

The Heat's Getting Hotter
Healthcare Prosecutions to Rise Dramatically

The Obama Administration is set to dramatically increase the number of healthcare fraud prosecutions to “add muscle to back up its rhetoric about cracking down on health care and corporate fraud.” According to the National Law Journal, Attorney General Eric Holder, Jr. is adding ten trial attorneys to the fraud section and looking for a new chief for the section. The Fraud Section is already the largest litigation unit within the Justice Department’s Criminal Division and Holder has now named prosecution of health care fraud a “top priority.”

The Law Journal goes on to report that since 1997 healthcare fraud prosecution has been responsible for more than \$14 billion in criminal fines and settlements. Many of these prosecutions have resulted from the work of strike force teams sent from the Justice Department to local U.S. Attorney’s offices to assist them in rapidly prosecuting health care fraud cases. But healthcare defense lawyers are concerned that the heightened attention on health care fraud will not uncover more massive fraud, but rather lead to prosecutions for minor violations.

The defense bar raises the concern that adding more prosecutors and launching more strike forces will inevitably mean that Justice starts trying to turn minor, inadvertent violations of complex health laws into major litigation and press-release-worthy settlements. Prosecutors live to prosecute, especially young lawyers told they're bringing "cases of extraordinary importance" aimed at reaping millions for the American taxpayer. So defense lawyers counsel caution.

The concern that prosecutions of minor violations will multiply is well-founded. Once a bureaucracy is established, the publicity surrounding the “big” cases generates a call for more prosecutions, more staff, bigger budgets and more regulation. At the same time, once word gets out that the government is serious about prosecuting fraud, the level of fraud tends to diminish substantially. This is known in legal parlance as the “deterrent effect”

If government were subject to the same market forces as the private sector, it would cutback or redirect staff and resources as the number of “big” cases decreases. Yet, experience tells us that the government bureaucracy which successfully created the deterrent effect, rather than retreat, continues to grow, based on its past success. Soon there simply aren’t enough big cases to justify the now bloated bureaucracy. Rather than reduce staff and budget – concepts foreign to most government agencies – the bureaucrats concentrate on less important cases to justify their continued existence.

Anyone familiar with the growth of healthcare regulation and prosecution over the past thirty years will readily recognize the trend. Today, state and federal healthcare regulations rival the Internal Revenue Code in complexity. Thirty years ago, most healthcare attorneys could readily keep the regulations in their memory. Today, teams of lawyers spend hours each month just keeping current on changes to these regulations. No physician or healthcare provider can be expected to keep track of all of the regulations and follow them scrupulously. Yet, as prosecutors search for new prosecutions, many well-meaning physicians will likely be caught up in their widening net.

Given this reality, physicians must increase their efforts to assure compliance with the law. Any

new venture must be carefully reviewed by a healthcare lawyer. General practitioners are notoriously lacking in knowledge sufficient to adequately advise physicians. The biggest problem is often the fact that they simply do not know what they don't know. What would appear to be a simple, straightforward transaction in any other context may well impact upon all forms of esoteric healthcare related regulations – regulations of which a general practitioner may be completely unaware. Similarly, billing and collection efforts should be reviewed periodically, preferably with someone intimately familiar with coding requirements, to assure that claim forms are properly coded and that medical records support these codes. Lack of documentation remains the greatest single liability when attempting to defend a payor audit and payor audits are going to become the most common trigger for health care fraud prosecutions.