

**HCCA 21st Annual Compliance Institute
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Overlapping Surgery Developments

**Alana B. Sullivan
Erlanger Health System**

**Sara Kay Wheeler
King & Spalding LLP**

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Agenda

- Overview of Overlapping Surgeries
- Discussion of Key Authority
 - Teaching Setting
 - Non-Teaching Setting
- Recent Spotlight on Overlapping Surgeries
- Enforcement Developments
- Practical Strategies for Providers
- Questions?

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Basic Overview of Overlapping Surgeries

- Overlapping surgeries generally occur when two surgical procedures under one attending surgeon overlap in part

Procedure 1

Procedure 2

- Overlapping surgeries may occur in multiple settings:
 - Teaching hospitals (often with the assistance of residents)
 - Non-teaching hospitals (often with help from other surgical assistants)
- Over the past 1.5 years, we have seen a significant surge of attention surrounding these issues

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Numerous Considerations and Stakeholders



Overview of Authority

Brief Overview of Medicare Rules for Teaching Surgeries

- Medicare billing rules for teaching surgical services permit certain parts of two surgical procedures, under the supervision of one attending surgeon, to overlap in certain circumstances.
 - The teaching surgeon must *personally document* in the medical record that he/she was physically present during the *key/critical portion(s) of both procedures*
 - The teaching surgeon has discretion to define the key/critical portion(s)
 - When the key/critical portion of one procedure is over, the teaching surgeon may move to a second procedure. The teaching surgeon must designate another qualified surgeon to be *immediately available* for the first procedure, should the need arise

See 42 C.F.R. § 415.172; Medicare Claims Processing Manual, Ch. 12

Brief Overview of Medicare Rules for Teaching Surgeries

- Medicare does not pay for instances where the key/critical portions of both procedures overlap
 - The American College of Surgeons calls this scenario “concurrent” surgery
- Three overlapping teaching surgical procedures are not billable to Medicare

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Brief Overview of Authority for All Overlapping Surgeries, Including Non-Teaching Procedures

- No Medicare payment rules for *non-teaching* overlapping surgeries
- Medicare Conditions of Participation call for providers to deliver surgical services in accordance with acceptable standards of practice (See 42 C.F.R. § 482.51)
 - Consider guidelines from industry groups, such as the American College of Surgeons
- Consider State Law
- Consider State Medical Board requirements
- Consider Joint Commission and other accreditation requirements

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Recent Spotlight On Overlapping Surgeries

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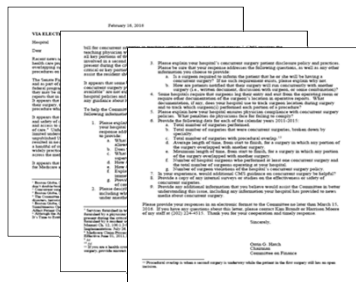
Pre-2015 Environment

- Regulators did not elect to enact rules regarding overlapping surgeries generally or prohibit such practices
 - Medicare rules focused on payment in teaching settings
- Lack of significant enforcement attention
- Lack of media attention

2015 Boston Globe Investigative Report




Senate Finance Committee Letter



- In February 2016, the Senate Finance Committee sent a letter to 20 hospitals and health systems across the country
- Senate Finance Committee staff and members also met with leaders of industry groups including The American College of Surgeons (ACS)

American College of Surgeons Guidance



AHA, AAMC Urge Hospitals to Review Updated American College of Surgeons Statements on Principles and Make Any Needed Changes to Hospital Policies

May 11, 2016

The American College of Surgeons (ACS) recently released *Statements on Principles on the responsibility of the primary surgeon during surgery*. Several news reports have raised questions about the primary surgeon's liability. Public safety officials are most concerned about the primary surgeon's liability. Public safety officials are most concerned about the primary surgeon's liability.

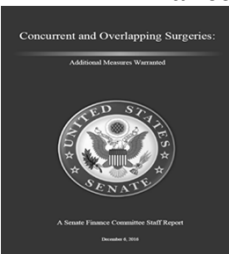
What You Can Do

The goal of hospitals and physicians is safe, high-quality and efficient patient care. In response to new technology, increased demand for surgical expertise, emerging surgical techniques, and the growth and aging of the population, U.S. hospitals have

- On April 12, 2016, the ACS revised their Statement on Principles, which addresses the inter-operative responsibility of surgeons
- The ACS Principles are similar, but not identical to, the Medicare billing rules
- ACS Principles emphasize patient informed consent and communication
- In light of the updated ACS Statements on Principles, the AHA has **urged hospitals to review their policies and procedures**

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December 2016 Senate Finance Committee Report



