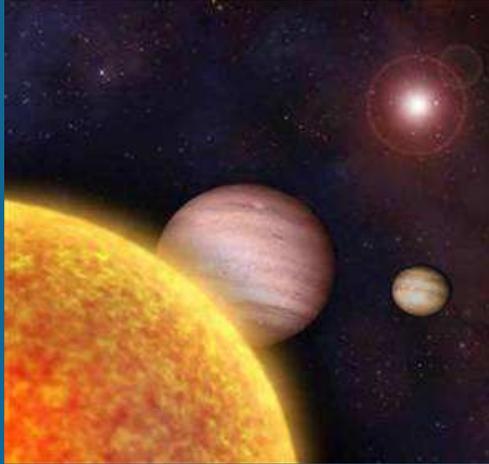


Physician Supervision of Hospital Outpatient Services: Clinical and Regulatory Perspectives Remain Worlds Apart



Moderator:

Steve Lipton

Partner

Davis Wright Tremaine LLP

Ed Rauzi

Partner

Davis Wright Tremaine LLP

Panelists:

Terri Keville

Partner

Davis Wright Tremaine LLP

Adam Romney

Associate

Davis Wright Tremaine LLP

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.



Medicare Terminology: Refugees from the 60s

- Two categories of services—
 - Diagnostic
 - Therapeutic
- Two sites of service—
 - Physician's Office
 - Hospital
- Two types of “incident to” services
 - Physician's “incident to” service
 - Hospital's “incident to physician's” service

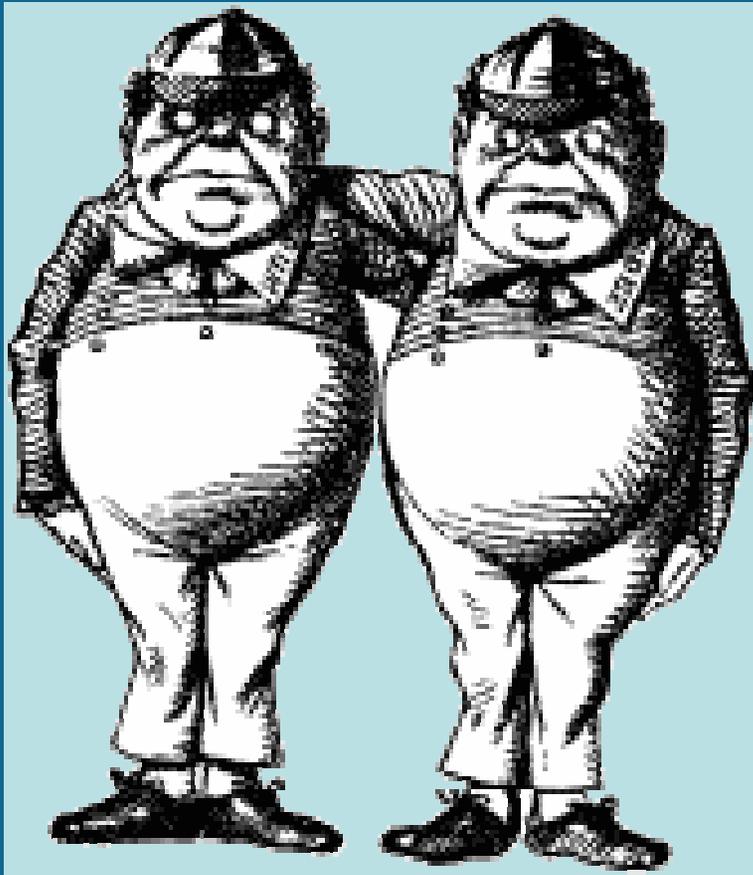


1861(s) The term
“medical and other health
services” means any of
the following items or
services:

* * *

(2)(A) **services
and supplies** (including
drugs and biologicals
which are not usually self-
administered by the
patient) **furnished as an
incident to a
physician's
professional service,**

(B) **hospital services**
(including drugs and
biologicals which are
not usually self-
administered by the
patient) **incident to
physicians' services
rendered to
outpatients** and partial
hospitalization services
incident to such
services;



- Medicare's rules on physician supervision depend upon a series of ***“either/or” characterizations.***
- Medicare's rules are the result of ***policy choices*** or ***analogies*** made by CMS, most involving two options.

