

DEFENDING PHYSICIAN OWNERSHIP

Legislative Talking Points Defending Free-Standing ASCs¹

I. Ambulatory surgery centers save money

- **Medicare reimbursement is less.** By federal law, Medicare reimbursement for services provided in ASCs must be “substantially less” than the Medicare reimbursement for those same services if they were performed on an inpatient basis. (42 U.S.C. Sec. 1395 I(i)(2)(A)(ii)).
- **Hospitals generally paid more for the same outpatient service.** Hospitals generally are paid more than ASCs even when hospitals and ASCs provide the identical outpatient service. According to a March 2004 MedPAC report, the Medicare hospital payment rate exceeded the ASC payment rate for 87% of the surgical procedures that Medicare pays for in an ASC.
- **ASCs save Medicare beneficiaries money.** Medicare beneficiaries generally pay lower co-payments when procedures are performed in ASCs, as opposed to those same services being performed on an inpatient basis.
- **Private insurance cost studies.** As early as 1977, a study conducted by Blue Cross Blue Shield revealed that, on average, procedures performed at ASCs cost 47% less than those same procedures performed on hospital inpatients.
- **The U.S. Government says ASCs lower costs, and, because of these cost savings, the U.S. Government has specifically promoted ASC development.**
 - The Office of the Inspector General (“OIG”) of the U.S. Department of Health and Human Services stated in 1999 that the Medicare program promoted ASCs because they “can significantly reduce costs for federal health care programs, by simultaneously benefiting patients.” (See 64 Fed. Reg. 63517, 63536 (November 19, 1999)).
 - The U.S. Congress has continually made a concerted effort to promote the development of ASCs, because of expected cost savings. For example, in 1980 Congress authorized Medicare to cover ASC services in order to “encourage the performance in an ambulatory setting of certain surgical procedures that are now frequently furnished on an inpatient hospital basis.” (See Medicare program final rule on ambulatory surgical services, 47 Fed. Reg. 34082 (August 5, 1982)).
 - In developing its safe-harbor allowing physicians to self-refer to ASCs, the OIG stated that: “The HCFA [the former name of CMS] has promoted the use of ASCs as cost-effective alternatives to higher cost settings, such as hospital inpatient surgery.”
 - The OIG also stated: “Our regulatory treatment of ASCs recognizes the U.S. Department of Health and Human Services historical policy of promoting greater

¹ The AMA Advocacy Resource Center adapted the content for these talking points, with permission, from the Federated Ambulatory Surgery Association January 2005 Physician Ownership Whitepaper.

utilization of ASCs because of the substantial cost savings to Federal health care programs when procedures are performed in ASCs rather than in more costly hospital inpatient or outpatient facilities.”

II. ASCs are among of the most highly-regulated healthcare providers in the country.

- **Medicare certification.** ASCs that receive Medicare payments must meet extensive Medicare certification criteria. Medicare certifies 85% of ASCs that currently exist. In order to obtain Medicare certification, an ASC must satisfy the following criteria, which represent only a portion of the applicable Medicare requirements:
 - a governing body that assumes full legal responsibility for the ASC's operation and ensures the provision of “quality health care in a safe environment;”
 - a procedure for immediate transfer to a local hospital of patients requiring emergency services that are beyond the capabilities of the ASC;
 - specific requirements for the administration of anesthesia;
 - a credentialed medical staff;
 - with active involvement of the ASC's medical staff, an ongoing, comprehensive self-assessment of the quality of care provided by the ASC, including an evaluation of the medical necessity of procedures performed, and use subsequent findings to revise the ASC's policies and requirements for clinical privileges;
 - each operating room must be designed and equipped so that the types of surgery performed in the ASC can be accomplished in a manner that assures the physical safety of all individuals;
 - a program for identifying and preventing infections, maintaining a sanitary environment, and reporting identified results to appropriate authorities;
 - extensive emergency equipment readily available to the ASC's operating rooms;
 - specific requirements for nursing services;
 - a medical staff accountable to the ASC's governing body;
 - a medical staff credentialing process, where staff privileges are periodically reappraised;
 - specific medical record formation and retention policies and procedures;
 - policies regarding pharmaceutical administration;
 - policies and procedures for obtaining routine and emergency lab services from certified Medicare labs; and
 - policies and procedures for obtaining radiologic services from a Medicare-approved facility to meet the needs of its patients.

