

Allegations of a Bad Outcome: To Bill or Not to Bill . . .

Kelly Green

Janet Feldkamp

Beth Munz

Susan Ziel

Kelly J. Green, RN JD

Krieg DeVault LLP

12800 N. Meridian

Suite 300

Carmel, IN 46032

(317) 2380-6244

Kgreen@kdlegal.com

Janet K. Feldkamp RN BSN LNHA JD

Benesch, Friedlander, Coplan & Aronoff LLP

88 E. Broad Street, Suite 900

Columbus, OH 43215

jfeldkamp@bfca.com

Beth W. Munz RN MS JD

Parkview Health System

10501 Corporate Drive

Fort Wayne, IN 46845

(260) 373-7110

Beth.Munz@parkview.com

Susan E. Ziel RN BSN MPH JD

Krieg DeVault LLP

12800 N. Meridian

Suite 300

Carmel, IN 46032

(317) 238-6244

sziel@kdlegal.com



The American Association of Nurse Attorneys



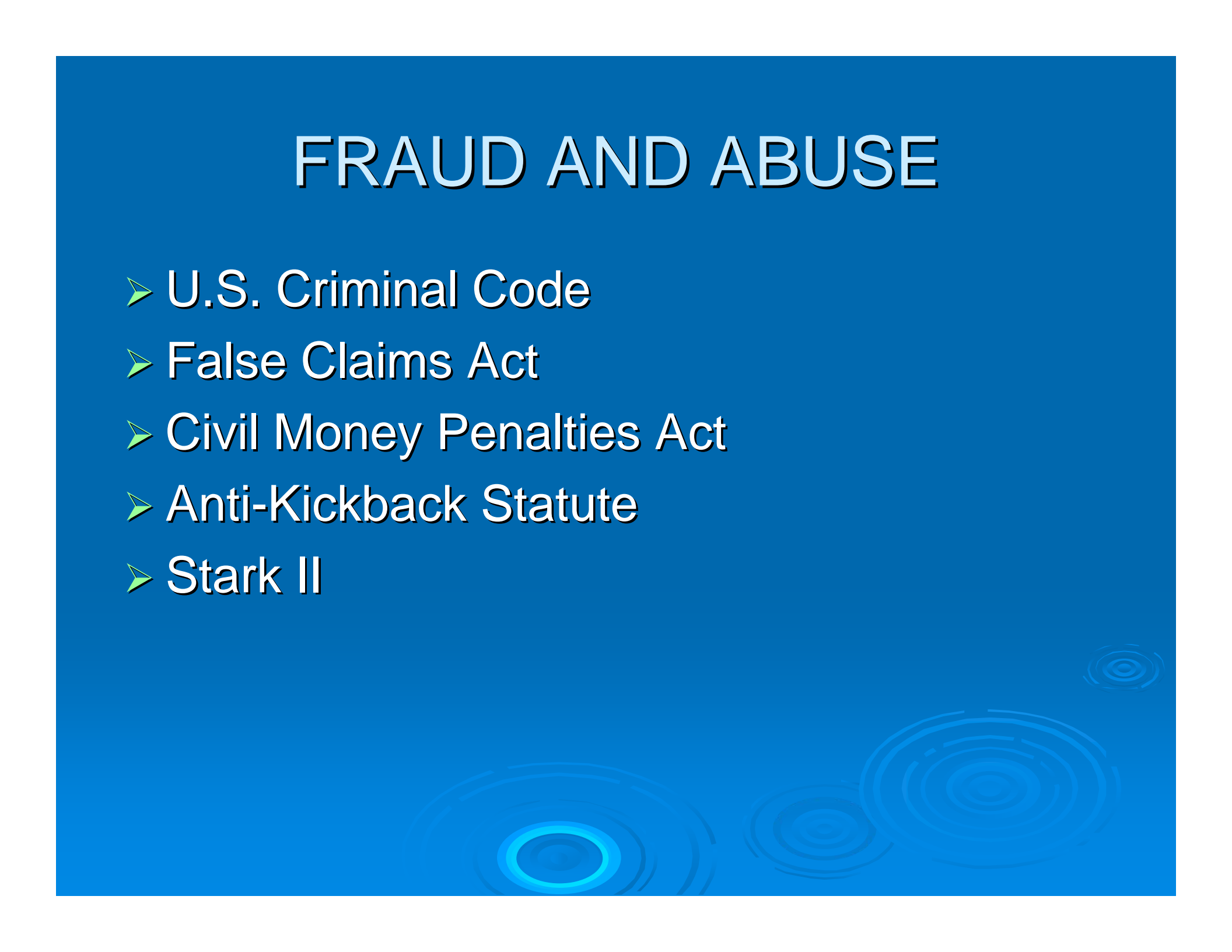
DISCLAIMER

- The information contained in this presentation has been prepared with the understanding that the author is not engaged in rendering legal, financial, medical or other professional advice.

