South Carolina Bar
Continuing Legal Education Division

2018 SC BAR CONVENTION

Health Care Law Section

"Health Care Law Update"

Friday, January 19

SC Supreme Court Commission on CLE Course No. 180806

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EMTALA Update: Recent Developments and Controversies

Alice V. Harris
Phillip G. Mullinnix

At A Crossroads—EMTALA & Psychiatric Patients In An Era of Strained Resources

2018 SC Bar Convention

Kiawah Island, Friday, January 19, 2018

NELSON MULLINS

What Are We Covering Today?

- What is EMTALA?
- Where does it apply?
- Basics of EMTALA
- Can a psychiatric Condition be an Emergency Medical Condition?
- EMTALA's increased penalties and recent settlements
- Stabilizing treatment and complications when patients are boarded in ED for lack of available inpatient psychiatric beds
- Transfers – the physician certification and complications when psychiatric patients are "stabilized" with restraints

What is EMTALA?

- EMTALA is basically the "patient anti-dumping" law
  - 42 U.S.C. § 1395dd
- EMTALA applies to any hospital with an Emergency Department (ED) that participates in Medicare
  - Applies to a Dedicated ED
  - Applies to hospital property, meaning the entire main hospital campus including buildings owned by the hospital within 250 yards of the hospital
  - Applies to an ambulance owned by hospital, to patients in observation status

Where Does EMTALA Apply?

Before Present to Hospital Campus/ED

- Patient
- Family
- Law Enforcement
- Post-Acute
- **EMTALA does not impact decision of where to take the patient (unless a transfer from another ED)**
- Does not apply to hospital outpatients if they have begun outpatient care
- Does not apply to inpatients

Medicare Hospital Campus / ED Setting

- Arrival at ED
- Arrival on Hospital property
- Is in an ambulance owned by the Hospital (except if EMS or non-employed physician directs to another hospital)
- Patients in "observation" status
- **EMTALA APPLIES**

After Discharge or Transfer

- Home
- Admission as inpatient
- Other Hospital or Institution
- Post-Acute setting
- Other setting
- **Once patient is appropriately discharged or transferred, EMTALA obligations end**

EMTALA Basics

- Must maintain an on-call list identifying physicians *by name* who are available to *any patient* in need of specialty services in the ED commensurate with services available at the hospital
- Must provide Medical Screening Examination (MSE) to *all* persons regardless of ability to pay for medical services that is *consistent* and *reasonable* to identify any emergencies

EMTALA Basics

- If the MSE reveals an EMC, must stabilize any identified EMC within capabilities & capacity of hospital (includes on-call MDs)
- Must implement an "appropriate transfer" for any patient who the Hospital cannot stabilize even using all available resources, *including on-call staff (stabile patients can be "discharged")*

Source: State Operations Manual, Appendix V

EMTALA Starting Point

- Patient presents at Hospital ED (or on hospital campus/250 yard rule) without a scheduled appointment and

  (1) Requests examination or treatment for a medical condition OR

  (2) A request is made on the individual's behalf OR

  (3) A prudent layperson observer would believe the patient needs emergency examination or treatment (based on the individuals' appearance or behavior)

- *Includes request for examination or treatment (or medical clearance) by mental health authority, sheriff's office, or local police*

Source: State Operations Manual, Appendix V

Can a Psychiatric Condition be an EMC?

- ED Scenario:
  - Patient presents to ED
  - Physician medically clears patient (no physical EMC)
  - Patient is demonstrating assaultive behavior indicating danger to himself and others in the ED
    - Can the ED release him into the parking lot to remove him from the ED?

Can a Psychiatric Condition be an EMC?

- An EMC exists where a medical condition manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in
  - Placing the health of the patient (or unborn child) in serious jeopardy
  - Serious impairment to the patient's bodily functions or
  - Serious dysfunction of any bodily organ/part.
- In the case of psychiatric patients, an EMC exists if an individual expressing suicidal or homicidal thoughts or gestures is determined to be a danger to self or others.

Medical Screening Examination

- Hospital must provide a MSE to determine if an EMC exists
  - Is a screening process - reasonably calculated to determine whether an EMC exists
  - Must be nondiscriminatory for all patients presenting with the same signs and symptoms (customary procedures for evaluating patients with same or similar complaints)
  - Includes capabilities of specialists and subspecialists on call and available to provide treatment
  - MSE is conducted by physician or other medical professionals deemed qualified to conduct MSEs by hospital bylaws such as nurse practitioners or physician assistants ("qualified medical persons")

Medical Screening Examination

- Hospital cannot delay MSE or refuse to treat the patient while waiting for insurance verification.
  - Normal hospital registration procedures are allowed but cannot delay MSE or treatment.
- MSE is an ongoing process designed to evaluate the patient for any EMC during ED visit – it is not triage
- Can involve wide spectrum of actions, from a simple process (brief history and physical exam) to a complex process including ancillary studies and procedures – appropriate to the individual's signs and symptoms
  - If MSE is appropriate and finds no EMC, EMTALA obligations end

The MSE & Psychiatric Patients

- When confronted with a Psychiatric patient, there are two examinations that must occur to comply with EMTALA:
  - The first is a "Physical" MSE to diagnose and treat any underlying EMC and rule out a physical cause of the psychiatric symptoms or to determine if there are any unrelated physical EMCs that are occurring simultaneously with the psychiatric symptoms.
  - The second is a Psychiatric Screening to determine if the patient has a psychiatric EMC.
    - The medical record should indicate an assessment of suicide or homicide attempt or risk, orientation, or assaultive behavior that indicates danger to self or others.
    - Can occur simultaneously with the physical screening.
- *While there are no preset guidelines on what must occur during either MSE, it is important to keep in mind that a facility's EMTALA Screening Policy becomes part of the standard to which the Hospital is held and thus failure to follow the standard screening process is a de facto violation of EMTALA.*

MSE – Intoxicated or Psychiatric Patient and Underlying Conditions

- Common Problem: *MSE focuses on intoxication and/or psychiatric symptoms*
  - But are there symptoms, vital signs, test or examination results that point to the existence of any other EMCs?
    - Missing signs of other EMCs may result in EMTALA violation or other consequences
    - Are there medical causes for the possible mental health condition? Or alcohol intoxication?
    - Are there conditions that might be masked by intoxication or mental health conditions?
  - See article at: https://www.ahcmedia.com/articles/120641-federal-law-emtala-and-state-law-enforcement-conflict-in-the-ed, includes discussion of conditions that can mimic alcohol intoxication

MSE – Intoxicated or Psychiatric Patient and Underlying Conditions

- Case example: Malpractice Claim filed by patient's estate for EMTALA violations
  - Patient presented to ED appearing "heavily intoxicated" with history of intoxication and appearances at ED for intoxication
  - Patient was discharged after having "sobered"
  - Patient was readmitted 40 minutes later, stumbling and unsteady. Patient's condition worsened in ED over rest of the day, but no further tests conducted until more than 24 hours later, when lab tests and a CT scan revealed she was suffering from a stroke (died three days later)

Source: https://lrus.wolterskluwer.com/news/health-law-daily/hospital-discharges-stroke-patient-as-intoxicated-case-proceeds-over-potential-emtala-violations

What is Stabilizing Treatment?

