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**WHAT IS FRAUD**

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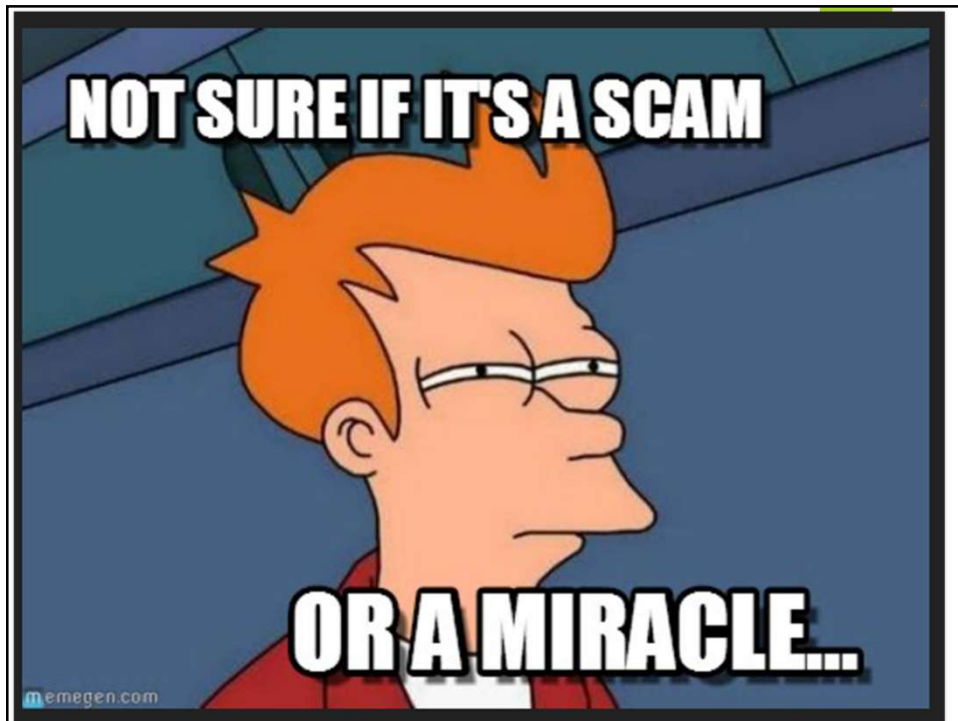
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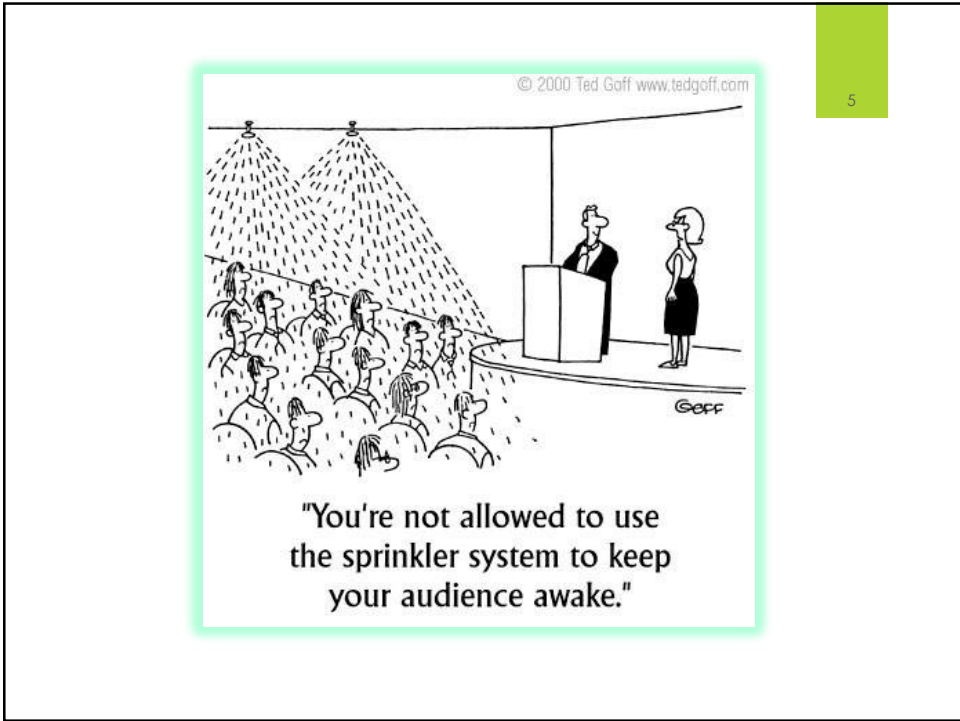
## THE BASICS

