

Consultant Guilty of Illegal Kickbacks By “Referring” Doctors’ Patients to Another Medical Provider in Exchange for Remuneration

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Under 42 U.S.C. § 1320a-7b(b)(1)(A) it is a felony for a physician to solicit or receive a kickback “in return for referring” a Medicaid or Medicare patient to another medical provider. But as a recent decision by the Eighth Circuit in *United States v. Iqbal* demonstrates, physicians are not the only ones capable of making illegal referrals under the statute—consultants can, too.

Defendant Iqbal was a consultant that managed a group of physicians. He approached a medical provider (“PCP,” a home care agency) with a profit-splitting scheme: he would send physicians’ patients to PCP in exchange for fifty-percent of PCP’s profits for serving the patient. PCP contacted authorities about the scheme and thereafter accepted Iqbal’s proposal while working undercover with authorities.

The sting operation resulted, at first, in a March 2011 meeting between Iqbal and PCP. At that meeting Iqbal touted his strong relationship with the group of physicians and his ability to refer their patients to PCP, and reiterated his fifty-fifty profit sharing scheme to which PCP agreed. Iqbal’s physicians later referred two patients to PCP, which PCP served and received Medicaid and Medicare reimbursement. PCP sent Iqbal separate payments in June and August for his fifty-percent share of the profits that PCP made from serving the two patients.

Iqbal was charged with three counts of illegal kickbacks: One, for soliciting illegal kickbacks during his March 2011 meeting with PCP; Two, for receiving an illegal kickback in June; and Three, for receiving an illegal kickback in August. All three counts were “in return for referring” patients to PCP under § 1320a-7b(b)(1)(A).

Iqbal challenged the sufficiency of the evidence, and conceded that the statutory phrase “in return for referring” meant that one must *cause or induce* the referral. The two-judge majority willingly assumed as much, declined to interpret the statute any narrower, and found the evidence sufficient to affirm his convictions. Although the majority’s reasoning was not surprising, Judge Kelly in a partial dissent and concurrence took up the task of

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interpreting the statutory phrase, “in return for referring.” The Eighth Circuit had not previously defined the term. Judge Kelly relied on cases from other circuits in similar contexts to adopt the interpretation “that a person refers an individual for a service only when, as a practical matter, the person exercises decision-making control over the selection of the service provider.” As a result, Judge Kelly utilized a *narrower* definition than Iqbal and the majority. Under that definition, Judge Kelly found insufficient evidence to affirm Iqbal’s convictions for *receiving* a kickback for referring the two patients, because the government failed to show that Iqbal exercised decision-making control over the physicians’ referrals. Judge Kelly, however, affirmed Iqbal’s conviction for *soliciting* a kickback during his March meeting with PCP because Iqbal held himself out to PCP as having the ability to make the referrals, regardless of his actual ability to do so.

So physicians, consultants, and everyone in between dealing with Medicaid and Medicare patients should keep in mind that while decision-making control over a referral is likely necessary evidence to prove a “referral” in return for an illegal kickback, solicitations do not require such decision-making control. All that is required is representing that one has the ability to do so.