HOUR #1: APPLICABLE RULES

- Fraud and Abuse
- Standards of Care
 - Legal
 - Professional
 - Industry

FRAUD AND ABUSE

- U.S. Criminal Code
 - False Claims Act
 - Civil Money Penalties Act
 - Anti-Kickback Statute
 - Stark II
- 

U.S. Criminal Code (DOJ)

- Applies to Any Person or Entity
- Prohibits Fraudulent or False Facts or Acts
- To Defraud or Take \$\$ or Property
- From Any Health Care Benefit Program
- Fine and/or Prison

U.S. Criminal Code

➤ SCENARIO

- Clinic falsifies records and bills for services never rendered by clinic.
- Provider consistently bills “insurance only” and waives all copays, deductibles and out-of-network payments from client.

False Claims Act (OIG)

- Applies to Any Person or Entity
- Prohibits False Claims and Illegal Remuneration
- Medicare and Medicaid
- “Knowing” Standard
- Treble Damages and Civil Money Penalties

False Claims Act

➤ SCENARIO

- Provider “knowingly” fails to comply with applicable licensure, supervision or billing requirements.
- Provider NPP “knowingly” makes misrepresentations on claims.

Civil Money Penalties Act (OIG)

- Applies to Participating Providers
- Medicare and Medicaid
- Prohibits False Claims and Illegal Remuneration
 - Inducements/Gifts to Beneficiaries
 - OIG Special Advisory Bulletin, Aug. 2002
- “Knowing” Standard
- Civil Money Penalties

Civil Money Penalties Act

➤ SCENARIO

- Provider bills for services performed by a provider excluded from the Medicare program.
- Provider gives “free” goods or services to Medicare beneficiaries.

Anti-Kickback Statute (OIG/DOJ)

- Applies to Any “Person”
- Prohibits Kickbacks, Bribes, Inducements
- In Return for Referrals or Ordering Covered Services
- Any Federal Health Care Program
- “Intent” Based
- Fine and/or Prison

Anti-Kickback Statute

➤ SCENARIO

- Professional courtesy or other gifts
- Hospital pressures MD to “discount” or “write off” fees or exclusive service arrangement terminated

Stark II


- Applies to Physicians, Immediate Family and DHS Providers
- Prohibits Illegal Remuneration
- In Return for Referrals or Ordering Covered Services
- Specific Exceptions
- Medicare/Medicaid
- Civil Money Penalties

Stark II

➤ SCENARIO

- Provider receives certain “free” or discounted services from a DHS to which provider refers M/M patients.
- Gifts, honoraria, consultation fees, etc. accepted in violation of OIG and industry guidance
- Professional courtesy

STANDARDS OF CARE

- Statutes and Case Law
 - Medicare Conditions of Participation
 - Licensing Requirements
 - Principles of Ethical Conduct
 - Professional Liability Carrier Rules
 - Accrediting Bodies
- 


Statutes and Case Law

- Mandatory Reporting Laws
 - Insurance Laws
 - Apology Laws
 - Tort and Contract Laws
 - Court Rules of Evidence
 - Court Decisions
- 


Medicare Certification

- Conditions of Participation
- Certification Standards
- Annual and Complaint Surveys
- Termination of Provider Status; Program Exclusion


State Licensure

- Requirements for Licensure
 - Professional and Ethical Standards
 - Scope of Practice
 - Supervision
 - Renewals; Duty to Report
 - Disciplinary Action
- 