- ▶ WHAT IS FRAUD?
- ▶ HOW DO YOU PROVE KNOWLEDGE?
- ▶ KICKBACKS
- ▶ WHEN IS A GOOD TIME TO REFER?

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# WHAT IS FRAUD?

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“Fraud means an **intentional** deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person.” 42 CFR § 455.2

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## ABUSE

“Abuse means provider practices that are inconsistent with sound fiscal, business, or medical practices, and result in an unnecessary cost to the Medicaid program, or in reimbursement for services that are not medically necessary or that fail to meet professionally recognized standards for health care.” 42 CFR § 455.2

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## WE ARE THE MEDICAID FRAUD CONTROL UNIT

“The unit will conduct a Statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to **fraud** in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers of medical assistance under the State Medicaid plan.” 42 CFR § 1007.11 (a)

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## 42 CFR § 1007.11 (b)

(2) "If the initial review indicates **substantial potential for criminal prosecution**, the unit will investigate the complaint or refer it to an appropriate criminal investigative or prosecutive authority.

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## 42 CFR § 1007.11 (b)

(3) If the initial review **does not indicate a substantial potential for criminal prosecution, the unit will refer the complaint to an appropriate State agency.**"

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## ON THE OTHER HAND...

42 CFR § 1007.11 (c) - If the unit, in carrying out its duties and responsibilities under paragraphs (a) and (b) of this section, discovers that overpayments have been made to a health care facility or other provider of medical assistance under the State Medicaid plan, **the unit will either attempt to collect such overpayment** or refer the matter to an appropriate State agency for collection.

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## Managed Care

- ▶ Managed care dollars **ARE MEDICAID DOLLARS**
- ▶ If it occurs in a Medicaid Managed Care arena, it is still under MFCU jurisdiction and prosecutable
- ▶ Fraud is fraud

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## When to Refer

- ▶ Administrative vs. Criminal
- ▶ Many cases begin with something small – not all cases need a full investigation before referring to MFCU - May have a “piece of the puzzle”
- ▶ Greed is a powerful thing – there's always fraud
- ▶ Timeliness is critical
- ▶ Cases with jury appeal
- ▶ ALWAYS COMMUNICATE WITH EACH OTHER

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## When to Refer Fraud



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REMINDS ME OF SOMEONE...

