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'And the Hits Just Keep on Coming' — The Collateral Consequences of a Criminal Conviction for Health Care Professionals

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A defense attorney represents a physician under investigation for allegedly prescribing controlled substances without a legitimate medical purpose. His medical practice regularly bills Medicare, Medicaid, and other third-party payers, and his patients use Medicare and Medicaid to cover their prescription drugs. His office has been searched by law enforcement and he has been forced to respond to several subpoenas. The process has already been lengthy and expensive.

The prosecutor's case is thin. Although the government's expert questions the documentation of medical necessity in several patient charts, some of those patients insist that their symptoms were real and that they needed the medication prescribed. After two years of investigation, things seem to be at a stalemate. The client faces the expense, humiliation, and stress of criminal charges and a trial.

Out of nowhere, the prosecutor offers the client 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. The client cannot wait to get the ordeal over with. The possibility of a no-jail outcome seems like the best the client can hope for. But has the client considered all of the potential consequences of pleading guilty?

For a health care professional, the collateral consequences of a criminal conviction go beyond licensure problems. These collateral consequences can be more serious than fines and perhaps as serious as prison. As a practical matter, the collateral consequences can effectively prevent a defendant from earning a living in the health care industry. This article explores the collateral consequences of a criminal conviction for health care professionals so that the defense attorney can advise the client of all the potential consequences of a plea.

Exclusion

For a health care professional, the most serious collateral consequence of a conviction is likely to be "exclusion." In this context, exclusion refers to an administrative action undertaken by the Office of Inspector General (OIG) of the U.S. Department of Health & Human Services. OIG has the authority to exclude individuals and entities from participation in federal health care programs when those individuals and entities have engaged in certain kinds of misconduct. Federal health care programs include Medicare and Medicaid.[1]

Medicare is the health insurance program for people age 65 or older, people under age 65 with certain disabilities, and people of all ages with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a kidney transplant). The program is funded by the federal government and administered by the Centers for Medicare and Medicaid Services (CMS).

Medicaid provides health insurance to low-income adults, children, pregnant women, and people with disabilities. The Medicaid program is administered by the states and jointly funded by the states and the federal government.

Exclusion has serious consequences for anyone employed in the health care industry. This includes not only licensed health care providers

such as physicians and nurses, but business executives, accountants, administrators, lawyers, and just about anyone employed by an entity that receives reimbursement from federal and state health care programs such as Medicare and Medicaid. According to the OIG, the "practical effect of an OIG exclusion is to preclude employment of the excluded individual in any capacity by a health care provider that receives reimbursement, indirectly or directly, from a federal health care program."M[2] As a result, exclusion is often referred to as a "professional death penalty" for a health care provider.

For certain criminal convictions, OIG is required to exclude an individual for at least five years. These are known as "mandatory exclusions." OIG also has the discretion to exclude individuals for certain other types of criminal offenses, including misdemeanor convictions relating to controlled substances. These are known as "permissive exclusions."

1. Mandatory Exclusions

The following convictions will result in mandatory exclusion for a minimum of five years:

- Conviction related to the delivery of an item or service under Medicare or Medicaid, including the performance of management or administrative services relating to the delivery of items or services under such programs.
- Conviction relating to patient abuse or neglect in connection with the delivery of a health care item or service.
- Felony conviction relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct (i) in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of items or services or (ii) with respect to any act or omission in a health care program (other than Medicare or Medicaid) that is financed in whole or in part, by any federal, state, or local government agency.
- Felony conviction relating to controlled substances.[3]

A thorough analysis of the facts and the law is required to determine whether a conviction has the potential to result in exclusion. Practically any offense could trigger exclusion depending upon the underlying facts. For example, a criminal conviction is considered "related to the delivery of a health care item or service" when there is a "common-sense connection" between the underlying facts and circumstances of the offense and the delivery of health care items or services to individuals for their health care needs.[4] Thus, the following convictions have resulted in mandatory exclusion:

