Quality of Care Breakfast Briefing Series

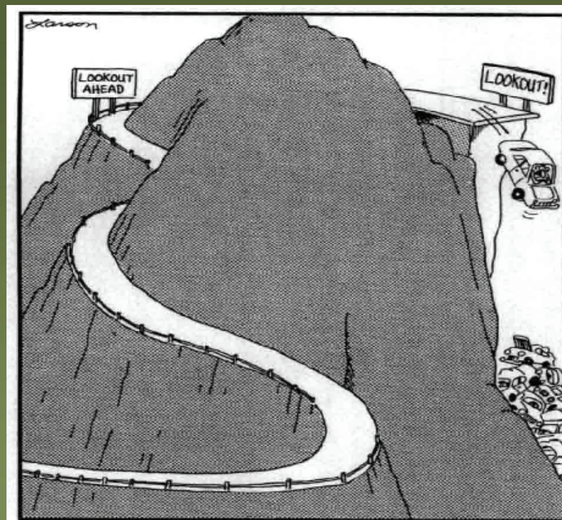
Quality of Care: Transforming Health Care Through Payment Reform, Public Reporting and Enforcement

Session I
October 16, 2007 – Chicago, Illinois
Executive Breakfast Briefing

FOLEY
FOLEY & LARDNER LLP

Janice A. Anderson
Foley & Lardner LLP
janderson@foley.com
312-832-4530

©2007 Foley & Lardner LLP • 321 N. Clark Street, Suite 2800, Chicago, IL 60610 • 312.832.4500 • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not actual clients but are representative of clients • 07.3857e



FOLEY & LARDNER LLP

©2007 Foley & Lardner LLP

Overview

I. New Paradigm for Reimbursement
  - Payment Reform
  - Public Reporting
  - Government Enforcement

II. New Legal/Compliance Risks

III. Problems Under Current Structures

IV. Recommended Solutions

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

- CMS is transforming payment policy from passive payor for services to active purchaser of high value health care
  - Payment Reform
  - Public Reporting
  - Enforcement
- Private Payors also are changing payment policies to pay for quality

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

Public Reporting

Sources of Data

- PEPPER
- Hospital Quality Initiative
- PERM
- CERT
- PQRI
- State adverse event reporting
- Malpractice suits
- Qui Tam relators (whistleblowers)

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

Data Mining

- Defined
- Data mining is a ***technology*** that facilitates the ability to ***sort*** through masses of information through database exploration, extract specific information in accordance with defined criteria, and then ***identify patterns of interest*** to its user
- Goals
  - Correct inappropriate behavior
  - Identify overpayments
  - Deny payment

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

- ***"We are reviewing assorted sources of quality information on your facility to see what it says and if it is consistent. You should be doing the same."***

  James G. Sheehan,
  Medicaid Inspector General, New York
  February 6, 2007

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

Public Reporting

Deficit Reduction Act Impact

- 2005 Deficit Reduction Act requirement effective January, 2007
  - Advise work force on federal and state False Claims Acts and whistleblower statutes
  - Likely to generate additional government enforcement activity

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

Performance Measurement Reporting System

- September 12, 2007
- Proposed new system for public reporting of price/quality transparency in health care (physicians & hospitals)
- Pools and analyzes information about quality, performance and cost
- Uses both public and private payor data

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

Performance Measurement Reporting System (cont'd)

- Information disclosed to
  - Consumers
  - CMS contractors
  - Other agencies (state & federal)
  - Chartered Value Exchangers and data aggregators, who will generate single or multi-payor performance measurement
  - Providers/physicians
  - Quality Improvement Organizations
  - Law enforcement
- PMRS will be a springboard for data and government enforcement actions

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

<u>*Government Enforcement of Quality*</u>

- Government prosecutions based on quality issues have grown exponentially in recent past
- Six themes present in cases
  - Unnecessary treatment/procedures
  - Kickbacks
  - Big admitters receiving special treatment
  - Poorly structured, or failure to follow, internal process
  - Underlying regulatory violations
- Cardiac procedures especially risky

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

- ***"[F]raudulent furnishing of medically unnecessary invasive procedures not only causes financial harm but puts patients at significant risk. The Office of Inspector General will vigorously investigate such cases and require appropriate corrective action to safeguard future patient care."***

  Daniel Levinson,
  Inspector General,
  U.S. Department of Health and Human Services
  August 17, 2006

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

Failure of Quality Prosecutions

- United Memorial Hospital (Michigan) – medically unnecessary pain procedures services
- Redding Medical Center – (CA) – unnecessary cardiac procedures

©2007 Foley & Lardner LLP

New Paradigm for Reimbursement

Elements of a False Claim

- Submit or cause to be submitted, a claim for payment
- Claim is false or fraudulent (false statement)
- Scienter: "Knew or should have known" or "reckless disregard" for the truth or falsity of the claim
  - *No specific intent needed*

©2007 Foley & Lardner LLP

15

New Paradigm for Reimbursement

Traditional Theories

- Claims for services not rendered
- Upcoding
- Claims for services not covered (*e.g.*, wound care kits, urinary incontinence devices)
- Duplicate payments

Quality of Care Theories

- Express False Certification
- Implied False Certification
- Worthless Services
- Criminal Statutes

©2007 Foley & Lardner LLP

16

New Legal/Compliance Risks

- Consider
  - Knowledge arising from data reporting
  - Work force encouragement to "whistleblow"
  - Processes and structures are not effective in identifying quality failures
- May lead to
  - False claims liability
  - Corporate liability

