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Handling Medicare and Medicaid Audits and Investigations, Part 2

In the second of a two-part Health Law column, Francis J. Serbaroli reviews the potential challenges faced by entities undergoing Medicare or Medicaid audits or investigations. He advises caution in dealing with those conducting these inquiries, and the need to get counsel involved to contain excessive demands for documents and information, prevent unnecessary expansion of the scope of the audit or investigation, and to protect the rights of the organization and individuals.

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In Part 1 of this article, we reviewed the various government agencies and private contractors that conduct audits and investigations of Medicare and Medicaid payments to health care providers, insurers and other recipients of such payments (hereinafter "provider"), what can trigger these audits and investigations, and their scope. In the second part, we discuss some of the steps a provider should take to protect itself. At the outset, we caution that what follows are very broad and general guidelines. When facing any kind of audit or investigation, it is imperative that the provider seek advice from lawyers experienced in handling these matters, who can tailor a response to the specific circumstances in which the provider finds itself.

As we noted in Part 1, there is no such thing as an "informal" audit or a "routine" investigation. Any inquiry by a government agency—such as the Office of Inspector General of the U.S. Department of Health and

Human Services, the New York State Attorney General's Medicaid Fraud Control Unit, the Office of New York State Medicaid Inspector General, or a government contractor such as a Medicare fiscal intermediary, carrier or Recovery Audit Contractor (RAC)—must be taken seriously.

The inquiry might turn out to be a simple one, such as where a single medical procedure was inadvertently coded the wrong way, and an erroneous bill was sent out. On the other hand, it could be the first step in uncovering a pattern of improper billing, inaccurate cost reports, or illegal activities. Thus, for example, a request to review a large volume of a cardiologist's patient charts could signal a concern about whether that physician is routinely performing unnecessary tests or procedures.

If an investigator from a government agency shows up at the provider's offices, flashes a badge, and asks to review books and records or to interview employees, the provider is not obligated to interrupt its normal operations to accommodate the investigator's inquiry. The investigator should be politely referred to in-house counsel or an appropriate senior executive, who can then (again politely) ask the investigator to submit a written request for the documents or information that he or she is seeking.

Sometimes, an investigator will not take "No" for an answer, and may provocatively ask "What are you hiding?" or "If you haven't done anything wrong, why won't you just give me what I'm asking for?" If he or she insists that it's just a routine matter, or complains about having made the trip for nothing, or asserts that the provider is impeding official responsibilities, do not give in. Be polite but firm, and ask that the request be submitted in writing and directed to the appropriate executive within the provider's organization (e.g., general counsel, compliance officer, etc.). This may elicit further provocations, such as "Why would you need an attorney if you haven't done anything wrong?" or "You're making this more difficult, and that doesn't look too good."

Cooperation with a legitimate inquiry is expected by the government, and is usually advisable. However, cooperation does not extend to giving up your rights, or accommodating someone who just drops in, flashes a badge, and seeks immediate access to the provider's books and records without the proper written instrument.

If the investigator persists, putting him on the phone with the provider's attorney usually has a salutary effect. Note also that, for HIPAA privacy purposes (Health Insurance Portability and Accountability Act), if any patient records or information are sought, a copy of the written or electronic instrument from the government agency requesting the records or information should be kept so that the provider has evidence that it was authorized to release them.

Subpoenas

A subpoena cannot be ignored. If the investigator has a subpoena, the subpoena will have a return date, and it should be responded to on a timely basis. Absent very unusual circumstances (such as the issuance of a so-called "forthwith" subpoena), a subpoena is not a license to obtain records or interview individuals immediately and without warning. The provider has the right to consult with counsel, to assess what it would take to comply with the subpoena, to seek to narrow the scope of the subpoena or obtain an extension of time to comply, or if necessary, to go to court to attempt to quash the subpoena. In general, the provider need not furnish records or allow its personnel to be interviewed on the spot. Exceptions include situations where the Health Department is investigating matters concerning an immediate or proximate threat to patient safety, such as the spread of an infection among the residents of a nursing home, or when a provider, such as a hospital, receives a subpoena from a local district attorney for medical records or information in connection with the medical care provided to a victim of a violent crime, or to a crime suspect who is receiving medical care at the hospital.

A grand jury subpoena is one that is issued by a grand jury currently sitting in federal or state court, and conducting an investigation that may result in criminal charges. There are also "office" or "administrative" subpoenas. Federal government agencies that have the authority to issue non-grand jury "administrative" subpoenas include the U.S. Department of Justice, U.S. Attorneys' offices, and the Office of Inspector General (OIG) of the U.S. Department of Health & Human Services. Another form of document request is the so-called "Civil Investigative Demand" or "Authorized Investigative Demand" issued by the Department of Justice or OIG. New York state agencies that have the authority to issue subpoenas include the Attorney General's Medicaid Fraud Control Unit and the Office of Medicaid Inspector General. Subpoenas may require the production of books and records (duces tecum) or compel a witness to appear and provide testimony (ad testificandum), or both.

Either a grand jury or an administrative or office subpoena has a return date by which the records must be produced or the witness must appear. A subpoena duces tecum describes the records being sought, and can provide some insights into the matter under investigation.

