NELSON HARDIMAN
HEALTHCARE LAWYERS

Knock, knock, it's the Government (Part I): Responding to Health Care Investigations

No matter how careful or compliant you think your operations are, there is perhaps no more trying moment in the operation of a health care business than the discovery that the government is investigating. How should you respond?

It depends. Sometimes, the news comes in a letter. Other times, it is delivered via a phone call. As distressing as it may feel to finding out that the government is looking into a compliance issue either in writing or by phone, however, nothing compares to finding regulators at your doorstep. Irrespective of how contact is made, there are certain things that are true for all contexts:

1. Seek Counsel. The first thing every provider faced with an investigation needs to do is seek appropriate counsel from a trusted attorney who is familiar with the relevant subject matter. This is not a self-serving plug for our law firm or lawyers in general. Under the pressure of the "looking glass," many health care providers adopt a "do-it-yourself" attitude. Sometimes, a provider may be concerned that retaining an attorney may project to the government defensiveness or having something to hide. In other cases, a provider may not fully appreciate the risk and may think the response is simply a matter of giving a straightforward answer, only to realize down the line that the matter was more complicated. It can often be difficult to discern where the trouble spots will be. It is, more often than not, a mistake to defend investigations without involving counsel. At a minimum, attorneys can provide a roadmap to the nuances in any investigation, identifying potential issues, problems, and determining responses. By functioning as intermediaries, attorneys offer a response mechanism by which providers are better shielded against harmful admissions. Above all, attorneys can offer the experience of the right and wrong ways to respond.

2. Identify the Issues. It is next critical to determine the issues at stake in the investigation. Is the investigation inquiring into whether the conduct of an individual warrants discipline against his or her license? Is the investigation focused on the sufficiency of documentation of medical necessity for services rendered. Each investigation is potentially looking into a distinct set of issues. Is there an individual or a billing practice that is the "target"? Often, there will be multiple potential issues. The sooner they are identified, the more focused and effective the response can be.

3. Act Promptly. Providers need to move expeditiously and avoid delay in responding. Inquiries and investigations of all kinds can take on a life of their own as they progress. In many (but not all) investigations, the optimal outcome will be available earlier in the process. At an early stage, the government has, by definition, invested fewer resources and made fewer findings than it will as the matter proceeds, creating a better "playing field" and making a favorable resolution more attainable. There is a unique opportunity at the outset to satisfy the concerns expressed by producing the results of the provider's own investigation. Unfortunately, many providers do not appreciate the "need for speed" and delay getting to the heart of the matter. It is important not to delay in investigating the matter, assessing the risks, and, of course, responding to the originating agent and agency.

4. Respond Thoroughly. The need for caution cannot be overstated. In many cases, once an investigation is opened, the range of risk exposure is not limited to the specific matter that precipitated the investigation, but to anything discovered along the way. In other words, investigators can come looking for one problem, but find a different one along the way that is a separate and independent grounds for sanction. It is critical not to inadvertently disclose or provide access to information that may be harmful. Additionally, some providers fire off cursory responses that may be timely but do not comprehensively address the circumstances under review. This can result in lost opportunities, when questions that could have been addressed in a detailed letter go unanswered, leading to a face-to-face interview that could have been avoided.

5. Identify the Documentary Evidence. Providers need to locate all relevant documentary evidence – records, email, and letter correspondence – that are relevant to the matter in question. Prior to taking any other action, after receiving any form of an inquiry, the provider should immediately take steps to prevent the destruction of documents, emails or other evidence that may be relevant to the inquiry. These steps should include, notifying the provider's owners, managers, staff members and anyone with control of, or access to, relevant evidence that destruction of documents is strictly prohibited. In addition, all relevant parties should be notified that any document

disposal done in the normal course of business should be suspended. Not only do the rules of evidence allow for an inference that unknown content of destroyed evidence is unfavorable to the spoiler, destruction or spoliation of evidence is a criminal offense, which carries with it sanctions that can include fines as well as imprisonment. Therefore, even if damning evidence exists, the provider is better off attempting to mitigate the impact of the evidence than it is defending a destruction of evidence allegation on top of a substantive investigation.

6. Protect the Attorney-Client Privilege. The attorney-client privilege doctrine generally provides protection for communications directly between a client and its attorney. The purpose of the privilege is to encourage the full and frank communication between attorney and client, as well as to facilitate the administration of justice. In practice this means that the client usually cannot be required to disclose oral or written communications provided by his or her attorney. Similarly, the attorney usually can not be required to disclose any oral or written communication received from his or her client. It should be noted, the privilege does not apply just because a client gives a document to his or her attorney. Rather, for communication to be protected, it must be made as part of a professional consultation. Therefore, under most circumstances, when responding to a subpoena or similar request for information, the provider is not required to turn over advice given by an attorney relating to the suspected activity. While the attorney-client privilege is broad, a provider must be careful not to inadvertently waive this privilege. The privilege can be waived if the protected communications are overheard by or disclosed to a third party. It is essential to determine the target of the inquiry, i.e. the client, so as to protect the privilege. A corporation can be considered a “client” within the meaning of the privilege, and thus the statements of any corporate officer or employee made to the attorney would be protected, if such individual was directed by the corporation to make such statements. If, however, an investigation is directed at a smaller part of the provider’s organization, for example, the compliance committee, and that committee hires an attorney, then the committee is the client for purposes of the privilege. In such an instance, it is important to ensure that any information shared amongst members of the organization doesn’t waive the privilege. If the compliance committee is the “client” and the attorney’s advice is also given to the board of directors, the privilege could be waived.