

## GOVERNMENT INVESTIGATIONS

### How Bad Things Can Happen to Good Doctors

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Everyone likes to think that government regulators are never going to come after them. It's always the other guy, one of the bad doctors. But the truth is that more good physicians each year get caught up in government investigations. It is not that they have done something bad; it is simply that there are so many rules now governing medical practice that it is very easy to be in technical violation of one of them. For example, everyone knows that under state law repeated acts of malpractice, incompetence, impairment and gross negligence can result in the Office of Professional Medical Conduct (OPMC) seeking to charge a physician with misconduct. But how many know that failing to wear a name tag or identifying badge when seeing patients, allowing office assistants to perform procedures beyond their scope, or charging too much for copies of office records can have the same result? All of these grounds are enumerated in state law among the 48 separate categories of professional misconduct with which the state can charge a physician.

Paradoxically, as good physicians are becoming more susceptible to governmental inquiries, the associated risks have increased as well. No inquiry or case today is trivial, or minor. Even the most inconsequential violation can result in a physician losing his or her managed care contracts or being unable to obtain privileges on a medical staff. Although such relatively minor cases could once be settled for a censure or a reprimand--the proverbial slap on the wrist--and all that would be at risk of loss, perhaps, would be the physician's self-respect, today even such a slap on the wrist is unacceptable. Managed care companies, always eager to trim from their list of participating providers physicians who might present a public relations problem, are quick to drop physicians with even the slightest of blemishes on their records. Physicians have been dropped for mere reprimands relating to non-patient care issues.

While the regulatory environment for physicians in the state has become more complex and possibly hostile, the federal government has begun micro-managing physician referral practices and patterns. In doing so, the federal regulators intend to look closely at the way physicians have organized their practices and are referring patients. Their stated goal is the total abolition of so-called self-referrals (that is, the referral of patient to an entity in which the physician has a financial interest). To achieve that goal, they have proscribed a number of ways physicians have long organized themselves and have made it more difficult for physicians to join together in the pursuit of certain particular practice opportunities. By way of example, physicians can no longer belong to more than one group and be assured that they can legally refer patients to other members of those groups. Federal regulators now require that no less than seventy-five percent (75%) of the total patient care services a group's members be furnished and billed through the group for them before referrals within the group are permitted. The implications of this group practice exception are quite broad. Physician group practices which desire to cooperate together and form larger managed care entities with which to contract with HMOs or self-insured employers must question whether their involvement in the larger group will threaten their ability to refer patients within their own group practices. Not to be left out, the state has also recently decided to track federal law in this area and is now similarly proscribing self-referrals.

So, what can good physicians do to protect themselves from government inquiry? Well, besides consulting competent legal counsel before getting involved in any new practice groups or opportunities, physicians should begin by treating all queries from any government agency as a serious threat to their practice. After all, as the old adage goes: It's better to be safe than sorry. Too many times physicians have compromised their position in a matter by simply failing to take seriously the government's first queries and replying without taking time to present their position in a credible fashion or, even worse, not replying at all. This is ironic since, if there is any time when it is easiest to dispose of these queries favorably, it is at their outset--before the regulators have become hardened in their views or prejudiced by other parties. Physicians, thus, should seek counsel when first contacted by any government agency and work with counsel to prepare a plan of action. To that end, physicians, of course, should avoid discussing a governmental query with anyone, including most importantly government investigators, before they have consulted with counsel. Needless to say, any admissions made to an investigator can, and will, be used against a physician. A careful, well-planned response involves more than just avoiding harmful admissions; it must place your actions in a positive, credible light and provide documentary support (where possible) that will compel the agency to abandon any further pursuit of its query. Now, this first response might take the form of a letter accompanying copies of records requested by the agency or it could consist of the text of an interview with an investigator depending upon the agency and the point in the investigative process that is involved. What is critical is that the first contact with any agency be planned and consistent with what may be your ultimate line of defense. In some cases,

that response may be one that, nevertheless, establishes that you are not going to make any investigation easy and will fight every point. This typically occurs when the agency is known to be biased against certain types of legal defenses and is intent upon charging the physician no matter what they may be told. But, those cases are not the most common. Overall, a physician is usually best served by putting his or her best case forward at the earliest possible time.