ANATOMIC PATHOLOGY IN TODAY’S VOLATILE MARKETPLACE: BEATING BACK THE CHALLENGES

DISCOUNTED ACCOUNTING BILLING AND MARKUPS

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DISCOUNTED ACCOUNT BILLING AND MARKUPS

Summary

Discounted account billing occurs when physicians purchase anatomic pathology services at a discount from a pathology provider, and then re-bill the pathology services to private payers and patients with a significant markup in price.

A common example of discounted account billing involves pap smears. It is increasingly common for gynecologists to purchase these cytological pathology services at a deep discount, and then re-bill the pap smears to patients and payors with a significant mark-up in price. The gynecologists have an obvious incentive to refer the pap smears to the lowest cost pathology provider, regardless of the credentials or quality of the pathology provider, so that the gynecologists can maximize their profit margins on the re-billed services. However, the risk to patients as a result of poor quality pap smears is significant if gynecologists are not basing their choice of pathology provider upon quality, but rather upon price.

Another example of the potential abuses and dangers of discounted account billing is the purchase of pathology services by urologists. Pathologists are reporting dramatic increases in the number of prostate biopsies being performed by urologists who engage in discounted account billing, not only in terms of more patients being subjected to prostate biopsies, but more specimens being taken from each patient. In the absence of medical indicators for the increases, this trend is disturbing and would appear to be the result of the desire of the urologists to increase their profits from the discounted account billing arrangements. Not only do increased numbers of prostate biopsies fuel the exponential growth in health care expenditures, but patients suffer if medically unnecessary biopsies are performed.

By accepting deep discounts on price and marking up the pathology services, the purchasing physicians not only may violate their professional codes of ethics, but also state fee splitting prohibitions, thereby placing their medical licenses at risk. Significant discounts are in violation of both the Medicare and Medicaid anti-kickback law and the Stark law, thereby placing all parties involved at risk for the substantial criminal and civil penalties of these federal laws. In addition, this type of discount places the pathology provider at risk for violation of another federal statute, the Medicare “usual charge” requirement.
DISCOUNTED ACCOUNT BILLING AND MARKUPS
Presentation Outline

This presentation outline discusses the potential abuses that may occur when physicians purchase anatomic pathology services at a discount and then re-bill the pathology services to private payers and patients with a significant markup in price. This practice is known as “account billing” and “client billing”. Not only are the purchased technical component pathology services being marked up, but the purchased professional pathology services are being marked up as well. This practice would be analogous to the purchase by a primary care physician of the professional services of a cardiologist or a surgeon and the rebilling of the cardiologist’s or surgeon’s professional services by the primary care physician.

As explained in more detail below, the practice of discounted account billing and markups often results in excessive ordering of pathology services, medically unnecessary biopsies, and inferior patient care. Purchasing physicians have a strong incentive to make referrals for pathology services based upon the lowest price (and thus the greatest profit margin) rather than quality.

Furthermore, by accepting deep discounts on price and marking up the pathology services, the purchasing physicians not only may be acting in violation of their professional codes of ethics, but also state fee splitting prohibitions, thereby placing their medical licenses at risk. Significant discounts are in violation of both the Medicare and Medicaid anti-kickback law and the Stark law, thereby placing all parties involved at risk for the substantial criminal and civil penalties of these federal laws. In addition, this type of discount places the pathology provider at risk for violation of another federal statute, the Medicare “usual charge” requirement.

A. Excessive and Medically Unnecessary Services

Account billing arrangements permit physicians such as dermatologists, gastroenterologists, gynecologists, and urologists to profit substantially on the ordering of anatomic pathology services for their patients. For example, a dermatologist may purchase the professional and technical pathology services for a skin biopsy for $25, and then re-bill the services to patients and payors for $85. The dermatologist makes a profit of $60, with no investment of time or effort other than the re-billing of the services.

Pathologists around the country report significant increases in the number of biopsies being performed by physicians who engage in account billing, often with no corresponding medical indicators for the increases. It appears as though these physicians are excising additional specimens from their patients and performing medical unnecessary biopsies. The physicians then refer the specimens for pathological processing and interpretation, purchase
the pathology services at a discount, and re-bill the pathology services at marked-up prices. Obviously, these reported increases in the ordering of pathology services are cause for alarm, not only because the patients may be subjected to medically unnecessary procedures (with the potential for adverse medical consequences), but also because the resulting health care expenditures associated with the services burden an already strained health care system.

