Dynamic Chiropractic

NEWS / PROFESSION

Chiro. Consultant to Plead Guilty to Fraudulent Back-Billing

FEDERAL INVESTIGATION MAY YIELD MORE INDICTMENTS

On March 3, 2006, a criminal information and plea agreement was filed in U.S. District Court, Southern District of Ohio, on behalf of chiropractic consultant Markell Boulis, who is pleading guilty to one count of filing false claims in connection with his back-billing chiropractic consulting business. Based on his plea, he faces a maximum sentence of five years.[1]

The plea was the culmination of a two-year federal investigation, and the plea negotiations took over a year to work out. I was the third and final attorney representing Markell Boulis. He and another family member were facing an indictment with numerous heath care fraud and other felony counts, which could have resulted in a prison term in excess of 15 years and could have involved losses and restitution in the tens of millions of dollars. Regrettably, the federal investigation is ongoing, and surely many more chiropractors will soon be hearing from the *Federales*.

From the late 1990s (with partners) and then on his own until 2003, Boulis worked as a consultant, focusing on "back-billing" for unbilled services. The idea is an attractive one: There are services that many chiropractors perform on patients, but which are not routinely billed. The unbilled services related to the "evaluation and management" of patients. The idea was that many chiropractors do more than give adjustments when they treat their patients. The most attentive chiropractors observe their patients' gait as they walk into the treatment room; they use their observation skills as the patients hop on the treatment table; they check their reactions to the adjustment and other modalities or therapies given; and they modify treatment decisions based on what they observe. In other words, they do a lot of mental work before, during and after the actual adjustment. Boulis and his former partners felt that all that mental work should be compensated separately,[2] so Boulis advised his clients that if they actually did all that extra work, they could bill a moderate-level E&M office visit (99213) in addition to the 9894x procedure code, every time the chiropractor saw each and every one of his or her patients. And, if they hadn't billed that E&M code for every patient visit, Boulis, through another one of his companies, would "back-bill" all of the chiropractor's patients' insurance companies, going back a year to 18 months.

The good news was that the technique generated a large amount of income for all involved. However, eventually, the insurance companies figured out what was going on, and the revenue stream dried up.

As Boulis' back-billing business was winding down, the Feds in Pittsburgh and Columbus started investigating. Early on, one chiropractor pled guilty, as did someone who represented herself as an "OIG compliance officer" at a Boulis seminar.

The problem with this concept is that the 9894x series is a bundled code; it includes not only the actual adjustment or manipulation, but also all of the assessment or mental work a chiropractor normally does before, during and after the manipulation. The explanatory note to the 9894x series contained in the AMA's *CPT Coding Manual* pretty clearly states that the manipulation code

includes all of the normal pre-, inter- and post-assessment mental work normally associated with the manipulation.[3]

The explanatory notes also state that if an unusual, separately identifiable service is provided, an E&M code can be billed in addition to the procedure code.[4]

Despite these clarifications, dozens and perhaps hundreds of chiropractors jumped on the back-billing bandwagon. I have spoken to some of these folks. Some are convinced they were entitled to bill both codes because of all the extra E&M work they routinely do on their patients. Some can point to correspondence with state insurance commissioners, which may justify the billing practice.[5]

Others felt that there was confusion early on, and they stopped billing both codes after it became clear (or clearer) that it was improper. And some perhaps felt they were entitled to the additional compensation, so they did what they had to do to get the extra money. (This last rationale is sometimes called "self-help" and is viewed by most government prosecutors as constituting fraud.)

So, what's next? Boulis will formally plead soon, and the *federales* will start going after his consulting clients and others. From prior searches, the Feds have the names and addresses of all of Boulis' clients.

Many of Boulis' clients work in Ohio; that is where the Feds will start. Initially, I would expect all of his Ohio clients to receive a federal subpoena for billing records. Since the Feds already know who was involved and the nature of the illegal activity, they will be interested primarily in two things: first, the dollar amount of the chiropractor's back-billings; and second, how directly involved the chiropractor was in the back-billing.

