

# Radiology Administrator's Compliance & Reimbursement Insider

JANUARY 2001

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## Get Comprehensive Clinical Documentation in Patient Charts

Ensuring thorough documentation in a patient's chart is one of the most difficult problems facing medical practices. Everything, from the quality of patient care to the way a service is reimbursed to the likelihood of success defending against lawsuits, may depend on the quality of the documentation in patient charts. It's a particular challenge in radiology practices, where several professionals may be making notes in a patient's chart, and the radiologist may never even see the patient. This puts a special burden on the compliance officer or practice manager, or whoever is responsible for ensuring the accuracy and completeness of patient charts in your practice.

The best way to guard against problems related to poor documentation is to include training and monitoring procedures in your practice's compliance program, says New York health care attorney Matthew Kupferberg. Make sure that your compliance officer offers appropriate training to all the professionals in your practice who make entries in a patient's chart—including radiologists and technologists—so that they know what's expected of them. Also make sure that the compliance officer periodically monitors the charts to ensure that they're meeting the requirements. Even if your practice doesn't have a formal compliance program, you must make an effort to provide comprehensive documentation in your patient charts.

Here's a look at why comprehensive documentation in your charts is so important and a checklist of eight steps to use as a basis for training and monitoring so that your documentation covers all the bases.

### Three Good Reasons to Insist on Comprehensive Documentation

Thorough documentation takes time, and that's something most radiologists and techs think they can't spare. Here are three good reasons why it's important that they give you comprehensive documentation of every patient encounter:

**1) Avoid problems with payors.** Payors take the position that if something isn't documented, it wasn't done, says Pennsylvania health care attorney Adrian Scipione. So if your patient charts don't support your claims, payors could demand repayment.

Plus the OIG's small physician practice compliance program guidance mentions medical necessity as one of the common "risk areas" in physician practices. Thorough documentation is the only way to prove that a service was medically necessary, Scipione says. If Medicare is paying and your documentation doesn't support the medical necessity of the services you bill for, you could be excluded from participating in the

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**GET COMPREHENSIVE CLINICAL DOCUMENTATION** (continued from p. 1)

Medicare program—or worse, charged with health care fraud. Although no one is likely to wind up in jail, your practice might have to work under a corporate integrity agreement and/or repay huge “estimated” overpayments. Thorough documentation can prevent all these consequences, he says.

**2) Protection in malpractice cases.** Comprehensive documentation is the best weapon you can have to fight a malpractice suit, Kupferberg reports. Thorough, accurate documentation that shows what a radiologist did and why, and why the radiologist didn't do something else, is tough to argue with. Even if the radiologist's diagnosis was wrong in hindsight—say, she missed a fracture—your practice may not be found guilty of malpractice if the diagnosis was reasonable at the time and the documentation shows the radiologist was thorough, Kupferberg notes. But you could be hit with a big malpractice award, even if the radiologist did everything right and came up with the correct diagnosis, if the patient has a bad outcome and the radiologist's documentation is inadequate.

**3) Improves quality of care.** Good documentation fosters good medicine. Ideally, a patient's chart should permit any other provider to step in and know the patient's complete history, signs and symptoms, diagnosis, treatments you rendered (if any), and progress to date, says Scipione. If the documentation in your charts doesn't allow another physician to pick up where you left off, it's not good enough.

**Eight Steps to Better Documentation**

Thorough documentation requires effort and attention, but it doesn't have to be unduly time-consuming, says Kupferberg. If everyone who makes notes in a patient's chart gets in the habit of always noting the appropriate information, the quality of your charts will improve, and documentation won't seem like such a burden. Here's what your radiologists, techs, and other professionals must know:

**1) Record the patient's chief complaint.** Your practice's professionals should always answer these simple questions: Why did the patient come in? What are her symptoms? How long has she been suffering these symptoms?

**2) Record the relevant history and prior diagnostic test results.** Any relevant history, including health risk factors, and the results of any prior diagnostic tests, should always be entered on the patient's chart. Although the office staff or nurse may take the patient's history, you want all your radiologists to understand the importance of noting the relevant aspects of the history in the patient's chart at each encounter. Or radiologists can mention the relevant aspects in their interpretation report, which should also be in the chart, says Kupferberg.

