

OVERVIEW¹

The Government's position on "Professional Courtesy" stems from the principle that by offering certain discounts to certain providers in a position to make more referrals on account of the benefit they receive will act in their own self interest by taking the benefit in exchange for making referrals. The Government seeks an "even playing field" where all potential for such inducements (or quid pro quo) are eliminated (or significantly reduced), especially where payment is in whole or in part from Federal Programs. Courtesy policies are intended to address financial courtesies to/or from entities in which providers who have financial interest under the Stark Laws. This means the courtesy is extended in exchange for referrals for certain services under the Stark Law. Stark applies to oral and maxillofacial surgery practices providing DHS (see list below). Stark affects an oral and maxillofacial surgery practice if its referrers have any kind of "financial relationship" with it. For example, if a referring dentist rents space from an oral and maxillofacial surgeon, that is a "financial relationship" that is subject to Stark. In this same vein, professional courtesy will now be considered a "financial relationship" under Stark, unless it meets certain stringent requirements, discussed below.

The specific situation to watch out for is this: A referring dentist sends a Medicare beneficiary to your practice, and the practice provides DHS to that patient. Meanwhile, the referring physician/dentist, and/or his/her staff, receives professional courtesy from your practice.

¹ Information or responses contained herein do not constitute legal advice to the reader. Webinar attendees or other recipients of information contained herein are encouraged to review specific factual circumstances with your attorney in order to resolve any legal questions.

These are the Designated Health Services ("DHS"), as applicable to oral and maxillofacial surgeons (cross walking from some Medicare list of codes billed by oral and maxillofacial surgeons and the CPT[®] codes described as DHS):

HCPCSMOD	HCPCS	DESCRIPTION
70355	70355	Panoramic x-ray of jaws
97140	97140	Manual therapy
97762	97762	C/O for orthotic/prosth use
97110	97110	Therapeutic exercises
70330	70330	X-ray exam of jaw joints
70330	70330	X-ray exam of jaw joints
70140	70140	X-ray exam of facial bones
70320	70320	Full mouth x-ray of teeth
97035	97035	Ultrasound therapy
70100	70100	X-ray exam of jaw
70320	70320	Full mouth x-ray of teeth
97032	97032	Electrical stimulation
70350	70350	X-ray head for orthodontia
70300	70300	X-ray exam of teeth
97112	97112	Neuromuscular reeducation
97024	97024	Diathermy eg, microwave
95851	95851	Range of motion measurements
70310	70310	X-ray exam of teeth
70486	70486	CT maxillofacial w/o dye
70250	70250	X-ray exam of skull
7038026	70380	X-ray exam of salivary gland
97750	97750	Physical performance test
70380	70380	X-ray exam of salivary gland
70360	70360	X-ray exam of neck
70150	70150	X-ray exam of facial bones
92526	92526	Oral function therapy
70240	70240	X-ray exam, pituitary saddle
70260	70260	X-ray exam of skull
70328	70328	X-ray exam of jaw joint
97001	97001	Pt evaluation
97530	97530	Therapeutic activities
97033	97033	Electric current therapy
70210	70210	X-ray exam of sinuses
97760	97760	Orthotic mgmt and training
97597	97597	Active wound care/20cm or <

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DHS also includes procedures performed in a hospital (in-patient or out-patient) setting.

At the same time, professional courtesy has always been a sticky legal issue because of the federal anti-kickback rules. For instance, it is a violation of the federal anti-kickback rules for a practice to target professional courtesy to its key referrers, since the practice is then effectively compensating the referring "physicians" (the term physician applies to oral and maxillofacial surgeons and dentists) for their referrals. Similarly, it has always been a problem to provide "insurance only," or a routine waiver of co-pay, since this has long been considered by the Office of Inspector General (OIG) to be a violation of the anti-kickback rules and the federal False Claims Act.

All practices that bill the Federal Programs (Medicare, Medicaid, TriCare, etc.), must be concerned about the Medicare Fraud and Abuse Regulations. No one wants to be in the position of offering an inducement (fee discount waiver of patient of payment, free care) in exchange for a referral under the Medicare rules. Recall that even if *one purpose* for the discounts or free care is the inducement of referrals or the solicitation of them, it violates the Medicare rules.