Unfortunately, when the dangers posed by discounted account billing are brought to the attention of some state medical boards, the medical boards often decline to take decisive action. It appears that some state medical board members are concerned about alienating physicians who take advantage of account billing. In addition, it is likely that some of the board members themselves have participated or continue to participate in account billing arrangements. Obviously, when the public becomes more aware of the abuses of account billing, scrutiny will be focused on the action or inaction of state medical boards to monitor the activities of licensed physicians in the state and ensure patient welfare.

B. Patient Care Issues

The account billing practice raises the specter of significant patient harm. A patient could suffer harm if pathology services are sent to the “lowest cost” provider, rather than to the “best quality” provider so that the referring physician could pocket the profit. For example, assume a woman’s gynecologist sends the pap smear to the pathology provider who has the lowest account billing price, without regard to (or in deliberate disregard of) the credentials and quality of the pathology provider. The gynecologist marks up the price and pockets the profit. The woman’s pap smear is misdiagnosed and she dies. As long as account billing is legally permissible, human nature will cause many referring physicians to consider discounted prices (and profit margin) over quality. As noted above, if a state medical board is aware of the potential for grave harm to patients as a result of discount account billing arrangements, and fails to take action to curb the abuses, the public outcry over the medical board’s failure to protect the patient welfare will be significant.

In addition, some low cost pathology providers utilize physicians out of state who are not licensed in the state where the patient resides. Most state laws prohibit a physician who resides in another state from performing services for a patient unless the physician is licensed in the state in which the patient resides. The only exception is for irregular, occasional consultation services. In the event of an adverse patient outcome, the medical board could come under fire for “looking the other way” and permitting unlicensed physicians to provide services.

Finally, to answer the claim from some purchasing physicians that account billing arrangements benefit the patients because the patients receive a single bill, the physicians do not purchase the pathology services for their Medicare patients, but only purchase the pathology services for the private patients. This is because Medicare regulations restrict account billing. If
the physicians only purchase the services from which they can profit through a markup (the non-Medicare services), and their elderly (and more vulnerable) Medicare patients are left with multiple bills, the claim that the physicians are engaging in account billing to benefit their patients is rather hollow.

C. AMA Ethical Guidelines

In a letter dated July 27, 2001, the Council on Ethical and Judicial Affairs of the American Medical Association addressed the issue of the markup of purchased anatomic pathology services. The Council explained that if anatomic pathology services are provided by pathologists at a discount, the purchasing physicians should not charge a markup. The Council considered such a markup to be an excessive charge added to the service provided by the pathologist and would “exploit patients”.

The Council’s position also has direct bearing upon many state medical practice acts. Many states condition a physician’s medical license upon compliance with professional codes of ethics. If a pathology practice’s physician clients are marking up discounted anatomic pathology services, then these physicians risk violating the AMA’s ethical guidelines, and consequently risk sanction by their state medical boards, including revocation of their medical licenses.

Despite the ability of state medical boards to discipline physicians for violation of the AMA’s code of ethics by engaging in discounted account billing, there has not been a history of enforcement by state medical boards.

D. Medicare and Medicaid Anti-kickback Law

The Medicare and Medicaid anti-kickback law prohibits the payment, receipt, offering or solicitation of remuneration in exchange for the referral of services or items covered by the Medicare or Medicaid programs. Because a physician who contracts with a pathology provider is a source of Medicare and Medicaid referrals to the pathology provider, the Medicare and Medicaid anti-kickback law must be considered when negotiating the compensation arrangement between the physician and the pathology provider.

As a general matter, if the prices paid by the physician for the pathology services are less than fair market value, an allegation could be made that the physician has received a kickback from the pathology provider (in the form of below market prices) in exchange for the physician’s continued referrals to the pathology provider. Therefore, it is critical that pathology providers charge, and physicians pay, reasonable amounts for the pathology services. It is significant that fair market pricing is an important theme throughout the Office of the Inspector
General’s (“OIG”) model compliance guidance for both physician practices and pathology providers.