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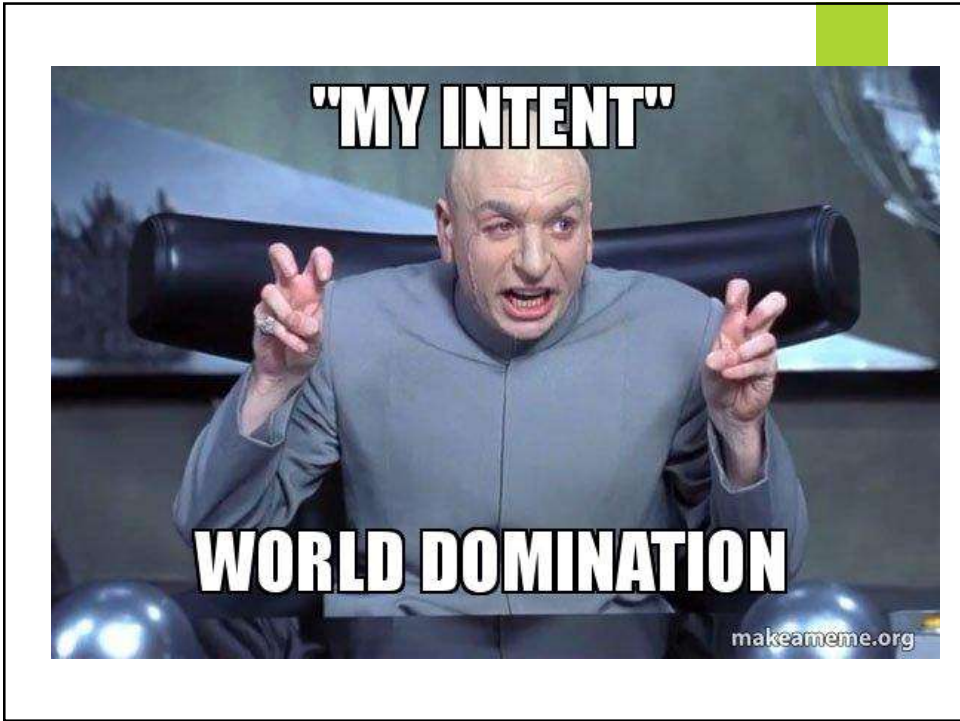
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HOW DO YOU  
PROVE  
KNOWLEDGE?

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## TYPICAL STATE MEDICAID FRAUD STATUTE

“Any person who furnishes items or services for which payment may be made under this chapter, who: (1) **knowingly and willfully** makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under this chapter; or

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## TYPICAL STATE MEDICAID FRAUD STATUTE

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(2) **knowingly and willfully** makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment;

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## TYPICAL STATE MEDICAID FRAUD STATUTE

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(3) having knowledge of the occurrence of any event affecting his or her initial or continued right to any such benefit or payment, or the benefit of any other individual in whose behalf he or she has applied for or is receiving such benefit or payment, conceals or fails to disclose such an event **with an intent fraudulently to secure such benefit or payment** either in a greater amount or quantity than is due or when no such benefit or payment is authorized..."

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## DEFINITION OF “KNOWING”

“The term ‘knowingly’ as it is used to describe a state of mind of the defendant means that he was conscious and aware of his act/omission, **realized what he was doing, and did not act/fail to act because of mistake or accident.** An act is done knowingly if the defendant is aware of the act and aware that it was done voluntarily or intentionally.”

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## WHAT ABOUT “WILLFUL”?

“An act is ‘willful’ if it is done **intentionally** and by design, and not out of mistake or accident. **The defendant acted willfully if the defendant intended the conduct.**”

**“The term ‘willfully’ only requires the actor to intend conduct; no ill will or malevolence is required.”**

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KNOWLEDGE OF THE LAW IS NOT AN  
ELEMENT

IGNORANCE OF THE LAW IS NOT A  
DEFENSE

“The Commonwealth does not need to  
prove that the defendant knew his  
act/omission was unlawful.”

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## Direct Evidence v Circumstantial Evidence

When a witness, such as an eyewitness,  
asserts actual knowledge of a fact, that  
witness' testimony is **direct evidence**.

On the other hand, evidence of facts  
and circumstances from which  
reasonable inferences may be drawn  
is **circumstantial evidence**.

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## PROVING KNOWLEDGE

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“Knowledge may be proved by circumstantial evidence. The knowledge that a person possesses at any given point in time may not ordinarily be proved directly, **because there is no way to directly show how the human mind works.**”

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## PROVING KNOWLEDGE

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In determining what a person knew at a particular time, you may consider any statements made or acts done or omitted by that person, and all the other facts and circumstances shown in the evidence that may aid in your determination of that person's knowledge.”

