Risk Matters: Healthcare Trends

By Jeffrey A. Woods, JD

This is the last Risk Matters article for 2023. Normally, the end of the year is a time for reflection, but in the Risk department we are always looking toward the future to anticipate issues that may adversely affect our policyholders. According to *Forbes* magazine*, the Top 5 Healthcare Trends in 2023 and beyond are:

- Artificial Intelligence in Healthcare
- Remote Healthcare – Virtual Hospitals, Healthcare Communities, and Telehealth
- Retail Healthcare
- Wearable Medical Devices
- Personalized Healthcare

While not all these trends are brand new, each brings its own unique challenges. Our policyholders report being approached by vendors and presented with modalities new to the market which impact the practice of medicine with promises of efficiency and cost reduction. As with most trends and new modalities, especially those that are technology-related, there will be new risks for physicians and providers. Rest assured that SVMIC and the Risk Department will remain vigilant in our protection of our policyholders. We will

be addressing several of these topics and trends in the coming year. In the meantime, if you are approached by a vendor offering new technology related to these cutting-edge trends and have questions, please contact one of our risk education consultants or claim attorneys.

Medicare Reimbursement in 2024 Announced

By Elizabeth Woodcock, MBA, FACMPE, CPC

On November 2, the Centers for Medicare & Medicaid Services (CMS) released the final rule for the Medical Physician Fee Schedule (PFS). The PFS conversion factor for 2024 is $32.74, a 3.4% decrease from the 2023 conversion factor of $33.89. The overall payment rate will be reduced by 1.25% based on requirements for budget neutrality. By contrast, hospitals will enjoy a 3.1% increase, based on the market basket reimbursement methodology that CMS applies to facilities.

The following physician specialties received an overall estimated 3% increase, reflecting the agency's continued boost to office-based evaluation and management services: family medicine, endocrinology, and hematology/oncology. Reductions will be felt by interventional radiology, nuclear medicine, and vascular surgery with estimated 4%, 3%, and 3% declines, respectively. A decrease of 3% is also projected for physical/occupational therapy. All other specialties, according to CMS's projections in Table 118, are expected to fall between -2% and 2%.

The Medicare PFS final rule presents some novel reimbursement opportunities for medical practices. Starting January 1, 2024, physicians and advanced practice providers can be reimbursed for training caregivers to support their loved ones with certain diseases or illnessesClinical psychologists and therapists are also eligible to render these services. For arranging services that extend to the community, practices can be paid for Community Health Integration (CHI) with new codes G0019 and G0022.

Additional payment for the so-named "cognitive load" of building a relationship with a patient for delivering primary and longitudinal care is finalized for the coming year. The code - G2211 - was proposed years ago, but subsequently shelved over financial concerns for the Medicare program. The federal agency resurrected the code declaring that its former budgetary estimates were misguided. The description for the new add-on code is: "Visit complexity inherent to evaluation and management associated with medical care services that serve as the continuing focal point for all needed health care services and/or with medical care services that are part of ongoing care related to a patient's single, serious condition or a complex condition." The assigned work RVUs associated with the new visit complexity add-on code are 0.33.

Social Determinants of Health (SDOH) Risk Assessment will be reimbursed, including a distinct, additional payment when rendered during the annual wellness visit. No cost-sharing will be due from the patient when the examination is performed with the visit. The new code is G0136, with the description: "administration of a standardized, evidence-based Social Determinants of Health Risk Assessment tool, 5-15 minutes." There is no standard screening requirement, although CMS suggests several, including PRAPARE. 0.18 work RVUs are allocated for the assessment.

Care navigation receives payment through new "Principal Illness Navigation" codes, designed for managing patients with high-risk conditions (cancer and dementia, for example). Billable services include identifying and connecting patients with appropriate support resources. The new codes are G0023, G0024, G0140, and G0146.

Immunization administration increased by 2%. The rate in the office setting went from $19.84 to $20.30, based on the national payment amount. Importantly, the additional in-home administration payment (M0201) -- $38.55 in 2024 - is made permanent, although it is limited to one pay-out per home visit.

Payment for evaluation and management (E/M) office visits, as well as select mental

health, medical nutrition therapy, and ESRD services, via telemedicine is made permanent in 2024; many other services are denoted as provisional.

Place of service is critical for telemedicine claims; for 2024, claims billed with POS 10 (Telehealth Provided in Patient's Home) will be paid at the non-facility (higher) rate. Claims billed with POS 02 (Telehealth Provided Other than in Patient's Home) will continue to be paid at the facility rate, which is normally 40% lower.

