Researching Medicare and Medicaid Issues: Sources and Techniques

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Goals for Today
2. Understand What Resources are Available.
3. Using the Resources and Technologies.
4. Running a Structured Research Project.
5. Tips for Success and Avoiding Traps.

Context: Why Are We Researching This Issue?
- How Medicare/Medicaid Research Issues Arise:
  - Internal Compliance Questions.
  - Government Investigations.
  - Reimbursement Dispute (appeal, arbitration, litigation).
  - Commercial Litigation Issues (proving damages, explaining the "why" that motivated parties).
  - Corporate Transactions.
  - Help the Client Sort Out Rules to Do their Jobs.
  - Reimbursement Planning.
Context: Why Are We Researching This Issue?

- The reason for what you are doing is important.
- Not every question requires same level of rigor – be clear about purpose before you start.
  
> "It was a good answer - not a complete analysis, not a hard question - but the point is, I did it." (Hart, from The Paper Chase, 1973)
- Sometimes all you need (or can afford) is a quick answer (e.g., what does Reg say? What does NCD/LCD say?)
- Ask the Partner or Client whether they are seeking a comprehensive structured research project. If not, make it very clear what scope of work you are undertaking.
- *But be sure you can explain what you did and why.*

Understanding What Resources are Available

- Reimbursement resources have changed dramatically over the past 10 years.
  - Commercial sources changing.
  - Far more publicly-available primary source material (which used to be only on commercial services).
  - Better on-line searching.

The Medicare Program Primary Source Information

- "Information age" tendency to cut corners using on-line resources and rely on secondary sources.
- Similar tendency to see on-line analysis that looks "just right."
- Don’t Do it! Not just plagiarism – it’s often wrong!
- Think law school, not college, and use PRIMARY SOURCES!
- Do not even assume that cites are correct or current.
The Medicare Program Primary Source Information (cont.)

- Statutes:
  - 42 USC §§1301 – 1320d-8, 1395 – 1395hh.
  - Title XVIII of the Social Security Act (SSA).
- Legislative History including Congressional Record, Committee Reports and Conference Reports.
- CMS Resources:
  - Regulations – 42 CFR.
  - Federal Register Commentary.

The Medicare Program Primary Source Information (cont.)

- CMS Manuals:
  - Paper Based Manuals – continuing utility.
    - Provider Reimbursement Manual
    - State Medicaid Manual
    - Historic References
  - Internet Only Manuals - more on these later.
  - Communication Vehicles:
    - Program Transmittals
    - Manual Instruction Updates
    - One-Time Notifications (CMS Pub. 100-20)
    - Recurring Update Notifications (CMS Pub. 100-21)

The Medicare Program Primary Source Information (cont.)

- CMS Forms and Instructions.
- Different purposes, e.g.:
  - CMS Form(s) 855
  - CMS Form 1500 & 1450 (UB 04)
  - CMS Form 2567
  - CMS Form 2552 and 339
- Forms are more important than many realize:
  - Certifications
  - What information is actually required
  - Instructions matter!
- Use the official list when possible:
The Medicare Program Primary Source Information (cont.)

- Medicare Coverage Database:
  - National Coverage Determination Process
  - Local Coverage Determinations
  - Local policy articles
  - National coverage analyses, coding analyses for labs, Medicare coverage guidance documents
- CMS Issuances:
  - CMS Coding Guidance
  - MLN Matters (formerly MedLearn)
  - www.cms.hhs.gov Summaries & Overviews
  - FAQs – often narrow; can be right on point
    - The search field for FAQs works.

The Medicare Program Primary Source Information (cont.)

- OIG Issuances:
  - Regulations
  - Fraud Alerts
  - Compliance Guidance
  - Advisory Opinions
  - Audit Reports
  - Settlement and CIA Agreements
  - OIG Work Plan
- Remember the OIG is not CMS.

The Medicare Program Primary Source Information (cont.)

