



Health Care Compliance Association
16th Annual Compliance Institute
Caesars Palace
April 29-May 2, 2012
Las Vegas, NV



HANDLING A HEALTH CARE FRAUD INVESTIGATION

Gabriel L. Imperato, Esq.
Broad and Cassel
Fort Lauderdale, Florida

1

Enforcement



- ☐ DOJ
- ☐ OIG-HHS
- ☐ Attorneys General
- ☐ SEC
- ☐ FTC
- ☐ Other Federal and State Agencies
- ☐ Multi Agency Task Forces

2

How Investigations are Initiated



- ☐ Competitor complaints
- ☐ Consumer complaints
- ☐ Current or former employee - "Whistleblower" complaints
- ☐ Insurance company complaints

3

Investigative Techniques



- ☐ Informal Interviews and requests for documents
- ☐ Insider Informants and Whistleblowers
- ☐ Search Warrants
- ☐ Subpoenas
- ☐ Electronic Surveillance

4

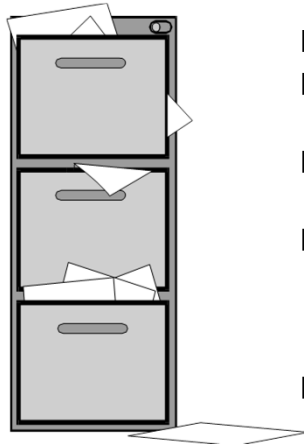
When The Government Knocks To Obtain Documents

- ☐ Subpoena or search warrant or request by government agent
- ☐ Employees notify executives immediately.
- ☐ Executives refer agent to company's counsel



5

Remember



- ☐ Search Warrant
- ☐ Agents can seize original documents
- ☐ Corporations do not have 5th amendment privilege
- ☐ If agent demands copy of personal records – (5th Amendment) respectfully decline and refer to counsel
- ☐ Important to label documents

6

If Search Warrant



- ☐ Request copy of warrant and affidavit (may not be available)
- ☐ Accept warrant and immediately fax to counsel and/or organization contact (i.e. general counsel or compliance officer)
- ☐ If you are not there... have employee fax to you and your counsel
- ☐ Send all employees (except essential response team or coordinator) away from work location where search is taking place



AND....

- ☐ DO NOT INTERFERE WITH AGENTS AND AVOID CONFRONTATION
- ☐ Review warrant carefully
 - Technically, agents can only seize what is listed on warrant
 - Bring to agent's attention if search areas are not listed in warrant
- ☐ List may include personal (5th Amendment) and corporate records and privileged documents

AND....

- ☐ No requirement to speak to agents or respond to questions
 - ☐ Respectfully decline & refer agent to counsel
 - ☐ Search warrant is for documents and E data, not testimonial evidence
-

9

If Search Warrant (cont'd.)

- ☐ Attempt to identify attorney/client privileged documents
 - ☐ Identify and determine agency of each investigator and the agent in charge and request contact information; government attorney assigned to case
 - ☐ Agents will request signature on a vague inventory of items seized – avoid execution of document
 - ☐ Keep your own inventory of areas searched, documents and items seized and questions asked by the agents
-

10

Post Search

- ☐ Counsel typically requests debriefing from investigators and/or government attorneys
 - ☐ Consider public relations
 - ☐ Debrief employees and response coordinator/team – prepare statement with counsel
 - ☐ Attempt to obtain copies of documents seized through counsel
 - ☐ Notice and instruction to employees
 - Notice of investigation
 - Litigation hold and suspension of document destruction
 - Instruction regarding interaction with government agents
-

11

Subpoena

- ☐ Served by Mail or Personally by Agent
 - ☐ Does not Require Immediate Response
 - ☐ Typically Has Future Return Date
 - ☐ For Documents and/or Testimony
 - ☐ Turn Over to Counsel for Appropriate Response
-