- Physician's felony conviction for wire fraud for making materially false or misleading statements about the efficacy of a prescription drug.[5]
- Pharmacy employee's theft of money from the evening deposits of the pharmacy.[6]
- Pharmacist's theft of drugs from his employer for his personal use.[7]
- Nurse administrator's felony conviction for fraudulently opening credit card account in the name of home health agency.[8]
- Corporation's misdemeanor conviction for failure to report elder abuse at a nursing facility.[9]

The minimum length of a mandatory exclusion is five years.[10] However, if certain aggravating factors are present (e.g., a loss greater than $5,000), OIG has the discretion to impose an exclusion longer than five years.[11] Additionally, a conviction on two occasions of mandatory exclusion offenses will result in exclusion for a minimum of 10 years.[12] Conviction on three or more occasions of mandatory exclusion offenses results in permanent exclusion.[13]

2. Permissive Exclusions

OIG's permissive exclusion authority is broad. There are at least 16 grounds for a permissive exclusion, and not all of them are related to a criminal conviction. The following criminal convictions can give rise to a permissive exclusion for a minimum period of three years:

- Misdemeanor conviction relating to health care fraud.[14]
- Conviction relating to fraud in nonhealth care programs operated by or financed by, in whole or in part, any federal, state, or local government agency.[15]
- Conviction relating to obstruction of a health care fraud investigation.[16]
- Misdemeanor conviction for controlled substances.[17]

Even if a defendant is convicted of an offense that is not on its face grounds for a permissive exclusion, counsel should consider whether the underlying facts might be grounds for exclusion. For example, the following conduct can give rise to a permissive exclusion regardless of whether the individual has been convicted of a criminal offense:

- Claims for excessive charges, unnecessary services or services that fail to meet professionally recognized standards of health care — minimum one year.[18]
- Fraud, kickbacks, and other prohibited activities — no minimum period.[19]
- Making false statements or misrepresentations of material fact — no minimum period.[20]

3. The Effect of Exclusion

The effect of exclusion is that no payment will be made by Medicare, Medicaid, or any other federal health care programs for (1) any item or service furnished by an excluded individual or entity, or (2) at the medical direction or on the prescription of a physician or other authorized individual who is excluded.[21] The exclusion applies even if the excluded individual does not furnish direct care to a patient. OIG has provided examples of the types of items and services that are reimbursed by federal health care programs when, if furnished by an excluded individual, violates an OIG exclusion. A few examples will demonstrate the breadth of the exclusion:

- Services performed by an excluded administrator, billing agent, accountant, claims processor, or utilization reviewer that are related to and reimbursed, directly or indirectly, by a federal health care program.
- Administrative services, including the processing of claims for payment, performed for a Medicare intermediary or carrier, or a Medicare fiscal agent, by an excluded individual.
- Services performed by excluded nurses, technicians or other excluded individuals who work for a hospital, nursing home, home health agency, or physician practice, when such services are related to administrative duties, preparation of surgical trays, or review of treatment plans, if such services are reimbursed directly or indirectly by a federal health care program, even if the individuals do not furnish direct care.[22]

In practice, until the exclusion is lifted, the excluded individual will probably be unable to work in the health care industry.

Additionally, the excluded individual will be placed on the Excluded Parties List at the General Services Administration. This may make it difficult for the excluded individual to work for any company, regardless of industry, that depends upon federal contracts. As a result, defense counsel and their clients need to carefully consider whether a conviction will trigger mandatory or permissive exclusion.

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.[23] The defendant's guilty plea in the hypothetical will establish that the defendant prescribed or dispensed a controlled substance to a particular patient on a particular date, without a legitimate medical purpose. If the patient or patients used Medicare or Medicaid to cover the prescription drugs, then the defendant will have caused false claims to be submitted to Medicare and Medicaid. As a result, OIG could seek to impose civil monetary penalties against the defendant. These civil monetary penalties are substantial — $10,000 for each item or service improperly claimed and an assessment of up to three times the amount improperly claimed.[24]

Medicare and Medicaid Enrollment

Even if the defendant avoids exclusion and civil monetary penalties, the Medicare and Medicaid enrollment regulations are full of traps for the unwary. In some ways, the enrollment regulations do indirectly what exclusion does directly; namely, bar a defendant from participating in Medicare and Medicaid based upon certain types of criminal convictions.