“If the radiologist notes relevant history in the chart, it shows that he was aware of and considered the history in making his diagnosis,” Kupferberg remarks. And noting relevant history each time will help reinforce the habit of checking the patient's history at every encounter—a fundamental, but sometimes neglected, practice, Kupferberg says.

Also, noting prior test results in the chart shows that these results are being included in the assessment of the patient's condition and haven't

been overlooked. Malpractice attorneys love to imply that the key to the patient's condition or treatment was right in front of the physician and the physician missed it. So noting prior results in the chart helps show that nothing was missed, Kupferberg explains.

❑ **Record positive and negative physical exam findings.** Negative findings can be just as important as positive findings when making a diagnosis, Scipione notes. But many radiologists and techs don't bother to note negative findings, or note them in only general terms (for example, "all other systems normal or w/i normal limits"). This is a poor practice, because it doesn't adequately show what was considered and ruled out, he explains.

❑ **Record clinical impression or diagnosis.** It's important that the chart reflect the radiologist's thoughts at the time of the visit, so all radiologists should be sure to record their clinical impression and diagnosis, including differential diagnoses, says Scipione. Getting in the habit of always recording the diagnosis will help your coders, too. It will save the time and trouble of getting the charts back for diagnosis coding, Kupferberg points out.

And techs must be sure to note any possibly relevant findings that they observe while performing a test, Scipione notes. A tech's notes frequently provide clues to what's going on with the patient—but the radiologist must read them and show that she's considered them when making her diagnosis. So, the radiologist should always at least initial and date the tech's notes, Kupferberg says.

❑ **Record plan for care.** This is another frequently overlooked step, says Kupferberg, but one that can really save time and trouble in the long run. If you're an interventional or radiation oncology

practice, your radiologists should document their plan for medication, consults, surgical procedures, diagnostic tests, and follow-up care. They should also clearly document their rationale for any additional tests or consults.

If the practice is ever sued, this will show that the radiologist thought through the patient's condition and came up with a plan. And if the patient didn't follow the radiologist's advice and has a bad outcome, this step may help prove that the patient was noncompliant or unresponsive. It will also help your coders and your office staff know when to track down test results or schedule follow-up appointments. It will help patients if they ever have to see another radiologist because theirs isn't available. Best of all, it will help the radiologist, because every time the patient returns he can review the chart and easily see exactly what the plan and impression was as treatment progressed.

❑ **Document promptly.** It's important to completely document each encounter in the patient's chart either during the encounter or as soon as possible afterward, says Kupferberg. The reasons are obvious—important details will be fresh in the radiologist's or tech's mind, and the chart will have more credibility if completed while the radiologist or tech was seeing the patient or as soon thereafter as possible, he stresses.

❑ **Make sure documentation is legible.** Notes in charts must be logical and legible, and that's often a problem. Physicians—radiologist included—always feel they're pressed for time, and they sometimes try to save time by cutting corners on documentation. Maybe they take only skeletal notes and try to fill the chart in later, or they rely on a nurse to do the documentation and they

sign off on it. And some physicians just have poor handwriting, so even if their documentation is thorough, no one can read it.

"Modern technology means there's really no excuse for poor documentation anymore," says Kupferberg. Take advantage of it to make documentation easier to do (and read). Hand-held computers, voice-activated recorders, and other inexpensive technology can save tremendous aggravation, perhaps prevent a costly malpractice award, and help ensure that your coders and billers submit appropriate claims for the services your practice provides. It's silly not to take advantage of these tools, Kupferberg says.

❑ **Always date addenda and corrections accurately.** Everyone who makes chart entries must understand that they must date any addenda or corrections accurately, *not* predate them to the time of the encounter. And errors should be lined through, never whited out, and the correction initialed by the writer and dated accurately. Everyone should be warned never to alter a record without clearly marking the change, our experts emphasize. And they should never obliterate the original entry. Altering records in a way that hides what was originally written may make malpractice cases almost impossible to defend, lead to charges of insurance fraud, and violate the medical licensing standards of your state. And it's a criminal offense in some states. ■

#### Insider Sources

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## I N T H E N E W S

## HCFA Delays Provider-Based Rules

As you may have already heard, HCFA has decided to delay implementation of its new provider-based rules. The rules now will go into effect for hospital cost reporting periods beginning on or after Jan. 10, 2001. So, for example, if your hospital's cost reporting period begins on April 1, 2001, the new rules apply to your hospital beginning on April 1, 2001.

