

An Ounce of Prevention: The Importance of Ethical Best Practices for the Medical Transcription Industry

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In January of this year, AHDI and MTIA announced the release of their *Manual of Ethical Best Practices for the Healthcare Documentation Sector*. The manual will help medical transcription businesses and professionals to adopt policies and procedures for complying with HIPAA privacy and security laws and operating in a manner consistent with ethical best practices. The manual is part of the associations' ongoing commitment to safeguarding protected health information and upholding the integrity of the profession and industry.

AHDI and MTIA members worked with Scott Edelstein, a partner in the health law practice of Squire, Sanders & Dempsey LLP, to create the documents in the manual. I recently had the opportunity to discuss with Mr. Edelstein why a set of ethical best practices is important for the future success of the medical transcription industry and individual companies:

Doggett: What recent changes or trends in law and government have increased the importance of compliance and ethical best practices for the medical transcription sector?

Edelstein: We have seen a number of developments over the last couple of



years that have indicated that there is going to be much more attention paid to anyone who participates at some level in the Medicare program, and that would include vendors. In addition, there has been a lot more activity concerning compliance with data privacy laws, including HIPAA. So a combination of these two things, I think, has really been the source of the increased demand to try to get compliance programs in place. The government has allocated a significant amount of money for Medicare fraud prevention, particularly under the Obama Administration. The Fraud Enforcement and Recovery Act

allocated \$330 million in new spending for the Attorney General's office for fraud prevention and another \$140 million for financial fraud investigation. That was on top of the activities already undertaken by the government through the Medicare Fraud Strike Force, which is staffed by the Department of Health and Human Services and the Department of Justice.

On the data privacy side, we have seen a significant amount of publicity surrounding data privacy breaches over the last couple of years. Probably one of the most significant cases involved CVS

Caremark, which was ordered to pay over \$2 million because of a HIPAA violation. For smaller companies, such as most MTSOs (medical transcription service organizations), a \$2 million fine could be devastating.

Doggett: I think that a lot of people within the sector do understand how laws and enforcement around patient health information could directly impact MTSOs, particularly small MTSOs, as you pointed out. I was wondering if you could speak as to how either directly or indirectly the government's crackdown on Medicare fraud stands to affect MTSOs.

Edelstein: I am not aware that the government has taken any action against MTSOs historically. However, the Fraud Enforcement and Recovery Act that I previously mentioned amended the False Claims Act by lowering the standard the government has to prove to show that a vendor has committed a False Claims Act violation. Because of that change, we are anticipating we will see a lot more activity against vendors such as MTSOs for alleged False Claims Act violations. What's important about the Act is that it permits *qui tam*, or whistleblower, actions. Disgruntled employees who are aware of certain inappropriate practices that their MTSO might have engaged in are typically the most likely candidates to bring a whistleblower action. Under the Act, they have the ability to file a complaint against the company, and the government can intervene. If the government does intervene and prevails, then the

ex-employee is entitled to a certain percentage of the award received by the government.

Doggett: So far we have talked about healthcare-specific laws around Medicare and patient health information. Are there laws that on the surface appear to be non-health care in nature but will stand to impact this sector, perhaps in ways that are not currently foreseen?

Edelstein: There certainly are issues regarding how workforce members are characterized, that is whether personnel should be characterized as an employee or an independent contractor. That characterization has implications for MTSOs and personnel because there are significant tax consequences. While I do not know if there is going to be a trend toward greater enforcement by the Internal Revenue Service (IRS), the IRS has already been fairly active in this area. Given the increased awareness of the issue, particularly by MTs,

companies will have greater incentive to ensure compliance.

Doggett: Are there any changes or trends you see on the horizon that would further warrant having a set of ethical best practices?

Edelstein: We are most likely going to have some type of healthcare reform in the very near future. As part of reform, the government will try to contain costs and to reduce fraud, so I think we certainly will see a continuation of the trend toward increased enforcement.

Data privacy will become increasingly important as more and more data is converted into digital format and as consumers develop increased sensitivity to how their information is being used. In addition to HIPAA enforcement, I think it is reasonable to expect that there will be more private lawsuits filed by patients who are suing because their information has been compromised.

HAVE YOU READ YOUR MEDICAL RECORD?

Campaign Ongoing! In 2005, AHDl advocated for the profession and quality patient care documentation by launching a yearlong campaign to target public awareness by promoting our "Have You Read Your Medical Record?" project and through educating the public in the importance of and procedures to create personal health records.

