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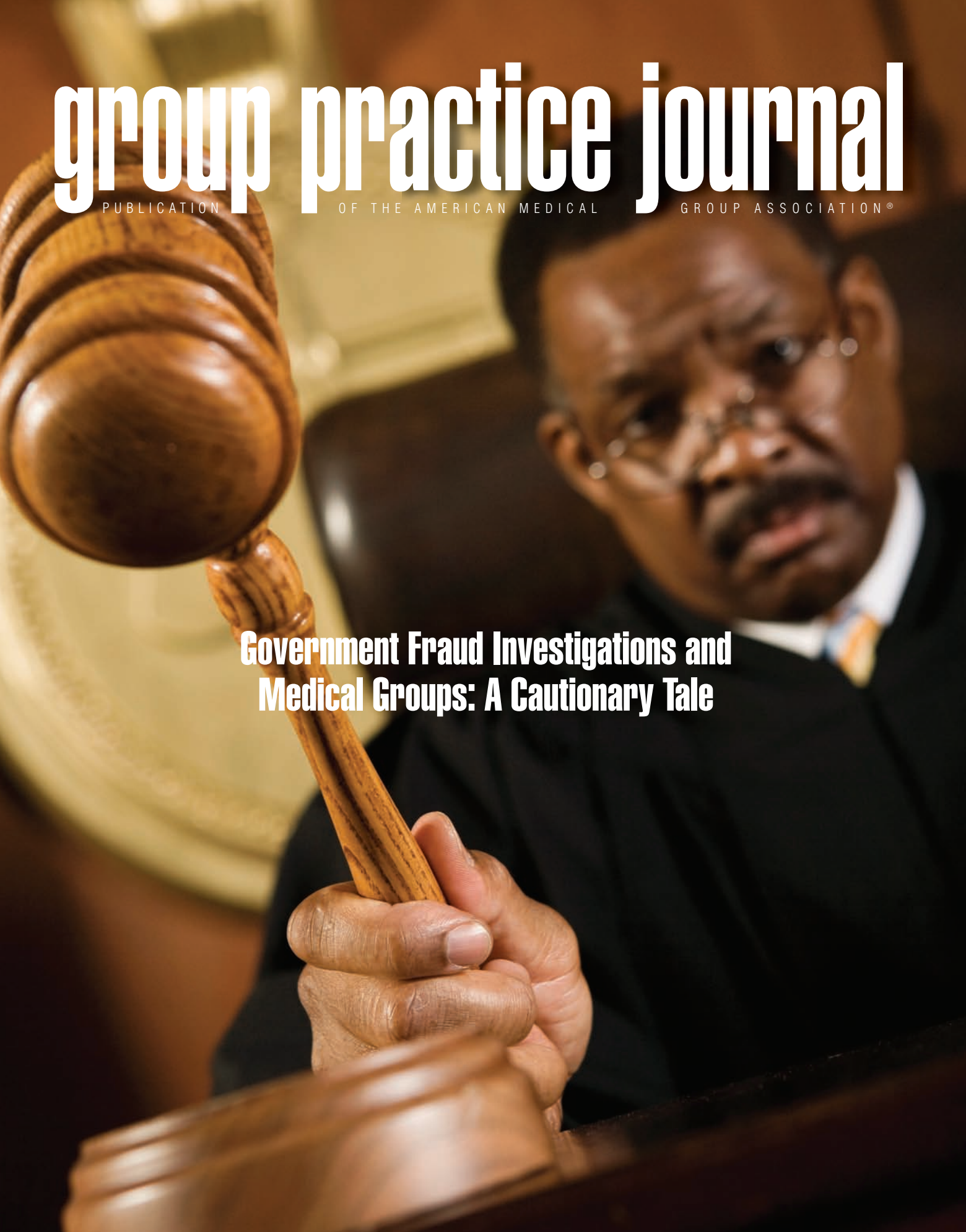

Government Fraud Investigations and Medical Groups: A Cautionary Tale

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INSIDE: STIMULUS FUNDING & HIPAA COMPLIANCE

Government Fraud Investigations and Medical Groups: A Cautionary Tale

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You are the chairperson of the board of directors of a profitable, 40-physician multispecialty medical group practice, a widely respected physician and an excellent businessman. Indeed, you are largely responsible for the group's rapid growth, which has occurred principally through the acquisition of smaller physician group practices in the area. You are the group's CEO because your colleagues recognize and appreciate your leadership and management skills.

