Jennifer Duell Popovec
Publisher of Medical Office Today

Duell Popovec is a veteran journalist who has covered healthcare real estate and associated issues for nearly 12 years. She has been published in Fortune magazine and the Wall Street Journal. Duell Popovec launched Medical Office Today in 2009. She holds a B.S. in Journalism from Texas Christian University and a Master’s degree from the Medill School of Journalism at Northwestern University.
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About Medical Office Today

Medical Office Today (www.medicalofficetoday.com) is a leading media outlet created specifically to help healthcare professionals successfully manage their medical offices.

*MOT* launched its popular Stark Law Series in 2010.  

*MOT* was founded in 2009 by Jennifer Duell Popovec, a veteran writer and editor.
About Cassidy Turley

Cassidy Turley (www.CassidyTurley.com) is a national team of commercial real estate professionals with a proven track record of delivering superior results for our clients. The firm provides a wide scope of services to leading healthcare institutions and healthcare real estate owners to assist in the management, transactions and strategy for maximizing operations and value. Cassidy Turley works with you to ensure compliance with stringent federal regulations, such as the Anti-Kickback Statute and Stark Laws as they relate to real estate operations.
Waller Lansden Dortch & Davis LLP (www.wallerlaw.com) is recognized among the nation's largest healthcare law firms with more than 60 experienced attorneys and paralegals in its multidisciplinary healthcare department and more than a dozen lawyers who focus on providing legal counsel on healthcare real estate transactions.

The Waller Lansden Healthcare Real Estate Services Group has extensive experience in the application of the federal Stark, Anti-Kickback and HIPAA statutes with respect to real estate transactions, and the firm’s Healthcare Operations attorneys are nationally recognized for their experience in all aspects of healthcare regulatory compliance.
Creighton Wright
Managing Director with Cassidy Turley

Wright leads Cassidy Turley’s Healthcare Practice Group. In addition, he is responsible for the management of 3.3 million square feet of medical office buildings for the Hospital Corporation of America in Georgia, Tennessee, Louisiana and Missouri. He has more than 15 years experience in the real estate industry.
Today’s Expert Panelists

John Claybrook
Partner with Waller Lansden Dortch & Davis

Claybrook is a member of the firm’s Commercial Real Estate Group and for more than 20 years has focused primarily on representation of and counsel to healthcare companies and other healthcare service providers regionally and nationally. He is a member of the American Health Lawyers Association.
Today’s Expert Panelists

Walter Neilsen
Attorney with Waller Lansden Dortch & Davis

Neilsen is a member of the firm’s commercial real estate group and works primarily with healthcare companies. He represents a publicly traded real estate investment trust (REIT) as national leasing counsel. Neilsen is a member of the American Health Lawyers Association.
Today’s Agenda

- Kick-off audience poll
- Stark Law, Anti-Kickback Statute & Federal False Claims Act explained
- Review of violations and penalties plus notable examples
- Update on Self-Referral Disclosure Protocols
- What does it mean to be “in compliance”?
- Fair Market Value discussion
- Compliance potholes
- Audience quiz
- Hallmarks of a strong compliance program?
- Who’s in charge of Stark Law compliance?
- Compliance checklist and best practices
- Q&A
Audience Poll

Did you attend *MOT*’s webinar last year on Fair Market Value?

a. Yes

b. No
Placeholder for poll
Placeholder for poll answer
Stark Law Explained

- Prohibits a health service provider (e.g., hospital, imaging center, cancer center) from submitting claims to Medicare/Medicaid for services rendered to a patient referred by a physician who has a financial relationship with the service provider (unless financial relationship falls within an exemption).

- Public policy rationale? To discourage patient referrals for financial compensation – we want doctors making decisions based on sound professional judgment, not $. 