HCFA announced the delay in a notice posted on its Web site on Oct. 3, 2000. The provider-based rules had been scheduled to go into effect on Oct. 10, 2000, but carriers are still unable to process and approve applications for provider-based status because HCFA hasn't yet established an application system. This caused HCFA to announce the delay.

The delay is a break for hospitals and hospital-based practices with off-site facilities. Many of them had been trying to figure out how to get provider-based status with no application system in place. The delay gives HCFA some extra time to

develop an application system and teach the carriers what to look for when deciding whether to approve an application. In its notice, HCFA indicates that before it can enforce the new rules, it must "clarify a number of administrative, procedural and technical issues and provide our regional offices...and hospitals with further training and guidance."

The provider-based rules are one of the most controversial sections of the new hospital outpatient prospective payment system (OPPS). The new rules require a facility located apart from the main hospital to get a HCFA designation as "provider-based" so that the hospital can include the facility on its cost report and the facility can get OPPS reimbursement. HCFA said it would demand repayment from any facility that a hospital claimed on its cost report if the facility didn't have the provider-based designation.

But when HCFA published the rules on April 7, 2000, it didn't

establish an application process. As a result, many hospitals and facilities were concerned that the uncertainty about their status would lead to demands for repayment. They sent many inquiries to HCFA about how to apply for provider-based status, and it eventually became clear that HCFA wasn't ready to implement the new system.

HCFA is developing an application form that it will send to carriers as soon as possible. Until then, providers can apply for provider-based status by writing a letter requesting the status to their HCFA regional office and submitting any supporting materials the regional office requests.

**Insider Says:** HCFA has posted a series of "frequently asked questions" about the provider-based rules on its Web site. You can find it at <[www.hcfa.gov/medlearn/provqa.htm](http://www.hcfa.gov/medlearn/provqa.htm)>.

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## HCFA Adopts Changes in Radiation Oncology Reimbursement

HCFA recently made changes to the hospital Outpatient Prospective Payment System (OPPS) that may make reimbursement simpler for radiation oncology practices. The changes include new codes for Intensity Modulated Radiation Therapy (IMRT), a radiation oncology procedure that previously had no codes. HCFA also approved a code for high-dose rate brachytherapy and a new technology code for an intravascular brachytherapy product and gave additional codes to a number of brachytherapy needles and seeds. And HCFA updated the conversion factor it uses to calculate

total reimbursement, which should result in a small payment increase—of about 2.25 percent—for the technical component of radiation oncology services delivered in a hospital outpatient setting. The changes were part of HCFA's *annual OPPS update* and are in effect as of Jan. 1, 2001.

### Temporary Code for IMRT

HCFA approved two temporary codes for IMRT, one for the planning and one for the delivery. These codes are assigned to APC 0302, Level III Radiation Therapy. They have a pay-

ment rate of \$407.18. These codes will be in effect for two to three years while HCFA collects better cost data, which it will use to make a permanent assignment to an APC group.

According to Wendy Smith Fuss of the American Society for Therapeutic Radiology and Oncology, these new codes should considerably simplify billing IMRT. Many practices were billing claims for IMRT using existing codes that described similar, but not identical, procedures (or using unlisted procedure codes). The codes for IMRT will increase

the accuracy of claims and alleviate the need to find a similar code or forgo reimbursement, she says.

The new codes are:

- G0174. IMRT delivery to one or more treatment areas, multiple couch angles/fields/arc, custom collimated pencil beams with treatment set-up and verification images, complete course of therapy requiring more than one session, per session.
- G0178. IMRT plan, including dose volume histograms for target and critical structure partial tolerances, inverse plan optimization performed for highly conformal distributions, plan positional accuracy and dose verification, per course of treatment.

### New Brachytherapy Codes

HCFA approved one *product-specific* high-dose rate brachytherapy code. Other manufacturers have submitted applications for their products, but haven't been assigned a code yet. Reimbursement is handled as a transitional pass-through. Although pass-through payment for radiopharmaceuticals or drugs is based on the average wholesale price, for

brachytherapy devices (seeds and needles), HCFA will calculate the reimbursement to the hospital based on the hospital's charge-to-cost ratio. So the hospital will need to submit its cost for the brachytherapy seeds when submitting a claim. The new code is:

- C1790. Brachytherapy Seed, Nucletron Iridium 192 HDR.

