Just What the Doctor *Didn't* Order

The Recent Crusade Against New Jersey's Medical Service Providers and Facilities

by Michael S. Weinstein and Jason R. Finkelstein

A struggling economy, new requirements under the Affordable Care Act, substantial reductions in fee schedules, increased competition—these are but a few of the changes in the medical services landscape that have greatly burdened private medical providers across the state of New Jersey over the last several years. Business models that once appeared to reward those providing superior service and accommodations have in large part been curtailed. As if this were not enough, the New Jersey U.S. Attorney's Office, the Office of the Inspector General and the Office of the Insurance Fraud Prosecutor, among other state and federal agencies, have launched an unofficial campaign against New Jersey's medical community based on a host of statutory and insurance fraud theories, as well as failing to comply with existing regulations. Compliance failures have increasingly been utilized by New Jersey officials to investigate, fine, and even prosecute medical providers, threatening both their practices and licensure.

This article highlights two examples of high-profile medical fraud prosecutions in New Jersey over the past year, as well as suggestions on how medical service providers, through reasonable but robust compliance programs, can avoid meeting similar fates.

The Changing Dynamic of New Jersey's Medical Landscape

A diverse range of medical providers, physicians, surgical centers, chiropractors and durable medical equipment providers, to name a few, are under heightened scrutiny throughout New Jersey. Often the lack of a provider's compliance with existing laws and regulations allows state officials the initial access and pressure they need to exploit a violation. While compliance enforcement is certainly important, necessary, and furthers public policy in maintaining a safe and effective medical community, the state's use of compliance investigations should serve as a wake-up call for all medical providers. Providers must examine and revamp current compliance programs, establish and implement new ones, and educate employees on the importance of strict adherence to state regulations. To do otherwise would create unnecessary risk.

While recent legislative and regulatory shifts may have provided the government with greater tools to wield in its prosecutorial endeavors, prosecuting agencies have also become more creative in both the variety and severity of claims waged against those appearing out of compliance with statutory and regulatory obligations. Among the more prevalent recent claims observed in this field are allegations of violating Stark law[1] anti-kickback restrictions; claims for false billing against insurance companies (*i.e.*, submitting bills for procedures never performed); the provision of medically unnecessary procedures (*i.e.*, convincing patients to receive pain management procedures they do not actually need); falsely reading tests/scanning results (in order to justify performing unnecessary procedures on patients); overbilling patients and insurance companies; sham payments for rent of medical office space (as discussed below with the recent Biodiagnostic Laboratory Services, LLC prosecution); and improper waiver of patient copays while pursuing claims against insurance companies. These are but a few examples of the breadth and scope of the indictments medical providers are facing in today's world of increased regulatory oversight.

Again, compliance is the key driving force to preventing catastrophic investigations into a medical practice. While the medical landscape has experienced a clear shift in recent years and a tightened noose around the neck of New Jersey's physician community, the 'best medicine' is learning to recognize potential areas of exposure and developing ways to ensure a facility's compliance with the law.

Case Study #1: Biodiagnostic Laboratory Services[2]

In April 2013, the New Jersey U.S. Attorney's Office filed a scathing criminal complaint against Biodiagnostic Laboratory

Services, LLC (BLS), its CEO (David Nicoll), two key BLS employees (Scott Nicoll and Craig Norman), and a New Jersey physician (Dr. Frank Santangelo), in culmination of a multi-year investigation. The complaint alleged the defendants hatched a massive cash-referral bribery scheme that resulted in millions of dollars of false claims being submitted to public and private health insurance providers. Essentially, numerous doctors, including Santangelo, were paid by BLS to send blood specimens to BLS for testing services (either on a flat fee or a per-test basis), often for tests that were entirely unnecessary for the patient's benefit. To disguise the bribe payments funneled back to the doctors, they were paid under the guise of "sham rents" for space in the doctors' offices. For example, BLS would 'rent' 2,000 square feet of space in Doctor X's office at $5,000 per month, even though BLS was only actually using approximately 100 square feet. Over the span of approximately seven years, BLS earned revenues to the tune of $200 million from the blood tests they were conducting in connection with their bribery scheme.

Between the unnecessary medical tests, bribery ring and sham rent scheme, the government was able to turn the BLS case into a well-publicized matter in the medical community and set an example for others. In addition to the four individuals originally implicated in the BLS scheme, since last April many New Jersey and New York doctors and physicians have come forward (and continue to do so) to accept plea deals, typically involving a forfeiture of the bribe money received from BLS, and carrying potential for substantial fines and/or prison sentences. As the BLS investigation continues to mushroom and result in additional arrests and plea bargains, the case provides a good lesson for doctors to be hypersensitive to proposals of this nature from blood or other testing service companies. As usual, if it sounds too good to be true, it probably is.

Case Study #2: Dr. Jose Katz[3]

The New Jersey U.S. Attorney's Office scored another major prosecution in April 2013, in its case against Dr. Jose Katz, a well-known cardiologist in northern New Jersey, who was the founder and sole equity holder of both Cardio-Med Services, LLC, and Comprehensive Healthcare & Medical Services, LLC. Katz was charged with launching a multimillion dollar fraudulent healthcare scheme that resulted in performing thousands of unnecessary tests and treatments on patients, as well as permitting many of those patients to be treated by unlicensed and/or untrained practitioners. The misconduct in which Katz specifically engaged included falsifying patient charts with fabricated diagnoses and symptoms, and ordering the same series of extensive tests for nearly all of his patients, regardless of their actual needs or ailments. In addition to subjecting his patients to a multitude of unnecessary tests and procedures, Katz ordered many of them to be treated by an unlicensed physician working with him, knowing full well the shortcomings in licensing credentials. Not only did Katz' scheme defraud multiple insurance companies that paid him for the medically unnecessary tests and procedures, but he also put many of his patients at considerable risk of grave physical harm from those procedures.