- No criminal intent required to prove a Stark violation - a violation is a violation, whether intentional or inadvertent

- No materiality threshold (even minor violations are subject to penalties)
Prohibits payment, receipt, offer or solicitation of any remuneration, directly or indirectly, either:

To induce, or in exchange for, a referral of a person for services

- To induce, or in exchange for, the purchase of an item or service for which reimbursement is sought (in whole or in part) under a federal healthcare program (e.g., Medicare, Medicaid)

- Remuneration – can be cash, discount off FMV, or even an opportunity to invest

- Intent – remuneration intended to induce referral or purchase of services

- Criminal statute
Federal False Claims Act Explained

The Federal False Claims Act makes it unlawful for any person to, among other things, knowingly:

- Present, or cause to be presented, a false or fraudulent claim for payment or approval
- Conceal or knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to the government

Recent legislative changes have:

- Imposed an obligation on providers to report and return known overpayments to the government
- Made violations of the Anti-Kickback Statute punishable under the False Claims Act
Stark Law Lease Exceptions

Leases must comply with all the following requirements:

- Written agreement, signed by the parties, which specifies the premises it covers
- Term of at least one year
- Space is reasonable and necessary for the legitimate business purpose and may include proportional allocation of common area expenses
- Rent is set in advance and consistent with FMV
Stark Law Lease Exceptions, cont’d

Leases must comply with all the following requirements:

- Rent not determined in a manner that takes into account the volume or value of referrals
- Agreement commercially reasonable even if no referrals
- Holdover month to month rental for up to six months immediately following an agreement of at least one year that otherwise met all the conditions above, provided the "holdover rental is on the same terms and conditions as the immediately proceeding agreement"
## Violations & Penalties

<table>
<thead>
<tr>
<th>Stark Law</th>
<th>Anti-Kickback Statute</th>
<th>Federal False Claims Act</th>
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<tr>
<td><strong>Civil penalties include:</strong></td>
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- Loss of eligibility
- Prison time

Civil penalties include:
- Fines ($5,500 to $11,000 per claim)
- 3x amount of damages sustained by government
- Loss of eligibility
The Justice Department secured $4.9 billion in settlements and judgments in civil cases involving fraud against the government from September 2011 to September 2012.

The Justice Department’s 2012 efforts included record recoveries for healthcare fraud, where recoveries topped $3 billion for the first time in a single fiscal year, thereby besting the previous record which had been set in fiscal year 2011.

The increased incentives for whistleblowers have led to an unprecedented number of investigations and greater recoveries. Of the $4.9 billion in fiscal year 2012 recoveries, a record $3.3 billion was recovered in whistleblower suits.
## Notable Stark Law Real Estate Violations

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<tr>
<th>Organization</th>
<th>Violation</th>
<th>Penalty/Fine</th>
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<tr>
<td>Detroit Medical Center</td>
<td>Leases not consistent with FMV</td>
<td>$30 million settlement</td>
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<tr>
<td>Parkridge Medical Center – Chattanooga, TN*</td>
<td>Leases above FMV (w/ physician landlord); release of physician tenant from lease obligation</td>
<td>$16.5 million settlement</td>
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<tr>
<td>St. John Health System – Okla.</td>
<td>Technical: back rent not collected</td>
<td>$13.2 million settlement</td>
</tr>
<tr>
<td>Ivinson Hospital – Wyoming</td>
<td>Leases below FMV</td>
<td>$635,000 settlement</td>
</tr>
<tr>
<td>Bristol Hospital and Bristol Gastroenterology Associates, PC (Bristol, CT)</td>
<td>Technical: occupying space without a written lease and rent not collected</td>
<td>$157,830 settlement</td>
</tr>
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* Parkridge Medical Center did not admit to any liability or wrong doing.
Update on Self-Referral Disclosure Protocol (SRDP)

- SRDP published in September 2010
- In March 2012, HHS reported to Congress on implementation of SRDP
  - From September 2010 to February 2012, there were 150 disclosures from 148 different providers
  - As of March 2012, CMS had settled six cases and collected $783,000 (range of $60 to $500,000; none involved real estate)
  - As of March 2012, 51 cases were still “under review,” and CMS was waiting for more info on 61 cases (the remainder were “on hold” or no longer within SRDP)
- Limited info on settled cases being disclosed by CMS, which makes it difficult to advise clients and assess risk
What Does It Mean to Be “In Compliance”?