- After an emergency medical condition is determined to exist, the hospital must provide stabilizing treatment within its capability and capacity
  - Capabilities of a medical facility means the physical space, equipment, supplies, and specialized services the hospital provides (including psychiatry)
  - Capabilities of the staff including the level of care the hospital can provide within the training and scope of professional licenses, and includes coverage through the on-call roster
    - Medical records should reflect medically indicated treatment, medications, surgeries, services rendered, screenings, tests, mental status evaluation, impressions, diagnosis, etc. as appropriate (plus effect of treatment on EMC)
    - "For individuals with psychiatric symptoms, the medical records should indicate an assessment of suicide or homicide attempt or risk, orientation, or assaultive behavior that indicates danger to self or others"
  - Capacity includes whatever a hospital customarily does to accommodate patients in excess of its occupancy limits. If a hospital has customarily accommodated patients in excess of its occupancy limits by whatever means it has therefore demonstrated the ability to provide services in excess of its occupancy limits.

Source: State Operations Manual, Appendix V

What is Stabilizing Treatment?

- If individual has an EMC, continued monitoring is necessary until the patient is stabilized or appropriately transferred.
  - There should be evidence of "ongoing monitoring according to the individual's needs" until it is determined whether or not the patient has an EMC or until the patient is stabilized or appropriately transferred.

    Source: State Operations Manual, Appendix V
- There should be evidence of this ongoing monitoring prior to discharge or transfer
- Example: Unstable psychiatric patient waiting for transfer
  - If discontinue monitoring process may violate EMTALA

When is a patient stabilized?

- "When no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility"
  - Essentially, when a patient is safe to be discharged home without the expectation of short-term deterioration
  - For a psychiatric condition, stabilized means patient is protected and prevented from injuring himself or others

Source: State Operations Manual, Appendix V

What is meant by transfer?

- Transfer means "... the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital" *Source*: 42 C.F.R. 489.24(b)
- Transfer requirements apply only to individuals who have been determined to have an EMC that has not been stabilized
  - Hospital has no further EMTALA obligation if it has been determined patient does not have an EMC or EMC has been stabilized
- Transfers do not include
  - Movement of deceased individual
  - Individual who leaves the facility without permission or against medical advice (AMA)
  - Movement of individuals between hospital departments (as long as all persons are moved in such circumstances, there is a bone fide medical reason to move the patient, and appropriate medical personnel accompany the patient)

Source: State Operations Manual, Appendix V

Transfers/Discharge

- Should not transfer an unstabilized patient unless:
  - Informed patient (or legally responsible person) requests a transfer in writing OR
  - A physician has signed a physician certification that benefits of the transfer outweigh the risks
    - Qualified medical person may sign a certification after consulting with a physician who agrees with the transfer (physician must subsequently sign the certification)
    - However, patient should be screened once again immediately prior to certification

  AND comply with other elements of appropriate transfer process

Physician Certifications

- "The date and time of physician (or the QMP) certification should closely match the date and time of the transfer"

  Source: *State Operations Manual, Appendix V*

  - Case of psychiatric patient awaiting placement
    - Shift change …
    - Prior physician signed certification …
    - May get cited if date and time of certification is not close in time to transfer

Chemical or Physical Restraints and Transfers

- Stabilization of Psychiatric EMCs
  - The administration of chemical or physical restraints for purposes of transferring the patient may stabilize a patient for a period of time and remove the immediate EMC
  - However, practitioners should exercise caution in determining if the medical condition is in fact stable after administering chemical or physical restraints.
  - Essentially, to determine stability for transfer, the Emergency Physician must take into account potentially foreseeable issues that could occur during a transfer (i.e. deterioration of medical or psychiatric conditions, transport time, effect and duration of medication administered).
  - If the Physician has any doubt regarding these issues, it is best to refrain from transferring the patient until the Physician is certain the patient will arrive at the receiving facility uncompromised.

EMTALA Penalties

- Effective January 2017:
  - Up to $104,826 penalty, per violation for hospitals with **100 or more** beds
  - Up to $52,414 penalty, per violation for hospitals with **less than** 100 beds
    - 82 Fed. Reg. 9174, 9179 (Feb. 3, 2017); 45 C.F.R. § 102.3
- Historically, the maximum penalty was
  - $25,000.00 for a hospital with fewer than 100 beds
  - $50,000.00 for a hospital with 100 or more beds.
- 45 C.F.R. Part 102 now requires an annual adjustment in the penalty amounts.
  - See 45 C.F.R. § 102.1 *et seq*.

Recent Settlements

- **05-18-2016, Grady Health System** in Georgia Settles Case for $40,000. Patient was extracted from his apartment by a SWAT team and brought to ED by police officer due to complaints of suicidal and homicidal ideations. While at GHS, two Licensed Professional Counselors (LPCs) evaluated the patient and determined that the patient should be held involuntarily for further evaluation and treatment. Five hours arrival in ED, ED physician discharged the patient without consulting the LPCs or the on-call psychiatrist.
- **01-06-2016, Floyd Medical Center (FMC)**, in Rome, Georgia, entered into a $50,000 settlement agreement with OIG. FMC failed to evaluate and treat a mentally ill patient who was transferred from another hospital to FMC for involuntary inpatient psychiatric care. Patient was aggressive and combative upon his arrival to ED. Three security personnel attempted to restrain the patient and patient was injured when security officers wrestled and handcuffed him. Security personnel informed nurse that patient's behavior was beyond what FMC could safely control. Without psychiatric evaluation or appropriate medical treatment, the ED physician medically cleared the patient and he was taken to jail. Despite having an on-call psychiatrist and capabilities to treat the patient, at no point was he evaluated or treated by a mental health professional.
- https://oig.hhs.gov/fraud/enforcement/cmp/index.asp

Recent Settlements

- **10-17-2017, Southeast Missouri Hospital Settles Case for $100,000:**
- OIG alleged that instead of being properly evaluated and treated, patients were discharged with unstabilized emergency medical conditions to the custody of police pursuant to a hospital policy: if a patient had a blood alcohol level (BAL) above 100, the patient was given to local law enforcement and taken to jail.
- Two patients presented to the Hospital related to possible suicide attempts by overdose.
- Both patients were discharged into the custody of local law enforcement and taken to jail, instead of being given an MSE and/or stabilizing treatment.
- https://oig.hhs.gov/fraud/enforcement/cmp/index.asp

