

## Litch's Law Log

*This month features a guest column that provides additional information as a follow-up to the March 2011 Litch's Law Log column on "Stark Reality," which addressed federal anti-kick-back and self-referral laws.*

*The AAPD has received several inquiries from pediatric dentists who utilize certified registered nurse anesthetists to provide anesthesia services in the dental office, in terms of developing contractual relationships consistent with federal law. The summary below was prepared by Laura D. Seng, partner, Healthcare and Business in the Chicago office of law firm Barnes and Thornburg, LLP. Barnes and Thornburg serves as outside counsel to the AAPD.*

*Please note that this column does not constitute legal advice and is not a substitute for consulting an attorney to develop appropriate agreements for your office.*

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## Considerations for Pediatric Dentists and CRNA Relationships

When a dentist engages a certified registered nurse anesthetist (CRNA) to provide anesthesia services in the dental office, the relationship of the dentist and CRNA must comply with a myriad state and federal regulations.

Listed below are the primary issues that the dentist should consider with regard to these contractual relationships. Please note that the items listed in Sections II, III and IV will also apply to the dentist's relationship with other anesthesia service providers in the dental office (such as a contract with a medical or dental anesthesiologist).

### LICENSURE REQUIREMENTS

Do the state licensure rules for CRNAs allow the CRNA to provide anesthesia in a dental office (e.g., what are the supervision rules for CRNAs in the state)?

Is the CRNA or dentist required to provide any notice to the state licensing board(s) as to the place of service where the CRNA furnishes anesthesia?

Is the dentist required to sign and file (with the state) any supervision documents related to the CRNA's practice?

Does the state require any registration, licensure or inspection of the dental facility in order to administer conscious sedation or anesthesia?

### BILLING

If the dentist is going to bill for the services of the CRNA, is this allowed under the dentist's provider contracts with third party payers?

Is the dentist allowed to bill for the CRNA under the state's Medicaid rules (and what are the billing requirements)?

Note that in some states, in order for the dentist to bill Medicaid for the CRNA's services, the CRNA must either be an employee of the dentist or have a written contract for services with the dentist. (check the state and local carrier rules)

### COMPENSATION AND OTHER CONTRACT TERMS FOR CRNAs

Assuming the dentist is allowed to bill for the services of the CRNA, if the dentist plans to bill federal or state health

care programs for the CRNA's services, the parties will need to determine the fair market value of the CRNA's services and utilize this as the basis for compensation. The parties will also need to consider items such as the cost of supplies, equipment, support personnel, etc. in determining appropriate compensation for the CRNA.

Any contract between the dentist and CRNA should also address medical malpractice liability, indemnification, record retention and access, HIPAA requirements, billing procedures and corporate compliance (in addition to general business contract terms).

### FRAUD AND ABUSE LAWS

Because the dentist is in a position to "refer" patients to the CRNA for anesthesia services, federal and state fraud and abuse laws are implicated – including the federal Anti-Kickback Statute.

Several states have their own specific fraud and abuse laws that may apply to the relationship between the dentist and the CRNA. It is recommended that a healthcare attorney review the various state laws to ensure that any contract with the CRNA complies with state laws.

Under the Federal Anti-Kickback Statute, it is a crime to pay or receive (or even offer or solicit) any kind of remuneration in exchange for a referral for a service or items which a federal healthcare program will pay in whole or in part. Therefore, if the CRNA is "underpaid" for anesthesia services, it could be argued that the dentist is receiving a benefit (remuneration) from

the CRNA with the intent that the dentist will refer patients to the CRNA. In other words, is the CRNA "paying" the dentist to ensure that the CRNA will receive a steady stream of work from that dentist?

Violations of the Anti-Kickback Statute are punishable through civil fines, imprisonment and exclusion from participation in the Medicare and Medicaid programs. In addition, violations of the Anti-Kickback Statute may also result in the healthcare provider being charged with violation of the False Claims Act.

Therefore, in order to best protect both parties from prosecution under the Anti-Kickback Statute, the CRNA should provide services under a written contract with the dentist. The contract and the financial relationship should also be structured to meet the requirements of a "safe harbor" to the Anti-Kickback Statute.

Although there are several requirements related to the personal services safe harbor, most importantly, the contract must be for a term of at least one year and specifically describe the services to be provided (type of services, how often, etc.), and the compensation must be consistent with fair market value and not determined in any way based on the volume or value of the dentist's referrals to the CRNA.

Any written contract should be drafted and/or evaluated by a healthcare attorney familiar with the requirements of the Anti-Kickback Statute and other applicable state and federal fraud and abuse regulations.