

Tips for Dealing with Insurers, Surveyors, MACs and the Government

Health Law Webinar

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Fredrikson

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A Visit From the NRC?

- Three questions to consider for any requests for information:
 - Must I?
 - May I?
 - Should I?

Finding The “Must”

- Federal, state or local law.
- Common law.
- Contractual terms
- Patient consent.

It's Alright to Cry

- The burden is on the party seeking information.
- “Polite transparency” is a great strategy.
- It's much easier to “ramp up” than “ramp down.”
- Nurse Wubbels is my hero.

The Courageous Nurse Alex Wubbels

- She stood her ground.
- She stayed calm.
- Good policies in place. She knew where to find them!
- She realized you can't unring the bell. An important question: What permanent harm is done waiting for an answer?

What Else Could Have Been Done?

- Video the encounter. (That is often resisted by officers, BUT IT IS ABSOLUTELY 100% LEGAL.) ACLU has a good app.
- Contact general counsel.
- As it escalates, bystanders can intervene/contact others.

I Want It NOW!!!!

- An OIG agent arrives demanding a medical record under the “immediate access” provision and won’t leave without it.
- You know that 42 CFR § 1001.1301 permits exclusion for failure to grant “immediate access.”
- What is “immediate access?”
- The answer is more complicated than you might think!

I Want It NOW!!!!

- 42 CFR § 1001.1301(a)(2) and (3) offers two definitions of “immediate access.”
- For validation of an entity or a survey it is: “the failure to grant access at the time of a reasonable request or to provide a compelling reason why access may not be granted.”
- For records: “The failure to produce or make available for inspection and copying....or to provide a compelling reason why they cannot be produced, within 24 hours of such request, except when the OIG or State Medicaid Fraud Control Unit (MFCU) reasonably believes that the requested material is about to be altered or destroyed.”

Private Insurance Audits

- Do you have a contract?
- Without a contract, cooperation isn't required. But it's likely wise.
- Look-back periods in contracts are often very short.
- Is there mandatory arbitration?
- State law may offer surprising protection. Look!
- Remember your Insurance Commissioner.

Terrible TPE

- Targeted probe and educate audits are purportedly friendly.
- If you disagree with the education, start with the MAC.
- The MAC's general counsel is an interesting resource.
- The Regional Office oversees MACs.
 - Regional Offices can be helpful.
 - Don't forget that saga of shared space.

Who's The Boss?

- Medicare: MAC, Regional Office, Baltimore.
- Medicaid: state/federal hybrid. State human services & federal oversight.
- Private Insurers: the contract, insurance law/commissioner.
- Medicare Advantage: Weird hybrid. See 42 C.F.R. § 422.101.

The Stubborn Surveyor

- CMS surveyor insists on access to your peer review information.
- State law matters.
- “Peer review” is a protection, not a privilege.
- Beware of Illinois Council. 529 U.S. 1 (2000).

Tips For Surveys

- Always ask for an exit interview. Include counsel.
- Instructions to surveyors are publicly available.
 - State Operation Manuals.
 - <https://qsep.cms.gov/welcome.aspx> for access to the Training Catalog
- Prepare staff for surveys, too!

Impact for Brace?

- A person from some company claiming to contract with the NSC sends a typo-ridden email saying that they will visit on Tuesday. When they arrive Wednesday asking to come behind the desk and take photos the receptionist, sensing a rat, sends them away.

Pesky Provider Agreements

- As it gets harder to negotiate terms of contracts, is it worth reading them?
- Even if you have no clout, you need to know what it says.
- Tale of the empty ASC.
- Parable of the poorly paid professional.
- Price transparency offers new data opportunities.

New Service Line

- Consider state notification requirements/capital expenditure reporting/certificate of need.
- Required approval from third party payors?

The Injurious Insurer

- Insurer seeks to terminate a provider agreement. What appeal rights exist?
- Does the contract offer any?
- State “any willing provider” provision.
- The power of the public.
- Energy of employers.

Better To Ask Permission or Forgiveness?

- Generally better to figure it out than ask.
- Are you already doing it? Asking is more perilous.
- Is the answer you receive binding?
- Use a certified letter/read receipt email as proof.

A Patient Walks In With Fake I.D.

- What do you do if a patient comes in with an insurance card and you **KNOW** that the card is for someone else?
- **MUST** you report the patient?
- **CAN** you report the patient?

