

What to Do When the Investigator or Prosecutor Is at the Door

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**Presented at the AAPS Spring Meeting,
Chicago, June 2, 2001**

The investigator is not your friend. The medical board investigator is not your friend.

I recently attended a trial advocacy seminar, and they spoke to us about primacy and recency. People remember the first thing they hear, they remember the last thing they hear, and they may not remember anything in between. If you don't remember anything else: the investigator is not your friend.

My name is Glen Crick. I am accused of having a holistic boutique law practice here in Chicago. Boutique practice because it's narrowly focused. It's on Oak Street too, which is where all of the other boutiques are. Holistic because we get involved, we like our clients, and we look at the whole person.

We deal only with medical professionals and other licensed professionals who are in danger of becoming unlicensed professionals. That's what we do; we defend licenses, in Illinois and other states. Medical licenses are what we do best. I have had cases as far away as Montana. Is anybody here from Montana? Good, I can talk with great authority about Montana if there is nobody from there in the audience.

The topic of my discussion generally is what to do if you are investigated—or more importantly, what not to do, and that may be where the holistic part of it comes in.

Let me talk a little bit about my background. I got into the business of representing licensed professionals who are in danger of becoming unlicensed professionals by a strange path. After returning from Vietnam, I went to the Illinois State Police Academy. I turned 21 in the Academy and ended up working a variety of assignments. In 1978, I was finishing law school as a financial fraud and forgery bureau was being developed here in Illinois. I was one of the first investigators in that unit, and within six months I was in charge of it. What we did was investigate Medicaid fraud in Illinois. We were responsible for a large number of prosecutions of people for Medicaid fraud here in the late 70s.

In 1980, there was a scandal at what is now known as the Illinois Department of Professional Regulation. It was then the Department of Registration and Education. I was brought over from the State Police to uncover fraud and corruption within the State licensing agency. I was there about three months when I realized that there was no fraud and there was no corruption. You wouldn't pay somebody not to do something they weren't competent to do to begin with. What there was was a lot of inefficiency, a lot of bureaucratic inefficiency. It's good for my profession that there is still a lot of inefficiency in the State's licensing agency.

If you haven't listened to what [other presenters] have told you, and you find yourself being investigated, here are some very practical tips for you.

The investigator is at your door, and the audit has turned bad. Do not panic. Don't forget to breathe. I have the same problem when I am on trial; I forget to breathe once in a while. I write it right across the top of my notes: BREATHE. That is very important. Don't panic.

I have a tendency to awfulize. Anybody know what awfulize means? I can take any event, and I can extrapolate it: I am going to be penniless, homeless, and living on the streets, talking to myself a great deal. That's any event.

Do you know the difference between an event and a tragedy? If it's happening to you, it's an event; if it's happening to me, it's a tragedy—it's a Greek tragedy. There are costumes, there are bands, there are animals, the whole scene.

First thing: don't panic. Everybody who practices medicine long enough in this country is going to be investigated. I am sorry to tell you that, but that's just the way it's coming down. You are going to be investigated; you are going to be questioned; your practice is going to be questioned; don't panic. Talk to some people who have walked this road before.

I tell my clients this when they come in: I don't know how this is going to turn out. If I could tell you that, I would be buying lottery tickets. I don't know how it's going to come out, but I tell you that I have done this before, and this is what we can expect. And this is what we are going to do; let's walk this road together. That's, I guess, part of the holistic thing too.

And you will hear me say this again: Don't get in a hurry. Do not get in a hurry. I have been doing this on every side of the fence there is: I have been an investigator, I have been in charge of prosecutors, I have been a defense attorney, and I have been accused of bad things in my life. Don't get in a hurry. The passage of time will only work to the benefit of the accused. I have never seen it happen another way—at least with the passage of time that you can control. The investigators have their own control of the time, especially the U.S. Attorney's office. They will wait six years to indict somebody; you can't control that. But once it's in your court, don't get in a hurry. The passage of time will only work to your advantage.

When you were in school if you took a journalism course or a writing course or something like this, they taught you about the 5 "Ws": who, what, where, why, when, how. I always put in "so what?" That's where you start.