©2007 Foley & Lardner LLP

Problems Under Current Structures

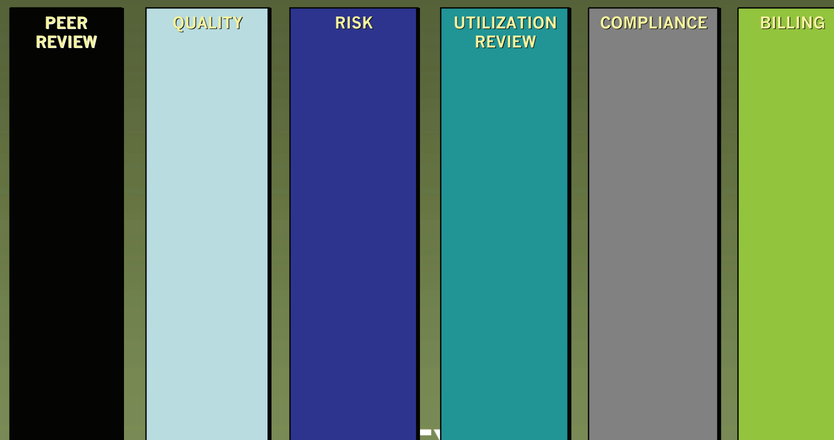
Hospital Peer Review and Quality Management

- Historical process is retrospective and based on incidents
- Peer review processes may be lengthy, biased (friends or competitors), and ineffective
- Delays can lead to evidence of a pattern of poor quality or unnecessary care (ex. United Memorial)

©2007 Foley & Lardner LLP

Problems Under Current Structures

SILO Approach



©2007 Foley & Lardner LLP

A Siloing of Responsibility

- ***"When looking at some of these very large [health care] corporations, there is a siloing of responsibility, which has the effect of inadequate cross of information between the peer review/quality people and the compliance people. The different components of a health care organization need to communicate and exchange information with each other and boards of directors can encourage this process."***

Lewis Morris,
Chief Counsel to the Office of Inspector General,
U.S. Department of Health and Human Services
September 25, 2007

©2007 Foley & Lardner LLP

Problems Under Current Structure

- "Getting the Board on Board: Engaging Patient Boards in Quality and Patient Safety" in 32 Joint Commission Journal on Quality and Patient Safety 179-187 (April 2006)
- Interviews conducted with CEOs and Board Chairs at 30 hospitals in 14 states
- "The level of knowledge of landmark IOM quality reports among CEOs and board chairs was remarkably low. . . There were significant differences between the CEOs' perception of the knowledge of board chairs and the board chairs' self-perception

©2007 Foley & Lardner LLP

Problems Under Current Structures

Physician Involvement

- Often, hospitals will need to enlist physician support to achieve the desired results and earn the pay for performance incentive payments
  - It is hard to enlist physician support by simply coaxing, cajoling, scolding, etc.
  - This is especially so if you do not (or cannot) employ physicians

©2007 Foley & Lardner LLP

Recommended Solutions

What's Needed for the Future

- Move from case-by-case evaluation ("bad apples") to quality control
- Structural changes/process change
- Consider
  - Audit Quality Controls
  - Integrate Quality and Compliance
  - Board Education and Oversight
  - New Strategies to Engage Physicians

©2007 Foley & Lardner LLP

Recommended Solutions

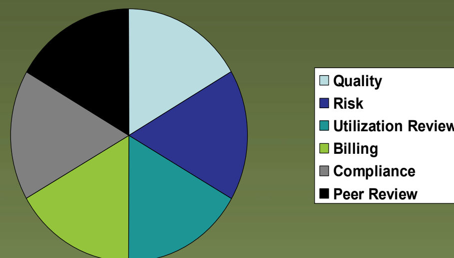
Audit Quality Controls/Legal Risks

- Audit for
  - Compliance with Medicare requirements (i.e. COPs)
  - Internal Quality Controls
  - Fraud & Abuse risks
- Red Flags
  - "The Buzz"
  - Failure to take appropriate or timely action

©2007 Foley & Lardner LLP

Recommended Solutions

Structure Needed



Be careful to keep the Privilege!

©2007 Foley & Lardner LLP

Recommended Solutions

The Buck Stops with the Board

- Board must recognize Quality/Safety as a core fiduciary obligation
- September 13, 2007, OIG and AHLA issue joint publication "Corporate Responsibility and Health Care Quality: A Resource For Health Care Boards of Directors"
  - Health care quality is a key component of mission and a core fiduciary obligation for the board
  - Elevate quality to the same level of fiduciary obligation that financial viability and regulatory compliance currently constitute

©2007 Foley & Lardner LLP

Recommended Solutions

Board Education and Oversight

- Governance responsibility for quality – measures and goals
- Increasing board education on quality – part of orientation
- Board needs to receive regular reports (errors, outcomes)
- Recruiting one or more board members with expertise on quality
- Frame an agenda for quality – IHI campaign, Joint Commission, quality measures

©2007 Foley & Lardner LLP

Recommended Solutions

Board Education and Oversight (cont'd)

- Quality planning, cooperation between board and medical staff
- Re-vamp peer review in light of Joint Commission – 2007 Ongoing Professional Practice Evaluation Requirements
- Restructure to integrate quality throughout organization and with compliance
- Get a handle on medical necessity
  - Where does compliance come in

©2007 Foley & Lardner LLP

Questions?

©2007 Foley & Lardner LLP