1. Medicare Enrollment

To receive payment for services provided to Medicare beneficiaries, physicians and other health care providers are required to enroll in Medicare. Even health care providers who do not receive payment for services might also enroll in Medicare in order to order or certify items or services for Medicare beneficiaries. After enrolling in Medicare, providers undergo a revalidation process every five years.

If a health care provider no longer meets Medicare enrollment requirements, CMS is authorized to revoke the provider's billing privileges.[25] Since Medicare is the single largest health care payer in the country, and often a health care provider's largest source of revenue, the loss of Medicare billing privileges can be catastrophic. The loss of billing privileges can also create a host of other regulatory problems for a provider such as loss of Medicaid billing privileges or private insurance contracts.

Because a provider's criminal history is relevant to enrollment and revalidation, defense counsel should be aware of two of the enrollment requirements.

First, effective Feb. 3, 2015, CMS expanded the instances in which a felony conviction can serve as the basis for denial or revocation of Medicare enrollment. CMS can revoke the billing privileges of any provider who, within the 10 years preceding enrollment or revalidation of enrollment, has been convicted of a federal or state felony offense that CMS has determined "is detrimental to the best interests of the Medicare program and its beneficiaries."[26] The phrase "detrimental to the best interests" is undefined. This leaves CMS with a tremendous amount of discretion in enforcing the regulation.

At a minimum, certain offenses are detrimental per se and are set forth at 42 C.F.R. § 424.530. The offenses that can lead to denial or revocation of enrollment include (but are not limited to) the following:

- Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
- Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
- Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
- Any felonies that would result in mandatory exclusion.[27]

Clearly, the offenses leading to revocation of enrollment are broader than the offenses that give rise to exclusion. In fact, in commentary accompanying the regulations, CMS declined to automatically exclude from the purview of the rule felonies relating to drugs, alcohol, or traffic violations.[28] The agency wrote: "We do not believe that felonies relating to drugs, alcohol, or traffic violations cannot be detrimental to the best interest of Medicare beneficiaries, and thus should be automatically excluded from the purview of [the rule]."[29] Thus, even felonies relating to drugs, alcohol, or traffic violations can lead to revocation of enrollment.

For example, CMS revoked the Medicare billing privileges of a physician who pled guilty to a felony charge of assault in the second degree.[30] The physician, who was intoxicated at the time, was driving a car that collided with another vehicle, causing injuries. CMS revoked the physician's billing privileges on grounds, inter alia, that the physician had been convicted of a felony detrimental to the Medicare program and its beneficiaries. The physician appealed, arguing in part that the crime is not one contemplated to be detrimental to the best interests of the Medicare program and its beneficiaries. The administrative law judge (ALJ) affirmed the revocation. The ALJ held in part that the regulation expressly deemed a felony conviction for assault as detrimental per se to the Medicare program and its beneficiaries. In dicta, the ALJ opined that even in the absence of a regulation that expressly deemed the conviction as detrimental per se, the ALJ would independently reach the same conclusion:

> Even if the regulations did not direct me to conclude that petitioner's assault offense is detrimental per se to the Medicare program and its beneficiaries, I would independently make this conclusion based on the facts of this case. Driving a motor vehicle when intoxicated is a threat to public safety and petitioner's conduct resulted in injury to another person. The State [Medical] Board concluded that petitioner's offense was a crime involving moral turpitude. … I agree. Medicare program beneficiaries deserve to receive care from physicians who exercise good judgment, both personally and professionally.[31]

Thus, while a felony conviction is always a serious matter, licensed health care professionals who are enrolled in the Medicare program or individuals who might need to enroll in the Medicare program in the future (a medical student for example), risk having their enrollment terminated or denied depending upon the conviction. Given the breadth of the offenses that can trigger revocation or denial, even offenses that seemingly have nothing to do with the provision of health care may cause significant problems for health care providers.

