

YOUR HEALTH CARE CASE JUST WENT CRIMINAL: WHY? WHAT SHOULD YOU DO NOW?



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AGENDA

- **Identifying Frequently-Used Health Care Fraud Criminal Statutes**
- **How a Criminal Health Care Case is Initiated**
- **Comparison of Criminal and Civil Health Care Investigations, Including Parallel Investigations**
- **Factors Involved with Determination to Go Criminal**
- **Compelling (and Not-So-Compelling) Defense Arguments**
- **Additional Strategies and Considerations**

FREQUENTLY-CHARGED HEALTH CARE CRIMES

- **Health Care Fraud**
 - Broad application available to investigate and charge virtually any type of health care fraud scheme
- **Anti-Kickback Law**
 - Prohibits bribery; recent trend DOJ trend using Travel Act to prosecute kickback transactions involving purely commercial plans
- **Controlled Substances Act**
 - Increased application in the wake of the opioid epidemic
- **Food, Drug, & Cosmetics Act**
 - Often used in misbranding, mishandling, and dissemination of certain drugs
- **HIPAA**
 - Crime for covered entities to use unique health identifier or to obtain or disclose identifiable health information
- **False Statements/Obstruction**

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HOW CRIMINAL HEALTH CARE CASES BEGIN

A criminal healthcare case can begin at DOJ through numerous avenues:

- **Qui Tam Complaints**
- **Agency Investigations**
 - HHS-OIG (HEAT)
 - FBI, FDA, VA, IRS, etc.
 - Data Analytics
- **Extraordinary Events**
 - e.g., Opioid Epidemic
- **News/Press/Politics**

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CRIMINAL VS. CIVIL INVESTIGATIONS

- **Criminal Investigations**
 - Undercover informants, electronic surveillance, search warrants
 - Grand jury
- **Civil Investigations**
 - Civil Investigative Demands
 - Subpoenas
 - Interviews
- **Practical Differences**
 - Access to information

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PARALLEL PROCEEDINGS

- **Encouraged by DOJ**
- **Beware of the “stalking horse”**
- **Complications Related to Cross Designating Civil AUSA**
- **Defense Counsel Must Regularly Seek Clarity**

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FACTORS LIKELY TO RESULT IN CRIMINAL CHARGES

- Nature and Circumstances of Defendant's Conduct
- Patient Harm
- Substantial Economic Loss
- Whether Defendant Occupies Position of Trust
 - e.g., Doctor, Lawyer, etc.
- Political Pressure
- Media Coverage
- Jurisdiction
- Timing/Resources

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DEFENSE ARGUMENTS

- USAM instructs, if conduct constitutes a federal offense and admissible evidence sufficient to sustain conviction exists, AUSA is directed to pursue criminal prosecution unless:
 1. No substantial federal interest
 2. Effective prosecution in another jurisdiction
 3. Adequate non-criminal alternative to prosecution
- The third exception is the most fruitful avenue for negotiation
 - Prosecutor must consider "all relevant" factors

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EXISTENCE OF AN ADEQUATE NON-CRIMINAL ALTERNATIVE TO PROSECUTION

- **Non-Criminal Alternative Considerations**
 - Civil action under the False Claims Act (USAM specifically identifies as alternative)
 - Collateral consequences (layoffs, etc.)
 - Permanent exclusion vs. Corporate Integrity Agreements
 - Payment
 - Demonstrate corporate changes (enhanced compliance, separate bad actors, etc.)

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ADDITIONAL DEFENSE ARGUMENTS AND MITIGATION STRATEGIES

- **MITIGATION**
 - Robust Compliance Program
 - Internal Investigation
 - Use of Experts (e.g., forensic auditor or certified medical biller)

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ADDITIONAL DEFENSE ARGUMENTS AND MITIGATION STRATEGIES

■ ADDITIONAL STRATEGIES AND CONSIDERATIONS

- Joint Defense Agreements
- Negotiating Global Settlement
- Deferred Prosecution Agreement

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THANK YOU.

■ Any Questions?

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