Using Your Head: Avoiding Common Pitfalls When Responding to Audits and Document Requests

Daniel B. Frier, Esq. **Guillermo J. Beades, Esq.** **Theresa M. DiGuglielmo, Esq.**

FRIER LEVITT
ATTORNEYS AT LAW
CELEBRATING 20 YEARS

ABOUT FRIER LEVITT, LLC

Frier Levitt is a national boutique healthcare law firm located in Pine Brook, New Jersey, New York, New York, and Uniondale, New York. Our over 30 attorneys bring collective experience and backgrounds in pharmacy, hospital administration, professional licensing, Attorney General actions, clinical practice, and medical billing. Through our experience in representing thousands of pharmacies across the country, we have developed strong relationships with key decision-makers at each pharmacy benefits manager and have successfully fought on behalf of pharmacies and healthcare providers in conducting Medicare appeals. Frier Levitt provides directed and uniquely-tailored legal services to specialty pharmacies including network issues, State and Federal Any Willing Provider laws, regulations limiting specialty drug co-payments and limited distribution drug concerns. Moreover, Frier Levitt also provides comprehensive legal services to our healthcare clients, including corporate and transactional services, regulatory advice, and litigation support.

FRIER LEVITT
ATTORNEYS AT LAW

DISCLAIMER

The materials and information provided in this presentation are for informational purposes only and not for the purpose of providing legal advice. The information contained in this presentation is a brief overview and should not be construed as legal advice or exhaustive coverage of the topics. You should contact your attorney to obtain advice with respect to any particular issue or problem. Statements, opinions and descriptions contained herein are based on general experience of Frier Levitt attorneys practicing in pharmacy law, and are not meant to be relied upon by anyone. Use of and access to this presentation or any of the materials or information contained within this presentation do not create an attorney-client relationship between Frier Levitt, LLC (or any of its attorneys) and the user or viewer.

All product and company names are trademarks™ or registered® trademarks of their respective holders. Any use of such marks is for educational purposes and does not imply any affiliation with or endorsement by them.

FRIER LEVITT
ATTORNEYS AT LAW

ABOUT THE SPEAKERS

Guillermo J. Beades, Esq., is a Partner in Frier Levitt's Healthcare Litigation Department and Co-Chairs the Firm's Insurance Defense Group. Guillermo represents healthcare professionals in a broad range of administrative, civil and criminal healthcare matters. Guillermo has extensive litigation experience before state licensing authorities and Medical Boards (e.g., NJ BME, OPMC), federal healthcare agencies (e.g., OIG, CMS, DEA) and state healthcare agencies (e.g., NJ Medicaid Fraud Division, NY OMIG). He represents practices and healthcare professionals in matters concerning credentialing and denial of privileges, administrative discipline, Medicare audits, hospital fair hearings, post-payment demands and pre-payment audits.

Theresa M. DiGuglielmo, Esq., is Senior Counsel to the firm's Healthcare Department. She advises clients regarding a wide variety of regulatory matters, including but not limited to Medicare provider enrollment issues, payor audits and terminations, use of the HHS-OIG's Self-Disclosure Protocol to voluntarily report potential fraud involving the Federal health care programs, and the structuring of business arrangements to comply with various Federal and State laws. Theresa is also actively involved in the firm's governmental affairs and advocacy practice and has developed experience in structuring dental transitions and advising entrepreneurial dentists. Following her graduation from Seton Hall University School of Law and a one-year Judicial Clerkship in Bergen County, Theresa gained practice experience at a firm that specialized in regulatory healthcare matters and medical malpractice defense, and was subsequently hired as Frier Levitt's first associate attorney in the Firm's inaugural year.

FRIER LEVITT
ATTORNEYS AT LAW

STATE OF HEALTHCARE

Healthcare is one of the most highly regulated industries in the country.

Current areas of particular concern to federal and state investigations include, but are not limited to:

- Fraud, waste and abuse
- Diversion / Indiscriminate Prescribing
- Anti-Kickback Statute Violations

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: THE WHO

Who is conducting the audit or requesting documents?

State and Federal Agency Requests

- Administrative
- Civil
- Criminal

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: THE WHO

CMS and Private Payers

- Routine
- Targeted
  - Suspicion of fraud, waste or abuse
  - Pattern of billing
  - Outlier?

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: THE WHO

Licensing Board

- Complaint
- Investigation
- Referral from State or Federal Agency

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: THE WHAT

Look at the documents! What is being requested?

Hot topic areas to look out for:

- E/M level of code
- Specific Procedure
- Modifier Use
- Consultations

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: THE WHAT

What is the scope of the request?

- Broad vs. Specific
- Range of dates
- Number of DOS requested

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: THE WHY

After determining Who is requesting What, determine Why!?

- Routine Investigation / Audit
- Post Payment Audit
- Target of civil or criminal investigation
  - FCA
  - Anti-Kickback
  - Fraud

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: COMMON MISCONCEPTIONS

Subpoena

- Reasonable time to respond
- *Duces Tecum v. Ad Testificandum*
- Motion to Quash

Warrant

- Specificity of documentation sought
- Specificity as to area where records can be obtained
- Not compelled to testify

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: COMMON MISTAKES

- Ignoring deadlines
- Not keeping copies of records
- Talking with investigators
- Not sending complete records
- Not sending legible records

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: COMMON MISTAKES

- Treating all audits and document requests equally
- Ignoring or Missing Key Words
- Not reviewing records before they are sent out
- Allowing investigators unfettered access to your office / computers

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: AVOIDING COMMON PITFALLS

Sit down and focus on the:

- Who?
- What?
- Why?