2. Medicare reporting obligation.

The second requirement defense attorneys should be familiar with is the reporting obligation in the enrollment regulations. A health care provider who is enrolled in the Medicare program is required to report "adverse legal actions" to CMS within 30 days.[32] Failure to report an adverse legal action is a basis, standing alone, for revoking Medicare billing privileges.[33]

Unfortunately, the regulations do not define the phrase "adverse legal action." Decisions of the Departmental Appeals Board (DAB) of the U.S. Department of Health & Human Services have interpreted the phrase broadly. At least two decisions of the DAB have found that the phrase

refers to "some legal action or action pursuant to or under color of law that is hostile or contrary to the interest, concern, or position of one against whom the action was taken."[34] One decision determined that the purpose of the section is to "provide CMS with information about adverse legal actions that CMS has determined are relevant to evaluating whether a supplier should continue to participate in Medicare."[35]

At a minimum, adverse legal action includes the felony offenses described in 42 C.F.R. § 424.530, as CMS has determined these offenses to be detrimental per se to the best interests of the Medicare program and its beneficiaries.

The Medicare enrollment application also requires the disclosure of "Final Adverse Legal Actions/Convictions." The list of convictions that have to be reported is broad and includes certain categories of misdemeanors. The enrollment application requires the enrollee to report the following convictions:

- The provider or supplier … was, within the last 10 years preceding enrollment or revalidation of enrollment, convicted of a federal or state felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. Offenses include: Felony crimes against persons and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions; financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversion; any felony that placed the Medicare program or its beneficiaries at immediate risk (such as a malpractice suit that results in a conviction of criminal neglect or misconduct); and any felonies that would result in a mandatory exclusion.
- Any misdemeanor conviction, under federal or state law, related to (a) delivery of an item or service under Medicare or a state health care program, or (b) the abuse or neglect of a patient in connection with the delivery of a health care item or service.
- Any misdemeanor conviction, under federal or state law, related to theft, fraud, embezzlement, breach of fiduciary duty, or other financial misconduct in connection with the delivery of a health care item or service.
- Any felony or misdemeanor conviction, under federal or state law, relating to the interference with or obstruction of any investigation into any criminal offense in 42 C.F.R. § 1001.101 or 1001.201.
- Any felony and misdemeanor conviction, under federal or state law, relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Given the breadth of the reporting requirement, and the consequences of not reporting in a timely fashion, defense counsel and the client need to consider — in advance of any plea — whether a conviction is reportable.

3. Medicaid Enrollment

Even if the defendant avoids termination from the Medicare program, the guilty plea could lead to the loss of the defendant's Medicaid provider agreement. In Ohio, for example, the Medicaid program is required to terminate the Medicaid provider agreement of a provider who is convicted of any criminal activity materially related to the Medicare or Medicaid program.[36] Again, the phrase "materially related" is undefined. Presumably, the Ohio Medicaid program would interpret the regulation broadly. Thus, if some common sense nexus exists between the conviction and the Medicaid or Medicare program, the defendant's Medicaid provider agreement could be terminated. The Ohio Medicaid program also has the discretion to terminate the provider agreement of any provider who prescribes services that are not medically necessary.[37]

Again, the defendant's guilty plea in the hypothetical will establish that the defendant prescribed or dispensed a controlled substance to a particular patient on a particular date, without a legitimate medical purpose. If the patient or patients used Medicaid to cover the prescription drugs, then the defendant arguably prescribed a service that was not medically necessary. Likewise, the conviction arguably constitutes criminal activity "materially related" to the Medicaid program. In either instance, the defendant could face the termination of his Medicaid provider agreement. Additionally, the defendant may be required to report the conviction to the Medicaid program in the state where the defendant practices.

The termination of the defendant's Medicaid provider agreement could, in turn, lead to the revocation of the defendant's Medicare billing privileges. Medicare can revoke the billing privileges of a provider whose Medicaid provider agreement has been terminated.[38] Like the conviction itself, there is no hiding the Medicaid termination from Medicare, as the termination is an "adverse legal action" that has to be reported to Medicare within 30 days.

