BUILDING CREDIBILITY ON BEHALF OF PROVIDERS DURING HEALTH CARE FRAUD INVESTIGATIONS

Kirk Ogrosky
Skadden, Arps, Slate, Meagher & Flom LLP
Washington, D.C.

I. INTRODUCTION

Given projected increases in expenditures and the rising number of Medicare and Medicaid program participants, the United States Department of Justice ("DOJ"), the Office of the Inspector General of the United States Department of Health and Human Services ("OIG") and state Medicaid Fraud Control Units ("MFCU"), will continue to expend significant resources pursuing fraud and abuse matters. In its 2005 Report summarizing Medicare and Medicaid Expenditures, the Centers for Medicare and Medicaid Services ("CMS") projected national health expenditures to reach $3.6 trillion by 2014, an average annual growth rate of 7.1%.[1] As recently as March 28, 2006, CMS alone requested an additional $5 million for fiscal year 2006, $50 million for 2007 and 2008, and $75 million for each year thereafter to support its efforts to establish a Medicaid Integrity Unit to combat health care fraud and abuse in the Medicaid program.[2] Not surprisingly, the health care industry is a top priority of federal, state and local law enforcement officials.

In this environment, few things are more important than a provider's credibility during a fraud investigation. To resolve what can be contentious interactions, a provider must establish trust and open the lines of communication with the government. During both civil and criminal investigations, providers who lose credibility with the government draw added scrutiny; providers who build and establish credibility, however, often receive the benefit of the doubt.

Understanding the investigatory process and the facts at the heart of the investigation are the keys for providers to build credibility and to resolve governmental investigations. This article provides an overview of how providers can reclaim credibility during government investigations—a time when providers are inherently suspect. It explains the process of how to effectively guide a provider through its responses to the government during an investigation. This article also briefly examines when and how internal investigations should be conducted in order to best protect the interests of the provider in terms of its criminal, civil and administrative exposure. It addresses issues related to how to respond to subpoenas, search warrants, and witness interview requests. As outlined below, a well-conceived and guided internal investigation and compliance plan are important tools that substantially assist providers with this process

II. INITIAL GOVERNMENT CONTACTS

The consequences of corporate prosecution for government program participants are so grave that every entity must ensure that they have a plan to address claims of wrongdoing before allegations escalate. Whether contacted by letter, civil subpoena, grand jury subpoena, search warrant, or a simple interview request, providers and their counsel must understand the investigatory process and how to communicate effectively with government agents and prosecutors.

Fraud and abuse investigations typically begin when sources report allegations of wrongdoing to an agency, prosecutor, or fiscal intermediary or carrier. The sources are usually employee whistleblowers, competitors, unwilling participants in a scheme, or government cooperators. In addition, some investigations start with data-mining projects related to billing and payment anomalies or industry-wide initiatives.

Agencies that investigate health care fraud and abuse include: OIG, MFCU, the Federal Bureau of Investigations ("FBI"), The Internal Revenue Service ("IRS"), The Postal Inspection Service, Department of Defense ("DOD"), and State Insurance Departments ("DOI"). In most cases, the first sign of an investigation is agent contact with a current or former employee or a letter request for information. These initial contacts are often followed by administrative, civil or criminal subpoenas. Less often, providers learn of the commencement of an investigation during the execution of a search warrant. Whatever the initiating government contact, providers need to quickly ascertain their status in the investigation—target, subject or witness. Providers also must understand their rights and those of their employees.

A provider's first priority should always be to get the facts. During the initial stages of an investigation, the provider has a unique opportunity to develop a relationship the investigating agency. Early on, the government proceeds with limited information while it collects additional information. As the investigation progresses, the government either confirms or refutes its perceived notion of the suspected violation. When providers fully understand the facts, they can influence the way the government perceives the case by guiding investigators through documents and witnesses. Whether contesting the allegations or fully cooperating, providers must understand the government's claims and the way that it views its case.

A. Requests for Interviews

Providers frequently learn of investigations from individual employees who report that they were approached by agents outside the workplace. In such situations, counsel for the

provider should interview the employees and attempt to ascertain the nature of the government's investigation. Thereafter, providers must decide how to prepare other employees for similar interviews. A witness is the property of neither the government nor the company, and both sides should have equal access to the witness for the purpose of interviews.[3] However, this has little practical meaning if employees are unaware of their options when confronted by investigators. Thus, it is important, and appropriate, for the company to apprise its employees of their rights and obligations should they be contacted by agents and asked to submit to an interview.