As of January 1, 2024, eligibility to perform services and bill Medicare is extended to marriage and family therapists (MFTs) and mental health counselors (MHCs), including addiction or drug and alcohol counselors who meet requirements to be considered as such. This extension applies to community health centers, including federally qualified health centers and rural health clinics. These counselors, along with clinical social workers, can render and be paid for Health Behavior Assessment and Intervention (HBAI) services.

The 2,709-page document can be viewed at this link, although it will be inserted into the official Federal Register on November 16.

The Growing Legal Risk of Online Tracking Technologies on Healthcare Websites

By Justin Joy, JD, CIPP

The use of website tracking technology, such as the Meta Pixel, in the healthcare industry continues to garner media attention. A prior Sentinel article in February 2023 provided information about the risk posed by website tracking technology, and a May 2023 article provided additional information on the topic, as well as guidance on mitigating this risk. This article focuses on how this risk has materialized into legal claims which class action plaintiffs are asserting against healthcare organizations across the country.

At least for now, the class action lawsuits are generally targeting hospitals and larger health systems. Many defendants in these lawsuits are settling the cases for millions of dollars.[1] Notably, while Facebook's parent corporation, Meta Platforms Inc. ("Meta"), is not the only vendor providing tracking technology, for many reasons, it appears to be the

most prominent in terms of attention on this issue. Like many other similarly situated technology companies, Meta states that it is not acting as a business associate on behalf of any HIPAA covered entity utilizing its technology. However, Meta itself is facing litigation related to the alleged improper collection of medical information and other data containing personally identifiable information. Meta has argued that it should not "be held liable for certain healthcare providers' alleged misuse of a publicly available tool," and the litigation against it should be dismissed.[2] This and other arguments were not prevailing in Meta's efforts to dismiss a medical information privacy class action case related to its online tracking technology.[3]

This legal risk is not confined to large healthcare systems and technology platforms, and the scope of these lawsuits could easily broaden to encompass medical practices who utilize tracking technology on their websites. Potential class action plaintiffs can check whether tracking technology is being utilized on a medical practice's website the same way that anyone can, using the Blacklight service developed by The Markup discussed in the earlier Sentinel articles, or by using another website privacy inspection service or app. If your practice has not yet determined whether tracking technologies are being utilized—particularly on password protected areas of websites, where protected health information ("PHI") is accessed and transmitted, such as a patient portal—now is the time to do so.[4]

While the legal risk posed by website tracking technology may seem like a new technical matter that few patients or healthcare providers do or should know about, a key element of many claims centers around the various notices that have been made available to the healthcare industry on the issue. Lawsuits often reference the guidance and other information that the U.S. Department of Health and Human Services Office for Civil Rights ("OCR") has issued specifically addressing this topic. In addition to the OCR bulletin referenced in the May 2023 Sentinel article, a joint letter was sent by the Federal Trade Commission ("FTC") and OCR in July 2023 to about 130 healthcare organizations cautioning providers "about the privacy and security risks related to the use of online tracking technologies that may be integrated into their websites . . . that may be impermissibly disclosing consumers' sensitive personal health data to third parties." Along with the allegations about prior notice of this issue, other allegations and claims in the class action lawsuits include improper collection and disclosure of private clinical and billing information, invasion of privacy, and violation of various state laws.[5]

In addition to the legal risk from class action plaintiffs, utilizing website tracking technology also presents significant regulatory risk. While no related HIPAA enforcement actions or settlements have been announced to date, numerous healthcare organizations have provided breach notifications to millions of patients about this issue.[6] In issuing the July 2023 letter referenced above, OCR stated it continued "to be concerned about impermissible disclosures of health information to third parties and will use all of its resources to address this issue." Notably, while the action did not involve a HIPAA regulated entity, the FTC took "enforcement action for the first time under its Health Breach Notification Rule against the telehealth and prescription drug discount provider

GoodRx Holdings Inc., for failing to notify consumers and others of its unauthorized disclosures of consumers' personal health information to Facebook, Google, and other companies."[7]

As suggested in prior articles, the most effective way to mitigate the risk is to remove or at least control tracking technology utilized on your medical practice's website, particularly any areas that contain protected health information, such as a patient portal. However, the first step in that process is to determine whether tracking technology is utilized on any webpage controlled by or integrating with your healthcare organization. In many instances, this legal risk cannot be mitigated by the execution of a business associate agreement with the tracking technology vendor because as noted above, most of these vendors do not consider themselves to be business associates, nor are these technology vendors providing the type of service that would make them business associates. In any instance, even with a business associate agreement in place, disclosures to a business associate still must have a permissible purpose pursuant to the HIPAA Privacy Rule, unless patients provide disclosure authorization.

