PUBLICATION

Operative Reports May Lead to False Statement Prosecution [Ober|Kaler]

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You are a hardworking surgeon who is committed to providing quality care to all of your patients, including your Medicare beneficiaries. Because you are so busy, you routinely dictate your pre-operative and post-operative reports between surgeries, or sometimes days afterwards. Because you are human, you sometimes make inadvertent misstatements in your descriptions of pre-operative diagnoses, or sometimes you are not as detailed as you could be in your descriptions of the surgeries that you perform. Because you are conscientious and aware that a Medicare contractor could audit you, you keep these preoperative reports for as long as you are required to by state and federal regulations. If some of your operative reports are incomplete, are you at risk for a prosecution for false statements? A recent case called *U.S. v. Natale*, 719 F.3d 719 (7th Cir. 2013), suggests that the answer is "yes."

Dr. John Natale was a vascular surgeon who specialized in repairing abdominal aortic aneurysms. In 2011, a federal grand jury in the Northern District of Illinois returned an indictment charging him with mail fraud, health care fraud, and false statements related to health care matters. The indictment alleged that from 2002 to 2004, Natale prepared false reports describing medical procedures that he did not perform, as well as authored fictitious reports that made it appear that he performed procedures more complex than the ones he actually performed. In addition, Natale allegedly submitted false claims to Medicare for surgeries he never performed.

At Natale's jury trial, the government elicited testimony from a witness who worked for the contractor who administered the Medicare program in Illinois. In addition to testifying in great detail about the claims submitted by Natale, the witness testified generally about Medicare's auditing process, stating that, during an audit, Medicare would sometimes request documentation such as operative reports, personal office notes, X-rays, etc. 719 F.3d at 726–27. There was no evidence that the prosecution of Natale resulted from a Medicare audit, nor was there evidence that the Medicare contractor ever requested or reviewed from Natale the operative reports at issue in the case.719 F.3d at 727. Dr. Natale testified in his own defense, admitting that the operative reports contained inaccuracies, which he characterized as "innocent mistakes," because he was "the busiest cardiovascular thoracic surgeon in the Northwest suburbs," who was sloppy in dictating too many reports at a time. *Id*.

The jury acquitted Natale of all of the fraud counts, but convicted him of making false statements related to health care matters, in violation of 18 U.S.C. § 1035 (a)(2). The language in 18 U.S.C. § 1035(a)(2) provides that anyone who: (1) in a matter involving a health care benefit program; (2) knowingly and willfully; (3) makes a materially false, fictitious, or fraudulent statement; (4) in connection with the delivery of or payment for health care benefits, items, or services shall be guilty of a crime.

On appeal, Natale argued that the trial court failed to properly instruct the jury on the elements of false statements. In particular, he first asserted that in order to convict him of false statements, the jury had to find that he acted with specific intent to mislead or deceive Medicare. Natale next argued that the trial court should have required the jury to find that the false statements were material to Medicare. The Court of Appeals rejected Natale's argument that conviction for false statements required a specific intent to defraud; in other words, the government was not required to prove that the defendant made the false statements with intent to deceive. According to the court, to convict someone of violating 18 U.S.C. § 1035, the government need only prove that a defendant: (1) knowingly and willfully; (2) made false and fraudulent statements; (3) in connection

with the delivery of or payment for health care services; (4) in a matter involving a health care benefit program, and (5) the statements are material to a health care benefit program. 719 F.3d at 742.

In addition, although the Seventh Circuit agreed with Natale that the trial court improperly instructed the jury on the materiality element of section 1035—namely, the court broadened *materiality* to include statements influencing or capable of influencing "any person or entity" rather than requiring the statements to influence or be capable of influencing Medicare—the circuit court found this error harmless. Specifically, because the government had offered evidence that in the event of a Medicare audit a Medicare contractor "sometimes requests operative reports as well as other physician notes," and because the government argued that to convict Natale it had to prove the operative reports were material to Medicare, there was no error that rendered Natale's trial unfair. 719 F.3d at 737–38.

So, post-*Natale*, are there any documents that are not material to a health care benefit program, like Medicare? In light of *Natale*, would it be safer for a physician's notes and reports to be brief rather than lengthier and, thereby, possibly full of sentence fragments or other inadvertent errors?

The lesson from *Natale* seems to be that health care professionals should take care to accurately and thoroughly prepare all medical records, reports, and/or claims related to the delivery of services to Medicare and other beneficiaries. Providers who fail to spellcheck or reread their reports for incomplete sentences, duplicate phrases, or misstatements run the risk that the government will find their documentation inadequate to support medical necessity, or, even fraudulent. Thus, providers who make mistakes in their documents not only face the possibility of an overpayment following a Medicare contractor's audit, but worse yet, an indictment for health care false statements.