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Survival Tactics for General Counsel: Best Practices When the Government is Investigating Your Organization

May 16, 2012

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Welcome

- Housekeeping
- Coming soon
- Today's speakers
- Overview of the Topic
- Discussion
- Questions

Welcome

- Download the slides for today's program by clicking the PDF link in the upper left corner of your screen.
- Also on the left is a Q&A box where you may type your questions. We'll look at those questions at the end of the program and answer as many as we can.
- At the end of the program, you'll receive an email with a link to a survey. Please take a moment to fill that out and give us your feedback.

Coming Soon

- Watch your inbox for details on the next Ober|Kaler Health Care General Counsel Institute webinar, which is scheduled for July.

Meet Today's Speakers



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Overview

- Relationship between RACs, ZPICs, Medicare/ Medicaid contractors and the government – Do they share information?
- Responding to government demands for documents/other tangible information
- Insider tips on preservation holds/document-retention directives
- Responding to government demands for witness interviews
- Internal investigations and when to involve Outside Counsel.
- Special issues presented by internal investigations including potential conflicts of interest, *Upjohn* warnings and attorney client privilege issues

Scenario 1: Is it a Bird, it is a Plane . . .

- Ms. Dogooder, an receptionist at your hospital, is sitting at her desk quietly working away and in walks a nice young man with a piece of paper. Mr. Jones introduces himself and insists that she take the piece of paper. Ms. Dogooder immediately calls you to ask what to do next.

First Question: Who Is It?

- Program Safeguard Contractors: RACs, ZPICs, carriers?
- Federal Law Enforcement: HHS-OIG, FBI, FDA, DOD, OPM-OIG?
- State Law Enforcement: MFCU, State Police, Local Police?
- The identity of the person can help you determine whether your organization is under investigation, and if so, what type of investigation(s)? This is the first step in framing an appropriate response

First Question: Who Is It?

- Current Landscape of Health Care Fraud and Abuse Enforcement
 - Parallel, joint and simultaneous investigations.
 - Consider possible civil, criminal, and/or administrative ramifications
 - Understanding who shares information with whom

Second Question: What type of document?

- Different types of documents call for different responses...
- And can tell you a lot about the underlying investigation...
 - HHS-OIG Subpoena / HIPAA Subpoena / AID
 - Grand Jury Subpoena-Person or Documents?
 - Request for Patient Charts
 - Request for internal review or “soft-audit”
 - Civil Investigative Demand-Documents or Person
 - Criminal or Civil Trial Subpoena
 - Search Warrant

Practice Tips: Response Protocol

- What do you do when Mr. Jones arrives at your door?
- Need a structure *already in place* when this happens
- Compliance policies
 - SW response policy and subpoena response policy
 - Call GC, Compliance Officer, CFO, CEO?
 - One point of contact with agent- remember to speak in one voice
 - Record management and legal hold policies

Practice Tips: Document Requests

- When do you call Outside Counsel?
- Simple overpayment matter or soft audit?
 - Document demand/request?
- Why?
 - Privilege concerns: Attorney-client, Quality Assurance, Peer Review
 - HIPAA, state medical privacy laws, rules of criminal and civil procedure
 - Admissions by client
 - Tactical/strategic concerns: limiting scope; rolling productions; producing documents before trial/grand jury
 - Future witness interviews

Practice Tips: Document Requests

- Immediately Issue upon Request for Documents
- Written Policy Distributed to Employees
 - Internal policy; letter from CEO, Compliance or Outside Counsel
 - Preserve records: suspend routine deletion of e-mail, paper files, computer documents, charts, correspondence, calendars.
 - Outside Counsel
- Why important?
 - When you know, or should know, that certain records are relevant to a present or future lawsuit, you have a duty to preserve the records. Fed.R. Civ. P. 26 (b) and 34.
 - Obstruction of Justice Concerns- 18 U.S.C. §1510, 18 U.S.C. §1518
 - U.S. Federal Sentencing Guidelines- §8C2.5(e)

Cautionary Tale: Document Retention and Production

- **The sad tale of former GSK in-house counsel Lauren Stevens**
 - Indicted in Nov. 2011 for obstructing FDA investigation, falsifying and concealing documents and making false statements in connection with discovery
 - Ms. Stevens eventually exonerated (case dismissed) but not before she suffered years of damage to her reputation and profession.
 - Her defense involved advice of counsel

