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This issue of Litch's Law Log features a guest columnist addressing an important legal issue for pediatric dentists participating in Medicaid.

Litch's Law Log

Audits and Investigations: What You Need to Know to Protect Your Practice

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Pediatric dental care is an important part of children's overall healthy development. Nevertheless, there are still many children who do not see the dentist soon enough and have significant health issues. Besides the fear that some children have, many families are not educated in pediatric dental care or lack adequate access (whether for financial or other reasons) to pediatric dental care. With the Affordable Care Act, however, many more families do have dental insurance. In addition, states are required to provide funding to cover dental benefits for Medicaid eligible children or those covered by Children's Health Insurance Program (CHIP) as a required component of the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit. With more pediatric dental patients being covered by some insurance, dentists can expect more scrutiny and with scrutiny come audits and investigations.

A glance at any report will clearly demonstrate that dental offices are being audited and investigated more than ever before. Audits and investigations are conducted by governmental agencies, contractors (RAC audits), or by third party payors or their agents. The consequences of the audits could be anything from the denial or disallowance of a few claims, to extrapolation of the findings, to termination or exclusion from the plan or program, disciplinary action or even criminal prosecution when there is evidence of fraud. The defense of your practice in connection with audits and investigations can be time-consuming and often involve the need for and cost of legal advice and representation. Moreover, unlike malpractice actions, these costs are generally not covered under any insurance you have for your practice.¹ As a dental provider, you should be aware of your rights and understand the possible consequences of both audits and investigations.

THE AUDIT PROCESS

Initially, you want to understand your procedural rights. In the event of a third party payor audit, that means you need to review your contract. Hopefully, you have maintained the participating provider contract, and any amendments or revisions thereto. If not, request a copy. Third party contractors often do not set forth those rights in the audit communication. They ask for information and inform

you of what they have found. Then they often take steps to withhold the amount they deem as repayment. The process is not always apparent and not always transparent. For instance, there may be ongoing denials which if you do not object to may be the basis of a finding against all similar claims. You need to review denials and the reasons therefore and if necessary, appeal from those denials. Often, similar audits will be conducted again on a yearly basis if the carrier finds that you continue to bill in the same way.

Audits done by or on behalf of governmental entities usually set forth your rights to respond and appeal from the findings. But, there are other times, a prepayment review, for example, that you may not have the same procedural rights to respond and object. In many cases, these regulations that apply to audits may be complex and can create pitfalls if not followed properly.

It appears that the current audits of dental offices are being conducted as "desk audits" and therefore dentists may not be advised of the audit when it is initiated. In these cases, there may have been a preliminary "probe" audit of a few of the dentists' files. The desk audits then consist of review of billings alone relating to certain procedures. If your state maintains a database or website that lists areas of auditing or billing alerts, these will provide you with the areas of most concern and therefore most likely to be audited. If you are a provider that bills only a few codes, know if there are issues with coding in your specialty areas.

"RANDOM" DENTAL AUDITS: RED FLAGS

Although you may be told that it is simply a "random" audit, be aware that there is usually a reason you have been chosen to be audited. The most logical explanation is that you have a large volume, or you have had a change in your volume of billing generally or with respect to a particular code. Any time there is a significant change in your billing pattern, there is a red flag at the payors. You may very well have a reason for the change (you have new providers that you have hired, for example), but these red flags will often be the reason for an audit.

ABOUT THE AUTHOR

Margaret Surowka Rossi has more than 20 years of experience as a strong advocate especially on behalf for her health care clients. She routinely represents individual providers in licensure, disciplinary and ethics proceedings and counsels and defends individuals, group practices and facilities faced with Medicaid, Medicare and other governmental investigations and audits. She also represents health care providers in compliance, employment and contract matters. Maggie brings an insider's perspective to her practice from her previous position as sole in-house counsel to the 14,000 member New York State Dental Association. In this capacity, Maggie counseled members regarding compliance, proposed legislation and regulations, developed a HIPAA guide for members, provided risk management seminars, and analyzed and guided members on all healthcare related matters. She is a frequent speaker on issues affecting the health-care industry. She developed and presents one of the few approved courses to fulfill New York dentists mandatory Jurisprudence and Ethics Course requirement. She is a member of the Board of Directors of the National Society of Dental Practitioners.

We have seen a number of third party audits relating to surgical extractions. Often if you only bill surgical extractions, you are setting yourself up to be audited. You need to examine your billings to see if there are other codes which may be more appropriate.

Whenever you have procedures which could have been billed using a lesser code and you are always billing for the highest code, you are susceptible to an audit and payback. Moreover, your records need to justify the reason for the higher code. These records need to support your judgment. If all your records are the same and contain the same wording and narrative, there will be examined more closely and susceptible to denial. If you are being denied certain claims, examine your billing and correct how you bill. Review the CDT Codes and make certain you meet the definitions.

