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Fraud in the MD/DC Arena

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In the past five years, there have been numerous criminal prosecutions of MD/DC clinics. Most of those indicted or investigated have pled guilty, in part because the possible jail sentences are substantial - upwards of 10 years. Chiropractic clinic owners have usually received sentences in the three-to-five-year range, although a few have received lesser or greater sentences, depending on how much money was involved in the fraud. Associate chiropractors who have pled out have received anywhere from probation to two years. And every once in a while, an investigation results in no criminal charges being filed. There is every reason to believe that these investigations will continue, in part, perhaps, because as recently as 2003, the Office of the Inspector General (OIG) listed chiropractic among its top 10 areas of investigation.

Does this mean the MD/DC model is fraudulent? Of course not. However, many MD/DC clinics are abusing the model and defrauding insurance companies. The scary part is that sometimes the clinic owners don't even know they are operating illegally. In fact, some may be certain they are operating legally, because a chiropractic consultant has set up the clinic, provides ongoing consulting services, and has cleared the fundamentals of the operation through his or her "legal department."

As part of a major criminal trial last year, I had an opportunity to review the materials of many MD/DC clinics and consultants. My basic conclusion is that there is not much difference between what is being offered. These systems are not necessarily fraudulent. However, the systems are extremely complicated, and are based on some questionable health care distinctions. The business realities of a busy health care practice often force these clinics to cut corners to save money and increase revenues, any and all of which can result in fraud-related problems. Here are a few areas of concern, and some specific examples.

The MD/DC Structure

In virtually every state, a chiropractor is either completely prohibited or limited to a minority ownership interest in a professional corporation/medical clinic. This ownership restriction has been circumvented by creating two or more corporate entities: a professional medical corporation owned by the MD, and a management corporation owned by the DC. The MD is paid a salary, even though he or she is the sole owner of the professional corporation, and most of the medical corporation's income is withdrawn by the management corporation as various types of fees.

To protect the DC from an MD who may want to take the clinic's business, some consultants and attorneys have recommended that there be two medical doctors. One MD is the clinic "owner," but does not actually work in the clinic. In fact, under some plans, the "owner" never sets foot in the clinic, and may not even meet the chiropractor. The other doctor is the working MD - the one who works at the clinic and does whatever the MD is supposed to do at the clinic.

Several years ago, a large insurance company filed civil fraud actions against several MD/DC clinics in New Jersey. One of the main allegations was that the MD "owner" lived in another state, had no contact with the clinic and was the "owner" of approximately 50 other clinics. The complaint argued that the MD was just renting her name for a small fee. Is any of this illegal in itself? Probably not. However, when these cases come to trial, the jury will probably look none too favorably on this rather obvious attempt to circumvent the restrictions prohibiting chiropractors from owning medical professional corporations. So, if this is what you are doing, it might be time to change.

Diagnostic Testing

What generates the most scrutiny among insurance companies and government regulators is the testing performed at some MD/DC clinics, and in particular, the various electrodiagnostic devices used by these clinics. In most cases, the diagnostic equipment is sold to the clinics by chiropractic consultants. Is that illegal? Absolutely not!¹ Nonetheless, clinics often buy expensive equipment on the advice of consultants, who claim the clinic can make tons of money from the use of such equipment. That's because reimbursement for diagnostic testing far exceeds the fees for chiropractic manipulation, and even for therapies and modalities a patient would normally receive during a visit.

However, the high reimbursement rates for diagnostic testing have led to considerable abuse in the field, in the form of medically unnecessary testing. Historically, this was only a problem between practitioners and insurance companies. However, under the federal HIPAA laws, providing medically unnecessary testing to

a patient insured by **any** health insurance company is a federal crime. Most federal prosecution involving MD/DC clinics have involved allegations about medically unnecessary testing.

In this space, it's impossible to provide an extensive discussion of what constitutes "unnecessary testing," but here are some basic points. First, it is probably always medically unnecessary to give a test after a prior test has come back negative, unless there has been significant worsening of the condition and the patient is now a potential candidate for a condition that the test will identify. Second, many clinics have different testing regimes for insurance patients and cash patients. Cash patients do not get testing other than X-rays. Is that illegal? Probably not in and of itself, but it is certainly going to be viewed as suspicious if only insurance patients get these expensive tests for normal chiropractic injuries and conditions.