Under the Stark Law, there is an exception created for courtesy policies. If you follow the correct rules, you are deemed not to be in violation. Those specific rules you recall are as follows:

- The courtesy must be offered to all doctors on the medical staff, or in the entities local community without regard to the volume and value of referrals or other business generated between the parties.
- The entities professional courtesy policy must be set out in writing and approved in advance by the practice's governing body.
- The courtesy offered by the practice may apply only to health items or services of a type that it routinely provides.
- The courtesy may not be offered to any doctor or doctor's family member if they are a Federal Health Care Program Beneficiary unless that individual has a showing of financial need.

- The professional courtesy policy must not violate the Anti-Kickback Statute. That is, it may not be offered with the intent to induce referrals, as discussed above.

To comply, start by defining what professional courtesy means to the practice. Is it free care, discounted care, insurance billing only or what? Next, define the community of potential recipients. Are there geographical or service limitations? Are there payor related limitations and definitions of hardship? From there, develop a written policy to be sure that it is an equal opportunity one that is one not based on the volume or value of referrals. If staff dentists are included, all of them should be included, not just those with a higher referral ratio to you. What about the practice's own doctors and staff or family members? Next, write it all down. Have the policy formally adopted by formal "resolutions" or minutes of your owners or managers. File it in the practice minute book with the rest of the practice resolutions as it is required to be available if sought.

Turning to the questions,

1. Does this include services in your office?

Yes. This includes services in your office to the extent that they are deemed DHS or otherwise covered under the Stark Regulations. The focus is on the services (are they DHS?) and if there is a "quid pro quo."

2. How do we go about checking on the State Laws?

There are easy ways to check on State Laws, including of course calling your attorney. Other ways would include simple Google or Yahoo searches. www.Findlaw.com is another common source that has many State Laws on its website. When checking State Laws, do be aware that there are sometimes what commonly referred to as mini Stark Laws are enacted by some States that may be more restrictive than the Federal Rule.

3. If an OMS is treating a DDS and the DDS is over 65 and has Medicare, can a discount be given?

Yes, if hardship can be shown.

- 4. If you offer a "pre-payment in full discount of 5%" to all self pay patients but not to insurance patients - would that be legal?**

Yes, as this could be a discount to avoid the costs of the billing and collection process. Self pay patients are beyond the reach of the statute.

- 5. Does this policy also relate to ALL 3rd party insurance or just services submitted to Medicare?**

The policy, once in place would relate to all people to whom the courtesy policy was extended. This courtesy is extended to people with various types of insurance, including private third party payors; however, within that group of people you would be concerned about the sub-group of the Medicare Beneficiaries for which financial hardship would have to be shown. If the practice offers DHS and bills the Federal Benefits then it should have a courtesy policy in the first place.

- 6. Do all these laws pertain to all the services performed in the Oral and Maxillofacial Surgery offices consults and surgeries performed in the office surgery suite?**

These laws are pertinent to all the services, regardless of where they are performed, by whom in the office, and what type of insurance is used by the recipient of the services, excepting the hardship requirement mentioned above for Medicare Beneficiaries. Please recall however that surgery in other than a hospital in-patient or out-patient setting is not a DHS. Hospital in-patient and hospital out-patient services are deemed DHS.

- 7. Can we set up policies for Private Pay patients and then a different one for insurance patients?**

If by private pay patients, you mean cash patients, yes. You could have a discount policy again to alleviate the cost of billing. If these services are for patients who do not have insurance for the services you are providing and are not Medicare or other federal program beneficiaries you are okay.

8. Is it possible that services in your office do not violate Stark but does it violate Anti-kickback?

Yes. It is possible that services in your office could not violate the Stark Regulations but violate the Anti-Kickback Statute. This would occur if you were not rendering a DHS (so Stark does not apply), but were routinely writing off co-pays or deductibles for beneficiaries of high referring dentists intending to induce them to send more patients.

