Billing
The Journal of the...
...Healthcare Billing and Management Association
HBMA
July/August 2008

Do the Right Thing

OVERPAYMENTS ARE NEVER FOUND MONEY!

By Bob Burleigh, CHBME

This is the second in a two-part series on overpayments. For Part 1, see the May/June issue of Billing, *p. 12.*

The last issue of *Billing* provided an article about overpayments that cited the East Tennessee Heart Consultants [ETHC] case (January 2007) and many of the federal laws and regulations that obligate health care providers to return excess payments. One of the key factors in the ETHC case was that it was the result of two employees who became whistleblowers after observing for years that the doctors simply did not believe in issuing refunds. I was delighted to have this real-life example of the consequences of refusing to issue refunds, but I was even happier that this story did not include a billing company, as it might have.

When a practice outsources its billing, we become the record keepers of its accounts receivable, including when they are overpaid; when, by whom, and by how much. As noted in the OIG Model Guidance for Third Party Billing Companies, we have a duty to keep clients informed of these circumstances and assist them in complying with their responsibilities. If ETHC had used a billing company, the whistleblowers might have been current or former billing company employees and the OIG Press Release would have named XYZ Billing Company, as well as ETHC, as the guilty parties!

Practices that resist or plainly defy your efforts to have them do the right thing by issuing full and timely refunds are not only putting themselves at risk, they are putting your company in jeopardy. In addition, if you profess to have a compliance program, but you tolerate clients who won't refund overpayments, you are silently teaching your staff that your program is a sham and your integrity is suspect.

Practices offer a rich and abundant variety of excuses, objections, and rationalizations for why keeping overpayments is not a problem. After all, the doctors are not *real* crooks, right?

Here are just a few of the most popular justifications and myths, along with their replies:

1. *"OK, OK, OK – I know I have to refund federal overpayments. But if an insurance company overpays, that's NOT covered by the federal laws and I won't issue a refund unless they ask me for the money." (This is the #1 problem for most billing companies; few providers resist issuing refunds to Medicare or Medicaid.)*

   The pretense of this argument is, frankly, embarrassing. This is the flimsiest of all concocted "reasons" to keep the money, since the premise is that, somehow, the payer knows they overpaid and does not care to request a refund. Thus, "if they don't want it, I get to keep it." We are supposed to nod and accept this lame excuse, allowing *(continued on page 16)*

INSIDE...

(***Do the Right Thing!*** *continued from page 1)*

the practice to pretend they are not doing anything wrong. We all know better and accepting this answer will make us a co-defendant.

In fact, federal laws allow the OIG and/or the United States Attorney (Department of Justice) to prosecute retention of ANY overpayments, not just federal funds, just as they did in the ETHC case (most of the overpayments were not for federally funded patients). In addition, many states, as noted in the earlier article, have their own laws that may be stricter than federal statutes. Finally, many insurance contracts address the provider's duty to return overpayments, which gives the insurer the right to sue the practice for breach of contract—and some have.

2. *"If I tell my clients they owe money (via Refund Reports, etc.) and to whom it is owed, I have fulfilled my responsibility." Similarly, "It is not my responsibility to force them to issue refunds, I just have to let them know what is owed and to whom."*

In fact, the tolerance of client misconduct turns the company into a co-conspirator and co-defendant. It is fortunate that the ETHC case did not involve a billing company, but many billing companies are at identical risk and are in denial. Of course, it would be far worse if the practice really did not know about refunds owed because the billing company never informed them; this would leave the billing company solely—or primarily—liable, since the practice had no other way to know about outstanding credit balances.

A prosecutor will look for evidence or any indication that the billing company had some knowledge or awareness that the practice did not issue refunds, such as conversations with the physicians or practice staff, repeated requests for the same refund, patient complaints, duplicate letters from insurers, "forgetfulness" by the client, etc. A billing company that knows, or has reason to believe, their overpayment notifications do not always lead to a check being issued and cashed may be equally guilty of wrongdoing. And, I am aware of billing companies that, after diligent efforts to reform the client, have elected to fire the practice in order to protect their company.

3. *"I tried to refund the money, but they never cashed the check, returned it to me, told me they didn't want the refund, etc. If they don't want it, I can keep it."*

FALSE. Every one of the fifty states has a long-standing unclaimed property law. The legal term for this is "escheat," a centuries-old word that loosely translates "that which belongs to the King." Under English common law, any unclaimed property—money, jewels, land, livestock, etc.—was deemed the property of the King if the rightful owner was unknown. In America, the King was replaced by our state governments. There are fifty Unclaimed Property Administrators, one in each state. They have their own trade association, the National Association of Unclaimed Property Administrators (NAUPA), as well as their own website **www.unclaimed.org**, that has a link to all fifty states' websites.

Under escheat, a "holder" (the practice, since the excess money is in their bank account) is required to surrender ("escheat") the money after the holding period expires. The length of holding time varies by state, but is typically three to five years. Some states require annual reporting of amounts held, similar to a tax return filing. The NAUPA web site links will provide access to the state's regulations, holding periods, forms, reporting and surrender procedures, etc. Note, too, that failure to fulfill escheat responsibilities offers an additional whistleblower opportunity to the state government. The bottom line is: if there is no insurer or patient to whom the refund might go, it goes to the state—period.

A variation of this one is, "We (actually, your billing company) wrote to the insurance company, advised them of the overpayment, and invited them to request a refund, but they never responded." Another: "We wrote to the insurance company and they wrote back, declining our offer of a refund."

The same duty applies—the money goes to the state or, alternatively, the patient. Keeping the money is NEVER appropriate.