- Federal Court Case Law (sometimes state courts too)
- Administrative Decisions
  - PRRB/Administrator
  - ALJ/DAB/Medicare Appeals Council Decisions
  - Medicare Geographic Classification Review Board
- Carrier/Intermediary/MAC Issuances
  - LCDs, LMRPs
  - Provider Bulletins
  - Manuals, “Billing Guides,” Fact Sheets
The Medicare Program Primary Source Information (cont.)

- Coding Guides:
  - International Disease Classification (ICD)-9-CM Reference Book for Hospitals and Physicians
  - AMA CPT Assistant
  - AHA Coding Clinic, UB-92 Code Editor and CD-Rom,
- Accreditation Organization Manuals (i.e., TJC)

Researching Specific Medicare Related Issues

- Other State and other Federal materials you might not think of:
  - Individual licensure regs – MD, NP, CNS, DPM, PA, etc.
    - May contain fraud and abuse, billing, scope of practice, supervision, and corporate practice limitations.
  - Facility licensure – hospitals, SNFs, residential care, ASCs, etc.
  - Federal and state drug control laws – Federal laws are administered by Drug Enforcement Administration.
  - Insurance and managed care.
  - State health planning/Certificate of Need laws.
    - CoN approvals may contain reimbursement, charity care, or other restrictions.

Medicare Program Secondary Source Materials

- AHLA Materials:
  - AHLA’s Health Law Archive
    - All Program Papers – 1993-2007
    - All Health Lawyers Weekly articles – 2001-present
    - All Health Law Digest articles – 1995-present
    - All Life Sciences and Health Law Daily briefings – 2007-present
    - All Practice Group newsletters, member briefings, toolkits and teleconference recordings – 2007-present
    - All Health Lawyers News – 1997-present
    - AHLA publications – Federal Healthcare Laws & Regulations and Medicare Law
    - AHLA Health Law Documents and AHLA Web Links
    - Discussion List postings
Medicare Program Secondary Source Materials (cont.)

- Other professional associations
  - Healthcare Financial Management Association (HFMA)
  - Health Care Compliance Association (HCCA)
  - American Hospital Association
  - American Medical Association
- Trade publications, e.g.:
  - Medical Economics
  - Modern Healthcare
  - Bureau of National Affairs
  - Report on Medicare Compliance
  - The Boston Health Law Reporter

Medicare Program – Background Information and Source Materials

- Commerce Clearing House (CCH) Medicare and Medicaid Guide
- MediRegs – Regulation and Reimbursement Suite
- Your organization may subscribe to these services. There are also helpful CCH apps for iPhone and iPad which we get for free
- Medicare Part B Desk Reference for Physicians, CPT Expert (Ingenix)

The Medicaid Program – Primary Source Materials

- Statutes –
  - 42 USC §§ 1396a to 1396v, 1301-1320(d)(8).
  - Title XIX of the Social Security Act (SSA).
  - State Statutes.
  - State Statutes generally include Medicaid Fraud Statutes.
- Legislative History including Congressional Records, Committee Reports and Conference Reports.
  - Many states do not report legislative history.
  - Governor’s signing statements.
The Medicaid Program – Primary Source Materials (cont.)

- Regulations –
  - 42 C.F.R. Parts 430 to 457, 483, 491, 493, 498 and 1000-1008.
  - State Regulations:
    - Many state regs are not on-line.
    - Need to secure paper copies from agencies and retain date of receipt.
    - State regs sometimes expire – don’t assume the old regs are not used as “guidance.”

- State Medicaid Plans.
- Manuals – Federal/State.

The Medicaid Program – Primary Source Materials (cont.)

- Informal issuances
- Forms and instructions
- Case law
- Carrier issuances

The Medicaid Program – Secondary Source Materials

- Much less available.
- Similar to the Medicare secondary sources:
  - AHLA Program Materials
  - BNA Publications
  - CCH
  - Westlaw/Lexis/Lois law Databases
The Medicare Program – Issues Related to Internet Only Manuals

- The key source of “subregulatory guidance.”
- You must become the master of them or they will become your master!
- Orientation to the Manuals:
  - Manual Organization –
    - Provider-type v. “functional areas” (program integrity, eligibility, entitlement and claims processing).
    - Paper v. internet only.
    - Consider the perspective of the entity at which the manual is directed.
  - CMS Crosswalks – unfortunately go from new to old, so much again, use multiple free text searches.

