WHEN CRIME STRIKES: THE RESPONSE OF IN-HOUSE COUNSEL TO CRIMINAL MATTERS

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Today, in-house counsel for health care organizations are finding themselves often in the unfamiliar and very rocky terrain of criminal law and procedure. These corporate attorneys are becoming embroiled in complex legal and business issues as they respond to criminal allegations and investigations. Involvement in criminal matters is becoming an ever more common, time-consuming and integral aspect of the practice of the typical in-house health care counsel.

Yet, most health lawyers lack the experience, knowledge and comfort with criminal law and procedure to respond confidently and appropriately to the criminal issues that arise within their organizations. Criminal allegations and investigations may appear in a myriad of ways. They may relate to misconduct by staff, by providers, by patients, by vendors, or by visitors or invitees. Regardless of whether the organization itself is at risk of criminal liability, criminal investigations and proceedings can disrupt health care operations, result in significant public relations issues, impair business initiatives, and result in consequential legal liability -- civil or administrative -- to the health care institution, its employees and its officers and directors.

At such times, common sense, broad perspective, and effective strategies are essential. In responding to criminal matters, in-house attorneys must know who it is they are protecting, what it is they need to do, and what they should avoid doing. They must establish credibility with law enforcement while diligently maintaining appropriate protections of confidential information, individual rights, and the well-being, integrity and reputation of their institutions. Regardless of the role of the organization in the criminal matter, they must gain the confidence of all involved. To health care providers, as to most non-lawyers, criminal investigations can be frightening, upsetting experiences. Often, tempers can fray and interactions become contentious. Law enforcement officials may appear to be impatient, skeptical, and overly confrontational.

To calm those involved, understand the facts, and help to facilitate resolution of the criminal matter, attorneys must establish trust and open lines of communication – both within the health care organization and with the investigating law enforcement officials. Providers who lose credibility with law enforcement personnel draw added scrutiny; providers who build and establish trust are more likely to receive the benefit of the doubt. Similarly, attorneys who gain the trust of members of their own organizations, and provide them with guidance and reassurance, will most readily gain an understanding of the full facts of the matter and be in the best position to understand the real risks to posed to the organization.

In assisting their organizations to respond to criminal matters, and the traumatic consequences they can have, in-house counsel need to know the steps of the criminal law enforcement process. They must understand how best to obtain the facts of the matter, to

assess the organization's involvement and exposure, and, to protect the interests of their organizational client in terms of its criminal, civil and/or administrative exposure. This article provides an overview of criminal procedure and the spectrum of criminal matters that may involve institutional and individual health care providers. It explains the process of how in-house counsel can effectively guide their client through the process, including internal investigations, external investigations, responses to document requests, subpoenas, search warrants, and interviews. This article also examines some of the key organizational issues and concerns and provides suggestions on how to minimize the internal "static" through notification of stakeholders and responses to publicity.

I. Criminal Matters in Health Care Organizations

In-house counsel are often among the first to confront criminal matters as they occur. The issues may be as diverse as they are complex. For example, hospital counsel are the first to be called when police arrive with a search warrant, when visitors accompanying a patient have a violent confrontation in the emergency room, when a nurse becomes suspicious regarding the sudden disappearance of medication from a patient's bedside, when a patient dies under unclear circumstances. In addition, they are the first to be notified when auditors discover improprieties in the submission of claims for federal health care benefits. Counsel of other types of organizations – behavioral health organizations and nursing homes – may be the first call when there is an allegation of sexual misconduct between clients, a physical assault on a staff member, or a therapist's receipt of a subpoena to provide testimony at the criminal trial of a client. Criminal issues may arise when an employee admits that he or she was arrested last night.

In other words, criminal issues in health care organizations may arise from virtually anyone – providers, employees, patients, clients, board members, vendors or even visitors or invitees. The criminal matters may involve federal or state law and involve injuries or death to persons, property matters, or financial transactions. Regardless of how an issue arises, counsel must be prepared to respond quickly.

II. The Steps of a Criminal Investigation/Prosecution

While health care attorneys have substantial experience with civil litigation, they may not have any familiarity with criminal procedure. Moreover, the process of litigating criminal matters as well as the legal issues involved substantially differ from those on the civil side of the courthouse. This section briefly describes the steps of criminal matter – from investigation through sentencing and appeal.

Step 1: Law Enforcement Investigation

While there are many ways that law enforcement officials may be alerted to criminal misconduct, most commonly, an individual who has knowledge or suspects criminal activity has occurred or who considers him or herself to be a victim, will submit a report to the police or other law enforcement officials. Law enforcement will then begin an investigation to determine the facts and determine whether to refer the matter for prosecution.