Practice Tips: Document Retention and Production

- Electronic Health Records (EHR), materials and e-mails provide new ways to misstep.
- To comply with subpoena, identify and preserve all relevant data without interrupting normal business operations
- Engage Outside Counsel familiar with preservation and production of electronic records; especially if company has no inside technology experts
- Computer specialists can help create search lists, automated solutions and develop electronic discovery protocols to prevent spoliation
- Consider hiring outside consultant to mirror image/burn documents to CDs

Scenario 2: Search Warrants

- Dr. Distress, an employed physician, is in his office diligently working on patient documentation when law enforcement agents come running into your building. One of the agents yells “FBI! Search Warrant!” Immediately, Dr. Distress panics. This type of thing has never happened to him. Dr. Distress immediately calls the chief of medicine who tells him to call you. You receive a frantic call Dr. Distress, who is speaking loudly and quickly, and saying something about “the police are here! It’s a raid!”

Questions to Consider: Search Warrants

- What do you do?
- Who is the point of contact with the agent?
 - You or your employee? Both of you? Outside Counsel?
- Consider:
 - Both of you AND Outside Counsel
 - You and Outside Counsel: Roles

Practice Tips: Search Warrants

- DO NOT INTERFERE WITH LAW ENFORCEMENT OR DESTROY DOCUMENTS
- Train employees on this concept on at least an annual basis

Practice Tips: Search Warrants

- Single Responsible Employee – acting under advice of counsel
 - Obtain copy of search warrant and attachments for counsel
 - Original documents
 - Copy health records needed to run your business
 - Note taker: areas searched, identity of agents
 - Not required to assist agents
 - Consent to search issues
 - Inventory
 - “Clean-up” subpoena for documents
 - Other employees: on site- interviews by law enforcement

Scenario 3: Subpoena/Demand for Testimony

- You happily working away on the giant pile of contracts sitting on your desk, when your secretary pops her head into your doorway. She tells you that she received a phone call from the Security Department that there is a woman at the front desk seeking to serve a subpoena, or some kind of legal document, on one of the nurses in the emergency room. The security officer tells your secretary that the woman insists that she be allowed entry to your facility to personally serve the individual named in the subpoena. She asks you what to do next?

Practice Tips: Subpoena/CID Request for Testimony

- Not all subpoenas relate to a government investigation - garnishment, divorce papers, child custody
- Subpoenas & CIDs – there should be a policy in place
 - Who should accept service?
 - Personal service – law vs. expedient practice
 - Depends upon state or federal process
 - Evasion of service of process
 - Security of your facility- you don't want process servers beyond the front desk
 - Interviewing employees on your premises – not good for security, HIPAA, patients' families, operation of the facility

Practice Tips: Subpoena/CID Request for Testimony

- Who should receive a copy of the subpoena/CID?
 - Depends on your organization: Different GCs
- When to contact Outside Counsel?
 - Individual or corporate liability
 - Admissions
 - Providing counsel to employees
 - Privilege

Scenario 4: Law Enforcement Interview

- Agent Badtiming shows up at Mr. Familyman's home at 7:30 p.m., right when he arrives home from a tough twelve hour shift as a radiology technician at your hospital. As is typical this time of night, Mr. Familyman is attempting to help his wife feed the kids, make sure they got their homework done, walk the dog and the usual mayhem that time of night. Agent Badtiming tells Mr. Familyman that he wants to interview him there on the spot about his work at your hospital. What options does Mr. Familyman have at this point?

A Common Scenario: Law Enforcement Interview

- Remember, the organization has rights too! The Sixth Amendment applies
- And, your employee has individual rights!
- That is, your employee can state that he/she would prefer to have counsel present during any interview by the agents
- This should **STOP THE INTERVIEW** in most cases

Practice Tips: Law Enforcement Interview

- The Government does have a right to interview your employees
- Your organization does have a right to have counsel present if they are current employees. Counsel can control time and place of interview
- The Employee has the right to:
 - Refuse or comply with interview
 - Have counsel present
 - Terminate interview at any time
 - Request identification
 - Exert control over time & place or postpone

Practice Tips: Law Enforcement Interview

- Train your employees at least annually that if approached by agents, they may request counsel be present. Give them a name & phone number ahead of time when you have reason to believe they may be approached. Empower them to ask the agents to come back when counsel is present
- Give employees tools to handle the interview:
 - Tell the truth: no guessing, speculating
 - Don't volunteer information
 - Take notes following interview
 - Get a copy of the subpoena if there is one

Practice Tips: Law Enforcement Interview

- Employer's Role
 - Counsel should be present for interview
 - Providing legal counsel for employees where needed.
 - Review policies regarding how to deal with government investigations. Do employees have sufficient tools and training to handle?
 - CAUTION:
 - Obstructing justice/interfering with investigation
 - Retaliation concerns

Scenario 5: Internal Investigation

- You are sitting at your desk working on the record retention and legal hold policies you learned you needed from this webinar, when your secretary again pops her head into your office. She says that someone from the accounting department is on the line. They wanted to know what to do because Dr. Greedy, a successful surgeon on your medical staff and a medical director, has failed to pay his annual CPI increase for the space he leases in the hospital for the last two years. Your first reaction, Dr. Greedy has a lease!?! I thought he was just a medical director. What do you do?

