LEGAL CORNER

Marketing Appropriately at Your Cancer Center

by Susan W. Berson, JD

...Structure your marketing and fundraising events and materials to comply with all relevant federal and state laws.

Marketing activities educate both the public and referring providers about the quality and type of services that community cancer centers provide. However, cancer centers must be aware of the various rules and regulations that set the permissible parameters of their marketing activities. These rules exist at the federal and state level. They consist of laws, regulations, government pronouncements, and published guidance (which does not carry the force of law but provides insight into the government's position on permissible marketing activities).

Most important, these rules govern not only permissible marketing within the community, but also permissible interactions with those providers that may use an institution's inpatient services.

When dealing with providers that may be possible referral sources, a cancer center must take into account federal and state kickback laws, as well as self-referral prohibitions. These laws, and the regulations and interpretations promulgated under them, prohibit the payment or offer of remuneration in order to induce providers to refer beneficiaries for services. While most cancer centers understand that they should not offer to pay providers to refer patients to their institutions, other forms of impermissible remuneration can be more subtle. For example, an expensive dinner for the provider and his or her spouse, tickets to a sporting event, or a round of golf may all be viewed as impermissible inducements under federal and state law.

Establishing medical director relationships or other arrangements for services with referral sources must also comply with state and federal referral prohibitions, or the provider may be prohibited from referring patients to the center. Community cancer centers must carefully consider how to appropriately reach out to community providers. Possibilities might include hosting educational programs about the benefits the cancer center offers, highlighting unique services that the cancer center provides, and direct mailings.

While many community cancer centers choose to market to potential beneficiaries (future patients) that may be in need of their services, they must be aware of the laws relating to the offering of beneficiary inducements. Federal and state laws prohibit the offering of other than nominal or token benefits to beneficiaries to induce them to use a particular provider for needed services. In most cases, offering patients free transportation or waiving copayments or deductibles would be considered impermissible inducements. Community cancer centers are allowed to conduct educational outreach programs and mailings to patients or potential patients, but they should carefully plan the contents of such programs to ensure that they are accurate, do not make unsubstantiated claims, and do not invoke any state consumer protection laws.

With the recent implementation of the Health Insurance Portability and Accountability Act (HIPAA) privacy rules, community cancer centers now must follow a new set of federal rules regarding marketing activities. In part, HIPAA established rules regarding the use of protected health information for marketing activities. While some activities, such as advising patients of alternative treatments usually are not prohibited, HIPAA *does* prohibit general marketing activities based on information obtained during the course of a patient's care, unless the patient specifically authorizes receiving such marketing communications. To ensure HIPAA compliance, community cancer centers should consider the source of any mailing lists they use to market their services and make certain that the use of such lists is permissible under applicable privacy and consumer protection laws.

In addition to all the points discussed above, community cancer centers that maintain not-for-profit status must also consider the effect that marketing (and fundraising) activities will have on their tax-exempt status. Such cancer centers must only engage in fundraising and marketing activities that are consistent with their exempt purposes because failure to adhere to the rules governing kickbacks and referrals can result in loss of tax-exempt status. Finally, community cancer centers must consider whether fundraising activities may generate unrelated business taxable income.

In today's restrictive economic and reimbursement climate, community cancer centers have no choice but to market their services to both providers and patients. The challenge is to structure your marketing and fundraising events and materials to comply with all relevant federal and state laws.

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