

Health Care Fraud Investigator Ethics

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Our Agenda Today

- Discuss the role of ethics in health care fraud investigations
- Identify the differences (and connections) between legal requirements and limits and ethics
- Discuss ethical challenges facing health care fraud investigators
- Discuss examples and answer/address your questions



Why should we care about ethics?

- We bring trust back to a failing system
- We choose to assert serious charges against the most trusted in society
- We specialize in a field that few others understand and don't want to
- We MUST be above reproach
- We cannot behave ethically sometimes
- We must uphold the trust that others place in us

ETHICS?

- Process by which you make decisions as a professional. It involves many aspects that must be considered to reach that decision.
- All of your choices have consequences

What are Ethics?

- Being compliant?
 - Refraining from prohibited activities
- Following the law and regulation?
 - Disallows what is perceived to be unethical
- Following your moral conviction?
 - My personal experience as to what is right
- Following policies?
 - Sets forth what an expectation, often limited in scope
- Not hurting anyone?
 - negative view as your actions as opposed to full view
- Doing the right thing?

What is Ethics?

Integrity (a characteristic of ethical behavior) is looking forward to the consequences of your actions!

James Reese
Retired FBI and renowned
speaker

Ethics Definitions

- The discipline dealing with what is good and bad and with moral duty and obligation
- A set of moral principles and values
- Ethics typically includes – (1) complying with laws and regulations; (2) principles of morality; (3) understanding and applying company policies; (4) the customs and expectations of the community; and (5) general concerns such as fairness.
- Anything else?

Ethics Definitions

- Less formal concepts
- The “front page of the New York Times” test
- The “would you be willing to tell your mother” test
- The “would you want your boss to know” test
- The “do you think its right” test

Accountabilities - To whom are you responsible?

- Your employer (and Customers, stockholders, co-workers)
- Law Enforcement (FBI, State Police, Prosecutor, etc.)
- Potential Defendant/Investigative target
- Profession – very key!!!!
- Family, friends!!!!
- Are the standards/issues different between the public and private sectors?

IMPACT OF ERRORS IN JUDGMENT (Big Picture)

- Corporate - Enron, Arthur Anderson
 - Financial ruin of thousands
 - Companies disappear
- Law Enforcement – Elliot Spitzer
 - Tarnish the field citizens trust
- Sports – well do you really need an example
 - Breeds disbelief in an age old profession we love
- Families – you know someone in your in circle
 - Divorce, kids, death

IMPACT OF ERRORS IN JUDGMENT (Our world)

- Your case goes wrong
- Law enforcement cannot pursue your case
- A fraudster is not convicted or penalized
- Legal claims are brought against your company
- Adverse publicity about your company
- Loss of job

The legal framework to your ethical choices

- Immunity Laws
- Information Sharing Principles
- Privacy Laws
- Bad faith Principles
- Legal issues in the court system

Law vs. (or and) ethics

- The law spells out obligations you must follow
- Your ethical obligations typically (always?) will be consistent with the law
- Are there any situations where the “ethical” step is not the lawful step?
- Your ethical obligations also may extend beyond the law – what you “should” do beyond what you “must” do

Ethical Concepts in the law

- Fraud Fighting Receives Substantial Legal Protections
- Strong Public Policy Supporting
- Participation in Fraud Investigations
- But there are limits to the strength of these protections
- No Risk-free Investigations, But Reasonable, Very Modest Risks

Example - State Immunity Statutes

- The Pennsylvania insurance immunity statute provides that no civil liability can arise for furnishing information to other insurers or law enforcement officials related to suspected fraudulent insurance acts "in the absence of fraud or bad faith." 40 P.S. § 474.1
- Other statutes use “absence of malice” or other similar phrases

Example - State Immunity Statutes

- Why is this protection limited?
- There is a goal that is being protected – sharing information to attack insurance fraud.
- Fighting insurance fraud is a public policy goal
- But, like most goals, it is not unlimited.
- When you act with “fraud, malice or bad faith,” the balance tips – and your activities are no longer protected.