Private Payers

If a health care provider loses his Medicare or Medicaid billing privileges, then he will likely lose his 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 will trigger the loss of provider agreements with other payers.

Even if the defendant maintains his Medicare or Medicaid billing privileges, upon learning of a conviction a third-party payer may terminate the defendant from the payer's insurance panel.

Professional Licensure

Another collateral consequence of a guilty plea, even to a misdemeanor, is disciplinary action against the defendant's license to practice health care in any state in which the defendant holds 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 licensee'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 a physician's controlled substance prescribing practices. Such review could lead to licensing charges beyond those pursued criminally or charges against the defendant's license while the criminal investigation is ongoing. Disciplinary action could include revocation, suspension or probation, to name a few. Even if the defendant escapes the licensing board's wrath initially, the defendant will most likely need to self-report the plea at license renewal.

Hospital Medical Staff Membership and Privileges

Most physicians maintain clinical privileges on the medical staff of one or more hospitals. For example, an internist or family physician might be self-employed and practice in an office setting. However, he or she will sometimes admit patients to a hospital or treat patients who have been admitted to a hospital. Some physicians, such as surgeons, anesthesiologists, or radiologists, practice primarily or exclusively in a hospital setting. As a result, these physicians have to maintain clinical privileges at hospitals where they practice. Dentists and psychologists might also hold clinical privileges at a hospital. The loss of privileges can have a devastating effect on a health care provider's ability to practice medicine at all.

The criteria for granting and maintaining privileges will typically be located in a hospital's medical staff bylaws. A physician's criminal history (if any) is usually one of the criteria the hospital evaluates when granting or denying privileges. Most medical staff bylaws also 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 members of a peer review committee of the medical staff may ask the physician to appear before them so that they can ascertain whether the conduct under investigation affects the physician's clinical or professional competence.

Even if the defendant escapes 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 the defendant carefully review applicable medical staff bylaws to determine whether a conviction will have adverse impact on his clinical privileges. Additionally, the defendant should determine whether the bylaws include a requirement to report a conviction to medical staff leaders. Finally, the defendant needs to carefully review any renewal applications to ensure that the questions are candidly answered because providing false or omitting material information at many hospitals and surgery centers is grounds to terminate privileges.

Collateral Civil Lawsuits

In addition to the ever-present threat of malpractice liability, a guilty plea may expose the defendant to other private civil lawsuits. For example, 16 states and one territory have enacted versions of the Model Drug Dealer Liability Act.[39] Under the model act, an "illegal drug" is any drug that is illegal to distribute under state law. A person may be sued if 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 model act also prohibits a third party (i.e., the "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 the defendant is not a U.S. citizen but holds permanent resident status, a criminal conviction presents special complications. In any of the following circumstances, for example, a conviction could render the defendant deportable:

- Consider a defendant convicted of unlawful drug distribution, based upon improper prescribing of a controlled substance. Such a conviction is a violation "relating to a controlled substance" and is therefore grounds for deportation.[40]
- If the defendant billed the Medicare or Medicaid program for the patient encounter that resulted in the writing of the prescription, then the conviction might be for Medicare or Medicaid 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.[41]
- Drug trafficking, and fraud crimes where the total loss is greater than $10,000, are also classified as "aggravated felonies."[42]

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."[43] A plea to a "misdemeanor" does not automatically solve the CiMT problem either. In Indiana, for example, and under federal law, the maximum misdemeanor sentence is one year, which triggers CiMT status.[44] By contrast, in Ohio, the maximum misdemeanor sentence is less than one year.[45]

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.

Tax Consequences

Any white collar criminal defendant considering a plea of guilty to a criminal charge should also weigh the potential tax consequences. One issue that frequently arises is whether money required to be paid under the plea agreement can be treated as a deductible business expense.