As a preliminary matter, providers should assure individual employees that they are free to answer questions from government agents and that all answers must be truthful if they elect to answer questions. Providers are also free to explain the benefits of declining an interview until the employee has had an opportunity to meet with counsel. Among other benefits, an individual who meets first with counsel will better understand his or her rights under the Fifth Amendment.

At a minimum, providers should request that individual employees who are approached by agents request the agent's background information, including the agent's name, agency and phone number, and request that the agent contact the provider's counsel. All contacts should be handled immediately and as confidentially as possible. Moreover, government agents must be treated seriously and accorded respect. Agents and prosecutors who sense obstructive conduct will respond by escalating the investigation, and may open new investigations into additional criminal conduct such as obstruction of justice.

Individuals who choose to provide a statement may be represented by counsel during their interview. For those individuals, the provider must determine whether the employee requires separate counsel and whether the provider will assume the cost of such representation. Counsel for the corporate provider should be aware of the ethical rules and not cross the line of representing an individual in a personal capacity. As such, counsel for the provider must make clear to individuals that they represent the company's interests.

The manner in which employees are apprised of their rights necessarily will vary depending on the circumstances of the case, including the number of employees involved, their physical locations, and the likelihood that the government may contact them before they can be interviewed by counsel for the company. Providers should consult counsel regarding the preparation of such a contact letter or before initiating any other such contact.

B. Administrative, Civil and Criminal Subpoenas

After the government's initial contact, providers can expect the government to seek documents by subpoena. Subpoenas are administrative, civil or criminal. Upon receipt of any

subpoena, providers should refer the request to in-house or outside counsel. Providers should have a policy assuring that investigatory requests and/or subpoenas be directed to counsel.

After receiving and reviewing the subpoena, counsel should seek to ensure that all responsive documents are retained. Counsel may issue a memorandum to key employees describing the request. This memorandum should clearly explain the subpoena, what documents should be retained, who will be collecting the documents, and it should contain instructions on how to collect documents for those participating in the collection.

Counsel evaluating a subpoena should also have their client, the provider, detail the state of its records and its ability to comply with the request. As soon the provider supplies this information, counsel should contact the government to discuss compliance issues. Given the nature of the subpoenaed material, counsel may seek to limit production based on overbroad requests, requests for privileged material, vague terms in requests, or expansive time periods covered by requests. Typically, counsel for the government will entertain reasonable requests to narrow subpoenas. If compliance issues remain unresolved, providers must decide whether to pursue a motion to quash the subpoena. Rarely do issues exist that the government will not be able to cure, so it remains unadvisable to move to quash a subpoena without exhausting all avenues with the government.

C. Search Warrants

The government will use search warrants when it believes there is a substantial risk that evidence will be destroyed. After it establishes by *ex parte* presentation to the court that there is probable cause to believe that a crime has been committed, the government will execute a search to seize relevant evidence. Notably, however, the government rarely uses search warrants in health care cases.

Search warrants are invasive, disrupt the provider's operations and create employee anxiety. During any search, employees should contact counsel or a designated employee immediately. If served with a warrant, providers must inspect the warrant for facial sufficiency (location, time, date and scope) and comply with its terms. It is also advisable that non-essential employees at the provider location be sent home. Having employees leave the facility will assure that their actions are not misinterpreted as interfering with the search. Further, limiting the number of employees at the search will minimize interviews and assure that employees do not expand the scope of the search by consent. To the extent practicable, communication by counsel with the agent in charge of the search is advisable to ascertain the nature of the allegations. Counsel should also seek a copy of the affidavit filed in support of the warrant.

Warrants permit the government to seize original documents. To safeguard a provider's interests, counsel should request copies of items seized and/or the return of critical documents. At a minimum, the senior person on the scene should keep track of the areas searched, questions asked and items taken. One consideration is whether to assist the agents in locating the items listed in the warrant. In most instances, where counsel for a provider assists the agents in locating the items listed in the warrant, the process proceeds at a faster pace and reduced scope. At the end of the search, counsel should request an inventory and attempt to assure that the inventory fully describes the items seized.

III. LEARNING THE FACTS: CONDUCTING AN INTERNAL INVESTIGATION

After the government's initial contact, counsel must learn and understand the allegations against their client, the nature of the investigation and the provider's exposure before recommending any action. To the extent possible, counsel should always ask the prosecutors and agents to describe the investigation and the role of the provider, including whether the provider is a target or subject of a criminal investigation. As long as the inquiry is a genuine attempt to understand the investigation, the government should welcome the discussion. While the government might not always accommodate the request, if done in a professional manner, there is no harm in seeking information. Having information from the government can assist counsel in designing and implementing a thorough internal investigation. Additionally, where there is an active criminal investigation, providers should not conduct an internal review until the parameters of the review have been discussed with agents and prosecutors, as it might compromise on-going law enforcement activities.

