

OIG/Medicaid Fraud/ FBI Investigations

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I. Introduction: Federal and State Efforts to Fight Medicare and Medicaid Fraud and Abuse

A. Health Fraud and Abuse is a Serious
Issue

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- 1. During FY 2014, federal government won or negotiated over \$2.3 billion in health care fraud judgments and settlements. This amount is down from \$2.6 billion in FY 2013.
- 2. Medicaid Fraud Control Units reported more than \$2.0 billion in criminal and civil recoveries (settlements, judgments, and pre-filing settlements) of Medicaid monies in FY2014.
- 3. During FY 2014, the OIG excluded 4017 individuals & entities (increase of almost 1,000 over 2 years ago).

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B. Evolving field

- 1. Government enforcement in perceived instances of fraud and abuse is continuing to expand and evolve into new areas.
- 2. Long accepted practices may be investigated as potential crimes.
- 3. Many gray areas in the law, so creates difficulty in knowing how to proceed safely.

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- C. Billing and payment from government and other third party payors demands 100% accuracy.

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II. Reasons Investigations Occur

- A. Self-disclosure of overpayment
- B. (Per the FBI) A seriously adverse survey by DIA
- C. MFCU or OIG access to information of excluded providers by Social Security Numbers revealing employment of an excluded provider

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- D. Qui Tam Relator (Whistleblower)
- E. Cost Report Issues
- F. Complaints by clients/residents/families
- G. Referral by other federal or state agencies
- H. Other

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III. Important Facts to Keep in Mind Related to Investigations (and you thought DIA investigations were problematic . . .)

- A. The scope of the investigation can always be expanded.

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- 1. It is possible the reason the investigation was initiated was invalid, but if they find something they do not think is proper, they can expand the investigation;

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- 2. The lack of precision in answers provided by “helpful” staff, not to mention intentional mis-information by staff trying to blame others can create significant issues;
- 3. The investigator’s ignorance is your problem;

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- B. Beware: Investigators will often try to catch people off-guard (pretend like the matter is related to someone else, when their focus is you or your employer);
- C. If the allegation is a criminal issue, investigators frequently lie to get any information they can to support their theory;
- D. If the allegation is a criminal issue, investigators frequently use scare tactics:

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1. If you have nothing bad to say about the entity or person under investigation, they may threaten you saying you are helping to cover things up;
2. Tell you that your employer will “throw you under the bus,” so you better dump on them before they dump on you;
3. Warn you not to talk to anyone about the matter, again threatening legal action against you;

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4. If you ask them whether you should get an attorney, they often will down play the need, or throw the question right back at you, “so do you think you have something to hide?”
5. They may use “good-cop, bad-cop” tactics to get information.

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- E. There is no “presumption of innocence” during an investigation (only once criminal charges are filed); as one astute witness put it, “you’re guilty until proven guilty!”

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IV. Various Types of Investigations

A. MFCU investigations (these always create a risk for criminal charges)

- 1. May begin with a phone call or letter seeking an interview;

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- 2. Always a right to be represented by counsel on your "own dime";
- 3. They may "tell you 'inside' information" about the investigation to get you to agree or supply new or additional or corroborating information;

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- 4. The person that is the center of the investigation is often the last person interviewed, as they think they have all the information they need before they interview the actual target of the investigation;
- 5. They may co-investigate a matter with DIA, OIG, etc.

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- 6. They will likely tape record the conversation, if it is a face-to-face interview (but that does not mean they will still "get it right" when they write up the report);
- 7. They may issue a warrant for your arrest that can be executed any time;

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- 8. They may forward the case to the county attorney (who again, may not be experienced in this type of issue);
- 9. OIG seemed concerned about the high conviction rate by MFCU in a 2014 report, based on referring cases out to county attorneys;

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B. OIG investigations

- 1. Can be civil or criminal matter
- 2. Can team up with MFCU or FBI, etc.

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- 3. Generally more cut and dried fact pattern if investigating the case alone and is a civil matter;
- 4. Often seen with excluded provider issues;
- 5. May show up at the work place unannounced or call and schedule a meeting;

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- 6. Generally more narrowly focused and may even have evidence they can share with you of violation of the law;
- 7. Many cases can be settled within a few months time.

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C. FBI investigations

- 1. Can involve alleged fraud and abuse; postal fraud (though the postal inspector will likely also be involved), etc.
- 2. Will often work with other law enforcement;

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3. May subpoena records;

4. If search warrant, expect the following:

- a. unannounced, number of agents descending on the location en masse;

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- b. They need to show identification of who they are (and you need to get the name and contact information of the lead agent, if you can)

- c. It is recommended that the person in charge:

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- i. Immediately seek to call in legal counsel.

