Failure to Know Where You Stand in Coding Compared to Your Peers

- We have spoken about this issue for many years.
- Have presented several enforcement cases either triggered by outlier status or where enforcers used outlier status to promote their case of improper billing.
- Recently represented a physician visited by ZPIC agents asking for documentation of patient visits.
  - Found 98% of visits coded as level 5.
- Physician enrollment in Medicare was suspended.
- So . . . How can you find out?
A Special Discount to Referral Sources Does not Qualify as Professional Courtesy

- The OIG has acknowledged that Professional Courtesy, if properly implemented, does not create a compliance risk.
  - Properly implemented, however, means that it applies to all professionals and not merely referral sources.
- A practice presented a written policy that provided for a 50% discount on Lasik services to referring ODs and a 25% discount for their staff members.
  - And yes, the ODs also referred patients with cataracts to the practice.

So . . . What are the elements of Professional Courtesy?

When you Place an Ad in the Newspaper, Be Prepared for the World to See it

We are providing this guidance because of a recent press release from an ophthalmology practice that described use of bladeless, computer-controlled laser surgery for cataract removal. The press release may imply a different Medicare policy regarding non-covered services that may be charged to the beneficiary if the cataract surgery is performed using a bladeless, computer-controlled laser. The press release states:

While traditional cataract surgery is fully covered by most private medical insurance and Medicare, bladeless cataract surgery requires patients to pay out-of-pocket for the portion of the procedure that insurance does not cover.

If You Rent Space from a Referral Source, Be Sure You Have a Written Contract that Meets the Safe Harbor Requirements

- Many practices lease space from ODs, or other ophthalmologists.
  - For years we have advised that you should have a written contract that meets the requirements of the Safe Harbor regulations.
    - Doing so provides complete protection against allegations of violating the Anti-Kickback statute.
- Recently contacted by a practice to assist in responding to a request from a ZPIC for all leases with referral sources.
  - Practice had 5 lease agreements, but only 1 was in writing.
  - Others were “on a handshake”.

So . . . What are the criteria for a safe harbored lease?

If You Co-Manage, Do Not Have a Written Contract

- For many years, we have discussed co-management and advised never to have a contract with a co-manager.
  - The OIG has stated publicly (in an article in American Medical News) and in regulations that an agreement to refer a patient back in exchange for a referral raises serious risk of violating the Anti-Kickback statute.
- We received an inquiry from an ophthalmologist, asking that we to review his co-management agreement to be sure that it complies with the law.

So . . . What constitutes an appropriate co-management program?
Don’t Use Willingness to Co-Manage to Induce Referrals . . . And Don’t Do It Publicly so that Everyone, Including Enforcers, Can See It

If You Co-Manage, Don’t Promise to Return the Patient to the Referring OD; And Don’t Put it in Writing!

What is Co-Management?

- At Practice, our mission is to create unprecedented relationships between the Referring Provider and/or Primary Eye Care Provider to produce outstanding clinical results in the correction of medical eye problems.
- Practice has put a protocol in place in order to communicate more efficiently to our Referring Providers and making sure we co-manage the patient effectively. We must make sure the following steps are always being done:
  1. Referring Provider always receives a Referral Letter. This keeps the Provider informed about the status of their patient.
  2. We don’t keep patients with Practice long term, we want to make sure we return the patient for continued medical care to the Referring Provider, when care is complete (determined by Practice Doctor).
  3. We don’t sell glasses or contacts to the Referring Providers Patient.

Don’t Base the Size of the Holiday Gift on the Number of Patient Referrals

- Each year a practice sends holiday baskets to optometrists who refer to the practice.
- The practice kept detailed records of the number of referrals from each OD.
- The practice sent out 3 sizes of gift baskets, the smallest to those who referred the least, and the largest to those who referred the most.
- But the biggest mistake the practice made:
  - It did not send anything to its lawyers.
- So . . . May you send holiday gifts?
**Why I Love My Job**

- CO: I know the answer to the question I am going to ask, but I need to share my pain.
- AWS: Not a good start. What’s up?
- CO: I am reviewing the Sunshine data we are getting ready to submit. I found several entries under the “Entertainment” category so I had to review the back-up. Seems a couple of doctors decided our reps should pay their way to a strip club while they attended their annual meeting.
- AWS: Perfect, you can be sure the government, the press and realtor’s attorneys will laser in on this type of stuff.

- CO: No kidding. This really #*7% me off. We keep training the reps and training the reps. I sort of understand why we always will have some rep who thinks they are going to get away with it. They will not be in the hot seat. If the government starts snooping around, it’s the company and the doctor who will be investigated for kickbacks. The rep will just be a witness, . . . and perhaps out of a job once I run this up the chain today.
- AWS: At a minimum you have to discipline the rep and you should flag the physician to be on your watch list. If you don’t mind, I am going to use this call as scenario in my compliance talks to underscore kickback risk.

**Failure to Have your Patient Confirm Subjective Complaints in Writing**

- Recall the case of David Chase, the ophthalmologist who was accused of Medicare fraud by falsifying patients’ complaints to justify surgery, but who was acquitted because during the trial the patients admitted that they had signed the statement reflecting their complaints.
  - Since that time we have encouraged physicians to do the same - - have the patients confirm their complaints in writing.
  - In a Medicare fraud case, one example was a patient who complained of glare when driving at night for second eye surgery. But the patient had first eye surgery the day before and could not have been driving.
  - The technician had re-written the complaint from the first eye surgery to justify the second eye surgery.
  - So . . . What should the practice have done?

**Don’t Think that you Can Talk a Federal Agent out of Pursuing an Investigation**

- We were asked to represent a physician whose practice was the subject of a search warrant.
- We learned that during the search, the practice administrator decided to speak to the agents to explain what had happened, figuring that would resolve the problem.
- We were able to avoid any criminal prosecution of the physician in the practice, and he settled for a modest civil payment.
- But the administrator was charged criminally based on the statements made to the agents during the raid.
- So . . . What should a practice instruct its employees to do if questioned by federal agents?
Be Careful If you Hold a CE Course for ODs

- Many practices hold CE courses for ODs in the area.
- While there is a public policy argument that offering CE courses should be encouraged, providing a CE course for which ODs receive CE credit and for which they would otherwise have to pay to attend, can be viewed as the provision of something of value to a referral source and, therefore, a violation of the Anti-Kickback statute.
- So . . . If you hold a CE course for ODs, what can you do to mitigate the risk of a compliance issue?

Be Careful If you Hold a CE Course for ODs; and Don’t Have Industry Subsidize it

- Whatever you do, do not accept financial support from industry to offset the expenses of the course.
- Not only will you face a potential kickback concern with respect to the provision of something of value to OD referral sources, but you will face a more serious allegation (and more difficult case to defend) that you accepted something of value from a manufacturer from whom you purchase items billed to Medicare.
- So . . . If industry is prepared to support your CE course, is there a way to accept that support?

And Don’t Have Industry Subsidize your Practice Meeting

- One manufacture recently approached us for advice in connection with a request from a practice to provide a grant for an educational meeting.
- We asked if the meeting were being sponsored by a professional society, whether there was a registration fee, what the grant would cover, etc.
- We learned that the meeting was a retreat for the physicians and senior management of the practice.
- We also learned that the company had been one of several sponsors for the retreat last year, and not only did the practice receive enough funding to cover the cost of the retreat, it made a profit as well.
- So . . . . . . . . . . . . Forget it.