Collateral Consequences of Healthcare Prosecutions

by Christopher A. Iacono

Assume for a moment you have been retained by a physician who has been charged with several counts of healthcare fraud. In the indictment, the government contends that your new client has been billing Medicare and Medicaid for services that were allegedly not provided over the course of a number of years. During your meeting with the client, he admits that some of his billing practices were improper, and although he may have defenses on some of the charges, he is considering whether or not to plead guilty. The decision on what stratagems to employ, similar to all other white-collar prosecutions, will depend on the client's facts and circumstances. In healthcare prosecutions, however, there are several important collateral consequences that criminal counsel should consider when advising a healthcare provider client accused of criminal conduct.

OIG Exclusions for Medicare and Medicaid

The Department of Health and Human Services Office of Inspector General (OIG) is authorized to exclude healthcare providers from federal healthcare programs, such as Medicare, and federally funded state healthcare programs, such as Medicaid, based upon a criminal conviction.[1] Once excluded, Medicare and/or Medicaid will not pay for any item or service furnished, ordered or prescribed, either directly or indirectly, by the excluded provider.[2]

Additionally, it is highly unlikely the provider will find employment with any entity, individual or institution that relies on Medicare or Medicaid.[3] As a result, exclusion from Medicare and Medicaid is one of the most significant sanctions that can be imposed on a healthcare provider, and can essentially end the career of a provider that relies heavily on such programs.[4]

Exclusions from these programs are either mandatory or permissive under the statute.[5] Mandatory exclusions are required by law, and permissive exclusions are imposed at the discretion of the OIG.[6] A mandatory exclusion from program participation for at least five years occurs under four circumstances:

1. for a conviction of a criminal offense related to the delivery of an item or service reimbursed by Medicare or a state healthcare program;
2. for a conviction of a crime relating to neglect or abuse of patients in connection with the delivery of healthcare;
3. for a conviction under federal or state law in connection with the delivery of a healthcare item or service, including the performance of management where administrative services relating to the delivery of such items or services or with respect to any act or omission in a healthcare program (other than Medicare and a state healthcare program) operated by or financed in whole or in part or any federal, state or local agency; and
4. any conviction under a federal or state law for a felony relating to the unlawful manufacture, distribution, prescription or dispensing of controlled substances.[7]

Mandatory exclusions for a period in excess of five years also can be imposed when there are aggravating circumstances, including that the loss amount to Medicare and the state healthcare programs exceeded $1,500 or that the acts resulting in the conviction occurred over more than one year.[8]

There are also a number of permissive exclusions.[9] For example, bases for permissive exclusions include: conviction for a misdemeanor crime related to fraud or theft in the delivery of healthcare services in general and licensing board actions.[10]

Regardless of whether the exclusion is mandatory or permissive, an exclusion from billing the federal programs for any period of time can have fatal consequences to a provider's career. Accordingly, if the client is interested in pleading guilty, counsel should attempt to negotiate a plea to a charge, and a factual record to support the plea that will not result in mandatory exclusion and provides defenses to permissive exclusions.

Emergency Suspension of License by the State

Certain states allow licensing boards to suspend physicians on an emergent basis, only if there is a "reasonable cause to

believe that a practitioner represents imminent danger to his patients."[11] When facing a motion to suspend on an emergent basis, the critical question is whether there is a potential of harm to any patient.[12] For example, allegations that relate to billing for services that were not provided would not likely support a suspension on an emergent basis because there is no danger to patients.[13] However, regarding allegations that relate to performing unnecessary services on patients, emergent suspension will likely be appropriate given that harm (or at least the potential of harm) to the patients is imminent.[14]

Most physicians do not have other sources of income. Emergency suspension, therefore, could have a devastating impact to healthcare providers. For example, many physicians have substantial lease payments for their office space and equipment, in addition to a mortgage on their home and other personal expenses. Without the ability to practice, a physician will be unable to pay both personal and professional expenses. The result could be that the physician's practice (and livelihood) will be curtailed based upon the allegations set forth in a complaint, warrant, or indictment.

