



How Current Government Initiatives May Affect Your Practice

by Sarah Q. Wirsky

Healthcare fraud has been a priority since the Health Insurance Portability and Accountability Act established a National Healthcare Fraud and Abuse Control Program to coordinate Federal, State, and Local law enforcement regarding healthcare fraud and abuse in 1996. Since that time, the federal government has recovered over \$18 billion for healthcare fraud and abuse, \$2.5 billion of which was won or negotiated in fiscal year 2010.

The states have also ramped up their enforcement efforts in this area in recent years. In 2010, Texas Medicaid recovered \$418 million and avoided costs of approximately \$333,000 due to healthcare fraud enforcement.

It is no surprise that Medicaid orthodontics have come under attack in Texas based upon the amount of money paid to orthodontists. In 2010, providers in Texas were paid \$184 million for Medicaid orthodontics, and 34 clinics received more than \$1 million during that period.

The conduct being examined in these investigations is no different than what the government examines in all healthcare fraud cases. However, there are some twists based upon how these issues are applied in the orthodontic and dental contexts. In light of that, there are some things that you can do in order to minimize your liability if you find yourself under audit or investigation. (It is impor-

tant to note that if you are currently under audit or investigation, you need to retain an attorney experienced in this area of the law to guide you through this process and any changes you may be implementing).

POTENTIALLY PROBLEMATIC CONDUCT

Services Not Rendered

The government often examines whether or not services that were billed were actually rendered. One of the government's favorite techniques for doing so is examining the amount of time the doctor spends with each patient. In other words, they divide the number of hours the doctor is in the office by the number of patients seen during that day. If the time per patient is unreasonable in the government's opinion, they frequently take the position that the doctor did not see all of the patients and/or did not see the patients long enough to adequately provide the service. The government has an even stronger case in situations where the billing codes are time based. The government also often examines a doctor's travel records to determine which days he or she was in the office.

Services not rendered are perhaps one of the most critical issues that the government will examine. If the government feels that unqualified personnel, such as dental assistants, instead of doctors must be treating patients because of the num-

ber of patients seen and/or the doctor is not spending adequate time with each patient, the government views this as a quality of care issue. When there is a quality of care issue, the government is much more likely to suspend payments or shut a clinic down, as opposed to a situation where there is merely a billing issue.

In the orthodontic and dental context, the doctor needs to ensure that he or she is spending adequate time with each patient. It is helpful to have the doctor sign the charts contemporaneously upon treatment. You also need to ensure that each doctor has a Medicaid provider number for each clinic in which they are working.

Necessity

Necessity is another critical issue in government investigations. In certain areas, such as orthodontics, home health, and hospice care, if the government can successfully challenge the determination of necessity, they can take the position that all charges paid for a patient were improper.

In the orthodontic field, patients who are under age 12 receiving full braces have been an area of focus. It is imperative that with all patients, but particularly these, necessity be adequately documented.

Upcoding

The government often examines whether a provider is consistently coding a more

complex procedure, for which the reimbursement is higher, rather than a less complex version of that same procedure. This is called upcoding. This has been applied in dental cases when the government is examining the types and/or materials of sealants or fillings being used. The government has focused on upcoding in orthodontic cases with appliances.

Unbundling

Unbundling is a situation when there is one procedure that is split up to maximize reimbursement. For example, two procedures can be performed separately and are reimbursed at \$100 each. However, when those two procedures are performed together, there is one billing code which pays \$150. When those procedures are performed together, the third code must be used instead of “unbundling” those procedures and billing the two other codes separately in order to obtain higher reimbursement. Appliances are an area that has been an issue in recent dental and orthodontic investigations.

Kickbacks

Kickbacks can be gifts or benefits to referral sources, beneficiaries, or employees. These are easier cases for the government than cases that turn largely on expert testimony regarding complex medical procedures. It is good practice not to make any substantial gifts to referral sources or any gifts at all to beneficiaries, such as rebates or gift cards.

The government could also take the position that employee compensation based upon revenue is a kickback. While this may not seem as obvious as the conduct discussed in the previous paragraph, this is not a good practice and should be discontinued.

PROACTIVE MEASURES

Because of what is at stake, it is imperative that providers are very careful when working with the government. In addition to severe monetary sanctions, the government has the ability to require a provider to have a corporate monitor, place a monetary hold or suspend payments to a

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provider, exclude a provider from government programs, and even put a provider in jail. The collateral consequences from a government investigation may also implicate licensure issues with the State Board.

One of the most basic things a provider can do to minimize liability is to accurately chart. Often, because a provider is busy, the level of detail in patient records does not support what was billed. This is an issue in all healthcare cases. The clinical staff needs to understand that patient treatment is only half of their job and the other half is accurately and adequately documenting the chart.

Providers and their staff must take the time to learn and follow the often complex Medicaid rules. If an office is big enough, hire an in-house compliance officer. If not, find a competent consultant to advise you. You need to make sure you are following every procedure in order to minimize your liability if you find yourself in the government's sights. ■



Ms. Sarah Wirskye has represented numerous individuals and entities in civil and criminal disputes with federal and state governments and private insurers. She is currently representing several healthcare providers, including dentists and orthodontists, in inquiries by both the state and federal authorities.

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