DOJ and OIG Health Care Fraud Enforcement in 2020 and Beyond

Kirk Ogrosky / Allison Shuren

Kirk Ogrosky and **Allison Shuren** are partners in Arnold & Porter's Washington, DC office. Mr. Ogrosky served as the head of the Medicare Fraud Strike Force at the Department of Justice (DOJ) from 2006 to 2010, Assistant U.S. Attorney in Miami from 1999 to 2004, and an Assistant Attorney General in Kentucky from 1996 to 1998. Ms. Shuren serves as Chair of the firm's health care practice. Before law school, Ms. Shuren was a practicing critical care pediatric nurse practitioner concentrating in pediatric cardiovascular disease and neonatal pediatric surgery. They can be reached at Kirk.Ogrosky@arnoldporter.com and Allison.Shuren@arnoldporter.com.

For 2020 and beyond, the U.S. Department of Justice (DOJ) will continue to expand its efforts to combat health care fraud. Although overall white-collar prosecutions have decreased under this Administration,[1] the same cannot be said for health care. DOJ expanded the Medicare Fraud Strike Force (MFSF) model into new judicial districts and has continued to hire more agents and prosecutors.[2] In addition, DOJ has targeted schemes involving opioids, telemedicine, and genetic testing.[3] To address opioid issues, DOJ has combined traditional Drug Enforcement Agency (DEA) narcotics enforcement with its health care fraud units. With no enforcement decrease in sight for the health care community, we expect the number of investigations and prosecutions to grow in: (i) pain management, (ii) telemedicine, (iii) genetic testing, (iv) labs, (v) pharmacies, and (vi) in-patient facilities.

DOJ and the U.S. Department of Health and Human Services (HHS) Office of Inspector General (OIG) continue to report major fraud cases against all sectors within the health care system.[4] For fiscal year 2018, the most recent reported year, DOJ reported $2.3 billion in health care–related judgments and settlements. While the return on law enforcement investment appears to be falling,[5] the results for 2018 are consistent with prior years and reflect recoveries from cases that began years, if not a decade, prior to the report. The False Claims Act (FCA) remains the central tool for DOJ seeking to return money to the Medicare Trust fund.[6] As the dollar amount cited above demonstrates, relators continue to have financial incentives to bring new cases. The number of FCA cases filed by relators should not impact DOJ priorities. That said, it remains to be seen whether intervention decisions will be impacted by the current Administration's priorities. All told, we expect traditional FCA enforcement to continue at a steady pace with significant monetary settlements coming from large publicly traded companies that cannot afford to defend themselves in court due to the FCA's penalty provisions.[7]

According to DOJ statistics, the vast majority of FCA cases are brought by relators. As a result, whistleblower attorneys contribute a great deal to the civil enforcement agenda. An unfortunate side-effect of relator-driven priorities is a minefield of erratic investigations that fail to advance long-term regulatory and law enforcement goals. The Granston Memoranda (Memo) which encouraged the dismissal of flawed FCA cases will hopefully lead to a decrease in the number of meritless cases.[8] The purpose of the Memo was to define a framework to guide DOJ's authority to dismiss FCA *qui tam* cases. Since 2018, DOJ has filed a number of motions to dismiss on the grounds for dismissal outlined in the Memo. The rationale for dismissal set forth in the Memo includes, among other things, preserving "government interests…when the government's expected costs are likely to exceed any expected gain." Per the Memo, examples of potential costs include "the need to monitor or participate in ongoing litigation, including responding to discovery requests." To date, DOJ has successfully argued the preserving government resources basis.[9] Defendants in FCA cases should be grateful that more of the meritless *qui tam* cases that thwart innovation, chill medical advancement, and waste resources will be dismissed.

