The complex issue of 'fee splitting'

Question: I am a licensed counselor new to private practice and plan to join a group headed by another counselor. The group practice will provide billing services and assist me in becoming part of managed care panels. I will be counseling a mix of private pay, TRICARE and Medicaid clients. I'll be considered an independent contractor, and they will pay me 60 percent of the fees I generate. Someone told me this may be considered "fee splitting" and could get me in trouble. Is this true?

Answer: Your question may seem simple, but in reality the answer is quite complex. I would strongly urge you to seek advice from a health care attorney in your state before entering into any arrangement of this type. Fee splitting could be an issue, but there are also other potential legal considerations that you should not overlook.

What is fee splitting? Unfortunately, there is no single definition — in statutes or codes of ethics — that applies in all states. Typically, health care professional licensure statutes or regulations that contain fee-splitting prohibitions forbid a professional from sharing fees with another professional or entity that renders no professional services. That ban on fee splitting may include any type of rebate, commission or other payment. For example, if a counselor refers a client to a colleague on the condition that he receives 10 percent of all collections but he performs no actual counseling, administrative or supervisory services, that likely would constitute impermissible fee splitting in states that ban such activities. The policy behind such a prohibition is that client referrals may be influenced by monetary incentives rather than by what is truly in the client's best interest.

Mental health practices such as the one you are planning to join frequently prefer to hire workers as "independent contractors" rather than "employees" for several reasons:

1) The practice does not want to pay the typical employer's share of taxes, unemployment compensation fund contributions and so forth.

2) The worker often wants the autonomy of being self-employed.

3) The practice owners believe this arrangement will reduce professional liability for them.

4) The practice owners or managers may think this type of operation provides an incentive for the worker to be productive.

What mental health practitioners do not necessarily realize, however, is that the characterization of the arrangement as a true "independent contractor" relationship as opposed to an "employment" relationship is not always their decision. Courts in malpractice cases, the Internal Revenue Service and other federal or state agencies may have the power to decide that a true employment relationship exists, despite the parties' characterization of the arrangement (for more, see the sixth edition of *The Counselor and the Law*, published by the American Counseling Association).

Additionally, a number of complex federal and state "fraud and abuse" laws prohibit arrangements that may be viewed as "kickbacks." The federal Anti-Kickback Statute provides that a person (or entity) who receives, pays, offers or solicits any "remuneration" (including any kickback, bribe or rebate, directly or indirectly, in cash or in kind) to induce referrals covered by a federal health care program is guilty of a criminal felony and can be fined and imprisoned. As if that's not enough, the guilty person(s) may be subject to civil monetary penalties and possibly treble (triple) damages under another law, the federal False Claims Act.

Does this mean all arrangements to share or split office expenses are illegal? No. There are even certain "safe harbors" under the Anti-Kickback Statute for properly structured employment and personal services contracts (including space rental agreements) that may help protect counselors. However, the devil is in the details. For example, the counselor's attorney may recommend, among other things, that the contract be put in writing, contain a term of at least one year and reflect fair market value of the services. Even establishing fair market value is not always an easy task. Sometimes, a bona fide employment arrangement may be the best way to structure the deal.

As counselors see more clients insured through Medicaid and TRICARE (and possibly Medicare in the future), the consequences of failing to properly structure employment, space rental and independent contractor agreements become real. Does this mean counselors may never enter into independent contractor arrangements? Again, no. However, counselors should seek advice from an experienced health care attorney to draft or review their contracts to ensure they are properly structured. One more reason to seek specific advice is that many states have enacted laws that mirror, or even go beyond, the scope of the federal laws prohibiting fraud and abuse.

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The question addressed in this column was developed from a de-identified composite of calls made to the Risk Management Helpline sponsored by ACA. This information is presented for educational purposes only. For specific legal advice, consult your own local attorney. To access additional risk management Q&As, go to *counseling.org/knowledge-center/ethics* and scroll to the bottom of the page for the ACA members-only link to the Risk Management Section of the ACA website. ◆

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