Santa Rosa Settlement

- **12-21-2015, Santa Rosa Memorial Hospital (SRMH), in Santa Rosa, California, entered into a $50,000 settlement.**
  - Patient presents to SRMH's ED for alcohol withdrawal and neck pain.
  - ED physician prescribed a medication for alcohol withdrawal and discharged the patient
  - The next morning, the patient was seen by multiple members of the hospital staff lying on the ground near the perimeter of SRMH's parking lot, possibly in need of medical assistance.
  - Despite being notified several times that the patient may be in need of medical assistance, SRMH failed to respond.
  - Eventually, a staff member who was jogging saw the patient on the ground and called 911. When EMS arrived, the patient had died shortly before EMS's arrival. An autopsy report revealed the cause of death to be acute bacterial pneumonia of the left lung.
  - https://oig.hhs.gov/fraud/enforcement/cmp/index.asp

"Boarding" Psychiatric Patients in the ED

- Many South Carolina hospitals face having to hold psychiatric patients in the ED for days or weeks because of a shortage of inpatient psychiatric beds
  - It is a national problem – with Mission Hospital in Asheville N.C., recently discharging a patient after holding him in the ED for 19 months
  - The number of ED visits related to mental health issues jumped 55% from 4.4 million to 6.8 millions from 2002 to 2011
  - At the same time, nationally inpatient psychiatric beds fell nearly 80%, from 500,000 to 114,000

Source: Modern Healthcare, **S.C. hospital to pay $1.3 million for not properly treating emergency psych patients, July 5, 2017** http://www.modernhealthcare.com/article/20170705/NEWS/170709977

Recent AnMed Settlement

- On June 23, 2017, AnMed Health, in Anderson, South Carolina, entered into a $1,295,000 settlement agreement with OIG.
- The settlement agreement resolved allegations that, in 36 incidents investigated by OIG, AnMed violated EMTALA in 36 incidents, involving individuals presenting with unstable psychiatric emergency medical conditions.
- https://oig.hhs.gov/fraud/enforcement/cmp/cmp-ae.asp

Recent AnMed Settlement

- AnMed maintained an inpatient unit, equipped and staffed to treat voluntarily committed patients
- The OIG asserted that not also admitting involuntarily committed patients violated EMTALA
  - The unit was not equipped or staffed to handle more violent patients, unable to participate in the unit's therapeutic programs
  - Arguably, AnMed had no duty under EMTALA to expand its resources to start admitting involuntarily committed patients
- Takeaway: If have unit or area in ED or as inpatient unit for less violent / behaviorally controlled patients, examine if need to expand / change to also handle involuntarily committed patients

Recent AnMed Settlement

- Because of the physical and staffing limitations of the inpatient psychiatric unit, AnMed, as many hospitals, held patients in the ED for days awaiting for transfers to a facility that could treat involuntary patients.
  - During the time period in which the patients were in the ED, the OIG questioned whether routine assessments by ED staff, physicians, and psychiatric extenders was enough
  - The OIG indicated the psychiatrists must routinely assess and treat the patient.
  - Takeaway: Provide periodic assessments of patient (both physical and psychiatric), including direct involvement by psychiatrists on staff, if possible

Questions?

Contact Information

Alice V. Harris

Meridian, 17th Floor

1320 Main Street

Columbia, SC 29201

Tel: 803.255.9487

Email: Alice.Harris@nelsonmullins.com

Phillip G. Mullinnix

Liberty Center, Suite 600

151 Meeting St.

Charleston, SC 29401

Tel: 843.534.4251

Email: Phillip.Mullinnix@nelsonmullins.com

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House Party: In-House Counsel Opens Up About What Makes Outside Counsel Party Poopers

Annette R. Drachman
Laura J. Evans

IN-HOUSE INSIGHTS

ANNETTE DRACHMAN, ESQ.
GENERAL COUNSEL
MEDICAL UNIVERSITY OF SOUTH CAROLINA

LAURA J. EVANS, ESQ.
CHARLESTON, SOUTH CAROLINA


WARNING
PET PEEVES
AHEAD

OVERSTAFFING MATTERS

Discuss staffing on the front-end

Do not staff up without permission

If changing staff, give timely notice

Introduce your entire staff

Ask yourself: Is this person adding value?

FAILURE TO HAVE A GAME PLAN

Communicate, communicate, communicate

Thinking outside of the box can be good…or bad

If you are calling an audible, be sure it is approved

Ensure that your game plan does not conflict with prior positions taken or with future strategy

TIMING IS EVERYTHING

Understand what we want to know and what we do not

Respect our schedule- give us ample time
(last-minute ≠happy client)

Regular communication is key

NO SURPRISES!!!!!!!!!!

SWEAT THE SMALL STUFF

Attention to detail is key

Quality work product = proofread, organized, clear, succinct

Be prepared – if you have billed time to factual or legal review, you better be able to explain it

UNDERSTAND THE OPERATIONAL SIDE

Philosophy/Mission Statement

Structure/Leadership

History

Important milestones/legal history

Strategy

Offer to shadow

Be up to speed on industry developments

DON'T TRY TO BYPASS US

(WE WILL FIND OUT)

WATCH YOUR BILLING

Repetitive entries

Overstaffing

Research regarding matters that should be within your general knowledge
(remember that you sold us on your vast health care knowledge)


Don't Rest
ON YOUR
LAURELS

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Antitrust, A Primer and Recent Developments

Will R. Thomas

No Materials Available

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Panel Discussion of Emerging Trends Qui Tam/ FCA Cases

E. Bart Daniel
Matt R. Hubbell
Beth Warren

CHAPTER VII
DEFENDING HEALTH CARE CASES

A multitude of factors must be considered for the health care practitioner to successfully defend a criminal investigation. Many of the factors affecting the defense strategy of the case are within control of the attorney, and many are not. The stage of the investigation, at the time defense counsel becomes involved, determines many of the actions he or she may take. As in any criminal investigation, the earlier criminal defense counsel is aware of the investigation and retained to represent the client, the better the result will likely be. The criminal defense attorney must be prepared, however, to respond to a panicked call from the attorney, CEO, or other officer of the provider being investigated because federal agents are at the door executing search warrants and attempting to interview key personnel.

It is of the utmost importance for corporate counsel, whether they are in-house counsel or retained outside counsel, to make their clients aware that the question is not *if* their client will ultimately be investigated, but *when*. With the intense scrutiny of health care providers by the federal and/or state governments, it is very likely that corporate counsel will, at some point, be contacted by government agencies regarding an investigation. The attorney should already have a course of action in place for their employees prior to the government's initial contact. Employees need to know their legal rights in responding to government investigators. However, much care must be used in advising employees of how to respond to an investigation so that the claims of obstruction of justice, tampering with evidence and other actions that could be viewed as interference with the government investigation, do not occur.

Once criminal defense counsel has been retained by the entity, a number of significant strategic decisions must be made. In a federal health care case, a thorough knowledge of the Department of Justice's guidelines regarding prosecutions of corporations must be understood by defense counsel and followed closely in order to take advantage of protocols in place and avoid pitfalls of placing their client at risk of losing defense opportunities.[1] In almost every case, whether state or federal, there will be a need for separate counsel for the corporation and various directors and employees because the government will likely identify multiple targets of the investigation. Counsel for the corporation and individuals must decide whether to enter into joint defense agreements, undertake internal investigations and make decisions regarding voluntary disclosure issues. In addition, defense counsel must identify the particular legal issues involved in the investigation and develop substantive defenses to the allegations. How to handle grand jury subpoenas, administrative and investigative demand subpoenas and search warrants will also be early issues facing the defense.