Last November, with no real choice given the substantial evidence against him, Katz pleaded guilty and was sentenced to six-and-a-half years in prison, followed by three years of supervised release, and a restitution payment of $19 million. Katz' severe sentence can probably be attributed not just to the sheer magnitude in dollars of the fraudulent scheme he fostered, but also, in large part, because of the tangible harm that many of his patients faced from the unnecessary tests and procedures they were ordered to undergo. As a cardiologist, these tests and procedures were not likely to involve ordinary run-of-the-mill blood work, but instead invasive and potentially life-threatening heart examinations. The government clearly made an example of Katz, and the case is a good example of the hefty penalties physicians face today for defrauding health insurance companies and their patients.

Why Compliance Matters

As the BLS and Katz prosecutions make abundantly clear, New Jersey's prosecutorial agencies are becoming increasingly aggressive in the matters they investigate and ultimately prosecute. Compliance, or a providers lack thereof, is often the first step in the process. For the most part, these are not isolated inquiries, but part of massive investigations intended to bring down an entire ring of physicians, medical centers and related parties. Compliance with existing statutes and regulations are more important than ever, and even minor, unintentional violations are being aggressively pursued by regulatory and law enforcement authorities.

Even for medical providers and surgical facilities that may not be exposed to serious ramifications such as long prison sentences and millions of dollars in fines and penalties, the impact of a criminal prosecution, or even the threat of one, could have a serious impact on business from a reputational standpoint. Smaller penalties, even when pleading guilty to lesser charges, may include substantial probationary periods, revocations of facility and physician licensures, and rescission of Medicare/Medicaid approvals, with the real possibility of a host of fines of varying degrees.

It is, therefore, absolutely critical for medical service providers to take preventative steps to protect themselves

and comply with existing regulations. While the steps appear simplistic and borne of commonsense, they should not be overlooked or undervalued:

- **Become Familiar With the Latest Statutes and Regulations:** Medical service providers should know and understand the law as the first, and often best, step to ensure compliance. Specific personnel should be assigned in a provider's office to seasonally track regulatory changes and changes in administrative procedures. Providers should consult with compliance counsel, who can provide updated guidance on changes within the state, at least once every year, if not more frequently.
- **Be Proactive:** Medical service providers should not hesitate. If questions arise relating to compliance with regulations, they should speak with a healthcare or medical fraud attorney and/or open direct lines of communication with the office of the insurance fraud prosecutor, etc. It is always better to be safe than risk running afoul later. The serious risk of blindly going along with past practices hoping the rules have not changed is far outweighed by the limited cost and time necessary to learn of compliance changes within the state.
- **Review Internal Protocols and Operations Manuals:** Medical service providers should conduct a thorough review of protocols and manuals fairly regularly to ensure compliance with updated legislation and regulations, making modifications/changes as needed. In doing so, the tough questions should be addressed, including: Has the state issued new or revised guidelines on this topic? Have insurance carriers changed their rules and expectations? Have internal procedures been properly followed in order to ensure compliance with relevant regulations? Are employees following all steps to comply with regulations? The adage, the best defense is a good offense, rings especially true here.
- **Be Transparent**: If an investigation is underway, it could be for a host of reasons. Medical service providers should be transparent and cooperative in the process, after speaking with counsel, to earn credibility and cure any problem before it mushrooms into a bigger one. It is important to understand that compliance failures do and will occur. The key is to identify, isolate, rectify, and minimize them in the future.
- **Conduct Due Diligence:** It is important for medical service providers to know their staff, vendors, treating physicians, etc., since they may be liable for the misconduct of others working under them or at their facility. Lack of knowledge can leave a medical service provider implicated for associating with the wrong people.

Conclusion

As New Jersey's state and federal law enforcement agencies continue to crack down on the medical community with mounting vigor, and as compliance becomes an increasing basis for enforcement actions, it is now more important than ever to be cognizant of compliance requirements and to ensure ongoing compliance with all relevant guidelines. As the BLS and Katz cases reflect, the potential ramifications for failing to engage and follow through on compliance issues far outweigh the upfront burdens and costs of a government investigation and prosecution. ⚖

Endnotes

1. 42 U.S.C. § 1395nn.
2. All facts referenced herein in connection with the BLS prosecution are derived from the following: 1) the criminal complaint dated April 9, 2013, in the matter captioned as *USA v. Biodiagnostic Laboratory Services, LLC, et al.*, United States District Court for the District of New Jersey, Mag. No. 13-8106 (MCA); and 2) the April 9, 2013, press release from the U.S. Attorney's Office for the District of New Jersey, titled "Clinical Laboratory President and New Jersey Doctor, Others Charged With Company in Multimillion-Dollar Cash for Referral Scheme," *available at* justice.gov/usao/nj/Press/files/BLS%20et%20al%20Arrests%20News%20Release.html.
3. All facts referenced herein in connection with the BLS prosecution are derived from the following: 1) the information dated April 10, 2013, in the matter captioned as *USA v. Jose Katz*, United States District Court for the District of New Jersey, Crim. No. 13-246 (JLL); and 2) the April 10, 2013, press release from the U.S. Attorney's Office for the District of New Jersey, titled "Prominent Tri-State Cardiologist Admits Record $19 Million Billing Fraud Scheme, Exposing Patients to Unskilled and Unnecessary Medical Treatment," *available at* justice.gov/usao/nj/Press/files/Katz,%20Jose%20Plea%20News%20Release.html.

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