Search Engines in CMS Manuals (cont.)

- Limited utility, must not rely on it.
- Core search engine on www.cms.hhs.gov more useful.
- Secondary sources (CCH, MediRegs) better search engines, not always current or complete.
- To find information in the Manuals, need to KNOW WHAT YOU ARE LOOKING FOR!
- Use the “find” tool to do a dumb search for text within a manual.
  “There is nothing like looking, if you want to find something ... You certainly usually find something, if you look, but it is not always quite the something you were after.” (Thorin, in J.R.R. Tolkien’s The Hobbit, 1937)

Most commonly used manuals for reimbursement questions include:

  - Much of what was in old Carriers and Intermediaries manuals.
  - Subdivided by different topics (some provider-specific, others general).
  - Considerable overlap with MCPM.
The Medicare Program – Issues Related to Internet Only Manuals (cont.)

- Medicare National Coverage Determinations Manual (NCD), CMS Pub. 100-03.
- Medicare Program Integrity Manual (PIM), CMS Pub. 100-08.

How to use the Manuals:
- Multiple manuals will address the same topic (Goal was to reduce “redundancies”).
- Must review each of them – cannot rely on one manual anymore.
- For example – purchased diagnostic test (“anti-markup”) rule:
  - MCPM Ch. 1 (General Billing Instructions) §§ 10.1.1.2, 30.2.1, 30.2.9 and 30.3.7
  - MCPM Ch. 13 (Radiological Services), §20.2.4.2
  - Not in Ch. 12 (Physicians/Nonphysician Practitioners) despite references in Ch. 1 to look there!

How to use the Manuals:
- Start with the Manual and topic you believe will contain that subject matter.
- Use the “Find” feature to scan for text.
- Then back out to www.cms.hhs.gov and search in CMS search tool (scan for manual sections you missed) – use find tool again.
- Finally, use commercial search engine (MediRegs, CCH, etc.) to check your work.
- Until CMS IOM search engine starts working, use this method.
Running a Structured Research Project

- What is a structured research project?
  - Organized, systematic review of primary and secondary source literature to identify relevant authorities and guidance.
  - Organized – you know what you are going to search.
  - Systematic – you have a plan for the research, and you stick to it.
    - Sticking to it is hard – “mucking around” is fun.

  “Yet knowing how way leads on to way, I doubted if I should ever come back….”
  (R. Frost, “The Road Not Taken”)

Build yourself a research tool or plan (see model in the Toolkit).

Describe what you are going to do.

Then show what you did.

This document is also helpful for explaining to partner or client what you did:
  - Particularly if you have to say there is “no answer.”

  “A Jedi must have the deepest commitment… the most serious mind.” (Yoda, “The Empire Strikes Back” 1980)

Researching Specific Medicare Related Issues

- How to get started:
  - Job 1. Understand the Question
    - What is really being asked?
  - Job 2. Understand the Facts
    - Develop all the facts before you start researching.
    - Ask all the questions you need about the what the provider/supplier bills, what is paid, history.
    - Learn any specific issues that might be relevant.
  - Job 3. Build the Research Plan
Researching Specific Medicare Related Issues (cont.)

- Research Hypo: Hospital client received a letter from the OIG stating that it filed improper claims for PA service and must repay $700,000.
- Don't jump too quickly into the research you think is right – learn the facts first.

"Facts are stubborn things"
(John Adams, "Argument in Defense of the Soldiers in the Boston Massacre Trials," 1770)

Facts to be developed to complete Jobs 1 and 2:
- What claims does OIG say were overpaid?
- Do these claims reflect actual billings?
- Who billed for the PA service? (PA? MD? Group? Hospital?)
- Under what benefit (i.e., independent, incident to, shared/split, as a hospital outpatient service, not billed separately, etc.)?
- Who was paid? And on what basis?
- Get copies of CMS 1500s, remittances, etc.
- Any communications with Carrier? Newsletters from Carrier?