This article seeks to provide an overview of the enforcement climate as we head into 2020. For in-house counsel and compliance officers facing a government investigation, nothing is more important than understanding how to promote integrity within your organization and build credibility with law enforcement during an investigation. In the FCA context, companies find themselves in the unenviable position of having to convince DOJ and OIG that fraud did not occur—in essence, having to affirmatively prove innocence—after government attorneys have spent months or years listening to relator's counsel side of events.

First, this article gives an overview of the investigatory process, provides insight into the meaning behind certain enforcement activities, and puts forward a few key suggestions for health care counsel to consider when dealing with DOJ and OIG. The essential takeaway is that you need credibility with the government when faced with allegations of fraud. Developing that credibility does not mean appeasement. It requires that counsel follow the law, stick to their word, act in good faith, communicate openly, and avoid gamesmanship. If the government or relator is incorrect either in their understanding of the facts or the law, companies need to be prepared to litigate aggressively to defend their interests.

Counsel who lose credibility will draw added scrutiny, whereas those who establish credibility receive the benefit of the doubt. This is especially true in the long run but is also important during initial encounters when enforcement has a truncated view of the evidence. It should go without saying, but the way most counsel damage their credibility is by not having a grasp of the facts prior to opening their mouths. So, after discussing the enforcement process, the article addresses how to investigate and marshal the facts.[10] It is worth noting that every investigation is different and there is no single recipe for success. There are, however, basic principles that can help companies build credibility while addressing subpoenas, interview requests, and civil investigative demands. This article is intended to assist how counsel might prepare for government inquiries, *qui tams*, and civil litigation. Having a well thought-out plan to address government inquiries goes a long way to ameliorating the costs of an investigation.

Responding to Modern Investigations

From the outset of any governmental investigation, it is critical to set the appropriate and cooperative tone. Being dismissive

and aggressive before clearly understanding the basis of the government's view can cause substantial problems. Although your entity may be entirely compliant and the allegations may be false, it is still critical to establish for the government that the entity takes its compliance obligations seriously, and that includes responding to government investigations. At the beginning of an investigation, counsel and compliance officers must understand how to respond and communicate with the government. For larger organizations, they may have an outside counsel who is prepared to handle the investigation. For smaller organizations, governmental investigations may be completely foreign. The following sections set forth information designed to help counsel and compliance officers deal with modern investigatory techniques.

In 2020, many governmental investigations will start with data mining for claims aberrations and hotline complaints, as compared to investigations started by former employee whistleblowers. Regardless of the source, the underlying issues are typically matters that were first addressed in compliance departments. This is why compliance personnel must treat all complaints as serious matters even when the facts do not appear to amount to fraud or abuse. As a preliminary matter, DOJ and OIG are not the only agencies that investigate health care fraud. Other agencies that conduct investigations include state Medicaid Fraud Control Units (MCFUs), the Internal Revenue Service (IRS), the Postal Inspection Service, Department of Defense (DOD), and the Federal Bureau of Investigation (FBI).

In most cases, the first sign of an investigation is a person reporting a law enforcement contact. These initial contacts are usually followed by subpoenas or governmental requests. On rare occasion (in the most serious cases), a search warrant is executed to seize documents. When the initiating contact is informal, counsel and compliance must decide whether the situation merits involving outside counsel or further information gathering. Once the government initiates formal contact, the company should communicate with the government through a single point of contact, usually counsel.

Whatever the initial contact—letter, subpoena, or employee interview—and response, counsel should focus on understanding the facts and the law. Always remember that the initial response sets the tone for what may turn into a lengthy investigation. Given that agents are proceeding with limited and biased information in the initial stages, do not be surprised if government agents and attorneys seem heavy-handed. As the investigation progresses, the government should be striving to understand the facts. When the government is willing to communicate, companies can make headway by guiding investigators through documents and witnesses. The following sections address the different types of contacts and provide pragmatic suggestions for 2020 and beyond. Please be mindful that every investigation is different, and the following suggestions are basic propositions.