Internal Investigation

- You should investigate!
- When must you investigate?
 - Allegation of violation of law
 - Suggestion of improper conduct
 - Potential for overpayment by the government
 - Potential for significant overpayment by a commercial insurer or third party payer
 - Potential whistleblower

Internal Investigation

- How investigations are initiated
 - Was there a complaint?
- What was the nature of the complaint?
- No complaint but an audit...
- Press Inquiry?
- Congressional Inquiry?
- Law enforcement initiative?

Practice Tips: Why Conduct an Internal Investigation?

- Fully understand the issue: who, what, where, when, and why?
- Individual wrongdoer vs. more widespread problem
- Search for intent - Kickback or Stark violation?
- Unearth deficiencies/problems – corrective action plan, “root cause” analysis
- Advise the Board of Directors
- Promptly ascertain facts before government does
- Anticipate & respond to government allegations
- Government “credit” for conducting investigation

Practice Tips: How Broad Should the Internal Investigation Be?

- Depends on the facts: need to investigate enough to determine credibility of allegations
- Type of liability/exposure: criminal, civil, and/or administrative?
- Dollar amount - potential exposure
- Disclosure process

Who Should Do the Internal Investigation?

- Distinction between scenarios involving, e.g., sexual harassment, discrimination vs. government interest in your organization?
- In-house Counsel?
 - Familiarity vs. viewed as lacking in independence
 - Potential culpability
- Outside counsel?
 - Less familiar, but viewed as independent and objective
 - How to handle individual bad actors
- Hybrid:
 - In-house Counsel first
 - Ex: PSC review of 330 claims
 - Outside Counsel second
- Close coordination between In-house and Outside Counsel

A Cautionary Tale: In-House Counsel and Internal Investigations

- *Wal-Mart de Mexico: Allegations Thus Far*
 - Senior Wal-Mart attorney received email from former executive at Wal-Mart de Mexico alleging bribery of government officials to help Wal-Mart obtain zoning permits to build stores & reduced environmental impact fees
 - Senior Wal-Mart attorney hired independent investigator who found credible evidence of bribery → notified Wal-Mart U.S. executives, who rejected idea of indep investigation; “preliminary inquiry” done by new “Corporate Investigations Unit (CIU)”
 - Wal-Mart CEO rebuked investigators for being “too aggressive;”
 - General Counsel of Wal-Mart de Mexico supervised Mexican bribery investigation → exonerated implicated executives, largely because they told him that they did not order/give bribes to government officials
 - December 2011: Independent Investigation Launched overseen by Wal-Mart’s Audit Committee
 - December 2011: notification to US DOJ, SEC that company had begun internal investigation into possible FCPA violations

Special Considerations in Conducting Internal Investigations

- Attorney-Client Privilege and Work Product
 - Outside accountant, forensic consultant, computer firm to mirror image hard drives
 - In-house counsel reporting to Board of Director
 - Contacting former employees and waiver of privilege
 - Waiver of privilege and disclosures to the government
- Witness Issues
 - *Upjohn* issues: who does counsel represent? Confidentiality
 - Conflict of interest issues: individual's conduct vs. organization's best interest
 - Counsel for current & former employees
 - Non-retaliation
 - Whistleblower's actions: "Stalking Horse"/ "Agent for the gov't"

Practice Tips: Internal Investigations

- Prepare a Written Investigative Plan: Attorney-Client Privileged
 - Timing/schedule
 - Issues: outside counsel, employee issues, etc.
 - Individuals w/information
 - Potentially-relevant documents
- Investigative Process
 - Interviews of employees and third parties
 - Analysis of financial data
 - Document collection and review
 - Review of emails

Practice Tips: Internal Investigations

- Report – may be verbal
 - Discovered facts and unknowns
 - All laws implicated
 - Analysis of facts and ramifications of unknowns in light of current law and government policies
- Corrective Action Plan
 - How to fix the problem
 - Assess the compliance process and policies to identify shortfalls in compliance and reporting
 - Disciplinary Actions
 - Report to government?

Questions?



More questions? Contact us.



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