

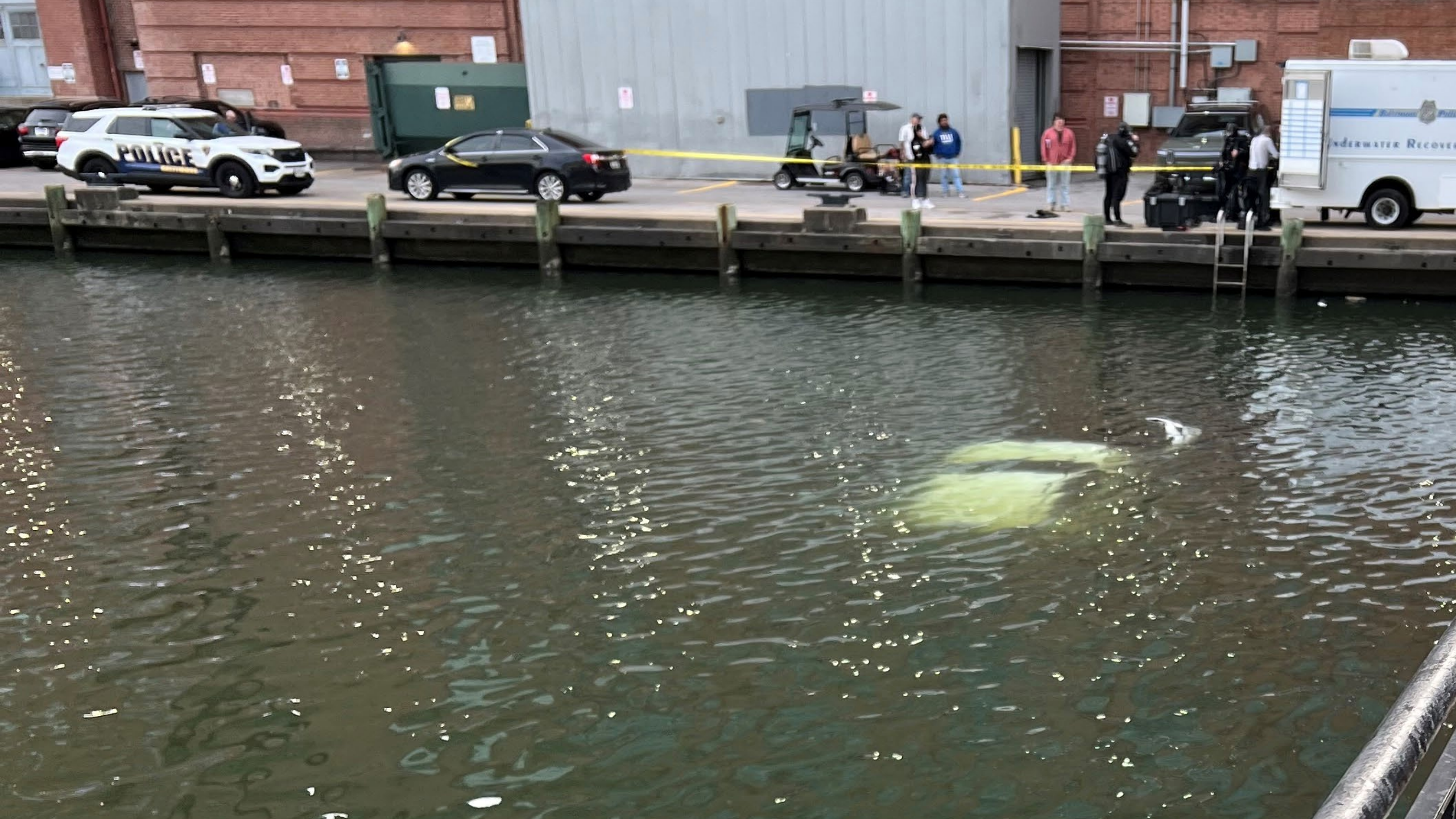
# HealthCare M&M

Health Law Webinar

July 10, 2024

**Fredrikson**

The logo for Fredrikson, featuring the name in a bold, black, sans-serif font. A red horizontal bar is positioned below the 'F', extending to the right and ending under the 'n'.



# Don't know much, Biology

- It is difficult to evaluate an expert.
- If you can't evaluate their expertise, you use the data you understand.
- Typographical errors get outsized by weight.

# Hasta La Vista Baby

- Does your employment agreement terminate employment, or terminate the entire agreement?
- If you terminate an agreement, do all of the elements of the agreement end?
- Does terminating the agreement terminate the non-compete?

