HCCA 21st Annual Compliance Institute
March 26-29, 2017

Overlapping Surgery Developments

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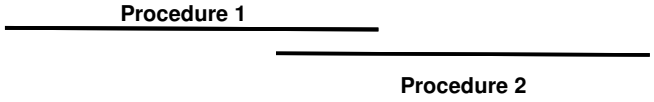
Agenda

- Overview of Overlapping Surgeries
- Discussion of Key Authority
  - Teaching Setting
  - Non-Teaching Setting
- Recent Spotlight on Overlapping Surgeries
- Enforcement Developments
- Practical Strategies for Providers
- Questions?

Basic Overview of Overlapping Surgeries

- Overlapping surgeries generally occur when two surgical procedures under one attending surgeon overlap in part



- Overlapping surgeries may occur in multiple settings:
  - Teaching hospitals (often with the assistance of residents)
  - Non-teaching hospitals (often with help from other surgical assistants)
- Over the past 1.5 years, we have seen a significant surge of attention surrounding these issues

Numerous Considerations and Stakeholders

Overview of Authority

Brief Overview of Medicare Rules for *Teaching* Surgeries

- Medicare billing rules for teaching surgical services permit certain parts of two surgical procedures, under the supervision of one attending surgeon, to overlap in certain circumstances.
  - The teaching surgeon must ***personally document*** in the medical record that he/she was physically present during the ***key/critical portion(s) of both procedures***
  - The teaching surgeon has discretion to define the key/critical portion(s)
  - When the key/critical portion of one procedure is over, the teaching surgeon may move to a second procedure. The teaching surgeon must designate another qualified surgeon to be ***immediately available*** for the first procedure, should the need arise

See 42 C.F.R. § 415.172; Medicare Claims Processing Manual, Ch. 12

Brief Overview of Medicare Rules for *Teaching* Surgeries

- Medicare does not pay for instances where the key/critical portions of both procedures overlap
  - The American College of Surgeons calls this scenario "concurrent" surgery
- Three overlapping teaching surgical procedures are not billable to Medicare

Brief Overview of Authority for All Overlapping Surgeries, Including *Non-Teaching* Procedures

- No Medicare payment rules for ***non-teaching*** overlapping surgeries
- Medicare Conditions of Participation call for providers to deliver surgical services in accordance with acceptable standards of practice (See 42 C.F.R. § 482.51)
  - Consider guidelines from industry groups, such as the American College of Surgeons
- Consider State Law
- Consider State Medical Board requirements
- Consider Joint Commission and other accreditation requirements

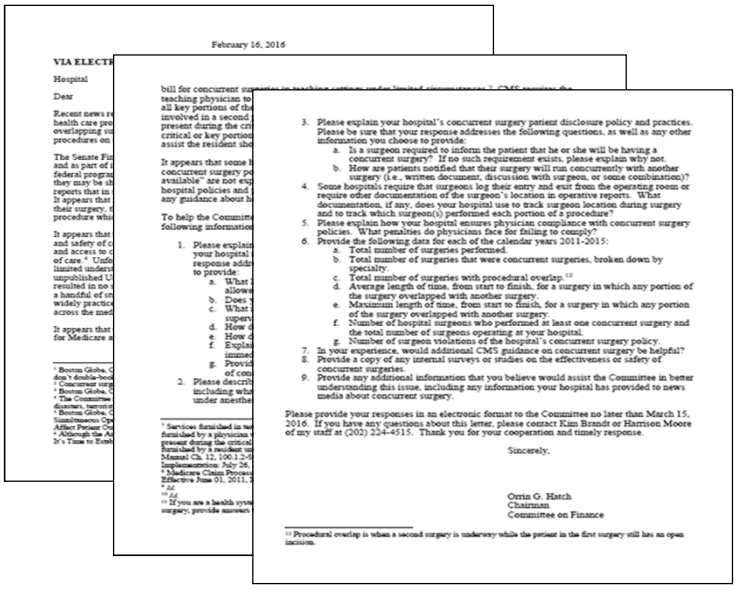
Recent Spotlight On Overlapping Surgeries