One day, your secretary informs you that an agent from the U.S. Department of Health & Human Services Office of Inspector General (HHS–OIG) has dropped in unannounced, is in the lobby, and has a few questions for you. You have several concerns. First, you have patients waiting to be seen. Second, you wonder why the agent can't call and schedule an appointment like everyone else. Third, you have no idea why the agent wishes to talk to you. You could, of course, simply say you have no time for him today and ask that he schedule an appointment. On the other hand, if you send him away, will he take umbrage or think the group has something to hide?

Unbeknownst to you, about two years ago, Dr. Tom Turncoat, a disgruntled former group member, filed a qui tam lawsuit against the group and you, individually, for causing the submission of false claims to Medicare and other federal healthcare programs for services that he asserted were not medically necessary.

One day, an agent from the U.S. Department of Health & Human Services Office of Inspector General dropped in unannounced.

The *qui tam* provisions of the Civil False Claims Act (CFCA) enable a private citizen like Dr. Turncoat to sue on the federal government's behalf and to obtain a share of the government's recovery as a reward for exposing false or fraudulent claims submitted to the United States for payment. The government's potential recovery in such cases can be staggering because the CFCA provides for treble damages and for civil penalties of between $5,500 and $11,000 for each false or fraudulent claim submitted by a provider for payment. If the U.S. Department of Justice (DOJ) intervenes, the whistleblower, who is also called a "relator," receives between 15 and 25 percent of the government's ultimate recovery amount through either a litigated judgment or settlement. If DOJ declines to intervene, Dr. Turncoat will receive between 25 and 30 percent of any recovery he obtains for the government. Either way, the successful relator will also receive an award of reasonable attorneys' fees and expenses.

You are unaware of the existence of the Turncoat lawsuit because the qui tam statute requires that such suits be sealed from public view to enable DOJ to conduct its investigation of allegations before deciding whether to intervene—without the group or you knowing that a lawsuit exists. If DOJ does decide to intervene, the group and you will likely end up settling out of court and paying the government a lot of money, particularly if the case involves a great many alleged false claims.

Since 1986, the *qui tam* provisions have been responsible for creating more than 1,000 new millionaires in the United States—generally from actions where DOJ intervened.

On the Horns of a Dilemma

You do not wish to talk to this agent. You briefly contemplate calling the group's healthcare attorney, but decide that, perhaps, that wouldn't look good either.

You tell your secretary to show the agent to your office.

To your surprise, the agent has some very specific questions. He asks whether the group has a policy of billing a 99211 office visit for every patient who comes in simply for a blood draw, flu shot, or month Vitamin B-12 injection and whether you are responsible for this policy. You answer that the group does have a policy of billing for a 99211 office visit whenever it is appropriate. After a few more preliminaries, you and he have a colloquy along the following lines:

Q: Have any members of the group objected to this policy of billing for a 99211 office visit in conjunction with a blood draw or flu shot?

A: Not that I'm aware of.

Q: Have any private payors audited the group's charges for 99211 office visits?

A: Possibly. I'm not sure.

Q: Didn't the group pay back money to Blue Cross two years ago for 99211 office visits as the result of an audit?

A: I don't recall.

Q: If you paid back money to Blue Cross, why didn't you pay back Medicare?

A: As I said, I don't recall if we did pay back Blue Cross.

Q: Isn't it a fact that you've reviewed other physicians' pre-bills and added charges for 99211 office visits where patients came in for a flu shot, blood draw, or B-12 injection?

A: I don't recall doing that.

Q: Isn't it also a fact that Dr. George Upright objected to this practice?

A. I don't remember.

Q. Here, let me show you a copy of an e-mail from Dr. Upright to you, dated December 15, 2003, in which Dr. Upright says, "I checked with Blue Cross and they say this is fraud." Do you recall getting this e-mail from Dr. Upright?

At this point you tell the agent you don't feel you should answer any more questions without talking to your lawyer. The agent says he understands, reaches into his pocket and serves the group with an HHS-OIG subpoena for group documents—including all documents relating to charges for 99211 office visits, flu shots, and blood draws for the past six years—and leaves.

