

Health Law FAQ

Presenters:

**Marguerite Ahmann, David Glaser, Katherine Ilten,
Catherine London and Pari McGarraugh**

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Fredrikson
& BYRON, P.A.

The State of E&M

- What is the deal with the proposed E&M changes in the physician fee schedule?

Declining Medicare Patients

- Can a Medicare enrolled physician decline to provide a particular service to a Medicare recipient because the reimbursement is too low? What about because they just don't want to do it?

Declining Medicaid Patients

- Can a **Medicaid** enrolled physician decline to provide a particular service to a **Medicaid** recipient because the reimbursement is too low? What about because they just don't want to do it?

No Shows

- Can one department or specialty with a problem with frequent “no shows” impose no show fees?

Financial Assistance Criteria

- Can different departments or specialty areas have different thresholds for financial assistance?

State of the Stark Law

- CMS has asked about possible changes to the Stark law. What are changes you feel would be beneficial?

Medicare Advantage Refunds

- Are providers required to refund and correct claims for Medicare Advantage and Medicaid HMO patients just as for Medicare and Medicaid plans?

Medicare Advantage Refunds

- How are Medicare Advantage refunds and corrected claims handled when the time frame goes back several years that involve a risk-sharing arrangement with the Medicare HMO?

Commercial Payor Refunds

- Do the same rules regarding refunds and corrected claims for Medicare and Medicaid apply to commercial payors?

Bundled or Unbundled

- We have received denials from third-party auditors when a hospital patient receives services like a PICC insertion, A Line or respiratory treatments such as a nebulizer or IPP. The insurer asserts they are part of the room and board rate. We appeal stating they are not routine since every patient does not receive them. What steps would you suggest?

New Stark Exception?

- An acquaintance of mine insists an exception has been created under Stark. He says a referring doctor can now own up to 5% of an IDT and refer his government patients. True or false?

Unsigned Charts

- We have discovered a bunch of unsigned charts. What should we do?

Can I Use Standing Orders?

- Yes! 42 CFR § 410.32 says “all diagnostic x-ray tests, diagnostic laboratory tests, and other diagnostic tests must be ordered by the physician who is treating the beneficiary, that is the physician who furnishes a consultation or treats the beneficiary for a specific medical problem and who uses the results in the management of the beneficiary’s specific medical problem.”
- Need not be written.

What Does Michael Cohen Teach Us About Attorney-Client Privilege?

- Do you need to hand someone ten bucks to have a privilege?
- Do you need to have a formal engagement?
- Is every conversation with a lawyer privileged?
- Does the presence of a lawyer make the conversation privileged?

How Do I Use Modifier-25?

- A consultant says that you must refund claims because the procedure is not “Separate and identifiable and unrelated.”

We Billed Under the Wrong Doctor. Are We Toast?

- No! See Medicare Claims Processing Manual Chapter 1, Section 30.2.2.1.
- “And otherwise correct Medicare payment made to an ineligible recipient under a reassignment or other authorization by the physician or other supplier does not constitute a program overpayment.”

Kickbacks Post eClinical Works

- Government criticized referral program.
- Up to \$500 per “referral.”
- “Resulted in between 2.2 and 4.6 percent of new customers.”
- Are these really referrals?

Should I Do Self-Audits During an Outside Audit?

- Nice to be ready to go, but ...
- Consultants routinely disagree.
- What will you do with charts that fail? (60-Day Rule)

All About BPCI Advanced

- What is the BCPI program?

Can I Accept Outside Referrals On My Scanner?

- Generally, yes but:
- Any financial relationships must meet Stark exception.
- Beware of state law, especially in Florida.
- The IDTF myth.

Do I Have to Give Patients a Notice for Imaging?

- Give written notice to all MR/CT/PET pts. (Email is ok.)
- At time of referral (i.e. NOT registration).
- Must indicate patient can go elsewhere.
- Address/phone for at least 5 “suppliers” within 25 miles. (if fewer than five, list them. If none, no notice necessary.)
- Can say more; may wish to warn about insurance coverage.

Can I Have a Hospital with One Bed?

- Are you “primarily engaged” in inpatient services?
- There is new (2017) CMS guidance, and a recent CMS termination with pending lawsuit.
- “Primarily engaged” does not apply to CAHs.

Can I Bill Incident To in the Hospital?