9. Could you define in layman's terms the Anti-Kickback Law and the Stark Law please?

Please see above commentary.

10. If we do 98% of all of our services in the office, we are not governed by STARK?

Please recall that the Stark Statute is not necessarily based upon the site of the location, but the services that are offered. Keep in mind, if you are not rendering a DHS, Stark does not apply.

11. If we give discount with insurance and submit the claim do we have to inform the insurance company?

If you routinely give significant discounts for insurance covered patients, and submit the claim for the full amount, you run the risk that you have violated the term of your agreement with the insurance company and altered your fee schedule.

- 12. Does Stark Law mean any services (e.g.: office consults, X-rays, general anesthesia extractions and implant)?**

The Stark DHS are defined above and listed by code. They do not include office consults, general anesthesia, extractions or implants. Discounts provided on these types of services are not reviewed under Stark but may violate the Anti-Kickback Statute.

- 13. Realizing that "financial need" is not fully defined - if you send a statement for payment and patient does not respond in 30 days can you write the balance off - or would you have to do that for all patients?**

You are correct that financial need and hardship are not fully flushed out in the Statutes. We do not however recommend writing off a patient balance simply because the patient does not respond in thirty (30) days. On the other hand, you should certainly have an active bad debt collection policy. If you make two or three attempts to collect and you have heard nothing from the patient, or the patient has basically made clear to you that he or she has no funds with which to pay you, then yes, write off the balance. I would think you would want to do that on a case-to-case basis, with some prior knowledge of the patient. Some patients may simply be slow-pays; others unfortunately will simply be no-pays. Carrying bad debt though, gives a false presentation of the Practice's financial position.

- 14. Who exactly is doing the "investigating" and what would trip such an investigation?**

The investigating would be done by the OIG , CMS or their delegates, and such investigations under the Statutes are usually instigated by former disgruntled employees, former doctors in your practice, competitors that see that you are gaining an unfair advantage and playing by different rules than they are.

- 15. Could you define in layman's terms the Anti Kickback Law and the Stark Law please?**

Please see the commentary above.

16. Does Stark apply to the doctor's own family members?

Strictly speaking, the Stark Law does apply to the doctor's own family members, but why are you billing them in the first place? If you do not submit a bill to Medicare or another federal program, Stark does not apply.

17. We're unclear on the "insurance-only" portion. Your documentation seems to state that this can be done if it is written in the policy. Is this in all circumstances or only if payer contracts do not specifically exclude this practice?

The insurance only portion is problematic, in that some insurance policies state that waiver of the co-pay is specifically not permitted. The co-pay is considered to be included as part of the fee. Therefore you have to read your contract to know what your requirements are under the specific insurance policy.

18. What has caused the significant interest in this topic that warrants such an in-depth presentation?

The significant interest in this topic is the theory that doctors of any kind, who have any financial interest in the entities to which they make referrals, may refer more than is medically necessary. These regulations are everywhere. Consider the Medicare Fraud and Abuse Anti-Kickback Statutes; they address what ownership interests you can have, how you invest in different entities (ASCs and other entities to which the practice doctors refer) without having a kickback. Consider the Stark Regulations that are concerned with doctors referring more DHS because they have a financial interest in the entity to which the referral was made. Consider also the numerous State Laws that prohibit certain doctors from owning interest in certain entities. Imaging is a direct concern of the Government, and is highly regulated.

- 19. If a doctor has opted out of Medicare, do the rules still apply to non-Medicare services like extractions?**

If the doctor has opted out of Medicare, and presents no bills to Federal Programs, then these rules do not apply.

- 20. If we have an insurance patient and we decide to bill insurance only - could we be in trouble with the insurance company for writing off the patient co-pay?**

See Question 11.

- 21. I would just like to clarify. So if the written policy indicates we will file insurance and adjust any co-pay or coinsurance for staff members of all dental providers in the area we will be in compliance?**

If offered to all “physicians” on the staff, then yes.

- 22. How will Stark be affected by nationalized health care?**

Your guess is as good as ours.

