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PRACTICE FOCUS

BLURRED BARRIERS IN CIVIL, CRIMINAL MEDICAID INVESTIGATIONS

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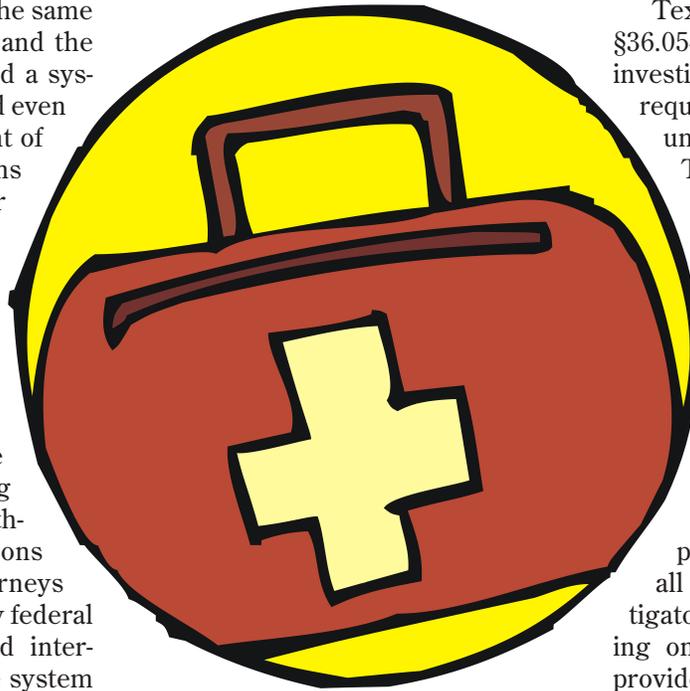


According to a press release from the Texas Office of the Attorney General, the state spends more than \$17 billion annually to fund its portion of the Medicaid program. In an effort to control Medicaid costs and at the same time combat abuse, the OAG and the Texas Legislature have created a system that has encouraged — and even required — the intertwining of civil and criminal investigations to the detriment of the proper administration of criminal justice, which likely violates Fifth Amendment due-process limitations.

A civil administrative investigation may act as a Trojan horse for a parallel criminal investigation by gaining the cooperation of an unsuspecting criminal target who would otherwise have invoked protections against self-incrimination. Attorneys should be familiar with the way federal agencies addressing Medicaid interact and should understand the system has blurred what should be clearly demarcated barriers between civil and criminal investigations of health-care providers.

What agencies are involved in investigating Medicaid fraud? The Medicaid Fraud Control Unit (MFCU) is a criminal investigation arm of the OAG. Texas House Bill 2292 gave MFCU prosecutors concurrent jurisdiction, with the consent of the local county district attorney, to prosecute relevant state felonies such as fraud and theft. MFCU's investigations may result in imprisonment, fines and exclusion of providers from the Medicaid program.

The civil arm of the OAG is the Civil Medicaid Fraud Division (CMF), which investigates and pursues civil fraud. Finally, there is the Health and Human



Services Commission (HHSC) in the Office of Inspector General (OIG). This agency conducts administrative reviews and on-site provider verifications, which sometimes are performed by MFCU investigators.

How do subpoenas work between these agencies? The OIG has subpoena power to compel the production of documents directly from Medicaid providers, and these subpoenas are available to MFCU criminal investigators building a criminal case. When a provider's records are withheld from the OIG, it

raises a red flag and the case will be turned over to MFCU. The genesis of MFCU's involvement is not an implication of criminality but the invocation of a person's constitutional rights.

Texas Human Resource Code §36.054 allows MFCU to use a civil investigative demand, a process that requires the provider to produce documentation discoverable under the Texas Rules of Civil Procedure. This mechanism permits MFCU to request documents under the guise of a civil disclosure, while avoiding the checks and balances of a grand jury subpoena.

How do the agencies collaborate? The OIG and MFCU participate in regular meetings to discuss individual cases and hold quarterly meetings to promote collaborative efforts at all levels. MFCU's criminal investigators supplement OIG by conducting on-site provider verifications for providers who meet the profile for criminal fraud, such as durable medical equipment suppliers. Since 52 members of MFCU's staff are commissioned peace officers, the result is that criminal investigators initiate investigations of high risk-type providers under the guise of an administrative review. This level of cooperation and coordination between the MFCU and HHSC-OIG is statutorily required; MFCU and OIG do not run parallel investigations but rather attack a case in a coordinated effort to build the best possible case against the target.

When do these collaborations become inappropriate? Parallel civil and crimi-

nal proceedings that examine the same conduct are permissible and often considered to be in the public interest. However, when civil and criminal investigations become too intertwined they cease to be parallel and could violate the Constitution's Fourth, Fifth and/or Sixth Amendment. In determining whether an investigation has become improperly intertwined, courts generally consider five factors gleaned from a range of cases dating as far back as 1951: 1. Was there any notice that evidence provided could be used in a criminal proceeding? 2. Was the civil investigation brought in bad faith? 3. Was the target of the investigations represented by counsel? 4. Did the defendant invoke his Fifth Amendment right against self-incrimination? 5. Did the defendant waive those rights?

How can I help my client? Courts will carry the initial burden to protect the rights of criminal defendants from the overreaching created by the Texas statutory scheme, and attorneys should move to dismiss indictments or, in the alternative, suppress evidence, where criminal investigators use a civil investigation as the pretense for a criminal

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create clear barriers between criminal and civil investigations to safeguard the constitutional rights of providers while maintaining an effective Medicaid fraud prevention and enforcement scheme by:

1. removing statutory authority for criminal investigators to use civil or administrative discovery devices to build a criminal case;
2. requiring OAG investigators to give notice immediately to providers, on first contact, as to the nature of their investigation, whether civil or criminal;
3. requiring civil investigators to notify providers that any statement made or documents produced in compliance with civil or administrative dis-

5. building safeguards to prevent the referral of a case from a criminal investigation unit such as MFCU to a civil investigation unit such as CMF or HHSC-OIC for the purpose of building a criminal case.

The political will required to ensure the integrity of the Texas criminal justice system may not exist in sufficient quantity in our courts or legislative halls. The demarcation between criminal and civil investigations (and investigative tools) may have to continue to be drawn at the federal level, where the political climate likely holds less sway. Until then, counsel must watch for constitutional violations in Medicaid fraud investigations and zealously defend against them. **I H T**

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investigation or use civil or administrative discovery devices to compel the production of evidence that could not be reached by operating within the confines of the criminal justice system. Those actions violate Fifth Amendment due-process protections and the proper administration of criminal justice.

Ultimately, however, the battle does not rest with counsel. The Texas Legislature should revise the Medicaid fraud enforcement statutory scheme to

covery can be used in a criminal proceeding against them and to ask providers to waive Texas Rules of Evidence 408 and 410 where applicable;

4. creating a barrier between civil administrative and criminal investigators to prevent the sharing of statements or documents to which Texas Rules of Evidence 408 and 410 apply or of evidence where no notice of possible use in a criminal proceeding was given; and



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