Say you are being investigated. The first question to ask before you do anything else is: Who is investigating me? I cannot tell you how many times people have come to my office and said, Glen, they came in and they took my records. Who? "The police." There are 26 separate law enforcement entities operating in Cook County, Illinois: Which one? "I don't know. Well they had guns." Well, they've all got guns. "They weren't wearing uniforms." Well, I think about 25 of them don't wear uniforms. Find out who is investigating. If your secretary rings you and says hey there's an investigator out here that wants to see you, ask "Who is it?"

Secondly, and this is really basic: Who is being investigated? Now if an investigator is here to talk to me about the guy down the hall, whom I hate, and who is smoking pot day and night and playing wild music, I want to talk to him. But if I'm the one being investigated, I may think a little bit—twice—before I ask him in. Find out who is being investigated.

Third, what are they investigating? Is this an OSHA [Occupational Safety and Health Administration] person? Is this a Medicaid fraud investigation? Is this the sexual abuse task force? Is this the Department of Children and Family Services? What's the investigation about?

This is one of my absolute favorites: Always be aware of the sensitive attempts to minimize. "Doctor, it's just a routine investigation." Wait a minute, who's it routine for? I mean if you get investigated every day, this is a routine investigation. If you only get investigated once a month, it's not quite that routine. If this is the first time in your 20-year practice an investigator has come to see you, it's not routine at all. No, no, it may be routine to the investigators, but it's not routine to you. Watch out for that. And good investigators will do that: "We just want to ask you a couple of questions." Okay, isn't that nice, just a couple of questions. What do they want to talk about, baseball? Are the Cubs having a good year?

Again: Find out who is there to investigate, who is the subject of the investigation, and what they want to talk about before you say anything. When Tom asked me to come over here and speak this morning, for example, I asked where do you want me to go and what am I going to talk about. Isn't that just common sense? Depending on the answers you get to those first questions, make a decision whether you are going to talk to them or not talk to them. Nine out of ten times I am going to tell you not to talk to them. But make a decision.

There are a couple of things to keep in mind in making the decision as to whether or not you are going to speak to the investigators initially.

First, confidentiality, patient confidentiality. I don't care if it's an audit case; the patients have rights in the privacy of their files.

A horror story out of school: The Illinois Department of Professional Regulation sent an investigator out to talk to a physician about a particular patient. The reason is that the insurance company did an audit of his records and found out that the doctor has not kept patient records. He is a psychiatrist, and he has not kept progress notes. The insurance company complained to the Department of Professional Regulation, and the doctor sat down with the investigator, who asked what was going on, and the doctor told him. He said that the patient was very paranoid and was concerned that his records would fall into the hands of the KGB or whomever else, etc. The doctor is now being prosecuted by the Department for breach of patient confidentiality. With whom did he breach confidentiality? The investigator. It's the most ridiculous case I have ever seen, but they are doing it. The department is charging a physician with breaching patient confidentiality because the physician talked to the department's agent. It doesn't make a lot of sense.

Again, make a decision as to whether or not you are going to talk to them. That is one of the most agonizing and important decisions I ever make when I am representing somebody: Are you going to talk to them, or not? My inclination is not to, if my client is wrong.

Let me say as an aside that I prefer my clients to be wrong.

God save me from the innocent client, because there is not a lot I can do for him. I can't use all my skills when I am defending the innocent. When somebody is wrong, I can come up with a good defense; I can negotiate; I can maneuver. When he is right, I just have to trust in God and do the right thing and go right through the motions.

But if my client is wrong, I am not going to talk to the investigator. We are not going to be interviewed. We are not going to be interviewed by the investigator because he is going to be telling the story later. I want that story told one time and one time only, and that's when it counts—that's in front of the jury, in front of the medical board, one time. Remember: they will use your words against you. What you don't say won't hurt you. As Abraham Lincoln said, even a fish wouldn't get in trouble if it kept its mouth shut. A lot of wisdom there, a lot of wisdom. Don't talk to them.

If my client is right, it's a harder decision to make because I've got a chance that perhaps I can start planting the seeds that will eventually make this thing go away. Anyway, it's a difficult decision to make, and I suggest you might talk to somebody else before you make the decision as to whether you are even going to talk to the investigator.