There are two kinds of assumptions/presumptions

- Rebuttable
- Not rebuttable/Irrebuttable

Which kind is this?

IM 3112.4 Outpatient Therapeutic Services.—

[T]he physician supervision requirement is generally assumed to be met where the services are performed on hospital premises; the hospital medical staff that supervises the services need not be in the same department as the ordering physician. (Emphasis added.)



Understanding the New Supervision Requirements

- Which services?
- Expansion of the direct supervision standard to new contexts?
- Supervisor qualifications?

Which Services?

New standard applies to therapeutic services covered under the incident-to provision for hospital outpatient services when furnished in an outpatient setting.

Supervision requirements for the following services were not changed by 2010 HOPPS:

- Diagnostic services
- Therapeutic services provided incident-to a physician's service provided in off-campus hospital-based departments
- Services covered on other bases

New Application of “Direct Supervision” Standard to On-Campus Outpatient Departments

The *supervisor* must be: present *in the hospital* (rather than in the department) and *immediately available* to furnish assistance and direction throughout the performance of the procedure.

“In the Hospital”

- Supervisor may be anywhere on the hospital campus:
 - “Areas in the main building(s) of the hospital that are under the ownership, financial, and administrative control of the hospital, and for which the hospital bills the services furnished under the hospital’s [CMS Certification Number]”
- Supervisor could be in a physician’s office, an on-campus SNF, RHC, or other nonhospital space.

Immediately Available

CMS says that the term “immediately available” means “without interval of time” and “available to furnish assistance and direction throughout the performance of the procedure.”

- No temporal or spatial standards for immediate availability
- Supervisor must not be so physically far away that he or she could not intervene “right away.”
- Supervisor must not be performing another procedure or service that he or she could not interrupt.

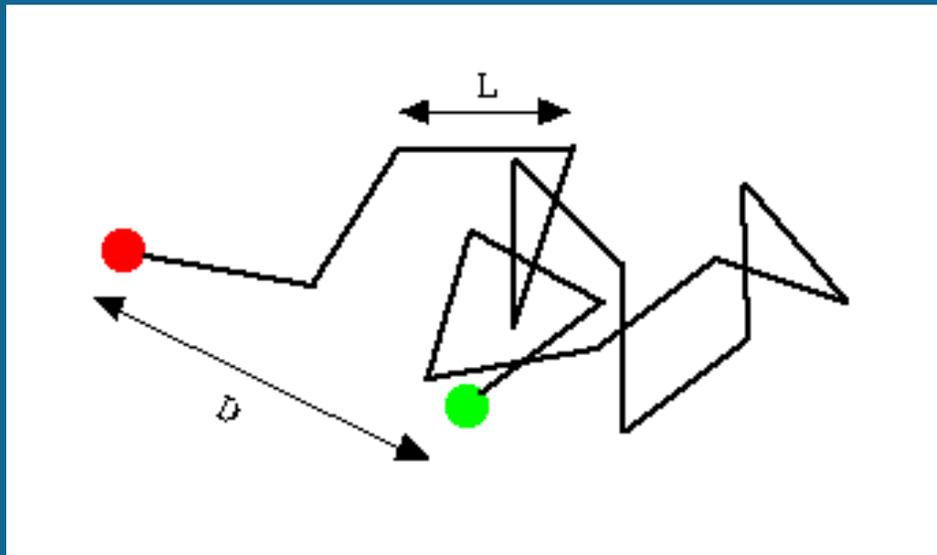
Who May Supervise

- The 2010 HOPPS “clarifies” that supervision may be furnished by physicians or non-physician practitioners (“NPPs”) who can perform the service under their scope of practice defined by state law.
- For this purpose, NPPs include:
 - Clinical psychologists;
 - Licensed clinical social workers;
 - Physician’s assistants;
 - Nurse practitioners;
 - Clinical nurse specialists; and
 - Certified nurse midwives