HCFA also approved one intravascular brachytherapy product as a new technology. It was assigned to APC group 0981 and its payment rate will be \$2,301.26. This new code is:

- C9702. Checkmate Intravascular Brachytherapy System.

And HCFA approved a number of new codes for brachytherapy seeds and brachytherapy needles. These codes are effective as of Jan. 1, 2001, and are in addition to other, previously published codes for brachytherapy devices. They are:

- C1706. Needle, Brachytherapy, Indigo Prostate Seeding Needle;
- C1707. Needle, Brachytherapy, VariSource Interstitial Implant Needle;

- C1708. Needle, Brachytherapy, UroMed Prostate Seeding Needle;
- C1709. Needle, Brachytherapy, Remington Medical Brachytherapy Needle;
- C1710. Needle, Brachytherapy, US Biopsy Prostate Seeding Needle;
- C1792. Brachytherapy Seed, UroMed Symmetra I-125;
- C1793. Brachytherapy Seed, Bard InterSource-103 Palladium Seed 1031C;
- C1794. Brachytherapy Seed, Bard IsoSeed-103 Palladium Seed Pd3S111L, Pd3S111P;
- C1795. Brachytherapy Seed, Bard BrachySource-125 Iodine Seed 1251L, 1251C;
- C1796. Brachytherapy Seed, Source Tech Medical I-125 Seed STM 1251;
- C1797. Brachytherapy Seed, Draximage I-125 Seed Model LS-1;
- C1798. Brachytherapy Seed, Syncor I-125 Pharmaseed Model BT-125-1; and
- C1799. Brachytherapy Seed, I-Plant Iodine 125 Model 3500. ■

### Insider Source

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## ASK THE INSIDER

RACRI welcomes questions from subscribers. You can 1) send your questions to Brownstone Publishers, Inc., "Ask the Insider," 149 Fifth Ave., 16th Fl., New York, NY 10010; 2) fax them to (212) 473-8786; 3) call (212) 473-8200, ext. 257, and speak with the editor; or 4) e-mail them to [jgormley@brownstone.com](mailto:jgormley@brownstone.com)

### Can We Get in Trouble for Downcoding Claims?

**Q** Most of our patients aren't on managed care and are supposed to pay a copayment of 20 percent of our charges. Sometimes patients have trouble coming up with these copayments. If we charge less than we're entitled to (downcode), the patient's copayment would be reduced. That might lead to a big enough increase in volume that it would make up for any decrease in revenue we experienced because of the downcoding. And since Medicare or the other insurers would be paying us less than we're entitled to, there's no reason for them to object if we want to downcode, right?

**A** Wrong, says New York health care attorney Matthew Kupferberg. Any claim that intentionally misstates the service provided is fraudulent. *Period.* It

doesn't matter who's saving money, just that your practice is submitting a claim that's inaccurate. Medicare, other payors, and your patients expect you to bill accurately. You risk charges under the False Claims Act when you knowingly fail to do so.

And besides the possibility of False Claims Act charges, there are other legal pitfalls. The discount could be considered an improper inducement to provide services reimbursable under the Medicare program. That's a violation of the antikickback law. And submitting an inaccurate claim would certainly violate the Medicare Conditions of Participation, which could lead to sanctions or even exclusion from the Medicare program.

Plus, if you advertise that you provide discounted services, you could get into trouble with your state's licensing

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**ASK THE INSIDER** (continued from p. 5)

board if your state regulates physician advertising. And if you've got a provider agreement with the insurer, you're almost certainly violating it when you intentionally miscode a claim, Kupferberg says.

If you want to assist patients in financial difficulty, you can do it without committing fraud, Kupferberg emphasizes. Although *routinely* waiving copayments can get you into big trouble, occasionally waiving a copayment is permissible as long as you can document the patient's financial hardship, he says. To do this, he advises having the patient sign a form that identifies the patient, the services involved, and the amount owed, and states the following:

**Model Language**

I hereby declare that I cannot afford the copayment and/or deductible for the above described services provided to me by ABC Radiology. I hereby request a waiver of the copayment and/or deductible for these services. I declare, under penalty of perjury, that the above is true and accurate.