- **Medicare certification is just the beginning.** Even if ASCs do satisfy Medicare certification criteria, this is only a fraction of the regulatory requirements that ASCs must satisfy. Medicare certification only enables ASCs to receive Medicare reimbursement for Medicare-covered services.
- **State licensure.** In addition to Medicare certification requirements, almost all states (43) require ASCs to be licensed.
- **Private accreditation.** Both Medicare and most states require that ASCs be surveyed regularly, either by state surveyors or by a national accrediting body, to verify compliance with applicable state and federal regulations: (1) the Accreditation Association for Ambulatory Health Care (AAAHC); (2) the Joint Commission on Accreditation of Healthcare Organizations (JCAHO); (3) the American Association for Accreditation for Ambulatory Surgery Facilities (AAAASF); and (4) the American Osteopathic Association (AOA).

III. Physician ownership of ASCs provides direct public benefits.

- **Increased quality of care.** Because physician-owners have more control over ASC management, as compared to the local hospital, ASCs can provide greater quality of care than that found in the hospital setting.
 - **Physician selection of staff.** ASCs, *particularly physician-owned ASCs*, increase quality of care because they create an environment where physicians are allowed to select essential staff of the highest quality. More specifically, physicians can select the highest-quality anesthesiologists, nurses, and other staff to maximize the quality of the care provided to the ASC's patients.
 - **Direct accountability of staff to the physician-owner.** Physician-owned ASCs also improve quality of services because the ASC's health care staff is directly accountable to the physician owners of the ASC for their performance.
 - **Close coordination of physician and staff.** Physician-owned ASCs are able to improve quality simply because the ASC's physicians and staff work together daily. This is frequently not the case in an inpatient setting, where a wide variety of different staff may be assigned to assist a physician, with little or no physician input into who is assigned, and little or no control over the quality of staff assigned.
 - **Physician selection of medical technology.** Physician-owned ASCs also improve quality because they give physicians greater control over equipment-selection decisions. This control assures that physicians have the most appropriate technology available to serve their patients. Frustration with hospital purchasing bureaucracies and budget politics is one of the major motivators for physicians taking the risk of establishing their own ASCs.
 - **Physician control over scheduling allows physicians to prioritize patient needs.** Because physician-owned ASCs give physicians more control over scheduling, physicians are able to prioritize patient needs, and ensure that

patient health is not compromise by unnecessary delays or other scheduling issues that, at a hospital, are often beyond a physician's control.