In addition, review the records you send in when responding to an audit. Obviously, you cannot alter or create documents, but you can learn from any mistakes. If the payor will not pay unless certain things are clearly noted, make sure you do so in the future. Also, when asked for records, make sure you send in everything: notes, radiographs, etc. The payor is not going to ask you for things you forget to provide, but will assume you do not have it if it is not provided when requested. From a practical standpoint, many dentists may leave a staff member with the responsibility of providing information, but the dentist should always check what is being provided before it is sent.

TO APPEAL OR NOT TO APPEAL

If you have the right to appeal from the findings and you have a basis for appealing, take the time and appeal. If you do not appeal, it is tacitly implied that you admit that you were wrong in your billings. Moreover, if you do not change anything about your billings, there is just a continual basis for more audits and paybacks. Many third party payers will take additional action in the future if there is no change. For instance, a payor may terminate your participating provider status or not renew your contract. Although you may not mind no longer participating, if you are terminating, you will have to truthfully disclose such termination in credentialing questionnaires.

INTERNAL AUDITS

Third party payors and state agencies are very interested in the effectiveness a provider's corporate compliance program. Regardless of whether you have a formal compliance program or not, it is beneficial for you to conduct internal reviews and audits. After an external audit, it is particularly effective to conduct random internal audits and to identify and correct deficiencies and errors. Learn from the audits and improve yours and your office's documentation and billing practices and policies.

INVESTIGATIONS

Investigations may not always start out looking different from than audits, but the consequences of investigations can have far more serious and broader effects. Instead of just seeking overpayments, investigations can lead to criminal penalties (including incarceration), civil monetary penalties in addition to reimbursement and exclusions, debarment or termination or more. One of the largest dental Medicaid investigations in recent memory involved the national pediatric dental chain known as "Small Smiles," which ended in a \$24 million settlement with the Department of Justice for allegedly performing medically unnecessary or substandard procedures on children insured by Medicaid, to turn a profit. That investigation can in turn lead to civil lawsuits by plaintiff classes, disciplinary actions against individual dentists and corporate integrity agreements which set forth conditions and limitations for continued practice of the offices.

Investigations, however, need not be so large or so purportedly intentional. Fraud does not have to be actual knowledge, but merely that the dentist should have known, that the conduct was wrong. In addition to double billing, phantom billing or unnecessary procedures, Medicaid fraud can include:

- Knowingly submitting false statements or making misrepresentations of fact to obtain a governmental health care payment for which no entitlement would otherwise exist;
- Knowingly soliciting, paying, and/or accepting remuneration to induce or reward referrals for items or services reimbursed by government health care programs; or
- Making prohibited referrals.

Fee-splitting arrangements, including those with billing companies (depending on state laws).

Investigations may also start without your knowledge and may result in the issuance of subpoenas or search warrants. It is always important for your staff to know who the individual and entity is that seeks information

as this may alert you to the significance of the investigation and consequences. For example, if agents are from a state Medicaid Fraud Control Unit, it is often an investigation that could lead to more serious consequences than from agents with the Office of Medicaid Inspector General (“OMIG”). In any event, your staff should always see the agents’ credentials, contact the owner immediately and act professionally. Staff need not answer questions or agree to an interview without counsel, but you cannot prevent them from doing so if they so choose. It is not uncommon in a criminal investigation for agents to visit and seek to interview employees at their homes.

Due to the serious and possible criminal consequences, experienced counsel should be immediately retained.

CONCLUSION

If you are audited or investigated, you need to prepare to defend your practice, determine if counsel is needed in the audit process and engage counsel as early as possible in the process. You will need to gather as much documentation as possible to refute claims. Do not fabricate or intentionally destroy records or obstruct the audit. Electronic records accurately reproduced in a hard copy format are acceptable. Patient-specific documentation is vital to respond to these desk audits. Raise all objections and provide documentation to refute audit findings as early in the audit process as possible. Be prepared to substantiate all your billings.

Consider developing a compliance plan, if you do not have one in place, and using internal audits to its effectiveness and improve your billing practices.

Finally, understand your rights and the consequences of any audit or investigation.

This column presents a general informational overview of legal issues. It is intended as general guidance rather than legal advice. It is not a substitute for consulting with your own attorney concerning specific circumstances in your dental practice.

Ms. Rossi will be presenting on this topic at AAPD 17 on Friday, May 26, 2017, from 9 to Noon as part of the program *Orange is the New Black: Coping with Medicaid and HIPAA Audits*.

¹ If disciplinary action results from an audit, the defense of that proceeding may be covered and you may have other insurance which may cover a portion of the costs, but generally responding to and defending against an audit will not be covered. It is always wise, however, to review coverage to see if it does apply.