Where You Went Wrong

You feel that you've been bushwhacked. Where did the agent obtain all these facts that he threw at you? How did he know about Upright and his e-mail? The agent knew because of Turncoat's complaint and because the *qui tam* statute required Turncoat to provide all the evidence in support of his claim to DOJ prior to filing it with the court. Indeed, the agent has already interviewed Dr. Turncoat and several other former group employees, including former billing personnel. Consequently, he was able to spring questions on you about events that occurred years earlier, some of which you'd long since forgotten.

Worse yet, the agent thought you were lying.

DOJ has a full arsenal of statutory weapons to prosecute the group.

Following in the footsteps of such luminaries as Martha Stewart and Scooter Libby, you may have elevated a civil problem into a criminal problem. Making a false oral statement to a federal agent and knowing it to be false at the time is a felony punishable by up to five years' imprisonment and a fine of up to $250,000. You do not know there is a statute called the False Statements Act, but you do know that several of your answers were not truthful. Of course, you remember the Blue Cross audit, and you did periodically review other physicians' pre-bills and add 99211 office visits where patients came in for a flu shot or blood draw or other routine injections. No physician presence is required to bill for a 99211 office visit and you thought it was a good way of boosting the group's revenues. Of course, you remember that Turncoat, Upright, and others objected, and said this was unlawful because no evaluation an management (E&M) service separate from the procedure is being provided, nor was any such E&M service medically necessary. But, you couldn't very well admit this to the agent, could you?

Where You Really Went Wrong

Let's be clear. The group and you already had a serious problem before the agent arrived on your doorstep. Assuming Dr. Turncoat's allegations are true, the group has perpetrated a fraud on federal healthcare programs (and private payors), and you are the individual primarily responsible.

Criminal Exposure for Fraud

DOJ has a full arsenal of statutory weapons to prosecute the group and you criminally for causing the submission of false claims: mail fraud, the criminal False Claims Act, the False Statements Act, and Conspiracy to Defraud, to name a few. In deciding whether to prosecute an organization criminally, DOJ weighs certain mitigating and aggravating factors. If the group were indicted, it would be suspended from participation in federal healthcare programs pending the outcome of the criminal proceedings and would likely go out of business. This would cause disruption in the lives of innocent patients, innocent group employees, and those group physicians who were not involved in management. This collateral damage that innocent third parties would suffer is a factor that mitigates against prosecuting the group criminally. Another factor the DOJ prosecutors consider is how high up the fraud extended within the organization. If only low-level employees were involved, that is a factor that mitigates against criminal prosecution of the organization. In this case, the fraud goes right up to you, the CEO—clearly, an aggravating factor.

An additional factor DOJ considers is the extent to which the organization has cleaned up its act: that is, the measures undertaken to prevent a recurrence of the fraudulent conduct. This underscores a conflict between the group's interests and your interests. The group's interests are best served by demonstrating to DOJ that the practice has cleaned house. However,

this means your days as CEO and director are probably numbered. The group can portray your removal from management as getting rid of the "bad apple."

DOJ could, of course, decide to decline criminal prosecution of the group but proceed against you individually. In many ways, this is an ideal resolution for DOJ. It spares the group the harm that would be inflicted on innocent third parties, while still seeking a criminal scalp from you—a scary thought.

Civil False Claims Act Exposure

Separate and apart from the possibility of criminal prosecution, the group and you also face significant risk of civil monetary penalties. If you proceed to trial on the CFCA lawsuit filed by Dr. Turncoat and lose, the judge is required to assess a civil penalty of at least $5,500 per false claim and to treble any damages found. Let's assume the group submitted 300 false claims annually for 99211 office visits when patients only came in for a blood draw or a flu shot, and that this practice continued for the six-year period prior to the filing of Dr. Turncoat's complaint. If the group proceeded to trial and lost, the court would have to impose a civil penalty of at least $5,500 per false claim or $9.9 million for the six-year period. This is before the mandatory trebling of the government's damages and an award of reasonable attorneys' fees and expenses to Dr. Turncoat. Remember that $5,500 is the minimum. The judge could assess a civil penalty for as much as $11,000 per false claim.

Administrative Exposure: Exclusion

If either the group or you is prosecuted criminally and convicted of a federal healthcare program-related crime, the law *requires* that the individual or organization be excluded from participation in federal healthcare programs for a minimum of five years, a risk that neither of you can realistically afford to take.

If the group and you were to proceed to trial on the civil Turncoat lawsuit and you both lost, the government might seek to have you both excluded from participating in federal healthcare programs, so-called "permissive exclusion." Whether under the mandatory or permissive exclusion provisions, exclusions of up to 15 years are not uncommon.