Not every chiropractor who gets contacted by the Feds will necessarily be a target, and it is not inconceivable that a few targets may end up getting a "get out of jail pass," depending on a variety of circumstances. As is always the case, the Feds are interested in advancing their case, so there might be some opportunities, at least initially, for some of the targets.

However, for the most part, this investigation process will be a difficult experience for the chiropractors who have engaged in this practice. I believe that many of Boulis' clients eventually will be forced to plead guilty to a felony, or they will be indicted.

Of course, there may be some possible defenses to the charges, as suggested above in the responses of the chiropractors. I think one of the best defenses would be that the chiropractor stopped back-billing early on.

Another possible defense might be the combination of a delegation of billing to subordinates and reliance on the advice of a consultant. However, I do not think either delegation or reliance, without the other, will work.

There is not much law in this area, but there have been a few federal health fraud cases that have rejected ignorance of the Medicare laws as a defense. These cases hold that a health care practitioner has a duty to know the applicable laws, that provider agreements require providers to know the law, and that the HCFA claims form requires the provider to certify that the services were in fact provided and were medically necessary.[6] But, it is possible that the combination of the two defenses might fare better.

For Boulis' clients outside of Ohio, I expect the Ohio U.S. Attorney's Office to contact the local U.S. Attorney's Office in the districts in which his clients operate. I expect this will be a significant nation-wide endeavor by the Feds, and there could be a spate of activity in California and Florida.

Let me also mention in passing that it is possible that the Feds may use this case as a springboard to go after what they believe to be a much larger fraud perpetrated by chiropractors and medical doctors: overtesting. We will have to wait and see how this plays out.

References

1. Boulis also will be pleading guilty to Medicare and tax fraud charges relating to his operation of another type of health care facility in another state.
2. Since 1997, a chiropractor's basic service has been billed under the CPT code 98940-3 series.
3. Other sources are even more explicit. As example, note the following from the January 1997 issue of *CPT Assistant*:
    - "The complete service of chiropractic manipulation requires a certain amount of preservice and intraservice work that is included as part of the service. This evaluation and management is necessary to determine not only what specific work will be necessary, but also to determine the effectiveness of the service being provided.
    - "Preservice work includes: reviewing previously gathered clinical data (including an initial or interim history, reviewing the problem list, pertinent correspondence or reports, and other important findings and prior care), review of imaging and other test results, test interpretation, and care planning.
    - "Intraservice work includes an interactive patient reassessment (i.e., determining the current status, determining indicators/contraindications, assessing the change in condition, evaluating any new complaints, correlating physical findings, and coordinating and modifying the current treatment plan). Also included in the intraservice work is a number of manipulation and postadjustment assessments that are necessary in order to adequately treat the ailment presented. This work is inherently included as part of the Chiropractic Manipulative Treatment service and would not be coded separately."
4. According to one notable chiropractic expert (Brad Hayes, DC. "Solving Insurance Problems." *Oklahoma State Chiropractic Independent Physician's Association Newsletter*, April, 2005), there are only six circumstances in which it would be appropriate to bill an E&M code with a chiropractic manipulation code: "1. A new condition. 2. An exacerbation of a condition. 3. The significantly worsening condition that must be formally evaluated to determine appropriate treatment or action. 4. A significantly improving condition that must be formally evaluated to determine appropriate treatment. 5. A formal re-evaluation of a condition to determine patient response to treatment and the need for additional care and type of care indicated; and 6. When more than 50 percent of the time is spent counseling the patient." And, of course, adequate contemporaneous documentation supporting these findings and additional services should present.
5. Some of Boulis' clients contacted their state insurance commissioner's office to try to find out whether it would be legal and proper to bill an E&M code along with the 9894x series manipulation code. Well, of course it is legal, and sometimes it is completely justified if there is a separately identifiable service for a different condition, or even the same condition. That's why the "25" and "59" modifiers were created. The question, however, is whether a chiropractor can bill an E&M code for every single visit of every patient. Regrettably, for some reason, it does not appear that this question was asked or answered in the affirmative by any knowledgeable expert.
6. See *U.S. v Nazon*, 940 F. 2d 255,259-260 (7th Cir 1991); *U.S. v Macaby*, 261 F. 3d 821 (9th Cir. 2001).

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