This chapter will give a general overview of various defense considerations involved in defending a health care fraud investigation.

A. Need for Separate Counsel

[1]*See* Memorandum from Eric H. Holder, Jr., Attorney General, United States Department of Justice, to all Federal Prosecutors (May 19, 2010); *see also supra* Chapter V (A) Federal Prosecutions; Charging Factors.

Defense counsel must be careful to avoid running afoul of conflict of interest concerns in the representation of the clients. In all but the simplest of investigations there will usually be more than one "subject" or "target" of the investigation. Significant conflict of interest dangers exist for the client who elects joint representation. Employers in general, and corporations in particular, act through individual employees. The employer may or may not be held criminally accountable for the acts of its employees. Because the fate of the two is not inextricably linked, conflicts of interest can arise. For instance, the provider may wish to distance itself from a "rogue" employee and cooperate with the government against the employee in exchange for leniency.[2] Conversely, employees (regardless of whether they are themselves named targets) are often approached by the government and asked to testify against the defendant employer. In such cases, the conflict of interest is immediate and inescapable. In all instances "targets" of the investigations must have individual counsel.

In addition to legal concerns, which are discussed below, defense counsel must consider practical concerns in representing more than one client. Oftentimes, government investigators will be uncomfortable in dealing with the same attorney for multiple individuals. This concern may arise whether or not the employees are considered "subjects" of the investigation. Legal analysis of these conflicts turns on interpretation of the Sixth Amendment and the court's prudential interests in ensuring integrity of the process.

The United States Supreme Court in *Wheat v. United States*,[3] squarely addressed the issue. According to *Wheat*, it is not the accused's right to counsel of choice which is paramount:

> [W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will be inexorably represented by the lawyer whom he prefers.[4]

The Court was concerned that the fairness of the trial process could quickly be compromised since conflicting ethical responsibilities force counsel into an unacceptable Hobson's choice.[5] Such a Hobson's choice can quickly arise because ethical proscriptions could prevent a lawyer representing multiple parties from doing such things as (1) cross examining one of his clients if necessary to exculpate the other; (2) effectively and fully cross examining a witness whose testimony may favor one client at the expense of the other; (3) using information gained from one client to the detriment of the other; and (4) adequately advising a client as to the desirability of plea options where the plea could result in one of the clients becoming an adverse witness. In light of these types of concerns, both the United States Supreme Court and the Fourth Circuit Court of Appeals have held that protecting the "integrity of the process" by

[2] *See* In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) (noting in prior history of case that corporation pled and "hung [employee] out to dry" as part of its plea agreement).
[3] 486 U.S. 153 (1988).
[4] *Id.* at 159 (emphasis added).
[5] *See* ABA Model Code of Professional Responsibility DR5-105(c) and Model Rules of Professional Conduct, Rule 1.7 advising against joint representation.

disqualification of counsel outweighs the defendant's right to choice of counsel.[6] So strong is this concern that the Court still retains the power to disqualify counsel on its own motion even where all parties to the joint representation waive the conflict (and their right to "effective representation").[7]

The Fourth Circuit has cited *United States v. Ross*[8] as an ideal illustration of the inherent dangers described above.[9] Defendant Ross sought to be represented by the same attorney who had earlier negotiated a favorable plea agreement for a co-defendant who would be testifying at trial. The court noted that, regardless of any waivers, permitting the representation would create an untenable situation: counsel would either violate earlier confidences by relying upon information learned from the former client/witness for the purposes of cross examination or counsel would respect the confidences at the expense of conducting a thorough examination. With both options being unacceptable, the court cut the Gordian knot by disqualifying the attorney.

Finally, two pragmatic interests weigh in favor of representation by separate counsel. First, either the government or the court *sua sponte* may move for disqualification *at any time*. Since waivers do not prevent disqualification, the defendant may arrive on the eve of trial only to be forced to obtain new counsel at the last moment. Second, the availability of joint defense agreements (discussed in the following section) largely obviates any advantage that might conceivably have been gained by joint representation.

In the unwise event that multiple defendants determine to utilize the same counsel, a written representation agreement compliant with state bar ethics rules should be executed, clearly disclosing the potential or actual conflicts.[10] The representation agreement should address the following at a minimum: the sharing of information, the consequences of plea bargaining, conflicting defenses, withdrawal from the multiple representation agreement, the details of the consultation with the clients about the representation, each client's right to conflict-free representation, and a knowing, voluntary and intelligent consent to the representation. Each individual client should be urged to seek consultation with a separate, independent lawyer regarding the multiple representation.

B. Joint Defense Agreements

Joint defense agreements, or joint common interest agreements, are a unique adaptation of the attorney-client privilege. The attorney-client privilege traditionally protects, from disclosure, those statements made by a client to counsel relative to a legal matter. In order to assert the privilege, a party must demonstrate: (1) that he was or sought to be a client of the attorney; (2) that the attorney in connection with the [information] acted as a lawyer; (3) that the

[6] *Wheat*, 486 U.S. 153; United States v. Williams, 81 F.3d 1321 (4th Cir. 1996).
[7] *Id*.
[8] 33 F.3d 1507 (11th Cir. 1994).
[9] *See Williams*, 81 F.3d at 1324-25.
[10] Note, though simultaneous representation of multiple parties should be discouraged, multiple representation of a corporation and its employees is not prohibited. Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1980); *See* S.C. RULES OF PROF. CONDUCT R. 1.7 (Conflicts of Interest: Current Clients).

[information] relates to facts communicated for the purpose of securing a legal opinion, legal services, or assistance in legal proceedings; and (4) that the privilege has not been waived.[11] Significantly, however, the privilege is easily lost where the communication is disseminated or made in the presence of a third party.[12] The burden is on the party asserting the privilege to demonstrate that these elements are met.[13]

The waiver rule would stand as an almost insurmountable barrier to cooperation among defendants but for the joint defense rule. As early as 1871 a joint defense exception to the waiver rule was recognized "in the context of criminal co-defendants whose attorneys shared information in the course of devising a joint strategy for their clients' defense."[14] Under the joint defense rule, mere disclosure to a third party of privileged information does not result in waiver so long as the parties sharing information are linked by a common interest.[15] Instead, the consent of all parties who share the privilege is required to breach it.[16] Thus, counsel for co-defendants acting pursuant to a joint defense agreement may freely talk among themselves and share beneficial information in the formation of trial strategy without risk of the information being revealed to the government. Moreover, this non-waiver rule applies not only to information gained pursuant to the attorney client privilege, but also to work product materials shared among defendants.[17] While each attorney participating in the joint defense agreement does not represent every party thereto, each attorney still owes a duty of confidentiality to the parties to the agreement according to its terms.