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# PROVING KNOWLEDGE

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It may be proved circumstantially, by proof that a defendant took actions inconsistent with a good faith belief that his conduct was legal. *Klaczak v. Consolidated Medical Transport*, 458 F. Supp. 2d 622,676 (N.D. Ill. 2006).

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**YOUR EVIDENCE**

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**IS CIRCUMSTANTIAL**

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## CIRCUMSTANTIAL EVIDENCE OF KNOWLEDGE

- Hiring inexperienced employees and “training” those employees;
- Indifference to the accuracy of statements;
- Forging documents; and/ or
- Failure to correct practices after being put on notice by employees and by audit that practices might be improper or billing might be inaccurate

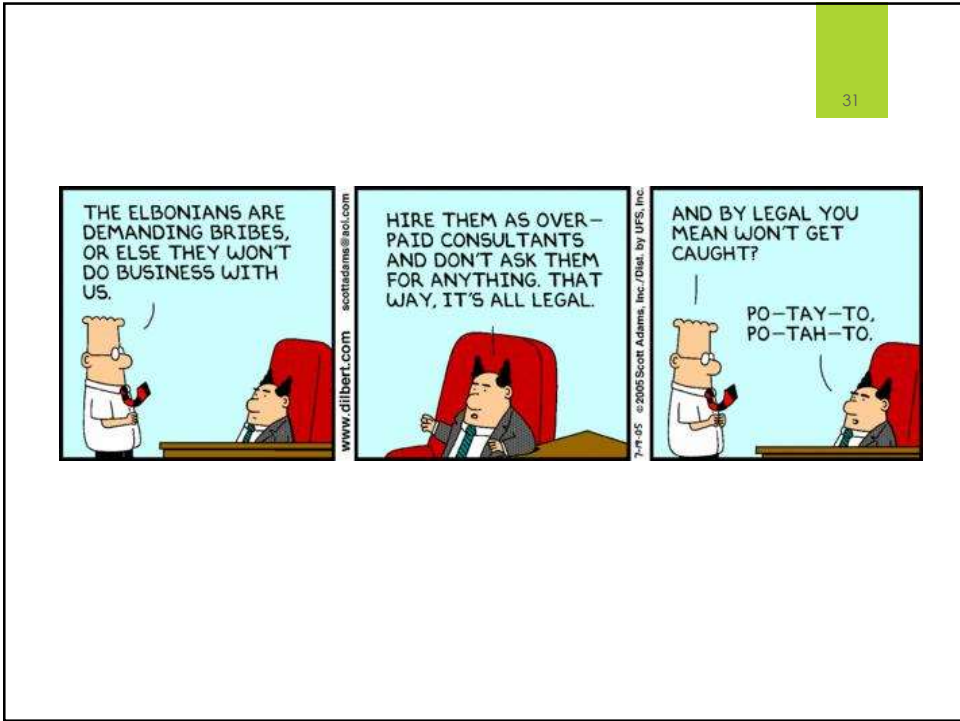
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## KICKBACKS

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## TYPICAL MEDICAID ANTI-KICKBACK STATUTE

“Whoever solicits or receives any remuneration, including any bribe or rebate, directly or indirectly, overtly or covertly, in cash or in kind in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this chapter...”

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# TYPICAL MEDICAID ANTI-KICKBACK STATUTE

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... or whoever offers or pays any remuneration, including any bribe or rebate, directly or indirectly, overtly or covertly, in cash or in kind to induce such person to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this chapter shall be punished..."

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## ELEMENTS OF CRIMINAL KICKBACK

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First: That the defendant solicited, received, offered to pay, or paid any remuneration (including any bribe or rebate), directly or indirectly, overtly, or covertly, in cash or kind to any person;

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## ELEMENTS OF CRIMINAL KICKBACK

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Second: That **one purpose** of the remuneration solicited, received, offered or paid was to induce such person to purchase, lease, order, or arrange for, or recommend that another person purchase, lease, order or arrange for any good, facility or service subject to being paid for by Medicaid.