- 23. If our doctors want to give a 10% discount to operating room staff at the local hospital, do you have to offer the same discount to other employees at the hospital?**

Yes. It should be to all hospital staff.

- 24. Both of these laws deal with dishonest doctors committing fraud. What about cases when Medicare commits fraud (i.e. facial fracture claim lost in processing in perpetuity, trauma cases that don't go to the OR in 24 hours and Medicare**

designates the case are non-urgent.)? These are real world cases that AAOMS members deal with daily.

We agree that it can be difficult to deal with the Medicare Program in terms of their claims lost, designation of non-urgent claims, and the real issues that you face in trying to care for your patients. Unfortunately, the amounts of recoupments that are being sought are so significant, and so Medicare and the Government are unlikely to back down on its contra less scrupulous providers.

25. You have referred to documentation. Do you need to have a log in which each incidence of providing a professional courtesy is documented?

You do not need to maintain a log of the incidents of professional courtesy, although I think that the adjustment (and therefore the adjustment code) would be documented in your billing system. That should be a sufficient notation.

26. Our office does not participate with Medicare or Medicaid. Those patients are considered "self-pay" patients. Can we offer a discount to those patients?

See Question 19.

27. Can extractions be subject to any discount since not prosthetic, etc.?

An extraction is not a DHS, and therefore not applicable under Stark. However, such arrangements may violate the Anti-Kickback Statute if done to induce referrals of beneficiaries.

28. A dental implant is not a covered procedure by medicare/medical so how does it really apply?

You are correct. It does not apply because it is not a DHS.

29. So if the patient does not have either Medicare or Medicaid then STARK does not comply or is it all 3rd party insurance?

The issue is not whether the patient has Medicare or Medicaid (except as it relates to hardship) it is whether the practice submits bills to Medicare or Medicaid Program and renders DHS. If so, Stark and the Anti-Kickback statute must be reviewed for compliance.

30. Does that mean that this would not apply to taking out wisdom teeth in an office setting?

Wisdom teeth are not a DHS. To my knowledge, they are rarely a covered service.

31. What is a reasonable effort to collect co-payment give an example or two?

A reasonable effort to collect the co-pay might be requesting the patient to pay two or three times. If you have requested the patient to pay at the time of service, and sent them two bills and made two or three telephone calls, there is no reason to let this bill age out beyond 120 days. This is simply a bad business practice. That would be deemed a reasonable effort to collect the co-pay or outstanding balance.

32. We are an Oral and Maxillofacial Surgery Out-Patient Surgery Center. How does the Stark Law pertain to us?

If you are truly an oral and maxillofacial surgery out-patient surgery center, meaning that your hospital is involved, then the referral to the out-patient surgery center is a referral to a DHS and again, the courtesy policy should be clear. If in fact what you really mean is that your oral and maxillofacial surgery center is an *ambulatory surgery center*, licensed and owned by your surgeon, with or without other doctors, then it is not applicable. The

Stark Regulations draw a clear line between the hospital operating as an in-patient or out-patient surgery center and ambulatory surgery centers which are excluded from the statute.

33. Please address how to report professional courtesies to insurance carriers on claims submitted.

It is recommended that you consult with your carrier representative.

34. In the hospital emergency room it is ILLEGAL for the hospital or surgeon to even ASK if a patient has any insurance coverage before rendering care. So AAOMS members are called in to provide care without knowing if a patient has medicare or medicaid. So medicare law prevents OMS's from knowing what we are getting into....yet, medicare will DENY any coverage if the patient is not taken to the OR within 24 hours if an OMS is a non-participating provider. What are AAOMS members to do in the real world?

I am not sure what the real question is. You would render the care regardless of the nature of the insurance in an emergency situation. I am not sure why you believe you would have an issue with the discount policy. There is no reason to believe that the person who landed in the Emergency Room requiring surgery would happen to fall within one of your discount classes. To the extent they even did, however, would you not have received some of the billing information after the time of the surgery?

35. Can we offer a courtesy to a certain class of doctors say dentists or do we have to apply the courtesy to all doctors of any specialty in the community?