4. *"(That) insurance company owes me thousands of dollars in unpaid claims, going back half a year. They owe me five times what I owe them, so I'll keep the money until they pay me what they owe me."*

This is the "offset" rationalization. This theory argues that there is a constant flow of money in BOTH directions and that at any given moment, one party owes the other more, so an offset allows for a bit of equilibrium. This fiction infers that the practice (or the billing company) is keeping a meticulous journal of debits and credits, by payer, and will, when the payer "catches up" return

(continued on page 17)

(***Do the Right Thing*** *continued from page 16)*

the excess payments or submit "no pay" claims ("We already have some of your money to cover these claims, just note your records and don't bother sending a check."). Of course, even a layman will see the obvious hole in the logic—the insurer will ALWAYS (almost, anyway) owe the practice more than the practice will owe the insurer, guaranteeing that no refunds will ever be issued. And, of course, NOBODY EVER submits a "no pay" claim. Without the constant flow of money in BOTH directions, this explanation is what it appears to be: a lie contrived into a justification.

5. *"We forgive small balances, so we can absorb small credit balances for the same amounts."*

Wrong. The federal threshold for refunds is $0.01. The law regarding non-federal credit balances is not as clear, but since all credits can be aggregated and surrendered under escheat, I think the answer has to be to refund any overpayment or give it up to the state. Forgiving a debt owed to you is one thing; forgiving a debt you owe is quite another.

6. *"Are there any other rules and/or penalties associated with federal overpayments?"*

Yes. The knowing retention, for more than 60 days, of an amount in excess of that to which a provider is entitled is subject to federal criminal prosecution, resulting in a $25,000 fine and up to 10 years in prison – per item. This provision can be applied to the provider and/or the billing company. To me, that is more than enough reason to diligently report credit balances – aged by date of last payment – to every client, every month

So, if an overpayment is identified and a procedure is in place to issue a refund, when should you post the reversing transaction to zero out the credit balance? My answer is: when the refund check clears, because until then, the overpayment (the money) is still in the provider's bank account and their A/R should reflect the unmet obligation.

This produces some understandable angst, because billing companies want to clean up the A/R and they argue that once the company has advised the practice to issue the refund, it has fulfilled its responsibility and can zero the balance. This is the "wink and nod" approach, since many know that the checks are never written and/or mailed, even when the company writes, or even signs, the checks. Besides, there are a multitude of reasons why the written, signed, and mailed checks are, sometimes at least, never cashed. And if the check is never cashed, the refund was never made and the practice still has money that belongs to another—even if it is the state. To me, this is a BIG deal and one I addressed in a Message Board reply in late 2007.

What, then, can a billing company do that is not too burdensome and is still compliant for both the company and the practice? There are several common and practical approaches (readers are invited to send in other compliant solutions to *Billing*, post them on the Message Board, or send them via email to me):

A. Inform the client of all overpayments on or before the end of the month in which the overpayment was received via the Credit Balance Report, or the equivalent, from your billing system. Most billing companies prepare a worksheet and "refund packet" to support the refund (I advocate doing this via electronic file, using scanned documents). I recommend moving these accounts to a "Refund Pending" Financial Class (or the equivalent). From here, the procedures vary quite a bit:

1. Some companies write the refund checks and, if refunds are paid from a different account than the one used for payment deposits, are legally allowed to sign them. The completed "set" can be sent to the practice for review and/or signed checks can be mailed.

2. Some practices prefer to write and/or sign their own checks. In some cases, the signed checks are returned to the billing company for mailing, in some cases the practice mails the checks (or puts them in a drawer until "later").

3. The bank statement and copies of the cancelled checks for the account (fewer and fewer banks return cancelled checks, offering scanned copies, instead) can be dually sent to the practice or their accountant, along with a copy to the billing company for use in zeroing out the credit balance.

4. **Note 1:** The establishment and use of a special-purpose checking account is referred to by accountants as an "imprest account." Operationally similar to a payroll account, the normal account balance is zero. Funds are deposited/transferred to cover the checks written; when all are cashed, the balance returns to zero. With this approach, unredeemed checks are noticed when the balance is greater than zero, as well as when the account is reconciled.

5. **Note 2:** Embezzlement of funds via falsified or manipulated refunds

(continued on page 18)

(***Do the Right Thing*** *continued from page 17)*

is a well-known risk area. This risk is multiplied if company employee(s) have signature authority on a refund account. Take additional precautions to separate duties and reconcile this account.

B. Some billing companies actually issue the refunds themselves, from a (hopefully separate) company account and issue the refunds, invoicing the practice for the amounts paid. A variation is similar, but the company waits for payment from the practice before issuing the checks. To be technically correct, the credit balances should remain in the practice's A/R until the cancelled refund check is received by the company. This approach works fine, but creates a new liability for the billing company, inasmuch as the inevitable returned and/or uncashed checks are now unclaimed property in the company's account. Reconciliation of this bank balance and surrendering of unclaimed funds is some more work, but not necessarily too much more work.

C. Some practices have their accountant/bookkeeper handle the check writing and reconciliation. Establishing a reconciliation notification process (i.e. electronic copies of the cancelled checks or the bank statement) will allow the posting of credit balance closures.

Regardless of how billing companies handle the details of resolving refunds, it is important that the end result is compliant for the clients and the company. It is not only ethical to do the right thing (*think of the opposite!*), it is consistent with the Federal Sentencing Guidelines, which expect and reward compliance, and which punish non-compliance. Proper handling of overpayments is one of the many responsibilities assumed by billing professionals that, like so many other duties, entails more work and potential liability than is immediately obvious. ▲

Bob Burleigh, CHBME, is president of Brandywine Healthcare Services in West Chester, PA. He can be reached at brandywinebob@aol.com.