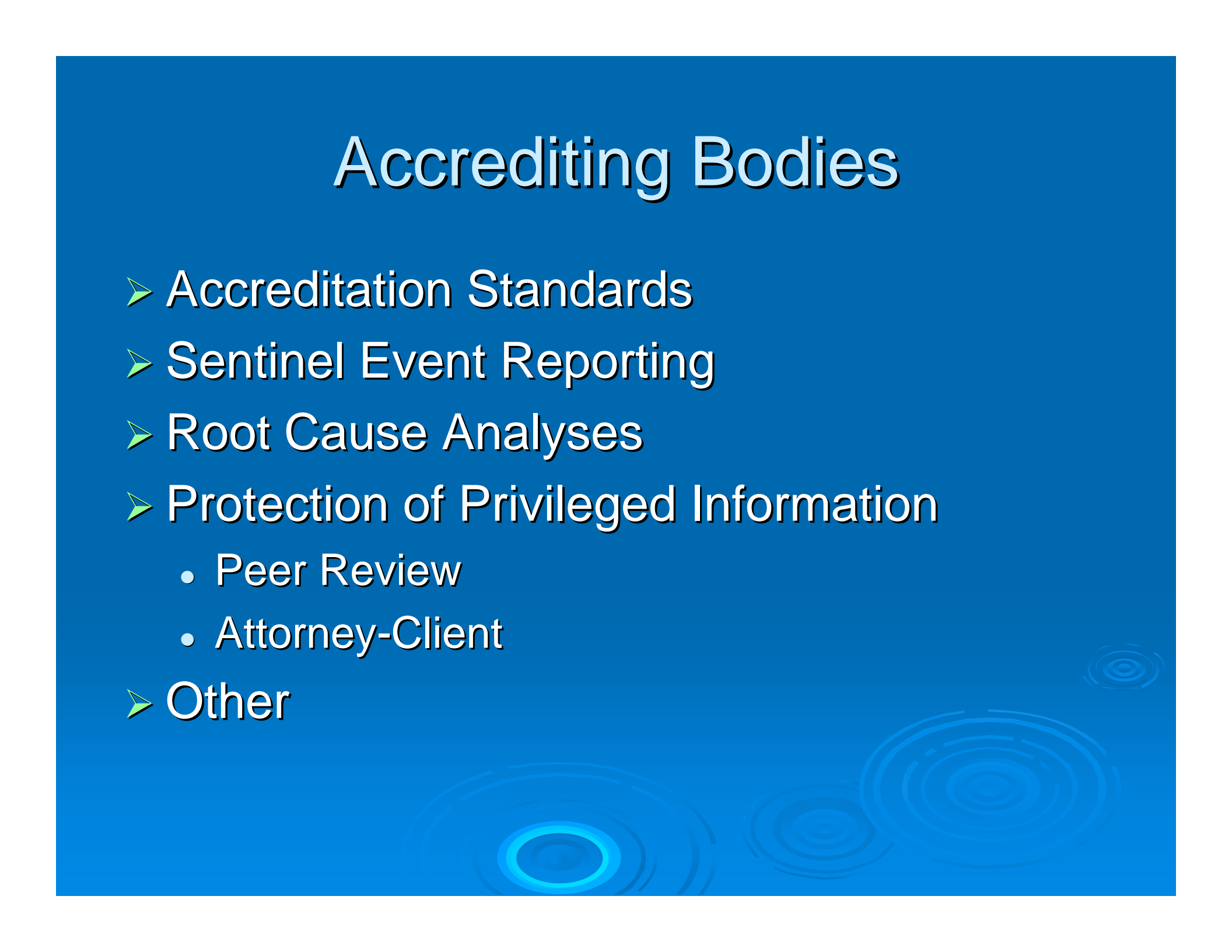
Principles of Ethical Conduct

- Professional Association or Licensing Board
 - Establishes Duties
 - Inform
 - Do No Harm
 - Disclose
 - Report
- 

Carrier Rules

- Insuring Agreement
 - Scope of Coverage
 - Claims Made vs. Occurrence Policy
 - Conditions of Agreement
 - Timely Reporting
 - Apology
 - Exclusionary Clauses
- 

Accrediting Bodies

- Accreditation Standards
 - Sentinel Event Reporting
 - Root Cause Analyses
 - Protection of Privileged Information
 - Peer Review
 - Attorney-Client
 - Other
- 

HOUR #2: PHYSICIAN PRACTICE DILEMMAS

- Scenario
- Applicable Rules
- Important Considerations
- Options and Related Risks

Physician Practice: Scenario #1

...

