

PUBLICATION

Worthless Services / Substandard Quality of Care Criminal Prosecutions May Be on the Rise [Ober|Kaler]

2014: Issue 15 - Focus on White Collar

If you are an operator of a skilled nursing facility (SNF), you might have faced the reality of insufficient medical staff and how it impacts your ability to deliver quality patient care to your residents. Or, you might have grappled with issues related to the adequacy of your medical records documentation. While such scenarios may occur for a variety of innocuous reasons, recent prosecutions may presage that federal and state government agencies will henceforth look more closely at such issues from a criminal perspective. These recent cases demonstrate that the government is willing to investigate and pursue criminal cases against SNF operators where the allegations related to irregular paperwork and inadequate staffing render “worthless” or substandard the quality of care administered to the elderly.

United States v. Houser

On June 19, 2014, in *United States v. Houser*, 2014 BL 171094, the U.S. Court of Appeals for the Eleventh Circuit affirmed the first reported criminal conviction and sentence following a trial for “worthless services” health care fraud. By way of background, in 2004, George Houser assumed ownership and control over three Georgia SNFs whose majority population consisted of Medicare and Medicaid recipients. Thereafter, from 2004 to 2007, Ohio officials conducted surveys at the facilities, some of which were in response to complaints lodged by residents' families. There are allegations in the record that Houser sometimes received advance notice that the surveys were to occur. Officials cited numerous deficiencies at the facilities and, ultimately, shut them down in 2007 based on the risk to the health and safety of residents. *Id.* at 3.

In April 2012, following an investigation and indictment, Houser and his wife were convicted of conspiracy to defraud the Medicare and Medicaid programs for filing claims for services that the government maintained were worthless. The government alleged that from 2004 to 2007 the Housers sought and received reimbursement for services that they, in fact, failed to provide to residents of three SNFs, and for services that were so grossly deficient or substandard as to be worthless. In particular, the Housers were convicted for failing to provide required and necessary services, like food, electricity, adult diapers, medication, and dialysis, and for providing services that “were of a quality that failed to meet professionally recognized standards of health care.” *Id.* at 7. Part of the government's proof at trial included evidence that: Houser mandated staffing cuts at the facilities, which caused resident care to suffer; insufficient amount of foods were provided to the residents because Houser had failed to pay the vendors, which caused the residents to lose weight; and Houser instructed staff to stop accurately reporting in patients' medical records their weight loss.

After Houser was sentenced to a 10-year prison term he appealed, asserting that using the health care fraud conspiracy statute to prosecute the concept of worthless services rendered the statute unconstitutionally vague. Houser argued that the concept of the “desirability” of services “has no place in an evaluation of worthlessness because what is totally undesirable to one person nevertheless may have value for another.” *Id.* at 6. Ultimately, the Eleventh Circuit affirmed his conviction without opining on whether “concept of worthless services based on inadequacy or undesirability is unconstitutionally vague” because the lower court's conviction was based both on the failure to provide statutorily required services and deficient services *Id.* at 13.

United States v. Klein, et al.

More recently, on June 24, 2014, a Virginia federal grand jury indicted four individuals for allegedly committing a multi-faceted fraud scheme related to a SNF that they operated. The charges include a scheme to defraud Medicare and Medicaid, a racketeering conspiracy, obstruction of justice, and a conspiracy to make false statements to Medicare and Medicaid. *United States v. Klein, Dietrich, Menten & Cox*, Indictment, No. 2:14 CR 00011 (W.D. Va. June 24, 2014) [PDF]. The indictment alleges that the four defendants, who are an owner and managers of the facility, defrauded many entities, including the vendors who supplied goods and services to the SNF. The indictment further alleges that the defendants defrauded Medicare and Medicaid by causing: the SNF to operate with insufficient nursing aide staff and supplies; residents to subsist in unsanitary conditions; and residents to receive no or inadequate pressure sore treatment. The indictment depicts with particularity the care of five residents, which the government alleges was so substandard that the patients suffered bodily injury. The indictment also asserts that two defendants coached a witness scheduled to testify before a federal grand jury to say that the facility was not short staffed, and that “we did nothing wrong.” *Indictment* at 8–13.

In addition, according to the indictment, from approximately 2008 to 2012, state regulatory officials conducted multiple surveys at the facility, some in response to complaints. State regulatory officials identified several quality-of-care deficiencies during this time period, which led to the facility's designation as a “special focus facility,” and to frequent denials of Medicare and Medicaid claims for new residents. *Indictment* at 5–7.

Furthermore, the indictment alleges that two defendants directed nursing staff to make false entries in the residents' medical records and, in anticipation of government surveys, allegedly “fill[ed] in the holes” in certain patients' medical records, so that it would appear that the care provided to the residents complied with federal SNF regulatory requirements. *Id.* at 35–36.

State of Ohio County of Franklin v. Hitchens & Autumn Healthcare of Zanesville, Inc.

On June 27, 2014, an Ohio special grand jury indicted the owner of a nursing facility, Steven L. Hitchens, on 39 felony and misdemeanor offenses, including engaging in a pattern of corrupt activity, Medicaid fraud, tampering with medical records, and unlawful operation of a nursing home. The allegations set forth in the [indictment \[PDF\]](#) include: false and fraudulent statements purportedly made by Hitchens to the Ohio Department of Medicaid related to Minimum Data Set assessments and family satisfaction surveys; alleged forgeries of nurses' notes and medical records that masked the substandard care that residents received; and the destruction, concealment and removal of nurses' notes and medical records with the purpose of thwarting the investigation of his nursing facility regarding complaints of deficient patient care. A nursing home operated by Hitchens, Autumn Healthcare of Zanesville, Inc., was also indicted for engaging in a pattern of corrupt activity, Medicaid fraud, evidence tampering, forgery, and theft. While the indictment does not provide an overwhelming amount of detail, news media sources claim that the indictments followed a roughly two-year investigation by regulatory officials and law enforcement into complaints from residents' families about the inadequate care that residents received, including withholding nutrition and medications. See, e.g., *Autumn Healthcare Owner Charged with Medicaid Fraud, Forgery*, Newark Advocate (June 29, 2014).

In light of these recent criminal enforcement actions, what can a skilled nursing facility do to prevent an investigation and ultimate prosecution for “worthless services” or substandard resident care? Nursing facilities should not take only the obvious steps of addressing staff shortages and ensuring that their staff dispense medically appropriate care to residents. Facilities should also direct and train staff to thoroughly document in residents' medical records the patient care provided. Failure to do so increases the likelihood that the government could prevail in a worthless services prosecution against your facility based, in part, on incomplete

and inaccurate documentation. Consider incentivizing employees to keep excellent documentation and rewarding them for pointing out deficiencies.