**Red**
- Free rent to physician tenants
- Hospital leasing space in physician-owned MOB that is doesn’t need
- MOB development with physician-developer

**Yellow**
- MOB development transactions with hospital executing a vacancy agreement or below FMV ground lease (with non-referral source developers)
- Poorly managed/maintained lease portfolio
- No FMV reports on file

**Green**
- Have no direct financial relationship with referral sources
- Have all leases and other contracts in writing, fully executed and professionally managed to meet Stark Law exceptions
- Have FMV reports or appraisals ordered and kept in files
How would you describe your organization’s Stark Law compliance program for real estate?

a. Comprehensive
b. Basic
c. Somewhere between basic and comprehensive
d. We don’t have one
Placeholder for poll
Placeholder for poll answer
FMV is defined as the “value in arms-length transactions consistent with general market value”

General market value is defined as:

“the price that an asset would bring as result of bona fide bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, as of the date of the asset purchase”

“the compensation that would be included in a service agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, on the date of acquisition of the asset or at the time of the service agreement”
Additional FMV Considerations

- Arm's-length transaction, consistent with general market value
- Commercially reasonable
- Serves legitimate business purposes and is necessary to achieve the intended business purpose
- Does not exceed what is reasonably necessary to accomplish the business purposes of the transaction
Stark Law requires that “rental charges over the term of the agreement [be] set in advance and . . . consistent with fair market value.”

- Can you use CPI escalations?
- Can you use FMV re-set (at commencement of renewal term, for example)?
- OIG/CMS have stated that hospitals should have appropriate processes in place for making and documenting reasonable, consistent and objective determinations of FMV
- Market comps/rent studies
With respect to leases, FMV means the value of rental property for general commercial purposes

- Not medical office only

Can take into account additional costs incurred by landlord/developers in upgrading the property
Obvious FMV Red Flags

- Valuation is very short and only provides a cursory analysis
- Valuation uses an incorrect definition of fair market value
- Facts and assumptions in the valuation do not match the reality of the situation

- Shouldn’t conduct multiple FMV studies on the same asset or scenario as it creates opportunity to be accused of appraisal shopping
Protecting Yourself from FMV-related Issues

- Process to determine FMV is key
- Maintain detailed records of FMV studies for each property and make certain that lease agreement rates/values are consistent with the FMV for the property
- FMV appraisals/reports should be conducted annually or a maximum of every two years
- Best practice is to engage an experienced healthcare appraiser with an MAI designation
Compliance Potholes

- Allowing tenants to occupy space that is different from what is described in the lease
- Providing services (e.g. cable, medical waste removal) that are not detailed in the lease and not allocated equally among tenants
- Failing to enforce operating expenses pass-throughs
- Failing to implement annual rent increases required by lease terms
- Forgetting to renew expired leases
- Providing any accommodation to financially struggling tenants that is not commercially reasonable
Hospital acquires a physician group on January 1, 2013. The group is located in a hospital-owned MOB, and its lease expires on April 30, 2013.

When the group’s lease expires, should the hospital execute a new lease with the group for this space?

a. Yes

b. No
Placeholder for quiz
Placeholder for quiz answer
Audience Quiz Answer #1

Right!
Doctor has a "time-share" lease. The lease provides that the Doctor may use the leased premises from 8 am to noon 12 on Tuesdays and Thursdays. Hospital discovers that the Doctor frequently uses the office on Thursday afternoons to complete paperwork, although the doctor doesn't see any patients. 

