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Clearing the COVID-19 surgical backlog: Compliance implications of overlapping surgeries

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For years, healthcare providers, including hospitals and surgical centers, have relied on the practice of overlapping surgeries to maximize patient access to care, physician efficiency, and utilization of operating suites. In general, the term overlapping surgeries refers to situations where one lead attending surgeon is responsible for procedures that overlap in time. As an example, the lead surgeon is present for and performs the key or critical portions of Procedure 1, and then a resident physician closes the surgical site while the lead surgeon begins Procedure 2. In contrast, the term concurrent surgeries is often used to describe situations where the key or critical portions of more than one procedure are simultaneous, and therefore the lead surgeon who is responsible for both is unable to be present for the entirety of both key and critical portions of the procedures.

Now more than ever, healthcare providers may be considering adopting or expanding the scheduling of overlapping surgeries to address backlogs created due to elective procedure cancellations during the COVID-19 pandemic. Although overlapping surgery practices have the positive effect of increasing patient care, surgical efficiency, and operating room capacity, healthcare providers should be mindful of compliance implications. Indeed, government enforcement actions and media scrutiny in this area has increased considerably in the last seven years. As such, healthcare providers would be well advised to confirm that their overlapping surgery policies and practices comply with the Centers for Medicare & Medicaid Services (CMS) rules and industry standards.

Overlapping surgery background

Overlapping surgeries may occur in both the teaching hospital setting (often with the assistance of resident or fellow surgeons) and the nonteaching hospital setting. With respect to teaching settings, CMS regulations dictate certain requirements that must be followed for billing the physician professional fees when a teaching physician is responsible for two overlapping procedures. In the nonteaching context, CMS regulations do not explicitly address overlapping surgeries, although industry groups such as the American College of Surgeons (ACS) have released guidance on the topic. In addition, CMS conditions of participation and state laws governing informed consent must also be considered.

In the teaching setting, CMS requires that the teaching physician be present during all key or critical portions of both overlapping operations and document in the medical record that they were physically present during the key or critical portions of both procedures in order to bill for their professional fees.[1] Notably, CMS does not define the key or critical portions of each procedure, and instead provides the teaching physician with the discretion to determine which parts of each procedure are key or critical. In addition, CMS requires that if the teaching physician is not present during non-key or critical portions of the procedure, they must be immediately available to return to the procedure. If the teaching physician is not immediately available, they must arrange for another qualified surgeon to be immediately available to assist in the first case, should the need arise. In the case of three overlapping surgical procedures, the role of the teaching surgeon is classified by CMS as a supervisory service to the hospital and is not billable to government payers under the Medicare physician fee schedule.

With respect to concurrent surgeries, the ACS Statements on Principles states that concurrent surgeries are not appropriate and defines concurrent operations as surgical procedures that "occur when the critical or key components of the procedures for which the primary attending surgeon is responsible are occurring all or in part at the same time."[2] While CMS does not differentiate between the terms "overlapping" and "concurrent," it will not make payment under the Medicare physician fee schedule for concurrent procedures in the teaching setting because teaching surgeons are required to be present for the key or critical parts of all procedures.[3]

Enforcement activity and media scrutiny

Not only do CMS rules explicitly permit overlapping surgeries to be performed, overlapping surgeries provide several benefits. They increase efficiency because the surgeon can focus their time on the key or critical portions of the surgery and allow other resident physicians or fellows to handle the less complex aspects of the surgery. This can expand patient access to surgeons, which is especially beneficial if there is a shortage of surgeons in a particular geographic area. Overlapping surgeries also give surgeons with a particular expertise the ability to treat more patients by using their time more efficiently. In addition, several medical studies support safety and outcomes associated with overlapping surgeries.[4] Despite these benefits, however, some media outlets, politicians, and patients have questioned certain practices over patient safety concerns.[5]

Historically, overlapping surgery practices received relatively little attention from the media and government agencies. However, in 2015, *The Boston Globe*'s Spotlight Team published a dramatic, in-depth investigative article regarding some overlapping surgeries that were being performed at Massachusetts General Hospital. *The Boston Globe* article catalyzed a domino effect of inquiries and investigations. Following the article, the Senate Finance Committee launched an investigation leading to the issuance of an extensive report on overlapping surgeries. The ACS then updated its guidance to address overlapping surgery practices, and there have been several significant False Claims Act investigations, settlements, and Office of Inspector General self-disclosures in this area.

