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DEPARTMENT OF HEALTH
DIVISION OF HEALTH RELATED BOARDS
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Tennessee Board of Medical Examiners
Private Advisory Ruling MD-04-01

J. Cameron Hall, M.D.
8375 Westfair Drive
Germantown, Tennessee 38139-3259

March 17, 2004

RE: PRIVATE ADVISORY RULING REGARDING "CLIENT BILLING"

Dear Dr. Hall:

This private advisory ruling is issued pursuant to your request dated December 29, 2003 and received in the Board's administrative office on January 2, 2004. The Tennessee Board of Medical Examiners *"is authorized to issue advisory private letter rulings to any affected licensee who makes such a request regarding any matters within the board's primary jurisdiction."* [1]

The Board finds the following facts regarding the issue of jurisdiction to issue the requested private advisory ruling:

1. The petitioner, Dr. Hall, is a medical doctor licensed by the Tennessee Board of Medical Examiners and therefore a "licensee" for purposes of the statute authorizing these advisory rulings.

2. The Board received a letter dated December 29, 2003 from the petitioner. In his letter, the petitioner requested an opinion as to whether the practice of "client billing" constitutes unprofessional conduct, or fraud or deceit or fee splitting. The answers to those questions require an interpretation of Tennessee Code Annotated §§ 63-6-214 (b)(1), (3) and 63-6-225. All of those cited statutes are contained in the Tennessee Code Annotated, Title 63, Chapter 6 which governs the practice of medicine and surgery and are therefore within the primary jurisdiction of the Board.

3. The petitioner, Dr. Hall, is certified as a pathologist and is therefore affected by whatever decision the Board might make on the issues involved in "client billing."

The Board, therefore, has authority to issue this ruling on the questions submitted by the petitioner because he is a licensee of the Board and is affected by the interpretation of a matter within the Board's primary jurisdiction.

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1 *Tennessee Code Annotated* § 63-6-101(a)(4).

1. Client Billing - An Overview

Initially the Board wishes to state that it has found little direct authority to regulate the business aspects of medical practice. To prevent getting bogged down in the minutiae of the business aspects of medicine that evolve regularly as reimbursement practices and new medical practice structures are created, the Board is loathe to tread where the legislature has not specifically directed it to go. However, when business practices negatively impact the quality of care being provided patients the Board will not hesitate to act. Under certain circumstances "client billing" can be such a business practice.

In the normal course of a medical practice a physician who is treating a patient may need to have certain biological specimens from the patient examined and interpreted to determine the appropriate course of treatment for that patient. Even though, by law, any physician who is licensed by the Board may examine and interpret such specimens, it is the general practice in today's environment of specialized medicine that a physician who is not a pathologist[2] will refer those specimens to an appropriate pathologist to obtain an expert interpretation of the specimens.

The term "client billing" for purposes of this Advisory Ruling refers to the method by which the non-pathologist physician (hereinafter "clinician") obtains payment for pathology services on specimens from their patients that have been referred to physicians specializing in pathology (hereinafter "pathologist") for examination and interpretation when the pathologist does not bill the patient or third party payor directly for those pathology services. In a "client billing" scenario the clinician is billed for the pathology services he requested by the laboratory or pathologist who provided the services. The clinician then bills either the patient or the patient's third party payor for the pathology services for which he or she was charged by the laboratory or pathologist. It is also important to note at this juncture that only pathologists or laboratories on their behalf can bill for services provided to patients of federally funded health care programs.

The economics of the practice of "client billing" have given rise to at least two questionable practices which are by implication included in the questions submitted by the petitioner in his request for this Advisory Ruling. They are as follows:

1. The practice of some clinicians billing patients or their third party payors for pathology services in an amount considerably more than that paid by the clinicians to the laboratory or pathologist. In some instances the clinician is billing the total amount of the reimbursement rate authorized for payment for that pathology service by the patient's third party payor even when the amount the clinician actually paid the laboratory or pathologist is less (sometimes far less) than the third party payor's authorized reimbursement rate.[3]

2. The practice of some laboratories and/or pathologists who discount the cost of their pathology services in an effort to induce clinicians to obtain their required pathology services from them. This is perhaps a natural consequence of a free enterprise system and not per se objectionable since federal

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2 Pathologist is defined as "A specialist in diagnosing the abnormal changes in tissues removed at operations or postmortem examinations." Tabors Cyclopedic Medical Dictionary, 17th Edition, F. A. Davis Publishing Co. 1993, Page 1445.