Investigatory Contacts

In the majority of cases, the first warning of an investigation comes when a former employee reports having been interviewed by agents. After gathering as much information as possible about the interview (including the substantive questions and names of people mentioned), counsel should decide whether it makes sense to have counsel call the agent. Assuming the agent is willing to talk and the subject matter is appropriate, counsel should gather as much information as possible and begin to identify potential legal issues.

If the company is the target of the investigation, counsel should next identify key individuals with relevant knowledge. If current employees, these individuals can be interviewed by counsel and advised on how to respond to inquiries

from government agents. Counsel must be mindful that the law says that a witness is not the property of the government nor the company and that both sides should have equal access to the witness.[11] Unfortunately, legal requirements have no practical meaning if employees do not know their rights when confronted by investigators. Counsel should advise these individuals of their legal rights and obligations should they be contacted for an interview.

Counsel also should inform employees that they may speak to a government agent if they choose, but that if they go forward with an interview, the company expects and requires that all answers be truthful. Also, companies may explain the benefits of preparing for an interview and seeking an attorney's assistance before sitting for an interview. An individual who declines an immediate request for interview in order to meet with counsel in advance will almost always be a more accurate witness. Counsel should advise all employees to get a copy of the card or the contact information of any agent who approaches them, including the agent's name, agency, and phone number. Shockingly, employees often report not knowing who spoke to them. Finally, employees should not discuss confidential patient information without first confirming the agent's credentials.

For individuals who choose to utilize counsel for their interviews, the company should determine whether the fees and costs should be indemnified. To do so, counsel should review the company's governing documents before making this decision. Company counsel also must keep in mind that the rules of professional ethics bar them from representing an individual employee in a personal capacity. As such, company counsel should make clear to individuals that they represent the organization.[12] The best way to apprise employees of their rights will vary depending on the circumstances. Relevant considerations include the number of employees involved, their positions and locations, and the likelihood that the government may contact them before they can be interviewed by company counsel.

To cultivate credibility with the government, counsel should request informational interviews with key employees immediately, and as confidentially as possible, in order to identify key facts and legal issues. Lawyers must know the investigatory process, the industry, and the company to gather the information necessary to gauge the seriousness of the situation. Agents who sense obstructionist conduct by company counsel may respond by escalating the investigation.

Requests for Documents

The second way companies learn of an ongoing investigation is service of a subpoena. Subpoenas raise a host of thorny issues, particularly for large organizations that possess countless documents and substantial volumes of electronically stored information (ESI). Where the government is investigating allegations in good faith, it is important that counsel deal effectively with subpoena requests to avoid provoking agents to make more aggressive demands, pursue higher penalties, or seek judicial enforcement of requests. This does not mean that all subpoenas are created equal or are reasonably designed to further the investigation. On many occasions, subpoenas are overbroad and unduly burdensome.

Subpoenas can be administrative, civil, or criminal and can be issued pursuant to a variety of enabling statutes. Health care investigations usually involve Inspector General Subpoenas, HIPAA subpoenas, grand jury subpoenas, or civil investigative demands (CIDs). The type of subpoena and how it is served can offer significant insight into the nature of the investigation. Any subpoena that signals that a company is under investigation should be handled by outside counsel.

Civil Investigative Demands

Over the past decade, Civil Investigative Demands (CIDs) have become the standard tool used by federal agents and prosecutors to obtain documents and testimony in health care fraud investigations. Prior to 2009, CIDs were rarely used. Although receipt of a CID is the hallmark of a pending *qui tam* case and mandatory DOJ investigation, it also may indicate DOJ is engaged in a criminal investigation. Unlike traditional civil discovery, CIDs are issued before litigation commences. This fact alone makes it difficult to seek judicial review or to attempt to set appropriate limits. Furthermore, certain prosecutors appear to believe that they are entitled to take testimony without objection or interruption by counsel.