12

Subpoena

- ☐ Prepare to assist counsel with response
 - ☐ Different types of subpoenas (Civil Investigative Demand, HIPAA Subpoena, OIG Subpoena)
 - ☐ Complete and timely response is important
 - ☐ May negotiate scope and timing of response (i.e. Rolling production)
 - ☐ Custodian of records for response to subpoena
-

13



**What To do When
The Government
Knocks to interview
You or Your
Employees**

14

Employee Rights

- ☐ May decline to speak with Agents
- ☐ May voluntarily speak to agents, but no obligation to do so
- ☐ 5th Amendment Right to Refuse
- ☐ Ask Agent to contact Company Counsel
- ☐ Joint Defense Agreement – Share information between parties – still privileged
- ☐ Company can advance \$ for cost of employee counsel (if necessary)



15

Employee Rights (Cont'd.)

- ☐ Right to be represented by counsel at interview
- ☐ Organization's Counsel can assist, but typically does not directly represent Employees
- ☐ Organization's Counsel represents organization
- ☐ Employee can retain their own counsel
- ☐ Organization should not forbid Employee to speak to government agents
 - Obstruction of justice
 - Ask employees to advise if visited by government agents
 - Organization memorandum regarding investigation is advisable

16

Follow-up Response to Initial Government Contact Conducting an Internal Investigation

- ❑ Proliferation of Federal and State Government initiated investigations have led organizations to consider a response to and a strategy for such investigations
- ❑ Overview.



17

Conducting an Internal Investigation (cont'd.)

- ❑ The initiation of an internal or parallel investigation of an organization is critical with reference to the allegations raised against the organization or in connection with an internal compliance matter
- ❑ It is important for an organization's resolution of an external investigative matter
- ❑ It is also important for an organization's compliance strategy and compliance program and resolution of internal matters
- ❑ No substitute for the facts to resolution of external and internal matters.

18

The Duties and Rights of Employers and Employees Related to Internal Investigations

- ☐ The duty to maintain a safe workplace is connected to the duty of an organization to investigate compliance matters
- ☐ Negligent hiring and retention of employees
- ☐ The duty of loyalty and fair dealing for employees and the organization
- ☐ The duty of an employee to cooperate with an organization investigation
- ☐ The employee's rights to privacy and to work free from unreasonable interference and harassment
- ☐ The right to have your reputation protected.

19

Legal Standards in Investigations

- ☐ A reasonable, fair, thorough, and prompt investigation which reaches reasonable conclusions usually protects employers against claims
- ☐ There is a qualified privilege to disclose matters relating to the investigation
- ☐ The investigation process must be consistent throughout the organization
- ☐ An investigation can only be sustained if there is probable cause and/or reliable and credible evidence of non-compliant conduct
- ☐ An ultimate factual conclusion must be based on a preponderance of the evidence (i.e. more than 50% probability)
- ☐ Right of employee to generally know results of investigation, but no right to review investigation report
- ☐ The attorney-client privilege does not necessarily apply to factual findings of internal investigation, but does apply to advise of lawyer based on the factual findings.

20

Legal Standards in Interviews

- ☐ Employees cannot refuse to cooperate and/or be interviewed by organization representatives without risking continued employment
- ☐ Do employees have Miranda rights?
- ☐ Employees have a moral right to due process and this would be organization's "best practice"
- ☐ The employees right to be confronted with the proof and the opportunity to respond
- ☐ The prohibition against retaliation
- ☐ Confidentiality of the interview, subject to waiver of privilege
- ☐ The right to counsel
- ☐ Proper instructions protect the evidence.

21

Evidence Collection in Investigations

- ☐ You must prove each element of the allegation using proper evidence
- ☐ Proper evidence is relevant
- ☐ Proper evidence is material
- ☐ Proper evidence is competent
- ☐ Proper evidence is authentic
- ☐ Proper evidence can be direct or circumstantial
- ☐ You can use hearsay evidence-statements against interest and business records – weight accorded to evidence.

