You're A Target. We Can Help.

Health care providers face more scrutiny than ever before. Government investigations contain numerous pitfalls for the unwary. Learn how we work with health care providers to protect their businesses. You're a target. Ice Miller can help.

Provider Beware – The Collateral Consequences of a Guilty Plea
In this guide, you will find information on consequences including:

- Exclusion
- Civil Monetary Penalties
- Medicare and Medicaid Enrollment
- Professional Licensure
- Tax Consequences
- Collateral Civil Lawsuits
- Immigration and Nationality Problems
- Hospital Medical Staff Membership and Privileges
- Private Payers

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Provider Beware –
The Collateral Consequences of a Guilty Plea

You are a health care provider under investigation for allegedly prescribing controlled substances without a legitimate medical purpose. Your practice regularly bills Medicare, Medicaid, and other third-party payers. Your office has been searched by law enforcement, and you have been forced to respond to several subpoenas. The process has already been lengthy and expensive. You face the expense, humiliation, and stress of criminal charges and a trial.

The prosecutor offers you a deal. He will accept a guilty plea to a single count of improperly prescribing a controlled substance to a single patient. He will even recommend probation. You cannot wait to get the ordeal over with and the possibility of a no-jail outcome seems like the best you can hope for. But have you and your lawyer considered all of the potential consequences of pleading guilty?

A plea of guilty to a criminal offense is a judicial admission of the essential elements of that offense. In other words, a plea will establish that you prescribed or dispensed a controlled substance to a particular patient on a particular date, without a legitimate medical purpose. Besides criminal fines and jail time, there are collateral consequences to a guilty plea that you should consider carefully. To a health care provider, these collateral consequences are sometimes more serious than fines or even jail.
Exclusion

The most serious collateral consequence is an exclusion from participation in federal and state health care programs such as Medicare and Medicaid. Exclusion is an administrative action undertaken by the Office of Inspector General (OIG) of the United States Department of Health & Human Services. Certain criminal convictions such as health care fraud or patient abuse will result in a “mandatory exclusion” of at least five years. However, OIG has the discretion to exclude providers for all kinds of other criminal offenses, including misdemeanor convictions relating to controlled substances. This is known as a “permissive exclusion.” For a health care provider, exclusion is a professional “death penalty” because, in many instances, the practical effect of exclusion is to preclude employment or medical staff membership of the excluded individual in any capacity by a health care provider that receives reimbursement, indirectly or directly, from a federal health care program.

Civil Monetary Penalties

The OIG can also impose civil monetary penalties against any person who submits false claims to Medicare or Medicaid, or causes false claims to be submitted to these programs. Your guilty plea will establish that you prescribed or dispensed a controlled substance to a particular patient on a particular date, without a legitimate medical purpose. If the patient used Medicare or Medicaid to cover the prescription drugs, then the OIG might conclude that you caused false claims to be submitted to Medicare and Medicaid. As a result, OIG could seek to impose civil monetary penalties against you. These civil monetary penalties can be substantial – $10,000 for each item or service improperly claimed and an assessment of up to three times the amount improperly claimed.

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**Medicare and Medicaid Enrollment**

Even if you avoid exclusion and civil monetary penalties, Medicare and Medicaid regulations are full of traps for the unwary. Your guilty plea could lead to the loss of your Medicaid provider agreement. State Medicaid programs must terminate the Medicaid provider agreement of a provider who is convicted of any criminal activity materially related to the Medicare or Medicaid program. Thus, if there is some common sense nexus between the conviction and the Medicaid or Medicare program, your Medicaid provider agreement could be terminated. Medicaid programs also have the discretion to terminate the provider agreement of any provider who prescribes services that are not medically necessary.

The termination of your Medicaid provider agreement could lead to the revocation of your Medicare billing privileges. Medicare can revoke the billing privileges of a provider whose Medicaid provider agreement has been terminated. Upon doing so, Medicare will impose a re-enrollment ban of at least one year. A health care provider is also required to report “adverse legal actions” to Medicare within thirty days. In our hypothetical, this would include both the guilty plea and the subsequent termination of the Medicaid provider agreement. The failure to report these adverse actions is also grounds for revoking Medicare billing privileges.

