



# 5 DEADLY MISTAKES IN MEDICAID FRAUD INVESTIGATIONS

A SPECIAL REPORT  
BY JOHN HOWLEY, ESQ

**WARNING:** DO NOT SPEAK TO FRAUD INVESTIGATORS  
BEFORE READING THIS REPORT

# 5 Deadly Mistakes in Medicaid Fraud Investigations

By: John Howley, Esq.

By the time Medicaid fraud investigators contact you, most of their investigation has been completed. You were not chosen at random. The investigators have already reviewed any submissions to Medicaid; they have interviewed witnesses; and they have come to the conclusion that you violated the law.

The next step is critical. Will they charge you with serious crimes? Will they demand that you pay back money? Will new evidence convince them that you have done nothing wrong or that any mistakes you made were unintentional?

The answers to these questions will depend on how you respond to the investigators. Respond properly and you may be able to avoid serious consequences even if you made mistakes. Fail to respond properly and you may face a life-changing disaster that includes heavy fines, a criminal record, the loss of professional licenses, exclusion from future participation in the Medicaid program, a long prison sentence and, if you are not a U.S. citizen, deportation.

This report describes five of the most common mistakes people make when confronted with a Medicaid fraud investigation. It is designed as a starting point to send you in the right direction. It is not a self-help guide. A Medicaid fraud investigation is too complex, and the potential consequences are too severe, for anyone to take a do-it-yourself approach.

**Here are the 5 Deadly Mistakes that you must avoid:**

## **Mistake #1: Ignoring Fraud Investigators**

Never ignore Medicaid fraud investigators. Burying your head in the sand will not make the investigators go away. They will simply finish their investigation without your input. They will report to the prosecutor and the court that you refused to cooperate. They will argue that your refusal to cooperate shows that you are guilty and deserving of the harshest punishment.

That said, you should never answer the investigators' questions or turn over any documents before consulting with an experienced lawyer. (See Deadly Mistakes #2 and #3). Anything you say can and will be used against you.

So, what should you do when contacted by Medicaid fraud investigators? Be polite and professional. Let the investigators know that you want to cooperate, but that you cannot talk right now. Then get professional help and advice right away.

If you are contacted by letter, bring the letter to a lawyer and get advice on how to respond. Make sure that you or your lawyer responds by the date in the letter, even if it is only to ask for more time.

If you are contacted by telephone or in person, politely tell the investigator that you cannot talk right now. Get their business card or ask for their name and telephone number. Tell them that you will get back to them. Then bring the investigator's contact information to a lawyer for advice on how to respond.

Responding promptly to Medicaid fraud investigators and letting them know that you are willing to cooperate with the advice of an attorney are the first steps to preventing a catastrophe.

## **Mistake #2: Admitting to Violations and Turning Over Documents Before You Have an Agreement**

Some clients believe that the investigators will “go easy” on them if they just admit they made mistakes, turn over all of their documents, and say they are truly sorry. This approach is based on a complete misunderstanding of how Medicaid fraud investigators work.

A Medicaid fraud investigator has one job and one job only: to gather evidence and press charges against you for Medicaid fraud. If you make statements or turn over documents that help the government’s case, then the investigators will say thank you and send the case to a prosecutor for criminal prosecution.

Any admission you make before you have an agreement with the investigators or prosecutor will only *increase* your chances of criminal charges.

The purpose of cooperating with Medicaid fraud investigators is not to surrender your rights. The purpose is to convince the investigators not to refer your case for criminal prosecution or, if criminal charges are inevitable, to limit the charges to less serious crimes.

Your best chance of avoiding criminal charges is to raise doubts about the strength of the case against you. Only after the investigators believe they may have problems proving their case, and that you are prepared to vigorously defend yourself, will they be willing to discuss a resolution that avoids criminal charges.

Turning over documents is a very complicated decision. Depending on the nature of the documents, you may or may not be required to turn them over to the government. You have the right to refuse to turn over certain types of documents, such as records that relate to Medicaid patients. For other types of documents, the investigators must make a specific, formal request. You should have a lawyer review the investigators’ requests and your

documents to determine what documents should – and should not – be turned over.

There may come a time when you will want to make admissions or turn over documents. For example, the government may be willing to enter into a settlement that avoids or reduces criminal charges on the condition that you disclose certain information or make certain admissions. Or your lawyer may negotiate a “proffer” agreement that allows you to tell your side of the story without anything you say being used against you.

As a general rule, you should not turn over documents unless you have no choice because of a subpoena, court order or other legal requirement, or because you have a specific reason such as to support your defenses or to comply with an agreement that avoids harsh penalties.

## **Mistake #3: Talking to Fraud Investigators Without a Lawyer**

Never talk to Medicaid fraud investigators without a lawyer.

Many clients ask, “But if I hire a lawyer, won’t the investigators think I’m guilty?”

Let’s get something straight right off the bat: If the investigators have contacted you, then they already think you are guilty. Talking to the investigators without a lawyer will not convince them that you are innocent.

The investigators are not reaching out to help you. They want to charge you with Medicaid fraud. They want to use your own words to convict you. An innocent mistake or memory lapse about a minor detail can be deadly. For example, if you say something that is not 100% consistent with what they have seen in the records, the investigators will use that inconsistency to argue in court that you are a liar.

Medicaid fraud investigators work in teams. If you agree to meet with them, they will put you in a small room with no windows. At least two

investigators will interrogate you. While you are being asked questions, one of the investigators will take notes. Those notes will be used against you.