Pre-2015 Environment

- Regulators did not elect to enact rules regarding overlapping surgeries generally or prohibit such practices
  - Medicare rules focused on payment in teaching settings
- Lack of significant enforcement attention
- Lack of media attention

2015 Boston Globe Investigative Report

Senate Finance Committee Letter



February 16, 2016

3. Please explain your hospital's concurrent surgery patient disclosure policy and practices. Please be sure that your response addresses the following questions, as well as any other information you choose to provide:
   a. Is a surgeon required to inform the patient that he or she will be having a concurrent surgery? If no such requirement exists, please explain why not.
   b. How are patients notified that their surgery will run concurrently with another surgery (i.e., written document, discussion with surgeon, or some combination)?
4. Some hospitals require that surgeons log their entry and exit from the operating room or require other documentation of the surgeon's location in operative reports. What documentation, if any, does your hospital use to track surgeon location during surgery and to track which surgeon(s) performed each portion of a procedure?
5. Please explain how your hospital ensures physician compliance with concurrent surgery policies. What penalties do physicians face for failing to comply?
6. Provide the following data for each of the calendar years 2011-2015:
   a. Total number of surgeries performed.
   b. Total number of surgeries that were concurrent surgeries, broken down by specialty.
   c. Total number of surgeries with procedural overlap.[12]
   d. Average length of time, from start to finish, for a surgery in which any portion of the surgery overlapped with another surgery.
   e. Maximum length of time, from start to finish, for a surgery in which any portion of the surgery overlapped with another surgery.
   f. Number of hospital surgeons who performed at least one concurrent surgery and the total number of surgeons operating at your hospital.
   g. Number of surgeon violations of the hospital's concurrent surgery policy.
7. In your experience, would additional CMS guidance on concurrent surgery be helpful?
8. Provide a copy of any internal surveys or studies on the effectiveness or safety of concurrent surgeries.
9. Provide any additional information that you believe would assist the Committee in better understanding this issue, including any information your hospital has provided to news media about concurrent surgery.

Please provide your responses in an electronic format to the Committee no later than March 15, 2016. If you have any questions about this letter, please contact Kim Brandt or Harrison Moore of my staff at (202) 224-4515. Thank you for your cooperation and timely response.

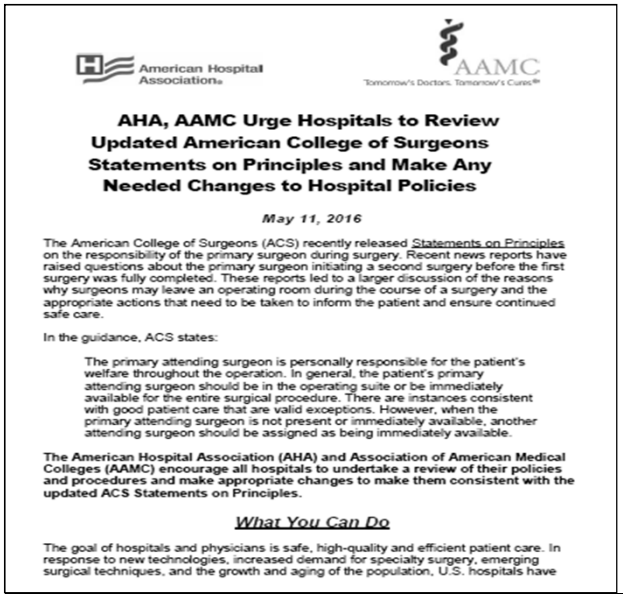
Sincerely,

Orrin G. Hatch
Chairman
Committee on Finance

[12] Procedural overlap is when a second surgery is underway while the patient in the first surgery still has an open incision.