If you decide not to talk to the investigator, I used to tell people to just say no. But I heard recently that yet another tribe has been discovered in the Amazon. This lost tribe that nobody ever heard of is rather unique in that there is no conflict at all within this tribe. There is not even a word for "no." They can't say no. What they can say—and they can say it about 20 different ways—is "let me get back to you." Keep that tribe in mind. If the investigator is sitting there and he wants to talk to you, don't say no, say, "Let me get back to you; let me talk to my attorney." This is America, okay? We've got the right to an attorney. Ask to talk to the attorney, to talk to your wife, to talk to your husband, to talk to anybody. "I'll get back to you."

I don't know how many people have said to me, "Well I talked to him because I didn't want to make the investigator mad." Now everybody wants to be liked, and that's a human condition. Find somebody to like you besides the investigator. Imagine this conversation: "Glen, I am going to jail now. I am going away for three years, I am going to be paying a \$25,000 fine, and I can't practice medicine for at least five years, but you know, I think the investigator really likes me."

Now you know we've got other things to worry about. Don't worry about the investigator not liking you.

Another one of the minimalizing techniques that investigators are trained to use: They are good at empathizing with the people they are investigating and finding some sort of a bond with them. One of my favorites is: "It will look better if you cooperate with us." It will look better for the investigator. It will look much better for the investigator. Maybe he will get invited to an awards ceremony or something like that, but it doesn't look better for you. It looks worse for you, and they get more information about you.

Consider the Federal Drug Enforcement Agency. I represent a lot of people who prescribe controlled substances. For one reason or another, the DEA comes out and knocks on their door and says: "We've got a problem with your prescribing habits; you have been prescribing too much of this, you have been ordering too much of that; we did an audit, and you can't account for this," or whatever. "It would be in your best interest—it would look

better for you if you surrender your DEA registration today. And physicians routinely do that. They routinely sign the form and surrender their DEA registration right there because they say it will look better. Then a month or so, a week or so, or a day or so down the line, they come to see me and now we are preparing a defense in Illinois. Illinois is a dual registration state. You have an Illinois medical license to practice medicine in Illinois, and you have an Illinois controlled-substance registration. Now the normal course of events if a physician is prescribing or dispensing controlled substances in some manner that is wrong, the Illinois Department of Professional Regulation will file charges. Those charges will be resolved at some point or another, and depending on the way they are resolved the Federal Government will act accordingly. It will mirror what Illinois has done. If the Illinois Department of Professional Regulation Medical Disciplinary Board recommends a physician's license be suspended for a year, the DEA will suspend the license also. It's a mirroring process. However, if you have surrendered your DEA registration, I have got nothing to argue about before the Department of Professional Regulation.

Doctors are very difficult to defend. Representing doctors is difficult because generally I start out behind the eight ball because they have already talked to the investigator. I think it's because during your entire education you explain things. When you go on rounds, you explain what you are doing. When you write a test, you explain. If you are a good physician, and when you are sitting with a patient you explain what is going on. When an investigator comes in, your first instinct is to explain everything. Henry Ford said, "Don't complain; don't explain."

Don't explain. First of all, there are a couple of built-in assumptions if you are going to explain something: First, the person you are talking to has to be listening. [Second, the person has to be seeking the truth.] Webster's Dictionary defines an investigation as a critical search for the truth. I have never heard anybody who was an investigator, other than myself, ever use that definition. Ask an investigator what he does. He'll say: "I gather evidence to prosecute this type of crime, that type of crime, this type of person,.... I gather evidence." No, it's a critical search for the truth.

Assumption number three is that they'll believe you. If they've already gone into this investigation with some preconceived notion of your guilt, they are probably not going to believe you.

Assumption number four is that they care. I mean they have got to care about whether or not you are right or wrong before you can explain something to them.

And assumption number five is that the explanation makes a difference. This is very important: the investigator usually doesn't have any control. Investigators by and large are to some degree errand boys and girls. They are going out and gathering information. It's the medical disciplinary board that is going to make the decision in a licensure case. It's the prosecutor who is going to make a decision as to whether or not to file the charges, not the investigator. So, explaining to the investigator may do some good for your soul, but I doubt if it's going to do any good for your case or for your pocketbook. So, I would hold the explanations for someone who is listening, who understands, and who is in a position to do something about it.