Do not amend records after receiving a document request or overpayment demand.

FRIER LEVITT
ATTORNEYS AT LAW

AUDITS & DOCUMENT REQUESTS: AVOIDING COMMON PITFALLS

- Know when to refer a matter out to counsel
- Have someone review everything before it goes out
- Keep copies!
- **Do not** submit documents or give verbal statements without first consulting with counsel. Even ostensibly "routine" audits may be part of a deeper investigation. Without advice of counsel, the provider may inadvertently help the payor to escalate the inquiry.

FRIER LEVITT
ATTORNEYS AT LAW

- UPIC: Unified Program Integrity Contractor – investigates suspected fraud, waste and abuse in Medicare and Medicaid claims
- ZPIC: Zone Program Integrity Contractor – focuses on potential fraud and refers cases to HHS-OIG
- RAC: Recovery Audit Contractor – detect and correct improper payments
- CERT: Comprehensive Error Rate Testing Contractor – statistically analyze and establish error rates and estimates of improper payments
- SMRC: Supplemental Medical Review Contractor – provides a variety of services aimed at lowering improper payments
- TPE: Targeted Probe Education – could lead to loss of billing privileges with CMS
- MAC: Medicare Administrative Contractor – multi-state, regional, private insurers that are authorized to process Medicare claims; involved in first stage of appeal, known as redetermination
- QIC: Qualified Independent Contractor – involved in 2nd stage of appeal process, known as reconsideration
- ALJ: Administrative Law Judge – involved in 3rd stage of appeal process; a hearing can be requested following an unfavorable QIC reconsideration decision

FRIER LEVITT
ATTORNEYS AT LAW

DENY / REDUCE / DELAY

The outcome of an audit is not an “all or nothing” proposition. A robust defense can mitigate the impact of an alleged overpayment.

In the same way that payors seek to deny, reduce, or delay reimbursement of claims, healthcare providers under audit can employ a similar approach:

1. DENY that the alleged deficiency in the claim merits a denial or a return of overpayment, e.g., by demonstrating that the claim meets the conditions of coverage.
2. REDUCE the amount of the clawback, e.g., by negotiating to pay back the differential between the CPT code that was submitted and the CPT code that should have been utilized.
3. DELAY the return of overpayment by demonstrating that it will cause a severe financial hardship that threatens the practice’s ability to serve beneficiaries and request a pay-over-time arrangement to reduce the financial impact.

FRIER LEVITT
ATTORNEYS AT LAW

NOTICE OF OVERPAYMENT

When Medicare identifies an overpayment, the amount is considered a debt the provider owes to the Federal government.

If not paid back, the government's options include offset against future claims reimbursements, or escalation of debt collection through the Department of Treasury.

Likewise, commercial payors may engage in an offset and/or pursue other formal collection efforts.

FRIER LEVITT
ATTORNEYS AT LAW

Q: If the amount in controversy is relatively low, isn't it more expedient to just return the overpayment than to engage legal counsel, and possibly still face a recoupment?

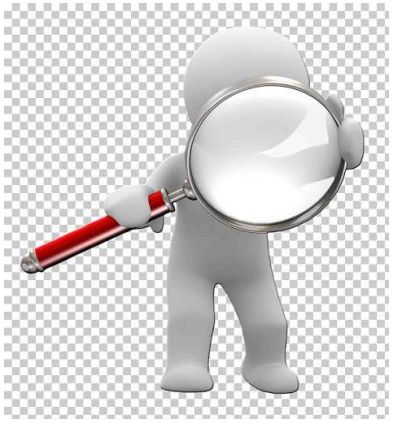
A: Providers should always push back, even if the ensuing clawback cannot be substantially reduced.

Benefits include:

- Documentation of objections/defense of practices
- Exhaustion of administrative remedies for future appeals
- Precedential value of not being viewed as an easy target

FRIER LEVITT
ATTORNEYS AT LAW

INTERNAL AUDITS



Whether entirely proactive, or in response to a payor inquiry, internal audits may reveal issues that need to be addressed, such as the return of a self-identified overpayment.

In some instances, a more formal self-disclosure process may be merited.

In either case, such matters must be handled with care and the advice of experienced healthcare counsel.

FRIER LEVITT
ATTORNEYS AT LAW

FINAL THOUGHTS

Even a “routine” audit can have serious consequences.

Handling a matter “in-house” can cost a practice far more than getting consultants and/or attorneys involved from the beginning.

A provider’s professional liability carrier may provide coverage for audit defense.

Use common sense and trust your instincts.

FRIER LEVITT
ATTORNEYS AT LAW

Thank You!

Daniel B. Frier, Esq.
dbfrier@frierlevitt.com

Guillermo J. Beades, Esq.
gbeades@frierlevitt.com

Theresa M. DiGuglielmo, Esq.
tdiguglielmo@frierlevitt.com

Phone: 973.618.1660

Website: FrierLevitt.com

LinkedIn: LinkedIn.com/company/Frier-Levitt-LLC

Twitter: @FrierLevitt

Facebook: Facebook.com/FrierLevittAttorneys

FRIER LEVITT
ATTORNEYS AT LAW