- Patient intubated pre-surgery by CRNA
- Patient reports broken tooth post-op
- Patient refuses to pay for anesthesia services; demands payment of dental bills

Physician Practice: Scenario #1

...

➤ Applicable Rules



Physician Practice: Scenario #1

...

- Important Considerations



Physician Practice: Scenario #1

...

- Options and Related Risks

Physician Practice: Scenario #2...

- OB patient progressing rapidly to delivery
- Numerous anesthesiologists and CRNA attempt epidural pre-op without success
- No pain relief, normal delivery, healthy newborn
- Patient refuses to pay anesthesiologist

Physician Practice: Scenario #2

...

Applicable Rules



Physician Practice: Scenario #2

...

Important Considerations



Physician Practice: Scenario #2

...

Options and Related Risks



Physician Practice: Scenario #3...

Patient in ASC holding area

Anesthesiologist reviews patient history
with family present

Patient claims HIPAA violation

Patient demands settlement or will file
HIPAA complaint

Physician Practice: Scenario #3

...

Applicable Rules



Physician Practice: Scenario #3

...

Important Considerations



Physician Practice: Scenario #3

...

Options and Related Risks



Physician Practice: Scenario #4...

“Led Zeppelin” concert the night before
OR personnel “hung over” so procedural
safeguards fail

Surgeon operates on wrong leg

Surgeon demands that hospital and
anesthesia group not bill for services

Physician Practice: Scenario #4

...

Applicable Rules



Physician Practice: Scenario #4

...

Important Considerations



Physician Practice: Scenario #4

...

Options and Related Risks



Physician Practices: Rules for the Road ...

Acknowledge receipt of allegation

Reassign patient, responsibilities

Investigation disclosures only “need to know”

Engage counsel timely

Report to carrier

Therapeutic communication with injured party(s)

- Patients expect explanation, apology, assurances of future prevention

Privileged paper trail



HOUR #3: ACUTE CARE HOSPITAL DILEMMAS



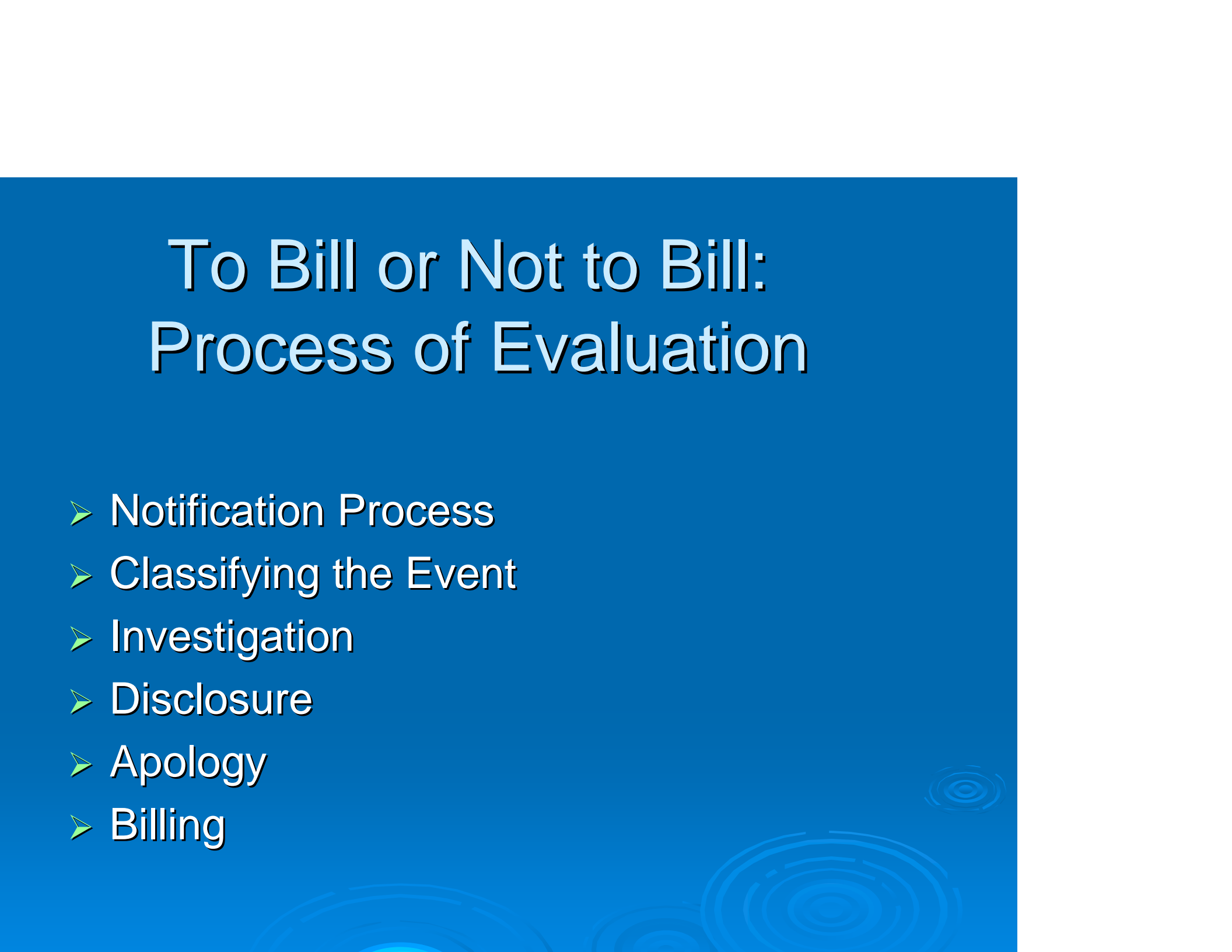
Allegations of a Bad Outcome: Background Issues in Acute Care

