



# American Society for Clinical Pathology

THE AMERICAN SOCIETY FOR CLINICAL PATHOLOGY  
POLICY STATEMENT

## FEE SPLITTING, MARKUPS AND RELATED PRACTICES (04-03)

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### POLICY STATEMENT:

ASCP is opposed to fee splitting, mark-ups, and related billing practices, as these practices adversely affect patient health and safety. The Society supports initiatives, such as direct billing, anti-markup, and patient notification provisions, to eliminate or reduce the likelihood of these inappropriate billing practices.

### BACKGROUND AND RATIONALE:

#### ***I. Introduction***

Fee splitting and markups for clinical laboratory services are a growing problem for patients, clinical laboratories and pathologists. These billing arrangements involve a practice whereby the clinician requires the clinical laboratory and/or the pathologist to share a portion of the reimbursement received for the performance of analytical or professional services. These practices distort rational medical decisions and lead to the overutilization of certain health care services. These practices are illegal under Medicare and Medicaid and have been declared unethical by the American Medical Association.

Because the practice of laboratory medicine is highly dependent on patient referrals, clinicians are in a unique position to control the flow of business to clinical laboratories. As such, clinical laboratories and pathologists have little power to prevent fee splitting, markups and similar practices by the clinician.

Fee splitting, markups and related practices cause a host of problems, such as inflating the cost of laboratory services for patients, federal and state governments, and other payers as well as undermining patient trust in the medical profession. These practices can also adversely affect clinical laboratories and patient welfare. Patients most likely to be affected by this inappropriate practice are uninsured individuals and those covered by a private third party payer.

These practices can have a number of different permutations. In a nutshell, these involve clinicians or other health care providers referring patient specimens to clinical laboratories or pathologists for analysis on the basis of an understanding that the referring practitioner or healthcare practice receives a financial or other benefit for referring patient specimens. This can involve a practice where the clinician bills for the services provided by the clinical laboratory or pathologist and forwards a portion of the overall reimbursement to the laboratory or pathologist.

Among the policy options to address these practices are direct billing, anti-markup and patient notification requirements. Direct billing requires the laboratory to bill for the patient's testing services. Anti-markup provisions would allow the clinician to bill the patient for testing services but would prohibit the physician from charging the patient more for the laboratory services than the laboratory billed the physician. Patient notification requirements would mandate that when physicians bill patients for testing services that they also inform the patient how much the physician was billed by the laboratory for the testing services.

## ***II. Fee Splitting Results in Overutilization of Laboratory Services***

Fee splitting, markups and related billing practices distort rational medical decisions as a result of an economic incentive to overutilize testing services. An incentive to overutilize laboratory services exists when the referring physician is in a position to be compensated for work performed by the clinical laboratory or pathologist.

This incentive is similar to the incentives prohibited by the first Stark anti-referral law, which bars clinicians from referring patient specimens to laboratories in which they had a financial interest. Studies by the U.S. Department of Health and Human Services (HHS) and other government agencies have shown that referrals to entities in which physicians have a financial relationship encourage excessive use of services.<sup>1</sup> An HHS Inspector General study found that physicians with a financial interest in the clinical laboratories to which they “referred Medicare patients [ordered] 45 percent more laboratory services than did physicians who did not have such financial interests.”<sup>2</sup> In addition, the Center for Health Policy Studies found that laboratory charges per enrollee under private health insurance programs were 41 percent higher in non-direct billing states.<sup>3</sup> This study also found that laboratory test utilization is higher in non-direct billing states.

Fee splitting and markups also increase the potential for harm to patients that result from unnecessary testing and treatments.<sup>4</sup> Moreover, the practice harms patients by unnecessarily raising the costs of health care (particularly for the uninsured) and undermines patient trust in the medical profession.<sup>5</sup>

## ***III. These Billing Practices Violate Federal and Some State Laws***

With few exceptions, fee splitting and markups violate Medicare and Medicaid anti-kickback and federal self-referral laws. Federal anti-kickback laws prohibit payment, receipt, offering, or solicitation of remuneration in exchange for the referral of services or items covered by Medicare or Medicaid.<sup>6</sup> Besides prohibiting clinicians from engaging in these practices, federal anti-kickback laws would also appear to apply to pathologists who participate in such practices.

Enforcement of the anti-kickback law requires proof of "knowing" and "willful" illegal remuneration, such as bribes or rebates, for patient referrals, and it can result in criminal sanctions.

Federal self-referral laws prohibit physicians from referring Medicare patients for certain health care services, such as laboratory tests, to entities with which the physician or their immediate family members has a financial relationship. Moreover, numerous states, such as Louisiana, California, New York, New Jersey, and Nevada have banned the practice of fee splitting by requiring that clinical laboratories directly bill the patient for services performed.<sup>7, 8</sup>

#### ***IV. Ethical Implications of Fee Splitting and other Similar Practices***

The American Medical Association (AMA) Council on Ethical and Judicial Affairs (CEJA) outlines the AMA's strong opposition to fee splitting, markups and similar practices regarding clinician compensation for services performed by clinical laboratories and/or pathologists. The following opinions are published in the AMA Code of Medical Ethics.

