Legal Issues in Coding

Coding Right and Risks if You Don't

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Learning Points

- Understanding the Difference Between Coding and Reimbursement Rules
- Understanding What Makes a Legally Accurate (or legally false) Claim
- Understanding Fraud Liability as it applies to Coders
- Best Practices for Resolving Concerns

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Introduction

- The challenges of being a coder
  - Keeping up with changes in the coding system
  - Keeping up with what are often carrier specific changes in how services should be coded
  - Keeping physicians on board to ensure that services are documented appropriately
- Of these, keeping up with carrier specific coding rules is the most significant where "legally accurate" coding is the goal.

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The Fundamental Coding Rule

- HIPAA and the resulting amendments to the Social Security Act under the Administrative Simplification Act
- National Transaction / Code Set Rules (45 C.F.R. Parts 160 and 162)

  - Code Set Defined at 45 C.F.R. §162.1002

    - ICD-9CM Vol 1 and 2 (including usage instructions) used for reporting diseases, injuries, impairments, other health problems and their manifestations, and causes of injury disease, impairment or other health problems

    - AMA CPT-4 and HCPCS II – (not including usage instructions) - physician services and other health care services

- Significance to Coders

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What is Coding?

- Coding Defined
  - Coding is the process of translating a service, a supply, or a patient condition into a numeric or alphanumeric code, using only those codes in the mandated code set so that a third party can understand what happened and why.
- Correct Coding
  - For a code to be the correct code, it must be legally accurate, which is to say that it will not mislead the recipient into a false belief about the service performed.
- Legal Accuracy
  - The representation made must be accurate in the eyes of the recipient based upon their rules.
- The importance of "correct" coding.
  - The service or supply
  - The condition it was provided for

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Coding vs. Reimbursement

- Understanding the difference between coding and reimbursement rules.
  - A coding rule establishes how a service must be represented so that it is properly understood.
  - A reimbursement rule establishes whether a service, correctly coded, is compensable or not under the member benefit contract.
- Objectives of Correct Coding
  - Getting Paid?

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Beyond the Code

- Material Representations Beyond the Service Code
  - Patient
  - Date of Service
  - Place of Service
  - Provider of Service
  - Circumstances (modifiers)
  - Condition (diagnosis) that the service is provided for.
  - Genesis of the condition causing the need for a service (auto, comp, other)
  - Medical Necessity

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Fraud As Applied to the Coder

- **The False Claims Act Standard - 31 U.S.C §3729**
  - Legally false claim
  - Presented to the United States
  - Knowledge of falsity
  - Damage to the government (most cases do not require a showing of damage)

- **Common Law Standard**
  - a representation of an existing fact;
  - its materiality;
  - its falsity;
  - knowledge of its falsity;
  - intent that the misrepresentation be relied on by the carrier;
  - carrier's reasonable ignorance of the falsity of the representation;
  - that the carrier did rely on the truth of the representation;
  - that the carrier suffered economic damage as a result.

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Coders Liable?

- Actual language of the statute…

§ 3729. False claims

(a) **Liability for certain acts.—**

(1) **In general.**--Subject to paragraph (2), **any person** who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), **or (G);**

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410 [FN1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

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Legal Falsity

- For a claim to be legally false it must not only contain a misrepresentation, but the misrepresentation must be material to the decision to pay.
- Using Our Prior List of Material Representations Involved in Billing
  - Patient
  - Date of Service
  - Place of Service
  - Provider of Service
  - CPT/HCPCS Code
  - Circumstances (modifiers)
  - Condition (diagnosis) that the service is provided for.
  - Genesis of the condition causing the need for a service (auto, comp, other)
  - Medical Necessity

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Defeating Falsity

- Proving the Representations Are Correct
  - Controlling vs. Persuasive Standards
    - If you are right with Medicare, are you really right with the rest of the (payer) world?
  - Controlling Standards
    - Arise under a contractual relationship that establishes a duty to abide by certain coding/billing rules.
    - Arise under a statute such as may be the case for an auto or workers compensation insurance case (or Medicare…)
    - Conflicts
  - Persuasive Coding Standards
    - May be used only in the absence of a controlling standard to establish that your representations about the service or supply provided were reasonable.

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Defeating Falsity

- What if you are wrong but the code or utilization rules are ambiguous?
  - Code Utilization Rules Exist
  - Code Utilization Rules Do Not Exist

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Defeating Falsity

- Ambiguity - As applied by the courts…
  - *U.S. ex rel Kersulis v. Rehab Care Group,* 2007 WL 294122 (E.D. Ark.)
    - A rule, regulation, or billing code must be capable of ***multiple reasonable interpretations***
    - The billing rule must ***not unambiguously speak for itself***
    - Any interpretation of an ambiguous billing rule must be *reasonable* even if it is incorrect ultimately
    - When a billing rule is legitimately ambiguous, and the provider considers the billing practice at issue to be the "generally accepted practice", that position is legally defensible ***as long as the defendant does not suspect something is wrong and does not deliberately avoid learning more***.

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Defeating Falsity

- Ambiguity - As applied by the courts…
  - *U.S. ex rel Kersulis v. Rehab Care Group,* 2007 WL 294122 (E.D. Ark.)
    - If the ***payor fails to issue formal guidance to clarify an ambiguous billing rule***, the rule remains ambiguous and non-compliance is at worst a mistake and does not establish FCA liability
    - On the other hand, a payer's issuance of ***formal guidance can cure an ambiguity*** and create FCA liability for non-compliance if evidence of sufficient publication (but not necessarily receipt) exist
    - The payor's failure to "negative" any reasonable interpretation that would make the defendant's statement factually correct continues to result in ambiguity
    - Taking reasonable steps to attempt to ensure compliance with an ambiguous rule, such as internal audits, help to establish the ambiguity defense.