Build the Research Plan:
- AHLA Health Law Archive, recent OIG audits regarding similar investigations.
  - Jump-start on issue.
  - Will not take place of full-scope research.
  - Will inform research plan.
- Specific coverage, participation and billing issues to determine the scope of the research (i.e., PA service, professional services in hospitals).
- Medicare statutes and regulations regarding the payment issue in question.
Researhing Specific Medicare Related Issues  
(cont.)

- Research Plan Inclusions:
  - Medicare regulations regarding PA billing as independent or incident to.
  - SSA Title XVIII re billing status.
  - Medicare manuals regarding PA services within providers.
    - CPM (CMS Pub. 100-4).
    - MBPM (CMS Pub. 100-02).
    - PIM (CMS Pub. 100-8).
    - Old Carriers Manual (CMS Pub. 14) and Intermediary Manual (CMS Pub. 13) to check consistency with Program Integrity and Claims Processing Manuals.

- Future Updates to Internet-Only Manuals.
- CMS transmittals and issuances regarding repayments.
  - Get on the CMS list serve for updates and notifications.
- Re: OIG Authority:
  - OIG related statutes, regulations and guidance on repayments, including OIG issuances on the specific overpayment issues. Often repayment issues may involve a fraud and abuse component to consider.

Tips for Using CCH

Use CCH for:
- Federal material.
- Annotations as a start.
- A lead on state and contractor (FI/carrier/MAC) material.
- Latest cases and documents.

Don't use CCH as:
- Only source for state or contractor material (e.g. LCDs).
- Only source for Federal case law – or to "Shepherdize" or "KeyCite"
Tips for Using CCH (cont.)
- If you are doing Medicare work regularly, you should try to check this every day:
  - Cases
  - Regs
  - OIG materials
  - Letters
  - Sub regulatory guidelines

Tips for Using CCH (cont.)
1. Search Tools
   - Click “Boolean Connectors” unless you want something different.
2. Example: Try “incident to” and “Nurse Practitioners.”
   - Too many hits?
   - You can scroll through to see where they are from or
   - Back off from select all, try just explanations and annotations.
   - See a few cases and 2 annotations.
   - Use links in the annotations to navigate.
   - Try Laws & Regulations.
   - Bingo!

Researching Specific Health Law Issues
- Research Plan Inclusions – Research Tips
  - Distinguish between CMS guidance given to providers vs. instructions to carriers/FIs/MACs.
Researching Specific Health Law Issues (cont.)

- Research Plan Inclusions – Research Tips (cont.)
  - Repayment questions
    - Involve more judgment calls because CMS guidance does not always address the specific repayment issues.
    - Contacting the Carrier/FIMAC can confirm your research – but getting wrong answer can be worse than no answer.
    - Whether a provider has a CIA in place can affect repayment decisions, particularly process and format.

Researching Tips

- Understanding the Issue:
  - Ask questions and then more questions.
    - Issues are often more complex than they first appear.
    - Understanding scope of issue before starting to research lessons need to do further research later.
    - Do you start with the “null hypothesis”? Or do you go in knowing what you think the answer is? Can be dangerous.
    - After thinking about the policy reasons, try to come up with possible answers before starting to research.

  “The message I stress: ... study your lessons
Don’t settle for less, even the genius asks questions.”
(Tupac, Me Against the World 1995)

Researching Tips (cont.)

- Recognizing the Importance of Background Research.
  - Provides a frame of reference before starting the research to answer the question.
  - Don’t study roots without looking at, at least, the tree.
  - Is necessary in understanding the scope of the question.
  - After researching an area several times, makes background research less extensive and mainly involves checking on recent developments.
Researching Tips (cont.)