3 To be fair, a great number of clinicians, including those in the Department of Health, "client bill" for only the amount they had to pay the laboratory or pathologist or that amount plus a nominal handling fee. For the Department of Health this handling fee is approximately Three dollars ($3.00).

law has been enacted to prevent flagrant abuse of this practice.[4] However, when this practice is considered in reference to the practice set forth in paragraph 1 it provides an obvious added economic incentive for clinicians to utilize such laboratories or pathologist and has led some to question whether it creates an incentive to over-utilize such services. In fact, an entire segment of the health care community could be devoted to such agreements between clinicians and laboratories or pathologists the sole purpose of which would be to institutionalize the combination of these practices for the financial gain of all parties to those agreements.

There are no statutes or rules that specifically authorize or prohibit "client billing" as it is described above. Consequently, for purposes of this Advisory Ruling and as an initial matter, in the absence of statutes or rules specifically prohibiting the practice of "client billing" the Board can unequivocally rule that "client billing" in and of itself does not violate the law and does not subject a physician to possible disciplinary action. However, as with all procedures and processes that are not made specifically unlawful, they may become so as they evolve into things they were never intended to become and as a result impact adversely on the health safety and welfare of patients. In this situation there are statutes[5] that could conceivably apply to the questionable practices set out above that have evolved as a consequence of "client billing" and would make such evolutionary processes unlawful and/or the basis for disciplinary action.

2. Does "Client Billing" constitute unethical conduct pursuant to T.C.A. § 63-6-214 (b) (1)?

Tennessee Code Annotated § 63-6-214 (b) (1) provides in pertinent part as follows:

> ***63-6-214 Grounds for license denial, suspension or revocation -- Reporting misconduct.***
> *(a) The board has the power to:*
> *(1) Deny an application for a license to any applicant who applies for the same through reciprocity or otherwise;*
> *(2) Permanently or temporarily withhold issuance of a license;*
> *(3) Suspend or limit or restrict a previously issued license for such time and in such manner as the board may determine;*
> *(4) Reprimand or take such action in relation to disciplining an applicant or licensee, including, but not limited to, informal settlements, private censures and warnings, as the board in its discretion may deem proper; or*
> *(5) Permanently revoke a license.*
> *(b) The grounds upon which the board shall exercise such power include, but are not limited to:*
> *(1) Unprofessional, dishonorable or* ***unethical conduct***; (Emphasis added.)
> . . . .

As ruled previously, "client billing" in and of itself does not violate this law and subject a physician to the sanctions. The Board has promulgated rules that identify, in part, what it considers as constituting "unethical conduct." That rule is 0880-2-.14 (8) of the Official Compilation of Rules and Regulations of the State of Tennessee (hereinafter O.C.R.R.S.T.) which provides in pertinent part as follows:

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4 Federal Anti-kickback statute 42 U.S.C.A. § 1128B (b); The Stark Laws 42 U.S.C.A. § 1395nn; Excessive charges permissible exclusion from Medicare 42 U.S.C.A. § 1128(b)(6)(a).
5 T.C.A. § 63-6-214 (b) (1), (3), (10), (11) and T.C.A. § 63-6-225.

> *(8) Code of Ethics - The Board adopts, as if fully set out herein and to the extent that it does not conflict with state law, rules or Board Position Statements, as its code of medical ethics the "Code of Medical Ethics" published by the A.M.A. Council on Ethical and Judicial Affairs as it may, from time to time, be amended.*
>
> > *(a) In the case of a conflict the state law, rules or position statements shall govern. Violation of the Board's code of ethics shall be grounds for disciplinary action pursuant to T.C.A. § 63-6-214 (b)(1).*
> >
> > . . .

The American Medical Association has developed "Principles of Medical Ethics"[6] that form the basis for all conduct expected of physicians. Pursuant to those "Principles" a body of opinions[7], that applies the Principles of Medical Ethics to the actual practice, has developed in relation to specific conduct of physicians. The combination of those "Principles" and the resulting opinions constitute the American Medical Associations Code of Medical Ethics which was adopted by the Board through the rule referenced above**.**

Ethical Opinion E-8.09 of that Code entitled, **Laboratory Services,** provides in pertinent part as follows:

> *The physician's ethical responsibility is to provide patients with high quality services. This includes services that the physician performs personally and those that are delegated to others. A physician should not utilize the services of any laboratory, irrespective of whether it is operated by a physician or non-physician, unless she or he has the utmost confidence in the quality of its services. A physician must always assume personal responsibility for the best interests of his or her patients. Medical judgment based upon inferior laboratory work is likewise inferior. Medical considerations, not cost, must be paramount when the physician chooses a laboratory.* ***The 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. However, if reliable, quality laboratory services are available at lower cost, the patient should have the benefit of the savings. As a professional, the physician is entitled to fair compensation for his or her services. A physician should not charge a markup, commission, or profit on the services rendered by others. A markup is 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. A physician may make an acquisition charge or processing charge. The patient should be notified of any such charge in advance.*** *(I, II, III, IV, V) Issued prior to April 1977; Updated June 1994.* (Emphasis added.)

The Board considers the amount charged to the clinician in the "client billing" situation by the laboratory or pathologist for a service rendered to be the "amount for a service already provided and accounted for by the laboratory." The Board further concludes that this Ethical Opinion intends that anatomical pathology be encompassed within the broader term "laboratory services." With that in mind and based upon the provisions of Ethical Opinion E-8.09, any form of "client billing" that does not pass the benefit of whatever savings the clinician might have negotiated in terms of payment for laboratory/pathology services on to the patient without any additional costs, other than an acquisition or processing charge could result in the clinician violating rule 0880-2-.14 (8), O.C.R.R.S.T. and therefore could subject the clinician to disciplinary action pursuant to T.C.A. § 63-6-214 (b) (1).

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6 Code of Medical Ethics 1998 - 1999 Edition American Medical Association, Council on Ethical and Judicial Affairs, 1998, pp xiv through xlix.
7 Id. pp 1 through 186

The question now becomes "what is a reasonable acquisition charge or processing charge"under Ethical Opinion E-8.09? The clinician is entitled to fair compensation for whatever costs are incurred for specimen preparation and handling as well as costs associated with billing and receiving payment for the pathology service that was referred out and for whatever unforeseen services (that are otherwise not reimbursable) might be necessary as a result of the specimen interpretation including, but not limited to, incorporation of the specimen result into the patients file, notification of the patient of the result and potential changes in treatment plans. Consequently, as a matter of equity and to avoid having to create an ultimately unworkable formula based on interpretation results and other contingent factors, the Board finds that the additional amounts, as acquisition or processing charges a clinician may ethically add to the cost charged by the pathologist shall be governed by Ethical Opinion E-8.09.

3. Does "client billing" constitute fraud and deceit pursuant to T.C.A. § 63-6-214 (b) (3)?

Tennessee Code Annotated § 63-6-214 (b) (3) provides in pertinent part as follows:

> ***63-6-214 Grounds for license denial, suspension or revocation -- Reporting misconduct.***
> *(a) The board has the power to:*
> *(1) Deny an application for a license to any applicant who applies for the same through reciprocity or otherwise;*
> *(2) Permanently or temporarily withhold issuance of a license;*
> *(3) Suspend or limit or restrict a previously issued license for such time and in such manner as the board may determine;*
> *(4) Reprimand or take such action in relation to disciplining an applicant or licensee, including, but not limited to, informal settlements, private censures and warnings, as the board in its discretion may deem proper; or*
> *(5) Permanently revoke a license.*
> *(b) The grounds upon which the board shall exercise such power include, but are not limited to:*
> . . . .
> *(3) Making false statements or representations, being guilty of fraud or deceit in obtaining admission to practice, **or being guilty of fraud or deceit in the practice of medicine**;*(Emphasis added.)
> . . . .

Neither this Board nor the courts of this state have previously been called upon to decide whether any of the various forms of "client billing" constitute fraud or deceit in the practice of medicine. This is a matter of first impression for the Board. As such, it needs to be noted initially that since the Tennessee Medical Practice Act[8] is not "specialty" specific, as is the modern world of medical practice, there is nothing inherently fraudulent or deceptive in the **ethical** practice of "client billing." Patients and their third party payors know that a physician is going to charge for examining any specimen the patient provides. If a clinician charges the patients or their third party payors only the amounts the clinician was charged by the laboratory or pathologist (plus the allowed acquisition/processing charges) the patients or their third party payors are merely reimbursing the clinician for an expense he had to incur along with a nominal fee to cover the cost incurred by the clinician in processing the specimens and billing for the services. It is merely a pass-through of incurred costs.

