

# Compliance Plan Tune-Up (Or Compliance Conundrums Considered)

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# What is compliance?

- Doing what is right?
- Doing whatever the government says?
- Doing what's legal?
- Something else I haven't thought of?

# What will get you on TV?

- Relationships between physicians and hospitals, between physician groups, and between health care professionals/facilities and drug/device companies that run afoul of the law.
- Coding problems.
- Confidentiality snafus.

# What will get you on TV?

- Keeping something that isn't yours.
- Lying in an interaction with the government.
- Innocent Stark problems.

# Core Compliance Principle: The System Should Be Fair

- Only seek reimbursement for care provided.
- Refund money for work you didn't do.
- Where there is a very clear RULE prohibiting it, a refund may be necessary. Note that RULES and POLICIES are different. This is where counsel earn their keep.

# Caveats

- Not all payors are created equal.
- For private insurers, unless the contract clearly prohibits something, or it is clearly contrary to all norms, you should not have a duty to refund. You need not follow Medicare rules for other payors.
- You don't have to treat everyone the same!

# Separating Fact From Fiction

- “Conventional wisdom” may be more aptly called “knee-jerk reaction.”
- Many people have incentives to make assumptions, and “calling the government” is NOT legal research.
- IF YOU’VE DONE THE WORK,  
DON’T REFUND PREMATURELY.

# Question Authority

- Is it a requirement or a guideline?
- Medicare: is it in the constitution, statute, regulations, Medicare Claims Processing or other Manuals, or carrier policy.
- Private payors: is it in the contract? Are the Manuals incorporated?
- Get a copy of the rule in writing.



# Question Authority

- Have your lawyer/consultant explain all arguments supporting and refuting the position.
- Determine if the rule was properly promulgated.
- Just because someone sounds smart doesn't mean they're right.

# The Environment

- Investigations will continue. Many will be shakedowns.
- “Everyone is doing it” should not give you comfort - it can be cause for worry.
- Dumb rules are being enforced.
- Nonexistent rules are being enforced.
- Take time to educate patients about billing.

# Compliance Plans: The Gritty Details

- Supposedly, regulations requiring compliance plans are coming.
- Now -- the true test of the compliance plan is what colleagues would say if an FBI agent asks “What has your organization done to comply with the law?”
- You can vent internally.
- If you don't know where else to turn, use the hotline or use gmail to send an anonymous note.

# What is a Compliance Plan?

- More attitude/philosophy than paper.
- More process than policy.
- Teach employees: make sure you know what you don't know, and understand that when in doubt, ask.
- Promise employees: their question will be answered.

# Good Sources of Information

- MAC Bulletins.
- Our webinars.
- Government web sites.
- Trade Associations (sort of).
- Magazines (sort of).
- The OIG workplan (better late than never).

# The Elements of a Compliance Plan

*The plan must have seven elements:*

1. Standards and procedures to reduce the prospect of criminal conduct.
2. Oversight by high level personnel.
3. Avoid giving responsibility to “bad people.”
4. Employee training.
5. Monitor and audit compliance.
6. Consistent enforcement through discipline.
7. An appropriate response to all detected violations.

# Policies and Procedures

- It is difficult to write a good policy.
- Some of the laws are counter-intuitive.
- Goal is to reduce the prospect of criminal conduct. Few policies will do that.
- The government loves to characterize “breaches of policy” as “breaches of law.”
- Must vs. should.

# Foiling Felons

- An organization must avoid giving responsibility to those with a “propensity to engage in illegal activities.”
- Make certain no care providers have been excluded from Medicare/caid.
- Recheck at LEAST annually. (Gov. wants monthly.)
- Consider criminal background checks for physicians, coders and other key employees.
- Compliance should be used as a factor in employee evaluations.



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- Compliance should be used as a factor in employee evaluations.
- You will be judged by the company you keep.

# Training Conundrum:

What do you tell people about missing documentation?

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Avoid the Clash!  
Don't Train in Vain!

# Compliance Training Tips

- Don't exaggerate.
- Track training.
- Track all training efforts: this counts!
- No “risks for reimbursement.” Fishy requests from a supervisor merit direct discussion or hotline call. Do you explain contemporaneous documentation?
- Distinguish between fraud and mistakes.

# Is this just for billing?

- Some would say the sentencing guidelines only deal with criminal violations, and you should similarly limit the plan.
- Reputation is broader. I would include sexual harassment, antitrust, etc.

# Monitor and “Audit” Compliance

- Review charts, but describe flaws wisely. Avoid sweeping generalizations and exaggerations such as “these services are fraudulent.”
- Determine whether internal or external reviews will be best received.
- Use outside reviewers to make sure you are on track.
- Be sure to review all types of services offered (hospital charts, remote sites, etc.).

# Monitor and “Audit” Compliance

- Don't worry about statistical validity.
- Use addictive drugs to your advantage.
- Address fears of retaliation.

# Monitor and “Audit” Compliance

- The funnel conundrum: Do you use formal and informal reporting structures?
  - Use free e-mail if you want anonymity; (spam issue)
  - Supervisor, compliance officer, attorney; (more entry points raise risk of falling through cracks)
  - Voicemail.
- Teach people to expect a response, and absent one, to report again.
- Use the semi-annual certification form.
- Exit interviews.



# Nuts & Bolts – Enforcement Through Discipline

- There must be consistent enforcement.
  - Some violations may require termination.
  - Repetition of error should not be tolerated.
- There must be “appropriate” discipline of those who fail to detect an offense.