Playing Politics

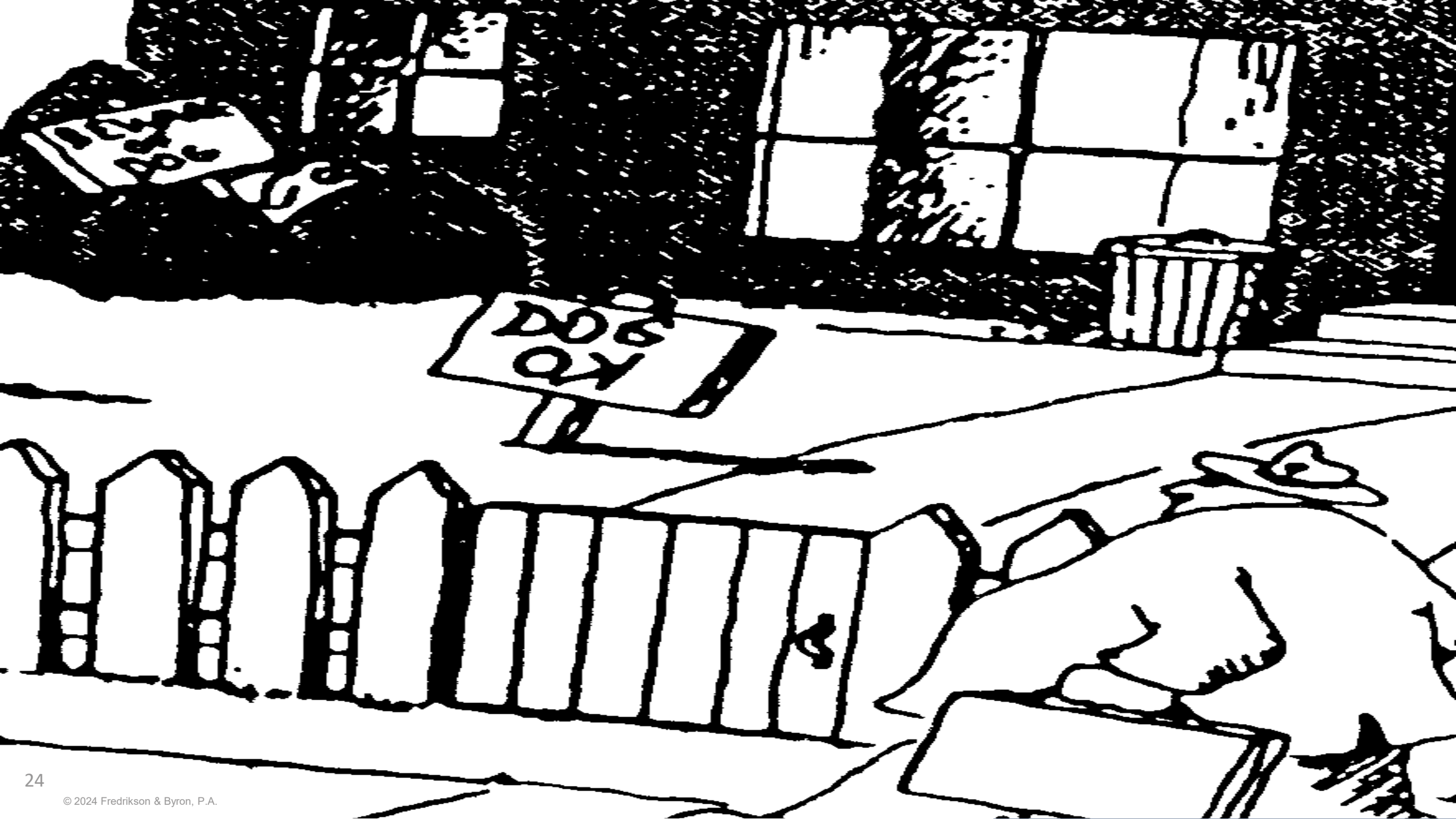
- When do you seek help from elected officials?
- When DON'T you?

The Subpoena

- A grand jury subpoena from Atlanta says, "The United States Attorney requests that you do not disclose the existence of this subpoena. Any such disclosure would impede the investigation being conducted and thereby interfere with the enforcement of the law."