Given the amount of information promulgated by various government agencies over the past several months on this topic, healthcare organizations should be aware that they are presumed by class action plaintiffs to be on notice of this issue, and, as a result, groups should take the necessary steps to reduce the significant legal exposure associated with this risk.

[1]. Naomi Diaz, "How much health systems are paying to settle Pixel lawsuits," Becker's Health IT (Aug. 23, 2023), https://www.beckershospitalreview.com/cybersecurity/how-much-health-systems-are-paying-to-settle-pixel-lawsuits.html.

[2]. Jessica Davis, "Meta punts pixel tool responsibility, says privacy fault is on providers," SC Media (May 10, 2023), https://www.scmagazine.com/news/meta-health-providers-using-pixel-tool-responsible-for-patient-privacy.

[3]. Steve Alder, "Federal Judge Tentatively Advances Meta Pixel Medical Privacy Class Action," HIPAA Journal (Aug. 18, 2023), https://www.hipaajournal.com/federal-judge-tentatively-advances-meta-pixel-medical-privacy-class-action.

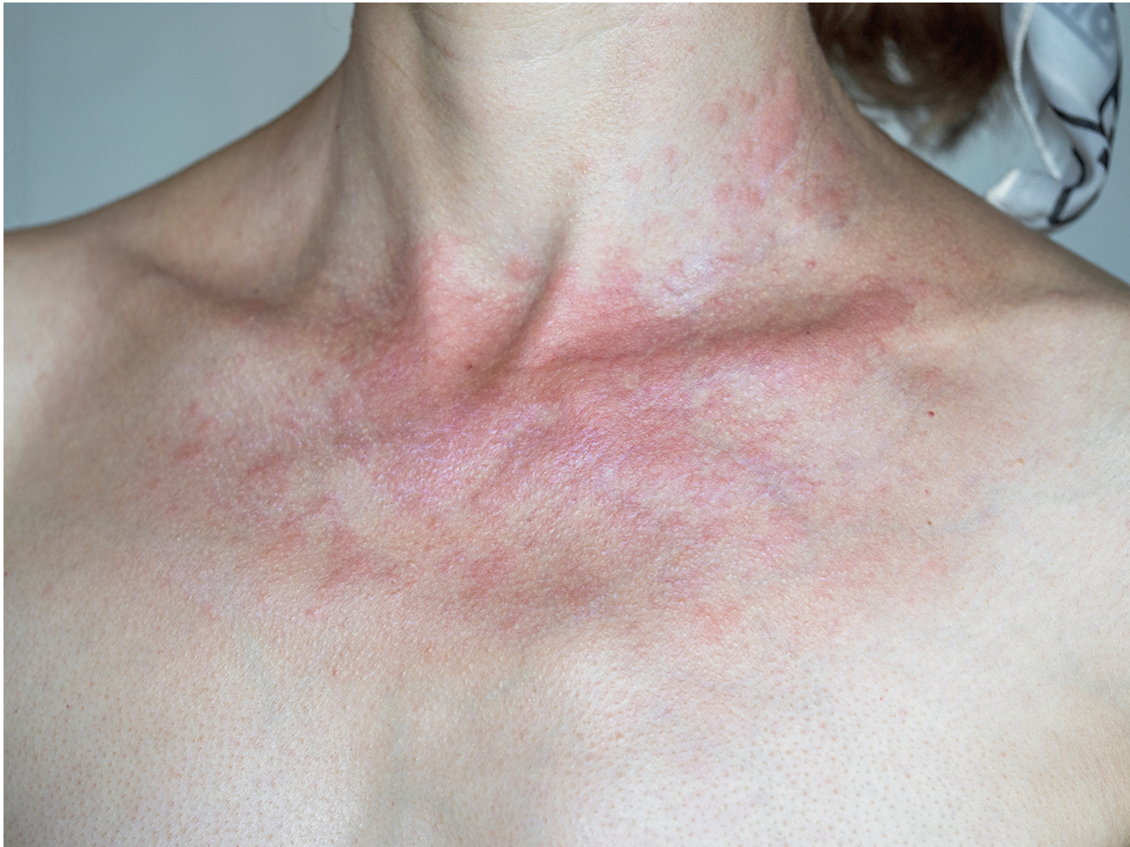
[4]. Such a check should also be performed whenever design or configuration changes are made to webpages to confirm that tracking technologies have not been added as part of the change.

