

Interacting with Government Agents and Other Officials

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Framework

- Always ask yourself:
 - CAN you
 - MUST you
 - SHOULD you
- Disclose the information.

Who Are You?

- You better, you better you bet get ID.
- Are they “the real me”?
- Won’t get fooled again.
- Don’t say “I can’t explain.”
- Remember “I’m Free.”
- Relax.

Here Comes Trouble

- CMS
- OIG
- FBI
- MFCU
- Postal Inspector
- IG Railroad Retirement Bd.
- DCIS
- Licensing boards
- State DHS/DOH
- FDA
- DEA
- ICE
- NRC
- NTSB
- Plaintiffs
- Reporters

Some Relevant Laws

- HIPAA.
- State Medical Records Statute.
- Vulnerable Adult/Child Abuse/Neglect.
- Validation surveys.
- Duty to Warn.
- Medicare “immediate access.”

Dude Shows Up, Says “I Need This Record Today.”

- Ask for ID.
- The more someone yells, the more suspicious you should be.
- Think Teddy Roosevelt.
- Are they using immediate access?
Some other principle?
- Make them show you the rule.

Medicare's Right to "Immediate Access."

SSA SEC. 1128(b)(12), 42 U.S.C. 1320a-7,

The Secretary **may exclude** the following individuals and entities from participation in any Federal health care program: **Any individual or entity that fails to grant immediate access**, upon reasonable request (as defined by the Secretary in regulations) to any of the following:

(A) To the Secretary, or to the agency used by the Secretary, for the purpose specified in the first sentence of section 1864(a) (relating to compliance with conditions of participation or payment).

(B) To the Secretary or the State agency, to perform the reviews and surveys required under State plans under paragraphs (26), (31), and (33) of section 1902(a) and under section 1903(g).

(C) To the Inspector General of the Department of Health and Human Services, for the purpose of reviewing records, documents, and other data necessary to the performance of the statutory functions of the Inspector General.

(D) To a State Medicaid fraud control unit (as defined in section 1903(q)), for the purpose of conducting activities described in that section.

Definitions Matter.

42 CFR 1001.1301 *Failure to grant immediate access* means -

- (i) The failure to produce or make available for inspection and copying the requested material upon reasonable request, or to provide a compelling reason why they cannot be produced, **within 24 hours of such request**, except when the OIG or State Medicaid Fraud Control Unit (MFCU) reasonably believes that the requested material is about to be altered or destroyed, or
- (ii) When the OIG or MFCU has reason to believe that the requested material is about to be altered or destroyed, the failure to provide access to the requested material at the time the request is made.

First Contact

- Personalized correspondence.
- Overpayment letters.
- Medicare bulletins.
- Denials.
- “Routine audit”/survey.

Profiles In Courage: Nurse Alex Wubbels

- She stood her ground.
- She stayed calm.
- Good policies in place. She knew where to find them!
- She realized you can't unring the bell.
An important question: What permanent harm is done waiting for an answer?

Quotes from the Washington Post

- “Why don’t we just write a search warrant?” We “don’t have PC.” (Supreme Court allows some warrantless searches but not others. See Birchfield v. North Dakota and Mitchell v. Wisconsin.)
- “I’ve never gone this far.”

Quotes from the Washington Post

- “Your policy right now is contravening what I need.”
- “Your policy is interfering with my law.”
- How do these compare?

What Else Could Have Been Done?

- Video the encounter. (That is often resisted by officers, BUT IT IS ABSOLUTELY 100% LEGAL.)
Download the ACLU's Mobile Justice App.
- Contact general counsel.
- As it escalates, bystanders can intervene/contact others.

Basic Principles

- Friendly is always good.
- Firm needn't be jerky.
- Absent a search warrant nothing must happen within a few hours. A search warrant can get documents, but it is less clear it can compel action.
- Question everything.

Patient Says “I Take Illegal Drugs”

- Why are they telling you?
- General duty to keep information confidential, especially if it was disclosed as part of treatment.
- Abuse/Neglect reporting.

Patient Presents with an OD

- You find drugs in the patient's pocket.
- What do you do with them?

**“My husband is poisoning me
with cow hormones.”**

- Is the person vulnerable?

Patient Steals a Wallet

- This one is easy.
- You can call. No need to cover for crimes that aren't related to health care.

Lessons from the OK Penile Bite Case

- Cops call hospital looking for a patient with certain injuries.
- Hospital says “we just treated someone with that, in fact.”
- Patient sues the hospital.

Know Your Injuries

- Many states have laws requiring reporting of certain injuries or diseases. (Gunshot/stab wounds, burns, etc.)
- The reporting may be aggregate, or it may be patient specific.

Patient Uses a Fake Insurance Card

- Is there a general duty to call the police when you know of illegal conduct?

Patient Uses a Fake Insurance Card

- Is there a general duty to call the police when you know of illegal conduct?
- What makes this situation more complicated?
- Is there “another way?”

Patient Forges an Opioid Prescription

- Slightly different from the insurance card.
- Strong argument that you can report.
- Not clear at all that you must.

Dudette Shows Up, Wants to Take Pictures Of Your Braces

- DME Validation Surveys are a thing.
- They should have ID from the National Supplier Clearing house.
- If you send them away, it could be bad.

ICE Asks “When is X’s next appt?”

- Could you tell the police generally?
- What makes ICE different?
- ICE considers health care facilities sensitive locations. That is just a policy. “Enforcement actions may occur at sensitive locations in limited circumstances, but will generally be avoided.”

ICE Asks “When is X’s next appt?”