22

Legal Claims When Things Go Wrong

- ☐ Defamation of an employee
- ☐ Retaliation for cooperating with the investigation
- ☐ False imprisonment in interviews
- ☐ Intentional infliction of emotional distress
- ☐ Assault and battery
- ☐ Invasion of privacy
- ☐ Malicious prosecution

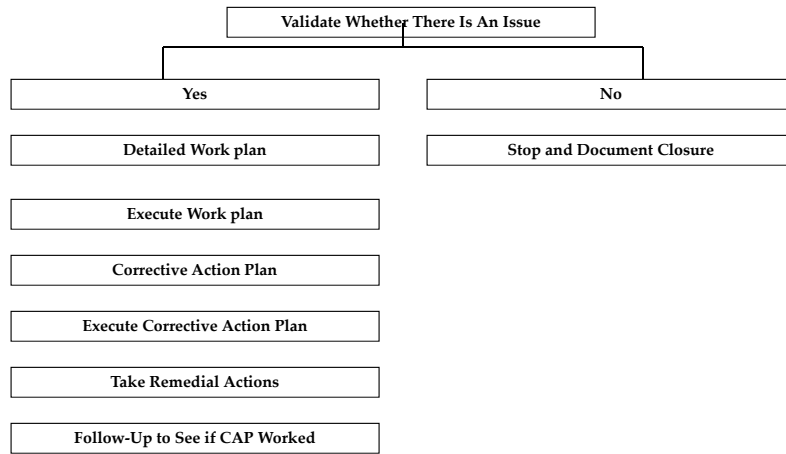
23

When Must You Investigate?

- ☐ Any time there is:
 - An allegation of a violation of law
 - A report of improper conduct
 - A potential for a government overpayment
 - A potential for an overpayment by any other third-party payor
 - A potential for whistleblower activity

24

Investigative Process



25

Validate and Planning

- ☐ Validation of the original compliance report is essential and is the reason for an internal investigation
- ☐ Avoid rush to judgment
 - "Chicken Little" approach
 - Siege mentality
 - Reliance on unverified information
- ☐ You rarely end up where you thought you would upon initiation of an internal investigation
- ☐ Do not ignore privileges and protections
- ☐ Do the work

26

Doing Nothing is Risky

- ☐ Increased likelihood of diversion of attention from core business activities
- ☐ Greater potential for harm to reputation
- ☐ Greater potential for harm to individuals
- ☐ Potentially greater financial penalties and sanctions (i.e. suspension and/or exclusion)
- ☐ Lawsuits, including individual defendants
- ☐ Increased fees for counsel, consultants, experts
- ☐ Compliance with a government request for information (even if ill-founded) can be expensive and resource intensive under any circumstances
- ☐ Need to do the work and get a handle on situation before it becomes unwieldy and out of control

27

Actual Failures Due to Lack of Investigation

- ☐ Compliance issues walk out the door-whistleblowers
- ☐ Demotions, counseling and bad evaluations after compliance issues reported
- ☐ Promotions of employees who caused non-compliance
- ☐ Complaints dismissed because employee was rude, incompetent, lazy, fill in the blank
- ☐ CFO knew of issue and commented, "if anyone finds out, we'll all go to jail"
- ☐ Multiple internal audit reports identified the issue and management ignored it
- ☐ Administrator looked the other way because the physician was a high admirer

28

Practical Initial Questions

- ☐ Differing agendas in integrated settings?
- ☐ Conflicts of interest?
- ☐ What is the time period at issue?
- ☐ What if there are collateral issues?
- ☐ Who are the point people internally?
- ☐ Who is and who is not on the team?
- ☐ How to preserve privilege?
- ☐ How much to reserve or escrow?