[5]. Courts across the country have routinely recognized that HIPAA itself does not provide a private right of action. However, many of these lawsuits leverage allegations of a defendant healthcare organization's failure to meet certain HIPAA Privacy Rule and HIPAA Security Rule requirements as part of their case.

[6]. Steve Alder, "Meta Facing Scrutiny Over Use of Meta Pixel Tracking Code on Hospital Websites," HIPAA Journal (Oct. 24, 2022). To be sure, as a regulatory matter, whether a breach has occurred is a legal determination based on the specific facts involved with an incident.

[7]. Following the GoodRx matter, the FTC has announced at least two other enforcement actions related to similar alleged practices of unauthorized disclosure of personal health information to third parties through tracking technologies integrated into websites and apps.

Closed Claim: The Importance of Being a "Hands-on" Medical Director



By Stephanie Walkley, JD, BSN

Brandi North,[1] a 43-year-old stay-at-home mom, presented to a medical spa where she had received various cosmetic treatments over the last few years. The purpose of this particular visit was to discuss options that would help her achieve a smoother appearance of the fine lines on her chest and remove discoloration. She discussed the options of microneedling and intense pulse light treatment (“IPL”) with the owner of the medical spa, Carla Donald, NP. After discussing both procedures, Ms. North decided to proceed with IPL, which would require a series of sessions. NP Donald scheduled Ms. North for her first session the following week.

On the day of the first scheduled IPL treatment, Ms. North arrived to find that her treatment would be performed by aesthetician Lindsey Brown. Ms. Brown applied lidocaine cream to Ms. North's chest and allowed it to sit for about 30 minutes. After the cream had ample time to take effect, Ms. Brown performed the IPL treatment on Ms. North's chest taking approximately 30-40 minutes. At no time prior to the procedure did anyone discuss and document the risks of the procedure with Ms. North. Likewise, no one asked Ms. North to sign a consent form.

Once the procedure was over, Ms. North was told to return in one month and released to go home. That night Ms. North reached out to both NP Donald and Aesthetician Brown with concerns about the area on her chest that had been treated. The area was hurting more than anticipated and appeared swollen and burned. Ms. North received reassurance that this was normal.

Rather than wait one month to return to the medical spa, Ms. North returned in one week concerned about the appearance of her chest. It still appeared burned and swollen. She asked for a referral to a specialist for further treatment. Instead of referring her elsewhere, NP Donald advised Ms. North that they could treat the area and convinced her to continue treatment at the medical spa.

Approximately one month later, Ms. North returned to the medical spa. She reported being in pain. The treated chest area was still edematous with irregular patterns in the skin and the presence of ten blisters. Aesthetician Brown advised Ms. North to keep the skin clean and return in one month.

Ms. North returned to the medical spa the next month for another follow-up visit. By this time the area had healed leaving scars where the blisters had been. Aesthetician Brown treated the raised areas with sublative laser therapy and microneedling. She instructed Ms. North to return in two weeks.

At her final appointment two weeks later, Ms. North expressed her dissatisfaction with her treatments and results. She also informed the medical spa that she no longer wanted to be treated by Aesthetician Brown. NP Donald told Ms. North that her chest should continue to improve with time.

Ms. North sought care elsewhere and received injections, microneedling, and IPL treatments from other providers to try and remove the scarring and discoloration. These treatments helped but did not entirely remedy the problems. Ms. North was left with several scars and some discoloration on her chest. Very unhappy with her results, Ms. North decided to pursue a healthcare liability action.