Some notable developments of enforcement activity in this area include the following two cases.

Massachusetts General Hospital

In February 2022, Massachusetts General Hospital and affiliated entities (MGH) entered into a $14.6 million settlement to resolve a qui tam related to overlapping surgery allegations.[6] MGH did not admit liability or wrongdoing. The settlement received considerable attention from the mainstream press, including *TheBoston Globe*. In some ways, this settlement represents the issue of overlapping surgeries coming full circle, because it was *TheBoston Globe* investigative journalism of MGH dating back to the fall of 2015 that spurred the increased focus and enforcement attention on overlapping and concurrent surgeries in recent years.

The qui tam was initially filed in 2015 by a former MGH anesthesiologist, Dr. Lisa Wollman. In addition to allegations that overlapping surgeries did not comply with CMS billing requirements, Dr. Wollman also contended that patient quality of care was compromised due to longer than necessary anesthesia times. Further, Dr. Wollman alleged that MGH failed to obtain valid patient informed consents because patients were not informed that their surgeon would not be present during their entire surgery.

Not only did the settlement agreement include a financial resolution, but MGH's parent organization also agreed to add the following language to its standardized procedural consent form:

> My surgeon has informed me that my surgery is scheduled to overlap with another procedure she/he is scheduled to perform. I understand that this means my surgeon will be present in the operating room during the critical parts of my surgery but may not be present for my entire surgery. I understand that my surgeon or another qualified surgeon will be immediately available should the need arise during my surgery.[7]

University of Pittsburgh Medical Center

The U.S. Department of Justice (DOJ) announced in September 2021 that it filed a complaint against the University of Pittsburgh Medical Center (UPMC), its physician practice group, and the longtime chair of UPMC's Department of Cardiothoracic Surgery alleging violations of the False Claims Act.[8]

DOJ contends that the cardiothoracic surgery department chair regularly performed as many as three complex surgical procedures at the same time, failed to participate in all of the key or critical portions of his surgeries, and forced patients to endure hours of medically unnecessary anesthesia time. DOJ has also raised concerns related to Medicare Advantage claims. Specifically, DOJ alleges that because the overlapping surgery practices caused undue complications for patients, that in turn resulted in additional diagnosis codes that increased the patient's prospective risk score and capitation payments to the applicable Medicare Advantage organization.[9]

Of note, the American Hospital Association and the Hospital and Healthsystem Association of Pennsylvania filed an amicus brief in support of UPMC's motion to dismiss, emphasizing that CMS's billing guidance related to overlapping surgeries not only permits overlapping surgeries when the key and critical portions are not at the same time, but also gives individual surgeons discretion to determine the key and critical portions of the procedures, as they involve complex medical judgments.[10] UPMC previously settled a False Claims Act investigation for $2.5 million related to overlapping surgeries performed by certain employed neurosurgeons in 2016.[11]

Practical considerations

Healthcare providers that permit overlapping surgeries should take steps to ensure compliance with applicable rules, including CMS requirements for teaching facilities. Many healthcare providers proactively enhanced compliance controls in this area within the past several years due to the increased focus on this practice and the resulting enforcement activity. Healthcare providers may also wish to consider reviewing their practices and policies in this area, including their training and education of their surgeons, surgical teams, and staff members, particularly if overlapping surgery practices increase in an effort to clear any surgical backlogs created by the COVID-19 pandemic.

Proactive compliance efforts will be unique to each healthcare provider and should be tailored based on factors such as whether a teaching setting is involved and whether the surgeons are employees. Best practices and

proactive compliance efforts could include the following.