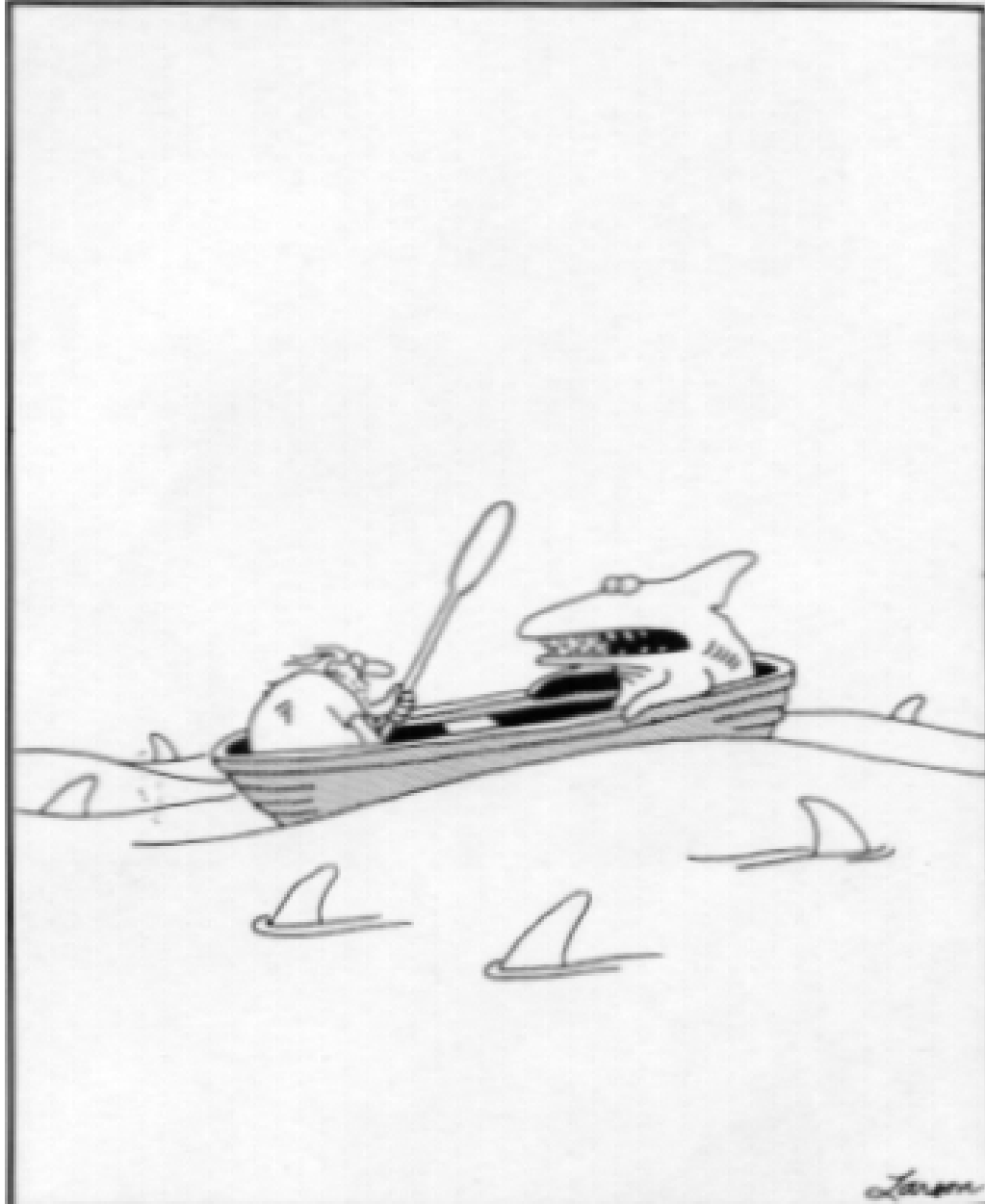
Armed Agents At The Door

- If they have a warrant, let them in.
- Do not talk to them.
- Get I.D. and call a lawyer.



Dealing With Investigations

- Agents want you to talk. They will use your:
 - Fear;
 - Confidence.
- Your biggest weapon:
 - Silence.
- Be especially wary of saying “my lawyer told me it was ok.”
You will have waived the attorney-client privilege.



“OK. I’ll go back and tell my people that you’re staying in the boat, but I warn you they’re not going to like it.”

The Agents Are NOT Your Friends

- Don't try to convince the agent "It is all a misunderstanding."
- Remember two key points:
 - Medicare rules are complicated. You may have violated one without knowing it;
 - To many investigators - there is no such thing as an "innocent mistake."

Know Your Rights

- Agent:

- Can't require anyone to attend interview.
- Can't obtain documents without a warrant or subpoena.
- Can't obtain privileged information.
- Can't prevent you from talking about the interaction.

Know Your Obligations

- Cannot prevent employees from talking.
- If you talk, you must tell the truth.
- Never destroy/hide documents.

Presenters



David Glaser

Attorney

612.492.7143

dglaser@fredlaw.com



Katie Ilten

Attorney

612.492.7428

kilten@fredlaw.com

Thank you!

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