

Protecting Practices from a Significant Billing Error

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By Ericka L. Adler

I recently had a client contact me regarding an issue with an employed surgeon who performs procedures at a surgery center ("ASC"). The surgeon had a patient scheduled for a procedure, but the patient never actually had the procedure performed.

Several weeks later, the surgeon was completing medical records and dictated an operative report for the patient (who still appeared on the schedule for the date in question). The dictated operative report led to a bill being submitted by both the practice and the facility for the surgeon's services. Ultimately, the patient received a statement and complained. The practice and ASC immediately refunded the payer.

This scenario presents a whole host of issues and, surprisingly, is not all that uncommon. Although this situation did not involve a federal payer, it is entirely possible that other cases exist.

How can a practice prevent something like this going forward? How can it best protect itself? The following are some suggestions:

1. Physicians should absolutely be subject to a policy that requires completion of medical records/operative reports within a certain timeframe (usually 24-48 hours). Waiting several weeks is unacceptable. The medical records policy at both the group and ASC level should include consequences for failure to comply. Additionally, the ASC/practice's EHR should also have some mechanism to reflect when procedures are cancelled/not performed so as to be as accurate as possible.

2. To the extent that there is an action taken by a payer under federal or state law (i.e. False Claims Act) for submission of a claim for services not performed, or for other issues related to billing, coding or documentation, every organization should have contractual protections in place. Many physician contracts have language that attempts to address these concerns, but striking a balance between the wrongful act of a provider and a true error or mistake is also key. While physicians need to be responsible for services they perform, it is essential to remember that doctors are not billing and coding experts.

Some effective language to address this concern might look like the following:

"Physician agrees to comply with all federal and state statutes, as well as all applicable third-party payer rules, and regulations applicable to billing and reimbursement activities, including, but not limited to, the following activities: appropriate documentation of services in the medical record and coding, participation in all training and education activities offered by Corporation as well as active participation in auditing and compliance activities."

A physician who fails to comply with the above requirements would be considered in breach of contract. You will note the reference to education and compliance activities, which are essential for the employer to offer. A physician who is educated and counseled, but still displays a disregard for proper billing or engages in abusive practices, should be subject to discipline. A physician subject to consequences for errors based on lack of knowledge, when the employer provides no guidance or support, is truly in an untenable situation.

Many organizations also include indemnification provisions in their documents. I often take issue with such language if it shifts the entire burden to the physician when the employer does not take on responsibility to review, educate, or audit the physician's billing and coding.

Indemnification language also often does not properly distinguish between negligent and intentional acts/omissions of a physician, with unintentional/inadvertent errors (which should have been caught by the billing staff or audit practices). Some acceptable indemnification language might build on the prior language (above) and look like this:

"Physician further agrees to indemnify Practice against the cost of any recoupment, repayment, fines, penalties or other amounts, including attorney's fees, which Practice is required to pay as a result of Physician's acts or omissions as it relates to Physician's obligations to bill and document properly ("Physician Audit Debt"). Practice shall have a right to reduce Physician Audit Debt from any amounts which are otherwise owed to the Physician under this Agreement or any other agreement between Physician and Practice. In the event, Physician is no longer employed by Practice at the time that the Physician Audit Debt arises or to the extent that the amounts owed to Physician by Corporation are insufficient to cover the amount of the Physician Audit Debt, then Physician agrees to pay the amount of the Physician Audit Debt to Practice within thirty (30) days after written notice by Practice to Physician of the amount due. The parties agree that "misconduct" shall not be considered to include inadvertent errors or mistakes. Such errors will be remediated through normal channels with the applicable carrier, intermediary, or CMS-designated payer."

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There is no one single approach to addressing billing and coding errors. Minimizing risk for the practice and the physician should be a team effort. However, practices must be sure to have policies and procedures in place, as well as appropriate contract language, to address situations that may arise.

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