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Overlapping surgeries: Time for a compliance checkup?

by Sara A. Brinkmann and Lauren S. Gennett

Overlapping surgeries is a practice that has been used for many years by healthcare providers (such as hospitals and surgical centers). This practice generally refers to situations where one lead attending surgeon is responsible for multiple surgical procedures that overlap in time. For example, the lead surgeon is present for and performs the key or critical portions of a procedure, then a resident physician closes the surgical site while the lead surgeon begins a second procedure. In contrast, the term "concurrent surgery" is frequently used to describe situations where the key or critical portions of more than one procedure occur at the same time; thus, the lead surgeon is unable to be present for the key or critical portions of both procedures.

Overlapping surgeries have many benefits, including maximizing patient access to care and in-demand surgeons, as well as enhancing efficiency of physician time and surgical rooms. At the same time, engaging in overlapping surgeries requires consideration of applicable rules and requirements for providers. Government enforcement scrutiny, notable settlements, and media interest in this area have increased considerably in the last 10 years. More than ever, providers should consider reviewing their overlapping surgery policies and practices to confirm compliance with applicable Centers for Medicare & Medicaid Services (CMS) rules, guidance, and industry standards.

Overview of overlapping surgeries

Overlapping surgeries occur in both the teaching hospital setting (frequently with the assistance of residents or fellow surgeons) and the nonteaching hospital setting. In teaching settings, CMS regulations contain requirements that must be followed for billing the physician professional fees when a teaching physician is responsible for two overlapping procedures. Specifically, to bill professional fees, CMS requires that the teaching physician be present during all key and critical portions of both overlapping operations and document in the medical record that they were physically present during the key and critical portions of both procedures.[1]

Notably, CMS does not specifically define each procedure's key or critical portions. CMS regulations do provide that, in the case of surgical, high-risk, or other complex procedures, the "teaching physician's presence is not required during opening and closing of the surgical field" for surgeries and that the "teaching physician must be present during the entire viewing" of a procedure performed through an endoscope. Apart from those regulations, CMS gives the teaching physician the discretion to determine which parts of each procedure are key or critical.

If the teaching physician is not present during critical portions of the procedure, CMS requires that they must be immediately available to return to the procedure during the entire service or procedure, if needed. If the teaching

physician is not immediately available, the teaching physician must arrange for or ensure another qualified surgeon is immediately available to assist in the first case, should the need arise.[2] For three overlapping surgeries, CMS classifies the role of the teaching surgeon as a supervisory service to the hospital, which is not billable to government payers.

In contrast, in the nonteaching setting, CMS regulations do not contain specific requirements for overlapping surgeries. Nevertheless, industry groups, including the American College of Surgeons (ACS), have released guidance on the topic that applies in all settings (teaching and nonteaching).

The ACS Statements on Principles states that concurrent surgeries are not appropriate in any setting. ACS 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."[3] While the ACS Statements on Principles are not enforceable laws, surgeons who are fellows of the ACS pledge "to live in strict accordance with the College's principles and regulations" as a condition of Fellowship in the College.

While CMS does not differentiate between the terms "overlapping" and "concurrent" in its regulations and guidance, CMS does 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 and critical parts of all procedures.[4]

In addition, it is also important to consider CMS's Conditions of Participation and state laws governing informed consent, which apply in teaching and nonteaching settings.

Enforcement scrutiny

As previously described, CMS expressly permits the practice of overlapping surgeries in the teaching setting. This practice can offer several benefits, allowing surgeons to increase efficiency by focusing on the key or critical portions of the procedures. In turn, this can expand patient access to in-demand surgeons. At the same time, capable residents benefit from the progressive autonomy of performing surgical procedures without an attending surgeon in the room. In addition, several medical studies support safety and outcomes associated with overlapping surgeries.[5] Nevertheless, some media outlets, politicians, and patients have questioned certain practices over patient safety concerns.[6]

Historically, overlapping surgery practices received relatively little media coverage and government scrutiny. However, in 2015, *The Boston Globe*'s Spotlight Team published an in-depth investigative article regarding certain overlapping surgeries at Massachusetts General Hospital.[7] This reporting led to a cascade of media and government inquiries and investigations. For example, the Senate Finance Committee issued a report on overlapping surgeries following an in-depth investigation.[8] The ACS also updated its guidance to address overlapping surgery practices.

On the enforcement side, there have been several significant False Claims Act (FCA) investigations, settlements, and the U.S. Department of Health and Human Services Office of Inspector General self-disclosures in this area. Prior *Compliance Today* articles have covered some of these historical settlements, including those related to Massachusetts General Hospital.[9] Some of the more notable recent developments include:

University of Pittsburgh Medical Center

In February 2023, the U.S. Department of Justice announced a settlement of $8.5 million with James L. Luketich, MD, University of Pittsburgh Medical Center (UPMC), and University of Pittsburgh Physicians (UPP), to resolve

allegations under the FCA.[10] In its complaint, the U.S. alleged that Luketich—the longtime chair of UPMC's Department of Cardiothoracic Surgery—frequently performed as many as three surgical procedures at the same time, failed to participate in all of the "key and critical" portions of his surgeries, and his patients experienced medically unnecessary anesthesia time. The government further alleged that these practices were known by UPMC leadership.