8 Tennessee Code Annotated, §§ 63-6-101 et seq.

The issues surrounding "client billing" as it is used for purposes of this ruling can only occur "in the practice of medicine." The Board turns now to the question of what constitutes fraud or deceit. "Generally, in an action for fraud, there must be proof of false representation of existing or past material facts"[9] and "mere expressions of opinion do not give rise to an action for fraud."[10] When called upon to define the term "deceit," the courts have almost uniformly, even when, as in this statute, the terms are included as "fraud or deceit," defined "deceit" as being synonymous[11] with "fraud" or defined "deceit" as being included within the definition of "fraud."[12] For purposes of this ruling the Board will define them likewise.

When a clinician in a "client billing" situation charges an amount in excess of identified incurred costs, elements of fraud or deceit may be involved. To determine this it is necessary to scrutinize the reimbursement process. The reimbursement rate for a pathologist's reading of a specimen has at least two components, just as does a clinician's reimbursement rate for the services he actually provides; they are the "professional" and "administrative" components. The former is reimbursement for the professional skill and judgment necessary to render the service, the latter represents reimbursement for the overhead costs (rent/mortgage, employee salaries, utilities, supplies, etc.) to operate the medical practice during the time that the service is being rendered.

In the client billing situation, the pathologist who discounts fees for services to the clinician is, by economic necessity, discounting both components only to such an extent that the pathologist will not take a loss on providing the service. If the pathologist is taking a loss it is either out of charity, bad business practice, or as an incentive for referral of more profitable business. To the extent that a clinician in this "client billing" situation bills a patient or the patient's third party payor at the full reimbursement rate authorized by the third party payor for a pathology service, when the clinician was charged much less than that to actually obtain the service, the clinician is in essence, if not in fact,[13] billing for a "professional component" of the pathologist's services that no one provided. Also, there is no administrative (overhead for the time it takes to provide the pathology service) cost incurred by the clinician for the pathology service itself. In fact, the clinician, by referring out the pathology service, has freed his or her time to provide other reimbursable services (including both reimbursement components) to the same or other patients.

The clinician in this "client billing" scenario therefore would be billing not only for a professional component no one provided but also for an administrative component he or she did not incur[14] and in doing so is making a false representation of material facts unless disclosure of this billing arrangement is made to the patient and third party payor. If misrepresented material facts are relied upon by patients or their third party payors, clinicians are unjustly enrich as a result of that fraud or deceit when they reimburse for that service. Consequently, such actions subject the clinician to disciplinary action pursuant to Tennessee Code Annotated § 63-6-214(b)(3).

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9 *Maddux v. Cargill,* Tenn.App.1989, 777 S.W.2d 687, 691; Ropeke v. Palmer, 6 Tenn.App. 348, 1927 WL 2224 (Tenn.Ct.App., Dec 20, 1927).
10 *Brown v. Brown,* Tenn.App.1993, 863 S.W.2d 432, 434.
11 Ropeke v. Palmer, 6 Tenn.App. 348, 1927 WL 2224 (Tenn.Ct.App., Dec 20, 1927); Georgia Marble Co. v. Standard Tile Co., 19 Tenn.App. 258, 86 S.W.2d 429 (Tenn.Ct.App., Apr 13, 1935); Jasper Aviation, Inc. v. McCollum Aviation, Inc., 497 S.W.2d 240 (Tenn., Jun 05, 1972).
12 State v. Tizard, 897 S.W.2d 732 (Tenn. Crim. App., 1994), State v. Mitchell, 1999 WL 559930 (Tenn. Crim. App., 1999).
13 The common practice in "client billing" entails a pathologist discounting both the professional and technical components of the reimbursement rate that could have been received had the pathologist billed the third party payor directly.
14 The extent to which this might be called double billing for the administrative component is mitigated by several factors, all of which are beyond the control of either the pathologist or the clinician, including, but not limited to, the result of the specimen interpretation and whether it requires further time (profession and administrative) on the clinicians part to formulate a treatment plan based thereon or whether collection efforts are necessary to secure payment for the billed services.

The Board also concludes that any collusive arrangement between clinician and laboratories or pathologists to institutionalize the questionable practices involved in "client billing" identified in Section 1 of this ruling for the financial gain of all parties to those agreements likewise subjects both the clinician and pathologist, including those who are employees of or independent contractors to laboratories engaged in such practices, to that same disciplinary action.

4. Does "client billing" by clinician for anatomical pathology services constitute fees splitting pursuant to T.C.A. 63-6-225?