Law enforcement investigations may be conducted through many means: including interviews (witnesses, victims and suspects), requests for documents, subpoenas, court orders, and, in extreme cases, search warrants.

Step 2: Indictment/Information/Arrest

If the investigation by law enforcement officers uncovers credible information that a crime has occurred, the matter will be referred to the prosecutor's office. That office can present the case to a Grand Jury who can return an "indictment" or the prosecutor can proceed by "information." Both an indictment and information are documents that set forth the charges and allegations against the defendant and thereby define the issues that will be pertinent to the prosecution in court.

Once the charges have been issued, the court may issue a warrant for the defendant's arrest. The defendant is taken in custody and processed. Typically, the defendant is photographed and fingerprints are taken. The defendant then must be permitted an appearance before a judge or magistrate.

Step 3: Arraignment

A criminal defendant is arraigned in a public hearing before a magistrate or criminal law judge. At the arraignment, the defendant is informed of the charges being brought and his/her rights (including, the right to remain silent, to have an attorney, and to have a preliminary hearing). If the defendant is indigent and requests a lawyer, the judge will appoint one.

At this, the defendant's initial appearance, the court must determine whether to release the defendant. The court must determine the least onerous condition reasonably likely to assure the defendant's later appearance to answer charges. The court may release a defendant on his or her personal recognizance (a promise to appear), conditional release (release that restricts the activities and associations of the defendant) or security release (a promise secured by cash, stocks, bonds or real property, also called "posting bail").

Step 4: Preliminary Hearing

If the matter is not submitted to a Grand Jury, a criminal defendant has the right to a preliminary hearing. The preliminary hearing is, in fact, a mini-trial, in which the prosecution is required to produce witnesses and other evidence to establish probable cause that the defendant committed a crime.[1] The prosecution does not have to prove guilt beyond a reasonable doubt -- the standard for a conviction; the prosecution just needs to provide sufficient evidence to convince the judge that the charges can be supported. The defense has an opportunity to hear some of the evidence and to cross-examine the state's witnesses. For strategic reasons, a defendant may sometimes waive his/her right to a preliminary hearing.

At the end of the preliminary hearing, the court will determine – as to each individual charge -- whether a reasonable person could believe the defendant committed

the crime. The court will dismiss any charges that are not supported by sufficient evidence.

In some cases, a Grand Jury is convened to consider the evidence. The Grand Jury meets in private with witnesses in the presence of the prosecutor. The Grand Jury makes a probable cause determination. If the grand jury finds probable cause, it will issue an indictment. The indictment contains the charges against the defendant.

Step 5: Discovery

Similar to discovery in civil actions, the criminal discovery procedure provides a mechanism for the exchange of information and documents. Unlike the discovery phase of civil actions, the mechanisms for discovery are less formal. For example, parties do not exchange interrogatories or conduct depositions. Plus more information is required from the prosecution than the defense. The parties exchange police reports, names, addresses and statements of witnesses, photographs, physical and mental examinations, and scientific tests. The prosecution must provide any statements or written confessions and must provide any exculpatory evidence.

Step 6: Pre-Trial Motions

Before trial, generally the parties will submit pre-trial motions to obtain rulings regarding evidentiary issues prior to the trial. These include issues of suppression of evidence, inadmissibility of statements, challenges to the charges (indictment or information).

Step 7: Trial

The prosecution must prove the defendant's guilt beyond a reasonable doubt. The case is generally a public trial before twelve impartial jurors. The jury must decide the factual issues and make the ultimate decision as to whether the state has proven the defendant's guilt beyond a reasonable doubt. Sometimes, with the consent of both the state and defendant, the parties may waive a trial by jury and consent to a bench trial before a judge.

Step 8: Sentencing

If the defendant is convicted, the case passes to the judge to make a decision as to the punishment to be imposed. The sentence may include probation, incarceration, or fines. The defendant may be required to make restitution. In many states, the victims of the defendant's actions may provide statements for the judge to consider in imposing a sentence.

In certain jurisdictions, and for certain crimes, there may be legally mandated sentencing guidelines that restrict a judge's discretion in imposing a sentence and consider the nature of the crime and the defendant's criminal history.

Step 9: Appeal

Defendants may challenge evidentiary matters and the fairness of verdicts through an appeal. A defendant has an absolute right to an appeal. The state may also appeal but cannot appeal a verdict of not guilty.