**Professional Licensure**

Another collateral consequence of a guilty plea, even to a misdemeanor, is disciplinary action against your license to practice medicine in any state in which you hold a license. Most states allow for disciplinary sanctions against the licensed provider, if after a hearing, the licensing authority finds that the acts from which the conviction resulted have a direct bearing on the physician’s ability to continue to practice competently. Moreover, many states allow law enforcement, including the office of the attorney general which prosecutes licensing violations, access to databases that monitor your controlled substance prescribing practices. Such review could lead to licensing charges beyond those pursued criminally or charges against your license while the criminal investigation is ongoing. Disciplinary action could include revocation, suspension, or probation to name a few. Even if you seem to have escaped the licensing board’s wrath initially, you will most likely need to self-report the plea at license renewal.
**Tax Consequences**

Any white-collar criminal defendant considering a plea of guilty to a criminal charge should also weigh the tax consequences involving money required to be paid under the plea agreement. The hard and fast rule is that a fine, criminal monetary penalty, or forfeiture paid to the government is not a deductible expense. There is a split of authority on the deductibility of court-imposed restitution. Since restitution is not considered a criminal penalty, but rather a reimbursement of loss paid directly to the victim, amounts paid as restitution are sometimes allowed as tax deductions.

The analysis may turn on complex issues such as whether payments were incurred in a trade or business, as opposed to losses incurred in a transaction entered into for profit. This makes the early involvement of the provider’s tax return preparer a must. The deductibility of attorney fees incurred in defense of criminal investigations and prosecutions is even more unsettled. The dividing line sometimes turns on such minutiae as whether the underlying conduct was business-related (such as falsification of a company record) or personal (such as embezzlement from one’s employer).

**Collateral Civil Lawsuits**

In addition to the ever-present threat of malpractice liability, a guilty plea may expose you to other private civil lawsuits. Indiana and Illinois are among 17 states that have enacted versions of the Model Drug Dealer Liability Act. Under the model law, an “illegal drug” is any drug that is illegal to distribute under state law. A person may be sued if he or she knowingly distributed, or knowingly participated in the chain of distribution of, an illegal drug that was actually used by the drug user. Suit may be brought by family members of the drug user, individuals exposed to illegal drugs in utero, an employer of the drug user, and various entities that fund treatment programs or otherwise expend money on behalf of the drug user. Suit may also be maintained by “a person injured as a result of the willful, reckless, or negligent actions of an individual drug user.” Under limited circumstances, even the drug user may sue. Plaintiffs need not prove that the drug caused harm.

The statute also prohibits a third party (read: “insurer”) from defending the action or indemnifying for damages. Since the cause of action belongs to the individual damaged, the prosecutor cannot waive or resolve this potential liability as part of a plea agreement.
Immigration and Nationality Problems

If you are not a United States citizen but hold permanent resident status, a criminal conviction presents special complications. In any of the following circumstances, for example, a conviction could render you deportable:

1. Consider a provider convicted of unlawful drug distribution, based upon improper prescribing of a controlled substance. Such a conviction is a “violation relating to a controlled substance.”
2. If the provider billed the Medicare or Medicaid program for the patient encounter that resulted in the writing of the prescription, then the conviction might be for program fraud. In that circumstance, the conviction likely constitutes a “crime involving moral turpitude” (CIMT) if the maximum sentence that could have been imposed is one year or longer.
3. Drug trafficking, and fraud crimes where the total loss is greater than $10,000, are also classified as “aggravated felonies”.

Entry into a deferred prosecution agreement does not automatically solve the “conviction” problem. A deferred prosecution agreement still constitutes a conviction if the defendant in the agreement admits “sufficient facts to warrant a finding of guilt.” A plea to a “misdemeanor” does not automatically solve the CIMT problem either. In Indiana and under federal law, the maximum misdemeanor sentence is one year, which triggers CIMT status. However, in Illinois and Ohio, the maximum misdemeanor sentence is less than one year.

While the immigration laws do provide some limited relief for some in these and similar circumstances, there is no substitute for a thorough examination of the immigration consequences of any plea of guilty, well before any decision is made.
**Hospital Medical Staff Membership and Privileges**

Most hospital medical staff bylaws require members to notify the medical staff leaders if a criminal investigation is pending or an arrest occurs. Many times the investigation or arrest has been widely publicized and a peer review committee of the medical staff may ask you to appear before them so that they can ascertain whether the conduct under investigation affects your clinical or professional competence. Even if you escape scrutiny initially from the medical staff, it is highly likely that the renewal application will have a question intended to catch such information. It is important that you carefully review any renewal applications to ensure that the questions are candidly answered because providing false or omitted material information at many hospitals and surgery centers is grounds to terminate membership and privileges.

**Private Payers**

Finally, a careful review of your provider agreements with private payers is necessary. You may be required to self-report even an investigation. In addition, if you lose your Medicare or Medicaid billing privileges, you will likely lose your provider agreements with other third-party payers. A standard condition of credentialing with third-party payers is the ability to participate in Medicare and Medicaid. Thus, the revocation of Medicare or Medicaid billing privileges can trigger the loss of provider agreements with other payers.
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Navigating the criminal justice system is only one of the challenges faced by a health care provider under investigation by law enforcement. The regulatory landscape of healthcare also contains numerous traps for the unwary. Navigating these minefields requires counsel knowledgeable about criminal law, as well as the regulatory programs within which the health care provider furnished services.

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