**Does the doctor's use of the leased premises on Thursday afternoons constitute a Stark Law violation?**

a. Yes

b. No
Placeholder for quiz
Placeholder for quiz answer
Audience Quiz Answer #2

Right!
Doctor signs a five-year gross lease with hospital on January 1, 2010 providing for a rental rate of $30 per square foot with yearly rental increases of 3% per year. Assume the Lease is Stark compliant. As of April 1, 2012, doctor has not paid the Hospital rent for January or February 2012. Doctor advises hospital that he is experiencing financial problems. Doctor tells hospital that he will try to catch up on the rent.

Is the doctor's promise to pay sufficient avoid a Stark Law violation?

a. Yes  b. No
Placeholder for quiz
Placeholder for quiz answer
Audience Quiz Answer #3

Right!
A five year lease with a referral source tenant includes an annual base rent escalation equal to 2%. Escalations aren’t charged or collected by the hospital landlord accounting department. Hospital can do the following to achieve compliance:

a. Tenant has been a good friend to the hospital, so landlord elects to waive the increases/back rent owed
b. Send a notice to tenant of rent owed and seek collection
c. It’s determined the rent paid over the term is sufficient to be within FMV, so no action is necessary by the landlord
d. Terminate the existing lease and enter into a new lease
Placeholder for quiz
Placeholder for quiz answer
Audience Quiz Answer #4

Right!
Hallmarks of a Strong Compliance Program

- Conduct annual FMV rent studies
- Have BOMA standard measurements in place for all MOB assets
- Utilize lease administration technology to track critical dates/rent escalations/OPEX CAM RECs for all tenants/organize tenant lease/property information
- Have dedicated policies and procedures for the operations of MOB assets
Hallmarks of a Strong Compliance Program, cont’d

- Have a form lease and defined leasing/lease approval process/rent collection/delinquency process
- Have a system by which spaces are periodically checked (particularly time share-part time suites) to insure that use and use periods conform to the lease
- Conduct monthly review of MOB operations and tenant status
- Real estate operations oversight falls under the General Counsel, COO and/or CFO – not the plant operations/facilities director
Audience Poll

What kind of software do you use to administer and manage leases?

a. Specific lease administration software
b. Excel or other non-specific software lease administration software
c. None/NA
Placeholder for poll
Placeholder for poll answer
Who’s in Charge of Stark Law Compliance?

- Larger organizations usually have a Chief Compliance Officer, but what about smaller organizations?
- Does the CCO oversee real estate operations/facilities? If not, who does?
- Is the CCO engaged/apprised of real estate decisions?
Audience Poll

Does your organization have a Chief Compliance Officer to handle Stark Law and real estate-related issues?

a. No
b. Yes
c. Don’t know
Placeholder for poll
Placeholder for poll answer
Compliance Checklist

- Leases are FMV
- Adhere to Commercially Reasonable Standards
- What documentation is required?
Compliance Best Practices

- How a third-party vendor can help
- Most important attribute of engaging a third party vendor/manager is to maintain an arm’s length relationship between the hospital and referral sources on real estate operations
- Communicating compliance requirements to internal and external team
- Must have a culture of compliance
- Championed from the leadership of the organization and filters down to the local hospital administrators/leaders
Question & Answer Session
Contact Us

Jennifer Duell Popovec
Publisher
*Medical Office Today*
Phone: 817.920.1434
jennifer@medicalofficetoday.com
www.medicalofficetoday.com

Creighton Wright
Managing Director, Principal
Cassidy Turley
Phone: 615.340.0526
Creighton.Wright@cassidyturley.com
www.cassidyturley.com

John Claybrook
Partner
Waller Lansden Dortch & Davis LLP
Phone: 615.850.8954
John.claybrook@wallerlaw.com
www.wallerlaw.com

Walter Neilsen
Attorney
Waller Lansden Dortch & Davis LLP
Phone: 615.850.8915
Walter.neilsen@wallerlaw.com
www.wallerlaw.com
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