# If you know, you...

- Is it wise for a lawyer in State A to offer advice in State B?
- It's easy to become complacent in an area where you have expertise.
- I've been humbled by out-of-state lawyers (And done the same to some others).



# One good term deserves another

- Many people hate confrontation. They prefer agreements to expire rather than actively terminating them.
- Stark is very unforgiving about lapse agreements.
- People are careless.
- Auto-renew constitutes a low risk insurance policy.

# “Docket to me”

- You receive a Civil Investigated Demand (“CID”).
- After responding, things are silent for a couple of years. Should you call to ask?
- You assume you’re in the clear, then you get a call from a reporter.
- Docket alerts are a useful tool.

# Putting the “Artificial” in Artificial Intelligence

- You google a federal regulation.
- Result is a free website or a page from the code of federal regulations.
- Or this official looking (and really pretty official) site:



Download

- PDF
- XML
- MODS
- PREMIS
- ZIP

Actions

- Browse the Code of Federal Regulations
- Help
- CGP Record

Content Details



# 42 CFR § 410.26 - Services and supplies incident to a physician's professional services: Conditions.

⚠ [View the most recent version of this document](#) on this website.

- Summary
- Document in Context ⓘ
- Related Documents ⓘ

<b>Category</b>	Regulatory Information
<b>Collection</b>	Code of Federal Regulations (annual edition)
<b>SuDoc Class Number</b>	AE 2.106/3:42/
<b>Contained Within</b>	Title 42 - Public Health Chapter IV - CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES Subchapter B - MEDICARE PROGRAM Part 410 - SUPPLEMENTARY MEDICAL INSURANCE (SMI) BENEFITS Subpart B - Medical and Other Health Services Section § 410.26 - Services and supplies incident to a physician's professional services: Conditions.
<b>Date</b>	October 1, 2021
<b>Citation Text</b>	51 FR 41339, Nov. 14, 1986, as amended at 66 FR 55328, Nov. 1, 2001; 67 FR 20684,

# Putting the “Artificial” in Artificial Intelligence

- You google a federal regulation.
- Result is a free website or a page from the code of federal regulations.
- Simply use the ECFR site.

# Calling your agent

- Rule 4.2 prohibits a lawyer from contacting the party the lawyer knows is representing by counsel.
- Are government investigators a party? Are they represented by counsel?
- What about a regulator?
- Sometimes the government thinks the answer is yes.



# Exhausted by exhaustion.

- Decisions from the Provider Review Reimbursement Board (PRRB) can be appealed to the Administrator of CMS and then district court.
- The administrator gets 30 days to review decisions. Appeals to the district court are due within 30 days.
- Are those 30 days consecutive or concurrent?
- See 42 CFR 405.1875 and 1877. And good luck!

# We will see you in court!

- A Medicare surveyor is threatening to impose a citation.
- You are convinced that they are misinterpreting the law. Are you entitled to injunctive relief?
- Make sure you read *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000)

# The 11th Commandment?

- You are in a dispute with a state Medicaid agency.
- The dispute involves significant money that you believe federal courts will offer a more reliable venue for analysis.
- You file suit against the state in federal court. This is when you will learn about 11<sup>th</sup> Amendment.



# Setting a record

- There have been possible shenanigans in the OR.
- Someone suggests using video cameras to ascertain the truth.
- Consider a myriad of issues, federal and state privacy laws and consent but it can also be a remarkable effective tool.

# I'm privileged to be wrong

- The attorney-client privilege protects communication to and from an attorney.
- The work-product privilege protects work done by attorneys and others under their direction in anticipation of litigation.
- Does the attorney-client protection comply to work by done by others at the direction of an attorney?

# I'm privileged to be wrong

- The attorney-client privilege protects communication to and from an attorney.
- The work-product privilege protects work done by attorneys and others under their direction in anticipation of litigation.
- Does the attorney-client protection apply to work by done by others at the direction of an attorney? YES!!!
- Work product is both broader and narrower than attorney/client. Try to understand the nuances. And remember the “Happy Hoppe:” Don’t over label things as work product!!

# Are you here to talk or to listen?

- We are attempting to determine if an organization follows its internal policy with respect to physician compensation.
- The policy can be difficult to understand. The author of the policy, is participating in the interviews explains it.
- Sign up for our September webinar!!!

# You're the boss!

- While doing interviews as part of an internal investigation, a high-level executive, or internal lawyer, asks to sit in on the interviews.
- Since I'm predisposed to defer to the client, I readily accede.
- When the GC steps out of the room to take a call, the witness raises new issues.