To refine the point, are all insurance patients getting the test? Many of these electrodiagnostic testing and imaging devices have their place - in certain cases. However, a reasonable question can be asked as to whether all patients who present with some kind of back pain require diagnostic testing, especially when the etiologies of their conditions are known and well-understood; for example, a pulled muscle resulting from an identifiable cause or event. I know there are chiropractors, and especially chiropractic consultants who sell equipment, who say using this expensive testing will rule out certain neurological problems. However, if there are no initial indications of neuropathy, radiating pain, or some other indication that a patient has anything more than a pulled muscle, I think clinic owners should think hard about having a protocol that includes a variety and series of expensive testing for a patient who presents with these relatively straightforward symptoms.

Billing Under the Physician's Provider Number

It seems obvious, but it's not often publicly acknowledged that the primary reason for a chiropractor to own or be involved in an MD/DC clinic is that insurance reimbursement is better for medical doctors than chiropractors. Insurance companies often limit chiropractic care and usually prohibit reimbursement for diagnostic testing other than X-rays, if such tests are ordered by a chiropractor. There are few such limitations on spinal care or testing when ordered by medical doctors. It is not surprising, therefore, that most chiropractic consultants teach that all services provided by ancillary health personnel in an MD/DC clinic be billed under the medical doctor's name and provider number, in order to obtain maximum reimbursement.² Is this illegal? The answer to this question is quite complicated. The short version is that it's not necessarily illegal, but in the real world, most of the clinics are on the wrong side of the legality line.

Here are the basics: In general, medical services rendered by others can be billed under a physician's name under what Medicare calls the "incident to rule." Under this rule, services by others which are integral though an incidental part of the physician's service in the course of the diagnosis or treatment of a patient, can be billed by the physician so long as they are commonly furnished or included in the physician bill; are of the type that are usually furnished in the physician's office or clinic; and are medically appropriate.

However, the most important requirement is that the physician have direct supervision of the patient, which means the physician must be in the office or clinic when the services are provided. There are no exceptions to this requirement. If the physician is not in the office/clinic when the services are provided, the service cannot be billed under the physician's name. To do so constitutes federal health care fraud, **period**.

Here's where it gets complicated. As stated, this is the Medicare rule. It absolutely applies to Medicare and other federal pay programs. But does it apply to private third-party pay plans? Maybe, sometimes, with some carriers, in some cases. Some carriers use the Medicare rule, others use variations of the rule, and still other payers have no written policy on the subject, but some of these jokers still try to enforce so called "unwritten policies and practices." The practical problem is that it is virtually impossible to know the "incident to" rules for all of a clinic's patients.

However, since the Medicare rule is by far the most restrictive, if the clinic is properly billing under the Medicare rule, and specifically, is in compliance with the direct supervision definition, then it should be proper under any third-party payer "incident to" rule. Does that mean it is absolutely fraudulent to bill a third-party payer without compliance with the direct supervision rule? No, but I would suggest this is a *de facto* safe harbor.

Unfortunately, it is virtually impossible for most MD/DC clinics to be in compliance with the Medicare rule, for the simple reason that for cost-savings reasons, most MD/DC clinics have part-time physicians. Thus, whenever the part-time doctor is not present in the clinic, a payer could take the position that bills for services submitted under the physician's name is fraudulent under federal law. The ugly reality is that billing services of ancillary health care personnel under a part-time physician's provider number is, at best, a crapshoot in today's environment.

Does this all these problems are resolved by hiring a full-time doctor? Well, it certainly solves the problem of direct supervision. However, other problems are likely just starting to surface. But more on that another time.

References

1. At least one state (California) has taken the position that it is unethical for a chiropractic consultant to sell equipment to clients. However, such statements have no real legal force, since chiropractic consulting is not regulated by any state or federal agency.
2. In the past year or two, as a result of some high-profile cases, some consultants have backed off and started advising their clients to bill chiropractic care under the chiropractor's provider number.

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