NATIONAL ASSOCIATION OF ADDICTION TREATMENT PROVIDERS (NAATP)

THE FOUR PILLARS OF COMPLIANCE

Licensing

Health Care

Clinical

Health Insurance/Benefits

Kathy A. Steadman
Coppersmith Brockelman PLC
ksteadman@cblawyers.com

Licensing Compliance

- Most states require drug and alcohol treatment centers to be properly licensed.
  - This is generally required through state departments of health services, behavioral health, mental health or similar regulatory body.
  - Treatment facilities are required to determine the proper class of licensure based upon the level of treatment provided. E.g IOP, residential.
  - Licensing must be kept up-to-date. Licenses generally expire after defined time periods. E.g. every 3 years.
  - Change of address, change in key personnel and other material changes may require notification to licensure agencies within specified timeframes.

Licensing Compliance

- For initial licensure, states often require a survey or in-person audit of the facility to ensure compliance with applicable laws.
- Complaints about licensing (or improper behavior under such licenses), are generally directed to the same regulatory agency that issued the original license.
- Any licensing complaints must be responded to timely and thoroughly in order to avoid adverse licensing consequences by the state agency.
- State agencies overseeing drug and alcohol treatment have the authority to suspend or revoke licensure and level fines and penalties for non-compliance.

Licensing Compliance

- In addition to facility licensing—you must ensure that individuals treating clients/patients are properly licensed.
- Review state licensing requirements for the level of treatment provided to clients.
- Check state licensing databases as a cross-check when hiring therapists/counselors.
- Check licensing oversight breadth to ensure individuals can treat under another professional's license.
- Maintain current copies of relevant licenses in files.

Licensing Compliance

- Adopt policies/protocols for rechecking license status at regular intervals. E.g. January 1, July 1 of each year.
- For independent contractor therapists/medical providers, be certain you understand the center's liability and related insurance coverage for their acts/omissions.
- Some states require that all relevant licenses be displayed. Clearly understand your state's requirements in connection with licensing.

Health Care Regulatory Compliance

- The federal Anti-Kickback Statute ("Anti-Kickback Statute") is a criminal statute that prohibits the exchange (or offer to exchange), of anything of value, in an effort to induce (or reward) the referral of federal health care program business. See 42 U.S.C. § 1320a-7b.

- The Anti-Kickback Statute is broadly drafted and establishes penalties for individuals and entities on both sides of the prohibited transaction. Conviction for a single violation under the Anti-Kickback Statute may result in a fine of up to $25,000 and imprisonment for up to five (5) years. See 42 U.S.C. § 1320a-7b(b).

- In addition, conviction results in mandatory exclusion from participation in federal health care programs. 42 U.S.C. § 1320a-7(a). Absent a conviction, individuals who violate the Anti-Kickback Statute may still face exclusion from federal health care programs at the discretion of the Secretary of Health and Human Services. 42 U.S.C. § 1320a-7(b).

Health Care Regulatory Compliance

- Although the Anti-Kickback Statute does not afford a private right of action, the False Claims Act provides a vehicle whereby individuals may bring qui tam actions alleging violations of the Anti-Kickback Statute. See 31 U.S.C. §§ 3729–3733.
- When a private citizen sues on behalf of the Federal government and is successful, they receive a percentage of the ultimate recovery for their "whistleblower" efforts.
- As of 2012, over 70 percent of all federal Government FCA actions were initiated by whistleblowers. Claims under the law have typically involved health care, military, or other government spending programs.

Health Care Regulatory Compliance

- Many states have adopted state specific anti kick-back and false claims acts.
- Some state statutes are so broadly worded that they are not dependent upon the submission of claims to a public program.
- For example, Arizona has a statute that prohibits an owner or director of a lab from soliciting referrals or splitting fees to induce referrals.
- Many other states have adopted prohibited inducement, anti kick-back and mini-Stark laws designed to eliminate the payment of referral fees in health care.

Health Care Regulatory Compliance

- Federal and state statutes that address anti kick-back in healthcare are frequently criminal statutes with significant penalties attached to violation(s).
- The payment of referral fees to brokers, patients, family members or others is dangerous and may result in federal and state law violations.
- For Medicare, Medicaid and other public health programs, there must be ZERO tolerance for remuneration or fees for patient referrals.