29

Discussing The Scope Of The Internal Investigation

- ☐ Subject matter to be addressed
- ☐ Who the law firm and investigative team will be accountable to within the client organization
- ☐ The scope of the internal investigation and the proffer of fact and/or legal conclusions

30

Stakeholders Removed From Process

- ☐ Independence
- ☐ Objectivity
- ☐ Candor
- ☐ Credibility
- ☐ Fairness
- ☐ Effective compliance program
- ☐ Anti-retaliation

31

Actual Stakeholder Quotes

- ☐ "I don't want to be squeaky clean. Just clean enough."
- ☐ "I don't want to be a poster child for compliance."
- ☐ "I can't believe he admitted doing that."
- ☐ "Oh, I thought you were against us. Now let me tell you the real story."
- ☐ "I can't imagine a situation in which I would admit we've done anything wrong."
- ☐ "Your job is to keep [Compliance Officer] out of our facility."

32

How Much Must You Investigate?

- ☐ Depends on the facts
- ☐ Initially, need to investigate enough to gauge the credibility of the allegation and to advise client as soon as possible
 - Reliable and credible evidence
 - Documentary evidence
- ☐ Dollar amount of potential exposure impacts practical decisions regarding scope, depth, and personnel involved in investigation

33

Who Should Investigate?

- ☐ Different categories of problems are best investigated by different personnel:
 - Human resources issues (such as sexual harassment or discrimination) should generally be investigated by the HR Department and/or employment counsel
 - Other general issues (non-criminal in nature, unlikely to result in substantial civil liability) can be initially investigated in-house
 - Need to consider whether attorney-client privilege may be important – involve counsel (in-house and/or outside)

34

Who Should Investigate?

(Cont'd.)

- ☐ Different categories of problems are best investigated by different personnel:
 - Criminal issues or issues likely to result in significant civil liability (whistleblower situations, high dollar overpayments, systemic problems) should not be investigated without the assistance of competent and experienced legal counsel and investigative team
 - Attorney-client privilege important – may want outside counsel involved to strengthen application of attorney-client privilege
-

35

Getting Counsel Involved

- ☐ Expertise in white collar and health care compliance
 - ☐ Familiarity with government enforcement and regulatory personnel
 - ☐ Conflicts of interest
 - ☐ Government's perception and credibility of organization
 - ☐ Familiarity with organization and industry segment
 - ☐ Cost
 - ☐ Independence
 - ☐ Objectivity
 - ☐ Disruption to ordinary business activities
 - ☐ Availability
-

36

Solutions for these Challenges

- ☐ Regular counsel and consultants may not be the best choice
- ☐ Build relationships and confidence in non-crisis situations
- ☐ Understand disconnect between clinical, regulatory, business, and legal matters
- ☐ Don't shoot from the hip
- ☐ Have an "investigation orientation" up front
 - Obtain buy-in on the process in advance
 - Acknowledge and discuss these viewpoints
 - Establish a provider's non-delegable responsibility to document, code, and bill correctly

37

Considerations with Consultants

- ☐ Scope of engagement
- ☐ Qualifications for specific assignment
- ☐ Privilege and work product protection
- ☐ Flow of information and coordination with counsel and organization personnel

38

Investigation Roadmap

- ❑ Investigations generally should follow the same basic roadmap:
 - Identify potential issues – those already identified, others that should be investigated
 - Identify individuals likely to have information, both inside and outside the company
 - Identify potentially relevant documents and institute document “holds” to prevent destruction or disposal
 - Identify individuals best suited to conduct investigation (in-house resources or outside counsel and/or consultants)
 - Prepare investigation plan – the more serious the issue, the more detailed the plan
-

39

Identifying Issues

- ❑ What wrongdoing has already been identified?
 - ❑ What other wrongdoing might be uncovered by an investigation?
 - ❑ Investigations always turn up additional facts and situations having ramifications for employees and organization.
 - ❑ Constant revision and modification of investigation “work plan”
-

