

The Texas Lawbook

Free Speech, Due Process and Trial by Jury

Forest Park: Key Takeaways for Health Care Professionals and Their Lawyers

May 1, 2019 | By Alyson Brown

In light of the government's successful prosecution of the Forest Park Medical Center bribery and kickback case, physicians, practice groups and health care executives should carefully examine their contractual relationships with hospitals, consultants, vendors and employees.

Evidence presented during the aggressive prosecution of the physician founders, administrators, surgeons and other affiliates of Forest Park Medical Center offers some important takeaways to guide health care professionals in their contracting relationships.

The Forest Park 21

Some quick background on the case: In December 2016, 21 people were indicted in what the government described in its 44-page indictment as a massive conspiracy of kickbacks and bribes disguised as marketing and consulting payments to shell companies. The 21 defendants included two physician founders of Forest Park, three bariatric surgeons, three spine surgeons, two hospital executives, a nurse, a lawyer and other physicians and consultants. Eleven defendants pleaded guilty before trial. Charges were dismissed against one defendant physician, and the claims against the lawyer were severed for a separate trial.

The nine defendants who went to trial in 2019 were Mac Burt (Forest Park co-administrator), Dr. Michael Rimlawi (spine surgeon), Dr. Douglas Won (spine surgeon), Dr. Shawn Henry (back surgeon), Dr. Mike Shah (pain management physician), Jackson Jacob (owner of companies through which Forest Park paid physicians), Iris Forrest (nurse and workers' comp consultant), Dr. Nick Nicholson (bariatric surgeon), and Carli Hempel (Forest Park director of bariatric services).

Following a 7 ½-week trial, seven of the nine defendants were convicted of multiple charges including conspiracy, kickbacks, commercial bribery and money laundering. Nicholson was acquitted of all charges. The jury deadlocked as to Hempel, and the court declared a mistrial.

After the jury's verdict was announced, U.S. Attorney Erin Nealy Cox said that "the verdict in the Forest Park case is a reminder to health care practitioners across the district that patients – not payments – should guide decisions about how and where doctors administer treatment."

Federal prosecutors were aggressive in their indictment and trial of the Forest Park defendants, using claims normally reserved for organized crime prosecution, along with more predictable kickback, bribery and conspiracy claims.

Key Takeaways

One defendant, Nicholson, was acquitted of all charges. When asked what "Dr. Nick" (as the prominent bariatric surgeon is commonly referred to) did differently from other defendants that led to his acquittal, his lead counsel Tom Melsheimer, identified several key factors, including his reliance on independent counsel, his scrupulous accounting of marketing payments received from Forest Park and the disconnect between his volume of surgeries performed at Forest Park and marketing payments.

Dr. Nick's acquittal illustrates the importance of this key principle: Physicians and health care executives should make sure their contracting relationships prioritize patients over financial relationships with hospitals and ensure that all agreements are thoroughly vetted by qualified counsel.

Trust Your "Spidey Sense"

Spiderman's "Spidey sense" warned him of approaching danger, but it's just as relevant in the legal sense. It's that vague but insistent sense that something is wrong with a transaction. When that happens, listen to your Spidey sense!

Payments for anything other than professional patient care services must be carefully scrutinized for possible Anti-Kickback, bribery or similar implications. Networks of intermediary

The Texas Lawbook

companies used to funnel payments should also trigger a health care professional's Spidey sense.

Whether they're called "marketing payments," "consulting fees," "administrative costs" or another creative term, any payments that could be characterized as compensation for anything other than professional services risk prosecutorial scrutiny.

Even relationships that are facially legal can become criminal if the parties fail to scrupulously follow the law. In the Forest Park trial, the prosecution readily admitted that marketing agreements such as those entered into between the hospital and several surgeons "could" be legal. Health care lawyers testified that there is nothing per se illegal about a marketing agreement – unless it is used to disguise payment for referrals or if the money is not used for the contracted purpose.

Evidence in the Forest Park trial demonstrated a direct correlation between referral volume and marketing payments with respect to several of the convicted surgeons. Some witnesses testified to conversations from the Forest Park leadership with directives to "bring up your numbers." Any suggestion that compensation is related in any way to procedure volume is a red flag in any health care contract.

Similarly, some of the convicted physicians were shown to have used funds paid through marketing or consulting agreements for personal benefit rather than professional services. Witnesses and defendants testified about luxury purchases such as cars, trips, jewelry and houses being funded through the proceeds of marketing or consulting fees. One defendant was paid under a consulting agreement but never provided consulting services or submitted invoices for any work performed under the agreement.

In contrast, the government produced no evidence that Nicholson used marketing money for anything other than actual marketing expenses. His marketing expenditures were accompanied by appropriate invoices and related documentation.

Further, in contrast to the other physicians, there was no correlation between marketing payments and Nicholson's number of surgeries performed at Forest Park. To the contrary, his defense team introduced evidence that the number of surgeries Dr. Nick performed at Forest Park actually increased after the marketing payments had ceased.

