

## Be careful about upcoding; DOJ may come after it as a false claim

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### Ask Part B News

**Question:** I recently saw a Department of Justice settlement in North Carolina that seemed to be entirely based on a pattern of upcoding E/M. I didn't know federal prosecutors did that! Is it common?

**Answer:** On Oct. 5, 2022, the U.S. Attorney for the Western District of North Carolina announced a \$130,000 settlement with Iredell Health Systems after allegations that the system "knowingly retained overpayments, or payments to which it was not entitled, obtained as the result of its billing for evaluation and management services performed by one of its providers."

The complaint was aimed at Ruby Grimm, M.D., claiming the oncologist "routinely billed and received payments from Palmetto/CMS using code **99213** without meeting the guidelines established by Palmetto/CMS" for that code. The complaint includes as an example of this a level 3 Grimm allegedly billed with "no documentation of the patient's history of illness or reason for visit," in which "the only documentation of an examination were [sic] the vitals recorded by [the] physician assistant," and "no documentation of medical decision making."

Upcoding issues are sometimes part of Department of Justice (DOJ) cases. In March 2022, for example, orthopedic surgeon Olarewaju James Oladipo, M.D., of Canton, Mass., was indicted for false claims and health care fraud on allegation, in part, that he was using "billing codes for more complex — and thus more expensive — services that were not provided (a practice that is sometimes referred to as 'upcoding')."

You might scan these cases and get the impression federal prosecutors are coming after providers solely for upcoding. However, upcoding is only part of the plot. The Oladipo indictment, for example, documents a shift in his practice from surgery to opioid prescribing; as the indictment notes, Oladipo "ensured a high flow of patients to his practice by prescribing powerful, highly addictive opioids at a rate that made him one of the top prescribers of such drugs in Massachusetts," suggesting that shift is what caught the prosecutors' attention.

One other thing many of these cases have in common is a qui tam relator. These cases can open the investigative door to many findings of irregularity beyond what the whistleblower alleges, including upcoding. In such cases, says Guillermo J. Beades, Esq., a partner in the health care litigation department and co-chair of the insurance defense group of Frier Levitt in Pine Brook, N.J., "the relator is doing the government's investigative job for them and outlining the offending conduct."

But the Iredell case is almost entirely focused on allegedly improper use of CPT coding. Geoffrey R. Kaiser, senior counsel in the compliance, investigations and white collar and health services practices of Rivkin Radler in Uniondale, N.Y., says that's not unique: "It is not the case that the government does not prosecute, civilly or criminally, this type of misconduct unless it is included with other kinds of billing fraud," he says.

Kaiser points to the Prime Healthcare Services (PHS) ex relator case that was settled in 2018 after seven years of legal wrangling. The original 2011 complaint alleged that PHS "explicitly instructed its physicians and hospital staff to disregard Medicare guidelines and to choose inpatient admission over outpatient/observation status in almost every instance, regardless of whether the criteria for inpatient admission has been satisfied." In 2018, DOJ settled for \$65 million and referred to the allegations as including "a practice known as 'up-coding.'"

The DOJ's definition of upcoding may be more expansive than yours, as it's not restricted to jacking up E/M levels. "Sometimes, a provider will upcode a diagnosis code to justify billing for a particular medical service or to obtain higher reimbursement under the Medicare Advantage Program for an allegedly 'sicker' patient population," Kaiser says. "And sometimes, a provider will intentionally misdescribe the service performed so that it will be paid by insurance — e.g., performing a 'nose job' (rhinoplasty) but billing for a deviated-septum repair. All of these forms of misconduct have been prosecuted at one time or another and, depending on loss amount and other factors such as any public health risk that may exist, the government does not require any additional justification — such as additional billing misconduct — to move forward."

While it's not as if prosecutors are peering over auditors' shoulders, searching for upcoders to prosecute, that doesn't mean they won't take the bait when it's obvious. "It's very rare for audits to be converted to civil or criminal actions," Beades says. "Many times audits are a precursor and essentially put the provider on notice that if they continue the

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offending conduct — which some do — then the next record request may be a subpoena from civil or criminal investigators.”

But practices should still stay on alert, Beades says, because it’s with good reason many prosecutions that cite upcoding also involve other illegal activities. “Since practices that violate these statutes many times play it fast and loose, it’s not surprising you would [also] find upcoding,” he says.

**Resources**

- DOJ, “Iredell Health System Subsidiary Agrees To Pay Over \$130,000 To Resolve Allegations That It Improperly Retained Overpayments Owed To Medicare And Medicaid Programs,” Oct. 5, 2022: [www.justice.gov/usao-wdnc/pr/iredell-health-system-subsidiary-agrees-pay-over-130000-resolve-allegations-it](http://www.justice.gov/usao-wdnc/pr/iredell-health-system-subsidiary-agrees-pay-over-130000-resolve-allegations-it)
- DOJ, “Prime Healthcare Services and CEO to Pay \$65 Million to Settle False Claims Act Allegations,” August 3, 2018: [www.justice.gov/opa/pr/prime-healthcare-services-and-ceo-pay-65-million-settle-false-claims-act-allegations](http://www.justice.gov/opa/pr/prime-healthcare-services-and-ceo-pay-65-million-settle-false-claims-act-allegations)
- DOJ, “Canton Doctor Indicted for Health Care Fraud,” March 22, 2022: [www.justice.gov/usao-ma/pr/canton-doctor-indicted-health-care-fraud](http://www.justice.gov/usao-ma/pr/canton-doctor-indicted-health-care-fraud)



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