Concurrent and Overlapping Surgeries: Additional Members Warned

A Senate Finance Committee Staff Report


December 6, 2016

The Senate Finance Committee released a report on concurrent and overlapping surgeries on December 6, 2016, highlighting areas of **Congressional concern**, including:

- Hospital policies, or lack thereof
- Hospital policy training and enforcement
- Practice of "concurrent" surgeries where key/critical portions of two procedures overlap
- Patient safety
- Patient informed consent
- Improper payments and billing concerns
- Lack of Medicare payment regulations in non-teaching context
- Lack of government enforcement

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December 2016 Senate Finance Committee Report



Concurrent and Overlapping Surgeries: Additional Members Warned

A Senate Finance Committee Staff Report

December 6, 2016

Senate Finance Committee staff recommendations regarding improper payments:

- The HHS OIG should review the controls in place to ensure that hospitals and physicians are ***appropriately billing for physician services provided by teaching physicians***
- CMS should review the agency's billing requirements for services performed by teaching physicians to determine if those ***requirements should be established for other surgical facilities and scenarios***

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Patient Safety Data

- Recent research regarding overlapping surgeries supports safety of practices
 - *Outcomes of Concurrent Operations: Results from the American College of Surgeons' National Surgical Quality Improvement Program:* Concurrent operations at ACS NSQIP hospitals were not associated with increased risk for poor outcomes when compared to non-concurrent operations. (Annals of Surgery, submitted 2017)
 - *Safety of Overlapping Surgery at a High-volume Referral Center:* Findings from administrative and clinical registries support the safety of overlapping surgical procedures at this center (Annals of Surgery)

Enforcement Developments

Recent and Significant Qui Tam Enforcement Activity

- January 2017: Vanderbilt close to finalizing settlement to resolve False Claims Act suit brought by **three physicians** who allege the University's medical center billed Medicare as if physicians were present for the key/critical portions of procedures when only residents were present
- August 2016: A *qui tam* lawsuit **filed by a former medical resident** filed against an Advocate Health Care teaching hospital is unsealed
 - Allegations include that surgeons improperly used (and billed for) assistants at surgery (including PAs) when qualified residents were available to assist

Recent and Significant Qui Tam Enforcement Activity

- July 27, 2016: DOJ announces a **\$2.5 million** settlement with the University of Pittsburgh Medical Center and related organizations to resolve False Claims Act allegations in connection with a *qui tam* lawsuit
 - Complaint alleged neurosurgeons submitted claims for surgical procedures performed by other surgeons or practitioners, *when the neurosurgeons did not participate in the surgeries to the degree necessary to bill for the claims*
 - One of the whistleblowers was a neurosurgeon
- January 2014: **Individual surgeons** settled with whistleblowers (one whistleblower was an orthopedic surgeon) in a case against Rush University Medical Center
 - Allegations include that surgeons improperly billed for overlapping surgeries that did not meet Medicare rules

Practical Strategies for Providers

Potential Provider Efforts: General Considerations

- Increased focus on teaching surgeries and overlapping procedures has raised tough questions
- Important to make sure right stakeholders are at the table
- Requires individualized analysis specific to each institution
 - Teaching institutions vs. non-teaching institutions
 - Consider employed versus non-employed physicians
 - Certain rules contain discretion and ambiguity
 - Continuum of approaches and risk
 - Certain institutions elect to enact rules that are more restrictive than the regulations

Potential Provider Efforts: Retrospective Considerations

Retrospective Efforts

- Potential retrospective claims/billing review
 - Consider 60 Day Overpayment Rule implications
- Diligence regarding historical practices and understanding of the rules
 - May require interviews, OR suite observation, etc.
 - Review policies regarding teaching and/or overlapping surgeries

Potential Provider Efforts: Prospective Considerations

Prospective Efforts

- Revise teaching surgery and/or overlapping surgery policies
- Refine training and education
- Refine documentation: consider paper order sets and electronic health systems refinements
- Develop prospective claims/billing audit plan
- Review and update patient informed consent processes and forms
- Review of patient safety considerations
- Prepare for media and patient questions
- Prepare for increased government enforcement, audits, etc.
- Continue to follow industry developments and research regarding overlapping surgeries

Questions & Discussion



Contact Information

Alana Sullivan
Chief Compliance Officer
Erlanger Health System
975 East Third Street
Chattanooga, TN 37403
(423) 778-6068
alana.sullivan@erlanger.org

Sara Kay Wheeler
Partner
King & Spalding
1180 Peachtree Street NE
Atlanta, GA
(404) 572-4685
skwheeler@kslaw.com