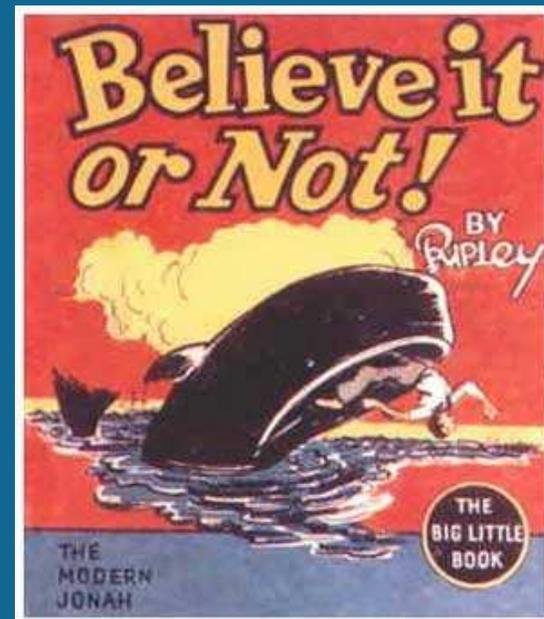
Supervisor's Expertise

- Prior to 2010 HOPPS, no particular expertise requirement to supervise outpatient therapeutic service.
- In 2010 HOPPS, the supervising physician or NPP:
 - Must be prepared to step in and perform the service, not just to respond to an emergency. This includes the ability to take over performance of a procedure and, as appropriate to both the supervisory physician or nonphysician practitioner and the patient, to change a procedure or the course of treatment being provided to a particular patient.

Does CMS *really* mean that a physician must be available immediately?



Does CMS *really* mean that a physician must be able to take over the therapy?



The Poster Children



CMS “plays the Quality Card”



What are the differences between on-campus and provider based departments?



How many physicians will it take to do what CMS requires?



What is the new authority for physician extenders to supervise these procedures?



Does a supervising physician have any malpractice risk? 📢

Do the new rules
have implications for
the hospital's medical
staff bylaws/rules?



What are the implications
for hospitals?

Medical Staff Issues

- CMS expects a hospital to have “bylaws, credentialing procedures, and policies that it believes are appropriate to ensure that all hospital patients receive high quality services in a safe and effective manner.”
- More specifically, CMS expects hospital “leadership, credentialing procedures, and other policies...to ensure that services furnished to Medicare beneficiaries are being provided only by qualified practitioners in accordance with all applicable laws, regulations, and coding guidance. For services not furnished directly by a physician, we would expect that these bylaws and policies would ensure that the services are being supervised in a manner commensurate with the complexity of the service, including personal supervision where appropriate.”

Medical Staff Issues

- Can hospitals get physicians to cooperate with CMS outpatient supervision requirements?
- Will physicians understand that CMS's promulgation of these requirements could be characterized as establishing a standard of care that *they* must meet—especially since CMS expressly invoked quality of care as a rationale?

Medical Staff Issues

- Are specific changes to medical staff bylaws required? Recall that medical staff bylaws amendments must be approved by both the medical staff and the hospital's governing body.

Medical Staff Issues

- Many medical staff bylaws list basic responsibilities of medical staff membership. These may include such general responsibilities as (1) abiding by all applicable government agency regulations and Joint Commission standards; (2) refraining from delegating diagnosis or care of a patients to other practitioners who are unqualified or inadequately supervised; and (3) coordinating care with other practitioners as required by, for example, department policy. See California Hospital Association Model Medical Staff Bylaws (2008).

Medical Staff Issues

- Department-specific rules and regulations or policies? Privilege Sheets?
- What about credentialing?

What are the record keeping implications?



Should hospitals
begin hiring
“outpatientalists”?