Privileges

- Insurer can avoid liability by showing that the communications and disclosures were privileged.
- Protection arises when an insurer communicates information in order to protect
 - its own interests
 - the interest of third persons
 - an interest the insurer and a third person share
 - or the public interest

Abuse Of The Privilege

The privilege may be abused by:

- publication of the defamatory material with "malice" (usually meaning that the person had reason to believe that the information was false);
- publication for a purpose other than that for which it is privileged (for example, reporting to the police because you want to negotiate a better PPO deal with a provider, rather than prosecute fraud);
- "excessive" publication (such as disclosure to the police and a newspaper); or
- publication of material not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged (gossiping about a provider's personal life in addition to reporting suspected fraud).

Privilege Conclusions

- Same idea – a worthy goal to be protected, but only up to a point.
- A gut check issue – No way to avoid all risk
- Protection is very strong, but not absolute
- You need to know when you have gone “too far”

Examples

- Facts – Investigator parked car outside house of claimant, observed claimant’s activities from the street for several days.
- Finding – No claim for invasion of privacy because claimant had to expect reasonable inquiry into and investigation of claims.

Examples

- Facts – Investigators conducted surveillance on claimant. Cut hole in hedge so they could look into windows and eavesdrop upon activities in house. Investigators also came to house pretending to have business with claimant and engaged in prolonged trailing of claimant in a conspicuous manner so as to excite speculation of neighbors.
- Result – Unreasonable intrusion/invasion of privacy for unreasonable conduct in investigation.

Examples

- Facts – Investigators were investigating disability claim. One of the investigators initiated a romantic relationship with claimant. While on a date, other investigator filmed specific activities (that demonstrated she was not disabled). When video was shown at hearing, claimant suffered physical and mental breakdown.

Examples

- Result – Insurer’s immunity did not extend to these activities. Investigators acted with malice and purposely intended to inflict emotional distress on claimant. \$2 million punitive damages award against insurer.
- Questions - Did they intend to inflict harm? What conclusions can you draw? Does the appropriateness of “your” action depend on the claimant? Why is this wrong?

Examples

- Facts: Workers comp claim – investigators repeatedly accessed claimant’s home by posing as representatives of a product marketing research company. Gathered information about activities during those visits, later used to deny claim.

Examples

- Result – no claim by plaintiff because no evidence that claimant suffered any harm from the “masquerade.” Investigators entered home with consent of claimant, for a “legitimate purpose” and for only a short period of time (although repeatedly).
- No evidence that investigators harassed or annoyed claimant during the investigation.

Examples

- Facts – investigators engaged in “rough shadowing” – court described as open, public and persistent following of plaintiff, without any attempt at secrecy and in a manner as to make obvious to the public that the claimant was being followed and watched.
- Result – Court finding against insurer, actionable tort for which plaintiff could recover damages.
- Case was from 1913 – does that matter? Do ethical standards “evolve?”

Question

- Is it ever “ethical” to do something that is against the law (or inconsistent with the law) because you won’t get caught?
- Is it ever ethical to try for a result that is not appropriate because you know you can get it?

An analogy?

- The role of the Prosecutor
- The duty of the prosecutor is to seek justice, not merely to convict
- The prosecutor is to protect the innocent as well as convict the guilty
- The prosecutor must protect the rights of the accused
- The prosecutor must use sound prosecutorial discretion

What is your job?

- To bring fraud charges?
- To determine whether fraud occurred?
- To recover as much money as possible?
- To ensure that fraudulent claims are not paid?
- To take any permitted steps to recover for fraudulent claims?
- How else would you frame it?

Ethic of Justice

- An "ethic of justice or rights" is based on abstract, impersonal principles, like justice, fairness, equality or authority.
- People who prefer this style see ethical dilemmas as involving primarily a conflict of rights that can be solved by the impartial application of some general principle.
- The statue "Justice Blindfolded" captures this approach very well. People with this style tend to place a good deal of weight on moral principles, laws or policies, which they believe should be applied to all equally.

Ethic of Justice (cont.)

- The advantage of this approach is that it looks at a problem logically and impartially. People with this style try to be objective and fair, hoping to make a decision according to some standard that's "higher" than any specific individual's interests.
- The disadvantage of this approach is that people who rely on it might lose sight of the immediate interests of particular individuals. They may unintentionally ride roughshod over the people around them in favor of some abstract ideal or policy.
- Carried to an extreme, people who strongly prefer this style may tolerate human harm in the name of some principle.

Ethic of Justice (cont.)