OIG Advisory Opinion 99-13 provides insight into the parameters for discounted billing for pathology services. This Advisory Opinion explains that pathology providers and the physicians who purchase pathology services risk violating the Medicare and Medicaid anti-kickback law if they have deeply discounted pricing arrangements. The OIG wrote that suspect discounts include, but are not limited to discounted prices that are below the pathology provider’s cost. In determining whether a discount is below cost, the OIG explained that it will consider the total of all costs (including labor, overhead, equipment, etc.) divided by the total number of tests.

Despite the fact that many account billing arrangements are in violation of the Medicare and Medicaid anti-kickback law, to date there has been no public investigation by the OIG regarding these arrangements. Representatives of the OIG has explained informally that the OIG’s resources are limited, and its failure to investigate account billing abuses is a direct result of its budgetary restrictions.

E. The Stark Law

The Stark law also is implicated by discounted account billing. The Stark law prohibits a physician from making a referral for certain designated health services, including pathology services, which are covered by the Medicare or Medicaid programs if the physician has a financial relationship with the provider of the services. Some government officials have raised concerns regarding discounted account billing to physicians, and have expressed the opinion that excessive discounts to physicians could violate the Stark law. However, to date, there have not been any public investigations or prosecutions of account billing arrangements based upon a violation of the Stark law.

F. Medicare Usual Charge

Another discounted billing issue is compliance with the Medicare “usual charge” statute. 42 U.S.C. 1320a-7(b)(6)(A) states that the Secretary of Health and Human Services may exclude from the Medicare program any provider who bills Medicare or Medicaid for charges that are “substantially in excess of such [provider’s] usual charge.”

In September 2003, the OIG proposed a new regulation that defines “substantially in excess” as “any charge or cost submitted for a furnished item or service that is more than 120 percent of the individual’s or entity’s usual charge or cost for that item or service…”. Many discounted account billing arrangements contain prices that 50 percent or even less of the
Medicare charges for the same services. Clearly, these discounted prices would raise significant issues under the OIG’s proposal.

Prior to the September 2003 proposed regulation, the OIG explained that charges in excess of a provider’s usual charges are permissible where they are “due to unusual circumstances or medical complications requiring additional time, effort, expense, or other good cause.” In Advisory Opinion 98-8, the OIG offered that a useful benchmark for determining whether a higher Medicare charge would meet the “good cause” exception is to compare the profit margin on the Medicare sale. If the profit margin on the Medicare sale is equal to or less than the profit margin on the “cash and carry” sale, the OIG probably would consider the “good cause” exception to be met. A pathology provider likely could not justify discounts significantly below the Medicare allowable fee under this standard. In fact, the OIG’s legal counsel has stated that the OIG does not believe that such significant discounts can be justified under the Medicare “usual charge” statute.

G. Fee Splitting Prohibition

Most state medical practice acts also prohibit fee splitting, which involves the division of professional fees in exchange for a referral. When a pathology provider significantly discounts its fee to the referrer of the pathology services, so that the referrer can re-bill the pathology services with a substantial markup, both parties are splitting the professional fee in exchange for the referral. Furthermore, many state medical boards endorse the AMA’s ethical prohibition against fee splitting, and include fee splitting as grounds for disciplinary action.

However, as noted above, state medical boards have declined to take disciplinary action against physicians who engage in fee splitting through discounted account billing arrangements. In Mississippi, for example, although the Mississippi Health Care Fraud Task Force issued a report in 2000 that criticizes discounted account billing as fee splitting, no medical board action has been taken against violators.

H. State Prohibitions

Several states have statutory restrictions on account billing and/or markup, although some of the prohibitions relate only to clinical laboratory or cytology services. These prohibitions include the following:

**Direct Billing:** California, Bus. & Prof. Code Sec. 655.6 (cytology); Louisiana, Rev. Stat. Sec. 1742; Nevada, Rev. Stat. Sec. 652.195 (cytology); New Jersey, Stat. Sec. 45:9-42.41A; New York, Pub. Health Law Sec. 586; Rhode Island, Gen. Laws Sec. 23-16.2-5.1.