Other Dispositions: Plea Bargaining and Accelerated Rehabilitative Dispositions

Throughout the criminal process, the state and defendant may engage in settlement negotiations, called "plea bargaining." The state may offer a defendant leniency including a reduced sentence or probation in exchange for a guilty plea.

In some jurisdictions, the courts have adopted "Accelerated Rehabilitative Disposition" ("ARD") programs that permit first time offenders an opportunity to clear their record.[2] The defendant agrees to comply with the requirements of the program (which may include public service, restitution, and no further criminal activity). If the defendant completes the program, the court will dismiss all charges. If the defendant fails to complete the program, the defendant may be prosecuted as provided by law. The defendant agrees in advance to waive his/her right to a speedy trial and the applicable statute of limitations.

While the defendant has not pled guilty and has not been convicted of a crime, the defendant's participation in the program can be considered as a conviction until cleared upon satisfaction of the program.

III. The Role of Counsel in Criminal Matters

The role of in-house counsel in criminal matters is often very unclear. The involvement of in-house counsel is necessary when the organization itself is at risk of liability. Nevertheless, even when the organization is not a direct party in the criminal proceeding, the organization as well as others affiliated with the organization may become embroiled in the criminal investigation and proceeding and be profoundly affected by the criminal matter. In such situations, it is very important for in-house counsel to determine an appropriate role and involvement in the matter. Much will depend upon the nature of the alleged criminal conduct, the location of such conduct (on or off premises), the identity of the persons involved (suspect, victims, witnesses), the severity of injuries sustained by the victims, and the possible direct or indirect exposure of the organization. Counsel should take a more active role if the organization or its senior management or board may be directly at risk in the criminal prosecution.

A. Initial Contact

The initial contact for state criminal law matters may be a visit or telephone call from the local police alerting counsel to a specific incident or matter or requesting information. Counsel for health care providers may also receive calls from employees asking whether they should report an incident to the police.

For federal investigations, providers may be contacted by letter, civil subpoena, grand jury subpoena, search warrant, or a simple interview request. 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. 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. 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"). 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.

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.

Regardless of the type or origin of the criminal investigation, or the depth of involvement of the organization in the criminal matter, in-house counsel's first priority should always be to get the facts. During the initial stages of an investigation, the attorney has a unique opportunity to develop a relationship with the investigating agency. Early on, law enforcement proceeds with limited information while it collects additional information. As the investigation progresses, law enforcement either confirms or refutes its perceived notion of the suspected violation. When the in-house counsel fully understand the facts, they may have an opportunity to influence the way that law enforcement perceives and investigates the case by guiding investigators through documents and witnesses. Whether the organization is contesting the allegations or fully cooperating, it is important to health care organizations that their in-house counsel understand the criminal allegations and potential claims.

B. Internal Investigations

The initial and very critical decision to be made by in-house counsel upon learning of the criminal matter is whether to perform an internal investigation. Counsel should definitely perform a full and thorough investigation if the organization may be directly involved in the criminal conduct or may have direct liability exposure (criminal, civil or administrative), or when the criminal matter, or its investigation, may personally involve senior management, board members, or health care providers.

After the initial contact from a law enforcement official, in-house counsel must obtain information to understand any allegations against his/her client, the nature of the investigation and the organization's exposure before recommending any action. To the extent possible, counsel should always ask the investigating officer to describe the investigation and the role of the organization and others, including whether the organization or any of its providers, officers, directors or employees are a target or subject of a criminal investigation. As long as the inquiry is a genuine attempt to understand the investigation, law enforcement should welcome the inquiry. While law enforcement might not always accommodate the request, if done in a professional manner, there is no harm in seeking information. Having this information can assist counsel in designing and implementing a thorough internal investigation. Additionally, where there is an active criminal investigation, counsel should not conduct an internal review until the parameters of the review have been discussed with law enforcement and it has been determined that it is not likely to compromise on-going law enforcement activities.

The internal investigation should be tailored 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. As outlined below, counsel conducting the investigation should keep fact-based memoranda of witness interviews as a record and take steps to assure protection of the attorney-client and attorney work product privileges.

Importantly, some licensing agencies require licensees to hold off conducting their own investigations of matters until the agency has had an opportunity to investigate. These agencies may be concerned that the organization's interviews with individuals and other fact-gathering efforts will affect its ability to gather information, will alert employees to issues, or will otherwise impede its investigation. In those situations, while counsel may not be able to perform a full investigation, he/she should still gather general facts about the matter so that he/she can analyze the organization's risks, determine the identity of involved individuals, and take steps to protect patients and other persons.

