

HIPAA, Legal Holds, and PHI:

Rachel Rose, J.D., M.B.A. With Sean McKenna, J.D., B.A.



Rachel Rose (RR): Please tell us a bit about your

background.

Sean McKenna (SM): I spent almost 16 years with the federal government handling healthcare fraud matters, first with CMS, then OIG-HHS, and my last ten

years were with DOJ in Dallas as a federal prosecutor. For the last three-plus years, I have represented healthcare providers and executives in enforcement actions varying from administrative, civil, and criminal matters, including advising clients on fraud and abuse and HIPAA issues.

RR: Can you explain what a legal hold is and what types of information healthcare providers and business associates may be required to maintain?

SM: Generally, a legal hold is the process used by companies and executives to preserve all forms of relevant information within the custody of certain persons or “custodians.” This usually includes all relevant information, including electronic material or “ESI” and protected health information (PHI), but limited only to when litigation is “reasonably” anticipated. A legal hold also is used for government investigations or other matters that require a party to avoid spoliation of information. Cases where a legal hold should be issued could be a medical malpractice action or simply notice of an audit. Increasingly, notice is required when there is a HIPAA breach or cyber-attack. The information typically requested is specific to a claim or action, but in government investigations, the evidence to be preserved by the relevant custodians is very broad. Such as medical records, billing claim forms, and other documents that contain PHI. If that occurs, federal and state HIPAA and privacy laws are applicable. But it also often includes other documents, such as contracts, emails, etc. that do not include PHI and don’t implicate HIPAA.

RR: How long is the length of a legal hold in relation to

items containing protected health information?

SM: A hold will be required and should be in effect if there is current or anticipated litigation, an audit, or government investigation. This includes documents that contain PHI. The scope of the hold should be tailored to the nature of the issue. However, time limits will depend on the length of the action or litigation of any potential claim.

Be mindful that under HIPAA, there is an automatic obligation to retain records for 6 years. It doesn’t require any legal process since it involves PHI and a patient’s medical care. This obligation may be longer if a State privacy law is more expansive.

The other thing to remember is the concept of preservation under a litigation hold. Information should be preserved under a hold and not altered or deleted. Contrast that concept with a covered entity’s obligation under HIPAA to amend a medical record at the individual’s request. That request can be denied, but there are specific requirements under HIPAA when a provider denies an individual’s request that could run afoul of a litigation hold.

RR: From your perspective, how important is it that entities that create, receive, maintain or transmit PHI have policies and procedures, as well as the technology, to preserve the PHI for the legal period of time?

SM: It is very important that entities adhere to the HIPAA requirement of six years and the state law requirement, which may be longer. A legal hold may extend the length of time that the information needs to be preserved. In general, the recent fines from HHS have hit inadequate policies and procedures hard. So, make sure that both the policies and procedures and adequate technology are in place.

RR: Even if a medical condition is at issue, the documents are public and no one’s insurance number, full DOB, or SS number should be included.

SM: That’s correct. During litigation, all parties have to balance the individuals’ right to protect their PHI with resolution of the conflict. That usually means painstaking efforts to thoroughly

review and redact the records, or the use of other legal processes to protect the individuals. Under no circumstances in civil litigation should identifiable information be available to the general public. Normally, a confidentiality or protective order is sought and granted by the Court. But remember, the government can rely on exceptions to HIPAA to obtain and use PHI in litigation.

RR: For sensitive information (e.g., substance abuse, mental health, minors, rape, etc.), what should be redacted and when is it appropriate for in camera review?

SM: Good question since HIPAA addresses these issues differently than normal PHI. Identifying information should be redacted always, unless it's a governmental entity. If PHI or identifying information is crucial to the conflict, and no exception to a State or HIPAA law applies, in camera review by the Court is appropriate.

RR: Are there any other recommendations that you have for persons who create, receive, maintain, or transmit PHI?

SM: In this era, err on the side of caution. As enforcement efforts in privacy increase, it is better to overprotect information. Subsequently scale back the transmittal of PHI if prudence dictates or you are compelled. Be thoughtful about how documents


are transmitted and kept, both between parties and from clients and vendors, including attorneys. Vendors and law firms also should know their obligations under HIPAA, and in some cases, stricter state privacy laws.