And you can always provide services without charge to indigent patients, Kupferberg notes.

**Supervision Requirements for Ultrasound**

**Q** We were under the impression that our radiologist didn't need to be on-site when ultrasound procedures were performed (he's always available by phone if needed). But our carrier won't reimburse unless a physician is on the premises to supervise. Our radiologist wants to fight the claims denials. Is it worthwhile?

**A** Not right now, says Virginia health care attorney Thomas W. Greeson, although it's understandable why everyone is confused. Here's the scoop:

In 1997 HCFA published supervision requirements for diagnostic tests. They required "direct" supervision for ultrasound, meaning that a physician had to be on the premises and available for in-person consultation during the ultrasound examination. But in early 1998, HCFA suspended that rule, Greeson reports, and HCFA officials made the internal decision that "general supervi-

sion" would be adequate for ultrasound and nuclear medicine diagnostic tests. (General supervision means that a physician is available by telephone and will review the patient's charts, but doesn't need to be on-site).

HCFA has never officially published this 1998 decision, although it has been widely reported. That's probably why your radiologist thinks general supervision is okay. But until HCFA officially publishes a new supervision policy in a program memorandum to Medicare carriers, physicians are subject to the requirements their carriers develop in their local medical review policies (LMRPs). And several carriers' LMRPs require direct supervision of ultrasound procedures. "The take-home message to radiologists is, you must follow your local carrier's policies until HCFA releases the long-awaited program memorandum," Greeson says.

**Seek Advice from Local Regulators When Disposing of Used Lead Aprons**

**Q** Our radiology department recently bought new lead aprons, and we don't know how to dispose of the old ones. Should they be included with our other radioactive material?

**A** Used lead aprons don't retain radioactivity, says Otha Linton, a consultant to radiologists and radiological organizations. So there's no need to dispose of them as if they were radioactive. But the lead in the aprons may be considered a hazard by your state and city regulators—there's a remote possibility that the lead could leach into the ground if the aprons are buried in a landfill not designed for hazardous waste disposal. So check with your local sanitation office or your state's department of environmental protection to see if there are any restrictions on lead apron disposal in your area, Linton advises. ■

**Insider Sources**

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## Set Employee Policy on Responding to Government Investigations

It sounds like a low-budget movie: a knock at the door late at night by a man flashing a badge. But that's not just a Hollywood cliché. If your practice becomes the target of a criminal or civil investigation, government investigators don't always contact your attorney to coordinate the investigation. Sometimes they start by questioning employees directly—in the workplace, or worse, at their homes. When surprised like this, an employee could give up important legal rights or make an inaccurate or incomplete statement. And that could land you both in hot water.

The risk now is greater than ever, as HCFA and the OIG step up their compliance enforcement efforts. To protect both the employee's and the practice's rights, experts suggest that practices enact a policy to help employees to deal appropriately with government investigators. A good policy should ask, but not require, employees to notify you of all contacts by government investigators. It should also inform employees of their legal rights. We've created a Model Policy that you can give to your attorney as a starting point in drafting your own policy (see pp. 9–10).

### Why You Need an Employee Response Policy

An employee response policy can help you prepare for the unexpected. "Practices usually don't plan for an investigation," says Cyndi M. Jewell, compliance officer of the Baylor College of Medicine. "You usually don't think about putting a policy in place until after you've been investigated." But there are four important reasons for a practice to enact an

employee response policy before it becomes a target:

#### Find out about investigation.

The government isn't required to inform you that your practice is under investigation. Sometimes the first time you learn that you're being investigated is when a government investigator approaches an employee. But if you have a policy that asks employees to inform you or your compliance office whenever they're contacted by government investigators, you'll learn about an investigation immediately—rather than long afterwards, when correcting any employee's misstatements is harder. If the policy also asks employees to meet with your compliance officer or attorney after the government interview, you can learn exactly what the government is looking into.

**Get better chance to correct employee misstatements.** A post-interview talk with an employee can also help you determine if the employee gave investigators incomplete or uninformed answers. Sometimes employees see only part of a larger picture or make mistakes or incorrect assumptions about what they've seen. If so, you want to be able to set the record straight with the investigators before the investigation goes any further.