# Discipline

- Think of peer review.
- Education.
- Progressive penalties:
  - Financial penalties;
  - Other discipline.
- Discharge.
- Try to avoid internal combat.

# Getting Advice

- Disclose all relevant facts.
- Get it in writing.
- Don't incriminate yourself.

# What is wrong with the next slide?

# Audit Results

Under-coded    Correctly-coded    Over-coded

Dr. A	13%	76%	11%
Dr. B	50	30	20
Dr. C	15	50	35
Dr. D	0	19	81
Dr. E	33	33	33

# Role of Documentation: The Law

“No payment shall be made to any provider of services or other person under this part unless there has been furnished such information as may be necessary in order to determine the amounts due such provider or other person under this part for the period with respect to which the amounts are being paid or for any prior period.”

*Social Security Act § 1833(e)*

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# ~~Audit Review Results – What do they mean?~~

	Documentation Exceeds Code Under coded	Documentation Supports Code Correctly coded	Documentation Does Not Support Code Over coded
Dr. A	13%	76%	11%
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# What if??

- One day, a patient who was treated by the very productive president of your group calls and complains she was billed for a complete physical, but she never removed any clothes.
- What do you do?

# What if??

A review of that physician's appointment book reveals that the physician worked from 9-3, took lunch, and saw 67 patients; 6 of the visits were billed as comprehensive physicals. The documentation supports all but 5 of the visits. (There is a comprehensive physical documented for the woman who called.)

# Should we quantify exposure?

- The government may use it against you.
- It is an effective method of convincing skeptics.

# Should we quantify exposure?

If you do it, include a disclaimer like “our chart reviews are not audits designed to determine whether we have been overpaid or underpaid.” First, they are not a statistically valid sample. Moreover, they only review the documentation, without attempting to determine the amount of work you actually performed. Therefore, these figures are far from scientific.

# Should we quantify exposure?

However, since a Medicare review would base the initial overpayment determination solely on the documentation, these figures give you some idea of how your charts would fare in the first phase of a Medicare review.”

# The Weakest Link

- A nurse is really worried about an issue.
- The nurse's manager pooh-poohs it, and says nothing to you, or anyone else.

# A Good Lesson

Sometimes professional and other associations have an agenda, and may inadvertently mischaracterize the legal reality. Beware.

# Do you need to refund all overpayments?

- Yes, but...
- The real question: What is an overpayment?
  - Overcoding;
  - Underdocumentation;
  - Violations of other rules?
  - Violations of COP? (For surgery centers and other “providers.”)
  - Reassignment problems.



# Refund Requirement

- Health Reform **REQUIRES** reporting and returning any Medicare/Medicaid overpayment within 60-days of “identification” of the overpayment.
- What is identification? That is, when does the 60-days start running?

# “Report and Return” Overpayments

GENERAL.—If a person has received an overpayment, the person shall—

- (A) **report and return** the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate, at the correct address; and
- (B) notify the Secretary, State, intermediary, carrier, or contractor to whom the overpayment was returned in writing of the reason for the overpayment.

# Identification

- Not defined.
- House bill required reporting when you “know of an overpayment.”
- “Identification” seems to require quantification. Otherwise, how could you return the payment?

# Overpayment

- “Any funds that a person receives or retains under title [Medicare or Medicaid] to which the person, after applicable reconciliation, is not entitled under such title.”
- Take the government at its word: fraud requires intent. Most refunds go directly to the payor, NOT through any self-disclosure protocol.

# Many Errors Aren't Overpayments: Signatures

- Carriers/consultants often claim that signatures are required.
- There is no rule requiring signatures for clinic services.
- There is GUIDANCE requiring signatures.
- Conditions of participation for hospitals/other facilities may require signatures in the chart; COPs are different from reimbursement rules.

# Beware of:

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



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Dear Dr.

*Letter.*

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.**

# Beware of:

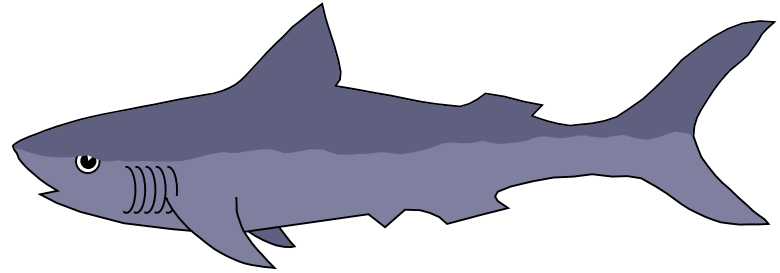
- Contact from the carrier or OIG.
- Sudden delays in reimbursement.
- Complaints from patients.
- Complaints from colleagues.

# 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 your home (or maybe office).

# Here Comes Trouble

- CMS
- OIG
- FBI
- MFCU
- Postal Inspector
- IG Railroad Retirement Board
- DCIS
- Licensing boards
- NRC
- FDA
- DEA
- Patients



# Prep Work is Key

- Know what to do/who to call.
- Try to remember these tips; it is easy to forget, and hard not to panic. (Get our laminated card.)
- An emergency plan must include how to contact people at odd hours.

# 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.

# 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.



# The Subpoena

A grand jury subpoena from Atlanta 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."

# 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.

# The Courageous 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?

# What Else Could Have Been Done?

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

# 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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