The internal investigation must be calibrated to the nature of the allegations in order to determine what happened, who was involved, and why it occurred. Understanding why individuals acted as they did is, in many ways, the most subtle and important goal of the internal investigation. In some circumstances, the internal investigation itself ultimately may serve as an indication of corporate responsibility and good citizenship. On January 20, 2003, Deputy Attorney General Larry Thompson issued a memorandum to DOJ officials providing nine factors to consider in deciding whether to charge a corporation with a criminal violation.[4] One of those factors, "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection," immediately rose to the forefront.[5] Under every articulated standard, however, self-examination and a determination if wrongdoing occurred is the predicate to whatever action may be necessary to correct problems, whether or not of a criminal nature.

A. Who Should Conduct an Internal Investigation

As a general rule, counsel should conduct or supervise the investigation. Legal questions related to whether the conduct at issue constitutes a violation are the heart of any investigation. Counsel must identify and resolve these issues based upon an analysis of the facts. While no longer the comfort it once was given the Thompson Memorandum, the attorney-client privilege may be asserted to protect certain communications, and the work product doctrine likewise will pertain to materials generated there under, only if the investigation is conducted by, or at the direction of, attorneys for the company.[6]

Whether in-house or outside counsel should be responsible for conducting the investigation is subject to a number of general considerations. In-house counsel are better acquainted with the company's history, structure, procedures and operations. Company employees are familiar with in-house counsel and therefore in-house counsel may be received more openly by employees. Unfortunately, in-house counsel are also likely to be viewed as lacking independence due to their status within the management structure. This is true particularly where alleged wrongdoing implicates an individual who has regular contact with in-house counsel. In these situations, it is advisable that the company seek outside counsel.

Another consideration is that it may be more difficult for in-house counsel to establish and maintain privilege because they are frequently called upon to provide business advice. This problem is exacerbated when information obtained in the internal investigation is shared by in-house counsel with auditors, accountants, underwriters and corporate officials not involved in defending the provider.[7] One concern with waiver is that it could extend to civil litigation.[8]

Outside counsel, because they are less familiar with the company's activities and personnel, may be more objective in assessing questioned practices. The judgment of outside counsel experienced in defending government investigations also may be a valuable asset to a company faced with allegations of wrongdoing. Similarly, outside counsel may be better acquainted with the subtle problems which often arise in the course of internal investigations. For example, they may be better able to avoid unfounded allegations of witness interference and obstruction of justice. Further, where the government perceives a conflict between the interests of a company's management and the interests of its employees, outside counsel also may have advantages in dealing with government investigators and prosecutors. The government is especially sensitive to the influence that management exercises over employees, and this tends to color the government's view of the conduct of in-house counsel.

In light of the foregoing considerations, it often is most effective for an internal investigation to be conducted by outside counsel, in close coordination with in-house counsel.

B. The Internal Investigation: Documents and Witnesses

The two principal components of an internal investigation are: (i) an analysis of relevant documents; and (ii) interviews of employees who may be able to provide relevant information. Generally, it is preferable to review documents prior to commencing interviews. The documents are a source of the identities of the individuals who will need to be interviewed as the internal investigation progresses. The government also identifies the employees it would like to interview based upon the documents. Further, the documents often raise questions which can be answered only through interviews of employees. The documents may also help refresh the recollections of the individuals being interviewed and avoid mistaken responses that may throw the internal investigation off course.

When interviewing employees, they must be informed of the purpose of the interview. Ordinarily, this would include advising each interviewee: (i) that the government is conducting an investigation; (ii) of the nature of the problem being investigated; (iii) that counsel has been retained to provide advice to the provider; and (iv) that the interview is necessary in order for counsel to obtain the information needed to provide appropriate advice.[9] Of course, the employee should be advised that the interviewer is not counsel to the employee and that any privilege belongs to the provider, who may choose to waive it. In some circumstances, although it may cause the employee to be less forthcoming, it is prudent to advise the employee affirmatively that the substance of the interview may be disclosed to company officials or the government.

Where it appears that the interests of the company may be adverse to those of an employee, clarity as to the lawyer's role is critical, as set forth in Rule 1.13 of the ABA Model Rules of Professional Conduct and its Comment. During interviews, it is important to avoid statements that might be misconstrued as an attempt to influence the witness's testimony. Therefore, characterizations of the provider's position on issues, or of the testimony of other witnesses, should be avoided.