1. Who Should Conduct an Internal Investigation?

As a general rule, legal 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. 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.

Whether in-house or outside counsel should be responsible for conducting the investigation is subject to a number of general considerations. In-house counsel is 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 is 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. Courts have held that the privilege is not available when counsel is merely providing "business advice."[3] A few courts have limited the scope of the privilege to communications between the attorney and a limited set of individuals – either so-called "core group members"[4] The 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.[5] One concern with waiver is that it could extend to civil litigation.[6] These limitations on attorney-client privilege and work product privilege are less likely to be an issue with outside counsel.

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.

2. 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. 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. 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 and avoid mistaken responses.

When interviewing employees, they must be informed of the purpose of the interview. Ordinarily, this would include advising each interviewee: (i) that law enforcement officials are 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.[7] Of course, the employee should be advised that the interviewer does not represent the employee and that any privilege belongs to the organization, which 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 the organization and/or law enforcement. If the employee refuses to cooperate, the employee may be informed that he or she may be subject to disciplinary action for doing so.

In conducting interviews, counsel should be careful not to directly – or even indirectly - advise employees not to cooperate with law enforcement. Such advice could result constitute obstruction of justice and result in criminal prosecution of counsel or organization.[8] Counsel should clearly inform employees that the organization expects that all information provided by employees to law enforcement must be truthful.

When 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, the information should be placed in a memorandum. As the organization 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 it is best to avoid the inclusion of attorney mental impressions and strategy in the memoranda.

3. Determining Whether Employees Need Separate Counsel

Individual conduct is always at issue in investigations. As such, some individuals may need separate legal counsel to advise them of their rights and obligations. Although it is difficult to generalize, when a provider, officer, director, or employee is the subject of a criminal investigation, there often is a serious potential for the existence of a conflict between the individual and the organization. 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.

Once it is clear that there is a conflict between the organization and a particular individual and that the individual needs separate counsel, consideration must be given as to whether the organization should retain and pay such counsel. Such decisions will need to be based upon the provisions of the corporate bylaws, insurance requirements and state or federal law.

4. Concluding Internal Investigations

An internal investigation conducted after a provider has been contacted by the government may differ in liability exposure from an investigation conducted prior to the government's involvement. In either case, however, the investigation may trigger collateral mandatory disclosure requirements.[9] 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.[10] 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.[11]

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 to determine if they should cooperate given the risk of exclusion. This decision should not be taken lightly. Only full cooperation is worth undertaking, and attempts at partial cooperation may be worse than none at all. The authenticity of a corporation's cooperation is critical and any conduct by the corporation which is interpreted to impede the exposure of the wrongful conduct may impact the charging decisions.

A major benefit of conducting an internal investigation is that, in some circumstances (especially federal fraud and abuse investigations), the internal investigation itself ultimately may serve as an indication of corporate responsibility and good citizenship. For example, in 2006, the Deputy Attorney General issued a memorandum to Department of Justice officials providing factors to consider in deciding whether to charge a corporation with a fraud and abuse criminal violation. One of the factors to be considered in deciding not to charge the corporation is the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation.[12]

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.

For in-house counsel, self-examination and a determination if wrongdoing occurred is also the predicate to whatever action may be necessary to correct problems, whether it is or is not of a criminal nature.

5. Documentation

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.

C. External Investigations/Interviews

Providers frequently learn of investigations from individual employees who report that they were approached by law enforcement officers outside the workplace. In such situations, counsel for the provider should interview the employees and attempt to ascertain the nature of the criminal investigation. Thereafter, providers must decide how to prepare other employees for similar interviews. A witness is not the property of the state, the federal government or the company, and all parties should have equal access to the witness for the purpose of interviews.[13] Thus, it is important, and appropriate, for the company to apprise its employees of their rights and obligations should they be contacted by investigators and asked to submit to an interview.

1. Discussions with Employees

As a preliminary matter, providers should assure individual employees that they are free to answer questions from investigators 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.

At a minimum, providers should request that individual employees who are approached by investigators request the person’s background information, including the investigator’s name, agency and phone number, and request that the investigator contact the provider's counsel. All contacts should be handled immediately and as confidentially as possible. Moreover, law enforcement officials must be treated seriously and accorded

respect. Officers 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 organization 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 organization'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 law enforcement may contact them before they can be interviewed by counsel for the organization. Organizations should consult counsel regarding the preparation of such a contact letter before initiating any other such contact.

