiliation for a sleep center is a distinct advantage. That is certainly the case with the St Thomas Health Services Center for Sleep, a facility next to the main hospital with ample parking and security people for nighttime visits. According to Bolds, the center is so well respected that some doctors who are not members of the joint venture are actively sending their patients.

After sleep physicians find a willing institutional partner such as a hospital, they essentially become part owners of the sleep center. At that point, the extra help from a third-party management firm is usually quite welcome. "There's no point in having a doctor try to be a businessman, and there's no point having a businessman try to decide about medical technical issues, or about what kind of monitoring equipment to use," Bolds says. "Everybody must have their own job and do it well."

As the attorneys will attest, the exact percentage of physician ownership in such ventures is extremely important. At the Saint Thomas joint venture, each sleep physician was offered the opportunity to be a partial owner within proper parameters. "That involved putting some cash money up to help capitalize the operation and get it going," Bolds says. "So you took some risk, and that was a bit of a step for the doctors. But with risk comes the potential for reward, and we do get a stream of income from it now—and it has ended up being a good investment for us."

SOVA receives a percentage of the revenue, and it is largely their job to market the venture effectively and tastefully. No sleep physician wants to engage in marketing efforts that are perceived as a "hard sell" and SOVA keeps this in mind at every step. "They aren't going to demand that we do something that makes us uncomfortable," Bolds says. "They come up with marketing ideas, and they may organize some public relations events where we get interviewed on TV—things that physicians feel comfortable with—so I don't feel like I'm out pandering myself."

An effective third-party management team can provide the nuts-and-bolts advice that makes the difference between success and failure. "You often really don't have the depth of expertise to develop a quality sleep center within your own staff," Dinger says. "We actively went out and pursued a third party to manage our center, because they could tell us how big the rooms should be, how they should be designed. What is a quality sleep technician and how do you recruit sleep technicians? How do you maximize efficiencies with payors? How should you negotiate with payors? The list goes on, and it made a lot of sense for us to invest in this."

"The hard part is hiring and firing people, and I'm terrible at that," Bolds admits. "Hiring technicians and keeping them trained adequately are a major headache, and SOVA has got some excellent technicians who have managerial ability and who can help oversee the work of technicians. Those managerial headaches get dealt with, and they come to us for technical issues and input. We have interaction, but the humdrum everyday stuff we don't have to hassle with."

A good third-party management firm can help physicians and hospitals determine whether a particular area is suited to a three-way venture. Is the market saturated? Is it too small or too large? These are crucial questions that must be addressed before any major initiative starts. "We're going into areas with a lot of county hospitals, in a fragmented market, where there are doctors trying to provide sleep studies—but they are struggling with the fact that it's expensive and reimbursement is low for doctors on their own," Giannotti explains. "Or you have hospitals where the reimbursement is OK, but they don't have alignment with physicians to provide an outstanding sleep center. That is where we come in. We show hospitals the capital requirements, what physicians may or may not be interested, and where we could locate them."

Ultimately, business considerations should never stray far from legal considerations. For example, Clay Stribling also points out that referral source investors can't receive a sweetheart deal to get in on the investment. "They can't get in at $1 when the business investors are getting in at $100,000," Stribling cautions. "And the referral source investors can't be given a disproportionately high percentage of the profits. All profits should essentially be in proportion to the percentage of ownership. And the percentage of ownership should be in proportion to the amount that the parties have brought to the table."

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