

**& OBERHEIDEN
MCMURREY**

5 THINGS YOU MUST KNOW

IF YOU HAVE BEEN CHARGED WITH HEALTH CARE FRAUD

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INTRODUCTION

Because exposure in healthcare investigations may involve severe civil penalties and even imprisonment, it is critical to develop risk awareness and to have experienced attorneys by your side that can navigate you through the process and mitigate or avoid criminal liability.

ABOUT THE AUTHOR

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Dr. Nick Oberheiden has successfully represented healthcare executives, physicians, and businesses in investigations before the Office of Inspector General (OIG), the Department of Defense (DOD), the Department of Justice (DOJ), the Department of Labor (DOL), the Department of Health and Human Services (DHS), the U.S. Postal Inspection Service (USPIS), the IRS, the FBI, the DEA, and the U.S. Secret Service

1

PAYMENT SUSPENSION

The Affordable Care Act has empowered law enforcement agencies to track and investigate health care fraud. One of the most powerful tools of that Act is the Department of Health and Human Services' authority to suspend a health care provider. This is usually done through a recommendation made by the Department of Health and Human Services to the Centers for Medicare and Medicaid Services ("CMS"). If CMS accepts the request, then CMS will halt all payments to the provider, leaving the provider essentially without reimbursements despite the fact that services were actually provided. In many cases, this payment stop will effectively shut down a business.

In these situations, experienced healthcare fraud defense attorneys will not simply do the obvious, which is to appeal the payment stop and chase the money, but they will understand that such payment stop could be indicative of a large scale audit or investigation and immediately implement a comprehensive defense strategy plan to protect the company and its officers. It is at this point that lawyers with the right experience can often direct the investigation away from criminal charges.

2 GRAND JURY SUBPOENAS ISSUED TO SUSPECT'S BANKS

Part of a government's goal in healthcare investigations is to recoup money that it believes was illegally obtained through fraudulent business operations. A first step in this recoupment process is to issue federal Grand Jury subpoenas to banks and financial institutions. Doing so offers the government a pair of insights. First, the subpoenas will locate the suspect's bank accounts and will allow the government to monitor the funds and cash flow. Second, the review of bank records will link the suspect to other individuals and companies that have a financial relationship with the suspect. Often, these links will lead to more Grand Jury subpoenas and an extension of the investigation to other targets.

It is very important to understand that banks are strictly prohibited from disclosing the existence of a Grand Jury subpoena to an account holder. To ensure the confidentiality and to avoid banks tipping off their customers, subpoenas are typically handled by the bank's legal department. Day-to-day staff at the customer's branch is often unaware that a subpoena is pending. Additionally, each subpoena explicitly warns the recipient that any unauthorized disclosure will result in a criminal prosecution for obstruction of justice. Appropriate confidentiality of a government subpoena is part of a bank's standard employee training and it is extremely rare that banks illegally share information with their customers.

3 FEDERAL AGENTS MAY CONTACT WITNESSES & TARGETS

Law enforcement agents will have done a significant amount of work interviewing people and reviewing documentation prior to the investigation becoming known. You should always remain aware of any employee that starts to act differently or asks probing questions about business practices. Agents will sometimes ask employees to gather information. For this reason, it is also important to watch out for any employee who is making copies of business information or taking information out of the office. Once the investigation is public (e.g. on the day of the execution of the search warrant), this process will only increase. The government will have identified the persons with whom they wish to speak, and will seek them out as quickly as possible. During this time, the government already has its main targets in mind, but will be looking for additional people to charge or to collect information from once the office prosecuting the case makes a charging decision.

It is important to understand that federal agents are allowed to lie to you. In their initial attempt to have a conversation with you, agents will often say that they are not investigating you but simply want to ask you questions about other people. Generally, this is not a true statement. In fact, misrepresentations are part of their standard repertoire of investigative tactics. By contrast, anyone, whether under investigation or not, that lies or misrepresents facts to a federal agent can be charged with a federal felony pursuant to 18 U.S.C. Sect. 1001. The only correct thing to do when a federal agent shows up at your door is to confirm your identity and to ask the agents to direct all questions to your attorneys. You will not outsmart an agent and there is absolutely nothing to gain by talking to someone who is better trained and highly motivated to put you in jail.

4 THE GOVERNMENT MAY SEIZE BANK ACCOUNTS & CONFISCATE ASSETS

More often than not, the government will be issuing subpoenas, executing search warrants, and investigating individuals without the targets of the investigation being aware of these actions. At the same time the government is executing its search warrants, it will also be serving seizure warrants on banks and other institutions where assets are located. Seizure warrants, like search warrants, require a federal magistrate judge approve the government's possession of those assets based on a finding of probable cause. It is important to note that tangible items such as cars, jewelry and other valuable things may be included in a seizure warrant. This is where the government's preliminary work on the bank accounts and tracing analysis is important as it is this process that leads it to the assets that it will be holding onto until the resolution of the case.