When a crime occurs or is alleged, the health care organization may be brought into investigations may be conducted by governmental law enforcement agencies including the police and even state licensing agencies. Depending upon the facts of the matter, it may be appropriate for counsel to request to attend interviews of witnesses by law enforcement or outside agencies. Counsel is likely not to be permitted to attend such interviews of lower level employees if the organization is suspected of being involved in the criminal activity. As a general rule, the organization/employees should not make interviews with fact witnesses other than senior management contingent upon corporate counsel being present.

Moreover, if permitted to attend an interview by law enforcement, counsel should be careful to circumscribe his/her role. Counsel does not represent the interviewee at the interview and therefore cannot object to questions or advise the employee not to answer. Counsel's role should be limited to supporting the employee (making sure that he or she understands the question) and obtaining information (learn facts about the matter, gain an understanding of the focus of the investigation, gain insight about the potential liability of the organization). It can be especially valuable to attend such interviews if the information provided by the employees may bind the organization or if the employee may not be credible, may not have a full understanding of the facts or issues or may provide erroneous information. Even in those circumstances, Counsel should not take an active role in the interview but may suggest to the investigator other sources of information.

Counsel should be careful not to lead the witness to believe that he or she is providing legal representation and certainly must refrain from taking any action that could have the appearance of counseling the individual not to cooperate or be completely truthful with the investigator.

2. Preparation for Interviews

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. This is especially so where the individual is being interviewed by government investigators. 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.

D. Requests for Information

Regardless of counsel's involvement in a criminal matter, in-house counsel is likely to be faced with questions regarding the provision of information to law enforcement. Counsel need to understand the legal limitations and requirements pertaining to the information that can be disclosed to law enforcement. If a request transcends legal bounds, they should promptly communicate with the pertinent law enforcement official and explain, if pertinent, how the law enforcement officer can obtain the information (e.g., with court order). Counsel who merely refuse to provide the information, without explanation, may be at risk.

1. Patient Information

Health care attorneys are acutely aware of legal requirements to protect patients' health information under federal and state law. These protections are especially important with regard to the provision of information to law enforcement officials.

a. The HIPAA Privacy Regulations

The privacy regulations of the Health Insurance Portability and Accountability Act set forth detailed requirements for the provision of protected health information ("PHI") to law enforcement.

Reportable Matters: [14] Under HIPAA, a health care facility can disclose protected health information to law enforcement if it is legally required to report (e.g., statutes relating to reporting of wounds, child abuse, etc.).

Compliance with Judicial Decree or Judicial Proceeding: [15] A health care facility may disclose protected health information to law enforcement to comply with a court order, court-ordered warrant, or a subpoena or summons issued by a judicial officer or a grand jury subpoena. The information, however, must be limited to the information sought in that document.

Administrative Requests:[16] Health care organizations may also release information pursuant to an administrative request, including an administrative subpoena or summons, a civil or authorized investigative demand, or similar process, provided that:

- The information is relevant and material to a legitimate law enforcement inquiry
- The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and,
- De-identified information could not reasonably be used.

Limited Information for Identification and Location Purposes:[17] General law enforcement requests cannot be honored unless they are for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person. The only information that can be provided:

- Name and address
- Date and place of birth
- Social Security number
- ABO blood type and rh factor
- Type of injury
- Date and time of treatment
- Date and time of death, if applicable
- Description of distinguishing characteristics (e.g., height, weight, gender, race, hair, eye color, facial hair, scars, tattoos).

Health care organizations, however, may not disclose protected health information related to DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

Victim of Crime:[18] A health care entity can provide information to law enforcement regarding a victim of a crime only if (1) the individual agrees or, (2) the health care organization is unable to get the victim's consent because of incapacity or emergency circumstances and:

- The law enforcement official represents that the information is needed to determine whether a violation of law by a person other than the victim has occurred and such information is not intended to be used against the victim;

- The law enforcement official represents the immediate law enforcement activity depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

- The health care facility determines that in its exercise of professional judgment, the disclosure is in the victim's best interest.

Decedents:[19] A health care facility may disclose protected health information about an individual who has died for the purpose of alerting law enforcement of the death of the individual if the facility has a suspicion that such death may have resulted from criminal conduct.

Crime on Premises:[20] A health care facility may disclose to law enforcement protected health information that the entity believes in good faith constitutes evidence of criminal conduct that occurred on its premises.

Reporting Crime in Emergencies:[21] A health care provider providing emergency health care in response to a medical emergency (other than an emergency on its premises) may disclose protected health information to a law enforcement official if the disclosure appears necessary to alert law enforcement to:

- The commission and nature of a crime

- The location of such crime or victims of such crime; and,

- The identity, description, and location of the perpetrator of such crime.