- HIPAA protects presence at the facility.
- Can you tell the patient ICE is asking about them? Can you tell them about the back door? (Know about the Mass. Judge who was indicted.)

State Surveyor Says “Show Me Your Peer Review”

- CMS requires you to HAVE peer review.
- This is a process requirement, not an outcome obligation.
- Know your state law. It may not be a privilege, it may be stronger!

Can You Fight It?

- The government often puts you in a pickle: See Illinois Council.
- Is the new 340B case a crack in Illinois Council?

Accreditation Surveys

- Generally you will need to cooperate, but the details may vary. (See prior slide.)
- When in doubt politely ask for more time.

Licensing Boards

- There is often a duty for licensees to cooperate.
- That doesn't mean they must talk the moment they are contacted.
- Don't forget the duty to report. Is your act of "kindness" a logical inconsistency?

Memorializing Interactions

- I am not a fan of recording interactions. Know your state law.
- Contemporaneous notes are wise.
- At times a certified letter is useful, particularly to confirm advice.
- Communications with agents should come through counsel.

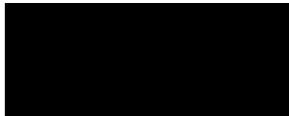
Government Counsel

- Communications should **DEFINITELY** come through counsel.
- Outside counsel has some advantages.
- The roughest, toughest, rootinest, shootinest claim-jumper* outside counsel may not get you the best result.

Source: Yosemite Sam



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Dear Dr.

The Office of Inspector General of the Department of Health and Human Services is currently conducting an audit of payments for clinical laboratory services under the Medicare program. In this regard, we need your assistance to confirm that you (1) requested the services provided and billed to the Medicare program by a laboratory and (2) received and considered the test results in the treatment of your patient. Your response will be vital in assisting our efforts to ensure that Medicare dollars are appropriately spent on deserving beneficiaries.

As part of this audit, we are reviewing Medicare payments to laboratories for additional automated hemogram indices that were billed with hematology profiles (CBCs or other hematology profiles). Examples of additional automated hemogram indices include red cell distribution width (RDW), mean platelet volume (MPV), red blood cell histogram, platelet histogram and white blood cell histogram. These indices are in addition to the "standard" indices which are part of a CBC: the mean corpuscular volume (MPV), the mean corpuscular hemoglobin (MCH), and the mean corpuscular hemoglobin concentration (MCHC).

1. Did you order a complete blood count (sometimes referred to as a “CBC”) or other hematology profiles for this patient on this date?

_____ **Yes** _____ **No**

2. Did you specifically request any of the additional automated hemogram indices referenced above for this patient on this date?

_____ **Yes** _____ **No**

4. If you answered “No” to question 2, please answer questions 4a through 4e below.

4a. Did you receive the additional automated hemogram indices as part of the test result provided from the laboratory?

_____ **Yes** _____ **No**

4b. Were the additional automated hemogram indices routinely provided as part of your request for the hematology profiles?

_____ **Yes** _____ **No** _____ **Not Applicable**

4c. Did the laboratory notify you that these additional automated hemogram indices were automatically included as part of hematology profiles?

Yes No Not Applicable

4d. Were you aware that these additional automated hemogram indices or other indices were billed separately under the Medicare program?

Yes No Not Applicable

4e. If you received the additional automated hemogram indices as part of the laboratory results, were the indices useful to you in the treatment of the Medicare patient?

Yes No Not Applicable

NOTE: If available, please provide an example copy of the laboratory requisition form.

You're Under The Microscope If:

- Medicare requests multiple medical records. (Don't worry about individual prepayment reviews.)
- You receive an overpayment letter.
- The carrier or Office of Inspector General contacts you with specific questions or seeks a meeting.
- Armed agents pop up at employees homes (or maybe office).

Prep Work is Key

- Everyone must be prepared for this possibility.
- It is hard for this to “take.”
- An emergency plan must include how to contact people at odd hours.

The Subpoena

- You get a grand jury subpoena from Atlanta that says “The United States Attorney requests that you do not disclose the existence of this subpoena. Any such disclosure would impede the investigation being conducted and thereby interfere with the enforcement of the law.”

The Letter

- Who sent it?
- Requests for multiple records are much more troubling.
- Make sure you keep a copy of everything you send.
- Be thorough.
- Talk with counsel.

The On-site Visit

- Keep track of what is reviewed.
- Keep the auditor isolated from the rest of the business.
- Be friendly, but firm.
- Try to be sure that no originals are altered.

Telephone Calls

- Get the caller's name.
- Find out what they are talking about.
- Call the person back. This will allow you to verify the caller's identity, and gather your thoughts.

Armed Agents At the Door

- If they have a warrant, let them in.
- Do not talk to them.
- Get I.D. and call a lawyer.

Dealing With Investigations

- Agents want you to talk. They will use your:
 - Fear.
 - Confidence.
- Your biggest weapon:
 - Silence.
- Be especially wary of saying “my lawyer told me it was ok.” You will have waived the attorney-client privilege.

The Agents Are Not Your Friends:

- Don't try to convince the agent "It is all a misunderstanding."

Remember two key points:

- Medicare rules are complicated. You may have violated one without knowing it.
- To many investigators - there is no such thing as an "innocent mistake."

Know Your Rights

Agent:

- Can't require anyone to attend interview.
- Can't obtain documents without a warrant or subpoena.
- Can't obtain privileged information.
- Can't prevent you from talking about the interaction.

Know Your Obligations:

- Cannot prevent employees from talking.
- If you talk, you must tell the truth.
- Never destroy/hide documents.

QUESTIONS?



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