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If your consultant's committing fraud, you may be too

The legacy of health care fraud enforcement has resulted in significant criminal and civil actions against third-party health care consultants -- attorneys, accountants and reimbursement experts who provide services to health care providers participating in federal heath care programs.

A much-publicized criminal indictment of two health care attorneys who assisted a Kansas hospital structure a relationship between referring physicians and a hospital highlighted the risk of liability for attorneys who participate in health care arrangements. A more recent Florida case further reflects the government's willingness to pursue criminal and civil responsibility against consultants who participate in the submission of false claims.

An important aspect of these and other cases involving third-party consultant liability is that in each case where consultant liability was established, parallel liability was established on the part of the contracting health care provider.

The government has, in fact, aggressively highlighted liability for third-party consultants through model compliance guidance and special advisory bulletins issued by the Office of Inspector General (OIG) of the Department of Health and Human Services. The recent OIG Advisory Bulletin on "Practices for Business Consultants" and the General Accounting Office (GAO) report on "Health Care, Consultants' Billing Advice May Lead To Improperly Paid Insurance Claims" are especially noteworthy.

False Claims Act

The most frequently used statute to impose liability on providers and consultants has been the civil United States False Claims Act (FCA). This civil statute can be applied by the government directly in an enforcement action or it can be initiated by a whistle-blower through its "qui tam" provisions.

The use of this statute, whether initiated directly by the government or by a whistleblower, often results in parallel criminal liability arising out of the same facts and circumstances forming the basis of the civil action. The four frequently used criteria for liability under the FCA include: false claims, false statements or records, conspiracy to submit false claims, and reverse false claims.

If the government and/or whistleblower can prove by providing a wealth of evidence that a defendant violated any section of the FCA, then the court may assess "three times the amount of damages that the government sustains because of the act of that person." Additionally, the FCA imposes a civil penalty "of no less than $5,000 and not more than $10,000 for each false claim."

The government often has taken the position -- and has achieved recoveries and judgments against providers - based on the theory that providers are accountable for acts of their employees and agents (including third party consultants). A health care provider or supplier can't merely retain a consultant and delegate responsibility, resulting in the submission of

false or improper claims, and avoid liability under the FCA.

Plus, all FCA complaints also are reviewed for potential criminal culpability. The consequence of a provider acting in deliberate ignorance, deliberate disregard or otherwise hiding, has and can result in criminal and civil liability for both provider and the consultant.

Selection Of A Consultant

The management of risk obviously starts with the selection of a consultant, and there are several aspects of this process to consider.

The selection criteria for any consultant should include, at a minimum, the consultant's experience, qualifications reputation and references. A provider should be careful to have a competent and credible understanding of the relevant experience of the consultant being considered, not only in general, but also as it would pertain to the particular engagement for which the consultant is being considered.

There are many consultants who have general experience in a broad subject matter, but it is important that providers choose consultants who possess relevant knowledge and experience relating to the subject matter at hand. It does not do a provider any good to hire a consultant who has broad based reimbursement experience under Part A of the Medicare and or Medicaid programs, when the subject matter of the engagement involves reimbursement issues under Part B.

If a provider chooses a consultant for cost reporting matters, you should ask if that consultant has experience in the preparation and submission of cost reports for the particular type of provider. There can be a substantial difference in filling a cost report between a general acute care hospital and home health agency.

A provider also should determine who within the consultant organization will be involved in the contemplated engagement and whether the parties assigned to the engagement possess the appropriate experience. The less experienced team member should have direct supervision by a more experienced team member, and you should not be reluctant to ask questions about each individual's qualifications.

For example, a hospital charge master (CDM) typically includes a review of CPT/HCPC codes, revenue codes, descriptions associated with the codes, and rates. Someone trained in hospital coding should review the CPT/NCPC codes; someone with hospital billing experience should review the revenue codes; and someone with clinical experience should review the descriptions to ensure that they actually match the service.

There are some invidual consultants who have coding, billing and clinical experience, although this is not typically the case. An organization is more likely to provide the full spectrum of this type of experience, assuming that they do this type of work for a particular provider (i.e. hospital).

A provider should make an effort to check a consultant organization's references in a thorough enough manner to verify its qualifications and experience.

A review of the OIG exclusion list at www.exclusions.oig.hhs.gov would be prudent. It also may be useful to ask prospective consultants to identify organizations to whom they have provided services in the past to ensure those organizations are not on the exclusion list.

Once a consultant under consideration is reviewed for experience, qualifications and references, it probably makes sense to have a discussion so that reasonable expectations can be established. A provider must understand the scope of a consultant's expertise and keep in mind that an individual qualified to prepare a cost report is not necessarily qualified to prepare an appeal of a cost report determination.

A consultant who submits claims for Part B services would not necessarily be qualified to submit a cost report and would not be qualified to appeal denials of Part A or Part B claims. Financial auditors normally are not expected to be authorities on Medicare regulatory issues.

A provider and a consultant should establish reasonable expectations based on the expertise of the consultant. If there is a fit, then proceed. If not, at least the scope of the engagement can be tailored and the expectations modified accordingly.

Be On The Alert

There clearly are some well-chronicled "warning signals" that can alert a provider to the likelihood of exposure and risk in the consultant relationship. The legacy of enforcement

involving consultant relationships, as well as public documents disseminated by the OIG, the GAO and the results of congressional hearings, has identified a number of questionable practices including: illegal or misleading representations, promises and guarantees, encouraging abusive practices, and discouraging compliance efforts.

Finally, the type of compensation arrangements in consultant contracts should be carefully scrutinized. A consultant contract based on a contingency and/or percentage of revenue is not only risky for a provider, but is considered a highly suspect compensation arrangement by government enforcement authorities. The chief concern with these types of payment arrangements is that they provide incentives for potential fraudulent and abusive conduct with respect to the submission of claims.

A compensation arrangement that does not incentivize potential fraudulent and abusive behavior, but otherwise rewards competent, credible, and reliable conduct in the consultant relationship will reduce the likelihood of exposure and risk in consultant relationships. As a general rule of thumb, if a consultant's advice seems too good to be true, it probably is. **BC**

Broad and Cassel, founded in January 1, 1946, has more than 140 lawyers and 200 support personnel located in seven offices throughout the state of Florida. Broad and Cassel has a national and international client base with offices located in Boca Raton, Fort Lauderdale, Miami, Orlando, Tallahassee, Tampa, and West Palm Beach. The Firm has extensive experience in a wide variety of practice areas including: Corporate and Securities; Real Estate; Estate Planning and Trusts; Commercial Litigation; Health Law; Taxation; Bankruptcy and Creditors' Rights; Labor and Employment; Intellectual Property Law; Computer and Technology Law; Appellate Law; White Collar Criminal and Civil Fraud Defense; and Special Assets.

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