In sum, when you agreed to talk to the agent, you and the group were playing in a very high-stakes game—a game you both were unaware of at the time.

Deferral provides an attorney with the opportunity to level the playing field a bit.

What Should You Have Done?

Defer the interview. You should've gone out to the lobby, introduced yourself, and said, "Our policy is to cooperate fully with all government investigations and inquiries, but to do so under the guidance of counsel. Give me your card or your name and your number and either I or the group's lawyer will get back to you."

The agent is there in hopes that you will consent to be interviewed on the spot. (If he only wanted to get the subpoena delivered, he could have mailed it!) He will be neither shocked nor surprised if you defer until such time as an attorney can be present.

Deferral provides an attorney with the opportunity to level the playing field a bit. He or she can ask questions and, depending on the answers, decide whether it is in the group's interest or your interest to consent to be interviewed. There are questions that should be asked and they sound much better coming from a lawyer than from you. They include:

Q: Is this a criminal investigation?

Q: What is the nature of the conduct being investigated?

Q: What is the status of the group in the investigation? Is it a target, a subject, or just a witness?

Q: What about its CEO?

Q: What about giving the CEO use immunity for purposes of his interview?

Indeed, you never should have been on the horns of dilemma. You, the other physicians, and the group's employees should've received training on how to respond to a government investigation as part of the group's compliance program.

How Much Will It Cost to Respond?

It will cost a lot because at least two and, perhaps, three different lawyers will be needed. Because there is a potential, if not actual, conflict between the group's interests and your interests, you will each need your own lawyer. If DOJ or HHS-OIG ask to interview other group physicians or employees, a third lawyer may be needed to represent these individuals.

But, first, the group's attorney has an HHS-OIG subpoena for documents to deal with. Today, the term *document* is usually defined to include e-mails and other electronically stored information (ESI). The group or its attorney must quickly issue a memo instructing group physicians and employees not to destroy or delete any documents, e-mails, or ESI responsive to the subpoena. Then, an electronic search must be conducted to find and segregate all responsive e-mails, which usually requires hiring an outside vendor. After the responsive e-mails and ESI have been captured, they may need to be reviewed to determine whether they include privileged communications that should be withheld and not produced to the government. This kind of a review is normally conducted by lawyers: either the group's attorneys or outside contract attorneys retained for this purpose.

The search for responsive paper documents, e-mails, and ESI for a

40-member physician group over a 6-year period, and segregation and review of such materials, are likely to be very expensive. But, they need to be done well. The group's interests are best served by avoiding criminal prosecution (and extinction), avoiding mandatory or permissive exclusion, resolving its alleged civil monetary liability, and surviving this ordeal as a viable economic entity. Therefore, it must be perceived as cooperating fully with the government's investigation and avoid committing any act that might be misconstrued as obstructing justice or impeding the investigation.

The group's lawyer and your lawyer will need to become familiar with both the damaging documents and e-mails and those that may be helpful. Both lawyers will engage in a dialogue with the DOJ attorneys in an attempt to persuade the government not to proceed criminally and not to intervene or take over Dr. Turncoat's civil lawsuit for treble damages and civil penalties.

Let's say that, despite the efforts of the group's attorney and your attorney, DOJ informs them that it will intervene or, in effect, take over the Turncoat action. At some point, the group and you will have to decide whether to attempt to settle the Turncoat case or to litigate the matter through discovery and trial. In this case, the group's attorney and your attorney recommend exploring a "global" settlement. Under such a settlement, the group and you would pay the government a lot of money and agree to live under a corporate integrity agreement (CIA), a government-imposed compliance program, in return for which the government would agree not to prosecute either of you criminally and not to initiate permissive exclusion proceedings against the group or you.

The DOJ attorneys, HHS-OIG, the group's attorney, and your attorney conduct several rounds of negotiations. Initially, the government demands $6.5 million from the group and $1.5 million from you as the price of a global settlement. You consider these sums ridiculous and outrageous. Ultimately, the government agrees to settle for $2.5 million from the group and $500,000 from you. You are forced to resign as CEO and as a director. DOJ also issues a press release about the settlement, the amounts each of you will pay, and what Dr. Turncoat will receive. The group and you are very concerned about the negative effects of such publicity on patients, referrals from primary care physicians and hospitals, and the local medical community generally. You are both told this is a non-negotiable item.