In some instances, the state may attempt to suspend the professional license as a condition of bail upon request. Such a suspension violates the United States Supreme Court's holding that the deprivation of a professional's license as a condition of bail is improper.[15] Accordingly, if a client's professional license is suspended as a condition of bail, counsel should immediately file a motion to modify bail to remove this condition.

Lender Issues

Physicians may also run into problems with financial lenders as a result of a healthcare prosecution. Many physicians have loans from banks for their office space and/or equipment. Often, loan documents will allow a lender to call a default where "a material adverse change occurs in the borrower's financial condition or the lender believes the prospect of payment for performance of the Note is impaired."[16] These types of provisions provide the lender with substantial leeway to call default on the loan if they learn of a criminal case against a healthcare provider.[17] If a lender calls a default on a physician's loan, it would likely result in the end of the physician's practice, regardless of whether the physician is convicted or not.

If a default occurs, the physician's practice may have to file for bankruptcy to prevent a foreclosure. While filing for bankruptcy will stay the foreclosure on the client's practice, the client will be required to appear at a meeting of the creditors.[18] The debtor interview allows the United States trustee to interview the physician under oath about the reasons for filing for bankruptcy and assets.[19] If the United States trustee is aware of the criminal matter, he or she may attempt to question the physician about the facts and circumstances of the criminal matter, which would implicate the physician's Fifth Amendment right against self-incrimination. Because of this possibility, criminal counsel should be present at the interview, and should be prepared to object to any questions relating to the criminal matter. Criminal counsel, as a result, should consult with a bankruptcy attorney to determine whether bankruptcy is an appropriate option for the client.

Considerations for the Factual Basis Supporting a Plea Agreement

When the decision is made to resolve the criminal case through a plea agreement, counsel should carefully consider and negotiate the criminal charge and the factual basis for that plea. The charge and a poorly negotiated factual basis can have an adverse affect upon several other collateral consequences that will affect the healthcare provider as a result of the prosecution. These include discipline by the state licensing board, issues with the private insurers, and reporting to the National Practitioner Databank. Each is discussed further below.

Discipline by the State Licensing Board

All physicians have a duty to report the criminal matter to the licensing board of each state in which a physician is licensed. Each state has different requirements regarding types of conduct and when the physician must report conduct to the state. For example, in New Jersey, a physician must report the following conduct to the New Jersey Board of Medical Examiners:

1. Pending or final actions by criminal authorities for violations of law or regulation, or any arrest or conviction for any criminal or quasi-criminal offense pursuant to the laws of the United states, this State or another state, including but not limited to:
   i. Criminal homicide pursuant to N.J.S.A. 2C:11-2;
   ii. Aggravated assault pursuant to N.J.S.A. 2C:12-1;
   iii. Sexual assault, criminal sexual contact or lewdness pursuant to N.J.S.A. 2C:14-2 through 2C:14-4; or
   iv. An offense involving any controlled dangerous substance or controlled substance analog as set forth in N.J.S.A. 2C:35-1 *et seq.*;
2. Actions by a health care facility or health maintenance organization grounded, in whole or in part, upon patient care concerns which actions condition, curtail, limit, suspend or revoke privileges;
3. Disciplinary actions by state licensing authorities;
4. Actions by Department of Health and Senior Services;
5. Actions by Drug Enforcement Administration or any state drug

enforcement agency;

6. Actions by Medicaid, Medicare, CHAMPUS, or other governmental insurance program;
7. Actions by professional review organizations or utilization review organizations; or
8. Actions by a medical malpractice insurance carrier declining coverage or a continuation of coverage; assessing a surcharge based on claims experience, imposing new limitations or restrictions on practice, or requiring remedial education or office monitoring.[20]

In addition to the foregoing, the failure to report to the licensing board could be a basis for discipline itself.[21]

When resolving the criminal matter through a guilty plea, the factual basis for the plea and the charge to which the client pleads guilty should seek to present the healthcare provider in the most favorable light to the licensing board. If counsel fails to negotiate the charge and the factual basis, the work of reaching a favorable plea agreement may be negated if the client is suspended by the licensing board. Finally, it may be necessary for counsel to request a postponement of any licensing board hearing until after the criminal matter has resolved, to avoid having the provider testify at a licensing hearing prior to the resolution of the criminal matter.