The Louisiana law, which was enacted in June 2003, states that “...[n]o person licensed in the state to practice medicine, dentistry, optometry, podiatry or chiropractic shall charge, bill, or otherwise solicit payment for outpatient anatomic pathology services unless the services were rendered personally by the licensed practitioner or under the licensed practitioner’s direct supervision.”

The Tennessee law states that: “No person licensed in this state to practice medicine shall agree or contract with any clinical, bio-analytical or hospital laboratory, wherever located, to pay such laboratory for anatomic pathology services or cytology services and thereafter include such costs in the bill or statement submitted to the patient or any entity or person for payment, unless the practitioner discloses on the bill or statement, or in writing by a separate disclosure statement in a minimum print size of ten (10) font, the name and address of the laboratory and the net amount or amounts paid or to be paid to the laboratory for the anatomic pathology services or cytology services.”

The California law states that “It is unlawful for any person licensed under this division ... to charge, bill, or otherwise solicit payment from any patient, client, customer, or third-party payor for cytologic services relating to the examination of gynecologic slides if those services were not actually rendered by that person or under his or her direct supervision.” Similarly, Nevada law provides that “It is unlawful for a physician to charge, bill, or otherwise solicit payment from a person for cytologic services ... [unless the] cytologic services were rendered by the physician himself or in a laboratory operated solely in connection with the diagnosis or treatment of his own patients.”

Vermont law states that it is unprofessional conduct (subject to disciplinary action) for a physician to agree “with clinical or bio-analytical laboratories to make payments to
such laboratories ..., unless the physician discloses on the bills to patients or third-party payors the name of such laboratory, the amount or amounts to such laboratory ..., and the amount of his or her processing charge or procurement, if any, for each specimen taken.” Delaware and Maryland have an almost identical statute.

Connecticut law prohibits “any system of billing or accepting payment for laboratory services that does not accurately identify the laboratory, the requester, the patient or recipient and the cost of such laboratory services.”

Oregon law states that “… a practitioner shall not mark up or charge a commission or make a profit on services rendered by an independent person or laboratory. ... Any services rendered to the patient that were performed by persons other than those in direct employ of the practitioner and the charges therefore shall be indicated on the patient’s bill.”
DISCOUNTED ACCOUNT BILLING AND MARKUPS
“Pearls of Pathology”

What is discounted account billing? Discounted account billing occurs when physicians purchase anatomic pathology services at a discount from a pathology provider, and then re-bill the pathology services to private payers and patients with a significant markup in price.

What effect might discounted account billing have upon the medical necessity of services ordered? Account billing arrangements permit physicians to profit substantially on the ordering of anatomic pathology services for their patients. Pathologists around the country report significant increases in the number of biopsies being performed by physicians who engage in account billing, often with no corresponding medical indicators for the increases.

What is the potential for patient harm? A patient could suffer harm if pathology services are sent to the “lowest cost” provider, rather than to the “best quality” provider so that the referring physician could pocket the profit.

Is account billing ethical? The Council on Ethical and Judicial Affairs of the American Medical Association has explained that if anatomic pathology services are provided by pathologists at a discount, the purchasing physicians should not charge a markup.

Is account billing legal under the Medicare and Medicaid anti-kickback law and the Stark law? If the prices paid by the physician for the pathology services are less than fair market value, an allegation could be made that the physician has received a kickback from the pathology provider (in the form of below market prices) in exchange for the physician’s continued referrals to the pathology provider. Significant discounts also implicate the Stark self-referral prohibition.

How does the Medicare “usual charge” restriction affect account billing? If the average of the amounts charged by a pathology provider to all non-government payors, patients and clients is more than 20% less than the provider’s charge to the Medicare program, the OIG’s position is that the provider may be in violation of the “usual charge” restriction.

Does state law restrict account billing? Most state medical practice acts prohibit fee splitting. When a pathology provider significantly discounts its fee to the referrer of the pathology services, so that the referrer can re-bill the pathology services with a substantial markup, both parties are splitting the professional fee in exchange for the referral. In addition, several states have statutory restrictions on account billing and/or markups.