

Compliance with Government Investigations

Avoid these costly mistakes.

BY LAWRENCE F. KOBAK, DPM, JD

As a podiatrist, you have no doubt encountered numerous government entities, requiring forms filled out, license applications, and information provided. Many of these proliferating entities are also empowered to investigate you. These investigations may be generated by a disgruntled former employee, a patient, an insurance company, or increasingly, statistical analysis. These investigations can take the criminal, civil, or administrative track. The first can involve prison time as well as fines, the second, fines and the last one could involve your professional license, your ability to prescribe, or curtail your ability to practice.

How you respond to investigatory requests may determine the outcome of the investigation. You must first understand who and what is investigating you; what powers they have; what they can and cannot obtain from you; and what they can and cannot do to you. To ascertain your situation, it is incumbent upon you, once you become aware of being investigated, to retain a knowledgeable health law attorney. The attorney will help prevent any early “missteps” that could jeopardize the outcome from the start. Podiatrists love to teach and explain. They do it many times each day, with each patient.

Many feel that if only they could

explain everything to whoever is investigating them, they would go away. Many also feel that retaining an attorney is a sign of guilt. The opposite is true. Most investigators prefer to deal with attorneys. They know that the attorney is knowledgeable as

to what is going on and speaks their language. The attorney will enable their client to cooperate in a way that is helpful to the investigation, and, if possible, helpful to you, the client.

Of course, there will be times when your attorney advises you to keep your mouth closed.

Another piece of general advice is to be totally honest with your attorney. S/he is there to defend you. There is attorney-client privilege, in part, so that your client can reveal everything, without fear. The only revelation that an attorney might have to reveal would be if the client told the attorney of an imminent crime they were about to commit. Let’s start with the premise that none of our readers are about to do that.

Do not assume you know more about the law than the investigator. A “favorite” story involves a podiatrist who proceeded to give the FBI inves-

tigator, who was also an attorney, a lecture about “natural law”. The doctor then proceeded to cite state cases, from jurisdictions that did not apply to the situation at hand. After some initial laughter, the FBI agent advised the podiatrist to listen to his attorney. Dealing with government investigations is not your specialty.

Federal Bureau of Investigation

The Federal Bureau of Investigation is the principal investigative agency of the Department of Justice. It has the authority to investigate all fraud committed against the federal government. The FBI may investigate all healthcare fraud. It is not limited to Medicare or Medicaid. It can investigate private health insurance programs for fraud and abuse.

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The FBI's investigations often involve many resources. They can interview many of the people involved, such as pharmacists, patients, and physician employees, before you even know you are being investigated. Often, they will perform statistical analysis to see if any of your services place you clearly outside the norm. With a judge's permission, they can also tap your phone.

In 1991, the FBI began a separate Health Care Fraud Division. They coordinate their investigations with CMS, HHS, and even state medical boards. They will consult with insurance companies, managed care entities, and other third-party payors. The scope of the Health Care Fraud Unit comprises cyber-crime, organized crime, violent crime, public corruption, terrorism, and other areas. It is quite sweeping. Think of medical records held hostage by cyber-criminals. Think of terrorists who finance their operation through fraudulently billing health insurances. Think of organized crime involved in no-fault schemes. The list is quite comprehensive. This unit has recouped billions of dollars back on a yearly basis. About a thousand criminal investigations and a thousand civil investigations are started each year by this division. The FBI currently has 56 field offices throughout the country.

In 2017, the Opioid Fraud and Abuse Detection Unit was formed. This unit concentrates on prescription opioids, pill mills, and pharmacies which are part of abusive dispensing of controlled substances. Any entity with a DEA number is a potential target; that includes podiatrists. While the genesis of an investigation is often involving a patient in trouble, cooperating with the FBI for a reduced sentence, this is not always the case. Often, an unhappy employee is happy to get payback from an employer. How-

ever, increasingly, as stated before, these investigations are driven by numbers. The numbers of prescriptions for certain practices raise suspicion. The number of patients who live in a certain vicinity who all receive opi-



oid prescriptions on a regular basis, even though it involves a long distance to the provider's office, can raise suspicions.

As an example, a health-care provider practiced in a

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rural area in upstate New York, near the Pennsylvania border. Within a year, several dozen patients came across the river from Pennsylvania, to see this physician, in New York. They all were being treated for pain. The physician never realized anything untoward was going on. He simply thought that he was getting referrals from satisfied patients. However, drug abusers often spread the word when there is an easy mark. The physician was very gullible—not a good quality when prescribing controlled substances. Drug abusers can be quite convincing.



For various reasons, the physician's attorney was able to demonstrate that while the physician might have been gullible, he was not culpable in any scheme to inappropriately dispense opioids. This doctor was see-

There is no defense that beats prevention.

ing some of those patients who pleaded poverty, gratis. While the physician received a stern lesson in how to spot drug abusers, the investigation was closed without prosecution of the physician.

Illegal Fee Splitting

Another area of FBI investigation involved investigating a healthcare provider who was providing his services in various healthcare offices for a 50 percent split in the fees. The podiatrist's office utilized a board-certified podiatrist but provided the patient, and the medical assistants as well as the aftercare after the foot surgery was performed. The travelling foot surgeon worked as an independent contractor. Under the federal Anti-Kickback Act, that is considered fee splitting.



If the same travelling podiatrist was employed as a part-time employee, it would have been legal.

The podiatrist soon changed all his contracts to part-time employee contracts. The surgeon was now under what is called a safe-harbor exception.

The FBI investigators used their judgment and let it go. The podiatrist was represented by counsel and was quite forthcoming during a voluntary interview. The investigators used their judgment. They were not dealing with any intent to defraud. It was an honest mistake. They could have proceeded, but they chose not to. Justice was served.

Another case involved podiatric practices prescribing excessive numbers of ankle braces. Within one year, hundreds of braces were being prescribed in a certain geographic area. The FBI investigation revealed that these

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patients had little if any follow-up. The patients usually had little justification for these prescriptions. Digging deeper, the investigators found that the people running the practices also owned the durable medical equipment company. The people were prosecuted under the Anti-Kickback Act. These cases were not generated by any patient or employee tips to the authorities. Simple data analysis made this situation stick out like a sore thumb. As stated before, many of the investigations are conducted by investigators who obtain their best evidence while sitting at a desk using a computer. The federal investigators are not stupid. They have seen most of these illegal schemes before. Sometimes a scheme has a new wrinkle, but it remains a variation on an old theme. There are no shortcuts when it comes to practicing podiatry appropriately.

A common scenario is when a provider goes outside their specialty to attempt to increase their revenue flow. An example would be if a podiatrist buys a “radiology truck” so that other physicians can go around and take bone density tests on patients provided by other practices. The podiatrist owns the truck and collects “a rent” from the physicians performing the tests. The FBI and other investigative bodies will track such operations closely to see if it passes the “sniff test”. Is the truck owner collecting fair market value for the truck rental? Is there a percentage involved? Are there scope of practice issues? Are patients incentivized to be tested?



There is no defense that beats prevention. Adopting a good compliance plan and using it will avoid many federal investigations. At the very least, it will help to defend yourself against such an investigation. Using an experienced healthcare attorney to review your employment arrangements, real estate leases, equipment leases, OHSa and, HIPAA compliance, is also invaluable. A large part of compliance involves the practice of having an active and effective compliance officer. That was discussed in detail in a recent article in *Podiatry Management* magazine (April/May 2024).

While nobody can guarantee that you will never have a problem from a governmental investigation, it is hoped that this article will make you aware of some of the common mistakes made, and how to avoid them. **PM**



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