# Thereto, thereupon, therefrom, thereunder, therefore, thereby...

- Drafting is incredibly difficult.
- While specificity can be a friend, it's often an enemy.
- “This agreement may be terminated if the physician’s privileges are revoked, suspended, or surrendered while under investigation.”
- What if the hospital prohibits the physician from providing a particular service?

# The Importance of the Vet

- Good experts win cases for you, but bad ones can be really, really bad.
- Drafting is incredibly difficult.
- A good review considers their approach, how much they listen, biases, how they present.
- The ludicrous lunch and the recalcitrant writer.



# Rule of Law

- Medicare's anti-mark-up regulation asserts it applies to professional services.
- If you stop your research there, you're missing a key point. The statute only applies to diagnostic tests. In preamble, CMS offered a cockamamie justification for its regulation:

## 72 FR 66222, 66315 (November 27, 2007)]

“Further, we see no reason to distinguish between the TC and the PC of the diagnostic tests for purposes of the anti-markup provisions. Although the Congress did not establish an anti-markup provision in Section 1842(n)(1) of the Act or elsewhere for the PC of diagnostic tests, the omission may have been inadvertent. That is, it is not immediately clear why the Congress, if it wished to prevent overutilization of diagnostic testing, would not have desired an anti-markup on the PC, because without such provision, the incentive to order unnecessary tests (in profit on the PC) remains. We believe that, in order to fully effectuate Congress’ intent to prevent or limit the ordering of unnecessary diagnostic tests, it is necessary to impose an anti-markup provision on the PC of diagnostic tests.”

66315

# Stepping in the same river twice

- A receptionist expresses concern that a physician is not present in the office suite to supervise services that are provided incident to her work.
- You look up the supervision requirement, found at 42 CFR 410.32 and see:

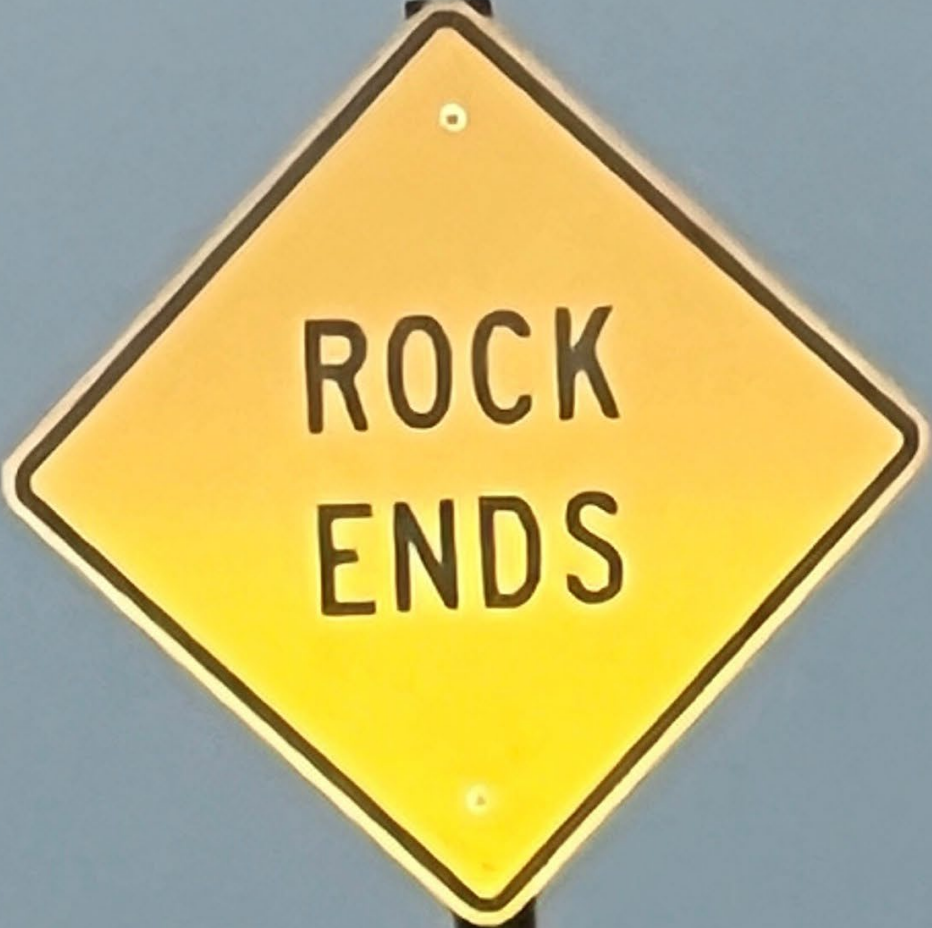
***Direct supervision*** in the office setting means the physician (or other supervising practitioner) must be present in the office suite and immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician (or other supervising practitioner) must be present in the room when the procedure is performed. Through December 31, 2024, the presence of the physician (or other practitioner) includes virtual presence through audio/video real-time communications technology (excluding audio-only).