- No, “incident to” is office only.
- Do not confuse office “incident to” to outpatient therapeutic services “incidental to the services of a physician.”

Can the Clinic Stop Seeing Medicaid Patients?

- Depends on state law.
- Be aware of the effect on other state programs.

Do We Have to Let Someone Take Pictures of Our Prosthetics?

- DME revalidation surveys expect to see your hours posted.
- They will also want to take pictures.
- Screwing this up can cause you to lose your supplier number.

Do We Have to Bill Site of Service Consistently with All Payors?

- No.
- Some payors don't recognize provider-based billing.
- Medicare guidance specifically recognizes this.

Do I Have to Use the OIG Disclosure Protocol to Refund Overpayments?

- This is a voluntary disclosure protocol.
- The OIG is the last place to raise a refund, except in certain special and rare circumstances.
- Report and return law says to go to the most appropriate entity (e.g., MAC, Medicaid agency, etc.)

Can Patients Use Cellphones to Record Medical Visits?

- Depends on state law.
- Governed by federal and state wiretap statutes.
 - In MN, it is legal to record a conversation if the person who makes the recording is a participant in the discussion.
 - Some states require the consent of every party to the discussion.
- HIPAA and malpractice considerations.

Can We Offer Free Transportation?

- Federal antikickback and CMP, state law analogs.
- Should be from site-to-site.
- Several OIG advisory opinions.
- January 2017: new safe harbor to antikickback and exception to the beneficiary inducement prohibition.
- Protects free or reduced transportation by an “eligible entity” if ...

Free Transportation

1. There is a policy that is applied uniformly and consistently and does not take into account the volume or value of referrals;
2. No air, luxury, or ambulance-level transportation;
3. No marketing of the program or advertising during the ride, driver not paid on per-beneficiary basis;

Free Transportation

4. Available only to “established” patients;
5. Available only within 25 miles of the provider/supplier (50 miles, if rural);
6. Available only for the purpose of obtaining medically necessary items and services (transportation back to a patient’s home is protected); and
7. Provider/supplier bears the cost of the free transportation.

Free Transportation

- Local shuttle services on a set schedule and route are okay if they:
 - Comply with all other safe harbor requirements EXCEPT no policy is required and services need NOT be limited to established patients for medically necessary items and services (e.g., employees and/or family may use).
- “Local” = < 25 mi between stops (< 50 mi in rural areas).

Can We Release Medical Records We Received from a Third Party?

- Yes!!! Under HIPAA, “PHI” is any health information, created, received, or maintained by a covered entity.
- HIPAA lets a covered entity disclose PHI in a designated record set.
- Alcohol and drug abuse records protected by federal law should NOT be redisclosed.
- Remember state law considerations.

Do I Need to Do a Security Risk Analysis?

- YES!!!
- An accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of ePHI held by the Covered Entity.
- Risk Analysis vs. Gap Analysis.
- Ransomware, encryption, software patches.
- Recent CMP: The University of Texas MD Anderson Cancer Center (\$4.3M).

Do You Have to Report a Ransomware Attack?

- Is the PHI unsecured?
 - OCR says a ransomware attack of an encrypted computer that is not powered down could be a breach of unsecured PHI.
- Is there a low probability the information has been compromised?
 - Now, two additional factors to consider:
 - 1) High risk of unavailability of data?
 - 2) High risk to the integrity of the data?
 - “In those cases, entities must provide notification to individuals without unreasonable delay, particularly given that any delay may impact healthcare service and patient safety.”

Can We Send Emails to Patients?

- Yes – there is no law preventing it.
- Must take precautions.
- Unencrypted email?
 - If a patient asks for a copy of his/her PHI, can send in an unencrypted email IF the patient consents to it after hearing about the risk. Document the conversation.
 - Advice: encrypt email to patients; check the address three times before sending.

Is \$6.50 the maximum charge for copies of PHI?

- Three methods:
 - Actual costs
 - Average cost
 - Schedule of costs for labor based on average labor cost
 - Can charge per page only where PHI is in paper form and person asks for a paper copy
 - Flat fee of \$6.50 maximum
- Notify individuals in advance of the approximate fee for copies.

Can I Have Different Prices for Different Patients?

- One might argue every attendee has multiple charges for identical services.
- Beware of catchy phrases like “you can’t discriminate.”
- Inconsistent pricing for services isn’t “illegal”, but it may have collateral consequences.

Can I Have Different Prices for Different Patients?