The settlement does not include an admission of liability by Luketich, UPMC, or UPP. The defendants agreed to effectuate a corrective action plan for Luketich as part of the agreement, and agreed to a year-long, third-party audit of Luketich's physician fee services billings to Medicare. UPMC previously settled an FCA investigation for $2.5 million related to overlapping surgeries performed by certain employed neurosurgeons in 2016.[11]

University of Southern California

In 2018, Relator Interoperative Neurophysiological Monitoring LLC (INOM LCC) filed an FCA lawsuit against the University of Southern California (USC), alleging surgeons in the Department of Neurology at the Keck School of Medicine at USC did not comply with billing requirements for certain surgeries.[12] In the fifth amended complaint, filed in March 2023, Relators INOM LLC and Justin Cheongsiatmoy, MD, set forth numerous allegations against USC and USC Care Medical Group, including that teaching surgeons were not present during critical or key parts of surgeries. Specifically, the complaint alleges that "USC routinely scheduled the same teaching surgeon to 'supervise' simultaneous surgeries occurring concurrently at both USC Keck Hospital and LAC+USC Medical Center."[13] As of April 2024, the case was still pending.

Erlanger Medical Center

In 2021, three physicians filed a whistleblower lawsuit against Chattanooga–Hamilton County Hospital Authority (d/b/a Erlanger Health System) and associated physician groups, alleging surgeons were permitted to operate on up to three patients at the same time, leaving residents without appropriate supervision or back up.[14] In March 2023, the U.S. filed a notice that it declined to intervene as to some claims and was not intervening at this time as to others. In June 2023, Erlanger moved for dismissal of the case. In January 2024, the district court entered an order on defendants' motions to dismiss, allowing the Relators to continue to pursue some of their FCA claims, including those related to purported FCA violations of Erlanger's noncompliant overlapping surgeries. Other claims, including plaintiffs' allegations concerning other Medicare rule violations, were dismissed due to a lack of identification of specific claims. As of April 2024, the case was still pending.

Additional scrutiny of supervision practices

In addition to enforcement activity concerning overlapping surgical procedures, there has also been scrutiny of resident supervision practices more generally. For example, in May 2022, the University of Maryland Shore Regional Health paid $296,870 to resolve allegations that it violated the FCA by submitting false claims to the U.S. for radiation therapy and diagnostic services that lacked the required supervision from a physician.[15] In addition, in April 2023, Meharry Medical College paid $100,749 to resolve FCA allegations that, from 2016 until March 2020, Meharry submitted fraudulent claims to Medicare seeking payment for physician services provided in the internal medicine, OB/GYN, and psychiatric outpatient clinics, and for psychiatric consultations at Nashville General Hospital, but the services were performed by unsupervised, nonphysician residents.[16] In both settlements, there was no admission of liability.

Best practices and being proactive

Scheduling overlapping surgeries is a long-standing practice with multiple benefits for both patients and providers. However, the continued enforcement environment suggests that providers would be well advised to confirm compliance with applicable rules. Providers may also wish to consider reviewing their practices and policies, including the training and education of their surgeons, surgical teams, and staff members. Importantly, 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 review of the following:

Policies, procedures, and other controls

Written policies and procedures addressing overlapping surgeries are helpful for organizations that regularly rely on this practice. Policies should comply with applicable CMS and state requirements, and providers may also consider incorporating ACS guidance into their policies. Relevant stakeholders (e.g., surgeons, risk management, and surgery schedulers) should be involved as appropriate in any changes and should be familiar with policy requirements. Policies may also need to be tailored based on the surgeons' employment status.

Electronic health records

It is helpful to consider the impact of documentation created by electronic health record (HER) systems. Certain EHR systems may automatically record surgery start/stop times and surgeon in/out times. If accurate, that documentation can support compliance efforts and aid in internal reviews. However, some systems that automatically generate in/out times for providers may not accurately reflect when individuals actually came in and went out of a room. Similarly, manually entered in/out times may not be consistently precise. As such, providers may want to review how various medical record entries are generated to confirm that times recorded are accurate and reliable.

Surgery scheduling systems

Providers may also want to consider updating or revising their surgery scheduling systems. For instance, some providers have implemented controls to flag situations where one surgeon has multiple surgical suites scheduled simultaneously or where a surgeon has three scheduled procedures that overlap in time.

Patient communication and informed consent

Much of the media scrutiny surrounding overlapping surgeries has been driven by informed consent concerns and whether patients were aware that the lead surgeon would not be in the operating room for the entirety of the procedure. Some state laws and Medicare Conditions of Participation govern informed consent requirements.[17] 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."[18] While CMS does not require the informed consent form to include specific language about overlapping surgeries, it may be beneficial to review consent forms and evaluate whether language adjustments could be valuable.