You need to protect yourself. An experienced Medicaid fraud lawyer will act as a buffer between you and the investigators. He can talk to the investigators, learn what they know, and discuss their concerns. Most importantly, your lawyer may learn where the gaps are in the investigators' case. This is critical information that will help you develop a defense.

In some cases, your lawyer can negotiate a resolution without you ever having to speak with the investigators. In other cases, your lawyer may negotiate a "proffer" agreement. This type of agreement allows you to explain your side of the story directly to investigators without them using your statements against you as long as you tell the truth.

You cannot obtain these protections on your own. In fact, the investigators will not advise you of these protections and defenses. Their job is to interrogate you. They want to keep you afraid and off balance. They want to double-team and build the case against you. Without a lawyer, you are at a serious disadvantage.

Having an experienced lawyer on your side tells the investigators that you are taking the investigation seriously, and that you are ready to challenge any charges against you.

## **Mistake #4: Responding Before You Are Prepared**

"The best defense is a good offense," especially when it comes to Medicaid fraud investigations. Merely denying the investigator's allegations will not convince them to go away. You must have a strategy for convincing them not to charge you with a crime. This strategy should include both technical, legal challenges and challenges based on the evidence.

The starting point is getting an objective understanding of the facts, including any mistakes you may have made. Sometimes clients had no intent to commit Medicaid fraud, but mistakes were made. You need an objective

look at your records and an understanding of where things may have gone wrong. Once you understand where the problems are, you can begin to build your defense.

You also need to understand the evidence against you. Do the investigators have documents or witnesses that they intend to use against you? What are those documents and who are those witnesses? Are there other documents that will contradict the evidence that the government thinks it has against you? You need to think through all the evidence the government may have before you respond to the investigators' questions.

You have a constitutional right to remain silent and to require the government to prove its case beyond a reasonable doubt. If, after conducting a review of your records, it appears that you have serious problems, your lawyer may recommend that you exercise those rights.

On the other hand, if the review of your records reveals that the government is mistaken or that there are weaknesses in its case, then your lawyer may advise you to produce evidence to raise doubts about the strength of the government's case against you. For example, if you are accused of making false statements, you may be able to avoid criminal charges by giving the investigators evidence that the statements were true when they were made, or that you believed the statements to be true when they were made, or that any problems with the statements were the result of a mistake and not an intentional attempt to defraud the government.

Medicaid fraud investigations are not always black and white. There are often gray areas where the government will be willing to negotiate a resolution without going to court. You need to have a complete understanding of your case – and a complete understanding of what the government may and may not do – in order to prepare your defense.

The bottom line is: Do not rush into responding to a Medicaid fraud investigation. An effective defense requires a thoughtful strategy based on the law, the agency that is conducting the investigation, and the evidence.

## **Mistake #5: Hiring the Wrong Lawyer**

You wouldn't seek out a dermatologist for heart surgery. Medicaid fraud is a highly specialized area of law. You need an experienced specialist on your side.

Medicaid fraud investigations require an understanding of complex government insurance laws and regulations, plus privacy laws, plus criminal laws. Most of all, your lawyer must understand how all of these laws and regulations apply in the real world of medicine.

Criminal defense lawyers – even very good ones – do not always have the necessary expertise in Medicaid laws, rules and regulations. Healthcare lawyers do not always have experience with criminal procedures, investigations and trials.

Medicaid fraud is investigated by a number of government agencies. Each one is different. Some agencies are very quick to recommend criminal prosecution. Other agencies are more interested in civil settlements to recover money. Some agencies require investigators to get approval from supervisors for any decisions. Other agencies give investigators authority to resolve matters on their own. Understanding how each agency works is critical to avoiding bad results.

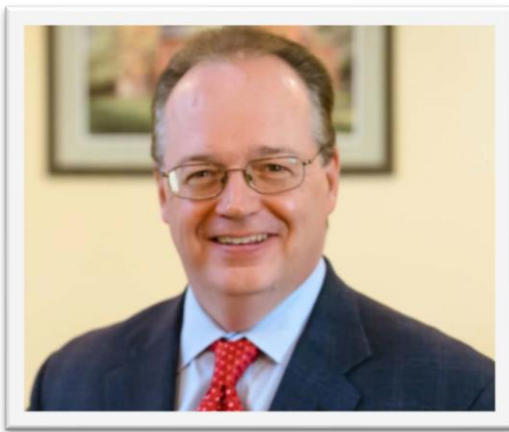
It is critical to have a lawyer who knows the investigative agencies, how they operate, what their authority is to settle or prosecute a case, and what criteria they use to decide whether or not to bring a criminal prosecution.

Make sure your lawyer has specialized expertise in Medicaid fraud investigations and defense.



### **About the Author**

John Howley, Esq. is a trial lawyer with more than 25 years of experience in criminal investigations, trials, and appeals. He represents clients before the Bureau of Fraud Investigation, the



Medicaid Fraud Control Unit (MFCU), the Office of Medicaid Inspector General (OMIG), and in criminal proceedings brought by federal, state and local prosecutors.

His experience includes defending major pharmaceutical companies, physician practice groups, individual physicians, pharmacists, nurses and physical therapists, durable medical equipment providers, and patients.

Mr. Howley has received the *Gideon Champion of Justice Award* from the New York State Association of Criminal Defense Lawyers, the *Thurgood Marshall Award* from the New York City Bar Association, and the *Medal for Excellence in Advocacy* from the American College of Trial Lawyers. He has argued in the U.S. Supreme Court, and he has been named one of New York City's *SuperLawyers*.

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