When the FBI, OIG, IRS, OSHA (etc., etc.) Knocks on Your Door

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Unfortunately for physicians, the list of entities, agencies and organizations empowered to take adverse action against them continues to grow at an alarming rate. Understanding, from the very beginning, what they are, what they are not and how to handle their intrusion/investigations are the keys to risk managing the threat they inherently carry.

Anti-Physician Acronyms

- BOM – Board of Medicine
- DEA – Drug Enforcement Agency
- AG/FCA – Attorney General/False Claims Act
- CMS – Centers for Medicare Services
- OIG/FBI – Office of the Inspector General/Federal Bureau of Investigation
- HMO – Health Maintenance Organization
- FTC – Federal Trade Commission
- HIPAA – Health Insurance Portability and Accountability Act
- CLIA – Clinical Laboratory Improvement Act
- EMTALA – Emergency Medical Treatment and Active Labor Act
- OSHA – Occupational Safety and Health Administration
- MEC – Medical Executive Committees
- IRS – Internal Revenue Service

What also ties these entities together in such an unprecedented manner is the mandatory cross-referral, cross reporting and intra-communications they are required to engage in whenever a complaint, an investigation and/or an action involves a physicians or medical practice. To facilitate this legal interweaving, each of these entities also has direct access to a central, physician based depository of data as to each and every practicing physician in the United States.

The National Practitioner Data Bank

- Medical malpractice
- Hospital actions
- Licensing actions
- Health Plans/Managed Care Company actions
- Government actions

As each and every physician, regardless of guilt or innocence, faces even the most seemingly benign or innocuous inquiry by any of these entities, certain questions and considerations must be preeminent in their minds.

Written Correspondence – virtually nothing sent to a physician or a medical practice today is "educational" and/or "informational". The true legal role of such correspondence is that it serves as a notice of investigation, nothing less.

Records Requests – escalating the level of investigation, entities that request records are thereby devoting more assets to the investigation. Careful consideration must be given as to how to produce records, what records to send and what records not to send.

Subpoenas – entering into the formal legal process, certain adverse entities also possess the power to subpoena records and/or documents. Such a measure is a serious escalation and significant legal event in the life of an investigation and/or action. Attempts to avoid service are counterproductive and legal counsel should always be consulted before issuing even a single document. Moreover, a subpoena does **not** compel a physician or a medical practice office staff member to speak with the investigators or offer a statement of any form.

Investigators – many physicians harm themselves, in a permanent, uncorrectable manner by falling prey to common, yet effective tactics utilized by investigators. Either through charm, false promises of leniency and/or intimidation, physicians all too commonly speak freely and recklessly with investigators – prior to understanding the true nature of the investigation, their legal rights and/or the threat of the underlying actions. No physician, or medical practice employee, should ever speak with any investigator without first securing the benefit of experienced health care counsel, proper preparation and/or first determining if such a discussion should ever take place.

"After the Knock" – even the most informal, initial contact by an investigator should prompt an immediate and well-coordinated reaction by the physician/medical practice. Instructions should be provided to employees regarding potential direct contact with them (even at home), the confidentiality of any issues at the practice, that the practice has legal counsel in place to represent the practice and provide each employee with counsel's contact information.

How to Avoid a "Knock at the Door" – understanding that good intentions and ignorance of the ever changing, increasingly complex laws and regulations governing physicians are not defenses to an investigation and/or action is the first step every physician must accomplish in order to reduce the risk of being investigated. Once having come to that understanding, every physician should then undertake a risk assessment, under the protection of attorney-client privilege, of their practice and practice methods. Risk Areas include, but are not limited to, patients, medical malpractice actions, hospital actions, interacting with state or federal Agencies, insurance companies and/or managed care companies.

Risk Assessment – A proper physician-based risk assessment should include, but not be limited to, a review of all contracts, Codes of Conduct, By-Laws, Procedures and Protocols, Documentation Requirements (from any source) and other structural mandates.

Defensive Documentation – One of the most commonly exploited weaknesses inherent in a physician's methods is the failure to secure timely documentation of events including, but not limited to, corroborating statements from witnesses (both internal and external to the medical practice).

The "Golden Rule" – in light of these new, harsh realities and as a key part of any risk management effort, no physician, no medical practice employee should ever speak to, or allow anyone else to speak to, investigators, the media and/or attorneys (other than their own health care counsel).
What is not said, what is not sent and what is not done may well become more important to the defense, and potential dismissal, of an investigation than any theory of law, court ruling and/or appellate review.

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