As written, the Stark exception appears to refer to all doctors, regardless of specialty, their immediate family members, and their office staff.

36. Please define modest in a dollar amount or % of total fee.

A modest dollar amount would be your cost of collections. Usually they might be in the neighborhood of \$25.00 possibly to \$50.00 depending upon the amount of time you might spend tracking down people upon submitting the bill, rebilling, collecting co-pays, etc. Most billing fees average approximately eight percent (8%). Somewhere within that eight to ten percent range would probably be modest.

- 37. In our office if an implant fails we will do a no charge for surgery service to re-implant, is this proper?**

An implant fails and you re-implant, that would be proper, that is simply part of the service. The implant is not a DHS, and the repeat procedure is not really a courtesy.

- 38. Does imaging services include all radiographs? How inclusive is that term?**

Imaging includes the codes shown above.

- 39. I'm sorry, but I missed the answer to one of the questions earlier - do you have to make your written policy of discounting available to the public/patients?**

No. You are not required to make your written polices discounting available to the public or patients, only to a Government official as requested.

- 40. Can we still give level of discounts to our referring dentists for all services as long as they are not on a federal program?**

You are permitted to give discounts to referring dentists and other members of the hospital's medical staff, as long as they are covered under your policy, and they are not a beneficiary of a Federal Program. If they are covered under a Federal Program, again, they would have to show hardship.

41. Can we give free services to our employees and their families as long as they are not on Medicare Medicaid?

Yes.

42. Do prompt pay laws apply to Medicare?

Sort of, in that at some point Medicare pays interest when its claims are long outstanding. As it so modest, we are not sure we would really say the prompt pay laws (where they exist) applies to Medicare in the same sense that they do as private insurances.

43. If an insurance company denies a procedure that we originally thought would be covered - can we give professional courtesy off fee at that point?

It depends on whether the patient is covered by Medicare or private insurance and whether or not you used an Advance Beneficiary Notice. If the patient signed an ABN acknowledging the possibility that the service(s) would not be covered and agreeing to be financially responsible for them, then you should attempt to collect from them. To the extent that you fully believed the services are covered services and the insurance company for whatever reason balked, and denied the claim, then you would have to make a case-by-case determination, but it would seem to me as though the patient has relied on the statement that you have already made that it was a covered (paid) service and you may want to consider giving either a professional courtesy or a significant discount at that point.

44. Can we give gifts during the year to our referring doctors and their staff?

Under the Stark Regulations, a physician can receive gifts from an entity up to a certain dollar amount, which is adjusted annually. In 2009 the amount is \$355.00. Therefore, an

entity could make a one time gift with a value of \$355, or multiple gifts whose value does not exceed \$355.

- 45. Can professional courtesy apply to a doctor's friends who are not medical professionals and does that courtesy have to be the same across the board?**

Yes, and again, you have to define the group to whom the courtesy applies.

- 46. Can we write a policy to bill our employees for insurance only? We thought you had to bill insurance a lower fee if you were discounting services.**

Yes. Although you may want to consider discounting rather than waiving the copay so as not to imply that your fees are less than what you bill.

- 47. What would typically be the event that would trigger an investigation for potential violation of Stark or the Anti-Kickback Statutes?**

Typical triggers for investigations are: competitors who believe you are acting unfairly, disgruntled staff members, or staff members who feel that their voice is not being heard in the office on an issue they feel strongly about often as it regards to billing practices.

- 48. While Stark applies only to hospital services rendered to Medicare/Medicaid patients, I think many wonder if okay to extend professional courtesy to non-Medicare/Medicaid patients in the office. Please clarify.**

Stark applies to DHS. It is okay to extend professional courtesy to non-Medicare/Medicaid patients.

- 49. If an x-ray needs to be taken but the patient is in not eligible for an x-ray through insurance (Medicaid), is it alright to waive the x-ray fee?**

Generally, this will not create a problem unless the patient's referrals to your practice could implicate the Anti-Referral Statutes described in the materials.