40

Identifying Issues

- What are the potential risks and benefits of an investigation?
 - Risks include costs and disruptions to ordinary course of business – can be managed
 - Risk/benefit of potentially uncovering unknown additional issues and/or misconduct
 - Benefits include potential advantages of early disclosure, cooperation with any government investigation and potential for preferred treatment in charging decisions and under civil penalty provisions and sentencing guidelines
 - No substitute for knowing the facts
-

41

Identify Relevant Documents

- Obvious relevant documents
 - Less obvious (but still relevant) documents
 - Other communications (emails)
 - Notes and records of meetings. When? About what?
-

42

Preserve Relevant Documents

- ☐ Do not destroy documents
- ☐ Suspend routine document destruction
 - Destroying relevant information could be viewed as criminal obstruction
 - Destroying relevant information could ultimately lead to a negative inference by law enforcement, judge and/or jury as to why documents were destroyed
- ☐ Issue litigation hold memo
 - All persons likely to have potentially relevant documents
 - All potentially relevant documents (including home computers of employees)

43

Identify Investigative Personnel

- ☐ Investigations of serious issues (large amounts at stake, criminal issues) should be managed by counsel
- ☐ Who should direct counsel?
 - Senior management (CEO, COO, General Counsel?), but not "stakeholders"
 - Board of Directors
 - Audit or other independent committee of the Board of Organization

44

In-House or Outside Counsel?

- Advantages to outside counsel:
 - Bolster application of attorney/client and work product privilege
 - Preserves independence of investigation (and appearance of independence)
 - Likely more familiar with process for conducting internal investigations
 - Likely more familiar with government enforcement tactics and priorities
 - May have relationships with government enforcement officials
 - May be more familiar with the applicable laws, regulations and the potential penalties and defenses
-

45

In-House or Outside Counsel?

- Advantages of in-house counsel:
 - More familiar with internal policies of organization
 - May have more credibility within the organization (not always the case)
 - May be more familiar with substantive laws and regulations applied to day-to-day operations of business organization
 - Even if outside counsel is engaged, in-house counsel can play a key role
 - Familiar with the organization-invaluable in identifying appropriate document sources, interview candidates, and describing standard policies
 - Assist in gathering documents and other resources and keeping costs down
-

46

Attorney-Client Privilege

- ❑ Attorney-client privilege protects communications between an attorney and client
 - Which were intended to be confidential
 - Which were made for the purpose of obtaining legal advice (not business advice)
 - As to which confidentiality has not been waived by disclosures to third parties or otherwise
- ❑ More difficult to demonstrate that communications to in-house counsel meet each prong of this test – Advantage of using outside counsel

47

Consultants & Others

- ❑ Attorney-client privilege extends to agents retained by the attorney to assist in providing legal advice to the client
 - Applies to secretaries and clerks
 - Also applies to investigators, interviewers, technical experts, accountants, consultants, and other specialists
- ❑ Attorney-client privilege applies to communications with agents as if communications had been with attorney
 - Between client and agent
 - Between agent and attorney

48

Prepare Investigation Plan

- ☐ In consultation with client, attorney should prepare investigation plan
 - Identify potential issues
 - Identify individuals who may have relevant information
 - Identify potentially relevant documents
- ☐ Revise investigation plan as needed
 - Add additional issues
 - Add additional individuals
 - Add additional document sources/locations

49

Conducting Investigation-Document Reviews

- ☐ First step is to gather and review documents
 - Authorized personnel should collect and deliver documents to counsel (i.e. custodian of records)
 - Track where documents came from
 - Keep confidential documents confidential
 - Identify "hot" documents
 - ☐ Documents that suggest wrongdoing
 - ☐ Documents that are exculpatory
 - ☐ Documents that raise questions and need further clarification

50

Conducting Investigation - Interviews

- ☐ Interviews should be conducted in private
 - To the extent practical, have witness (associate/paralegal) present during interview to take notes and corroborate your understanding of facts and impressions of witness
 - Sometimes need independent witness for potential impeachable testimony
- ☐ Keep notes of interview
 - Do not record interviews
 - Do not transcribe interviews
 - May prepare written report describing facts of each interview

51

Conducting Investigation – Interviews (Cont'd.)