The reason for the expanded use of CIDs was the enactment of the Fraud Enforcement and Recovery Act (FERA) of 2009. Prior to FERA, only the U.S. Attorney General could authorize issuance of a CID. Therefore, they were rarely used. FERA provides that the Attorney General may delegate the power to issue CIDs to U.S. Attorneys and the Assistant Attorney General for the Civil Division.[13] As a result, prosecutors across the federal government turned to CIDs to compel sworn testimony and documents.[14] DOJ may issue a CID if there is any "reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation."[15] Also, the current FCA came into being over 150 years ago as both a criminal and civil enforcement tool. While a subpoena can only call for production of documents, CIDs can require a company to: (1) produce documents; (2) answer interrogatories; and (3) give testimony.[16] Furthermore, unlike some of the other tools described below, the government may share any information obtained through a CID with all branches inside government and with *qui tam* relators and their counsel, so long as the government "determine[s] it is necessary as part of any false claims act investigation."[17]

Once a CID is received, the most important part of the document is the listing of the items to be produced. Given the wording of the requested materials, experienced health care counsel can almost always identify the nature of the investigation and the jurisdiction of the pending sealed matter. Understanding whether the issues relate to arrangements, medical necessity, or potentially other issues is critical to preparing an internal work plan. Although the request should not restrict the topics examined in an internal review, it most certainly sets the floor for what issues must be examined. After that review, counsel should attend to direct the government to relevant materials such that the prosecutors and agents can be efficient in their review.

Before meeting with the government to discuss the scope of the CID, counsel should develop an analysis of the scope of the requests and assure that all potentially responsive materials are placed on a litigation hold; in other words: not deleted, destroyed, or altered. All relevant personnel should receive these hold notices. If the language in the subpoena is clear and easily understandable, the hold can cite the subpoena request. If not, counsel should craft the hold in simple and broad easily understandable terms.

Inspector General and HIPAA Subpoenas

OIG has independent authority to investigate fraud related to federal payers. The Inspector General Act (IGA), 5 U.S.C. App. 3, created an independent authority that allows OIG to conduct its own investigations. More typically, OIG works hand-in-hand with DOJ in advancing *qui tam* cases. Nevertheless, OIG has authority to issue administrative subpoenas pursuant to 5 U.S.C. App. 3 § 6(a)(4), and the IGA authorizes subpoenas *duces tecum*,

document requests. If required, IG subpoenas are enforced by DOJ.[18] Although the IGA does not specify sanctions for failure to comply, courts have enforced IG subpoenas where (a) they are issued within the statutory authority of the agency, (b) the material sought is reasonably relevant, and (c) the requests are not unreasonably broad or unduly burdensome. In the current enforcement environment, IG subpoenas have become antiquated and are rarely used. If one is received, however, it is typically a sign that a sealed *qui tam* is pending. For purposes of enforcement and compliance, OIG typically directs counsel to call an attorney in DOJ's civil fraud section or the U.S. Attorney's office in order to produce the responsive materials.

In addition to CIDs and IG Subpoenas, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) authorized DOJ to issue subpoenas for documents and testimony in investigations relating to "any act or activity involving a federal healthcare offense."[19] HIPAA subpoenas are sometimes referred to as Authorized Investigative Demands (AIDs).[20] U.S. Attorneys' offices and DOJ attorneys can issue HIPAA subpoenas. Once again, the use of HIPAA subpoenas has declined since FERA expanded the use of CIDs. Prosecutors seem to prefer CIDs as they allow compelled depositions and interrogatories. CIDs and HIPAA subpoenas, unlike grand jury subpoenas, allow attorneys at DOJ to share documents and other information without regard to Rule 6(e).[21] Note that documents and testimony obtained through grand jury subpoenas cannot be shared absent a specific court order. DOJ believes that both CIDs and HIPAA subpoenas facilitate parallel criminal and civil proceedings, and line prosecutors and agents are encouraged to conduct such proceedings.