Review of policies and procedures and other controls

Written policies and procedures on overlapping surgeries are particularly helpful for organizations that regularly rely on the practice. Any written policy should comply with applicable CMS and state requirements. Healthcare providers may also consider writing the policies so that they are consistent with ACS guidance. Relevant stakeholders, including surgeons, risk management, and surgery schedulers, should be involved as appropriate in any potential changes to the policies and procedures and should be familiar with policy requirements. Policies may also need to be tailored based on the employment status of the surgeons.

A common theme in the qui tam complaints related to overlapping surgeries is that certain "star" surgeons were given special treatment. Accordingly, it is important to ensure that policies and procedures are consistently applied and enforced across surgical practices.

Electronic health record and surgery scheduling systems

Healthcare providers may consider the impact of documentation created by electronic health record systems. Some electronic health record systems may automatically record surgery start and stop times and physician in and out times. If accurate, that documentation can support compliance efforts and aid in internal reviews of overlapping surgery practices. However, some systems that automatically generate in and out times for individuals may not accurately reflect when individuals came in and went out of a room. Similarly, manually entered in and out times may not be consistently precise. As such, healthcare providers may want to review how various document entries are generated to confirm that recorded times are accurate and reliable.

Healthcare providers may also want to consider updating their surgery scheduling systems and practices. For example, some healthcare providers have implemented controls to flag situations where one surgeon has multiple surgical suites scheduled simultaneously. Other systems may flag when a surgeon has three surgeries scheduled that overlap in time.

Patient communication and informed consent

Some of the scrutiny on overlapping surgeries has been focused on informed consent and whether patients were aware that the lead surgeon would not be in the operating room for the entirety of the procedure, particularly if the patient specifically sought out the surgeon due to their reputation and experience. Some state laws and Medicare conditions of participation govern informed consent requirements.[12] For example, as a condition of participation, CMS requires that "a properly executed informed consent form for the operation must be in the patient's chart before surgery, except in emergencies."[13]

While CMS does not require the consent form to include language about overlapping surgeries, it may be beneficial to review consent forms and evaluate whether additional specificity is needed. The language provided above, which MGH was required to include in its consent forms as part of its settlement agreement, could serve as a helpful starting point.

Internal audits

Proactive compliance efforts often include an internal retrospective audit of claims, which requires reviewing the underlying medical records and documentation. Certain CMS documentation requirements for teaching settings are more straightforward (i.e., the primary surgeon must personally document in the medical record that they

were physically present during the key or critical portions of both procedures). However, the medical record itself typically will not indicate whether the primary physician had another surgery scheduled at an overlapping time. Thus, a surgery schedule often must be consulted to identify which surgeries overlapped. Even knowing whether a surgery was scheduled for a time that overlapped with another surgery does not provide insight as to whether the requirements for teaching physician billing were met, because which portion of surgery is considered key or critical is determined by the medical judgment of the surgeon. And, as noted above, timestamps for documentation entries may be unreliable for this purpose.

Reviewing overlapping surgery practices presents unique challenges and must be tailored to the specific documentation practices of each institution. While an internal review can shed helpful insight on general overlapping surgery practices, healthcare providers may experience challenges when analyzing whether a specific case met CMS requirements, absent video footage or having an auditor observe live surgical procedures.

Quality of care

Ultimately, quality of patient care and concerns over patient outcomes have animated the focus in this area. While studies have shown that, generally, overlapping surgeries do not negatively affect quality of care, it is important to be mindful of patient outcomes and potentially extended anesthesia times when physicians perform overlapping surgeries. In the event of a government investigation, demonstrating positive patient outcomes can help address the government's concerns and underscore the benefits of overlapping surgery practices, such as expanding patient access to talented surgeons. Alternatively, if there is a history of poor patient outcomes from overlapping surgeries as compared to the same surgeries that did not overlap, defending the practice may become more challenging.

In proactively assessing overlapping surgery compliance, healthcare providers can leverage existing quality-of-care efforts, such as monitoring any trends in adverse outcomes and comparing quality-of-care data for surgeons who regularly perform overlapping procedures to the data for other surgeons.