The hard and fast rule is that a fine, criminal monetary penalty, or forfeiture "paid to the government for the violation of any law" is not deductible as a business expense under IRC Section 162(a).[46] A split of authority exists on the deductibility of court-imposed restitution. Restitution is often considered not a criminal penalty, but rather a reimbursement of loss paid directly to the victim, so deductions of amounts paid as restitution are sometimes allowed.[47] Because the analysis will vary based upon the type of expenditure (fines, forfeitures, payments in lieu of forfeiture, restitution, civil penalties, and so on), the type of deduction sought (Section 162 business expense, Section 165 loss incurred in trade or business, etc.), and the general complexity of the issues, early involvement of a qualified tax professional is a must.

The deductibility of attorney fees incurred in defense of criminal investigations and prosecutions is also unsettled.[48] The dividing line sometimes depends 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).[49]

Practical Suggestions

Evaluate the collateral consequences immediately. Defense counsel and the client need to evaluate the collateral consequences of a potential conviction immediately. The determination of whether to plead or take a case to trial cannot be undertaken without a thorough understanding of the collateral consequences of a conviction. For a health care professional, prison and fines might not be the most serious consequence of a conviction. A misdemeanor, diversion, or deferred prosecution may not be a good resolution if the client's livelihood is lost as a result.

Consider retaining co-counsel with expertise in health care law. Clients and defense counsel should consider consulting with attorneys who specialize in health care law early in the representation. Health care law is complex and changing constantly. Attorneys who specialize in this area can help the client and defense counsel recognize the pitfalls of a potential plea and help craft a resolution more defensible to regulators. While this will add to the cost, it will save money in the long run.

The factual basis for any plea is critical. If the client decides to enter a plea, defense counsel needs to negotiate a resolution with an eye towards explaining the underlying conduct to regulators such as OIG and CMS, state licensing agencies, and third parties such as hospitals and private insurance companies. The identity of the offense is important, but the factual basis underlying a plea is equally important because regulators, licensing agencies, and other third parties will look at the defendant's conduct. Thus, careful negotiation of the factual basis of the plea and making a record of the factual basis are critical.

Be prepared to satisfy reporting obligations. The client needs to consider reporting the conviction immediately to regulators, hospital medical staff leaders, and insurance carriers. As a practical matter, the client may be legally obligated to do so within a certain period of time. Moreover, it may be better for these entities to find out about the conviction from the client rather than through a prosecutor, the grapevine, or the media.

Advise the client to watch for termination notices. If the client enters a plea or is convicted, the client should be advised to watch for notices from OIG, Medicare, Medicaid, and other third-party payers regarding exclusion, termination, or revocation. These actions will almost always

trigger appeal rights, which must be exercised within a certain period of time. While defending these types of actions is beyond the scope of this article, the client should be advised not to ignore these notices because the client will need to act quickly to challenge these actions. The client may need to consider hiring separate counsel with expertise in these areas.

Conclusion

Navigating the criminal justice system is only one of the challenges faced by a health care professional facing criminal prosecution. The regulatory landscape also contains numerous traps for the unwary. Navigating these minefields requires counsel knowledgeable about criminal law as well as the complex regulatory arena in which health care professionals work.