If a HIPAA subpoena is received, the first inquiry will be whether it was issued by a civil or criminal prosecutor. The very existence of a criminal investigation should alert the recipient to exercise maximal diligence and seek counsel immediately. When a criminal investigation is underway, the company will want to know the underlying facts as quickly as possible. There is no quicker way to trigger DOJ's ire than to obstruct or interfere in an ongoing criminal investigation. So, it is important for counsel to talk to DOJ as soon as possible. Something as simple as sending a hold notice without talking to the prosecutor, for example, could alert a target to the existence of an investigation at a time when prosecutors are conducting active undercover activities. Companies receiving potential criminal compulsory process (a grand jury subpoena, CID, or HIPAA subpoena) must obtain expert advice from experienced counsel who is keenly aware of how DOJ operates.

Grand Jury Subpoenas

The most old-fashioned, and perhaps most intimidating form of process, is the grand jury subpoena. A grand jury subpoena allows criminal prosecutors to obtain documents and compel testimony in a short timeframe. Whereas a CID or HIPAA subpoena may issue in a civil matter, a grand jury subpoena cannot. Furthermore, Rule 6(e) makes it a criminal offense for the prosecutor to leak or share material with the public, a relator, or even civil DOJ personnel absent a court order. A grand jury subpoena means that there is an open criminal investigation and that a federal prosecutor has been assigned to the matter. In addition, a grand jury subpoena for documents may be accompanied by a target letter. Most districts encourage prosecutors to advise individuals and entities of their status as a target.[22]

Subpoena Response

Responding to a subpoena sets the tone for the investigation. The government expects a quick and knowledgeable response. Although the topics under scrutiny and the subpoena are new to the company,

the government may have spent months investigating prior to issuing a subpoena. Counsel needs to take several immediate steps: (1) speak to the head of the Information Technology (IT) department to assure that a proper hold of company documents is in place, (2) identify key individuals who should be instructed to hold all materials related to the inquiry including hard copy and text/smartphone materials, (3) issue a formal internal hold notice, and (4) select the person/counsel who will interact with government.

For publicly traded companies, counsel will need to consult with their securities experts to determine when the company must publicly disclose the existence of a government investigation. In general, securities laws impose a duty to disclose specific events that may arise during an investigation. For example, a company must disclose when an investigation where there is a "material pending legal proceeding;" or where such a proceeding is "known to be contemplated" by a governmental authority; or where a director of an issuer is a defendant in a pending criminal proceeding.[23]

The hold notice should be written in layman's terms and should include a list of documents to retain and instructions on how the documents will be collected. Given all the ways that information is created, stored, and deleted, the ability to satisfy investigators that nonprivileged, responsive documents and communications are being retained, reviewed, and produced is important to successfully responding to subpoenas and defending against government action. As soon as the company assesses the state of its records and its ability to comply, counsel should meet with the government to narrow the request to the simplest universe of material that will satisfy the government. This process of narrowing the request will help focus the investigation for all sides. Common topics of discussion include time periods, clarity and breadth of requests, response times, ESI issues, and privilege. Counsel should always convey a commitment to promptly handle the compulsory process.

Search Warrants

In health care investigations, search warrants are rarely used. Though warrants are rare, counsel should know the process and have a plan to deal with a warrant should one issue. First, employees should know to contact counsel immediately when presented with a warrant. The warrant should be inspected for facial sufficiency (location, time, date, and scope), and all individuals involved should be instructed to comply with its terms. Thereafter, send home all nonessential employees—doing so will usually make the process move quicker. Request a copy of the warrant and all supporting documentation. It is usually advisable to assist the agents in locating materials, but do not discuss the facts with the agents during a search. Someone should try to keep track of the areas searched, questions asked, and items taken. Everyone should be professional and courteous to agents. At the end of the search, counsel should request an inventory that fully describes the items seized.

