LEGAL CORNER

Sharing IT Resources
Many Challenges Ahead

by Susan W. Berson, JD

The passage of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and many laws and regulations promulgated since then have to varying degrees focused on the transition to electronic files and electronic communication by providers in the healthcare sector. These laws have encouraged, if not mandated, the submission of claims in an electronic format, the submission of claims using a standard set of codes, the provision of health services "online," and the prescribing of medications electronically. In theory, the transformation to an electronic system makes sense. In practice, however, it has proven difficult to implement and is not without regulatory risks and burdens.

While many hospitals have undertaken significant upgrades of their information technology (IT) systems, these upgrades are typically very costly and are often cost prohibitive for providers in private practice. Many hospitals are willing to provide IT hardware, software, and other resources to providers, not only to defray cost, but also to facilitate "interactions" on healthcare consults. However, these arrangements create a variety of legal issues that must be considered.

A recent Government Accountability Office (GAO) report (available at *www.gao.gov*) highlighted many of the difficulties, including legal challenges, facing the implementation of new IT systems in the healthcare setting. One of the biggest challenges is that many of the laws pre-date the advent of the technology age and thus do not address IT arrangements. This means that providers are left "guessing" as to the impact of these laws and the risks they present, causing providers to be reluctant to take action.

The "Stark" law prohibits referrals by a physician to an entity with which the physician has a financial relationship. Thus, the sharing of IT resources could prevent referrals among providers, unless an exception applies. Similarly, the anti-kickback laws prohibit the knowing and willful offering or acceptance of any item of value in order to induce referrals for or the purchase of an item or services covered by a federal healthcare program. The provision of IT resources by a hospital to a provider could be viewed as an inappropriate inducement. While the Stark II regulations make reference to a new exception for "community-wide health information systems," a lack of certainty exists as to what this really means. In any event, many IT arrangements may not fall within the exception.

A similar proposal exists under the anti-kickback law. While an advisory opinion could be sought as to the applicability of the kickback prohibition to a specific arrangement, these opinions can take a long time to receive. In addition, many states have laws analogous to the federal anti-kickback and self-referral laws. Many of these laws have even fewer exceptions and are even less well developed than the federal legislation. Still, providers should take care to consider any applicable state laws in addition to the federal laws when structuring any IT arrangements.

The use of IT arrangements to "connect" the various parts of a given healthcare community could also raise antitrust concerns. While the Department of Justice has indicated that it will consider whether the benefits of such arrangements outweigh any antitrust concerns, there is still a great deal of uncertainty in this area that may cause reticence in adoption of IT arrangements.

The HIPAA restrictions also create issues in the adoption of IT arrangements. Providers are uncertain of what information may be shared while maintaining compliance with HIPAA requirements. For example, must the IT system limit the information that the provider can access on a patient to that specifically necessary for the provider's consult? Can providers have access to information on all patients in a practice or in a health system? Does the use of electronic systems create a great risk of patient information getting into the wrong hands? Does the access to more patient information create a new risk of malpractice?

Finally, the use of electronic systems, especially for prescribing drugs and for certain counseling and imaging services allows providers to consult far beyond state borders. This scenario has created a significant issue that the states are struggling with: Should providers be required to be licensed in the jurisdiction in which they are rendering advice or also in the jurisdiction where the patient is located? While certain states have begun passing telemedicine laws, these laws do not address all medical specialties, and some states have no laws on the subject.

While technology has created vast improvements in healthcare, the regulatory structure has not yet caught up with the advances. Stay tuned, as this is certain to be an area of great development.

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