Private Insurers

Most physicians have in-network provider agreements with private insurers. These agreements set forth the rights and obligations of both the provider and the insurer. A provider agreement will usually include provisions regarding the duty of their in-network providers to report criminal investigations and/or criminal convictions within a certain period of time; the bases for the insurer to remove the provider from the network; and the appeal process available to the provider if removed.[22] Most provider agreements allow insurers to remove a provider from the network based upon a criminal conviction. If a provider is removed from an insurer's network, the provider will likely lose patients, since it is more expensive for the patient to be treated by an out-of-network provider. An effectively negotiated factual basis for the plea will present a better likelihood that the client is not terminated as an in-network provider once the insurer becomes aware of the conviction.

Providers should be certain to comply with their obligation to report a conviction to each private insurer. Counsel should review the private insurers' provider agreement and advise the provider of his or her obligations. In most cases, the private insurers will have learned of the criminal investigation and/or conviction regarding the physician and request an explanation directly from the physician. Therefore, the provider should seek guidance from counsel when reporting, to not adversely impact the criminal matter.

National Practitioner Databank

The National Practitioner Databank tracks, among other things, disciplinary actions involving providers' professional licenses, including suspensions.[23] The National Practitioner Databank report is available to hospitals and other potential employers, as well as licensing boards and professional societies.[24] As a result, when negative reports about a physician are made to the National Practitioner Databank, the physician is greatly affected. One way to avoid serious impacts is to work with the state in an attempt to agree on the language that will be reported to the National Practitioner Databank. This is an opportunity to provide clarity on the facts surrounding the criminal matter that led to the suspension that is being reported, and perhaps the best chance to mitigate the professional damage to the physician.

Conclusion

Representing healthcare providers in criminal matters offers challenges well beyond the defense of the criminal investigation and its attendant charges. Counsel must be prepared to address a variety of collateral consequences, which could have a detrimental impact on the provider's ability to practice as a healthcare professional well beyond the end of the criminal matter. Failure to advise of these collateral consequences may be devastating to the provider's career and livelihood, even if counsel is able to achieve a favorable resolution in the criminal matter. ⚖

Endnotes

1. 42 U.S.C. § 1320a-7. The basic provisions for exclusion are found in 42 U.S.C. § 1320a-7. Additional provisions regarding exclusions are found in the Social Security Act § 1128.
2. OIG Special Advisory Bulletin on the Effect of Exclusion From Participation in Federal Health Care Programs, 64 Fed. Reg. 52791 (1999).
3. *Id.* ("The practical effect of OIG exclusion is to preclude employment of an excluded individual in any capacity by a health care provider that receives reimbursement, indirectly or directly, from any federal health care program.").
4. Alice Gosfield, Medicare and Medicaid Fraud and Abuse § 4:2 (2010 ed.) (exclusion can be a professional death sentence for provider).
5. 42 U.S.C. § 1320a-7.
6. *Id.*
7. 42 U.S.C. § 1320a-7(a)(1), (2), (3), (4).
8. 42 C.F.R. § 1001.102.
9. 42 C.F.R. § 1320a-7(b).
10. 42 U.S.C. § 1320a-7(b)(1), (4).
11. N.J.S.A. 45:9-19.9.
12. *Id.*
13. *Id.*
14. *Id.*

15. *See Rehman v. State of California*, 85 S.Ct. 8, 9 (U.S. 1964). *See also Grey v. Superior Court*, 125 Cal. App. 4th 629; 23 Cal. Rptr. 3d 50 (First Dist. 2005) (finding that prohibiting a physician charged with unlawfully prescribing controlled substances and sexual offenses from practicing was unreasonable because the defendant had voluntarily surrendered, was otherwise eligible for release under bail, and the medical board could suspend his license by other means).
16. The quoted language appeared in the loan documents affecting a recent healthcare provider client.
17. *Id*.
18. 11 U.S.C. § 341.
19. *Id*.
20. N.J.S.A. 13:35-6.19.
21. N.J.S.A. 13:35-6:19.
22. Such provisions are commonly found in agreements between private insurers and healthcare providers.
23. 42 U.S.C. 11101 *et seq*.
24. *Id*.

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