Joint defense agreements are of particular importance in criminal health care cases because the investigation is often a lengthy and time-consuming process. It is not unusual for a pre-indictment investigation of a complex matter to take at least a year. The investigations are oftentimes document intensive and involve a tremendous amount of research and "on the ground" activity by defense counsel. A practical benefit of joint defense arrangements is they aid in keeping the expenditure of money, time and resources to a more manageable level. The joint defense agreement should allow independent counsel to work together and not duplicate efforts. In addition to the combination of resources, it is always beneficial to have multiple counsel share information, ideas and tasks to compete with the government's substantial resources. It is important when considering whether to enter into a joint defense agreement to fully advise the clients of all potential consequences of such an agreement. These agreements may be written or oral, but written agreements provide much better protection for the individual attorneys. Great care must be taken once defense counsel enters into an agreement so that

[11]United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 27-28 (1st Cir. 1989); Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co., 951 F.Supp. 679 (W.D.Mich. 1996) (elements of attorney-client privilege discussed in context of civil securities fraud case); In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986); United States v. Sawyer, 878 F.Supp. 295, 297 (D.Mass. 1989).

[12]United States v. Plache, 913 F.2d 1375 (9th Cir. 1990) (defendant in securities fraud prosecution waived attorney-client privilege by disclosing potentially protected statements to the federal grand jury).

[13]*Id*.

[14]In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129. United States v. Under Seal, 902 F.2d 244 (4th Cir. 1990) (citing Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822 (1871)).

[15]*See* Sheet Metal Workers Int'l. Assoc. v. Sweeney, 29 F.3d 120, 122 (4th Cir. 1994).

[16]*In re Grand Jury Subpoenas*, 902 F.2d 244, at 248.

[17]*See* Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572 (S.D.N.Y. 1960).

waiver issues are considered. It is essential for each individual attorney to completely understand the written agreement and the potential pitfalls of violating the agreement. Risks of entering into a joint defense agreement include the potential for a party to use privileged or confidential information to another party's disadvantage and the possibility that counsel could be subject to disqualification should the party determine to cooperate with the government.

Counsel should fully inform their clients regarding the nature of a proposed joint defense agreement, including the benefits and risks of entering into such an agreement. The joint defense agreement should be dated and written in clear language. Some of the provisions to be considered for inclusion therein are as follows:

- the parties have common interests;
- the purpose of the agreement is to promote adequate representation;
- identify the information that will be shared;
- no party shall reveal information subject to the agreement without the prior consent of all parties;
- any party may withdraw from the agreement on stated conditions, including,
    - that he or she notify all other parties in writing;
    - that he or she return any information received under the agreement;
- no attorney subject to the agreement shall be disqualified from examining any party to the agreement who testifies in any proceeding;
- documents and materials shared by the parties shall be appropriately identified as subject to the joint defense agreement;
- the parties may use any information provided by any party to the agreement who testifies in any proceeding in cross-examining the party;
- a party who withdraws from the agreement waives any privilege, confidentiality or conflict claims;
- the agreement covers all parties, their attorneys and agents; and,
- nothing in the agreement creates an attorney-client relationship between an attorney and a party is who not the attorney's client.[18]

[18] DAN K. WEBB, ROBERT W. TARUN, & STEVEN F. MOLO, CORPORATE INTERNAL INVESTIGATIONS §5.05 (Law Journal Seminars Press 2004) (1993); Joseph P. Griffith, Jr., Anthony Lake & Tom Dillard, Continuing Legal Education Lecture, *Top Ten Pitfalls Encountered in Internal Investigations* (Mar. 19, 2008).

The case of *United States v. Bay State Ambulance*,[19] provides a classic illustration not only of the need for a joint defense agreement, but how the privileges can be waived in the absence of client control. In *Bay State*, individual executive targets and the hospital obtained separate representation. The hospital's counsel, in producing documents in response to a government subpoena, requested that Mr. Felci forward to the hospital any documents that might be relevant. Unfortunately, Mr. Felci did not coordinate this production through his own attorney. In fact, Mr. Felci produced the documents to the hospital without even informing his attorney of what he was doing. Months later, after it was apparent that the produced documents were damaging to Mr. Felci, he attempted to argue that they were privileged since they had been transferred to hospital counsel pursuant to a joint defense. The court was unsympathetic and noted that (1) it was difficult to conceive how Mr. Felci could have believed them to part of his "joint defense" when he failed to even inform his own lawyer of either the documents existence or disclosure; and (2) Mr. Felci could not have expected them to remain confidential since he knew that the request for documents was inspired by the government's subpoena. On these grounds, the privilege was deemed waived.[20]

C. Voluntary Disclosure

A very difficult issue, which defense counsel will face immediately upon being retained, is the question of whether to voluntarily disclose information to the government about the entity or individual's activities. The Office of Inspector General (OIG) and the Department of Health and Human Services (HHS) have established a voluntary disclosure program protocol for entities to follow. The first program was developed in 1995 and has been supplemented with a new program and protocol, which was announced in October 1998.[21] Yet despite the Government's enthusiasm for the practice, there is much debate among health care practitioners as to the benefits of voluntary disclosure. Some practitioners believe voluntary disclosure is of great benefit to the entity. Others believe it is of great danger.

The government has moved to further incentivize self-disclosures in the recently passed Patient Protection and Affordable Care Act . This Act directs the Department of Health and Human Services along with the Office of the Inspector General to establish self-referral disclosure protocol (SRDP) for health care providers to self-disclose Stark violations and potential Stark violations.[22] The SRDP must be established by September 23, 2010.[23] In establishing SRDP, HHS and OIG must inform health care providers with "a specific person, official or office to whom such disclosure shall be made" and "instruction on the implication of the SRDP on corporate integrity agreements and corporate compliance agreements".[24] An important consideration for a health care provider weighing a self-disclosure under SRDP is the congressionally authorized reduction in financial penalties if the provider utilizes SRDP.[25]

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[19] 874 F.2d 20, 28 (1st Cir. 1989).
[20] *Id.*
[21] The protocol is available from the OIG/HHS website. Office of Inspector General Department of Health and Human Services, http://oig.hhs.gov/fraud/selfdisclosure.asp (last visited Aug. 26, 2010).
[22] Pub. L. No. 111-148 §6409, 124 Stat. 119, 654 (2010).
[23] *Id.*
[24] *Id.*
[25] *Id.*

Factors that must be considered in determining penalties include the "nature and extent of the improper or illegal practice, timeliness of such self-disclosure, cooperation in providing additional information related to the disclosure, and such other factors as the Secretary considers appropriate."[26]

Many factors must be carefully considered in determining whether or not to voluntarily disclose. If there are minor overpayments that have been received from governmental payors to which the entity is not entitled based on clerical errors, computer problems or other unintentional acts, there may be some benefits to voluntary disclosure. There are also benefits if clear intentional misconduct has occurred and the entity is simply trying to reduce its ultimate exposure. In between those two extremes, a multitude of more complicated questions about voluntary disclosure arise.