Subpoenas generally request a broad variety of documents—in many cases, more documents than the investigation requires. Sometimes their breadth is extraordinary. Again, it is advisable to consult with counsel when a provider receives a subpoena, since it may be possible to confer with the government agency that issued the subpoena to narrow its scope to exactly what the agency requires, and to agree to a mutually convenient schedule for the production of documents or the appearances of witnesses. Moreover, counsel should review the documents or items being turned over to assure they are covered by the subpoena, and to determine if they are protected by any privileges. All documents should be "Bates Stamped" for inventory, retrieval and reference purposes.

When a subpoena is served, the provider should identify and secure the documents or items sought by the subpoena. It should also immediately issue written instructions to appropriate individuals that no documents or items are to be destroyed, altered in any way, or removed. It is advisable for the provider to have its lawyers advise those employees who will be compiling the documents or items covered by the subpoena how to conduct their activities. Counsel will also determine from the agency issuing the subpoena whether copies or originals are called for. In all circumstances where originals are demanded, the provider should retain an exact copy of what is turned over to the government. It is also imperative to ensure that all "hard" and "electronic" documents are provided. In fact, given the volume of material sought and how it is stored, it is frequently necessary for a third-party vendor to assist in the production of subpoenaed documents and information.

It is important to note that a subpoena covers only documents and records that already exist. A provider need not create new documents or records in order to comply with a subpoena. However, in consultation with counsel, the provider may do so if it is to the provider's advantage.

Search Warrant

A search warrant is an altogether different matter. A search warrant must be issued by a judge or magistrate based upon allegations of criminal conduct, and supported by probable cause that a crime has been committed, and that evidence is to be found at the site of the search. The issuance of a search warrant means that a very aggressive government investigation is under way, that criminal charges may result, and that the provider is likely facing serious legal problems. The issuance of a search warrant is not typical in health care investigations, although it does occur.

When presented with a search warrant (and the provider has an absolute right to a copy), it is imperative that the provider contact counsel right away and turn the matter over to them. If there is no opportunity to

consult with counsel, the provider should read the search warrant carefully. The search warrant will typically contain a description of the premises to be searched, the time during which the search may be conducted (typically during the day but sometimes outside of normal business hours if the issuing court has been convinced that there is a legitimate concern that items or documents might be moved elsewhere or destroyed), and the signature of the issuing judge or magistrate. If the search warrant does not contain all of these elements, it may not be valid. However, the agents executing the search warrant aren't likely to listen to any argument about its validity. In that case, it is advisable to allow the agents to execute the warrant, and let your counsel deal later with any issues of its validity or propriety.

Regardless of the search warrant's validity, the provider may observe the search, and, to the extent feasible, take notes about what is being searched and taken, and determine that it is being carried out within the limits of the warrant. Regardless of the ultimate propriety of the warrant or its manner of execution, the provider's employees would be well advised not to impede the search or they could be arrested and/or charged with obstruction. See, e.g., 18 U.S.C §2231.

The provider can and should keep a record of all documents and items being searched or removed. If the search warrant authorizes the seizure of computers or hard drives that are key to the provider's conduct of its business, consult with counsel immediately. In the course of a search, the provider may be approached by an investigator and presented with a "Consent to Search" form that enables the investigator to expand the scope of the search beyond that delineated in the search warrant. The provider is not required to sign this form. It may be advisable to let the investigators return to the court that issued the search warrant to get an expanded search warrant if they need it. Again, each situation presents different facts, which is why an immediate consultation with counsel is advisable.

In connection with the execution of a search warrant, only limited claims of privilege may be asserted, such as documents that would impugn the Fifth Amendment right not to self-incriminate, and documents that are protected under the attorney-client privilege. Although agents may try, a search warrant does not require that a provider's employees be interviewed about the matter under investigation by the agents executing the search. (That's the purpose of a subpoena ad testificandum.)

I will conclude this second article with the following points:

- Anything that the provider or its employees tell an investigator can later be used against them. For example, any individual providing false information to a federal investigator, even though that individual was not under oath, may be guilty of a felony. 18 U.S.C. §1001.

- The provider should discourage casual discussions among its employees about matters under investigation, since such discussions are usually not privileged and may in fact ultimately be used against the provider or the employee.

- Employees of the provider should report all calls or written requests from carriers, intermediaries, RACs, or government agencies to in-house counsel or a senior executive, and the provider should keep a record of all such requests. If the provider keeps track of these requests and notices multiple inquiries from one or more of these sources, it may indicate that the provider is under investigation.

- If the provider believes that an internal review is warranted, it should not perform the internal review by itself. The provider should retain outside counsel, and counsel in turn will retain outside auditors and other professionals as needed to perform the review so as to protect the review as much as possible under the attorney-client privilege. Moreover, depending upon the type of

provider involved, the results of the internal review may implicate its financial reporting obligations.

Audits and investigations can and do disrupt a provider's business, and put unnecessary stress on the provider and its employees. The use of outside counsel in an investigation or an in-depth audit can significantly ease these pressures, minimize the need for contact by the provider with prosecutors, investigators or auditors, and better control the flow of the documents and information being sought.

About the Author:

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