

ETHICAL PRACTICE BOARD ADVISORY

AUDIOLOGISTS BEWARE!...AND BE AWARE OF CONFLICTS OF INTEREST

ROBERT HAHN, ESQ., DEBRA ABEL, AUD, JANE M. KUKULA, AUD, AND
MEMBERS, ETHICAL PRACTICE BOARD, AMERICAN ACADEMY OF AUDIOLOGY

The American Academy of Audiology has advocated avoidance of conflicts of interest in all professional interactions by including a prohibition in the Code of Ethics. Rule 4c states “Individuals shall not participate in activities that constitute a conflict of interest”. In the late 1990’s, there was rising concern regarding incentives being offered to and accepted by audiologists (Decker 1999 and Liang 1999). In the early 1990s, a Presidential Task Force was appointed to look into the issue of professional ethics and make recommendations. As a result of the work of the task force, the Ethical Practices Board (EPB) of the American Academy of Audiology in conjunction with the Academy of Dispensing Audiologists adopted the *Ethical Practice Guidelines on Financial Incentives from Hearing Instrument Manufacturers* position statement to assist audiologists in the interpretation of Rule 4c and avoid conflicts of interest. Further, the EPB and others have worked to educate the membership about ethical issues, especially conflicts of interest.

From discussions with membership at local, regional and national meetings, it appears that some members are still unaware that the acceptance of incentives such as trips or cash from hearing aid manufacturers is unethical and may also violate federal law. Some members express the belief that acceptance of trips, business partnership money or points and equipment for a specific volume of hearing aids purchased, and other incentives is permissible as long as one would have prescribed the hearing aid regardless of the receipt of such incentives. While the ethical issues are clearly present despite the denial of some audiologists, it is also important to be aware of the potential for criminal liability under the federal Anti-Kickback Statute, which prohibits audiologists from accepting gifts or incentives in return for prescribing items or services payable under a federal health care program. Possible penalties for violation of this statute could include exclusion from participation in Medicare, Medicaid, and other federal health programs; heavy fines; and imprisonment. The following information is provided to help familiarize members with the Anti-Kickback Statute as well as other important federal laws prohibiting health care fraud.

ANTI-KICKBACK STATUTE (AKS)

Under the Federal Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b)), it is a felony for any person (including an audiologist) to knowingly and willfully solicit or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for purchasing, leasing, or ordering (or recommending the purchase, lease, or ordering) of any item or service reimbursable in whole or in part under a federal health care program (except for the Federal Employees Health Benefits Program). (Abel and Hahn, 2005). In addition, many states have anti-kickback laws, which may differ from the federal law.

If an audiologist accepts incentives from a hearing aid manufacturer based on a reward system for purchasing the manufacturer’s products and then prescribes hearing aids made by that manufacturer that are reimbursable under a federal health care program, this may violate the AKS. The audiologist cannot avoid violation of the law by disclosing the incentives to patient.

As an audiology-based example, consider Ima Gonetotahiti, AuD, who agreed to purchase 25 Poortone hearing aids to qualify for the trip to Tahiti. One hearing aid was dispensed to a Medicaid patient who was reimbursed, in whole or in part, by the state Medicaid program. Dr. Gonetotahiti received remuneration (the trip) in return for prescribing a hearing aid that was reimbursed by a federal health care program (Medicaid).

The Anti-Kickback Statute is a criminal statute so the government has to prove intent, but they only have to prove that inducing or rewarding orders of the manufacturer’s products was *one* purpose (not necessarily the only purpose) of the transaction. The Office of the Inspector General enforces the AKS. While there are “safe harbors” (i.e., types of transactions that the Inspector General has determined do not violate the AKS), it is doubtful that the typical hearing aid manufacturer incentive plan would fit into any of these safe harbors.

The AKS prohibits kickbacks in the forms of incentives and/or ‘perks’ because (a) they create an incentive to over-utilize reimbursable services, increasing costs to Medicare and other federal health care programs; (b) they distort medical decision-making, compromising quality of care; and (c) they result in unfair competition by freezing out qualified providers who are unwilling to pay kickbacks (Abel and Hahn, 2005).

GIFTS OR INDUCEMENTS TO BENEFICIARIES

It is unlawful to knowingly offer or give remuneration to Medicare or Medicaid beneficiaries to influence their choice of provider for any item or service covered by Medicare or a state health care program (42 U.S.C. § 1320a-7a(a)(5)). The law prohibits such gifts, because they increase costs to the Medicare and Medicaid programs by inducing beneficiaries to obtain items and services they do not need. Penalties include civil fines and exclusion from participation in the Medicare and Medicaid programs.

Certain gifts, however, are permitted. These include, for example, gifts of nominal value (i.e., no more than \$10 per item or \$50 in the aggregate per year per beneficiary). Waivers of co-payments or deductibles are also permitted provided they are not advertised, not routine, and made after an individualized determination of financial need or the failure of reasonable collection efforts.

THE FALSE CLAIMS ACT AND RELATED LAWS

Knowingly submitting a false claim to a federal health care program (e.g., presenting a false bill to a Medicare carrier) violates several laws, including:

Federal criminal laws prohibiting false claims and false statements to U.S. government agencies (18 U.S.C. §§ 287 and 1001)


Medicare and Medicaid Fraud (42 U.S.C. § 1320a-7b(a)(1))

The False Claims Act (31 U.S.C. § 3729 et seq.)

Submitting claims for services not performed, for medically unnecessary services, and for “upcoding” (i.e., coding at a higher level or for more services than were provided) is a violation of the False Claims Act. For example, if an audiologist performs cerumen removal (which is not reimbursed by Medicare) and then performs another procedure that is unnecessary and bills Medicare for the other procedure (CPT) code to guarantee some form of payment for the visit, the audiologist has submitted a false claim.

We can expect to see increased enforcement of the federal and state laws designed to prevent health care fraud and abuse as agencies address the escalating cost of federal health care programs such as Medicare and Medicaid. To that end, audiologists need to review the federal laws and begin to understand how the laws apply to the practice of audiology. These issues, laws and regulations are not always covered in depth in academic programs in audiology. As a result, many audiologists may be unaware of the potential for criminal liability and severe penalties associated with the acceptance of incentives such as trips.

It is clearly the intent of the Ethical Practices Board to advise the membership when particular business practices place them at risk. It is not the intent of the Ethical Practices Board to regulate an individual’s business or to determine the financial needs of an audiologist’s practice. The EPB’s goal is to provide guidance to the membership to avoid potential ethical and legal complications.

We must strive to avoid even the appearance of conflict of interest when interacting with our patients, other health care providers, manufacturers and third party payers. The personal belief that one is putting the patient’s interests first is not sufficient. If it were, there would be no need for objective codes of ethics (Decker, 1999) nor would there be a need for society to enact laws that make some unethical practices illegal. Audiology is a profession striving for autonomy and with autonomy comes an increased responsibility to our patients and to society at large. 

REFERENCES

- Abel, D., & Hahn, R. (2005). Practice Management and Ethical Issues. *Ethics in Audiology*. Reston: American Academy of Audiology, Publisher.
- Decker, N., (1999). Conflict of Interest in Professional Practice. *Audiol Today*, 11:4, pg 28-29.
- Liang, B., (1999). In Trouble with The Law and The Profession: Fraud, Abuse and Professional Ethics in a World of Provider Distrust. *Audiol Today*, 11:4, 26-27,