IOM Report

Focus on Quality

- Leap Frog
- National Patient Safety Goals
- 100k lives campaign
- Increased reimbursement for participation
- Possible Pay for Performance

To Bill or Not to Bill: Process of Evaluation

- Notification Process
 - Classifying the Event
 - Investigation
 - Disclosure
 - Apology
 - Billing
- 

Process: Notification

Notification of Major/ Catastrophic Event

- Phone cascade
- Computer notification
- Key personnel

Initiate Early Intervention Process



Process: Classifying the Event

- Event classified according to severity
 - Near Miss, No Injury, Minor, Moderate
 - Major
 - Permanent lessening of bodily function
 - Disfigurement, surgical intervention
 - Catastrophic/Sentinel Event
 - unanticipated death
 - major permanent loss of function
 - not related to the natural course of the patient's illness or underlying condition

Process: Early Intervention

- Investigation within 24 hours
- Multidisciplinary team
- Root Cause Identification
- Hold Bill?

Process: Investigation

Review from admission through event

- Step by step process
- Standard procedures reviewed
- What actually occurred
- Interviews
- Review of actual documentation

Challenges

- Two sides to every story
- Approach to investigation - Culture

Process: Disclosure

Content of disclosure

Who is to perform disclosure

To whom to disclose

When should disclosure take place

Issues to consider:

- Hospital/physician relationship
- Risk of emotional harm if physical injury remote
- Trust / Culture
- Exposure/ Liability

Process: Apology

State apology law

- Who makes the apology
- To whom to apologize
- Define content
- Controlling the chatter

To Bill or Not to Bill: Factors to Consider

- Type and severity of injury
 - Potential complication of procedure
 - Unrelated to procedure
 - Risk addressed in informed consent
- Root Cause
- Hospital exposure
 - Bad outcome v. malpractice

Billing: Hospital Exposure

Hospital duty to the patient

- Duty
- Breach of duty
 - Deviation from standard of care/protocol
- Breach causes the injury
- Types of damages: resolved or permanent

Amount of hospital exposure

- Full, Shared, Questionable
- Media concerns

Types of Hospital Liability

Medical malpractice: Negligence

Lack of informed consent: Battery

General hospital liability: Negligence

- Credentialing

Criminal Liability

- HR issue

Hospital Insurance Difference in Approach?

Commercial

- Require early reporting, written notice
- Seven “deadly sins”

Self Insurance

- Reporting: Board reporting, quarterly loss runs, descriptions re: allegations, reserves
- Review ways to minimize loss

Hybrid

- Self Insurance with Commercial layer

Billing: Defined Terms

➤ Billing terms:

- Charge:
 - A monetary value associated with the provision of service performed by a department.
- Bill
 - A summary of charges submitted to a patient and/or third party
- Write-off
 - Deduction from revenue for a specific purpose
 - Monies not collected
 - Contractual allowances
 - Customer Service (deducted from bill prior to submission)

Billing: Considerations

Questions

1. Should the charges remain on the bill?
2. Who gets credit for services rendered?
3. Are the charges for a stand alone service or are the charges embedded?
4. If embedded – who will isolate the charges?
5. Is it appropriate to bill?