All the treatment on Ms. North's chest occurred without anyone ever notifying the medical director of the medical spa, Dr. Jim Tatum who was the supervising physician for NP Donald and the medical spa staff. He first learned of Ms. North and her treatment when he was served with a lawsuit.[2]

Ms. North filed suit against the medical spa, NP Donald, and Dr. Tatum. The allegations included failure to properly hire, retain, train, and supervise qualified aestheticians; failure to properly assess Ms. North before performing procedures; failure to obtain informed consent; failure to properly document pre-operative and/or post-operative procedures; failure to implement and enforce appropriate policies, procedures, and protocols; and failure to use the care and skill required under the circumstances. SVMIC immediately retained counsel to represent Dr. Tatum in the lawsuit.[3]

Defense counsel for Dr. Tatum soon discovered that the defense of the case would be challenging. The medical records did not contain notes regarding an assessment of Ms. North's skin, whether she would be a good candidate for the recommended procedure, or any discussion regarding the risks, benefits of, or alternatives to treatment. In other words, the medical records were scant and did not contain an appropriate assessment or any documentation regarding informed consent. Furthermore, neither the medical spa nor NP Donald had any type of policies, procedures, or protocols established for the procedures provided at the medical spa or for collaboration with Dr. Tatum.

When defense counsel met with Dr. Tatum, they learned that he took a "hands off" approach with the medical spa. Dr. Tatum had a long-standing professional relationship with NP Donald. He signed on as her supervising physician and as the medical director of the medical spa without thoroughly investigating or understanding what his duties and responsibilities would be in those roles. Dr. Tatum did not know what procedures the medical spa offered or whom among the staff would perform these procedures. He trusted that if there were any medical issues that needed his expertise either NP Donald or the medical spa staff would notify him. This "hands off" approach runs afoul of the Tennessee rules for physicians supervising nurse practitioners and for serving as medical director/supervising physician[4] of a medical spa. At the beginning of litigation, it became apparent that it would be best to try and resolve this case. The parties successfully mediated a settlement.

There are several lessons to be learned from Dr. Tatum's case. First and foremost, before agreeing to supervise a nurse practitioner (or any other advanced practice provider) know what your duties and responsibilities are as the supervising physician. Most states have very detailed requirements for the supervision of and/or collaboration with nurse practitioners. For instance, in Tennessee, Dr. Tatum should have had protocols in place and known what his chart review requirements were. Do not set yourself up for potential liability by not knowing and complying with the applicable rules and regulations. Although the nurse practitioner and aesthetician should have notified Dr. Tatum of the problems Ms. North was experiencing, their failure to do so did not absolve him of responsibility in this case. If the appropriate protocols had been established, then his defense would have been

stronger. However, the lack of any documentation or active participation in supervising NP Donald and the medical spa made it appear as though Dr. Tatum was simply collecting a paycheck from the medical spa for the use of his name and license.

Second, and truly just as important, before agreeing to act as the medical director or supervising physician of a medical spa, know what you are getting yourself into. In Dr. Tatum's case, and others we have seen, physicians have agreed to this role without researching the breadth of what it entails. Knowing what duties and responsibilities come with the role of medical director in your state cannot be overstated. This may include knowing what training and certification medical spa staff are required to have for the procedures they perform and verifying staff compliance with these requirements. Dr. Tatum signed off on paperwork without appreciating the work it would require of him.

Similarly, in other cases, there have been physicians that have contracted with medical spas but have otherwise failed to fulfill the requirements as set by the state. For example, the state of Tennessee tasks the medical director or supervising physician of the medical spa with registering the medical spa with the state. If the medical spa is operating without being properly registered, the physician may be subject to disciplinary action by the medical board. In addition, when serving in the capacity of medical director or supervising physician of a medical spa, a physician must also submit an attestation that he or she "assumes and accepts responsibility for the cosmetic medical services provided at the medical spa."

Do your homework and know what is required. The old adage "an ounce of prevention is worth a pound of cure" is sage advice for anyone wanting to work as a medical director or supervising physician in a medical spa. Help yourself avoid potential lawsuits, licensing board actions, and possible coverage issues under your professional liability insurance policy by making educated and informed decisions when deciding whether to act in this role.

[1] Names of all parties involved have been changed.

[2] Tennessee law requires that potential plaintiffs send healthcare providers a notice of intent letter pursuant to Tenn. Code Ann. §29-26-121 al least 60 days prior to filing a complaint based upon health care liability. Dr. Tatum received the letter but did not open it. The failure to open the letter and report it to SVMIC deprived Dr. Tatum of the opportunity to investigate this matter pre-suit.

[3] The medical spa and nurse practitioner were insured by other carriers and had separate counsel.

[4] Tennessee regulations for medical spas use the terms medical director and supervising physician interchangeably.

The contents of The Sentinel are intended for educational/informational purposes only and do not constitute legal advice. Policyholders are urged to consult with their personal attorney for legal advice, as specific legal requirements may vary from state to state and/or change over time.