Health Care Regulatory Compliance

- Other compliance issues to consider:
- Health Insurance Portability and Accountability Act (HIPAA)
  - Privacy
  - Security
  - HITECH
  - Part II Regulations (special privacy protections for drug and alcohol treatment records that apply to any federally assisted programs).

Health Insurance Regulatory Compliance

- Payment by insurance companies or employee benefit plans to drug and alcohol treatment centers is generally based upon assignment of benefits by a policyholder.
- Obtaining a valid assignment of benefits is a prerequisite to assignment of insurance claims.
- Some policies cannot be assigned.
- The language of the assignment is critical for prompt and proper payment of claims.

Health Insurance Regulatory Compliance

- Proper payment of claims under a patient's insurance policy or employee benefit plan is contingent upon compliance with the policy's terms and requirements.

- The assignment generally means that the drug and alcohol treatment center "stands in the shoes" of the patient/insured.

- The treatment center must comply with all requirements of the policy/plan in order to be properly paid. Examples are:

    - Premiums may only be paid by those specified in the policy (most insurers now limit who can pay the premium for an insured).

Health Insurance Regulatory Compliance

- All patient financial responsibility amounts must be paid in advance of treatment.
- Failure to properly collect patient responsibility amounts in connection with treatment has been held to constitute fraud and misrepresentation on the insurer/employee benefit plan.
- Insurers often point to a specific exclusion for denying the entire claim when patient responsibility amounts have not been collected. E.g. Treatment for which no charge is made to the insured.
- Usual and customary billing limits will apply. Many states are adopting balance billing/surprise billing legislation—know what your state requires. E.g. California, Texas, Arizona.

Health Insurance Regulatory Compliance

- Many of the licensing and health care regulatory issues can also have an impact on payment under an insurance policy or employee benefit plan.
  - Failure to be properly licensed can result in denial of claims—this is because the treatment center would not meet the definition of "provider" or other key policy/plan definitions.
  - Failure to comply with health care regulations can also impact payment/reimbursement under an insurance policy or employee benefit plan. Examples are prohibited inducements or violation of state or federal anti kick-back statutes.

Health Insurance Regulatory Compliance

- Other considerations in connection with insurance policy/regulatory compliance:
  - Prohibited inducements
  - Rebating
  - Misrepresentation
  - Unfair Practices or Frauds

Clinical Regulatory Compliance

- Clinical/proper treatment protocols are a fundamental requirement for avoiding liability.
- Proper licensure of staff (previously discussed).
- Proper training of staff.
- Proper medical oversight of staff.

Clinical Regulatory Compliance

- Medical records should clearly and completely describe the treatment rendered.
- Medical records should be internally and externally consistent.
- Review state requirements to determine whether medical and other treatment records must follow a specific format.
- Keep corroborating records of attendance at group or individual sessions. E.g. patient sign-in.
- Facilitate staff continuing medical education to ensure that treatment protocols are current and valid.

Clinical Regulatory Compliance

- Ensure medical direction is relevant in terms of specialization or practice area.
- Ensure consents for treatment are clear, accurate and compliant with applicable law.
- Ensure the center is properly insured for clinical/medical treatment.
- Make sure if you are involving family in treatment decisions for adults, that you have proper authorizations to share information and decision making.

Recommendations

- Establish a strong and well-defined compliance function in your organization.
- Adopt compliance policies and procedures.
- Clearly communicate the compliance policies and procedures to staff, clients, regulators and other constituents.
- Routinely audit treatment center practices to ensure compliance with policies and procedures.
- Empower compliance staff to enforce policies and effect necessary change in connection with reported violations.

Recommendations, continued

- Maintain clear, detailed and accurate medical records for each patient/client.
- Review and update intake and patient financial responsibility forms at least annually and make any/all changes as necessary.
- Review legislation that may affect your center and implement changes as necessary.
- Ensure that you have proper and complete insurance for your center that protects you in the event of regulatory violations.

Recommendations, continued

- Know the insurance policies and employee benefit plans for your clients and comply with required terms.
- Be consistent in your application of policies and procedures to avoid arguments of waiver or pretext.
- Scrupulously protect patient privacy/confidentiality (Separate HIPAA issues).
- Reward compliance behavior by staff.

Conclusions

- Long-term sustainability depends upon high levels of compliance.
- Those centers with well-defined, well-communicated compliance programs are more likely to survive regulatory/payment scrutiny.
- The more significant the claim submissions to an insurer or employee benefit plan—the more likely there will be significant audit and payment scrutiny.
- Compliance functions are no longer an option.