

COMPLIANCE WITH “PROFESSIONAL COURTESY” RULES IN OMS PRACTICES

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The Government's position on "Professional Courtesy" stems from the principle that by offering certain discounts to certain providers who are 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 payment for those seniors as for 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 referral for certain services under the Stark Law. Stark applies to oral surgery practices providing DHS (see list below). Stark affects an oral surgery practice if its referrers have any kind of "financial relationship" with it. For example, if a referring dentist rents space from an oral 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.

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

HCPCS	MOD	DESCRIPTION
70100		X-ray exam of jaw
70110		X-ray exam of jaw
70140		X-ray exam of facial bones
70150		X-ray exam of facial bones
70210		X-ray exam of sinuses
70220		X-ray exam of sinuses
70240		X-ray exam, pituitary saddle
70250		X-ray exam of skull
70260		X-ray exam of skull
70300		X-ray exam of teeth
70310		X-ray exam of teeth
70320		Full mouth x-ray of teeth
70328		X-ray exam of jaw joint
70330		X-ray exam of jaw joints
70350		X-ray head for orthodontia
70355		Panoramic x-ray of jaws
70360		X-ray exam of neck
70380		X-ray exam of salivary gland
70486		CT maxillofacial w/o dye
70487		CT maxillofacial w/ dye
70488		CT maxillofacial w/o dye & w/ dye
92526		Oral function therapy
95851		Range of motion measurements
95852		Range of motion measurements
97161		Pt eval low complex 20 min
97162		Pt eval mod complex 30 min
97163		Pt eval high complex 45 min
97164		Pt re-eval est plan care
97024		Diathermy eg, microwave
97032		Electrical stimulation
97033		Electric current therapy
97035		Ultrasound therapy
97110		Therapeutic exercises
97112		Neuromuscular reeducation
97140		Manual therapy
97530		Therapeutic activities
97597		RMVL devital tis 20cm/<
97598		RMVL devital tis addl 20 cm<
97750		Physical performance test
97760		Orthotic mgmt and training
97762		C/O for orthotic/prosth use

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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 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.

What follows are several questions from practices (and our answers) on this topic.

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.

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. Within that group of people you would be concerned about the sub-group of the Medicare Beneficiaries for which 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 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. 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, you could have a discount policy to alleviate the cost of billing, as long as it is roughly comparable to the cost of billing.

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 patients of high referring dentists intending to induce them to send more patients.

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

Remember, the Stark Statute is not necessarily based upon the site of the location, but the services that are offered

10. 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 altered your fee schedule.

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

The Stark DHS are referenced above and listed by code. They do not include office consults, general anesthesia, extractions or implants.

12. 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, he or she has no funds with which to pay you, and 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.

13. 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 Statues 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.

14. 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, Stark does not apply.

15. 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.

16. 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 articles 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.

17. 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.

18. 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?

Correct, though you should define "in the area."

19. 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?

No. This would be acceptable.

20. 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.

21. Extractions can be subject to any discount since not prosthetic, etc.?

An extraction is not a DHS, and therefore not applicable.

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

You are correct. It does not.

23. 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.

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

Wisdom teeth extractions are not DHS.

25. 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.

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

It is recommended that you consult with your carrier representative.

27. 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.

28. 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.

29. 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.

30. Does imaging services include all radiographs? How inclusive is that term?

Imaging includes the codes shown above.

31. 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 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.

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

Yes.

33. 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 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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 Surgery practice?

An example of this might be if your practice referred to a separate imaging facility 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.

39. 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

40. 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.

41. 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.

42. 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.

43. 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 fair to say that this likely still does continue. Ideally it is not targeted to the key referrals.

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