The first of the complicated questions, which must be addressed by the health care defense attorney, is whether or not the client is required to disclose pursuant to the criminal disclosure statute.[27] This statute applies to any health care provider or a beneficiary who:

> having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized.[28]

The Patient Protection and Affordable Care Act increases the risk of prosecution under this statute because the Act removed the intent requirement.[29] Ignoring the applicability of this statute can quickly complicate a defense by resulting in additional felony charges.

Another complicated disclosure issue is to whom such disclosures should be made. Some believe that the HHS/OIG, with its protocol in place, is the appropriate entity. Another school of thought is that disclosures should be made to the United States Attorney's Office instead of HHS/OIG, because the U.S. Attorney's Office has the ultimate decision-making authority. Regardless, if defense counsel determines that voluntary disclosure is beneficial, the HHS/OIG protocol should be carefully followed and each guideline of the protocol should be carefully considered.

Voluntary disclosure can provide health care defendants with a significant opportunity to reduce the penalties associated with a conviction or plea in certain cases. Where the proper

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[26] *Id.* at 655.
[27] 42 U.S.C. § 1320a-7b(a)(3).
[28] *Id.*
[29] 42 U.S.C. § 1320a-7b(h) (stating "Intent. With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section,")

conditions are satisfied, as much as a five point reduction in the "culpability score" under the Sentencing Guidelines may be obtained.[30] However, in order to qualify for the five point reduction, the disclosure must be made "(A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense."[31] Even failing these temporal requirements, an organization which fully cooperated with the government's investigation and "clearly demonstrated recognition and affirmative acceptance of responsibility" after learning of a government investigation may qualify for a two point reduction.[32]

The application notes to the guideline provide excellent insight into the actions required of the defendant organization. Timeliness is described in terms of being before, or contemporaneous with the initiation of the criminal investigation.[33] As for completeness of cooperation, "[a] prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the *individuals* responsible for the criminal conduct."[34] Thus, the government will often expect to see the cooperating organization ousting wrongdoers from within its ranks and into the arms of the law.[35]

Voluntary disclosure may serve at least one additional benefit. Cooperation negates the prospect of enhancement for obstruction. Under Section 8C2.5(e), a three point enhancement is added "[i]f the organization willfully obstructed or impeded, attempted to obstruct or impeded, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, with knowledge thereof, [and] failed to take reasonable steps to prevent such obstruction." Thus, the potential exists for as much as an eight point swing to occur in running the range between full cooperation and outright interference with the government.

D. Internal Investigations

Once corporate defense counsel is in place, an internal investigation of the allegations should immediately begin. In its simplest context, the goal of the investigation is clear – find the facts. The method by which the investigation is done is critical and must be undertaken with great care to protect the client. There are distinct benefits to having an attorney do the internal investigation rather than a non-attorney. The investigation will likely be more beneficial to the client if done by a knowledgeable defense attorney who is familiar with the issues at stake and the manner in which the government is operating their own investigation. Most importantly, an internal investigation conducted by outside defense counsel provides the protection afforded by the attorney work product and attorney client privileges.

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[30] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2009).
[31] *Id.*
[32] *Id.*
[33] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g), cmt. n. 12 (2009).
[34] *Id.* (emphasis added)
[35] *See* In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) (noting in prior history of case that corporation pled and "hung [employee] out to dry" by ceasing to pay for employees legal defense as part of its plea agreement).

Counsel conducting an internal investigation should seek a clear understanding of all pertinent issues and problems as soon as possible. Counsel should develop defined objectives and plans for the investigation, and have appropriate corporate management approve the same. Obviously, those individuals who are targets of the questioned conduct should play no role in this approval process or in the internal investigation other than to provide information. In large corporations, a special committee of individuals who have no involvement in the matter is often appointed to oversee internal investigations to avoid conflicts of interest. All employees who have knowledge of the allegations or access to relevant documents should be interviewed, and documents and electronic data must be preserved, reviewed and indexed (or bates stamped) for easy access. All notes and memorandums produced by counsel conducting the internal investigation should be clearly marked as attorney work product and attorney client privileged. A chronology of events should be drafted and continuously updated as facts are developed. A memorandum explaining the existence of the internal investigation, requesting full cooperation with counsel leading the same, and cautioning against the destruction of documents and relevant evidence should be distributed to company employees. In the event of a contemporaneous grand jury investigation, counsel should be involved in coordinating a response to grand jury subpoenas for documents and other evidence and in preparing witnesses for grand jury testimony. Counsel should develop appropriate protocols in the event that the government attempts to execute a search warrant during the course of the internal investigation.[36]

To avoid confusion and misunderstandings by corporate personnel, attorneys should be careful to inform employees that they represent the provider and they are not the employees' personal attorney. Counsel should also advise the employee that the attorney-client privilege is held by the organization. Counsel must also inform the employee that they have the right to choose not to talk to counsel (or to the government), and if the employee chooses to talk to counsel, he or she may have a personal attorney present. Counsel should memorialize in writing the oral warnings and information given to the employee in memorandums that are clearly marked "attorney work product." When government authorities or a grand jury are investigating the same matter which is the subject of the internal investigation, counsel should be particularly careful not to engage in misleading conduct or speech that might be construed as tampering with the witness in violation of the obstruction of justice or subornation of perjury statutes.[37] If possible, counsel should always have a second person present that can be a witness to the procedure followed and the conversation that occurs. It is generally not a good idea to tape record the conversation or ask the witness to sign the subsequent memorandum of the interview, because the memorandum then becomes the statement of that witness.[38] Even though the witnesses may be considered "white collar," counsel should deeply probe into difficult and sometimes unpleasant issues at the core of the investigation in a professional manner but with cautious skepticism. Counsel should attempt to test the veracity of witness statements and guard against accepting witness accounts without corroboration.

[36] *See supra* Chapter II.

[37] *See generally,* 18 U.S.C. §§ 1501–1521 (2006) (obstruction of justice statutes).

[38] The memorandum should be the impressions and recollections of the attorney and should state that it is privileged and contains mental impressions of the attorney so that it is privileged throughout the process.

Where the government or grand jury is undertaking an investigation, it is best for engaged attorneys to notify the authorities in writing of individuals and entities that are represented by counsel. Such written notification should request authorities to contact applicable counsel if they are interested in approaching a represented individual. This notice should prevent the authorities from contacting the clients directly in violation of ethical rules.[39] In the event the government has already contacted a client prior to such notice, a full debriefing should be conducted as soon as possible.

Should counsel conducting the internal investigation utilize expert witnesses or investigators, a written agreement with them should be executed. This agreement should include provisions noting that their services are being provided to develop attorney work product, to assist counsel in his efforts to render legal advice, and to assist attorney's preparations in anticipation of litigation. Any documents prepared by these individuals should be addressed to counsel leading the internal investigation.

During the internal investigation, privilege issues should be paramount in the defense attorney's mind. Potentially applicable privileges include attorney-client privilege, work product privilege, self-evaluation privilege and any Fifth Amendment protections. The very structure and scope of the internal investigation should be established with these privileges in mind.