Rachel Rose

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Spotlight on DME
(Durable Medical Equipment) Part 2

Proper documentation and coding for DME has been in the spotlight for quite some time. Whether you are a supplier or a physician's office that orders and supplies DME in-house, the pressure of further coding and audits will likely continue to increase as the government focuses on the achievement of goals to accomplish conversion of the Medicare Trust Funds for future beneficiaries.

an including the Table (Table C) referenced in the last part of this issue. This will ensure that HCPCS code L0433 cross-linked to L0448 and L0451.

- Therefore the code that was being billed, L0433, became the code for the back brace instead, that

OTS that requires "personal self adjustment" in the JCR add referred to past a low deficiency cited by DMEPOS was the incorrect use of the L0433 code. The documentation submitted by the practice did not contain the required wording to indicate that the brace was "used

Sanitized Off-the-Shelf back braces that required only "minimal self-adjustment" to the patient.

The back braces billed after January 1, 2014, however, were taken from inventory on hand at the practice and the labels will list the L0433 code on them. This has contributed to the incorrect assignment of code L0433 after that date for a code that now required fitting and adjustment to the patient.

Now, need you if you look up the allowable for both L0433 and L0448 on my code, at least, they are the same! Therefore, using an incorrect code did not cause the federal government to audit. However, the practice referred to in the article had a handwritten note on the label that stated, "I got this 8/15/14" of Medicare work, and as a result, Health Integrity determined the proper adjustment.

There were other items, however, that impacted the reimbursement details. When you have a change to look at the table below will point out very important details that you must have in your documentation to successfully reimburse an audit.

See table C right

What is required to document in the Medical Record for these items in order to prevent denial due to Medical Necessity?

Failure to follow LCD guidelines can indicate the reason for denial and suspension.

The tips below may help to ensure that you prevent an unfavorable audit result for your practice.

- Read and understand all specific LCD requirements, when they release certain required items they mean it. The LCD for each "MC" Center can be found on their respective website and on the CMS website. Here is an example of what it looks like when printed on the LCD. CMS Center website at: <http://www.dhs.gov/medicare-coverage-database/mc/> (http://www.dhs.gov/medicare-coverage-database/mc/)
- Follow the coverage guidelines (LCD) and make sure in the documentation and bill each specific patient. Start on the LCD for the individual patient and make sure you have the required documentation for each LCD before you bill.
- Each LCD begins with a Coverage Section of the Medicare Act.
- Read the LCD for the Medicare Act.

Local Coverage Determination (LCD): Special Order: T150 and L00 (8/15/14) (L00 at 15/14) has a specific effective date on the LCD.

It states:

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Table C: Published Orthotic Codes Split into Two Codes Effective January 1, 2014

Fee From Existing Code	Crosswalk to New Off-the-Shelf and Revised Codes
L0443	L0443 and L0448
L0444	L0444 and L0448
L0445	L0445 and L0448
L0446	L0446 and L0448
L0447	L0447 and L0448
L0448	L0448 and L0448
L0449	L0449 and L0448
L0450	L0450 and L0448
L0451	L0451 and L0448
L0452	L0452 and L0448
L0453	L0453 and L0448
L0454	L0454 and L0448
L0455	L0455 and L0448
L0456	L0456 and L0448
L0457	L0457 and L0448
L0458	L0458 and L0448
L0459	L0459 and L0448
L0460	L0460 and L0448
L0461	L0461 and L0448
L0462	L0462 and L0448
L0463	L0463 and L0448
L0464	L0464 and L0448
L0465	L0465 and L0448
L0466	L0466 and L0448
L0467	L0467 and L0448
L0468	L0468 and L0448
L0469	L0469 and L0448
L0470	L0470 and L0448
L0471	L0471 and L0448
L0472	L0472 and L0448
L0473	L0473 and L0448
L0474	L0474 and L0448
L0475	L0475 and L0448
L0476	L0476 and L0448
L0477	L0477 and L0448
L0478	L0478 and L0448
L0479	L0479 and L0448
L0480	L0480 and L0448
L0481	L0481 and L0448
L0482	L0482 and L0448
L0483	L0483 and L0448
L0484	L0484 and L0448
L0485	L0485 and L0448
L0486	L0486 and L0448
L0487	L0487 and L0448
L0488	L0488 and L0448
L0489	L0489 and L0448
L0490	L0490 and L0448
L0491	L0491 and L0448
L0492	L0492 and L0448
L0493	L0493 and L0448
L0494	L0494 and L0448
L0495	L0495 and L0448
L0496	L0496 and L0448
L0497	L0497 and L0448
L0498	L0498 and L0448
L0499	L0499 and L0448
L0500	L0500 and L0448

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