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Legally False but not Fraud?

- Knowing Falsity
  - Knowingly – Defined in FCA as follows:

    (1) the terms "knowing" and "knowingly"

    (A) mean that a person, with respect to information

      (i) has actual knowledge of the information;

      (ii) acts in deliberate ignorance of the truth or falsity of the information; or

      (iii) acts in reckless disregard of the truth or falsity of the information;

    (B) require no proof of specific intent to defraud;

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Intent as a Degree of Wrongness

- Knowingly and the Degree of Knowledge:
  - Mistake
  - Negligence
  - Recklessness
- Express/Implied False Certification Theories
  - Implied False Certification – submitting a claim implies compliance with all governing rules that are a precondition to payment. *Mikes v. Straus*
  - Mistakes/negligence are not fraud. Recklessness is required. *Wang v. FMC Corp*
  - Duty to be familiar with payment rules. *U.S. v. Mackby*

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Mistakes Not Fraud

- Mistakes are not fraud
  - Complexity of reimbursement standard often justifies judicial empathy in FCA cases
  - Court will not "hold a defendant to the government's strict interpretation [of a statutory requirement], so long as defendant's interpretation was **reasonable**. *Luckey v. Baxter Healthcare Corp*
- *What about a pattern of mistakes?*

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Structural Causes of Coding Errors

- In some cases, poor structural controls can lead to errors
  - Charge master has incorrect codes
  - Charge master does not permit selection of the correct code
  - Billing systems automatically apply exclusionary modifiers (or codes are pre-loaded with modifiers)
  - Billing systems that automatically assign diagnoses based on the service performed to ensure coverage.
  - Computerized coding of the EMR?

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Coders Charged/Sentenced for False Claims

• Maine - Dawn Grover, an employee working in the billing department at a Bangor-area women's health clinic, pled guilty to submitting false claims to public and private health insurance programs, announced U.S. Attorney for the District of Maine Thomas E. Delahnty II on March 14. After an internal audit, the health clinic discovered a pattern of billing for more extensive examinations than those actually performed, billing for procedures not performed, and altering medical records. The audit also found a 90% error rate that resulted in overpayments to the clinics of more than $300,000. Grover faces a maximum sentence of 10 years' imprisonment, a fine of $250,000, and an order to pay full restitution to the affected health insurance programs.

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Coders Charged/Sentenced for False Claims

• U.S. Attorney for the Southern District of Indiana Joseph H. Hogsett announced March 24 that Andrea R. Williams was sentenced to two years' probation for committing healthcare fraud when she used her position as the billing manager of a patient transportation services company to defraud the Medicaid program out of approximately $102,012. Federal and state investigators found that, for a two-and-a-half year period, Williams submitted claims for payment to Medicaid falsely indicating that the company was providing all of its services to wheelchair bound patients, thereby causing the Medicaid program to pay at a higher rate. In addition, Williams falsely represented that most patients required an additional attendant to help transport them. The sentencing judge also ordered Williams to pay full restitution to the Medicaid program.

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Coder Liability

- The falsity of the claim occurred as direct result of actions by the coder.
  - Solely…
  - In collusion with others…Additional conspiracy liability?
- Financial Incentives
- Any attempt to cover up the error
  - Alteration of records

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Resolving Concerns

- Houston – We Have a Problem
  - Resolution requires identification
    - Build and keep your "book of rules" updated.
    - Periodically evaluate your work.
    - Be forthright in addressing any mistakes you find.
  - Its not all about you…
    - Errors can be caused by someone or something else
      - Physician's or a computer assigning codes
      - Structural sources of error

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Resolving Concerns

- Houston – We Have a Problem
  - This just doesn't seem right…
    - First be certain that your concern is justified
      - Prove it right or wrong using binding guidance. Try to do both.
      - Is your binding guidance really binding?
    - Where you can't find a clear binding rule, listen to alternate justifications objectively.
      - Discuss the matter and try to achieve consensus about how to proceed
        » Seek formal guidance?
        » Seek the assistance of a neutral expert?
        » Take the more conservative approach?
      - Be Willing to Accept an Opposing Opinion if well justified.

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Resolving Concerns

- Houston – We Have a Problem
  - This just doesn't seem right…
    - Other person not approachable?
      - Try anyway
      - Look for someone else to resolve the issue.
        » Corporate compliance officer, compliance counsel
        » Seek formal guidance on your own.
    - Be Sure to Present Solutions – Not Just Problems.
      - Don't assume everything you think is wrong is fraud – no one likes a chicken little. Make the effort to be sure.
    - Document the issue and your efforts at resolution.
      - As with everything, documentation of your efforts to do the right thing can not only be beneficial to you, but to your practice as well.

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Conclusion

- Coders can no longer rely on:
  - This is the why I have always done it.
  - This is what my friend told me to do.
  - Universal approaches to coding.

Coding errors can have serious consequences. The concept of being a "professional" coder implies knowing how to find the appropriate standards to justify the code choices we make. While not an easy task, it is what is demanded of you as a professional coder.

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