Notes

1. The definition of "federal health care program" is located at 42 C.F.R. § 1001.2.
2. The Effect of Exclusion From Participation in Federal Health Care Programs, Special Advisory Bulletin, Office of Inspector General, Sept. 1999.
3. 42 C.F.R. § 1001.101.
4. See,e.g., In re Erik D. DeSimone, R.Ph., Departmental Appeals Board, Dept. of Health & Human Services, Docket No. A-04-103, Decision No. 1932 (July 20, 2004).
5. In re W. Scott Harkonen, M.D., Departmental Appeals Board, Dept. of Health & Human Services, Docket No. A-12-78, Decision No. 2485 (Nov. 9, 2012).
6. In re Ellen L. Morand, Departmental Appeals Board, Dept. of Health & Human Services, Docket No. A-12-17, Decision No. 2436 (Jan. 17, 2012).
7. In re Kenneth M. Behr, Departmental Appeals Board, Dept. of Health & Human Services, Docket No. A-05-81, Decision No. 1997 (Sept. 28, 2005).
8. In re Charice D. Curtis, Departmental Appeals Board, Dept. of Health & Human Services, Docket No. A-12-13, Decision No. 2430 (Dec. 21, 2011).
9. In re American Healthcare Management, Departmental Appeals Board, Dept. of Health & Human Services, Docket No. C-04-466, Decision No. CR1278 (Feb. 18, 2005).
10. 42 C.F.R. § 1001.102(a).
11. See,e.g., 42 C.F.R. § 1001.102(b).
12. 42 C.F.R. § 1001.102(d)(1).
13. 42 C.F.R. § 1001.102(d)(2).
14. 42 C.F.R. § 1001.201(a)(1).
15. 42 C.F.R. § 1001.201(a)(2).
16. 42 C.F.R. § 1001.301.
17. 42 C.F.R. § 1001.401.
18. 42 C.F.R. § 1001.701.
19. 42 C.F.R. § 1001.951.
20. 42 C.F.R. § 1001.901.
21. 42 C.F.R. § 1001.1901(b)(1).
22. Special Advisory Bulletin, supra note 2.
23. 42 C.F.R. § 1003.102.
24. 42 C.F.R. § 1003.103.
25. 42 C.F.R. § 424.535(a)(1).
26. 42 C.F.R. § 424.535(a)(3).
27. 42 C.F.R. § 424.530(a)(3)(i)(A)-(D).
28. 79 Fed. Reg. 72510 (Dec. 5, 2014).
29. Id.
30. In re John Hartman, D.O., Departmental Appeals Board, Dept. of Health & Human Services, Docket No. C-13-1076, Decision No. CR3056 (Jan. 6, 2014).
31. Id. at 4, n.3.
32. 42 C.F.R. § 424.516(d).
33. 42 C.F.R. § 424.535(a)(9).
34. In re Akram A. Ismail, Departmental Appeals Board, Dept. of Health & Human Services, Docket No. A-11-109, Decision No. 2429 (Dec. 20,

2011), at 10; In re Phyllis Barson, M.D., Departmental Appeals Board, Dept. of Health & Human Services, Docket No. C-11-800, Decision No. CR2510 (Feb. 28, 2012), at 7.
35. In re Gulf South Medical & Surgical Institute, Departmental Appeals Board, Dept. of Health & Human Services, Docket No. A-11-63, Decision No. 2400 (July 21, 2011), at 8.
36. Ohio Adm. Code § 5160-1-17.6(I)(6).
37. Ohio Adm. Code § 5160-1-17.6(G)(19).
38. 42 C.F.R. § 424.535(a)(12).
39. Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Indiana, Louisiana, Michigan, New Hampshire, New Jersey, New York, Oklahoma, South Carolina, South Dakota, Tennessee, and the U.S. Virgin Islands; for examples, see Ind. Code Ann. 34-24-4, et seq.; 740 Ill. Comp. Stat. 57/ et seq.
40. 8 U.S.C. § 1227(a)(2)(B).
41. 8 U.S.C. § 1227(a)(2)(A).
42. See 8 U.S.C. § 1101(a)(43)(B) and (M).
43. 8 U.S.C. § 1101(a)(48).
44. See 18 U.S.C. § 3559(a)(6); Ind. Code Ann. § 35-50-3-2; 8 U.S.C. § 1227(a)(2)(A)(i)(II).
45. Ohio Rev. Code § 2929.24(A)(1).
46. 26 U.S.C. § 162(f). The provision codified a judicially created doctrine prohibiting a deduction that violates public policy.
47. SeeCavaretta v. Comm'r, T.C. Memo 2010-4; but see older decisions such as Kraft v. United States, 991 F.2d 292 (6th Cir. 1993), cert. denied 510 U.S. 976 (1993) (restitution paid to Blue Cross-Blue Shield per plea agreement in a health care fraud prosecution was not deductible, but certain attorney fees were deductible).
48. SeeCommissioner v. Tellier, 383 U.S. 687 (1966) (allowing deduction for attorney fees in an unsuccessful criminal defense).
49. See generally United States v. Gilmore, 372 U.S. 39 (1963).

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