- This style is more common of men than women, and of people who define themselves in more solitary, individualistic terms.
- It seems to fit with a more legalistic approach to life that gives allegiance to some external source of authority.
- This approach can also go along with a traditional management style that prefers to justify decisions according to authority, policies or other impersonal standards, like numbers or executive prerogative.

Ethic of Care

- An "ethic of care or responsibility" is founded on a sense of responsibility to reduce actual harm or suffering.
- For these people, moral dilemmas generally involve a conflict of duties or responsibilities. People with this orientation believe that the focal point of every ethical dilemma is the specific individuals involved and the particular circumstances of the case.
- Solutions, then, must be tailored to the special details of individual circumstances. Notions of equity, or what is appropriate or "fitting," tend to be favored by this approach.
- Making exceptions does not phase these people, and they tend to feel constrained by policies that are supposed to be enforced without exception.

ACFE Code of Ethics

- A Certified Fraud Examiner shall not engage in any illegal or unethical conduct, or any activity which would constitute a conflict of interest.
- A Certified Fraud Examiner will comply with lawful orders of the courts and will testify to matters truthfully and without bias or prejudice.
- A Certified Fraud Examiner shall, at all times, demonstrate a commitment to professionalism and diligence in the performance of his or her duties.



ACFE Code of Ethics

- A Certified Fraud Examiner shall, at all times, exhibit the highest level of integrity in the performance of all professional assignments and will accept only assignments for which there is reasonable expectation that the assignment will be completed with professional competence.



ACFE Code of Ethics

- A Certified Fraud Examiner, in conducting examinations, will obtain evidence or other documentation to establish a reasonable basis for any opinion rendered. No opinion shall be expressed regarding the guilt or innocence of any person or party.
- A Certified Fraud Examiner shall not reveal any confidential information obtained during a professional engagement without proper authorization.

ACFE Code of Ethics

- A Certified Fraud Examiner will reveal all material matters discovered during the course of an examination which, if omitted, could cause a distortion of the facts.
- A Certified Fraud Examiner shall continually strive to increase the competence and effectiveness of professional services performed under his or her direction.



ACFE Standards of Professional Conduct

A. Integrity and Objectivity

1. Members shall conduct themselves with integrity, knowing that public trust is founded on integrity. Members shall not sacrifice integrity to serve the client, their employer or the public interest.
2. Prior to accepting the fraud examination, members shall investigate for potential conflicts of interest. Members shall disclose any potential conflicts of interest to prospective clients who retain them or their employer.
3. Members shall maintain objectivity in discharging their professional responsibilities within the scope of the engagement.
4. Members shall not commit discreditable acts, and shall always conduct themselves in the best interests of the reputation of the profession.
5. Members shall not knowingly make a false statement when testifying in a court of law or other dispute resolution forum. Members shall comply with lawful orders of the courts or other dispute resolution bodies. Members shall not commit criminal acts or knowingly induce others to do so.



Summary

- We must behave ethically for ourselves, employer, profession, society
- Choices have consequences, will you look forward to yours
- Consider impact of your decision
- What are the rules/laws that govern the decision
- Will I violate my morals with this decision?
- What if a clear light were shown on my decision and printed on the headlines of the newspaper

Scenario

- Documents are provided to you by an unknown third party that strongly suggest a fraud is occurring. Your boss is under pressure to meet his/her numbers for referrals to law enforcement. He/she says go to the prosecutor and ask that charges be brought.



Scenario

- During an on-site visit to a provider office, you are given several files to copy. Due to time constraints you do not get to copy all of them. When you return to the office how do you handle the situation? What are important considerations in your decision?



Scenario

- During several interviews you conduct with law enforcement, one provides exculpatory evidence for the target. You later find out that the law enforcement agent has not followed up on the evidence and has not informed the prosecutor. What do you do and what are important aspects of your decision?

Scenario

- You are assigned to a case for investigation that you really want to work. You determine in the early stages that your spouse's friend works in the office of the target. What do you do and why?
- What if you are the Manager making the assignment and overseeing the investigation?

Scenario

- You are investigating a case against a prominent doctor
- Your theory would support a very high dollar demand
- But you have real doubts about whether the theory or facts are right
- You also know that the doctor will not accept any adverse publicity and will settle to avoid a suit