

Legal Q/A

by Bruce E. Wood, Esquire

Q: Would our group practice violate the Medicare rules if we charge our self-pay patients less than Medicare reimbursement rates?

A: Many physicians are under a common misconception that it is illegal in all cases to charge less than Medicare or to accept a fee schedule that pays less than Medicare. The Medicare rules prohibit a provider from submitting claims to Medicare or Medicaid for amounts substantially in excess of the provider's usual charges. The penalty for violation is permissive exclusion from the Medicare and Medicaid programs (although to the author's knowledge no physician has been excluded on these grounds).

The term "usual charges" has been interpreted by many in the industry to mean the usual charges of the provider to private pay patients (which includes self-pay and private insurance) because HCFA (now called CMS - Center for Medicare & Medicaid Services) has followed that interpretation for the similar phrase "customary charges" in the Provider Reimbursement Manual that affects institutional providers. Recently, the Office of Inspector General issued an advisory letter that expressly stated that Medicare does not have a blanket prohibition on discounts to private pay customers and that the Medicare rule was intended to address a much narrower issue - tiered pricing structures that set one price for Medicare or Medicaid and a substantially

lower price for most other customers. The OIG letter concluded by Medicare billing prohibition is not implicated unless a provider's charge to Medicare is substantially in excess of its median non-Medicare/Medicaid charge. In other words, the provider is only at risk for a violation if it is discounting close to half of its non-Medicare/Medicaid business.

Even if a large part of the physician's practice involves discounted fees, the statute is not violated unless there is a "substantial" disparity with the Medicare and Medicaid rates. There is no hard and fast rule as to what constitutes "substantial" but we generally believe that a differential of up to 15-20% is probably safe.

Finally, Medicare also allows charge differentials for "good cause." Very often the physician will have a good business reason for discounting certain fees. For example, the administrative burden of billing and collecting from private or self-pay patients is significantly less than with Medicare or insurance companies, resulting in lower costs to the physician. Discounted fees for managed care companies are usually justified by higher volume of patients, aside from the harsh reality that physicians do not always have a real choice as to whether to accept their reimbursement rates.

The physician or group practice should always maintain a customary fee

schedule that is greater than Medicare rates (or at least greater than 85-90% of Medicare). If discounts off that schedule are to be granted to any one, they should be supported by some justifiable business reason. Bear in mind, however, that we are talking only about the permissive exclusion provisions of Medicare. It is still better to have a fee schedule that is at least equal to Medicare rates. Although a modest discount off Medicare rates may not be illegal, it could result in a reduction in reimbursement since Medicare pays the lesser of actual charges or the Medicare RBRVS rate.

Physicians should also be cautious that discounts are not offered under any circumstances that could be considered

as an inducement for the referral of Medicare business. If even one purpose of a discount is to influence the referral of Medicare business, a violation of the anti-kickback statute may occur - a criminal offense. For example, offering a discount to senior citizens for services that are not covered by Medicare could be construed as an illegal kickback if the purpose of the discount is to encourage those patients to seek treatment from the physician for Medicare covered services.

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