#### Prevent government from getting documents it's not entitled to.

An employee response policy can also help you protect your practice's legal rights. Sometimes investigators will ask employees to hand over practice records. But the government isn't necessarily entitled to those records. Your policy can make sure employees know when to say no to government requests for records, and what to do when they must hand over records.

**Educate employees about their rights during questioning.** An employee response policy also helps educate your employees about their rights if a government investigator ever approaches them. Being confronted by a government investigator can be a very intimidating experience. But if employees are aware of their rights beforehand, they'll be able to deal with the situation more effectively. Your policy should also inform them of their legal obligations when dealing with investigators so they can avoid breaking the law if they decide to answer questions.

### What Your Policy Should Tell Employees

Like our Model Policy, your policy should do the following:

**1) Tell employees to check any investigator's identification.** Have employees ask to see an investigator's credentials to make sure that the person is, in fact, a government investigator. Also, have employees get the investigator's card or write down the investigator's name, title, division, address, and phone number. You'll need this information during the investigation [Policy, par. 1].

**2) Ask employees to report contacts by investigators.** Encourage employees to report an interview request to you. This is key information for your compliance and self-reporting efforts. But don't require employees to tell you about the request. "It's important that practices don't order their employees to report an interview request as a condition of employment," says health care attorney Thomas S. Crane. If you require the employee to report the contact, you not only look as though you have something to hide, but you

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**GOVERNMENT INVESTIGATIONS**

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could be charged with obstructing the investigation. Treat it like any other self-reporting situation, Crane says. If an employee wants to come forward and report the interview request, he should be encouraged to do so. You can tell employees that if they want to report the contact, they can call their supervisor (or your compliance officer).

Also, tell employees that they can have their supervisor speak with the investigator. "Being questioned by a government investigator can be a frightening experience," says Crane. "A supervisor or a compliance officer might be able to approach the situation more calmly and learn more from the investigator," he says [Policy, par. 2].

**Insider Says:** Tell your supervisors and compliance officer to ask for details if an employee reports a contact by a government investigator. They should ask the employee what agency the investigator represents and what else the investigator said or asked about.

**3) Inform employees that cooperation with an investigator is optional.** Tell employees that they aren't legally required to talk to an investigator. But make it very clear that you're not telling employees to refuse to talk to an investigator, only that it's their choice.

You also shouldn't tell employees to invoke their Fifth Amendment right against self-incrimination. If you do, you could end up facing witness tampering, obstruction of justice, or other criminal charges. It's also important for employees to realize that they're not under arrest if an investigator simply asks to speak with them—and that the investigator won't inform them of their legal rights in that situation.

But employees need to understand that if they do speak to an investigator, they must tell the truth, even though they're not under oath. An employee who gives false or misleading answers could end up facing criminal charges for obstructing the investigation. So warn employees that anything they say during an interview can be used against them in court [Policy, par. 3].

**4) Tell employees they can schedule the interview for whenever they want.** It's very important for employees to know that they can set the interview schedule and location. An investigator can't order an employee to appear at a certain time or place or to answer questions right away. Tell employees to schedule the interview for a time and location that's convenient for them [Policy, par. 4].

**5) Explain that employees have the right to have someone else present during questioning.** Tell employees that if they choose to speak to an investigator, they have the right to have someone with them during the interview, including an attorney. Employees will often want an attorney, particularly if they're concerned that they've violated the law or if they want to be sure that someone is watching out for their interests. You can advise employees that it's usually in their best interests to have an attorney present during questioning. But don't tell them they must have someone with them.

There's also the issue of whether your practice's attorney should represent employees too. Depending on the facts the investigators learn, your practice's best interests and an employee's may conflict. In that case, you don't want your attorneys representing the employee. Your policy should simply say that you will help employees get an attorney if they want one.

Also, tell employees that they can have a representative of the practice accompany them to an interview if they wish. This could help the practice get a complete picture of the interview and determine the scope of the investigation more easily. But don't order employees to request a practice representative at the interview. It could appear that you're trying to influence a witness [Policy, par. 5].

**6) Tell employees that they can end the interview at any time.** Since employees don't have to speak with the investigator in the first place, they have the right to terminate an interview at any time. Tell employees this. An employee may decide it's in her best interests to end an interview immediately if, for example, she thinks her rights are being threatened or she's being mistreated by the investigators [Policy, par. 6].