Internal reviews

Proactive compliance efforts often include an internal retrospective claims audit, which requires reviewing the underlying medical record documentation. Certain CMS documentation requirements for teaching surgeries are fairly straightforward to review (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 must often be consulted contemporaneously to identify which surgeries potentially 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 the surgeon's medical judgment determines which portion of surgery is considered key or critical. And, as previously noted, time stamps 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 into 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 patient care

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 vital 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. Regarding proactive compliance efforts, 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.

Ultimately, the use of overlapping surgeries is a long-standing practice with numerous benefits. Permitting overlapping surgeries, however, can present certain compliance challenges—particularly concerning auditing. As enforcement scrutiny and media interest in this topic remains strong, effective compliance controls can help healthcare providers capture the benefits of overlapping surgeries while guarding against potential enforcement risk. If providers ultimately face enforcement actions or consider options for remediation of past conduct, it is critical to ensure organization decision-makers and external support (e.g., legal counsel, consultants) have a deep understanding of overlapping surgery requirements, government enforcement trends, and how to navigate the contours of auditing in this area.

Takeaways

- Healthcare providers frequently rely on the practice of overlapping surgeries to increase patients' access to care, surgeons' abilities to treat more patients, and operational efficiencies.
- Enforcement scrutiny and media interest related to overlapping surgery practices have intensified over the past decade.
- Healthcare providers that permit overlapping surgeries should ensure compliance with applicable rules and consideration of industry guidance.
- Compliance controls should be tailored to fit the unique aspects of the healthcare provider's practice and systems and be consistently applied.
- Employing compliance controls and best practices can facilitate the benefits of scheduling overlapping surgeries while also mitigating potential compliance and enforcement risks.

1 42 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, January 28, 2024,

https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/clm104c12.pdf.
2 "Chapter 12 - Physicians/Nonphysician Practitioners," § 100.1.2.
3 American College of Surgeons, "Statements on Principles," April 12, 2016, https://www.facs.org/about-acs/statements/stonprin.
4 42 C.F.R. § 415.172.
5 *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," *JAMA* 321, no. 8 (2019), https://jamanetwork.com/journals/jama/article-abstract/2725689; 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), https://journals.lww.com/jbjsoa/fulltext/2018/09000/the__practice__of__overlapping__surgery__is__safe__in.5.aspx; Brent A. Ponce et al., "Outcomes With Overlapping Surgery at a Large Academic Medical Center," *Annals of Surgery* 269, no. 3 (March 2019), https://journals.lww.com/annalsofsurgery/abstract/2019/03000/outcomes__with__overlapping__surgery__at__a__la
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7 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.
8 Jonathan Saltzman and Jenn Abelson, "Senate committee calls for ban on surgeons conducting simultaneous operations," U.S. Senate Committee on Finance, news release, December 6, 2016, https://www.finance.senate.gov/chairmans-news/senate-committee-calls-for-ban-on-surgeons-conducting-simultaneous-operations.
9 Sara Brinkmann, Lauren Slive Gennett, and Isabella Wood, "Clear the COVID–19 surgical backlog: Compliance implications of overlapping surgeries," *Compliance Today*, July 2022, https://compliancecosmos.org/clearing-covid-19-surgical-backlog-compliance-implications-overlapping-surgeries.
10 U.S. Department of Justice, U.S. Attorney's Office for the Western District of Pennsylvania, "James L. Luketich, M.D., University of Pittsburgh Medical Center, and University of Pittsburgh Physicians Agree to Pay $8.5 Million and Implement Monitoring Actions to Resolve False Claims Allegations," news release, February 27, 2023, https://www.justice.gov/usao-wdpa/pr/james-l-luketich-md-university-pittsburgh-medical-center-and-university-pittsburgh.
11 U.S. Department of Justice, U.S. Attorney's Office for the Western District of Pennsylvania, "False Claims Act Violation by UPMC Resolved for $2.5 Million," news release, July 27, 2016, https://www.justice.gov/usao-wdpa/pr/false-claims-act-violation-upmc-resolved-25-million.
12 United States of America et al v. University of Southern California, No. 2:18-CV-08311 (C.D. Cal Sep. 19, 2022).
13 Fifth amended complaint for money damages and civil penalties, United States of America et al v. University of Southern California, No. 2:18-CV-08311-SSS (C.D. Cal. Mar. 3, 2023).
14 United States of America et al v. Chattanooga Hamilton County Hospital Authority et al, No. 1:21-CV-00084 (E.D. Tenn. 2024).
15 U.S. Department of Justice, U.S. Attorney's Office for the District of Maryland, "University Of Maryland Shore Regional Health Agrees to Pay $296,870 to Settle Federal False Claims Act Allegations of Billing for Unsupervised Radiation Therapy and Diagnostic Services," news release, May 17, 2022, https://www.justice.gov/usao-md/pr/university-maryland-shore-regional-health-agrees-pay-296870-settle-federal-false-claims.
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17*See, e.g.*, 243 Mass. Code Regs. 2.07(26).
18 42 C.F.R. § 482.51(b)(2).