This is an ongoing campaign included on AHDl's Mission: Possible initiatives (#5) and components are encouraged to continue working with members of your community.

At www.ahdionline.org/mp, you will find the following materials:

- Have You Read Your Medical Record Poster
- Have You Read Your Medical Record Quick Tips
- Instructions for Contacting and Working with Local Media Outlets
- Personal Health Record: What's in it for You? Pamphlet
- Have You Read Your Medical Record PowerPoint Presentation

Doggett: Can you speak to what kind of remedies private individuals might have access to?

Edelstein: Individuals do not have a private right of action under HIPAA, but they would under tort theory in most states. That typically would entitle them to civil damages for invasion of privacy, including actual damages and perhaps punitive damages.

Doggett: Can you provide us with a cautionary tale that further underscores the importance of compliance, ethical best practices, and transparency?

Edelstein: Last year, the pharmaceutical company Pfizer had to pay \$2.3 billion to resolve criminal and civil healthcare liability related to fraudulent marketing practices and payment of kickbacks. Some of the activities that the government was concerned about involved payments made to physicians and others for consulting arrangements. The government was very skeptical of these arrangements. These types of arrangements are not unusual in the medical transcription industry. For example, it is not unusual for an MTSO to hire hospital administrators or medical records directors to be consultants, and I think these payments will be very carefully scrutinized.

Doggett: Are there any other cautionary tales that you wish to share?

Edelstein: The pharmaceutical industry has been the recipient of probably some of the largest fines imposed

by the government. In addition to Pfizer, several years ago, AstraZeneca and TAP Pharmaceuticals paid a \$1.1 billion Medicare fraud settlement.

So when the government does focus on a particular industry, they jump in with both feet. We have seen the same thing in the medical device industry and in the hospital industry. So I think this should be a warning for MTSOs. Although MTSOs have not really seen any government enforcement activity in their industry, we should remember that 10 to 15 years ago the pharmaceutical industry had not really seen much government enforcement activity either. Look at the changes and at the penalties that have been imposed in that industry. With the changes to the False Claims Act, I think the medical transcription industry needs to be particularly vigilant right now by ensuring that they have appropriate compliance programs in place to avoid being destined to the same fate as the pharmaceutical and medical device industries.

Doggett: Can you describe how other sectors of the healthcare industry have benefited from a program like the one created by AHDI and MTIA?

Edelstein: When we are talking about the data privacy aspects, most healthcare providers are covered entities under HIPAA. Accordingly, they have had to have HIPAA policies and procedures in place to meet their regulatory obligations. Such HIPAA compliance programs have given providers the added benefit of being able to promote their commitment to

patient privacy, resulting in improved relationships with their customers, specifically patients. What it does is engenders trust. If patients know that their healthcare provider is complying with certain guidelines or principles for maintaining confidentiality and security of data, then that makes the patient much more willing to do business with the provider. I expect we will see the same thing with MTSOs. Having a HIPAA compliance program or adopting high standards for data privacy and confidentiality will engender trust among MTSO customers.

Doggett: Do you have any sense or insight into how the government views an industry that creates and supports a set of ethical best practices?

Edelstein: The government tends to embrace that. We have seen, for example, the pharmaceutical industry develop voluntary guidelines for marketing of products to healthcare providers. The government embraced that action and specifically referred to the guidelines in the compliance guidance that it developed for the pharmaceutical industry. Other industries such as the medical device industry have adopted similar marketing guidelines. Those guidelines have been geared more towards the anti-kickback statute, but because the government has looked at the guidelines favorably, I think the same thing would happen here with the medical transcription industry adopting these ethical best practices.


Doggett: To close out this interview, do you have any general words of wisdom for an MTSO that may feel overwhelmed by the idea of needing to embrace ethical best practices?

Edelstein: I believe that an ounce of prevention is worth a pound of cure. While it may seem overwhelming at first blush, it is a lot easier to adopt principles or guidelines at this stage, before there is any government investigation, than to have to go back when you are in the midst of

a government investigation and try to figure out what you should have done differently.

Doggett: It appears you are playing Russian roulette if you do not embrace ethical best practices and hope that you are skipped over by the government.

Edelstein: Yes, and invariably what happens is that a company which is the subject of an investigation will say, “Gosh! Why didn’t I just

adopt some policies and procedures a year or two ago before this whole issue came up? It would have been so much easier to do that than to go through this time-consuming, burdensome, and costly process of responding to a government investigation.” 

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