Legal Corner

New Medicare Rules For Consultant Services: "My Brother's Keeper"

J. Anthony Manger, JD

Introduction

Medicare has recently changed the rules regarding payment for consultation services. The rule changes affect both the consulting physician and the referring physician. In the view of many, the new rules set an unfair trap for the unwary. Whether or not that characterization is fair, *MPM*'s physician readers should be aware of these important rule changes. In this article, I will review the rule changes and the purported reasons for them. In addition, I will suggest some procedures for avoiding their traps.

The Rule Change

In making these rule changes, the Center for Medicare and Medicaid Services (CMS) seeks, for perhaps the first time in history of the Medicare program, to make physicians "their brother's keeper" for reimbursement purposes. Medicare has long had a number of explicit conditions that must be met to obtain reimbursement for a consultation. Among those conditions is the requirement that the consulting physician document the request for and necessity of a consultation in the patient's medical record. Now, however, CMS requires that both the consulting physician *and the referring physician* document the request and its necessity in the patient's record.

Clearly, if you are a specialist, you must understand this change in Medicare's reimbursement rules. After all, it is your *billings* that are at stake. In addition, you also have an interest in ensuring that physicians who refer patients to you understand the rules—and I suggest that you take a proactive position in that regard.

If you are a primary care physician or are otherwise a frequent source of referrals, you too have a real interest in these rule changes. Your failure to adhere properly to the new rules, jeopardizing payment to your consultants, will hardly win friends among your consultant colleagues. On the other hand, if you not only implement appropriate procedures in your own office, but also advise your consultant colleagues of these new rules (perhaps just by sending them a copy of this article), you may enhance those relationships.

First, a discussion of the rules covering billing for consultations is merited. Then, we will look briefly at CMS' reasons for imposing this new documentation requirement. Finally, steps that consulting physicians may wish to take to avoid ensnarement in CMS' new trap will be suggested.

Billing for Consultation Services: The Rules

Definition

At the outset, we must define what is meant, under Medicare rules, by a "consultation service." Not every referral of a patient to another physician constitutes a consultation service. Instead, a referral may constitute a "transfer of care." Naturally, only if the definition of a consultation service is met must the rules for billing such a service be followed.

The *Medicare Claims Processing Manual*[1] states that "a consultation service is distinguished from other evaluation and management visits because it is provided by a physician…whose opinion or advice regarding evaluation and/or management of a specific problem is requested by another physician…" The manual further states, "The intent of a consultation service is that a physician…is asking another physician...for advice, opinion, a

recommendation, suggestion, direction, counsel, etc., in evaluating or treating a patient because that individual has expertise in a specific medical area beyond the requesting professional's knowledge."

Certainly, the consulting physician may, and often does, provide treatment for the condition that led to the referral. The manual distinguishes that from transfers of care, contending that, "A transfer of care…occurs when a physician…requests that another physician…take over the responsibility for managing the patient's complete care for the condition and does not expect to continue treating or caring for the patient for that condition." By way of example, the manual describes an emergency room (ER) encounter in which an ER physician treats a patient for a sprained ankle and refers the patient to an orthopedist. The orthopedist's work, according to the manual, does not involve a consultation service because no advice or opinion is expected by the ER physician (and, indeed, the ER physician does not anticipate that he or she will continue to care for the patient).

Now the CMS will require that both the consulting physician and the referring physician document a consultation request (and its necessity) in the patient's record.

Documented Request

Now, however, the manual states that, "A request for a consultation…and the need for consultation (ie, the reason for a consultation service) shall be documented by the consultant in the patient's medical record *and included in the requesting physician's…plan of care in the patient's medical record*."

What constitutes "documentation" of the request? Some take the position that both the requesting and consulting physician notations in the medical record, memorializing a verbal request, should be sufficient. Indeed, the manual states that the "initial request may be a verbal interaction between the requesting physician and the consulting physician…" Still, in my view, the safer course (at least in the absence of advice from CMS) is to require that the request be in writing. Indeed, the manual states that, "A *written* request for a consultation from an appropriate source and the need for a consultation must be documented in the patient's medical record" (*emphasis added*). I take the position, however, that a reasonably contemporaneous confirmatory writing, even if done after the consultation occurred, should be sufficient.