Child Abuse or neglect:[22] The health care facility may disclose protected health information to a public health authority or other appropriate governmental authority authorized by law to receive reports of child abuse or neglect.

Other forms of abuse, neglect or domestic violence:[23] Health care facility may disclose protected health information to a governmental authority, including a social service or protective service agency authorized by law to receive such reports, to the extent the disclosure is required by law and the disclosure is limited to the relevant legal requirements. The health care entity may disclose only if (1) the individual consents to the disclosure; or (2) the disclosure is authorized by statute or regulation and:

- The entity in the exercise of professional judgment believes the disclosure is necessary to prevent serious harm to the individual or other potential victims;

- The individual is unable to agree because of incapacity; and

- The public official authorized to receive the report represents that the protected health information sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

If the health care entity makes the disclosure, it must inform the individual that a report has been or will be made unless the entity believes informing the individual would place the individual at risk of serious harm; or the entity would be informing a personal representative who the entity believes is responsible for the abuse, neglect or other injury and, in its professional judgment, it believes informing such person would not be in the individual's best interest.

b. Other protections of patient information

Providers must also comply with other statutory protections for health information. Although they differ significantly between states, some states have laws restricting disclosure of patient information pertaining to HIV infection,[24] mental health records,[25] and substance abuse treatment records.[26]

2. Privileges

Many states have enacted laws providing protection to communications in certain confidential relationships because of their perceived value to society. These privileges shield communications to such individuals as physicians, psychotherapists,[27] clergy[28] and attorneys from disclosure without the permission from the individual. Some statutes extend such protections to state criminal investigations and prosecutions as well as other judicial and administrative proceedings.[29] Importantly, such privileges are very limited. Some privileges are only applicable to civil litigation, not criminal prosecutions.[30] In addition, the federal courts engage in a balancing test to determine whether to apply state privileges to federal claims in federal court.[31] Moreover, courts increasingly are interpreting such privileges as restrictively as possible because they obstruct the search for truth of the judicial process.

Some states have adopted laws affording health care organizations and providers with a privilege that protects the confidentiality of peer review information and documents. In many states, the privilege is very limited and fragile. It will only apply when the documents are created by peer review participants within the ambit of specific proceedings and for the purpose of performing peer review. It will often only apply when the documents are not available from sources outside of the peer review proceeding and will be considered waived when shared outside of the peer review context.[32] Moreover, in some states, the peer review privilege does not apply to criminal proceedings.[33]

Thus, Counsel should be concerned about sharing peer review documents within the context of a criminal proceeding. While health care organizations may not have any basis for protecting such documents in criminal proceedings, the disclosure of such documents and information is certain to constitute waiver of the privilege in any antecedent civil or administrative proceedings.[34]

3. 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 law enforcement 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, the counsel making the request for the government will consider reasonable requests to narrow subpoenas. If compliance issues remain unresolved, providers must decide whether to pursue a motion to quash the subpoena. Rarely do defects or issues exist in subpoenas that cannot be cured, so it remains unadvisable to move to quash a subpoena without exhausting all avenues with the government.

4. Search Warrants

Law enforcement will use search warrants when it believes there is a substantial risk that evidence will be destroyed or when it believes that it is meeting undue resistance to information requests. After it establishes by *ex parte* presentation to the court that there is probable cause to believe that a crime has been committed, law enforcement will execute a search to seize relevant evidence. Thankfully, the government rarely chooses to use search warrants against health care providers.

Search warrants are invasive, disrupt the provider's operations and create employee anxiety. When a search warrant is executed, employees should contact counsel or a designated employee immediately. When served with a warrant, counsel or the designated employee 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 official 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 officers 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.

E. Monitoring of Criminal Proceedings

Often, if an organization or its senior management is not implicated in a criminal prosecution, counsel may feel that they are off the hook, and may neglect the matter once the initial investigation stage has concluded. Counsel, however, should consider the benefits of remaining in touch with law enforcement and the prosecution about the matter – or even arrange for a corporate representative to attend any substantive hearings and the trial – to monitor if the case may require the involvement of the organization's employees as witnesses, or if there is a possibility of a related civil action. If a civil lawsuit has been filed, or if there is a credible threat of a civil lawsuit, the organization should consider hiring outside litigation counsel to monitor the criminal case.