The Supreme Court's decision in *Upjohn v. United States*[40] highlights the importance of selecting the right investigation methodology and the significance of the stakes in terms of the privilege. In *Upjohn*, a multi-national pharmaceutical corporation discovered that a foreign subsidiary had made an improper payment to "bribe" a foreign official.[41] Upon learning of this occurrence, the company's general legal counsel issued a questionnaire to all relevant managers as part of an internal investigation.[42] These questionnaires were returned to legal counsel and the company eventually made a voluntary disclosure to the IRS and Securities and Exchange Commission.[43] The IRS quickly launched its own investigation and subpoenaed the questionnaire results.[44] Upjohn objected on the ground of attorney-client privilege.[45] The Supreme Court was then asked to decide whether or not the company's own internal investigation waived the privilege since legal counsel spoke to middle and lower management as opposed to merely the corporation's leadership team.[46]

The Court began by noting that, though the attorney-client privilege was among the most sacrosanct, a split of authority had developed among the circuits when confronted with its application in corporate settings. A number of circuits restricted the privilege only to those

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[39] *See* S.C. RULES of PROF. CONDUCT R. 4.2, ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").
[40] 449 U.S. 383 (1981).
[41] *Id.* at 386.
[42] *Id.* at 386-87.
[43] *Id.* at 387.
[44] *Id.* at 387-88.
[45] *Id.* at 388.
[46] *Id.*

communications between legal counsel and a select "control group" of top-level corporate directors. Other circuits did not view interplay between legal counsel and "rank and file" employees as waiving the privilege by way of public disclosure. The Supreme Court adopted the more expansive view reasoning that it was essential for legal counsel to be able to gather information and communicate with all employees relevant to the issue at hand.[47] Thus, under *Upjohn*, an internal investigation does not necessarily waive the privilege so long as the legal counsel is acting in such a capacity and discusses the matter only with those employees necessary for the conduct of the investigation.[48]

Careful review of all documents is also necessary to determine and protect the various privileges of the client. It is likely that the provider represented by defense counsel will have had multiple attorneys representing it with regard to various matters. Thus, there will be privileged written and oral communications in almost every aspect of the investigation. These privileges will need to be vigorously asserted as the criminal health care defense attorney produces documents pursuant to government subpoenas. Counsel must take great care to protect these privileged documents, because accidental disclosure can be devastating. Even an inadvertent disclosure could constitute a "knowing and voluntary" waiver as to all communications regarding the same subject.[49] The defense attorney will likely be required to provide documents through a privilege log and also provide documents that have privileged material redacted.

Whether or not counsel should draft a written report summarizing the results of the internal investigation and/or making recommendations should be determined on a case-by-case basis. Corporate defense counsel should be aware that the drafting, presentation to a special committee, discussion of, and reliance upon such a report as a defense to civil health care fraud claims may cause a loss of its attorney-client and work product privileged status.[50]

E. Options in Dealing with Prosecutors

When a grand jury or government authorities are investigating allegations of criminal health care fraud, defense counsel must consider the options available to his individual or corporate client in dealing with the prosecutors.

With respect to an individual subject or target, counsel may want to consider opening a dialogue with the government to discuss his client's role in the matter under investigation in an effort to cooperate with the investigation, to allow authorities to assess his role in the activity, to mitigate possible sentencing, and/or to exonerate him and convince authorities not to pursue prosecution against him. Such an approach is usually accomplished through a "proffer" to the government. Counsel may offer to provide the prosecutors a verbal proffer or written proffer of the client's information. The more typical approach is to have the client proffer his information through an interview by the government. Such a client proffer should in many cases be conditioned upon a "proffer agreement" between the prosecutors and the client which sets forth the terms and conditions of the proffer. Prosecutors in most jurisdictions have a standard proffer

[47] *Id.* at 395.
[48] *Id*.
[49] In re Martin Marietta Corp., 856 F.2d 619 (4th Cir.1988).
[50] In re Perrigo Co., 128 F.3d 430 (6th Cir. 1997).

letter agreement that basically states that the client will not be prosecuted based on the statements made during the proffer except in the event the client is untruthful.[51] Prosecutors often reserve the right to make derivative use of information provided during a proffer. That is, they reserve the right to seek additional evidence in the case based upon the information gathered during the proffer. Such derivative evidence may be used to prosecute the client for criminal conduct. A client may also be subpoenaed to testify before a grand jury.

Depending upon the facts in each case, the prosecutor's options include:

- decline prosecution;
- provide the witness with informal or letter immunity;
- provide the witness with transactional immunity;
- provide the witness with statutory or use immunity;
- enter into a deferred prosecution or non-prosecution agreement;
- accept a guilty plea to a lesser charge;
- accept a guilty plea to less than all charges to limit client's prison exposure;
- accept a guilty plea to all charges with stipulations as to applicability of sentencing guidelines in order to limit client's prison exposure; or,
- accept a guilty plea with no conditions.

With respect to a corporate subject or target, counsel may similarly want to consider opening a dialogue with the government to discuss his client's role in the matter under investigation. On the federal level, the factors which guide a U.S. Attorney's or the Department of Justice's decision to prosecute a corporation are set forth in the U.S. Attorney's Manual at Section 9-27, as well as the Holder Memo set forth previously in Chapter V. There are meaningful incentives for a provider to conduct an internal investigation of possible wrongdoing, self-report the same to the government, and cooperate with authorities. Because a conviction can effectively kill a corporation and have adverse consequences on innocent shareholders, prosecutors are becoming more receptive to prosecuting the corporation's culpable individual employees/officers and resorting to deferred prosecution agreements[52] or non-prosecution agreements with respect to corporate subjects and targets. Convictions of the entity, in the health care arena, can result in exclusions from federally funded programs which are the "life blood" of the entity's existence. Such agreements usually require cooperation from the corporation in the form of a waiver of attorney-client and attorney work product privileges, and a monetary penalty may be imposed. In some cases of widespread corporate misconduct, additional corporate

[51] A typical Proffer Letter Agreement is set forth at Appendix C.
[52] A sample Deferred Prosecution Agreement is set forth at Appendix D.

integrity agreements are included which provide for the company to hire an independent consultant to monitor its activities to insure the company does not repeat its wayward conduct.

F. General Defense Strategies: Statutory Exemptions

Some health care statutes contain specific statutory exemptions and exclusions. Though these are unavailable with respect to many charges such as mail fraud, wire fraud, and money laundering seen in health care cases, the defense practitioner should be alert for such defenses. For instance, the Anti-Kickback and Stark Statutes and regulations provide a number of "safe harbors." These safe harbors are addressed in Chapter V(B) Anti-Kickback and Chapter V(C) Stark.

Where available, these may provide shelter. However, the application of each exclusion or safe harbor typically turns on the establishment of a number of complicated and technical elements. Thus, counsel experienced with the intricacies of health care fraud defense should only undertake evaluations of the availability of such defenses.

