Although the anti-kickback statute has been a fixture of the federal Medicare and Medicaid programs since 1972, there is relatively little caselaw determining the outer reaches of its scope. For the most part, health care lawyers have been limited to the “one purpose doctrine” under Greber\(^1\) and the joint venture analysis under Hanlester\(^2\) as legal guidance on how far the Government can go in prosecuting arrangements under the anti-kickback statute.

Last month, the United States Court of Appeals for the Tenth Circuit issued a decision in United States v. McClatchey\(^3\), that helps significantly to fill in the information gap as to the meaning of a key element of the anti-kickback statute; the requirement that an offer or payment of remuneration be made “to induce” referrals.

---

1. **Elements of the Anti-Kickback Statute**

The anti-kickback statute is a criminal provision which potentially applies to any individual or organization that makes referrals for covered health care items and services, or is in a position to influence the flow of business reimbursable under the Medicare and Medicaid programs. To prove a violation of the law, the Government must show that the parties acted “knowingly and willfully,” that remuneration was at least offered or solicited, and that the remuneration constituted an inducement or reward for either the referral of patients or the arranging for reimbursable services.

Both the remuneration and intent requirements of the statute are relatively clear. While the statute describes remuneration as including kickbacks, bribes, and rebates, it is generally construed as anything of value, and HCFA has defined it in its proposed “Stark II” regulations as including “any payment, discount, forgiveness of debt, or other benefit made directly or indirectly, overtly or covertly, in cash or in kind. . . .” 63 Fed. Reg. 1720 at 1723 (January 9, 1998). With respect to the knowing and willful requirement, in Bryan v. United States, the Supreme Court interpreted the element of willful intent in a criminal statute as requiring a finding “that the defendant acted with an evil meaning mind” (emphasis added), that is to say that he acted with knowledge that his conduct was unlawful.” 524 U.S. 184, 193 (1998). What has been far less clear are the circumstances

---

\(^1\) United States v. Greber, 760 F.2d 68, 71-72 (3d Cir. 1985) (“If one purpose of the payment was to induce referrals, the [Act] has been violated.”)

\(^2\) Hanlester Network v. Shalala, 51 F.3d 1390 at 1399 (9th Cir. 1995) (Where payments were made to investors whether or not they referred business to the joint venture, the fact that a large number of referrals resulted in the potential for a high return on investment, or that the practical effect of low referral rates was failure for the joint venture, was insufficient to prove that Appellants offered or paid remuneration to induce referrals.)

\(^3\) No. 99-3274, 2000 U.S. App. LEXIS 13708 (June 13, 2000).
under which a remuneration constitutes an “inducement” for referrals. In McClatchey, the Tenth Circuit addressed that issue.

2. The McClatchey Decision

McClatchey represents the latest in a series of decisions arising out of the Government’s high profile investigation of an arrangement between Baptist Medical Center of Kansas City, Missouri (“Baptist”) and Blue Valley Medical Group (“Blue Valley”). The Government alleged that the physician owners of Blue Valley had entered into an arrangement with Baptist under which the physicians agreed to transfer their patients to Baptist in exchange for payments disguised as medical director and consulting fees. The payments, approximating $75,000 per year, were made over a period of ten years from 1984 through 1994. After numerous pre-trial proceedings, the Government’s case was reduced to claims against two physicians and two hospital administrators. The physicians, Drs. Robert and Ronald LaHue, were the principal owners of Blue Valley. The hospital administrators were the chief executive officer, Dan Anderson, and the chief operating officer, Dennis McClatchey.

The jury returned a guilty verdict against all of the defendants; however, on a subsequent motion to set aside the jury verdict, the district court reversed the conviction of Mr. McClatchey on the basis that the evidence was insufficient to support the jury’s verdict. On appeal, however, the United States Court of Appeals for the Tenth Circuit reversed the district judge’s acquittal, holding that there was sufficient evidence for the jury to find that McClatchey violated the anti-kickback statute by entering into a consulting agreement with the LaHues in an effort to disguise referral payments from Baptist to Blue Valley.

3. The Significance of McClatchey

In reaching its decision, the court of appeals interpreted the inducement requirement of the statute as requiring proof that remuneration was offered or paid “with the intent to gain influence over the reason or judgment of a person making referral decisions.” As in Hanlester, however, the court required a greater showing than mere encouragement, citing favorably the district court’s instruction that the defendants “cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes.” McClatchey, 2000 U.S. App. LEXIS at *26. The court of appeals also noted that, “a hospital or individual may lawfully enter into a business relationship with a doctor and even hope for or expect referrals from that doctor, so long as the hospital is motivated to enter into the relationship for legal reasons entirely distinct from its collateral hope for referrals.” Id at *29 (emphasis added). Interestingly, the court acknowledged in a footnote that it may be difficult for a jury to distinguish between when the desire for referrals is a “motivating factor” and when it is merely a “collateral hope or expectation.” But the court had little sympathy for the jury’s plight, noting that “making such difficult factual determinations . . . is the very role which our system of justice assigns to the finder of fact.” Id.

It is difficult to square the Tenth Circuit’s holding in McClatchey with the Ninth Circuit’s holding in Hanlester, the only other case that provided a significant analysis of the inducement requirement. The appellants in Hanlester, who had sold partnership interests in joint venture laboratories to physicians in a position to refer, could hardly be said to have entered into the arrangement for legal reasons “entirely distinct” from their collateral hope for referrals. Nevertheless, the Ninth Circuit in Hanlester ruled that partnership profit distributions were not an inducement for referrals even where a large
number of referrals would result in a high return on investment and a low rate of referrals would result in failure for the joint venture labs.

Unfortunately, Hanlester is beginning to appear more like an aberration. Parties seeking to justify arrangements under the anti-kickback statute had best heed the McClatchey standard and be prepared to demonstrate that they are motivated to enter into the arrangement for legal reasons “entirely distinct” from any hope for referrals.

* * * * *

This memorandum was prepared by Mark R. Fitzgerald, attorney in Gardner, Carton & Douglas’s Health Care Department. If you would like more information about the McClatchey case, or wish to discuss other health care issues of interest to you, please feel free to contact any of the following Gardner, Carton & Douglas health law attorneys.

HEALTH LAW DEPARTMENT

Washington, D.C.
Mark R. Fitzgerald (202) 408-7209
E. Michael Flanagan (202) 408-7109
James Jacobson (202) 408-7191
James Jorling (202) 408-7131
Kathleen M. Nilles (202) 408-7240
Carin J. Sigel (202) 408-7173
T.J. Sullivan (202) 408-7157
Donna K. Thiel (202) 408-7144
Christopher L. White (202) 408-7148

Chicago
Earl J. Barnes, II (312) 245-8470
Bernadette M. Broccolo (312) 245-8454
L. Edward Bryant, Jr. (312) 245-8420
D. Louis Glaser (312) 245-8744
Steven B. Kite (312) 245-8449
Michael W. Peregrine (312) 245-8455
William H. Roach, Jr. (312) 245-8432
Geoffrey B. Shields (312) 245-8430
Michael J. Staab (312) 245-8781
Douglas B. Swill (312) 245-8504
W. Edward Webb (312) 245-8725
Mary G. Wilson (312) 245-8512

Gardner, Carton & Douglas

321 North Clark Street 1301 K Street, N.W.
Suite 3400 Suite 900, East Tower
Chicago, Illinois 60610 Washington, D.C. 20005
(312) 644-3000 (202) 408-7100

This client memorandum is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned here.