Another very important thing: If you are going to talk to the investigator, do not lie. One of my clients is a physician who is just recently out of federal prison for that very thing, lying to the DEA

during a drug audit. It is a crime to lie to a federal agent. Because of my political beliefs, I find it offensive that it is against the law to lie to our government. My government has lied to me. But that's a personal thing.

Let's talk about subpoenas for a minute. If they show up with guns and they've got a search warrant, there is not a damn thing you can do. Stand back and try to keep an eye on them. Ask them for a receipt, and try to keep an eye on what they are taking, but there is not a thing you can do. But if they come out and they serve you a subpoena for your records, take your time responding. Talk to someone you trust, talk to an attorney, before you release anything. Make a copy of everything you give, and Bates stamp it. Do you what know Bates stamps are? Those are numbering stamps that number pages in order. Bates stamp every document you give to them, index it, be very, very careful what you give to them. Give them everything they subpoenaed, assuming your attorney tells you that they have the right to it, but keep a careful inventory of what you given, because you are going to see it again. There is some reason that they are asking for it. Make sure that no extra documents get put into it. More importantly, make sure no documents fall out of it. Keep a careful watch on what you do.

If you are told you have the right to remain silent, for God's sake remain silent. That is called the Miranda Warning. The Miranda Warning is only given to someone who is the subject of a criminal investigation. If they say you have got the right to remain silent, there is no more subtlety involved: you are the center, the target, the victim of a criminal investigation. And again, investigators, good investigators, will minimize that. If I were going to give somebody the Miranda Warning—and I used to do that—I would say: "Doctor, you watch television don't you? You know what the Miranda Warning is? The Supreme Court says we have to give this to everybody we talk to now, so just bear with me for a second." And then I would read it out and then I would ask whether there were any questions. Nothing to it, right? If you see it on television, there is nothing to it, so don't worry about it.

If you are told you have the right to remain silent, I strongly suggest you remain silent. The worst thing you can do is.... Okay, you've disregarded everything else I have told you, and you have decided to talk to the investigator though it is not in your best interest, and he has told you you've got the right to remain silent, but you don't pay any attention to that because the investigator likes you, and it's okay. But do not give a written statement. Don't put anything in writing. **Do not give a written statement.** I will guarantee you this: a written statement will never ever ever ever be used in your favor. It will only be used against you because the prosecutor is going to look at the written statement that you gave to your friend the investigator and he is going to say, "Well this is self-serving. He says he didn't do it, wow, I knew that. But he also says right here that he ordered ... , or that he didn't pay attention." That's what's going to go in front of the jury. No written statements. There is nothing to be gained by them.

Another issue is that 95 percent of all the cases—criminal, administrative, or civil—in this country are settled. There is a negotiated settlement of those cases. Most criminal cases end up in plea bargaining. Most civil cases end up with a settlement conference or a settlement agreement. The Illinois Department of Professional Regulation will discipline in excess of 4,000 people. The Department of Professional Regulation here in Illinois is an umbrella agency, which regulates a hundred professions and

occupations in Illinois. It's not a state medical board like in a lot of states. They discipline 4,000 people, and the department would fall apart if they had to do 250 hearings. They may do 200 hearings, and of those cases that go to hearing or that go to trial, a large fraction of them are settled along the way, somewhere in between. What I am telling you is this: "A Day in Court" is not how these cases get resolved. (I'm in my fifties now so I remember television when it used to be "A Day in Court.") It's more like Monty Hall's "Let's Make a Deal." You are going to come up with a negotiated settlement 9 out of 10 times. If you are going to have a negotiated settlement, the less information the other side has, the better. Knowledge is power. If they don't know what's going on, you've got a lot more room to negotiate.

And where do they get the majority of the information—about your coding, your billing operations, about anything in your office? Who has the most information? You do.

So again, make a decision as to whether or not to even be involved in the investigative process. I am not talking about audits. But when that audit shifts to the investigative stage, make a decision as to whether or not to be involved in it. And if you are going to give out information, give it through a third party. If I say you are the most wonderful physician in the world, that is advocacy. If you say it, it's ego. Have somebody else advocate for you, and have somebody else transmit the information.