5 EXECUTION OF A SEARCH WARRANT

When the government is confident that it has collected enough evidence it will ask a federal magistrate judge to issue a search warrant. The application for a search warrant does not occur in a public court proceeding. It is a highly confidential, sealed process that only the requesting federal prosecutor, the investigating agents, and the reviewing judge are involved in. In order for a warrant to be issued, U.S. constitutional law requires that a neutral and impartial magistrate must find that probable cause of a crime exists and that evidence of that crime is likely located at the premises outlined in the petition. In order to meet the probable cause standard, the government must present a comprehensive and detailed sworn affidavit outlining the places to be searched.

Search warrants in healthcare cases typically include business locations, clinics, homes, storage facilities, cars, all electronic devices (smart phones) and anywhere else the government believes that evidence exists to support its case. The search warrant affidavit is an important document as it is the basis for the government to intrude on a person's Fourth Amendment right against unreasonable search and seizure. The affidavit will likely remain sealed until a defendant is formally charged with a crime.

On the day the warrant is executed, a team of federal agents and police officers will enter the designated locations and begin to gather the evidence. This will likely include documents, computers and other electronic media. The government will also take pictures of the premises and inventory all of the items seized. In addition, on the day of the search, law enforcement will attempt to interview everybody at the location. These interviews are normally non-custodial (meaning that the interviewee is not under arrest), therefore there are no Miranda warnings given prior to the interview.

Many times these onsite interviews provide crucial evidence due to the fact that everyone is still under shock from the scenery of dozens of agents storming a house or a clinic and therefore psychologically less reserved and intellectually less prudent in their statements to law enforcement agents.

HOW EXPERIENCED LAWYERS CAN HELP YOU

There are a number of things that experienced healthcare fraud defense attorneys can do to mitigate or to avoid these worst-case scenarios. Among the most important features an experienced healthcare defense attorney can offer you is to correctly read the early signs of an investigation to avoid criminal charges.

1

AVOID CRIMINAL CHARGES

Main priority of an effective defense is to avoid criminal charges. Many healthcare investigations appear criminal, but are civil in nature. Equally so, many criminal investigations turned into criminal investigations due to fatal mistakes at the beginning of the case. You need attorneys that exactly understand your industry, that know how the government builds its case and what to do against it.

2

PREPARE YOURSELF

Dealing with an investigation or a search warrant is one thing. Not knowing how to continue doing business after a raid is another thing. Many clients are so perplexed to see their business being investigated that they forget taking precautions. When the government leaves with all computers, phones, and files, these targets have little left to maintain their business. Make sure this doesn't happen to you. Make copies of your phone contacts, save your relevant files on clouds, and store paper copies in safe places. Don't let the government deprive you of your entire history of contacts, files, and information. Think ahead. Be able to re-open and continue your business the day after a raid.

3

PLAN YOUR CASH FLOW

Imagine you wake up one day and all your money and all your assets are gone. What are you doing next? How are you paying for essentials? Who is paying for your kids' school? What happens to your mortgage? How can you pay your staff? How can you afford qualified lawyers? If you think you are a potential target of a federal healthcare investigation you need to discuss a financial safety net with your lawyers that will enable you to make it through the investigation. Don't surrender simply because you have no funds left to defend yourself! Plan ahead. Ask the right lawyers.

OUR RECENT CASE OUTCOMES

- **Healthcare Fraud, Business Executive** (*Department of Justice*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Business Executive** (*Department of Defense*)
RESULT: No civil or criminal liability, case dismissed
- **Healthcare Fraud, Physician** (*Department of Justice*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Physician** (*Department of Defense*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Physician** (*Department of Defense*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Physician** (*Department of Defense*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Physician** (*Department of Justice*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Marketing Group** (*Department of Defense*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Marketing Group** (*Department of Defense*)
RESULT: No civil or criminal liability, case dismissed
- **Healthcare Fraud, Public Official** (*Attorney General*)
RESULT: No civil or criminal liability, case dismissed.
- **Healthcare Fraud, Toxicology Laboratory** (*Department of Defense*)
RESULT: No civil or criminal liability, case dismissed
- **Healthcare Fraud, Toxicology Laboratory** (*Department of Justice*)
RESULT: No civil or criminal liability, case dismissed

QUESTIONS?

The attorneys of Oberheiden & McMurrey, PLLC are among the country's most demanded **Healthcare Fraud Defense Attorneys**. Our enormous experience in healthcare investigations– both as senior government officials as well as innovative defense attorneys– and our long and distinct track record of dismissals, has made us attorneys-of-choice for clients from virtually all sectors of the healthcare industry. Among many others, we have successfully represented physicians, pharmacies, compound pharmacies, toxicology laboratories, DNA testing facilities, DME companies, physician syndications, MSOs, and healthcare executives in fraud investigations spanning the entire United States.

If you believe you are under investigation or if you want to preemptively ensure that your business stands on a firm, solid, and safe foundation, you should speak with one of us directly. All consultations are free and confidential and will be handled exclusively by one of the following attorneys.

**CALL US DIRECTLY AND SPEAK TO ONE OF OUR ATTORNEYS AT:
(800) 810-0259**

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