

# Health Care Fraud Investigations in Virginia: Ex Parte Government Interviews of Current or Former Health Care Provider Employees

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## I. INTRODUCTION

With the ever-increasing amount of federal and state resources devoted to fighting health care fraud – whether through criminal prosecutions or civil enforcement proceedings – many health care providers face the very distinct possibility that they will be subjected to some sort of government false claims or anti-kickback scrutiny. This Article will address the government's responsibilities under Virginia's ethical rules when it attempts to interview or contact health care provider ("provider" or "company") employees without the involvement of company counsel.

In Virginia, virtually all health care fraud investigations involve one, if not all, of the following entities: the United States Attorneys' Offices (Eastern and Western Districts of Virginia), the Federal Bureau of Investigation ("FBI"), the Federal Department of Health and Human Services Office of the Inspector General ("OIG"), the Defense Criminal Investigative Service ("DCIS"), and the state level Medicaid Fraud Control Unit ("MFCU") within the Virginia Attorney General's Office.

Pursuant to the Health Insurance Portability and Accountability Act of 1996, Pub. Law 104-191 (August 21, 1996), and, as a result of the additional financial resources devoted on the federal level to health care fraud enforcement, both the Eastern and Western Districts of Virginia have commenced regular Health Care Fraud Task Force meetings involving all the above agencies, as well as representatives from private pay insurance companies. The overall effect of these task force meetings is a heightened emphasis on the development of new criminal and civil fraud investigations and cases and a sharing of information regarding case developments and specific health care providers in certain geographic areas.

After opening an investigation, the government devotes investigative resources to the matter and assigns one or more investigative agents to gather facts related to the allegations or the subject matter area under scrutiny<sup>2</sup>. Generally, the agent's first source of "testimonial" information about the provider will come from current or

former provider employees, who are usually contacted by the government absent the knowledge of the provider or its counsel.

The purpose of this Article is to provide a brief summary of the ethical rules to which all Virginia attorneys (and the agents working under their supervision) must adhere when conducting these criminal or civil investigations, and the constraints on the government's ability to conduct *ex parte* interviews of current and former health care provider employees.

## II. THE VIRGINIA RULES OF PROFESSIONAL CONDUCT

Effective January 1, 2000, Virginia adopted new ethical standards relating to *ex parte* contacts with represented persons and entities. The recently adopted Virginia Rules of Professional Conduct (the "Virginia Rules") differ substantially from the Virginia Code of Professional Responsibility (the "Code"). The Virginia Rules are applicable to all state level health care fraud prosecutors, as well as the investigators and auditors who work under their direction. Moreover, as a result of the Citizen's Protection Act of 1998, codified at 28 U.S.C. § 530B, also known as the "McDade Act," the Virginia Rules are made applicable to all United States Department of Justice attorneys conducting investigations in Virginia<sup>3</sup>.

Under the newly issued Virginia Rule 4.2 (modeled upon ABA Model Rule 4.2), a lawyer may not communicate *ex parte* with any represented "person" without the consent of that person's lawyer. This expands upon the original prohibition, contained in DR 7-103(A)(1) of the Code, which merely precluded *ex parte* contacts with a "party." Thus, the prohibition has been expanded to address contacts in matters that occur in a non-litigation context. Virginia Rule 4.2 states

In representing a client, a lawyer shall not communicate about the subject

matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

In the case of an organization, the Commentary to Virginia Rule 4.2 indicates that the "control group" test as outlined in *Upjohn v. United States*, 449 U.S. 383 (1981) determines which company employees cannot be contacted *ex parte*. The "control group" test prohibits *ex parte* communications with **any employees** of an organization who, because of their status or position, have the authority to bind the corporation." Virginia Model Rule 4.2, Comment 4 (emphasis added). As outlined in Section III below, in the health care provider context, even low-level employees such as nurses, pharmacy technicians, administrative coders and billers, and physician assistants can bind the entity (in a health care fraud criminal or civil investigation) by their actions. Therefore the *Upjohn* "control group" test arguably precludes the ability of counsel to contact these individuals on an *ex parte* basis.

On its face, Virginia Rule 4.2 would appear to prohibit any attempts by government attorneys and/or their agents to interview company employees, when the company is known to be represented by counsel. However, the Commentary to Virginia Rule 4.2 specifically refers to certain investigative settings, and contains a caveat. Comment 2 states:

In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent.

Virginia Model Rule 4.2, Comment 2.

Accordingly, Virginia Rule 4.2 authorizes *ex parte* government interviews of health care provider employees so long as "applicable judicial precedent" has approved these contacts. However, federal and state courts have in fact limited the use of these *ex parte* contacts.