- **Few patient complications.** The Federated Ambulatory Surgery Association (“FASA”), the nation’s largest association of ASCs, receives quarterly reports from a large number of U.S. ASCs as part of its Outcomes Monitoring Project. According to recent results from the Monitoring Project, 68% of ASCs participating in the project reported having had 3 or fewer complications per 1,000 patient encounters. (The Outcomes Monitoring Project involves quarterly, voluntary reporting by more than 400 ASCs on a variety of clinical and operational performance factors).
- **PIAA data indicates fewer paid liability claims resulting from ASCs as compared to hospitals.** A 2002 study by the Physician Insurers Association of America (“PIAA”) found that medical liability claims involving care in ASCs are less likely to result in payments than claims arising from care in hospitals and other settings. Specifically, only 22.8% of claims arising from care in ASCs resulted in payments, as compared to 30.9% in other settings.
- The 2002 PIAA study referred to above also found that injuries resulting from care in ASCs were less severe than those in other settings.
- **Greater efficiency and consumer convenience.** ASCs give physicians more control over process and scheduling decisions, which in turn results in greater efficiency, productivity, and consumer convenience.
 - **“Turnover time” is drastically less than it is in hospitals.** The time it takes to prepare an operating room for the next surgery after completion of the previous surgery is known as “turnover time.” The average turnover time in ASCs is *drastically less* than in hospitals. This drastic reduction in turnover time enables physicians to perform more procedures in any given period of time. This greatly increases productivity and efficiency vis-à-vis hospitals, and makes it possible to schedule procedures at much more convenient times when compared to the inpatient environment.
- **ASCs also create greatly enhance patient satisfaction, and this remains true when ASCs are compared with hospitals.**
 - **The U.S. Government recognizes ASCs’ community benefits.** In their July report entitled “Improving Healthcare: A Dose of Competition, the Federal Trade Commission and Department of Justice stated, with respect to ASCs in particular, that ASCs had *“a number of beneficial consequences for consumers,” such as improved technology, a non institutional, friendly environment, “more convenient locations, shorter wait times, and lower co-insurance than a hospital department.”*
 - **Government surveys demonstrate great patient satisfaction with ASCs.** Medicare beneficiaries prefer ASCs to hospitals for outpatient surgical and diagnostic procedures, according to a study by the U.S. Department of Health and Human Services Office of the Inspector General (OIG). The OIG surveyed 837 Medicare beneficiaries who had cataract extraction with intraocular lens

implant, upper gastrointestinal endoscopy, colonoscopy or bunionectomy procedures. The survey showed:

- Beneficiaries prefer outpatient surgery to in-hospital stays;
 - 98 percent of beneficiaries said they were satisfied with ASCs, compared to 94 percent being satisfied with hospitals;
 - Post-operative care was not an issue for most beneficiaries; and
 - Reasons cited for a preference of ASCs over hospital outpatient departments included: (1) less paperwork; (2) lower cost, (3) a more convenient location and parking; (4) no waiting at the ASC; (5) more organized and friendlier staff compared to crowded and uncomfortable hospital settings.
- **Press Ganey Survey.** Recent surveys from Press Ganey Associates, Inc. (2004) show average patient satisfaction levels in ASCs exceeding 90%.
 - **ASCs v. hospitals.** Patient satisfaction survey results indicate that when compared to hospitals, patients tend to find ASCs to be friendlier environments, and prefer the personal attention, convenience, and efficiency offered by the typical ASC.
- **ASCs' community benefits extend far beyond the patients who have surgery in an ASC.**
 - Communities often find it much easier to **recruit surgeons** when an ASC exists in that community.
 - ASCs are also **create jobs** for residences of their communities, jobs which almost always **provide health benefits**.
 - Most ASCs are **tax-paying businesses** and thus contribute to the community's tax base.
 - ASCs also contribute to the community by providing **charity care**, assisting with fundraising for community projects, health education, and research.

IV. Physician ownership of ASCs does not create a conflict of interest.

- **Surgical procedures not likely to be abused.** By their very nature, surgical services are much less likely to be abused than other health care services. A patient might be willing to submit to an unnecessary service, e.g., an extra physical therapy session, but a patient is very unlikely to submit to an unnecessary surgery.
- **Physicians do not receive payment for tests and ancillary services associated with the ASC surgical procedure.** Medicare pays ASCs a composite rate, i.e., a **fixed-fee payment**, that covers all of the ASC's services, *including all related diagnostic and therapeutic items or services that are provided in connection with the surgery itself*. Consequently, a physician owner of an ASC has no financial incentive to order extra lab or other diagnostic tests from his/her ASC.