# This stuff matters!

*[62 FR 59098, Oct. 31, 1997, as amended at 63 FR 26308, May 12, 1998; 63 FR 53307, Oct. 5, 1998; 63 FR 58906, Nov. 2, 1998; 64 FR 59440, Nov. 2, 1999; 66 FR 58809, Nov. 23, 2001; 69 FR 66421, Nov. 15, 2004; 72 FR 66398, Nov. 27, 2007; 75 FR 73615, Nov. 29, 2010; 77 FR 69361, Nov. 16, 2012; 83 FR 60073, Nov. 23, 2018; 85 FR 19286, Apr. 6, 2020; 85 FR 27620, May 8, 2020; 85 FR 54871, Sept. 2, 2020; 85 FR 85026, Dec. 28, 2020; 87 FR 70223, Nov. 18, 2022; 88 FR 79525, Nov. 16, 2023]*

# Tell her no, no, no

- The client asks your thoughts on a particular practice.
- You tell them it's risky.
- They ask you to send an email outlining the risks.



ROCK  
ENDS

A yellow diamond-shaped road sign with a black border and two mounting holes at the top and bottom. The sign is mounted on a black post. The background is a clear blue sky. A thin black wire is visible on the left side of the frame.



# Has anyone seen my skis?

- After receiving a CID, you interview half a dozen executives; describe the company's policies and practices. You feel reassured.
- You explain to the board that it doesn't sound like you have a material problem. You tell the government that CID is baseless.
- Bad facts are often slow to bubble to the surface.

# Making indemnification your friend

- During an investigation, an employee wants to engage counsel.
- Should you encourage or discourage this? Should you pay?
- Fewer lawyers is often better. But employee comfort is very valuable. Whatever you do, if the employee has counsel, do everything in your power to choose it.

# Gone but not forgotten

- Due diligence during the transaction discloses that the company had some relationships that might be considered kickbacks.
- The Company represents and warrants that the problems have been fixed. Deal counsel advises that as long as the conduct ended, the purchaser is in the clear.

# Gone but not forgotten

- Due diligence during the transaction discloses that the company had some relationships that might be considered kickbacks.
- Company represents and warrants that the problems have been fixed. Deal counsel advises that as long as the conduct ended, the purchaser is in the clear.
- Fixing criminal activity does not eliminate old liability. Moreover, Medicare overpayments go with the provider number.

# It's Obvious!!

- A psychologist has billed more than 24 hours in a day.
- Their billings are 4 times the expected amount.
- Before you fire them, how much inquiry is needed?

# It's Obvious!! The sequel

- A cardiologist has 35,000 RVUs. The software reviewing his E&Ms have him at 34 hours of work a day.
- I was certain there was overcoding. Then I shadowed him.

# How do you know when you're done?

- You interview 3 people, asking them each the same question about a practice at the organization: Have they seen Dr. X do anything shady?
- You are scheduled to talk to 2 more people who work with Dr. X.
- Should you waste their time and yours?

# Public Policy

- You are drafting a new compliance policy.
- You want to ensure that regular reviews are conducted.
- Which is better?
  - The clinic shall review 5 charts annually for each physician.
  - The clinic shall periodically review 5 charts for each physician.
  - The clinic shall periodically review charts for each physician.



# “Fly below the radar by avoiding government payors”

- Worried about the antikickback statute and/or Stark, the plan is to only accept cash pay or private insurance.
- If the deal involves people who refer to or get referrals from you, those laws still likely apply.
- If there is a state law similar to the federal laws, have you admitted you think the deal is sketchy?
- If it is cash pay, beware of Medicare patients.

# Envelopes aren't just for stamp collectors

- The date on which correspondence were received matters.
- Postmarks help, but given slow mail, stamping a receipt date is worthwhile.
- Calendar the appeal due date, and a reminder a couple of weeks before it.

# If you could read my mind, what a tale my thoughts would tell.

- This webinar could be “things I have watched witnesses say that made me cringe.”
  - “We have \$300,000 in reserve for this case.”
  - The highlighting headache.
  - Evasive maneuvers



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# Presenter



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