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Utilizing Preventive Health Care to Help Keep Government Lawyers Away



By MARK J. SILBERMAN

What do an oncologist and a white-collar attorney have in common?

The answer is not the punch line to a joke—it reflects something far more serious—and could provide the guidance needed to encourage health-care professionals and companies to take their own advice and apply the principles of preventive health care to audit, compliance and enforcement investigations.

The answer begins with a conversation between old friends—prom dates, at that. She: an oncologist; he: a health-care attorney. She married a geneticist and he married a hospital administrator. It was inevitable they would talk health care. Interestingly, both found themselves discussing the frustration and disappointment they feel when people wait too long to come to them for help.

It is much more concrete for the oncologist: If people were only aware of their risk factors or understood early symptoms for what they were. The potential benefits of routine checkups and early intervention are undeniable. In *those* instances, all of the training and experience, the technology and innovation, and the sheer

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will to improve a bad situation come into play. Unfortunately, that coin has another side.

Too often people wait. They are afraid, so they wait. They ignore the reality of the information they have available and hope the situation will resolve itself. The result can be converting a manageable situation into one where the only option left is to best manage a challenging one and pray for a miracle.

The parallel is equally true for the lawyer: Properly navigating health care—with all its regulations, reimbursements and evolving levels of oversight—takes effort. Designing and implementing processes and procedures in the right way rarely happens by chance. The fact that the government's enforcement efforts against health-care professionals are at an all-time high (mostly because that is where the money is) further complicates the issue and raises the stakes. The result is that health-care companies and health-care professionals are at risk.

Some of these health-care companies and professionals are on top of it. They are aware and responsive and evaluate everything that is happening; however, too many of them hope the situation will resolve itself.

Consider simple requests for information, such as an audit letter, a repayment demand or a subpoena. Every single request of that nature can result in a broad array of circumstances, ranging from copying a bill to a False Claims Act allegation to an indictment. Early intervention can help dictate what is to come. When health-care companies and professionals understand their risk factors, identify symptoms for what they are and coordinate early with qualified professionals, it can potentially make all the difference.

Some people think they can “figure it out on their own.” Where a simple consultation could have avoided a questionable (or worse, improper) course of action, left unchecked, these circumstances can progress. What might have been manageable is now acute. What could have been a minor issue may potentially cost an individual his freedom or a business its life.

Considerations for Health-Care Companies and Professionals

In health care, the efforts to “solve” these problems are focused on the benefits and importance of preventive health care, including:

- Routine checkups;

- Identifying risk factors;
- Avoiding exposure to circumstances that increase risk;
- Early assessment; and
- Aggressive intervention, when necessary.

Often, the goal is to avoid the problem. Ideally, you would not need to use your skills. You would want to know how to resuscitate a patient, but you may not want to encounter a situation calling for you to do it. It may be better to leave your training and skills related to managing extreme circumstances unutilized because the situation was managed and the problem was avoided.

The goal of these preventive measures is to avoid the point of no return—where despite all of the training, resources and commitment of the people involved, they cannot produce the desired result. Challenging situations are still likely, but there may be less of them and it will not be for a lack of trying.

Health-care companies and health-care professionals should consider taking their own advice, and it may be time for their attorneys to follow suit.

The attorney often jokes that he is the only health-care lawyer he knows who has handled a half-dozen first-degree murder trials (he used to be a prosecutor). But he routinely explains to his clients that nothing would make him happier than to never need to utilize his trial skills on their behalf. Having experienced the uncertainty and cost of litigation, indictments and various enforcement efforts has taught him the value of avoiding them.

A cure for cancer would change the world forever—but what about solving the problem of health-care fraud? What if it was possible to get in front of the problem by having health-care professionals and companies realize the role they can (and should) play in minimizing their exposure to these issues?