- **Physician owners perform the services themselves, personally.** Physicians use ASCs as a *natural extension of their office practices*. Physicians utilize ASCs so that they can perform surgeries personally-- surgeries their patients need but which physicians cannot perform in their own offices. There is little, if any, risk of abusive practices, since any revenue from surgeries is strictly constrained by the physician's own time and availability.
- **Congress has recognized that physician self-referral to ASCs does not give rise to conflict of interest concerns or take advantage of Medicare or Medicaid.**
 - The Stark statute regulations contain an exception for any "designated health services" that are reimbursed by Medicare as part of the ASC composite rate. According to CMS, these ASC-related services were carved out of Stark's self-referral prohibitions because CMS "***found no risk of abuse when payments for these services are included in the ambulatory surgical center payment rate.***"
 - **The Stark statute does not prohibit the self-referral of surgical services.** The surgery services provided by physicians in ASCs are NOT subject to the Stark self-referral statute. This is because Congress understood that because the surgeries were being performed by the referring physicians themselves, there was no danger of over-utilization.
 - **Creation of an anti-kickback "safe-harbor.** The OIG -- ***which is charged with prosecuting fraud, e.g., overutilization***--recognized the benefits of physician-owned ASCs by creating a regulatory "*safe harbor*" that protects physician investments in ASCs from anti-kickback prosecutions when certain standards are satisfied.
 - **Other important statements by the OIG:**
 - "Where the ASC is functionally an extension of a physician's office, so that the physician personally performs services at the ASC on his or her own patients as a substantial part of his or her medical practice, we believe that the ASC serves a ***bona fide business purpose*** and that the risk of improper payments for referrals is relatively low."
 - **States recognize that physician self-referral to ASCs does not raise concerns about over-utilization.** Although approximately half of the 50 states have adopted their own self-referral laws, none of them prohibit physician self-referral where the physicians themselves practice.

V. ASCs do not have an unfair competitive advantage over hospitals.

- **Hospitals have greater bargaining power.** Because of their size and prominence in many communities, hospitals have far greater bargaining power than ASCs when it comes to negotiating with insurers.

- **Bargaining power helps hospitals operate more inexpensively than ASCs.** This greater bargaining power often allows these hospitals to purchase drugs, medical supplies, devices, and supplies at lower cost than those available to ASCs in the community.
- **Hospitals can lock ASCs out of payor contracts.** This greater bargaining power often gives hospitals the ability to prevent ASCs from obtaining contracts with certain payors.
- **The federal government has noted that competition has many positive effects on hospitals.** In commenting on the effect that competition has had on the ability of hospitals to provide certain services, the FTC/DOJ in their July 2004 report (“Report”) entitled “Improving Health Care: A Dose of Competition,” stated that “vigorous competition promotes the delivery of high quality, cost-effective health care” by lowering prices and promoting quality and innovation that results in numerous benefits, including “treatment offered in a manner and location consumers desire.” The Report also stated that “[C]ompetition has a number of effects on hospitals, including the potential to improve quality and lower costs.”
- **The federal government recently stated that if, in fact, competition with ASCs was hurting some hospitals’ ability to provide certain services, the solution was not to restrict or otherwise penalize ASCs.**
 - In their recent Report, the FTC/DOJ stated that “Competition will undermine the ability of hospitals to engage in cross-subsidization...To address this issue, Congress and state legislature should consider whether direct subsidies for desired conduct are advisable.”
 - According to the Report, if competition from ASCs is, in fact hurting the ability of hospitals to provide certain types of services, ***the solution to the problem is rewarding hospitals for providing these services, rather than placing unwise restrictions on the competition that has proven so beneficial in lowering costs and improving patient quality.***
- **Hospitals get paid more than ASCs for identical outpatient services.** According to a March 2004 report from MedPAC, when comparing Medicare reimbursement for the outpatient services that are provided in ASCs, with the Medicare reimbursement for the same outpatient services when provided by a hospital, 87% of the time Medicare payment rate to the hospital exceeded that ASC payment rate.
- **Hospitals get paid for more outpatient services.** ASCs are also restricted with respect to the services for which they can be reimbursed, when compared to the outpatient services for which hospitals receive reimbursement. Reimbursement is limited to those procedures. Medicare’s list of approved reimbursements is also used by many commercial insurers. ***No such similar restrictions are, however, placed on hospital outpatient surgery departments.***