

Part B Insider (Multispecialty) Coding Alert

Compliance: Get the 'Rest of the Story' About 5 Common Compliance Beliefs

True or false? Being unaware of accidental overpayments can't invoke false claims liability.

Compliance myths and misperceptions can cause you to take the wrong action or miss the risk-management boat. And some beliefs include a mixture of truth and fiction, which really gets murky. Below, experts set the record straight about a number of prevailing notions.

1. The "attorney or coder or consultant told me it was OK" provides a solid defense. "The reality is that as a provider, it's your practice and you send the bill and are responsible for it," cautions attorney **Michael Cassidy**, in private practice in Pittsburgh, Pa. But a provider that can show it attempted to comply could defeat an allegation of criminal intent in a government prosecution, he adds.

Obtain this in good faith: The government is going to have a very hard time proving criminal intent if you have a written opinion from an attorney saying that what you're doing isn't a legal violation, says attorney **Robert Markette Jr.**, with Gilliland & Markette LLP in Indianapolis. "This is called good faith reliance upon the advice of counsel." And a good faith effort in that regard means you consult an attorney who specializes in the particular area for advice before implementing a practice, Markette adds.

Caveats: "Good faith reliance on the advice of an attorney only works in gray areas," Markette cautions. For example, it wouldn't work "if something is obviously illegal like accepting or paying \$50 per Medicare referral."

What about opinions provided by accountants and consultants who aren't attorneys? "Because you are relying on the attorney's expertise in applying the law to facts and reaching a conclusion, relying upon a legal opinion from an accountant and/or a consultant is not the same," says Markette.

2. A healthcare provider can't face false claims liability for failing to detect accidental overpayments. The truth is that "keeping overpayments is a false claim if you knew or should have known the circumstances creating the problem," warns Cassidy. The legal catch phrase there, of course, is "should have known."

"The way the FCA [False Claims Act] operates, the level of 'knowledge' you must have regarding an overpayment means that you were something more than merely negligent in retaining the funds," explains attorney **Robert Salcido**, with Akin, Gump, Strauss & Hauer LLP in Washington, D.C. But "drawing the precise line between being merely negligent in retaining funds (which does not result in FCA liability) -- and being reckless or deliberately ignorant (which does create FCA liability) -- is a difficult one" to do.

Example: Suppose a provider submits a batch of claims and receives substantial payment for them, Salcido postulates. But the provider doesn't have audit or compliance procedures to detect overpayments. In that case, the government will likely claim the provider is being reckless if it failed to return an overpayment -- even if the provider was "totally unaware" of receiving it, he warns.

On the other hand, say a hospital with compliance procedures in place receives several hundred thousand dollars each month in federal healthcare payments, Salcido continues. And despite the hospital's best efforts, it fails to detect an overpayment that came to less than 1 percent of the revenue, he says. "Under these circumstances, the hospital would have a very good FCA defense that even if it were negligent in failing to identify the overpayment, it was not reckless or deliberately ignorant -- so no FCA liability should be imposed."

3. Low-volume providers have only a remote chance of ending up on the government's radar screen. Not true, now that

the RACs and MACs, etc., use computers to detect potentially problematic billing, says **Beth Carpenter**, a consultant in Lake Barrington, Ill. "These computer searches ... don't care if you have 50 patients or 8,000 patients -- the program looks at the codes and billing patterns," she adds. The government also has so many statistics that it can see a "blip" when a provider doesn't conform to the "norm in the marketplace," she adds.

Easy pickings: "It doesn't cost the government a lot of money to run data analysis to identify providers with certain errors," observes attorney **Paula Sanders** with Post & Schell in Harrisburg, Pa.

4. The RACs aren't likely to directly target hospice providers. Markette notes that "RAC websites clearly show they are focused on hospitals." And "you do talk to home health agencies who see the RACs as a non-issue, because they have been hearing about them for so long, but nothing has happened." Markette predicts those providers will come to regret that perception, however.

Why so? For one, Markette thinks that "at some point the Centers for Medicare & Medicaid Services will pull the RACs aside and tell them they can't just focus on hospitals." And "even if the RACs never really look at home health and hospice directly, the RACs' activities free up a bunch of auditors ... to audit home health and hospice providers." Markette points out that "the Government Accountability Office has even suggested this as a response to the RACs focusing on 'big ticket' providers."

The Medicaid RACs are also "rolling out next year," he adds, noting that providers can't bet those auditors will target hospitals only. Markette predicts, in fact, that the Medicaid RACs could go after nursing homes.

5. You don't have to comply with a law before the government issues regs. "People don't realize that they are expected to comply with a statute when it goes into effect, even if the government hasn't issued regulations yet," says attorney **Marie Berliner** in private practice in Austin, Texas. "Providers should make a good faith effort to comply with the spirit of the law at least." For example, the HIPAA regulations had many specific requirements to ensure protected health information (PHI) didn't get in the wrong hands, Berliner points out. "But even before that [covered entities] should have made some effort to protect PHI by locking offices and filing cabinets, as examples."