- Note that Robinson-Patman prohibits price discrimination for goods.
- If you provide a discount to a cash paying walk-in, why is an auto insurer not entitled to the same rate?
- Many seemingly logical justifications run afoul of the law or your contracts.

Can We Give Special Deals to Patients with High Deductibles?

- How is a high deductible plan different from auto?
- Pricing is largely about intellectual consistency.

I Have to Give Medicare My Lowest Price, Right?

- Wrong. Medicare pays the lower of:
 - Actual charge.
 - Fee schedule amount.
 - Usual and customary charge.
- Usual and customary charge is defined as your median (50th percentile) charge.

I Have to Give Medicaid My Lowest Price, Right?

- Maybe. Depends on state law.
- In some states the “usual and customary” charge is defined as the charge that you charge most often.
- Some states follow Medicare.
- Some states require Medicaid to be the lowest.

Are Coders Personally Liable?

- Almost never.
- Indemnification governed by state law, corporate documents.
 - Good faith.
 - Conduct legal.
 - Believe actions in company's best interest.

Can I Adjust My Fees to Out-of-Network Patients to Mirror the Network?

- Extremely controversial issue.
- Insurers want the network to mean something.
- There may be no contract between you and the insurer, but there is a contract between the patient and the insurer.

Can I Adjust My Fees to Out-of-Network Patients to Mirror the Network?

- How the insurer reimburses out-of-network services may affect the analysis.
 - Fee schedule.
 - Percentage of charges.
 - Percentage of fee schedule.

Can I Adjust My Fees to Out-of-Network Patients to Mirror the Network?

- New Jersey court ruled against Health Net and for the physicians in an ASC dispute where ASC waived co-insurance. State law forbids dentists from waving co-insurance.

Can We Give Prompt Pay Discounts?

- What rationale supports the discount?
 - Insurance contracts prohibit “a billing fee.”
 - Is it interest?
- I love my dentist.

Can I Share the Legal Advice I Get With Others?

- Risks waiving the privilege.
- May be able to use “common interest” privilege.
- Its validity is far from clear.
- Share at your own risk.

Can Physicians Get Credit for Ordering Ancillaries?

- Stark: Not for Medicare (Medicaid??)
- State law? Not in MN.
- Stark doesn't apply to private pay, but ...
- How do you divide the revenue?
 - Equally.
 - Production.
 - Anything else that isn't who ordered it.

How Often Do We Have to Check the OIG Excluded List?

- There is no law that requires you to check.
- CMS's current position is that you must check the OIG List of Excluded Individuals and Entities monthly.
- "New" Medicare Advantage manual language supports this.
- What about the System for Award Management ("SAM"), formerly GSA list?
- Watch out for attestations/certifications to payors.

Do We Have to Do Fraud, Waste, and Abuse Training for Medicare Advantage?

- The regulations apply to plans, not you, so the law doesn't require it, BUT your contract likely does.
- The regs state that if you are a provider or supplier that is enrolled in Medicare, you are deemed to meet FWA requirement, but NOT the compliance training obligation.

Can We Make a Shareholder/ Employee Reimburse Us for Damages?

- Yes, in some circumstances.
- If employee acts in good faith, believes they are acting in the best interest of the corporation, and reasonably believe they are acting legally they are entitled to indemnification.
- For physicians, consider addressing this through the compensation formula, but also look at your organizational documents.

What Should We Do if We Get a Subpoena for Medical Records?

- Evaluate whether service is proper.
- Is there an authorization enclosed? Is there an authorization on file?
- Determine whether HIPAA's requirements are met.
- Determine whether state law is more restrictive.

If We are not a Contracted Provider for an Out-of-State Medicaid Plan, Can We Bill the Patient?

- Depends on state law.
 - Restrictions on balance billing.
 - Consider impact of fee schedules.

Can Health Care Professionals Sell Goods to Patients Directly?

- Depends on state law.
 - Any outright prohibition?
 - More general ethical principles?
 - Disclosure requirements?

Questions?

David Glaser

612.492.7143

dglaser@fredlaw.com

Catherine London

612.492.7464

clondon@fredlaw.com

Marguerite Ahmann

612.492.7495

mahmann@fredlaw.com

Katie Ilten

612.492.7428

kilten@fredlaw.com

Pari McGarraugh

612.492.7480

pmcgarraugh@fredlaw.com