**7) Inform employees that they may request a tape.** Let employees know that they can ask that an interview be taped. Also, tell them to ask for a copy of the tape so that there's an exact transcript of what was said [Policy, par. 7].

**8) Tell employees not to turn over records if investigator has no search warrant.** It's important that employees understand that business records are private property and belong to the practice, not to them. Even if an employee prepared a document himself, he has no right to turn it over to investigators without the investigator producing a valid search warrant. Jewell also points out that "since investigators are typically looking for patient records, practices must make sure that they're taking all the steps they can to protect patient confidentiality."

That doesn't mean you're trying to prevent the government from get-

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## MODEL POLICY

## Advise Employees of Their Rights and Responsibilities in a Government Investigation

As HCFA and the OIG step up their compliance enforcement efforts, your practice might be hit with a government investigation. It's even possible that government investigators will contact your employees directly, either at their workplace or at their homes. It's an intimidating situation, and an employee could inadvertently give up legal rights that could protect you both during the investigation.

A good compliance program plans for that contingency and

prepares employees with advice about how to respond to a visit from a government investigator before there's a knock on the door. You can use the Model Policy below as a starting point in drafting your own employee response policy. It's based on an employee response policy currently in effect at the Baylor College of Medicine in Texas. Have your attorney review your employee response policy thoroughly before you make it official.

### ABC RADIOLOGY, PC

#### POLICY ON EMPLOYEE RESPONSE TO A GOVERNMENT INVESTIGATION

To: All Employees

Policy No: \_\_\_\_\_ Effective Date: \_\_\_\_\_

**Statement of Policy.** It is the policy of ABC Radiology to fully cooperate with any government investigation. This policy sets forth your rights and responsibilities as an employee of ABC Radiology, if you are ever contacted directly by a government investigator.

**Purpose of Policy.** Sometimes employees of medical service providers are contacted directly by government investigators during the course of an investigation. An investigator could show up at your home or place of business and ask to speak with you about an investigation. Sometimes these visits occur at odd hours of the day or night. The following employee response policy will help you protect your rights and ABC Radiology's rights if you are ever contacted directly by an investigator.

- 1. You Should Ask for Identification.** Ask to see the investigator's badge or other credentials. Get the investigator's business card or write down his or her name, title, division, address, and phone number.
- 2. You Can Inform ABC Radiology of Interview Request.** You're not required to report an investigator's interview request to us, but if you think ABC Radiology should hear about the interview, we ask you to call your supervisor or our compliance officer at 123-4567. If you wish, you can do this before speaking to the investigator. And if you wish, you may ask the investigator to speak with your supervisor or another representative of ABC Radiology.
- 3. Your Cooperation Is Optional.** You're under no legal obligation to speak with the investigator. If you do speak with the investigator, you should realize that you are not under arrest, so the investigator is not required to read you your legal rights. If you do give an interview, you are legally obliged to tell the truth. Even though you are not under oath, you can still be charged with crimes if you lie to or mislead the investigator during the interview. Assume that anything you say during the interview can be used against you in court.
- 4. You Can Schedule the Interview.** If you decide to speak with the investigator, you don't have to do it immediately. You can schedule the interview for any time or location. Generally, it's better to schedule the interview for a time when you're fresh and a location where you're comfortable.
- 5. You Can Bring Someone to the Interview.** You have the legal right to bring someone with you to the interview, including an attorney. To protect your rights during the interview, it's generally good advice to have an attorney represent during the interview. If you want an attorney, ABC Radiology will work with you to find one.  
You also have the right to bring a representative of ABC Radiology with you to the interview if you so choose. While ABC Radiology doesn't require employees to bring a lab representative with them to interviews, we will be glad to send someone with you if you wish.

If the investigator insists on an interview without allowing you to bring someone with you, we encourage you to simply end the discussion and reschedule it for another time.

- 6. You Can End the Interview Whenever You Want.** You have the right to end the interview at any time. If you believe that the investigator isn't respecting your rights, or for any other reason, you can simply end the interview.