Compliance challenges considerations

The use of overlapping surgeries is a long-standing practice that may be particularly useful for hospitals and other healthcare providers that need to address backlogs caused by elective procedure cancelations and delays related to the COVID-19 pandemic. Allowing overlapping surgeries, however, can present certain compliance challenges, and enforcement activity and media scrutiny on the practice have increased over the past several years. Effective compliance controls and implementing best practices can help healthcare providers capture the benefits of overlapping surgeries, including expanding patient access to surgeons and increasing operational efficiencies, while minimizing potential compliance risks.

Takeaways

- Healthcare providers often rely on the practice of overlapping surgeries to maximize patients' access to care, physicians' ability to treat more patients, and operational efficiencies.
- Efforts to clear surgical backlogs from the COVID-19 pandemic may result in scheduling more overlapping surgeries.
- Media scrutiny about and enforcement related to overlapping surgery practices have increased over the past decade.
- Healthcare providers that permit overlapping surgeries should ensure compliance with applicable rules,

including Centers for Medicare & Medicaid Services regulations for teaching facilities, and consider guidance from other leading authorities.

- Compliance controls, including policies, procedures, education, and training, should be tailored to fit the unique aspects of the healthcare provider's practice and systems and then be consistently applied to all healthcare providers.

142 C.F.R. § 415.172 ; Centers for Medicare & Medicaid Services, "Chapter 12 - Physicians/Nonphysician Practitioners," § 100.1.2, *Medicare Claims Processing Manual*, Pub. 100-04, revised March 4, 2022, https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/clm104c12.pdf.
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342 C.F.R. § 415.172 .
4*See, e.g.,* Sharon Theimer, "Study of thousands of operations finds overlapping surgeries are safe for Mayo Clinic patients," Mayo Clinic News Network, December 1, 2016, https://newsnetwork.mayoclinic.org/discussion/study-of-thousands-of-operations-finds-overlapping-surgeries-are-safe-for-mayo-clinic-patients/; Eric Sun et al., "Association of Overlapping Surgery With Perioperative Outcomes," *Journal of the American Medical Association* 321, no. 8 (2019); Juan C. Suarez et al., "The Practice of Overlapping Surgery Is Safe in Total Knee and Hip Arthroplasty," *The Journal of Bone and Joint Surgery* 3, no. 3 (2018); Brent A. Ponce et al., "Outcomes With Overlapping Surgery at a Large Academic Medical Center," *Annals of Surgery* 269, no. 3 (March 2019).
5*See, e.g.*, Jenn Abelson, Jonathan Saltzman, Liz Kowalczyk, and Scott Allen, "Clash in the name of care," *The Boston Globe*, accessed May 9, 2022, https://apps.bostonglobe.com/spotlight/clash-in-the-name-of-care/story/; United States Senate Finance Committee Staff, *Concurrent and Overlapping Surgeries: Additional Measures Warranted*, December 6, 2016, https://www.finance.senate.gov/imo/media/doc/Concurrent%20Surgeries%20Report%20Final.pdf; Jonathan Saltzman, "Former Red Sox pitcher settles claim with doctor, MGH for $5.1 million," *The Boston Globe*, May 8, 2019, https://bit.ly/3KSLnJm.
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8 U.S. Department of Justice, U.S. Attorney's Office for the Western District of Pennsylvania, "United States Files Suit Against UPMC, Its Physician Practice Group, and the Chair of Its Department of Cardiothoracic Surgery for Violating the False Claims Act," news release, September 2, 2021, https://www.justice.gov/usao-wdpa/pr/united-states-files-suit-against-upmc-its-physician-practice-group-and-chair-its.
9 U.S. ex rel. D'Cunha v. Luketich, No. 19-cv-495 (W.D. Pa.), Compl. in Partial Intervention ¶ 159 (September 2, 2021).
10 U.S. ex rel. D'Cunha v. Luketich, No. 19-cv-495 (W.D. Pa.), Amicus Curiae Br. (November 1, 2021), https://www.aha.org/system/files/media/file/2021/11/aha-hap-amicus-brief-on-concurrent-and-overlapping-surgeries-11-1-21.pdf.
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12*See, e.g.*, 243 Mass. Code Regs. 2.07(26).
1342 C.F.R. § 482.51(b)(2) .