If you are invited to come in to an informal or disciplinary conference before a licensing agency, make a decision as to whether or not to go. By no means go in without counsel. Remember, these people are not your friends. Your best friend may be the chairman of the medical disciplinary board, but your best friend may not have any control over the process once you get started, once the investigative reports are written, once the prosecutor has his hands on it.

I agonize with my clients over this question. If we get invited to an informal conference, do we go? Most of the time, if my client is wrong, I don't go. I want them to file a formal complaint so I can see specifically what they are alleging that my client did and we can prepare a defensive position based on those charges. I don't want to have coffee with one or more members of the medical disciplinary board and the department attorney, talk about God knows what, and let them be privy to a whole lot of things that might be excluded at the trial stage. They might form some bias that is going to affect the outcome of the trial when it goes before the medical disciplinary board.

If my client is right, it becomes more problematic. If we have a very good position, we might be able to make the thing go away. I've got to be conscious of the cost to my client, so maybe we will go and talk to them. Even if you do decide to talk to the investigator or even if you do decide to go to a conference, remember this: you can stop at any time. You can just remember that you have to be somewhere else. Your license cannot be taken as a result of not talking to an investigator. That's not the way it works. Your license cannot be taken away as a result of saying to someone at an informal conference, I am sorry, I've got another appointment or I just don't particularly like your attitude today, so I am going to leave. No, you have a due process right in your license, which requires that before the state can revoke your license, you must be given notice and in most cases an opportunity to be heard before a board of your peers. You get a trial. Sometimes it's best to take the trial.

I said, don't get in a hurry. Let me come back to that one more time. There are reasons to delay these cases once they get started. Witnesses die, witnesses move. When the prosecutor today gets a case on his desk, it's an important case. "The people in the state of Illinois hired me to do this; this is a bad doctor, and I've got to take care of this case." If I can stall that case a month, probably 20 more cases will come in. If I can stall it six months, there are 50 more cases on top of that one, and it will not seem quite so important. If I can stall for a year, the prosecutor is looking at a way to get rid of it.

Delay is good. I'll tell you a story about that, from the *Arabian Nights*. The Shah of Persia for some reason decided to have two people executed. One of them sent a message through an emissary to the Shah saying that "if you don't execute me, I will teach your horse to fly."

Now the Shah was not stupid, but the Shah really didn't have anything to lose and he thought well, what the heck, it wouldn't cost him anything. So, the prisoner is sent back to his cell, and the other condemned man asked why he did that.

"You're just postponing the inevitable; you can't teach a horse to fly. Why even bother?"

"But think about this," the man replied. "In a year the horse could die of natural causes; I don't know what happens then. In a year, I could die of natural causes, so it is no great loss. In a year the Shah could die. In a year, the horse could fly."

I'll tell you something: I have seen horses fly, if you give it enough time. Don't get in a hurry. The passage of time will only work to your advantage.

Another problem: employees. As somebody once told me, Jesus had twelve. One doubted Him, one denied Him, one betrayed Him. That's 25 percent failure rate for the person that some people think is the Son of God or at least an agent of God.

As an investigator, I was always looking for the weak link. In the language of the trade, I was looking for somebody to flip. The best case is to have the office manager testifying about how the doctor instructed her to miscode. That's the best case in the world. The other term of the trade is a hammer. I am looking for something that can encourage the office manager to flip, such as something that she has done wrong.

If you know you are being investigated—I strongly suggest this—the first thing you do is call your staff in and tell them. If you really think you may have a problem, you might suggest to them that they get an attorney to represent them during this investigation at your cost. I am going to tell you straight up though, if you do that, be willing to pay for the attorney and stay out of it—don't tell the attorney what to do or anything like that.

The last thing I've got to say, and this is part of the holistic approach to the whole thing is, remember, if you become the target of an investigation, you will get through it. People forget that. People awfulize. I have been told a number of times that the most valuable service I provided to a client was that the day he came in I told him this is just something he would have to walk through, but he would get through it.

I say, "You're going to get through this. You are going to practice medicine again. Life will go on. This is part of the glorious adventure that is life."

Glen Crick, Esq., now deceased, practiced law in Chicago.