Conclusion

Knowing the investigations process, understanding how the government is proceeding, and making well-informed decisions can reduce the emotional and financial expense of dealing with an investigation. Effectively and efficiently dealing with the government does not mean assuaging government attorneys and agents. It requires building credibility with the prosecutors and agents by following the law, understanding the evidence, keeping your word, acting in good faith, communicating openly, and avoiding gamesmanship. Counsel who establish credibility always will receive the benefit of the doubt in the long run and will be in the best position to fully resolve the issues.

Endnotes

1. Khimm, Suzy, *Trump Hits Corporate Violators—With A Feather: Obama Came Down Hard On Offenders. But From Wall Street To Polluters To Businesses Shortchanging Workers, This Administration Is Using A Lighter Touch*, NBC News (Aug 20, 2018), accessed on Nov. 25, *www.nbcnews.com/politics/white-house/trump-hits-corporate-violators-feather-n899431*.
2. Press Release, Dept. of Justice, Assistant Attorney General Benczkowski Announces Newark/Philadelphia Medicare Fraud Strike Force to Focus on Health Care Fraud and Illegal Opioid Prescriptions (August 13, 2018), accessed on Nov. 25, *www.justice.gov/opa/pr/assistant-attorney-general-benczkowskiannouncesnewarkphiladelphia-medicare-fraud-strike*.
3. The Department of Health and Human Services, Office of the Inspector General, Media Materials: 2019 Appalachian Region Opioid Takedown (April 17, 2019), accessed on Nov. 25, *oig.hhs.gov/newsroom/media-materials/2019/arpo/*; *www.justice.gov/opa/pr/ appalachian-regional-prescription-opioid-arpo-strike-force-takedown-results-charges-against*.
4. DOJ/HHS, Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2018 (May 2019), accessed on Nov. 25, *oig.hhs.gov/publications/docs/hcfac/FY2018-hcfac.pdf* (DOJ "won or negotiated over $2.3 billion in health care fraud judgments and settlements." In addition, DOJ "opened 1,139 new criminal health care fraud investigations," and charges were filed in "572 cases involving 872 defendants. A total of 497 defendants were convicted . . . .").
5. Thornton, David, *Why Does HHS OIG's Budget Keep Rising As Its Output Keeps Falling?* Federal News Radio (August 6, 2018), accessed on Nov. 25, *federalnewsradio.com/agency-oversight/2018/08/why-does-hhs-oigs-budget-keep-rising-as-its-output-keeps-falling*. It is notable that leaving political appointed position unfilled across DOJ has the effect of leaving interim, career employees in decisionmaking positions where avoiding moving forward on larger or media generating cases serves the purpose of avoiding unwanted political attention. This may be a portion of what is occurring across DOJ where nonconfirmed career employees do not feel empowered to move forward or fear reprisal for unwanted media attention.
6. False Claims Act, ch. 67, 12 Stat. 696 (1863)(codified as amended at 31 U.S.C. §§ 232-235). The U.S. FCA is believed to be based on *qui tam* laws dating back to the middle ages in England. Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, Congressional Research Service (Aug. 6, 2009). In 1318, King Edward II allowed a 33 percent recovery share to individuals who won claims against officials who moonlighted as wine merchants. *Id. See also* Press Release, Dept. of Justice, Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986 (Jan. 31, 2012), available at *www.justice .gov/opa/pr/2012/ January/12-ag-142.html* ("[a]mong the top settlements the government has achieved since the passage of the 1986 amendments are the following, which include, in some cases, criminal and state civil recoveries: $2.2 billion—J&J (2013); $2.3 billion—Pfizer Inc. (2010); $1.7 billion—Columbia/HCA I & II (2000 and 2003); $1.4 billion—Eli Lilly and Company (2009); $950 million—Merck Sharp & Dohme (2011); $923 million—Tenet Healthcare Corporation (2006); $875 million—TAP Pharmaceuticals (2002); $750 million—GlaxoSmithKline (2010); $704 million—Serono, S.A. (2005); $650 million—Merck (2008); and $634 million—Purdue Pharma (2007)).
7. *Id.* at n.5.
8. The Granston Memo (Jan. 10, 2018), accessed Nov. 25, *www.arnoldporter.com/-/media/files/perspectives/publications/2018/10/granston-memo/granston-memo.pdf?la=en*; *see also https://www.arnoldporter.com/-/media/files/perspectives/publications/2018/10/granston-memo/granston-memo.pdf?la=en*.
9. *United States ex rel. Toomer v. Terrapower, LLC*, No. 16-226, 2018 WL 4934070 (D. Idaho Oct. 10, 2018); *United States ex rel. Stovall v. Webster University*, No. 15-3530, 2018 WL 3756888 (D.S.C. Aug. 8, 2018); and *United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, No. 14-1047, 2019 WL 1060876 (D.D.C. Mar. 6, 2019).
10. Given the prevalence of compliance investigations in health care, it is critical that counsel decide in advance if they want the internal investigation material to be privileged or not. Two recent decisions make clear that courts will not hesitate to order the release of attorney–client communications if an internal investigation is not carefully initiated. In *United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, Case No: 6:09-cv-1002, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012), the court ruled that hundreds of documents created by or directed to in-house counsel and compliance were not protected. The court determined that while communications with outside counsel enjoy a presumption of protection, communications between in-house counsel and corporate employees do not, and the organization has the burden of establishing that each communication is privileged. Perhaps more disturbing, in *United States ex rel. Barko v. Halliburton Co.*, 2014 U.S. Dist. LEXIS 30866 (D.D.C. Mar. 11, 2014), the court compelled production of internal investigation materials. This case highlights the risk associated with having in-house personnel involved with internal investigations. Before counsel starts to make inquiries into the underlying facts, they should carefully consider why and how to achieve their goals. If counsel intends to have privileged communications, then it should be stated explicitly that the communication is privileged

