

What to Do When Under Investigation

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Investigations of criminal activities in the health care sector are increasing. While many federal regulatory violations are treated as civil matters that could result in monetary penalties and/or exclusion, a number of the laws that govern the industry also carry criminal penalties, including the False Claims Act and the Medicare and Medicaid Anti-Kickback Statute.

As soon as you believe that you or your practice may be under investigation, you should both take immediate action and refrain from certain other actions. Following these “dos and don’ts” will help you preserve your rights and avoid additional “process crime” charges such as perjury or obstruction of justice that could arise if you do the wrong thing.

How will you know that you are under investigation? You may receive a subpoena or civil investigative demand requiring you to produce records. You or your staff or even your patients may be interviewed by investigators. Federal agents may execute a search warrant on your office. [See my article CSI: Your office - What to do when you get a subpoena, CID, or search warrant in the July 2017 Bulletin.] In these instances, contact your attorney immediately! You may also receive what is known as a “target letter,” possibly with a request for a meeting with federal officials to discuss cooperation or to negotiate a resolution. In many cases the investigation has been underway for months before you become aware of it, and direct contact with you or

your practice may only occur once the government believes it has built a strong case. Investigations may be launched because of tips from insiders or patients, qui tam whistleblower suits or referrals from the Centers for Medicare and Medicaid Services (CMS) or other payors.

The following guidance is based on a program presented by my colleagues Patrick J. Egan, Esq. and Nathan Huddell, Esq. on January 5, 2023.

You may be surprised to learn how many federal agencies are authorized to conduct or otherwise participate in criminal investigations. The Federal Bureau of Investigation (FBI) and the Office of Inspector General of the Department of Health and Human Services (OIG) are the most familiar, but the list also includes the Internal Revenue Service, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Postal Inspection Service, the United States Secret Service, the Commodity Futures Trading Commission, the Environmental Protection Agency, the Securities and Exchange Commission, the Drug Enforcement Administration, United States Immigration and Customs Enforcement, the Department of Defense, and dozens of additional Offices of Inspectors General within various federal departments (e.g., Department of Education, Department of Transportation, etc.)

How broad is the universe of federal crimes? In 2022, the Heritage Foundation estimated that the United States Code now contains 5,199 federal crimes. This estimate excludes

the much larger universe of federal crimes created by the Code of Federal Regulations. By one estimate, the CFR and the U.S. Code together include “as many as 300,000” provisions with criminal penalties.

In the health care world, the most familiar allegations involve the False Claims Act, which imposes criminal and civil liability against any person, organization, or a contractor when they knowingly submit or cause the submission of a false or fraudulent claim to a government agency when the intent is to receive payment or approval, and the Anti-Kickback Statute, which prohibits the knowing and willful payment of remuneration to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs. Physicians and other providers also frequently face investigation by the DEA and criminal liability for violations of the Controlled Substances Act, particularly because of the enforcement focus on the current opioid crisis. But these are not the only federal criminal violations that may be alleged against physicians.

What to Do When Under Investigation:

The most important step to take is to engage experienced criminal defense counsel immediately. Your defense counsel will advise you when and when not to speak to investigators, what documents you should provide, how to communicate with staff about

the investigation, and what other actions you should take or avoid. Your counsel will also act as the liaison with the investigators and government attorneys.

You should refrain from communicating with anyone—other than defense counsel—regarding the investigation itself or the subject matter of the investigation. At all times you should be open and candid with defense counsel; communications between you and your attorney are generally protected by attorney-client privilege.

If you are directed by your defense counsel to retrieve records that might be responsive to any requests from the government, do so diligently. Failing to produce records that the government later deems responsive could increase your exposure as to the underlying offense; it might also cause the government to pursue separate charges for obstruction.

Your defense counsel will determine the scope and focus of the investigation, and determine your status: Target, subject, or witness?

- Targets of investigation are often indicted. The government will classify a party as a target when it believes it has gathered sufficient evidence to support criminal charges. An indictment charges the entity or individual with specific criminal activity.
- Status as a subject of an investigation usually indicates that the government is interested in discovering additional information about the company or individual but has not yet determined if it will seek an indictment.

- Witness status, generally, indicates that the company or individual is not going to be prosecuted, but the government intends to obtain information from the company or individual.

An initial classification of the company or individual as a target, subject or witness will likely shape your attorney's response to the government. However, an initial characterization may change. For example, if the government seeks evidence to present to the grand jury to obtain an indictment and testifying before the grand jury may expose the client to potential liability—and thereby potentially change the client's classification from witness or subject to target—then the client and defense counsel should consider the potential ramifications before responding.

Your defense counsel will negotiate with the government regarding the response to any requests for documents or testimony, and manage the collection, review, and production of documents in response to grand jury subpoenas. Your counsel will assert privileges as appropriate and make critical, often very time-sensitive determinations about assertions of Fifth Amendment rights and decisions to cooperate. Your counsel may, where appropriate, deliver a formal presentation to the prosecuting attorney(s) to attempt to dissuade them from pursuing criminal charges, a practice sometimes referred to as a “declination presentation.” The goal of a declination presentation is to persuade the prosecutor to exercise his or her discretion not

to charge the client by highlighting, for example, certain factual or legal weaknesses in the government's case, or by emphasizing important policy considerations that federal prosecutors are required to weigh. In some instances, however, a declination presentation may expose issues that result in further investigation by the government, so deciding whether to make a presentation requires careful analysis by your defense counsel.

What Not to Do When Under Investigation:

Equally important are the actions you should not take. These actions could result in the government pursuing additional criminal charges that may be easier for the government to prove than the suspected offenses that gave rise to the underlying investigation. These “process crimes” include perjury, obstruction of justice, and knowingly and willfully concealing a material fact or making a materially false, fictitious, or fraudulent statement in any matter within the jurisdiction of the federal government.

- Do not communicate with anyone—other than defense counsel—regarding the investigation or its subject matter. This prohibition extends to discussing with such persons the substance of their recollection regarding the events in question, or the substance of any information they have communicated or may later communicate to the government and/or counsel conducting an internal investigation.

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Such communications could be construed as witness tampering or other forms of obstruction.

- Do not direct any other person (excluding defense counsel) to engage in any such communications on your behalf.
- Do not alter or destroy any potentially relevant records, particularly medical records or billing records.
- Do not create any potentially relevant records (unless directed by defense counsel); and
- Do not engage in any other conduct that might antagonize investigators or prosecutors.

Process-crime prosecutions often are made easier by the manner in which federal agents approach and question unsuspecting, uncounseled, and unprepared individuals during investigations. Among the well-known process crime cases are Martha Stewart's conviction for obstruction, false statements, and conspiracy in her insider trading trial; Michael Flynn's guilty plea to making false statements

to the FBI; and Barry Bonds' conviction for obstruction relating to the government's investigation into the BALCO steroid case. Stewart was sentenced to five months in prison and fined \$30,000, Flynn was later pardoned, and Bonds' conviction was overturned by an appellate court.

A federal criminal investigation can be a frightening ordeal. Your best chance of minimizing the consequences is to engage experienced defense counsel as soon as possible. A qualified defense attorney has been through this process many times, knows the players and the system, and can guide you at each step of the way.

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