– Tip for Research in Medicare Regulation:

**Key Practical Tip:** Always check the Electronic Code of Federal Regulations – (E-CFR)
  - Updated almost daily.
  - The two-column printed format looks better, but can be out of date. Updated on October 1.
  - You only need to get burned once to learn this tip!

Researching Tips (cont.)

- Understanding How Items or Services are Billed to the Programs.
  - There are different coverage and payment rules depending on the provider/supplier of services.
    - E.g., “incident to” means very different things in physician office vs. outpatient hospital department.
  - Understanding how and where the items or services are furnished can eliminate unnecessary research.

Researching Tips (cont.)

- Knowing What Sources Need to be Reviewed.
  - Understand CMS Manuals.
    **Key Practical Tip:** If you print from a CMS Manual, handwritten the Manual name, chapter, and date of printing.

    If you print from a commercial service, e.g., CCH or MediRegs, using the “File” and “Print” functions, the printout will reference the Manual name, the chapter, the section and other descriptive information.
Researching Tips (cont.)

- Knowing What Sources Need to be Reviewed (cont.)
  - Review index tables.

  **Key Practical Tip:** Reviewing the entire Manual or regulatory chapter can often prevent erroneous research results or can clarify a relevant section.

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Researching Tips (cont.)

**Key Practical Tip:** If you know a reg is recent, use CCH and click on “Federal Register Issuances” for reverse chronological listing of issuances sorted by “Adopted,” “Proposed” and “Notices.”

**Key Practical Tip:** To make sure you have not missed any Federal Registers or clarifications or correction notices, use “What’s New” link under “Quarterly Provider Updates” link on the CMS Manuals page: [http://www.cms.hhs.gov/QuarterlyProviderUpdates/03_What'sNew.asp](http://www.cms.hhs.gov/QuarterlyProviderUpdates/03_What'sNew.asp).

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Researching Tips (cont.)

- Use search tools:
  - Get to know the limitations of the different sources.
  - Always search on more than one source.

  **Key Practical Tip:** Searching state regulations on commercial services (CCH, LoisLaw, MediRegs etc.) saves time because all the regulations are in one place.

  **BUT THEY CAN BE OUT OF DATE OR INCOMPLETE – SO NEVER END THERE!**
Researching Tips (cont.)

Tips for Using Federal Register Preambles.

Key Practical Tips:
– Do key word search using the “Find” mechanism to identify the preamble section.
– Find key information including contacts at CMS Baltimore, background info like statutory and regulatory history.
– Table of Contents overview of topics discussed and assists in locating the topics in your search.
– Many final payment rules include helpful List of Acronyms.

Researching Tips (cont.)

Searching for the Missing Piece.
– Stick to your plan.
  • Most difficult project is finding a rule that doesn’t exist.
  • Go through research plan and check each type of information identified on the plan.
– Know when to stop.
  • After reviewing materials from research plan, any additional materials?
  • After reviewing any additional materials and index tables, stop researching.
  •Sometimes there is no needle in the haystack!

Researching Tips (cont.)

Interpreting the Research.
– Deal with conflicting information.
  • Research results can be conflicting.
  • Be aware from a legal standpoint what implications are of conflicts between regulations and manuals.
– Talk and think it through.
  • Review your research with someone else.
  • Write out the conflict so it is understood.
  • Which reading is more consistent with statutory scheme, policy, common sense?
  • Contact a regulator to discuss the conflict.
Reseaching Tips (cont.)

- Confirming Research with Regulators.
  - Know which agency to contact.
    - Past experience and recommendations.
    - CMS and other agency contact lists.
  - Find the right person to answer the question.
    - Official agency contact in Fed Reg.
  - Obtain confirmation of the answer.
  - Know when to rely on regulator-provided information.
    - Sometimes you get the answer you want, but you know it can’t be right.

Questions?

- This is hard, complicated and arcane.

- Ask questions!

I can't keep up with what’s been going on,
I think my heart must just be slowing down,
Among the human beings in their designer jeans,
Am I the only one who hears the screams
And the strangled cries of . . . lawyers in love.

(Jackson Browne, Lawyers in Love, 1983)

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