### III. FEDERAL AND STATE DECISIONS APPLICABLE TO *EX PARTE* INTERVIEWS OF HEALTH CARE PROVIDER

## EMPLOYEES

Under Virginia Rule 4.2, company counsel can assert that they represent virtually all current employees – even low-level health care provider employees – and preclude the government from conducting *ex parte* interviews of these employees. The federal court decision in *United States ex rel. Mueller v. Eckerd Corp.*, 35 F. Supp. 2d 896 (M.D. Fla. 1999) held that in a national civil Federal False Claims Act investigation, under Florida's version of Model Rule 4.2, the government could not conduct *ex parte* interviews of Eckerd non-managerial pharmacists, pharmacy technicians, and pharmacy clerks because those individuals could bind the company, despite the fact that they lacked managerial responsibility<sup>4</sup>. The government had sought, by motion, to interview these low-level pharmacy employees outside the presence of company counsel. In holding that the low-level employees could not be interviewed *ex parte*, the Court indicated:

[T]he pharmacy technicians perform day to day activities, including "count[ing], pour[ing] and packag[ing] medication and assisting in the correction of managed care claims." Pharmacy clerks gather third party payment information from customers and assist pharmacists by taking prescription and refill information from customers. The "mere factual observations" about which the government seeks to inquire are directly related to the premise of their complaint – the fraudulent filling of partial prescriptions. The technicians and clerks would be precisely the employees who could verify Eckerd's practices in regards to filling patient prescriptions. If indeed the employees who contacted the government were to convey their "negative experiences" to the government, it is the type of "derogatory information that could be imputed to or bind the corporation."

*Eckerd*, 35 F. Supp. 2d at 898 (citations omitted).

The principal recognized in *Eckerd* – *i.e.*, that low-level health care employees can bind the health care provider by their actions or omissions – was also recognized in the Virginia Circuit Court case of *Dupont v. Winchester Medical Center, Inc.*, 34 Va. Cir. 105 (1994 Va. Cir. LEXIS 64). The Court, in a medical malpractice case, issued a protective order prohibiting the plaintiff's counsel or her agents from engaging in *ex parte* communications with the defendant hospital's nurses. The Court stated:

In the case of an organization, this rule [ABA Model Rule 4.2 Official Commentary] prohibits communication by a lawyer for one party concerning the

matter in representation with persons having managerial responsibility on behalf of the corporation, and with any other person whose act or admission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

*Dupont*, 34 Va. Cir. at 107.

Judge Wetzel properly recognized that, despite the fact that the low-level nurses were not "managerial" employees or the members of the "control group" of the medical corporation, where "the [nurses] are actual players in the alleged negligent act or where they have the authority to make decisions to bind the corporation, then they are acting as the corporation with regard to those acts and are in essence its alter ego." *Id.* at 108. Judge Wetzel then prohibited plaintiff counsel's contacts with certain nurses involved in the alleged malpractice, absent the presence of hospital counsel.

Moreover, the United States District Court for the Western District of Virginia recently interpreted Virginia DR-7-103(A)(1) (Virginia's predecessor to Virginia Rule 4.2) and ABA Model Rule 4.2 in the context of federal civil litigation. In a business litigation case, plaintiff's counsel requested to make *ex parte* contacts with **former** management and non-management employees. See *Armsey v. Medshares Management Serv., Inc.*, 184 F.R.D. 569 (W.D. Va. 1998). Judge Sargent, in interpreting this "issue of first impression in Virginia" under the Comment to Model Rule 4.2 (Virginia Rule 4.2 had not yet been implemented), held that the plaintiff could not engage in *ex parte* contacts with these former employees because their acts or omissions during the course of their employment may be imputed to the defendants. In a rather exhaustive analysis of the Virginia Legal Ethics Opinions, including Virginia Legal Ethics Opinion 1670 (1996)<sup>5</sup>, Judge Sargent held:

I agree with the [Virginia Legal Ethics Committee] that former employees may no longer bind their corporate employer by their current statements, acts or omissions. Yet, this does not prevent liability from being imposed upon their former employer based upon on the statements, acts or omissions of these individuals which occurred *during the course of their employment*. In fact, Plaintiffs' counsel in this case has informed the court that it seeks to speak to each of these former employees because Plaintiffs believe that they can impute liability upon Medshares through

the statements, actions or omissions of these former employees. Under these facts, I do not believe *ex parte* communications with these former employees is proper.

*Armsey*, 184 F.R.D. at 573 (internal citations omitted) (emphasis added).

Under an *Armsey* analysis, the prohibition against *ex parte* contacts with low-level health care employees engaged in activity subject to government investigation would also extend to **former** employees. It is critical to note, however, that the law concerning former employees is unsettled and that the Virginia Legal Ethics Opinions, decided under former Code provisions, as well as Comment 4 to Virginia Rule 4.2, take a contrary position and permit *ex parte* contacts with former employees even if they are management level former employees<sup>6</sup>.