Note, if they try to stop you from calling your attorney, you should ask if you are under arrest. If you are under arrest, they need to read you your Miranda rights. The manager may then decide whether to talk with agents or keep silent; and

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ii. politely request to see the search warrant and any exhibits (and ask to make a copy of it);

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iii. indicate that you will cooperate as best as you can, recognizing that all staff have constitutional rights, and will be allowed to exercise them; you will want to notify the management staff at your location that the incident is occurring and that you expect them to cooperate, and remind all staff they are free to speak with the agent(s) as they see fit, or they can speak only with counsel present and they are free to decline if that is what they want; remind them to tell the truth;

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d. lock down of the premises, depending on the amount of the information needed;

e. staff must be accompanied throughout the premises if they wish to go anywhere on site;

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- f. before and after photographs of the facility/location if have gathered evidence
- g. attempted separation and questioning of witnesses (unless decline to be interviewed);

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- i. It is o.k. to decline to be interviewed, or to indicate that you will only speak when you have counsel present;
- ii. If you do agree to be interviewed, remember the following:

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- a) Be truthful and professional, recognizing that you may have a right to an attorney;
- b) NEVER SPECULATE OR GUESS at an answer; if you do not know the answer, say so;
- c) Do not swear or use profanity in front of or directed to a government agent;

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- d) Address the agents as “sir”, “ma’am” or officer;
- e) DO NOT TRY TO STOP OR OBSTRUCT THE INVESTIGATION;
- f) Ask, “Am I under arrest?” If yes, you have the right to remain silent;

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- g) Request an attorney;
- h) If not under arrest, ask, “am I free to go?”
- i) Do not sign anything without consulting an attorney;

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- j) Provide documentation as quickly as possible;
- k) Maintain the integrity of the record **at all times and at all costs! Never change or destroy records, period!**
- l) Back up all electronic data regularly;

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h. May seek identifying information of all on site, including access to cell phones;

i. More than one site may be affected at a time; any attempts to "warn" another site could be viewed as obstruction;

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i. Managers must never tell staff not to talk with the agents;

ii. Managers should always tell staff they have the right to speak with the agents if they want, and they need to tell the truth;

iii. Counsel and pool counsel issues.

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j. If special circumstances exist (e.g., sole caretaker of minor child or dependent adult, nursing mother, serious medical condition and access needed to medication, etc.), make sure that management notifies the investigators;

k. It is acceptable and a good practice to document the actions of the investigators during the investigation/visit; write down times, locations, what was said by whom.

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5. Steps to take after the search warrant executed and FBI leave:

- a. De-brief everyone (ask what was asked by agent and what was said in response);
- b. Confer with counsel about next steps to take;

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- c. Need for informational response to staff;
- d. Possible need for informational response to public;

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6. Repercussions from a Search Warrant

- a. Expect an immediate 100% denial of all Medicaid funds;
- b. Appeal rights will be waived to get funds returned at even less than a 100% level;

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- c. If exercise appeal rights, have to exhaust administrative remedies (have a hearing, etc., wait for decision, appeal if unfavorable, etc.), but this may be the only way to conduct discovery and get some information about what the investigation was based on.

- d. Common to have to pay a consultant to complete audit of entire operations;

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- e. Staff upheaval;

- f. Lawyers bills mount up quickly;

- g. Access to records taken by FBI becomes more difficult;

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- h. How do you keep providing services if missing records?

- i. Often other investigations ensue (e.g. DIA, DHS, etc.), so one is hit from multiple fronts)

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V. Recommendations to Manage/Avoid Repercussion from an Investigation

- A. Lawyer up immediately! There are two kinds of people that need attorneys: innocent people and guilty people;
- B. Maintain your integrity. If you do not have your integrity, you have nothing;
- C. Need for Strong Compliance Programs. Need to be ever-vigilant and correct problems while they are small;

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- D. Use of outside consultants to see things through fresh eyes;
- E. Keep informed on changes in the law (especially related to government payors);
- F. Consider cutting back on Medicaid services;

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- G. Consider building a “war chest”;
- H. Be prepared for things to take various twists and turns for months to years later;
- I. Be prepared for a severe strain on relationships;

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- J. Use Public Relations Professionals to guide you in your response to the media;
- K. Keep on pressing ahead; this too shall pass (just not soon enough for most people).

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Thank you

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