Tennessee Code Annotated § 63-6-225 provides in pertinent part as follows:

> ***§ 63-6-225 - Unlawful division of fees by physicians.***
> ***(a)It is an offense for any licensed physician or surgeon to divide or to agree to divide any fee or compensation of any sort received or charged in the practice of medicine or surgery with any person, without the knowledge and consent of the person paying the fee or compensation, or against whom the fee may be charged.*** (Emphasis added.)
> . . .

Once again, neither the courts nor the Board have previously been called upon to decide whether any of the various forms of "client billing" constitute a violation of this statute. However, a portion of an opinion [15] of the Office of the Tennessee Attorney General and Reporter is very instructive on what factors should be considered in interpreting and applying this statute. That opinion provides in illustrative part as follows:

> *T.C.A. § 63-6-225 prohibits any division of fees or any agreement "to divide any fee or compensation of any sort received or charged in the practice of medicine or surgery with any person, without the knowledge and consent of the person paying the fee ...". Due to the age of the statute (originally passed in 1917, last amended in 1932), no legislative history is available. Our research reveals, however, that historically, referral fee or fee splitting statutes were intended to prevent three abuses: ordering unnecessary services, increasing charges for needed services, and influencing with profit considerations the decision of where best to refer a patient*[16]*. Factors such as the intimacy of the physician-patient relationship, the fact that medical care is a technical process which frustrates consumer knowledge, and the fact that concern for health often makes price a secondary consideration, encourage deference to physician decisions concerning treatment. The Legislature's use of the language "... without the knowledge and consent of the person paying the fee ..." in T.C.A. § 63-6-225 indicates its concern that patients have full knowledge regarding any financial considerations which may influence the physician's treatment recommendation. This*

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15 OAG 95-030 (4/5/95).

16 From AGO footnote #2 "Hall, Making Sense of Referral Fee Statutes, 13 J. Health Politics, Policy and Law 623, 627 (1988). The author uses the term "referral fee statutes" based on the Medicare and Medicaid statute at 42 U.S.C. § 1320a- 7b(b) (1982) which is sometimes also referred to as the antifraud and abuse or the kickback statute. Id. at 623 note 1. The author notes that the federal statute's prohibition of referral fees in the Medicare and Medicaid programs is substantially similar to state prohibitions of fee splitting in medical practice generally. Id. at 625. Additionally, although some states' statutes limit fee splitting prohibitions to the referral context, "the evil to be proscribed" by such referral statutes "is not just the payment for the referral, but also any relationship where the referral may be induced by considerations other than the best interests of the patient." Beck v. American Health Group International, Inc., Cal.Rptr. 237, 243 (Cal.App.2 Dist.1989). The rationale for such statutes is that "a sick patient deserves to be free of any reasonable suspicion that his doctor's judgment is influenced by a profit motive." Id. at 243. See also E & B Marketing Enterprises, Inc. v. Ryan, 568 N.E.2d 339 (Ill.App.1 Dist.1991). (Agreement by physician to compensate marketing firm based on a percentage of billings for referrals amounted to illegal fee-splitting agreement.)

> *language ensures that the patient's best interests are given primary consideration and thereby protects the public welfare.*[17]

To constitute "fee splitting" as prohibited by this statute physicians must in some way *"divide or agree to divide any fee or compensation of any sort received or charged in the practice of medicine.*" Attorney General Opinion 95-030 contains a definition for the operative term of this statute which the Board adopts for purposes of this ruling. That definition is as follows:

> *According to Webster's Second New International Dictionary, unabridged, "divide" means:*
> *1. To part asunder (a whole); to sever into two or more parts or pieces; to sunder; to separate into parts; as, to divide an orange.*
> *2. To cause to be separate; ...*
> *3. To make partition of among a number; to apportion, as profits of stock among proprietors; to give in shares; to distribute; to share; as, to divide booty or profits ...*[18]

The Board finds that **ethical** "client billing" does not constitute the division of any fee. It is merely a pass-through of the fee charged by the pathologist, who actually provided the service by the clinician who requested and was charged for the service, to the patient or third party payor (in an amount almost identical to the amount the pathologists charged for the service). Therefore **ethical** "client billing" is not a division of fees and does not violate T.C.A. § 63-6-225.