- 50. I don't understand the part of the Stark law which states that referrals of certain services to a Practice in which we have a financial interest are prohibited. How does that apply to us as an Oral and Maxillofacial Surgery practice?**

An example of this might be if your practice referred to a separate imaging facility, in which you had a financial interest, that did CT scanning or other high end imaging. You would be making a referral to an entity in which you had a financial interest. That would be a violation, and the CT imaging company would not be able to submit the bill to Medicare, absent an exception to the rules. It is possible there could be one, but this arrangement would have to be properly structured. If there is no financial interest in the imaging entity, then Stark does not apply.

- 51. I just don't understand these laws. Why is the government wanting to govern how we choose to discount our patients or offer courtesies when we are required to write off large amounts of money when Medicaid pays? Why doesn't the government require that these patients pay the portion the government doesn't pay for?**

Again, the Government is concerned with ferreting out less scrupulous providers.

- 52. Where are you going to post or send those procedure codes that you mentioned?**

Please see above.

- 53. We are located in Florida. We have an OMS practice with 6 operatories on the first floor and 2 OR's on the second floor. General dentists have expressed an interest in utilizing our OR's for general dentistry under sedation with an anesthesiologist providing anesthesia services. This is self pay. Is this a violation of Stark?**

As long as the general dentist paid a reasonable rental fee for the use of your ORs, this would be permissible under the general fraud and abuse regulations. There would be no real quid pro quo as you would not be giving them free rent, which could be viewed to be in exchange for a referral. On the other hand, you would have to check your State Law to make sure that your OR is not licensed or regulated in a way that prohibits other individuals from using it. It is, however, not a violation of Stark

54. How will we receive the list of codes?

The list of codes is available within this document.

55. Often times the doctor will want to give a random discount to a patient for various reasons and they are not Medicare/Medicaid, in office services, can they still do this based on what they want?

Random discounts for various reasons such as hardship, or the like occur. Strictly speaking it is not a great idea to give random discounts; the Government likes nice bright rules. However, this is likely to continue to occur. If possible, you should identify in your policy those excepted situations where a discount may apply.

56. Can our doctor give a 50% discount to (sell) IV sedation to a patient or does it violate anti-kickback rules?

IV sedation is not a Stark service. I am not sure it induces patients or referrals for patients for IV sedation to offer a discount for it. I would think it would either be required or not required based upon the individual's personality and their anxiety tolerance. Fifty percent (50%) may be a large discount however, some discount may be appropriate. Also, you want to be careful that you are not inducing referrals by offering such a large discount.

57. If my practice does not accept any Medicare patients, may I still offer an occasional courtesy write off to a referring doctor?

If you do not bill any Medicare or other Federal Programs, you may have the courtesy policy that you want. The issue is of billing the Federal Programs for DHS.

58. Is it a courtesy to participate in the Hospital's self insured health plan if it requires my practice not to balance bill the patient (the hospital employee) and only accept what the plan pays?

It is not a courtesy to participate in the Hospital's self insured plan even if it requires your practice not to balance bill the employee, as it is simply the requirement of the health insurance plan, and you are following the plan's rules.

60. Is it courtesy to routinely write off what my practice does not think it can collect, even if it is from a population the practice routinely treats?

If you practice reasonably and you cannot collect from a patient, it is not a violation to routinely write off what you do not believe you can collect. The problem comes from where your practice is in an area that it draws very heavily from a significant specific population base, ethnic, or otherwise. If the "word is out" that by coming to you, all co-pays are written off, or there is an automatic ten percent (10%) discount, then you want to be careful that you are not inducing those individuals. However, it is common and good business practice to write off that debt.

61. Is it considered professional courtesy if the doctor makes a case-by-case determination on what to write off?

Case-by-case determinations of courtesy can be problematic, particularly if they happen multiple occasions and the reasons are not clearly stated either in the chart or in the

billing record. However, it would be fair to say that this likely still does continue. Ideally it is not targeted to the key referrals.

62. How does my practice create and “approve” a professional courtesy plan? What does it actually need to say?

You may see above. Also, the AAOMS has available a Professional Courtesy template to assist members with implementing a professional courtesy policy. Visit

<http://www.aaomsstore.com/> for details.