It is likely that valuable information can be gleaned from criminal proceedings that will have impact – positive or negative – on various arguments and defenses. The outcome of a criminal trial also can have a strong impact on the organization's liability exposure and can influence significantly its defense. If the defendant is convicted, for example, the organization may decide not to argue that the conduct – and resulting harm – did not occur. However, a conviction may afford the organization the opportunity to proffer the defense that the harm to the victim was caused by an unforeseeable, superseding criminal act that ameliorates the organization's liability. An acquittal could provide the organization with other defenses, such as the argument that the harm was accidental and not inflicted by negligence. In any case, continual monitoring of the proceedings is necessary and beneficial.

F. Organizational Concerns

Criminal investigations, charges and proceedings are almost always troubling and traumatic to health care organizations and to their providers, employees, directors and other constituents. Even the possibility that a criminal action may have occurred within the premises of a health care provider, or may have involved persons associated with the institution, can cause concern by patients, providers, referral sources, licensing agencies, contributors and others, and among the public at large. It can create a crisis of confidence in individuals, can fracture relationships within the organization, can impede the smooth operations of the institution and divert it from its mission, can cause a stain on its reputation, and can result in financial liability. In-house counsel must be sensitive to the fears and concerns that often arise in such situations, and should take affirmative steps to quell concerns to the extent possible.

Reassurance, clear and forthright communication, cooperation with law enforcement officials – tempered by the need to protect confidentiality as permitted by law, and a broad understanding of the institution's needs and liabilities are necessary.

Soon after learning of a criminal matter, in-house counsel should notify all appropriate senior management staff, board members and other individuals of the alleged criminal matter before they learn about it through other means. If the organization has children within their care, it should consider providing a carefully-worded notice to parents, referral sources and funders. Such notice should state the facts as succinctly and carefully as possible to avoid undue concern, and should provide reassurance of the institution's intention to protect the safety of the children, cooperate with law enforcement, and monitor developments in the matter.

Since criminal matters can trigger negative publicity, especially in health care institutions, in-house counsel should consider alerting the organization's communications director promptly. Counsel may provide help to the communications department, and other appropriate senior management, in the preparation of materials informing employees on what they should do if they are contacted by the media, and in developing a statement for the press. Counsel without media training and experience can benefit themselves from the insights and advice of communications experts.

IV. Conclusion

In-house counsel of health care institutions can play an important role in protecting their organizations in the event of criminal investigations or charges, and in minimizing the negative affects of such matters. Establishing credibility with law enforcement officials, and with the organization's staff and constituents, is vital. While providers and the government may not see eye to eye on the underlying facts and appropriate outcome of a case, it is possible to reach workable compromises, and to resolve investigations more effectively, if the parties communicate openly.

For counsel to develop such credibility, they must understand the facts, the investigation and the potential exposure that their clients face. Well-conceived and well-executed internal investigations can help providers address the government's allegations and concerns. In the face of potential allegations of wrongdoing, without a clear understanding of the scope of the organization's exposure, it is impossible for a provider's board or management to chart an appropriate course of action. Counsel cannot provide such advice unless they have ascertained the facts. Similarly, a provider cannot minimize the risks of criminal prosecutions, civil enforcement actions, or other adverse consequences unless it has carefully and objectively scrutinized its own conduct and assessed its own vulnerabilities.

In short, all well-grounded action to protect the institution's interests depends on a command of the facts and the ability to truthfully and persuasively communicate those facts to the government, and to other appropriate parties who serve the organization. It is not possible to argue that, even under the best of circumstances, an institution can turn a criminal matter into a positive situation. Yet, with clear and careful guidance from in-house counsel, due diligence, integrity and unity of purpose, a health care organization can minimize the adverse consequences. Who knows, in so doing, it may also make some friends in the local police department and prosecutor's office – never a bad idea.

[1] *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (Preliminary hearing to determine if there is probable cause to hold defendant. For indigent individuals, the right to counsel generally begins at preliminary hearing stage).

[2] *See, e.g.*, Pennsylvania Rules of Criminal Procedure, Rules 300-320.

[3] *See, e.g.*, attorney-client communications related to areas other than legal counseling, such as business advice, are not privileged. *In re Search Warrant*, 1999 U.S. App. LEXIS 3861 (6th Cir. March 5, 1999); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984); *Stafford Trading, Inc. v. Lovely*, 2007 U.S. Dist. LEXIS 13062 (N.D. Ill. Feb. 22, 2007).

[4] *See, e.g., Country Life Ins. Co., et al v. St. Paul Surplus Lines Ins. Co.*, 2005 U.S. Dist. LEXIS 39691 (N.D. Ill. Jan. 31, 2005); *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979); *Reed v Baxter*, 134 F.3d 351 (6th Cir. 1978).