However, when the questionable "client billing" practices set forth on Section 1 of this ruling are applied to this statute a different finding results. Based upon the analysis set forth in Section 3 of this ruling, regarding billing and receiving payment for the "professional component" of a medical service no one provided, a division of fees in violation of T.C.A. § 63-6-225 could be established. When a pathologist agrees to discount his professional service for a specimen provided by a clinician, and he or she knows or should know that the clinician is billing the patient or third party payor at the full reimbursement rate that the pathologist could have billed had he or she billed directly, the pathologist and the clinician are in fact agreeing *"to sever into two or more parts or pieces"*[19] the pathologist's fee. Consequently, if the person paying the fee (patients or their third party payors) have no knowledge of and have not consented to this billing arrangement, a division of fees without knowledge and consent of the payor is established, as is a violation of this statute.

Based upon the above analysis those agreements that exist that tend to institutionalize the questionable practices set forth in Section 1 of this ruling constitute a violation of this statute. Both the clinician and pathologist enter into these agreements for the main purpose[20] of allowing the clinician to bill at the maximum reimbursement rate for pathology services while being charged by the pathologist only a portion of that reimbursement rate. There is no doubt that this constitutes an agreement for the division of the pathologist's fee. When this is accomplished without patients' or third party payors' knowledge and consent, all the elements necessary for a conviction and appropriate disciplinary action before the Board under T.C.A. § 63-6-225 are established.

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17 OAG 95-030 (4/5/95) pp 2 & 3.
18 OAG 95-030 (4/5/95) p 4.
19 OAG 95-030 (4/5/95) p 4.
20 Additionally, some pathologists, or laboratories on their behalf, could discount fees not only for this purpose but also could require that as a prerequisite to receiving such discounted fees the clinician must also refer all their federally reimbursed specimens. This would be an arrangement which begs for the application of the Federal "Allurement" statutes, See 42 U.S.C.A. § 1128B.

Conclusion and Rulings

Historically the Board has not involved itself in issues regarding the business operation of medical practices. The legislature has not given the Board authority to regulate in that area except to the extent that business practices impact on the quality of care provided to the citizens of this State. It is for that reason that, however tempted the Board might be to do so based upon the conduct of both clinicians and pathologists in the area of "client billing," the Board cannot consider prohibiting client billing completely. Even if the Board was authorized and inclined to do so, the foregoing analysis indicates to the Board that **ethical** "client billing" could serve several purposes which should be beneficial to patients. It could help bring down the cost of health care while at the same time encouraging clinicians to consider quality rather than cost in determining to which laboratory or pathologist they should refer their business. It also helps remove any real incentive for clinicians to over-utilize pathology services. Consequently the Board formally rules as follows:

1. "Client billing" in and of itself does not violate the law and subject a physician to possible disciplinary action.

2. "Client billing" " that does not pass the benefit of whatever savings the clinician might have negotiated in terms of payment for laboratory/pathology services on to the patient, without any additional costs other than a reasonable acquisition or processing charge could result in the clinician violating rule 0880-2-.14(8), O.C.R.R.S.T. thus subjecting the clinician to disciplinary action pursuant to T.C.A. § 63-6-214(b)(1).

3. When a clinician "client bills" at the full reimbursement rate authorized by the third party payor for a pathology service, when in fact the clinician is charged and pays less than that cost to actually obtain the service, the clinician is billing for a "professional component" of the pathologist's services that no one provided and an "administrative" cost that was not incurred and is therefore making false representations of material facts unless disclosure of this billing arrangement is made to the patient and third party payor. If misrepresented material facts are relied upon by patients or their third party payors, clinicians are unjustly enrich as a result of that fraud or deceit when they reimburse for that service thus subjecting the clinician to disciplinary action pursuant to Tennessee Code Annotated § 63-6-214(b)(3).

4. When a pathologist agrees to discount his professional service for a specimen provided by a clinician, when he or she knows or should know that the clinician is billing the patient or third party payor at the full reimbursement rate that the pathologist could have billed had he or she billed directly, the pathologist and the clinician are in fact, if the person paying the fee (patient or their third party payor) has no knowledge of and has not consented to this billing arrangement, both engaging in a division of fees in violation of T.C.A. § 63-6-225.

This opinion was adopted by the Tennessee Board of Medical Examiners on the 17th day of March, 2004.

David L. Cunningham, MD, President
Tennessee Board of Medical Examiners

***The ruling contained herein shall affect only the licensee making the inquiry and shall have no precedential value in any future proceeding before it. Any dispute regarding this letter may be resolved pursuant to the declaratory order provisions of *Tennessee Code Annotated* Section 4-5-223.

cc: Rosemarie Otto
Larry Arnold, M.D.
Robert Kraemer

MA/G4014111/BME