INFORMAL DISPUTE RESOLUTION IN THE ERA OF CMS' ENHANCED CIVIL MONEY PENALTIES ENFORCEMENT REGIME:

HOW TO UN-RING THE SURVEY CITATION BELL

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If the IRS were to audit every taxpayer every year and often more frequently when another issue might arise, this would almost give the general public a sense of the regulatory world in which Medicare participating health care providers live. A yearly survey is a guarantee, and complaint-initiated surveys throughout the year are very much the norm. Civil Money Penalties (CMPs) have been imposed on providers found to be out of compliance for over 20 years. Until recently, providers were able to challenge the penalty imposed through an appeal process before having to actually write a check or – at a minimum – engage in informal dispute resolution (IDR) with the state survey contractor to challenge errant citations.

The problem – real or perceived – was that many providers would appeal every CMP as a matter of course. The result was a perceived effort to delay enforcement or frustrate the process by burying it in paper for months to years. Section 6111 of the Affordable Care Act of 2010 was aimed at addressing this issue by revising and expanding the role of CMPs. When CMS' final rule took effect in early 2012, the range of CMPs or immediate jeopardy citations (Scope and Severity Levels J, K, and L) doubled to $3,050-$10,000 *per day* and $50-$3,000 *per day* for S/S of D-I. Additionally, CMS demands payment 90 days after giving notice of the CMP regardless of whether an appeal is pending or the citation is contested with funds held in escrow pending final adjudication. In the more serious cases, a CMP of $1,000,000 is not difficult to imagine. For instance, suppose that on January 1 a physician orders a certain insulin dose for a diabetic resident and to notify her of blood glucose readings

consistently in excess of 200, but the staff either fail to document the dose given or the reason for refusal and fail to notify the physician of high blood glucose readings until the facility's annual survey occurs on April 1. On a bad day, this could rate a K-level citation with a CMP of up to $1,200,000 – roughly a quarter's worth of operating expenses for the average 100-bed skilled nursing facility (SNF). Is the foregoing legally and medically wrong? Maybe. But when the CMS-2567 is issued, what's an SNF to do?

ADVICE FOR THE SURVEY PROCESS – AN OUNCE OF PREVENTION

First, a reality check. Surveys would be much easier to defend if every care provider had a tiny stenographer on one shoulder and a tiny regulatory counsel on the other to record every interaction and observation and to review every chart entry for accuracy. When a surveyor was on-site, every care provider she interviews would have a perfect recollection of all prior chart entries on every resident and could provide an explanation for every prior action taken by herself and her co-workers. We do not live in that world.

In our world, staff can be caught off guard during her normal duties by a surveyor wanting details of incidents occurring several months before. These interviews are recorded in summary form, not stenographically, and are then approximately recited in the CMS-2567. They may request information on the charts under review but may not have the opportunity to review every page of a chart which has been thinned over time. The exit conference may provide some insight into the citations that are likely to be issued and which residents are the subject of the survey, but once that occurs, little opportunity exists to right the ship.

Fortunately, in cases of immediate jeopardy (IJ), the surveyors must notify the administrator and facility management during the survey so that the issue can be abated. The bad news is that a CMP must be immediately imposed upon a finding of immediate jeopardy, but for now, let's focus on the carrot and not the stick. Because the IJ must be disclosed during the survey, a provider must begin building the record right away. The information the surveyors leave the facility with will be the sole basis on which the statement of deficiencies are drafted and the resulting CMP imposed. To the extent possible, the provider must make sure to pull any relevant documentation and provide it to the surveyor whether it is thinned sections of a chart that demonstrate prior ineffective interventions or care planning, policies addressing the care at issue, or calling in a knowledgeable off-duty staff member for an interview. In modern EHR/EMR systems, targeted searches and reports can be run that may provide more detail than the printed version of the chart. The goal here is not to load the surveyors down with information but rather to make sure that the decision-making and care provided by the facility are amply presented prior to the drafting of the statement of deficiencies. Actual outcomes will be fact-dependent, but in the right case, access to the additional information may shorten the duration for per-day CMPs or at least require the surveyor to address favorable facts in the statement of deficiencies that can be later argued during the IIDR process.

THE POST-SURVEY PROCESS – A POUND OF CURE

Currently, CMS offers informal dispute resolution in two formats: informal dispute resolution administered by state survey agencies (IDR) or independent informal dispute resolution (IIDR) administered by a third-party contractor selected by CMS. Depending on the timing of CMS' regional office's decision on the imposition of a CMP, it may be possible to complete both. However, CMS requires that a pending IDR be withdrawn in order to request an IIDR, so the stars must favorably align in order for this to occur. The deadline to request an IIDR and submit all relevant materials is ten (10) days from receipt of CMS' offer of IIDR (generally contained in the same letter which imposes the CMP). Scope and severity of citations can only be challenged when the facility is cited for substandard quality care or immediate jeopardy, which will represent the larger CMPs worth fighting.

The IIDR process itself consists of three phases: (1) the written record, (2) the IIDR conference, and (3) the report and recommendation of the reviewing entity. By regulation, the request for an IIDR will be provided to the patient or the patient's representative and provide an opportunity to provide written comment.

After requesting the IIDR, a provider must marshal the evidence beyond the chart and present it to the reviewer for review prior to the IIDR conference. This will typically consist of a written statement outlining the rationale for why the citation at issue should be reversed, findings should be altered, or the severity reduced, the relevant portions of the medical record and potentially written statements of witnesses to support the provider's position. An expert witness should be retained in order to provide an objective review of the chart and to help develop and refine the provider's theory of defense. Also, if not previously retained, regulatory counsel with experience in CMS appeals and health care litigation should be retained to assist with preparing witnesses, developing the theory of defense, and to assist in developing the evidence that will be needed later in the event of an appeal before CMS' Departmental Appeals Board (DAB). Although state laws prohibit attendance by the facility's counsel at the IIDR conference, no prohibition exists for nursing consultants or quality assurance personnel.

The IIDR conference will typically be conducted either in person or via telephone. Although telephonic conferences are preferred by most reviewers, the in-person conference format allows presentation of visual aids, makes pointing to specific records much easier, and – most importantly – facilitates communications in a way that telephones simply cannot. Further, the skills which make clinical staff and facility management successful are not necessarily the skills required to defend against a citation and advocate the provider's position. Thus, the role of the quality assurance consultant or other professional in making the provider's case is essential.

Once the IIDR conference is completed, the reviewer will prepare a recommendation as to whether the citation should stand as written, should stand with a different scope and severity level, or should be modified by adding/removing certain factual findings. The reviewer does not make recommendations as to the amount of the CMP, but a change in the underlying scope and severity level or the outright removal of a citation will result in a change. The IIDR recommendation is not binding on either the state survey agency or CMS and can be rejected for essentially any reason, sometimes with a rationale, sometimes without.

The IIDR process enjoys a unique position in the new regulatory enforcement scheme. More Hail Mary pass than magic bullet, a well-executed IIDR can serve as a cost-effective pre-appeal challenge to a potentially devastating CMP.

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