[5] *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); *Nxivm Corp. v. O'Hara*, 241 F.R.D. 109 (N.D. NY 2007).

[6] *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).

[7] *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 394, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981) (discussing protected communications by corporate counsel with company employees).

[8] *See, e.g.*, Cal. Pen. Code § 136.1 ("preventing or dissuading a witness from testifying at a trial, proceeding or inquiry authorized by the state"); O.C.G.A. § 16-10-24 ("knowingly obstructing or hindering a law enforcement officer in the lawful discharge of his official duties").

[9] *See* 42 U.S.C. 1320a-7b(a)(3) (2000) (obligating health care providers to report known fraud).

[10] *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).

[11] 18 U.S.C. § 1350 (2000); 17 C.F.R. § 240.13a-14 (2002).

[12] Deputy Attorney General Paul J. McNulty, United States Department of Justice, *Memorandum Titled Principles on Federal Prosecutions of Business Organizations (2006).*

[13] *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).

[14] HIPAA, 45 CFR § 164.512(f)(1)(i).

[15] 45 CFR § 164.512(f)(1)(ii).

[16] 45 CFR § 164.512(f)(1)(ii)(C).

[17] 45 CFR § 164.512(f)(2).

[18] 45 CFR § 164.512(f)(3).

[19] 45 CFR § 164.512(f)(4).

[20] 45 CFR § 164.512(f)(5).

[21] 45 CFR § 164.512(f)(6).

[22] 45 CFR § 164.512(f)(6)(ii), § 164.512(b)(2).

[23] 45 CFR § 164.512(f)(6)(ii), § 164.512(c).;

[24] *See, e.g.*, Missouri: § 191.657 Rev. Stat. Mo. (HIV-related information may only be released in a civil or criminal proceeding by court order with a compelling need for disclosure); New York: NY CLS Pub Health § 2782; Pennsylvania Confidentiality of HIV-Related Information Act, 35 P.S. § 7607.

[25] *See, e.g.*, Pennsylvania Mental Health Procedures Act, 50 P.S. § 7111; Fla. Stat. § 394.4615.

[26] *See, e.g.*, Fla. Stat. § 397.501; 20 ILCS 301/30-5.

[27] *See, e.g.*, Conn. Gen. Stat. § 52-146c; Fla. Stat. § 90.503.

[28] Fla. Stat. § 90.505; O.C.G.A. § 24-9-22; 735 ILCS 5/8-803; Burns Ind. Code Ann. § 34-46-3-1.

[29] *See, e.g.*, New Jersey physician-patient privilege, N.J. Stat. Ann. § 2A:84A-22.1-22.2.

[30] *See* Pennsylvania physician-patient privilege, which does not apply to criminal prosecutions. *See Commonwealth v. Alexander*, 551 Pa. 1, 708 A.2d 1251 (1998).

[31] To determine whether to recognize a state evidentiary privilege**,** the federal courts engage in a balancing process. In deciding whether to recognize a physician peer review privilege, a court must weigh the state's interest in confidentiality of physician peer review proceedings against the evidentiary need for disclosure of relevant and probative information. *See, e.g., In re DOJ Subpoena Duces Tecum*, 2004 U.S. Dist. LEXIS 26153 (W.D. Tenn. June 22, 2004); *In re: Administrative Subpoena Blue Cross Blue Shield of Massachusetts, Inc.*, 400 F. Supp. 2d 386; 2005 U.S. Dist. LEXIS 29846 (D. Mass. 2005). The federal courts have recognized the privileged character of attorney-client communications, spousal communications, psychotherapist-patient communications, clergy-penitent communications, and a qualified privilege for presidential communications but have refused to apply the physician-patient privilege or an academic peer review privilege. *Nilavar v. Mercy Health System – Western Ohio*, 210 FRD 597 (S.D. Ohio 2002).

[32] *See, e.g.*, Case Notes and procedures of the Philadelphia Discovery Court at § 13.2 (1992).

[33] *See* Pennsylvania's Peer Review Statute, 63 Pa. Stat. § 425.4 ("Proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any ***civil*** action against a professional health care provider…" (emphasis added); see also Cal Evid Code § 1157 *(*do not exclude the discovery or use of relevant evidence in a criminal action.) But some states have remedied this problem: see Kansas: K.S.A. § 65-4915; Massachusetts: ALM GL ch. 111, § 204.

[34] *But see* Tex. Occ. Code § 160.007 (2006) (which states that such disclosure does not constitute a waiver).