- In February 2016, the Senate Finance Committee sent a letter to 20 hospitals and health systems across the country
- Senate Finance Committee staff and members also met with leaders of industry groups including The American College of Surgeons (ACS)

American College of Surgeons Guidance



American Hospital Association

AAMC
Tomorrow's Doctors. Tomorrow's Cures.

AHA, AAMC Urge Hospitals to Review Updated American College of Surgeons Statements on Principles and Make Any Needed Changes to Hospital Policies

May 11, 2016

The American College of Surgeons (ACS) recently released Statements on Principles on the responsibility of the primary surgeon during surgery. Recent news reports have raised questions about the primary surgeon initiating a second surgery before the first surgery was fully completed. These reports led to a larger discussion of the reasons why surgeons may leave an operating room during the course of a surgery and the appropriate actions that need to be taken to inform the patient and ensure continued safe care.

In the guidance, ACS states:

> The primary attending surgeon is personally responsible for the patient's welfare throughout the operation. In general, the patient's primary attending surgeon should be in the operating suite or be immediately available for the entire surgical procedure. There are instances consistent with good patient care that are valid exceptions. However, when the primary attending surgeon is not present or immediately available, another attending surgeon should be assigned as being immediately available.

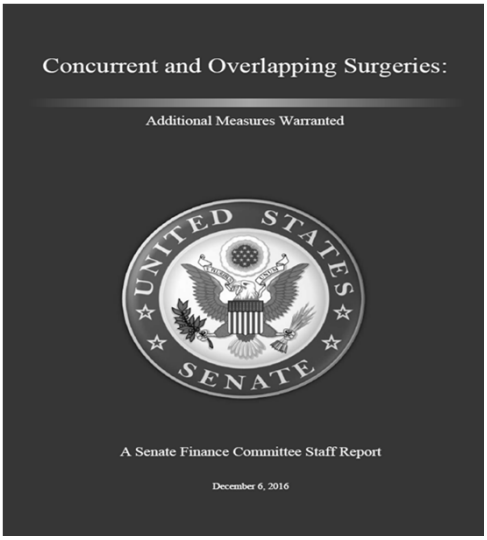
The American Hospital Association (AHA) and Association of American Medical Colleges (AAMC) encourage all hospitals to undertake a review of their policies and procedures and make appropriate changes to make them consistent with the updated ACS Statements on Principles.

What You Can Do

The goal of hospitals and physicians is safe, high-quality and efficient patient care. In response to new technologies, increased demand for specialty surgery, emerging surgical techniques, and the growth and aging of the population, U.S. hospitals have

- On April 12, 2016, the ACS revised their Statement on Principles, which addresses the inter-operative responsibility of surgeons
- The ACS Principles are similar, but not identical to, the Medicare billing rules
- ACS Principles emphasize patient informed consent and communication
- In light of the updated ACS Statements on Principles, the AHA has ***urged hospitals to review their polices and procedures***

December 2016 Senate Finance Committee Report



Concurrent and Overlapping Surgeries:

Additional Measures Warranted

UNITED STATES SENATE

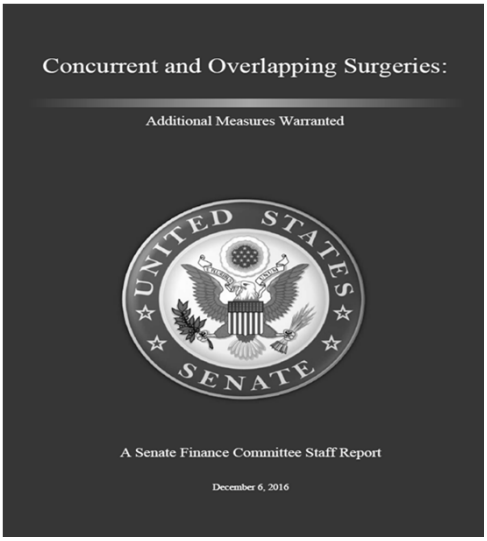
A Senate Finance Committee Staff Report

December 6, 2016

The Senate Finance Committee released a report on concurrent and overlapping surgeries on December 6, 2016, highlighting areas of **Congressional concern**, including:

- Hospital policies, or lack thereof
- Hospital policy training and enforcement
- Practice of "concurrent" surgeries where key/critical portions of two procedures overlap
- Patient safety
- Patient informed consent
- Improper payments and billing concerns
- Lack of Medicare payment regulations in non-teaching context
- Lack of government enforcement

December 2016 Senate Finance Committee Report



Senate Finance Committee staff recommendations regarding improper payments:

- The HHS OIG should review the controls in place to ensure that hospitals and physicians are ***appropriately billing for physician services provided by teaching physicians***
- CMS should review the agency's billing requirements for services performed by teaching physicians to determine if those ***requirements should be established for other surgical facilities and scenarios***

Patient Safety Data

- Recent research regarding overlapping surgeries supports safety of practices
  - *Outcomes of Concurrent Operations: Results from the American College of Surgeons' National Surgical Quality Improvement Program:* Concurrent operations at ACS NSQIP hospitals were not associated with increased risk for poor outcomes when compared to non-concurrent operations. (Annals of Surgery, submitted 2017)
  - *Safety of Overlapping Surgery at a High-volume Referral Center*: Findings from administrative and clinical registries support the safety of overlapping surgical procedures at this center (Annals of Surgery)

Enforcement Developments

Recent and Significant *Qui Tam* Enforcement Activity

- January 2017: Vanderbilt close to finalizing settlement to resolve False Claims Act suit brought by **three physicians** who allege the University's medical center billed Medicare as if physicians were present for the key/critical portions of procedures when only residents were present
- August 2016: A *qui tam* lawsuit **filed by a former medical resident** filed against an Advocate Health Care teaching hospital is unsealed
  - Allegations include that surgeons improperly used (and billed for) assistants at surgery (including PAs) when qualified residents were available to assist

Recent and Significant *Qui Tam* Enforcement Activity

- July 27, 2016: DOJ announces a **$2.5 million** settlement with the University of Pittsburgh Medical Center and related organizations to resolve False Claims Act allegations in connection with a *qui tam* lawsuit
  - Complaint alleged neurosurgeons submitted claims for surgical procedures performed by other surgeons or practitioners, *when the neurosurgeons did not participate in the surgeries to the degree necessary to bill for the claims*
  - One of the whistleblowers was a neurosurgeon
- January 2014: **Individual surgeons** settled with whistleblowers (one whistleblower was an orthopedic surgeon) in a case against Rush University Medical Center
  - Allegations include that surgeons improperly billed for overlapping surgeries that did not meet Medicare rules

Practical Strategies for Providers

Potential Provider Efforts: General Considerations

- Increased focus on teaching surgeries and overlapping procedures has raised tough questions
- Important to make sure right stakeholders are at the table
- Requires individualized analysis specific to each institution
  - Teaching institutions vs. non-teaching institutions
  - Consider employed versus non-employed physicians
  - Certain rules contain discretion and ambiguity
  - Continuum of approaches and risk
  - Certain institutions elect to enact rules that are more restrictive than the regulations

Potential Provider Efforts: Retrospective Considerations

Retrospective Efforts

- Potential retrospective claims/billing review
  - Consider 60 Day Overpayment Rule implications
- Diligence regarding historical practices and understanding of the rules
  - May require interviews, OR suite observation, etc.
  - Review policies regarding teaching and/or overlapping surgeries

Potential Provider Efforts: Prospective Considerations

Prospective Efforts

- Revise teaching surgery and/or overlapping surgery policies
- Refine training and education
- Refine documentation: consider paper order sets and electronic health systems refinements
- Develop prospective claims/billing audit plan
- Review and update patient informed consent processes and forms
- Review of patient safety considerations
- Prepare for media and patient questions
- Prepare for increased government enforcement, audits, etc.
- Continue to follow industry developments and research regarding overlapping surgeries

Questions & Discussion

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