and that counsel has been asked for and is providing legal advice.

11. *See United States v. Medina*, 992 F.2d 573, 579 (6th Cir. 1993); *United States v. Matlock*, 491 F.2d 504, 506 (6th Cir. 1974); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966).
12. This is a key part of the "*Upjohn* warning" that takes its name from *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Court in *Upjohn* held that communications between company counsel and employees of the company are privileged, but the privilege is owned by the company and not the employee. The purpose of the Upjohn warning is to remove any doubt that the lawyer speaking to the employee represents the company, and not the employee.
13. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1624 (2009).
14. *See* 31 U.S.C. § 3733(a)(1).
15. *Id.*
16. 31 U.S.C. § 3733(a)(1), (f)(1).
17. *Id.*
18. *See* 28 U.S.C. §§ 516-19.
19. Pub. L. No. 104-191, § 248, 110 Stat. 1936, 2018, codified at 18 U.S.C. § 3486 (2000).
20. *See* 18 U.S.C. §3486(a)(1)(A)(i)(I).
21. Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities at 31, *www.justice.gov/archive/olp/rpt_to_congress.htm*.
22. *See Justice Manual* § 9-11.153, *www.justice.gov/usao/eousa/foia_reading_room/usam/ title9/11mcrm.htm#9-11.153*.
23. *See* 17 C.F.R. § 229.103 (2009) (disclosure of "legal proceedings"); id. at § 229.401(f) (disclosure concerning involvement of directors or executive officers in certain legal proceedings). But even where specific disclosure requirements are set forth as in United States Securities and Exchange Commission ("SEC") Form 8-K or Regulation S-K, those requirements are subject to interpretation.

Reprinted from Journal of Health Care Compliance, Volume 22, Number 1, January–February 2020, pages 17–24, 62, with permission from CCH and Wolters Kluwer.
For permission to reprint, e-mail permissions@cch.com.