Sometimes, of course, referring and consulting physicians may be part of the same group practice with a single, shared medical record for the patient. Similarly, in hospital settings, there may be a shared medical record. The rule changes make clear that physicians affiliated in the same group practice are not disqualified, in otherwise appropriate circumstances, from acting as requesting and consulting physicians. Also, it is clear that documentation in a single, shared medical record will meet the requirements of the rules.

Consultation Report

As has long been the case, the new rules require that a written report be furnished by the consultant to the requesting physician. In the typical office setting, the report should take the form of a distinct written document sent to the requesting physician.

The manual specifies, however, that there are settings in which a formal, distinct written report is not necessary. For example, in ER or other hospital settings where there is a shared medical record, the report may consist of "an appropriate entry in the common medical record." Similarly, in large group practices using a shared medical record, such as an academic department or a large multispecialty group, "it is acceptable to include the consultant's report in the medical record documentation and not require a separate letter from the consulting physician…"

Why Have the Rules Been Changed?

CMS believes that sometimes there has been confusion between referring and receiving physicians as to whether the referring physician is requesting a consultation or is transferring care. CMS contends that the new rules will help to avoid such confusion, and thereby reduce the number of services improperly coded as consultations.

In addition, however, a recently released audit conducted by the Office of the Inspector General (OIG) of the Department of Health and Human Services asserted that in the year studied (which was 2001), Medicare paid out approximately $1.1 billion more than it should have for services billed as consultations.[2] Although the OIG report was issued in March 2006, which was after CMS' issuance of the rule changes, it had been widely circulated in draft form among industry insiders for many months. Thus, undoubtedly the report's findings were known to CMS.

Strikingly, OIG found that in its randomly selected sample of 400 billed consultations, fully 75% of services billed and allowed as consultations did not meet all applicable program requirements. Still, even assuming the validity of OIG's findings, CMS' rule changes do not even begin to address most of the errors found by the OIG audit. Errors that accounted for most of the purported $1.1 billion in overpayments were caused by improper coding as to the *type* or *level* of consultation—errors not addressed by the rule changes. Considerably less than half of the overpayments fell into 2 other categories:

- failure to meet the definition of a consultation; and
- failure of documentation, which might arguably be affected by the new rules.

What Should You Do?

Clearly, if you are a specialist or are otherwise frequently asked to be a consulting physician, you need to make sure that your office procedures ensure your own compliance with CMS' new rules. In my view, however, you should do more. If you do not take proactive steps to assure compliance by your referral sources, it is *your* compensation that is at risk. Thus, here are some steps which you should consider taking. I have put them in order, beginning with the most simple and obvious to those that might be rejected as too administratively cumbersome.

- Make sure that your referral sources are aware of the new rules. Send them a copy of this article or another document regarding *their* new obligations.
- Send a confirming letter to referring physicians containing the elements required by the rules. Ask referring physicians to countersign and return a copy of the letter. Place the letter in the patient's record. (Even if you do not get a countersigned return, this may have some value.)
- Send a confirming letter (of the type referred to above) to referring physicians via certified mail, return receipt requested. Keep a copy of the letter and the return receipt in the patient's record.

If you are typically a referring physician, you can enhance your relationship with specialist colleagues by making sure they are familiar with CMS' new rules—and, of course, by ensuring that your office procedures don't put their billings at risk.

Final Thoughts

CMS' new rules for consultation services make you, in a sense, "your brother's keeper." They present new and difficult challenges, especially to the consulting physician. Both referring and consulting physicians, however, need to be aware of CMS' rule changes and proactively respond to them—as well as assist valued colleagues in doing the same. MPM

J. Anthony Manger, JD, is a member of Norris, McLaughlin & Marcus, P.A., of Bridgewater, NJ, and New York, NY, and serves as Chair of the firm's Health Law Practice Group. He is also Co-Chair of the Health Law Section of Meritas, an international consortium of independent law firms, and is a member of *MPM*'s Editorial Advisory Board.

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