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7. **You Can Request a Tape.** You may ask that the interview be taped. If the investigator tapes the interview, request a copy of the tape.
8. **DO NOT GIVE ABC RADIOLOGY RECORDS TO AN INVESTIGATOR WITHOUT A SEARCH WARRANT.** Any lab records in your possession are the property of ABC Radiology. If an investigator asks you for records or if he can look for them, ask if he has a search warrant. **IF THE INVESTIGATOR HAS NO SEARCH WARRANT, DO NOT ALLOW HIM TO TAKE (OR VIEW, OR COPY) ANY ABC RADIOLOGY RECORDS.** Inform your supervisor or the compliance officer of the record request immediately.
9. **YOU MUST ALLOW SEARCH IF INVESTIGATOR PRODUCES SEARCH WARRANT.** If the investigator has a search warrant, you must allow the search to occur. Take the following steps:
  - a) Make a copy of the search warrant;
  - b) Call your supervisor or the compliance officer immediately;
  - c) Ask the investigator if you can make copies of the records he is going to take;
  - d) Note the scope of the search warrant and make sure the investigator sticks to it; and
  - e) Prepare a log of all records removed by investigators.
10. **Special Instructions if Investigator Shows Subpoena.** Sometimes an investigator will arrive with a subpoena and ask you to turn over ABC Radiology records. If an investigator shows you a subpoena for records, you don't have to give them to him immediately. Notify your supervisor or the compliance officer immediately. Give the subpoena to your supervisor or to the compliance officer, who will forward it to the appropriate person for response. Follow your supervisor's or the compliance officer's instructions.
11. **You May Review Your Testimony with a Supervisor or Compliance Officer After the Interview.** Upon completion of your interview with the investigator, you can call your supervisor or the compliance officer to schedule a review of your interview. However, you are not required to review your statements with any employee or officer of ABC Radiology.
12. **Investigator Can't Guarantee Leniency or Immunity.** In their efforts to further investigations, investigators sometimes make offers to potential witnesses that they have no legal authority to keep. This could be an offer of leniency or immunity for anything wrong you may have done in exchange for talking to the investigator. You should be aware that an investigator has no legal authority to offer you leniency or immunity from prosecution. Only a federal or state prosecutor can make a binding deal with a witness.

## GOVERNMENT INVESTIGATIONS

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ting the records. But while you should urge cooperation, the practice also has to make sure that the government follows the rules when searching patient records, to protect both the patients' and the practice's rights. Tell employees not to turn over any records unless the investigator shows them a search warrant. Employees should also report all requests for records to their supervisor or to your compliance officer [Policy, par. 8].

**9) Tell employees what to do if investigator has a search warrant.** If the investigator has a search warrant, he's legally entitled to search the premises (within the limits set by the search warrant) and remove records. Have your employees use

the following procedure if they're presented with a search warrant:

- Make a copy of the search warrant;
- Inform a supervisor or the compliance officer;
- Ask if the practice can make copies of records before they're removed;
- Note the scope of the search warrant and make sure the investigator sticks to it; and
- Prepare a log of all records removed by investigators [Policy, par. 9].

**10) Tell employees what to do if investigator has a subpoena for records.** If the investigator gives the employee a subpoena for records, tell the employee that he doesn't have to hand over the records immediately.

Instead, the employee should give the subpoena to his supervisor, who'll forward it to the appropriate person for response [Policy, par. 10].

**11) Ask employees to meet with you after interview.** You can ask, but not require, employees to meet with you after an interview by a government investigator, to go over the interview. You'll want to debrief employees to find out what questions they were asked and how they responded. That way you can find out what the government is looking into and if you need to correct any misstatements the employee may have made to the investigators [Policy, par. 11].

**12) Tell employees that investigator can't offer a deal in exchange for testimony.** Sometimes

investigators will try to trick people they're interviewing into giving unfavorable information by offering them a deal in return. This can be particularly effective if an employee feels guilty about something or is frightened by the sight of a badge. Tell

employees that an investigator has no power to grant leniency to someone in exchange for cooperation. Only a prosecutor can recommend leniency or offer to reduce charges against someone in exchange for cooperation [Policy, par. 12]. ■

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### Insider Sources

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**SHOW YOUR LAWYER**

*Here are the court cases and/or laws referred to in this issue.*

- Annual OPPS Update: Medicare Hospital Outpatient Prospective Payment System Interim Final Rule, Fed. Reg., 11/13/00, p. 67798.