#### **IV. SUGGESTED RESPONSES TO GOVERNMENT ATTEMPTS TO INTERVIEW HEALTH CARE PROVIDER EMPLOYEES**

Health care providers often first learn that they are under investigation by the government when an employee is contacted at home (either in person or by telephone) by a government investigator, and asked to "answer a few questions" or submit to an "informal" interview regarding billing, coding, clinical or admission practices. Upon learning of these contacts, the provider and its counsel should consider the following steps to minimize the likelihood of further government contacts with provider employees absent the presence of company counsel, and to structure the flow of information to the government<sup>7</sup>.

##### **A. Contact the Government**

Upon learning that the health care provider is under investigation, counsel should immediately confirm in writing with the responsible government attorney (whether, for instance, that is the Assistant United States Attorney, state prosecutor, or OIG counsel) that all of the provider's current employees are represented by company counsel for any actions or omissions taken in connection with their employment and that any attempts to contact or interview these employees should be channeled through counsel. Often, it is critical to send such a letter immediately upon discovering that one's client is under investigation, and it is also advisable to copy the investigator or agent with this letter. Depending on the facts involved, counsel should also consider informing the government attorney that former employees, in their company capacities, are also

represented by counsel pursuant to the logic of *Armsey v. Medshares Management Services, Inc.*, 184 F.R.D. 569 (W.D. Va. 1998).

### B. Advise Current Employees

Company and counsel should also advise current employees generally, about the scope of the investigation, and should advise the employees of their rights and obligations when, or if, they are contacted by government representatives<sup>8</sup>. Employees may also be told that from time to time, employees of health care companies may be contacted by representatives of governmental agencies as part of inquiries into health care companies. These governmental representatives may work with the state Department of Health, the state Attorney General's Office or Medicaid Fraud Control Unit, the Health Care Financing Administration ("HCFA"), the Federal Bureau of Investigations ("FBI"), the U.S. Attorney's Office of the Department of Justice, or the Occupational Safety and Health Agency ("OSHA").

Company counsel should consider distributing memoranda, or wallet-sized cards, advising each current employee of their rights when contacted by a government investigator, in the event the government decides to proceed with *ex parte* contacts despite requests from company counsel that it be present during any interviews. Possible suggestions for company employees include the following:

1. **GET A NAME:** Ask the governmental representative for a business card or some other form of identification that includes the person's name, title, and employing organization or agency.
2. **CONSIDER YOUR RIGHT TO BRING AN ATTORNEY:** You have the right to have an attorney present during any conversations with a governmental representative. The company is prepared to have company counsel present at its expense. If you would like someone to be with you at a meeting or telephone call with a governmental representative, please contact a company representative – *e.g.* the Compliance Officer or other appropriate management officials. At the least, you should feel free to notify the company after any contact with a governmental representative.
3. **FIT IT IN YOUR SCHEDULE:** You have the right to request any governmental representative who contacts you at home or outside the workplace to call you during business hours. In addition, if you schedule an appointment with the governmental representative, you have the right to schedule that meeting during business hours as well.
4. **YOU DON'T HAVE TO BE INTERVIEWED UNLESS COMPELLED BY COURT ORDER TO DO SO:** If you do not wish to speak with the governmental representative, you are free to inform them of this. If the governmental representative contacts you informally in person or over the telephone, you are not obligated to talk to them. You can ask them to put their request in writing. The government may require you to be present by delivering to you a subpoena which compels attendance by court order.
5. **DURING THE INTERVIEW, DETERMINE WHETHER YOU CAN ANSWER THE QUESTIONS:** You have every right to state that you do not know the answers to the questions that are being asked of you, if you truly cannot answer them. You should not guess or even try to make up answers just to satisfy the governmental representative. A truthful, "I don't know the answer to that question," is a completely sufficient answer.
6. **DURING THE INTERVIEW, GET A PEN AND PAPER:** You have the right to take notes during any conversations with a governmental representative. This includes in-person and telephone conversations. Additionally, if you don't take notes during your conversation, you should document your interaction with the governmental representative as soon as it is over.
7. **DURING THE INTERVIEW, DON'T DISCLOSE CONFIDENTIAL DOCUMENTS:** Documents that are confidential, such as patient documents or incident reports, and those that are privileged, such as those that include legal advice or analysis, should not be disclosed. If you are asked by a governmental representative to provide any documents, it is best to review these documents first with a company official or its legal counsel. If you provide any documents to a governmental representative, make sure that they are *photocopies* and not originals, and keep

an identical set of photocopies for yourself. In no event should any documents be destroyed or altered as a result of a contact by a governmental representative.