After any interview, it should be reduced to a memorandum. As the provider may ultimately decide to waive the attorney-client privilege and work product protection, counsel should draft fact-based summaries without opinion. With regard to the potential of waiver, Director Buchanan of the Executive Office of United States Attorneys noted last year that "[t]o

avoid any such disclosure unnecessarily, experienced attorneys will refrain from including mental impressions and strategy in their notes of witness interviews."[10]

C. Determining Whether Employees Need Separate Counsel

Individual conduct is always at issue in government investigations. As such, some individuals may need separate legal counsel to advise them of their rights and obligations. Although it is difficult to generalize, where the provider is the subject of a criminal investigation, there often is a serious potential for the existence of a conflict between it and its employees. For example, an employee may have taken a questioned action based upon information or direction received from a supervisor. Even if contrary to company policy, the action would in all likelihood be attributable to the company, and the company could be held vicariously liable for it if the individuals involved possessed the requisite knowledge and intent. In such a situation, the interests of the company, the supervisor and the employee may vary. Accordingly, counsel for the company should refrain from providing legal advice to the individuals involved.

Where an individual has in fact committed criminal wrongdoing, the corporation has an interest in punishing and disclosing the conduct. Again, Director Buchanan advised that "a zero tolerance approach to employee crime is integral to the organizational culture of a good corporate citizen and can be based on rewards as well as punitive action . . . . Employees who have committed crimes using the corporate structure, however, cannot expect protection from their corporate employer."[11]

D. Concluding Internal Investigations

After counsel has reviewed relevant documents and interviewed and debriefed those knowledgeable about the matters at issue, it often is helpful to prepare a memorandum that: (i) summarizes the facts developed through the internal investigation; (ii) analyzes applicable legal principles; (iii) identifies any weaknesses in the company's practices or procedures; (iv) outlines the arguments against criminal prosecution or administrative sanctions; and (v) recommends any corrective actions or other measures which would improve operations and enhance the company's criminal and administrative defense of the case. Most cases involving suspected fraud and abuse involve highly complex facts, the significance of which can be difficult to grasp unless distilled in a detailed written analysis. After this is complete, the provider may evaluate the conduct and the available options. This decision is heavily fact specific and must be made with the advice of experienced counsel.

An internal investigation conducted after a provider has been contacted by the government is different from an investigation conducted prior to the government's involvement. In either case, the investigation may trigger collateral mandatory disclosure requirements.[12] For example, CMS requires certain disclosures for Medicare Advantage and Medicaid managed care providers, and many state laws require nursing homes to report all alleged incidents of abuse, mistreatment, neglect, and misappropriation of resident property. Such reports to state officials may implicate a false claims analysis should the quality of care be so low that DOJ considers program payments excessive. Additionally, for certain types of corporations, if evidence of illegality or misconduct is uncovered in the course of the investigation, disclosure may be required under the securities laws.[13] Further, the Sarbanes-Oxley Act requires that the corporate officer signing a company's periodic report certify that any fraud which involves management (or other employees who have a significant role in the company's internal controls), whether or not material, be disclosed to the auditors and the audit committee.[14]

E. Corporate Provider Cooperation

If criminal conduct is discovered during an investigation, a provider must decide how to proceed. This determination is case specific and will be based upon potential exposure. Where the conduct poses the risk of corporate indictment, providers have little choice but to cooperate given the risk of exclusion. This decision, however, must not be taken lightly. Only full cooperation is worth undertaking, and attempts at partial cooperation may be worse than none at all. The government takes the position that its focus is on the "authenticity of a corporation's cooperation" and any conduct by the corporation which is interpreted to "impede" the "quick and effective exposure" of the wrongful conduct should be taken as a factor in favor or corporate prosecution.[15] Given this "no cooperation is better than incomplete cooperation" standard, it is imperative that counsel conducting the investigation thoroughly examine key documents and witnesses and make sure that the facts are known and presented.

The decision to cooperate will impact how the internal investigation report is assembled. Once a provider has made a decision to cooperate with the government, a decision must be made as to whether there will be a written or oral presentation of findings and what impact this may have upon waiver of the attorney-client privilege and work product protections.

F. Preparation for Interviews

Whether a corporate provider decides to cooperate or not, the government will move forward with conducting witness interviews. Even when presented with a comprehensive internal investigation report and full interview notes, the government will seek to confirm the

report's findings. Careful preparation of individuals who agree to be interviewed by the government, or who are called before a grand jury, is a critical adjunct to the internal investigation.