Consult Counsel and Follow Their Recommendations

Several defendants relied on an "advice of counsel" defense. But it is important to select the right counsel and even more important to follow counsel's recommendations. Due to the

high risk connected with health care contracts, the complexity of the regulatory landscape and the potential for federal prosecution, counsel should be well-versed in health care law as well as employment law for review of physician and health care executive employment agreements, professional services agreements and consulting/marketing arrangements.

A general practitioner may be able to spot an obvious Stark violation or Anti-Kickback issue but may not be aware of some of the more nuanced provisions regarding medical directorships, payments to business development contractors or bonus provisions that could be construed as payments for referrals. Melsheimer cautions: "It's important to have an attorney who is willing to say 'No' – which isn't always a popular answer." If a financial arrangement between a physician and hospital crosses the line—or at least abuts it – counsel must be willing to deliver unwelcome news to their health care clients.

Although multiple defendants relied on the "advice of counsel" defense, they testified that they relied on the advice of the lawyer who drafted the marketing agreements in question. The acquitted defendant retained separate and independent counsel and did so early in the Forest Park "courtship." Trial exhibits showed that Nicholson used his long-time health care counsel to vet the Forest Park marketing agreement, and that counsel identified specific steps that should be taken to ensure statutory compliance. His counsel's advice – as far back as 2008 – included the specific admonition that "Dr. Nick must not be remunerated in any manner for the volume or value of patients referred to the hospital."

Focus on the Patient and Watch Out for Emails

A key piece of evidence for the acquitted Forest Park defendant was introduced late in the defense case: a series of emails between Nicholson and his father (also a surgeon and financial advisor to his son). In that email conversation which was admitted into evidence, his father noted some inconsistencies between the financials provided by the Forest Park founders and what they stated anecdotally about how much they were making.

Dr. Nick's response was "As long as we behave in an ethical fashion and take care of the patients – I think we can leave them [Beauchamp and other Forest Park owners/administrators] to their own creative reporting of their P&I statements to the public. We just need Joette [independent health care counsel] to make sure we're acting ethically and within all legal bounds."

Nicholson went on to write, "we should still keep our eggs in multiple baskets for the time being." His defense team successfully argued that his focus was on patient care, acting legally and ethically and maintaining relationships with

The Texas Lawbook

hospitals other than Forest Park.

In contrast, the prosecution offered evidence regarding other defendants that suggested more of a money-driven relationship. Kim testified that Beauchamp voiced displeasure about the volume of surgeries being referred. Barker, a Forest Park co-founder, testified that he received over \$100,000 from the hospital in exchange for performing surgeries. Beauchamp testified that the marketing contracts were just a means to disguise payoffs. The government also offered into evidence emails from defendant physicians who requested prompt payment of their marketing money and purchases of expensive seats at sporting events. The extensive email trail among many of the defendants created a visual trail that allowed the jury to follow the money.

Health care professionals should be cautious in all email correspondence, but particularly those involving financial arrangements. The Forest Park trial makes clear that there can be no hint of a relationship between compensation and patient referrals. Decisions regarding surgery location, ancillary providers, medical equipment and medication should focus solely on what is in the best interest of the patient. Documentation is critical to establish a patient-centric decision tree.

The Prosecution's Net Can Trap Lower-Level Employees

The prosecution did not limit its focus on the owners of Forest Park, senior administrators and physicians. A nurse/workers' comp coordinator was convicted, and the bariatric surgery administrator was prosecuted with a mistrial being declared. Trial counsel noted that with respect to Carli Hempel, the bariatric surgery program administrator, she appeared to be a sympathetic defendant who was following orders of her superiors.

The willingness of the government to prosecute administrative employees illustrates the importance of such employees speaking up with concerns about possible improper activity and pushing back on supervisors who issue instructions that may run afoul of compliance statutes. Proper training of all staff concerning Anti-Kickback and bribery laws is highly recommended, with appropriate open-door policies that permit employees to report concerns without fear of reprisal.

The jury also heard testimony that Hempel received only a base salary, with no bonus or incentive tied to surgical volume or referrals. In establishing compensation policies for medical practice staff, physicians and health care executives should regularly review staff compensation to ensure market rates are paid

and that bonuses or incentives do not implicate any of the prohibited activity under the Anti-Kickback Statute, such as compensation for referrals.

Going Forward

Government prosecutors likely view the Forest Park prosecution as a success, with 11 pretrial guilty pleas and seven convictions. With continued media focus on health care fraud and the rising costs of medical care, there is no end in sight to prosecution of kickback, bribery and conspiracy claims. Federal prosecutors have demonstrated their intent to aggressively pursue criminal enforcement at all levels of health care organizations.

Caution is advised with contracting for marketing and consulting fees or paying incentive compensation that correlates to numbers of procedures or referrals. Those who work in the health care industry – and the attorneys who advise them – must stay educated regarding nontraditional theories of recovery in addition to the familiar Stark and Anti-Kickback laws. Physicians and health care executives should follow a prescription of sound legal advice, careful monitoring of financial arrangements, attention to warning signs, proper training and compensation of administrative staff, and consistently patient-focused treatment decisions.

Alyson Brown practices employment law with Clouse Brown PLLC. She represents physicians, health care executives, and practice groups with employment law issues, including physician employment contracts, professional services agreements and covenants not to compete.