While there will always be those who set out to intentionally break the law, what may be viewed as more agonizing are the circumstances where health-care companies and professionals tried to get it right and failed—resulting in consequences that could have been avoided for people who thought they could manage what was happening but who did not realize the import of the situation. It is when the health-care company or professional is actually one of the good players but the “other side” is portraying them as part of the problem. These are the types of situations that those in the health-care industry may want to avoid.

The costs of defending against allegations of improper conduct (whether civil, administrative or criminal) are significant. They can be as (if not more) expensive when someone has done nothing wrong. The lawyer has yet to meet someone who has a separate rate for when someone did not commit the improper conduct. Therefore, avoiding the situation altogether may be the primary course of action. This does not happen by accident. It takes effort.

The time, money and effort spent navigating complex health-care regulations, as well as responding to inquiries from the government, insurance companies, other health-care providers and attorneys—all of whom are looking to take back (or just take) your money—is astounding. Proactively getting out in front of these mat-

ters can be invaluable. Imagine a world in which health-care providers and companies could actually focus on health care!

Returning to the conversation earlier between the attorney and the oncologist, the attorney has seen firsthand both the benefits of the preventive process, along with the consequences of avoidance. The attorney has worked with clients who receive a request for information and immediately coordinate with the appropriate professionals to determine the proper course of action. More often than not, in those situations, what could have been a long and expensive process—taking its toll on the finances and reputation of the business—can be resolved in a series of meetings focused on properly framing the issue and revealing any misunderstanding.

The attorney has worked with a client who noticed new trends from some of her competitors—who rather than follow suit, decided to call her attorney first. The simple inquiry quickly revealed the conduct to be fraudulent and an avoidable problem was averted. (The government soon figured it out, too, and the consequences to the competitors were real.)

Others are less fortunate. Some people have founded their entire business model on bad advice. This could be rooted in what “everyone else” in the business was doing, or often occurs when someone openly does something when they are unaware that what they are doing is wrong, which increases their potential of becoming a target. Still others figure if the conduct could be considered “in the grey” they can just stop if the government starts pursuing that sort of behavior. However, someone is going to be the first one investigated—and it may be you. It is often too late to “stop” once you learn that the government is investigating a trend.

In other instances, the poor advice is the result of a “rookie” (albeit well-intentioned) self-evaluation. Self-lawyering (which can be as destructive as self-medicating) to avoid what otherwise may have been minimal legal fees can produce seven-figure demands for overpayment that often involve not-so-minimal legal fees.

The concept is sound. Since the attorney got married and had children, he embraces the principles of preventive health care. He follows up on circumstances that would have historically been ignored or put on hold. As a result, he sees health-care professionals more often. However, the encounters are much more routine and, candidly, all around more pleasant.

The same can be true of your lawyer (whether more encounters with your lawyer will be more pleasant might depend on the lawyer, but the effect likely will be).

Looking Ahead

In sum, there appears to be no reason why health-care professionals and health-care companies should not be taking their own advice and learning from their own guidance. As in health care, the better information you provide, the better guidance you are likely to receive. Whether visiting a doctor or determining whether to seek legal counsel, the following points are worthwhile to consider.

- The more regularly you are evaluated, the more likely a potential situation can be detected early.

Earlier detection can often lead to more options for resolution.

- Let the person with the relevant training decide the importance of a particular symptom. (The Internet can undermine lawyers as much as doctors in their efforts to help people.)
- When circumstances arise, have them checked out. When something proves to be nothing, you are likely to feel better knowing what is going on, and the “pain” of expending a little time and money may be well worth it.
- If something requires evaluation, not finding out about it will not change what is actually happening.

- In the unfortunate event that something is more serious, you will likely be glad you came in when you did.

Perhaps most significantly, these preventive measures are likely to avail you of all of the training, experience, dedication and commitment of the professionals to whom you have entrusted your concerns. In addition, their skills for handling acute and crisis situations will often be left unutilized. It is far better to emerge in front of situations than to find that the only option that remains is to make the best of a bad circumstance that is beyond anyone’s control.

Preventive health care works. The time for preventive law appears to be at hand.