In Opinion E-6.02, CEJA states "[p]ayment by or to a physician solely for the referral of a patient is fee splitting and is unethical." CEJA has also explained that if anatomic pathology services are provided at a discount, the purchasing physician should not charge a markup.

AMA Opinion E-8.09(2) states, "[a] physician should not charge a markup, commission, or profit on the services rendered by others." This opinion describes a markup as "an excessive charge that exploits patients if it is nothing more than a tacked on amount for a service already provided and accounted for by the laboratory." The opinion does allow the clinician to bill "an acquisition charge or processing charge" but that the "patient should be notified of any such charge in advance." Moreover, this opinions states that a "physician who disregards quality as the primary criterion or who chooses a laboratory solely because it provides low-cost laboratory services on which the patient is charged a profit, is not acting in the best interests of the patient."

Additionally, CEJA favors direct billing of laboratory services in opinion E-6.09. This opinion states that "[w]hen it is not possible for the laboratory bill to be sent directly to the patient, the referring physician's bill to the patient should indicate the actual charges for laboratory services, including the name of the laboratory, as well as any separate charges for the physician's own professional services."

Opinion E-8.03 elaborates that "[i]n general, physicians should not refer patients to a health care facility outside their office at which they do not directly provide services and in which they have a financial interest."

It should be noted that CEJA has also addressed the practice of clinical laboratories engaging in fee splitting by compensating physicians for their referrals. In opinion E-6.03, CEJA states "clinics, laboratories, hospitals, or other health care facilities that compensate physicians for referral of patients are engaged in fee splitting which is unethical."

## V. *Economic Harm to Clinical Laboratories*

Over the past two decades federal and state reimbursements (Medicare and Medicaid) for laboratory services have declined significantly. Repeated erosions to the caps for laboratory fee schedule (known as the national limitation amounts) have declined 36 percent. Moreover, for almost 15 years now the annual adjustments for laboratory reimbursements haven't kept pace with inflation. In fact, the lack of a reliable annual update has further eroded laboratory reimbursements by over 20 percent. At the same time, the cost of providing laboratory services has increased steadily, making it very difficult for clinical laboratories to provide state-of-the-art diagnostic facilities. This inability to keep pace with the high costs of laboratory services is affectively undermining the ability of clinical laboratories to provide "accessible, efficient, and high quality testing."<sup>9</sup> Fee splitting, markups and other similar practices are compounding the financial difficulties facing clinical laboratories today. The practice may force laboratories to reduce testing services and could force some laboratories to close, thereby reducing patient access to care.<sup>10</sup> This could be particularly problematic for patients in rural and underserved areas.

### REFERENCES:

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- <sup>1</sup> Hearing on Physician Self-Referral Regulations. Hearing before the Committee on Ways and Means Subcommittee on Health, U.S. House of Representatives. Testimony of Kathy Buto, Deputy Director, HCFA Center for Health Plans and Providers, U.S. Department of Health and Human Services. May 13, 1999.
  - <sup>2</sup> Financial Arrangements Between Physicians and Health Care Businesses: Report to Congress. U.S. Health and Human Services Department Office of the Inspector General Office of Analysis and Inspections. May 1989.
  - <sup>3</sup> Dyckman, Z. Impact of Direct Billing Requirements For Laboratory Tests on Laboratory Charges, Utilization and Costs. Center for Health Policy Studies. March 1993. p. 15.
  - <sup>4</sup> Hearing on Physician Self-Referral Regulations. Hearing before the Committee on Ways and Means Subcommittee on Health, U.S. House of Representatives. Testimony of Kathy Buto, Deputy Director, HCFA Center for Health Plans and Providers, U.S. Department of Health and Human Services. May 13, 1999.
  - <sup>5</sup> Financial Arrangements Between Physicians and Health Care Businesses: Report to Congress. U.S. Health and Human Services Department Office of the Inspector General Office of Analysis and Inspections. May 1989. p. 3
  - <sup>6</sup> Financial Arrangements Between Physicians and Health Care Businesses: Report to Congress. U.S. Health and Human Services Department Office of the Inspector General Office of Analysis and Inspections. May 1989. P. 4.
  - <sup>7</sup> Wood, JP. Discounted Account Billing and Markups. American Pathology Review. Winter 2003. p. 2.
  - <sup>8</sup> Financial Arrangements Between Physicians and Health Care Businesses: Report to Congress. U.S. Health and Human Services Department Office of the Inspector General Office of Analysis and Inspections. May 1989. P. 4.
  - <sup>9</sup> Statement of the American Clinical Laboratory Association. U.S. House Ways and Means Subcommittee on Health. April 20, 1993. p. 3.
  - <sup>10</sup> Statement of the American Clinical Laboratory Association. U.S. House Ways and Means Subcommittee on Health. April 20, 1993. p. 2.