- ☐ Management should only be present when necessary (i.e. rarely)
- ☐ Employees must be advised that legal counsel represents company, not employees individually and what they say may not be kept private (“UpJohn Warning” or “Corporate Miranda Warning”)
 - Depending on the severity of the allegations and potential culpability of the employee, you may choose to advise them of the potential need for their own counsel
 - In some instances, organization may pay for employee counsel
- ☐ Employees must be encouraged to report if they have been threatened or asked to change their stories

52

Investigation Complete

- ☐ Counsel should report to client, including
 - Discovered facts
 - Remaining unknowns
 - All implicated or potentially implicated laws, and
 - Counsel's analysis of the facts (and unknowns) in light of those laws
- ☐ Report must remain confidential-limit circulation of report-oral report preferred

53

Internal Investigation Report

- ☐ Oral or Written?
- ☐ Report "should" include a summary of the facts
 - Identify potential cause(s) of the incident
 - Describe the incident in detail, including how it happened and/or continued
 - Identify financial impact and any health and safety matters
 - Identify time period in question
 - Identify individuals involved
 - Identify individuals who should have detected non-compliance
 - Include at least an estimate of the magnitude of issue

54

Fix the Problem

- ☐ Using the report, identify corrective action needed to fix the problem
- ☐ Need to assess compliance process and policies to identify deficiencies in existing compliance programs and reporting mechanisms
- ☐ Responsible employees should be disciplined, as appropriate
- ☐ Additional policies, procedures, or reporting layers should be added as necessary to promote future compliance

55

Now What?

- ☐ Need to discuss with client:
 - Whether the past conduct needs to be disclosed and any liability resolved with government.
 - Options of self-disclosure – to whom? Department of Justice, Attorney General, Insurance Commissioner?

56

Voluntary Disclosures

- Potential benefits:
 - Potential to avoid severe criminal liability
 - Potential to minimize civil exposure
 - Potential to neutralize whistleblower lawsuits

57

Voluntary Disclosures

- Potential harms:
 - Invites further detailed scrutiny to verify facts
 - May encourage government to require additional investigation
 - May result in penalties for conduct that would have remained undiscovered

58

Is It "Voluntary?"

- ❑ Misprision of a Felony – 18 U.S. C. § 4 provides that "whosoever...having knowledge...of a felony...conceals and does not as soon as possible make known the same...shall be fined...imprisoned...or both"
 - Requires active concealment
- ❑ Medicare Statute – 42 U.S.C. § 1320a-7b(a)(3) arguably makes it a felony to conceal or "fail to disclose" facts affecting right to receive payment

59

Is It "Voluntary?"

- ❑ False Claims Act – Amendments to the FCA made as part of Fraud Enforcement and Recovery Act of 2009 (FERA) – 31 U.S.C. § 3729(a)(1)(G)
 - Illegal to "knowingly conceal...or knowingly and improperly avoid...or decrease...an obligation to pay or transmit money or property to the Government..."
- ❑ Presentment of claim not essential for False Claims Act Liability under Affordable Care Act
- ❑ Affordable Care Act establishes "obligation" to report "identified" overpayment within sixty (60) days

60

Disclosure Considerations

- Decision to disclose should be made in conjunction with counsel, but is a business decision – weighing potential risks and benefits
 - Where available, disclosure may offer protections too significant to pass up
 - Useful for substantial violations of law
 - Leaves as an open question more minor or isolated violations – time + expense + minimum settlement may make minor disclosures prohibitively costly
 - Continuing focus on compliance programs, good faith cooperation and prompt disclosure

61

T H E E N D

QUESTIONS?

62