At some point, the group and you will have to decide whether to attempt to settle or to litigate.

According to your lawyer, even if the government were to decline to prosecute you criminally, litigating Dr. Turncoat's CFCA case to a conclusion is too risky. If you go to trial and lose, the results would be catastrophic. In addition to paying the government a much larger amount of money, you would almost certainly be permissively excluded from participation in Medicare and Medicaid, and your medical career would be over.

The legal fees that the group and you are each paying to your attorneys are, needless to say, significant and mounting. The group decides to settle on the government's terms. You have little choice but to do the same. Besides, you want to put this nightmare behind you.

Adding insult to injury, the group and you are also required to pay Dr. Turncoat's legal fees and other expenses incurred in bringing his lawsuit. In addition to the 15 percent, or $450,000, Turncoat will receive from the government as his "reward," his lawyer wants another $250,000 from the group and $250,000 from you for Turncoat's award of "reasonable" attorney's fees and expenses. You can't believe it. Ultimately, the group and you agree to pay $100,000 and $50,000, respectively, to resolve Turncoat's claim for "reasonable" attorney's fees and costs.

How Much Less Would It Have Cost for an Effective Compliance Program?

Of course, the group had a compliance program in place prior to all this, but everyone understood that compliance was not high on your list of priorities. Thus, the group's program consisted of a high-sounding code of ethics and a compliance committee, which did little else but meet briefly four times a year.

Now, as part of the settlement, the group has entered into a CIA with HHS-OIG, which is more than 30 pages long. Moreover, the CIA is for a 5-year term and has extensive reporting requirements. The CIA requires that the group designate a compliance contact within 30 days; develop policies and procedures for complying with federal healthcare program requirements within 120 days; provide education and training to all of its officers, directors, and employees on such requirements within 120 days; and engage an accounting, auditing or consulting firm with the requisite expertise—a so-called Independent Review Organization (IRO)—to conduct periodic reviews of the group's billing and coding practices. The CIA has very specific procedures that the IRO must follow in reviewing "discovery" samples of the group's claims and, depending on what they find, reviewing "full" samples of such claims and identifying any overpayments received. Failure to comply with certain of the CIA's obligations will trigger the imposition of stipulated penalties of not less than $750 per day and up to $5,000 per day, depending on the nature of the violation. A material breach of the CIA may trigger the initiation of permissive exclusion proceedings. Under the CIA, HHS-OIG may examine the group's books and records at any time.

Needless to say, living under the gun of the CIA—along with the group's payment of $2.5 million to the government, $100,000 to Turncoat's attorney, and substantial legal fees to the group's attorneys—has not enhanced your standing with your colleagues. Many blame you for this debacle and your future with the group appears tenuous.

To what extent would this outcome have been different had a real compliance program been in place? Unfortunately, a real compliance program costs money and includes some of the CIA's elements without the reporting requirements and certain other bells and whistles. An effective compliance program must have: (1) an audit component, either internal or external, to review samples of claims, investigate further when appropriate, identify any overpayments received, and repay such amounts to the carrier; (2) education and training for new hires; and (3) periodic updated education and training for all personnel, including physicians. If employees have a billing or coding question, the program must also designate an individual to whom they can turn for an answer.

In this case, an effective compliance program should have prevented the conduct giving rise to Dr. Turncoat's lawsuit and HHS-OIG's investigation. Ideally, it should have saved the group the cost and disruption of complying with the HHS-OIG subpoena as well as the $2.6 million settlement paid to the government, Turncoat's attorney's fees, and the legal fees paid to the group's attorneys—a total savings in the neighborhood of $5 million.

Conclusion

The CFCA and *qui tam* actions like Dr. Turncoat's are not going away. Indeed, healthcare fraud enforcement enjoys strong bipartisan support in the U.S. Congress, largely because of the funds the government has recovered pursuant to the act, including its *qui tam* or whistleblower/reward provisions. Since 1986, the CFCA and *qui tam* have been responsible for the recovery of more than $22 billion, $14.3 billion (65 percent) of which has been from healthcare fraud cases. On May 20, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009, which includes several technical amendments to the CFCA that will assist whistleblowers like our Dr. Turncoat.

Medical groups and other healthcare providers should recognize that an effective compliance program is a necessary part of the cost of practicing medicine under our current system. Whatever the cost, however, it pales in comparison to the expense of defending—and losing—a *qui tam* lawsuit.

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