Billing: Documentation

Write off:

- Clear Policies and Procedures
 - Identify who has authority to do it.
 - When to write-off
 - Who needs to approve it
 - Guidelines for documentation
 - Clearly identify the reason for it.
 - Tracking to a specific account
 - Administrative
 - Risk Management

Allegations of a Bad Outcome: Scenario #1

➤ Scenario:

- Full Liability

- Patient on medical unit
- Receives 2 extra does of Lovenox as a result of a missed order to discontinue the medication.
- Error leads to bleeding requiring neurosurgery.

Scenario #1: Billing Issues

Medication

- 2 extra doses not ordered
 - Eliminate the charge for medication

Neurosurgery

- OR procedure
- Physician fee

Rehabilitation

- Expectation prior to error
- Ventilator, long term care

Allegations of a Bad Outcome: Scenario #2

➤ Scenario:

- Shared Liability

- Knee operation
- Surgeon marks site in SAU
- OR preps and drapes other leg for surgery
- Time out performed
- Wrong site noted half way through procedure – continue with correct site.

Scenario #2: Billing Issues

Charge for correct site

- Separating charges from wrong site

Physician issues

- No payment from hospital for physician

Allegations of a Bad Outcome: Scenario #3

➤ Scenario:

- Question Liability

- Patient for elective colonoscopy, conscious sedation administered for procedure.
- Prior to discharge, patient wants to get dressed by himself, he loses his balance, hits head,
- ER workup with sutures.

Scenario #3: Billing Issues

Issues:

- Patient requested privacy
- Clinical judgment by health care provider
- Requests total bill write-off
 - Colonoscopy charges
 - ER charges

Allegations of a Bad Outcome: Scenario #4

Community hospital within health system

- Pediatric patient admit to community hospital for high fever
- Missed diagnosis, delay in treatment
- Condition deteriorates requiring higher level of care – transfer to major medical hospital

Scenario #4: Billing Issues

Error at community hospital – delay in diagnosis and treatment

System decisions

- Hospital Liability v. Physician liability
- More than one provider
- Administrative write-off
 - Health system v. community hospital



HOUR #4: LONG TERM CARE DILEMMAS



Profile of Older Americans

Study by U. S. Department of Health and Human Services; 2004

Increase for 65+ of 9.3% from 1993 to 2003

Older women outnumber older men

31% of non-institutionalized persons live alone

By 2030: older population to be 71.5 million

Profile of Older Americans

85+ population projected increase from 4.7 million to 9.6 million in 2030

For 1/3 of Americans >65, Social Security benefits are 90% of their income

Baby Boomers

Expectations changing with baby boomers retiring

Will the face of long term care change?

Lack of saving for retirement by baby boomer generation

Ramifications of lack of savings, Medicaid drain and private pay issues for future retirees