8. FIND OUT WHY: Ask why you were contacted and what the governmental representative is looking for.

## V. CONCLUSION

The new Virginia Rules, combined with the McDade Act and recent federal and state case law decisions, broaden the ability of health care provider counsel to represent all current employees in the context of government fraud and anti-kickback investigations and to limit the government's ability to conduct *ex parte* interviews of staff. Given the recent federal and state law changes in the area of *ex parte* contacts by government prosecutors and agents in the context of civil and criminal investigations, individual prosecutors are likely to disagree with requests from provider's counsel that current company employees cannot be contacted without the presence of company counsel. Despite the differences of opinion, it is advisable to document all conversations with the government and to memorialize that company counsel raised the *ex parte* issue at the beginning of the investigation, cautioning the government that it will be viewed as proceeding at its peril in the event it makes *ex parte* contacts with company employees.

With the protections provided by the new rules and supporting case law, counsel should proactively engage the government and assert this representation and should also take steps to advise provider employees of their individual rights when contacted by a government investigator. Generally, most, if not all, employees are comforted by the fact that the company has taken appropriate steps to educate them about the nature of the government investigation and has provided them with a list of options when, or if, they ever receive the "knock on the door" from a government investigator.

<sup>2</sup> Government investigations are commenced for a variety of reasons, including the following:

- A "qui tam" complaint under the Federal False Claims Act has been filed against the provider;
- Disgruntled ex-employees may make complaints to the Government through fraud "hotlines" or other mechanisms;
- The provider's practices may be targeted for review based upon the OIG Fiscal Year Workplan, or other projects such as Operation Restore Trust; or
- A provider's competitors or patients may "report" a provider to the Government for suspect

practices.

<sup>3</sup> The Act states that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B.

<sup>4</sup> The commentary to Florida Rule 4.2 differs from the commentary to Virginia Rule 4.2, and states: "In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in the representation (1) with persons having management responsibility on behalf of the organization and (2) with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or (3) whose statement may constitute an admission on the part of the organization. . ." Rules Regulating the Florida Bar, Comment 4-4.2. Comment 4 to Virginia Rule 4.2 defines "represented person" according to the *Upjohn* test, and prohibits *ex parte* contacts with employees who can "bind" the company. Pursuant to recent United States Department of Justice Guidelines, even certain actions of low-level employees of a health care provider (or any entity) can subject the entity to criminal or civil liability. *See, e.g., UNITED STATES DEPARTMENT OF JUSTICE GUIDANCE ON PROSECUTION OF CORPORATIONS*, Appendix, Document 12 (1999).

<sup>5</sup> Virginia Legal Ethics Opinion 1670, interpreting the Code, indicates that a lawyer may conduct *ex parte* interviews with his corporate adversary's former employee because the former employee "no longer speaks for the corporation or binds it by his or her acts or omissions."

<sup>6</sup> *See also Queensberry v. Norfolk & W. Ry.*, 157 F.R.D. 21 (E.D. Va. 1993). In this FELA action, the Court granted the railroad's Motion in Limine to prohibit plaintiff's counsel from engaging in *ex parte* communications with low-level current railroad employees about the subject matter of the litigation. In construing the effect of DR 7-103(A), the Court recognized that "because any employee might bind the corporation pursuant to Fed. R. Evid. 801(d)(2)(D), it would seem fair that the employer's attorney ought to be present at any interview where an admission is made." *Id.* at 23. In granting the Motion in Limine, the Court also relied on the ABA Model Rule 4.2 and associated Official Commentary. *Id.* at 21. *See also Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096 (E.D. Va. 1994) (relying upon DR 7-103(A) and ABA Model Rule 4.2 and prohibiting a FELA plaintiff's counsel from conducting *ex parte* interviews of low-level railroad employees); *Schmidt v. Norfolk & W. Ry.*, 32 Va. Cir. 326 (1994 Va. Cir. LEXIS 814) (holding that in a FELA action, the plaintiff's attorney may communicate directly with non-managerial employees). The Court [in Schmidt] distinguished *Queensberry* on the grounds that

under the Federal Rules of Evidence (which are inapplicable to Virginia state court proceedings), admissions of even low-level employees may bind the company. *Schmidt* was decided under DR 7-103(A), and not Virginia Rule 4.2.

<sup>7</sup> The provider and its counsel should review all federal and state statutes relating to obstruction of justice and ensure that their actions could not be perceived as violating the statutes. *See, e.g.*, 18 U.S.C. § 1518 (Obstruction of Criminal Investigations of Health Care Offenses); 18 U.S.C. § 1516 (Obstruction of Federal Audit); 18 U.S.C. § 1505 (Obstruction of Proceedings Before Departments, Agencies, and Committees); and 18 U.S.C. § 1510 (Obstruction of Criminal Investigations).

<sup>8</sup> In the event an administrative or grand jury subpoena, Authorized Investigative Demand, or search warrant are served on the provider, counsel should immediately take additional steps to coordinate information, prevent document destruction, and establish an internal investigation strategy. Such matters are beyond the scope of this article.

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