An individual who has not received general guidance about the government interview process or the grand jury process may inadvertently make statements that confuse issues or create the impression of improprieties that do not exist. This is especially so where the individual is being interviewed by government investigators who are asking questions that fit a preconceived theory of the case. Moreover, if unprepared, the individual unintentionally may make statements that contain inaccuracies that later can create credibility concerns or give rise to charges of perjury. Nevertheless, preparation of individuals by counsel in advance of government interviews must be free from undue influence and misleading conduct. Whether prepared by counsel for the company or separate counsel, individuals should be advised of the importance of telling the truth. Counsel must explain the importance of answering questions truthfully and with complete candor.

IV. CONCLUSION

Building credibility with the government helps providers resolve investigations. Although providers and the government might not always agree on the underlying facts and the appropriate outcome, it is possible to reach workable compromises if the parties communicate openly. For counsel to develop credibility, they must understand the facts, the investigation and the potential exposure their clients face. Well-conceived and executed internal investigations help providers address the government's concerns and allegations. It is impossible for a provider's board or management to chart an appropriate course in the face of potential allegations of wrongdoing without sound legal advice about the scope of the company's exposure. Counsel cannot provide that advice unless they have ascertained the facts. Nor can a provider minimize the risks of criminal prosecutions, civil enforcement actions, or other adverse consequences, unless it has scrutinized carefully its own conduct and assessed objectively its own vulnerabilities. In short, all well-grounded action to protect the company's interests depends upon a command of the facts and an ability to truthfully and persuasively communicate those facts to the government.

ENDNOTES

1. Earl D. Hoffman, Jr., et al., Brief Summaries of Medicare and Medicaid, Office of the Actuary Centers for Medicare & Medicaid Services, at 5 (Nov. 1, 2005) available at http://www.cms.hhs.gov/MedicareProgramRatesStats/downloads/MedicareMedicaidSummaries2005.pdf (last visited April 13, 2006).

2. Bolstering The Safety Net: Eliminating Medicaid Fraud: Hearing before the Senate Subcommittee on Federal Financial Management, Government Information and International Security of The Committee on Homeland Security and Governmental Affairs (March 28, 2006) (statement of Dennis Smith, Director, Center For Medicaid And State Operations), available at http://www.cms.hhs.gov/ apps/media/press/release.asp?Counter=1822 (last visited April 13, 2006). Mr. Smith explained that the Medicaid Integrity Program, pursuant to the Deficit Reduction Act, will "enter into contracts with eligible entities to carry out certain specified activities including reviews, audits, and identification and recovery of overpayments and education." Id.

3. See *United States v. Medina*, 992 F.2d 573, 579 (6th Cir. 1993); United States v. Matlock, 491 F.2d 504, 506 (6th Cir. 1974); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966).

4. Deputy Attorney General Larry Thompson, United States Department of Justice, Memorandum Titled Principles on Federal Prosecutions of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf (last visited April 13, 2006) [hereinafter Thompson Memorandum].

5. Id. at 4.

6. See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Merrill Lynch v. Allegheny Energy Inc.*, 2004 WL 2389822 (S.D.N.Y. 2004) (discussing work product protection in the context of internal investigations).

7. See, e.g., id.; *John Doe Corp. v. United States*, 675 F.2d 482 (2d Cir. 1982); *In re Wilkie, Farr & Gallagher*, 1997 U.S. Dist. LEXIS 2927 (S.D.N.Y. Mar. 14, 1997).

8. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002) (holding that the company's disclosure of internal audits to DOJ during a fraud investigation waived privilege); *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) (holding that the disclosure of an internal investigation report and underlying documents to SEC waived privilege).

9. See, e.g., *Upjohn*, 449 U.S. at 394 (discussing protected communications by corporate counsel with company employees).

10. Mary Beth Buchanan, Effective Cooperation by Business Organizations and the Impact of Privilege Waivers, 39 Wake Forest L. Rev. 587, 596 (2004) (citing Deputy Attorney General James B. Comey's remarks to the ABA 14th Annual Institute on Health Care Fraud (May 13, 2004)).

11. Id. at 599.

12. See 42 U.S.C. § 1320a-7b(a)(3) (2000) (obligating health care providers to report known fraud).

13. See, e.g., Section 10A of the Exchange Act, 15 U.S.C. § 78j-1 (2000); In the Matter of W.R. Grace & Co., Exchange Act Release No. 39157, 1997 SEC Lexis 2038 (Sept. 30, 1997).

14. 18 U.S.C. § 1350 (2000); 17 C.F.R. § 240.13a-14 (2002).

15. Thompson Memorandum, supra note 5, at 1.