Long Term Care

Highly regulated care setting

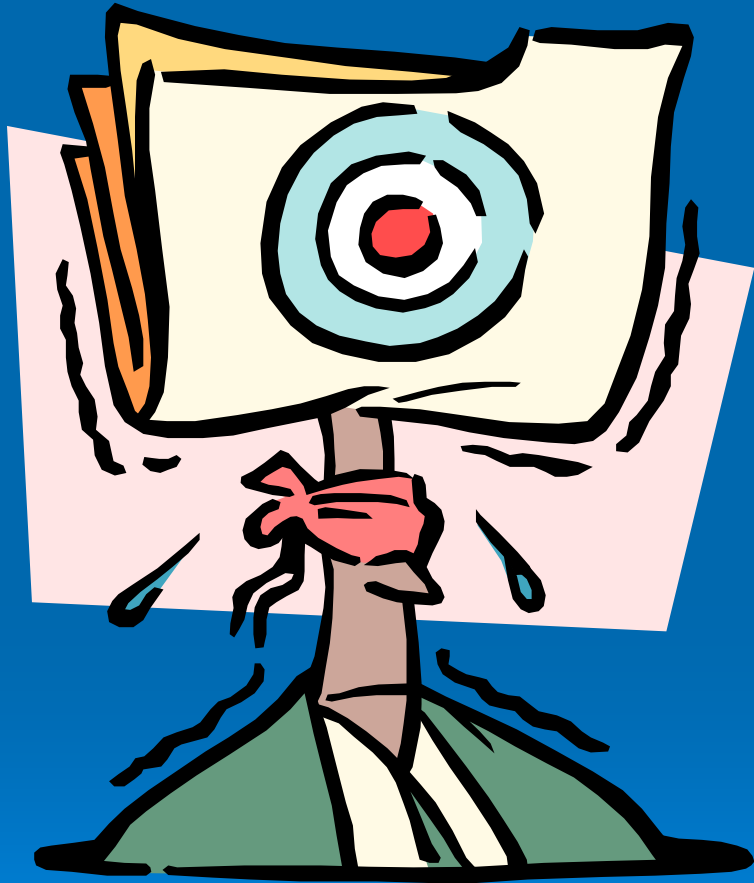
Issues as to what “quality” is

- F309: The facility shall assist the resident to attain or maintain the highest practicable physical, mental and psychosocial wellbeing

Dislike of congregate care in this country

Negative national attitudes about aging and infirmity

Current Regulatory Environment



Medicare and Medicaid

Medicare and Medicaid certified nursing facilities with multiple regulatory and interpretive requirements

Additional overlay of state laws and regulations

Requirements voluminous and sometimes contradictory

Centers for Medicare and Medicaid Services (“CMS”) contacts with State Survey Agencies

CMS & State Operations Manual

SOM:

http://www.cms.hhs.gov/manuals/107_som/som107index.asp

Chapter 7: Survey & Enforcement

Appendix P: Survey protocol

Appendix PP: Interpretive Guidelines

Certification Requirements

Statutory requirements found in 42 CFR 483; 42 CFR 488 and other parts of CFR

State Operations Manual (“SOM”) provides additional requirements

Interpretive Guidelines changing without regulations changing since 1995

Interpretations also varied between states

Substandard Care

All citations of noncompliance assigned a scope and severity

Based upon more serious tag, sanctions are applied

Substandard care requires a pattern of facility behavior that causes harm

Regulatory sanctions applied for substandard care

Immediate Jeopardy

Facility's actions or inactions that cause the resident serious harm or death or the potential for serious harm or death

Most severe citation

Requires immediate intervention by the facility

\$3,050 to \$10,000 per day civil money penalty

Immediate Jeopardy Examples

Failure to protect from abuse:

- serious injuries: head trauma or fractures
- non-consensual sexual interactions
- unexplained serious injuries without investigation
- suspicious injuries: e.g., black eyes, rope marks, cigarette burns, unexplained bruising

Immediate Jeopardy Examples

► Failure to prevent from neglect

- lack of timely assessment after injury
- lack of supervision of residents with special needs
- failure to carry out physician orders
- unsupervised smoking for residents with known safety risks
- use of chemical/physical restraints without adequate monitoring
- inadequate supervision to prevent physical altercations

Scenario: Substandard Care

Facility cited for substandard care for the development of avoidable pressure sores for several residents over a period of time

Pressure sores were not discovered until they were significant

Residents covered by Medicare Part A

Scenario: Individual Resident Harm

Resident with fall history and fall risk

Fall risk not assessed by facility in the Minimum Data Set (“MDS”)

Resident falls within first 24 hours after admission

Fall results in fracture and hospitalization

Does the facility bill a federal program?

Scenario: Immediate Jeopardy

Residents obtain hepatitis B from finger sticks from diabetic monitoring

Multiple residents are infected with blood borne illness

Not detected until well after the transmission

When does the facility bill?

How does the facility address the past billing issues?

Criminal Issues Recently In News

Not all billing related

- Sexual abuser issues
- Lack on adequate care to address residents needs that rises to the level of neglect
 - How is neglect defined in nursing facilities?
 - What ramifications does it have on requesting reimbursement from a federal program?
- Sexual abuse by staff
- Financial exploitation

Felony Criminal Charges

Felony criminal charges filed in 2 separate death cases in Michigan

Asphyxiation death of resident regarding nurse's not timely responding to resident with tracheostomy in need of suctioning

Malnutrition and neglect death in a group home

Filed 2001 in the Detroit area