Recent FCA Developments: *Universal Health Services v. US ex rel. Escobar*

SC Bar Convention
Health Law Section
January 19, 2018
Beth Warren, AUSA

Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S.Ct. 1989 (2016)

- Qui tam alleged mental health services were delivered in violation of state regulations for supervision and licensing
- Dismissed by district court on grounds relator did not allege violation of any "condition of payment;" reversed by 1st Circuit.
- Supreme Court granted *certiorari* to resolve circuit split on "implied false certification" theory of FCA liability
- Implied false certification: where defendant seeks payment while in violation of a material payment requirement, but where no explicitly false representation is made on the claim for payment

Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S.Ct. 1989 (2016)

Holding: Implied certification liability is not limited to violations of conditions of payment

Court endorsed "implied false certification" ***at least*** where

1. "the claim does not merely request payment, but also makes **specific representations** about the goods and services provided."
    a. *"Specific Representation" is construed broadly and is satisfied by the payment codes and NPI numbers found on a claim form*
2. the defendant's **failure to disclose** noncompliance with material requirement renders those representations "**misleading half-truths**."
    a. *"[M]isleading half-truths" – must be a nexus between the representation and the undisclosed violation*

Escobar and Materiality

"[W]hen evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."

Escobar and Materiality

- Court emphasized the materiality standard is “demanding” as the “False Claims Act is not an all-purpose antifraud statute, or vehicle for punishing garden-variety breaches of contract or regulatory violations.”
- Misrepresentation is not material merely because the Government had the “option to decline to pay,” or the underlying requirement was labeled a “condition of payment.”
- Court encouraged courts to take a more holistic approach to determining materiality.

Escobar and Materiality

The Court's "natural tendency test" requires either that

1. a reasonable person would attach importance to the violation, or
2. defendant knew or had reason to know the Government would attach importance to the violation

Court identified several non-exclusive factors for courts to consider

1. Whether Congress labeled requirement as a "condition of payment"
2. Whether the requirement goes to the "essence of the bargain"
3. Whether the scope of the violation was significant or "minor and insubstantial."
4. What actions the Government took in response to the same or similar violations when it had actual knowledge of such violations

Escobar and Materiality

- Implied false certification claims require a showing that the "defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Id.*at 1996.
- Court may have expanded a knowledge requirement to materiality
- If equivalent to false claims knowledge, reckless disregard or deliberate ignorance satisfies knowledge requirement
- This requirement appears limited to implied false certification claims

Escobar and Implied False Certification

- *Escobar*'s discussion of falsity was limited to implied false certifications and did not address the scope of other FCA falsity theories such as
  - *Factual falsity* – incorrect description of goods and services
  - *Express false certifications* – claim includes false express certification of compliance with legal requirement
  - *Fraud in the inducement* – where the underlying contract or benefit was obtained under false pretenses
  - *Worthless services* – where the goods or services provided were so deficient as to be effectively worthless

Escobar in the Fourth Circuit: *US v. Triple Canopy*

- United States intervened in qui tam alleging Triple Canopy, a contractor providing security services in Iraq, violated FCA by falsifying marksmanship records of its guards who were unable to meet the requirements, then charging the US for their labor.
- District court dismissed suit, declining "recognition of an implied certification theory of liability." *United States ex rel. Badr v. Triple Canopy, Inc.*, 950 F.Supp2d 888 (E.D. Va. 2013).
- Fourth Circuit reversed, holding implied certification can be basis for FCA claim
- Supreme Court accepted certiorari, in light of *Escobar*, vacated and remanded

Escobar in the Fourth Circuit: *US v. Triple Canopy*

- On remand the Fourth Circuit determined that *Escobar* did not alter its earlier conclusion that the US stated a claim under the FCA and again reversed the district court and remanded for further proceedings. *US v. Triple Canopy*, 857 F.3d 174, 177 (2017).
- Court did not accept defendant's interpretation that *Escobar* narrowed the falsity requirements but instead stated the "half-truth" discussed in *Escobar* is present in this case.
- Neither did *Escobar* alter its materiality ruling. Triple Canopy's omission was "material for two reasons: common sense and Triple Canopy's own action in covering up the noncompliance." *Id.* at 178.
- "Guns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight." *Id.* at 179.
- The fact the US did not renew Triple Canopy's contract and intervened in the qui tam also supported materiality

Escobar in the Fourth Circuit: *US v. Palin*

- Criminal case where the husband and wife defendants were convicted of healthcare fraud related to billing Medicare for unnecessary urinary drug screen tests. *U.S. v. Palin*, 2017 WL 4871381 (4th Cir. Oct. 30, 2017).
- Record established insurers would not have paid claim had they known the tests were not medically necessary.
- Fourth Circuit questioned whether *Escobar* materiality standard would apply in criminal health care fraud cases

> "We do not believe the Supreme Court intended to broadly 'overrule' materiality standards that had previously applied in the context of criminal fraud. And we doubt the court's examination of how materiality applies under 'implied false certification' FCA cases transfers to all cases charging fraud, or even all cases charging health care fraud." *Id.* at *3.

Escobar in Fourth Circuit: District Decisions

- *United States ex rel. Oberg v. Pa. Higher Education Assistance Agency*, 2017 WL 1758074 (E.D. Va. May 3, 2017): Court held that *Escobar*'s materiality guidance did not constitute a departure from already existing law and as the court's prior ruling held that the relator's complaint satisfied the pleading requirements for an FCA claim there was no basis to reconsider that ruling.
- *United States v. Lang*, 2017 WL 1449674 (E.D.N.C. Apr. 21,2017) The court grants the defendant's motion to dismiss the Government's complaint, holding "the government has failed to identify any specific representations made by defendant containing half-truths which were presented when defendant made such demand."

Escobar in Fourth Circuit: District Decisions

- *United States ex rel. Grant v. United Airlines, Inc.*, 2016 WL 6823321 (D.S.C. Nov. 18, 2016) the relator's complaint, alleging that the defendant violated various contract requirements when repairing military aircraft jets, fails to satisfy the pleading requirements of FRCP 9(b) and implied false certification under *Escobar* as it alleges only a general scheme without any supporting facts.

Escobar in Fourth Circuit: District Decisions

- United States ex rel. Beauchamp v. Academi Training Center, Inc., 220 F. Supp.3d 676 (E.D. Va. 2016) The relator's declined qui tam action alleges that the defendant billed the State Department for security services in Afghanistan when its security personnel had not complied with the weapons qualification requirement in its contract. The defendant moved for judgment on the pleadings asserting that the complaint did not set forth an implied certification claim under *Escobar*. Court rules that the allegations in the complaint are consistent with the implied certification requirements of *Escobar*. The court says that billing for services of unqualified personnel was a specific misrepresentation to the Government. As to the materiality of the misrepresentation, the court says that:

"it strains credulity to argue that the government's payment decision would not have been affected had the government known that the [security personnel] responsible for protecting U.S. officials in Afghanistan had not fulfilled the weapons qualification requirement."