U.S. v. Greber, 760 F.2d 68, 72 (3rd. Cir. 1985).

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## ELEMENTS OF CRIMINAL KICKBACK

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Third: That the good, facility or service was subject to being paid for in whole or in part by Medicaid.

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## MEANING OF “REMUNERATION”

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“Anything of value in any form whatsoever...”

*U.S. v. The Health Alliance of Greater Cincinnati*, 2008 WL 5282139, S.D.Ohio, December 18, 2008

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## MEANING OF "INDUCE"

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"Induce connotes the intent to exercise influence over the reason and judgment of another in an effort to cause referrals of business." Boman v. Southeast Med. Servs. Group, 1998 WL 1182063 at 10 (Mass. Super.).

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## CRIMINAL CONVICTIONS

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## CONSEQUENCES OF CRIMINAL CONVICTION

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Mandatory OIG exclusion from all Federally funded health care programs for conviction of:

- Medicare fraud;
- Patient abuse or neglect;

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## CONSEQUENCES OF CRIMINAL CONVICTION

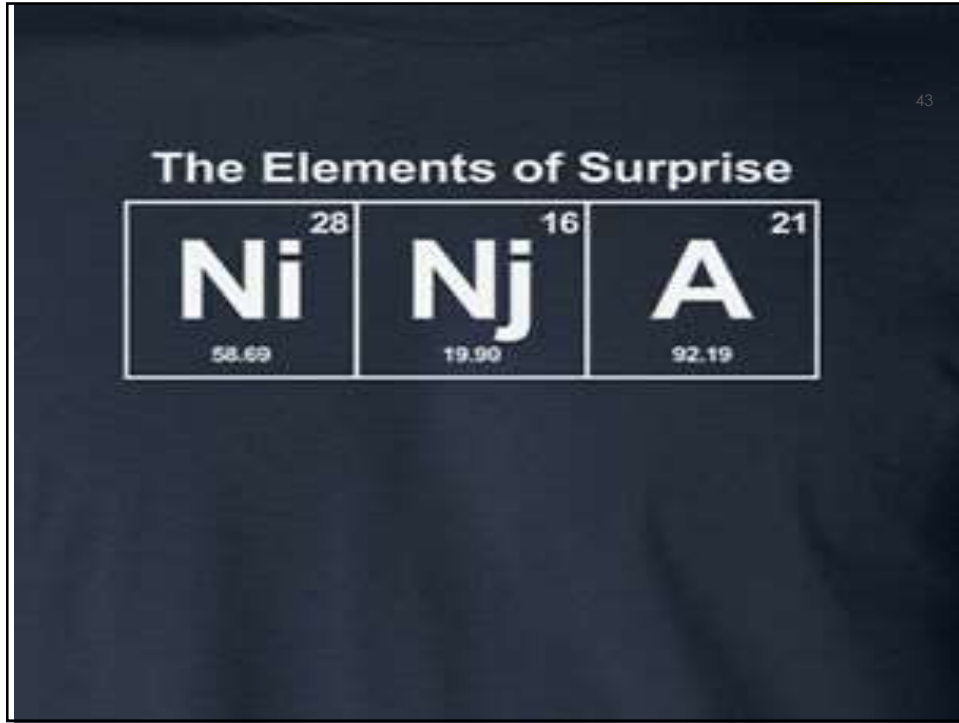
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Felony convictions for other health care related fraud, theft, or other financial misconduct; or

- Felony convictions for unlawful manufacture, distribution, prescription, or dispensing of controlled substances.

42 U.S.C. § 1320a-7

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## CRIMINAL ELEMENT MATRIX

RCW	Elements (statutory)	Jury Instruction differences	Evidence (Physical/ Testimonial) (each element requires 3 items of evidence)	Source/ Witness
9A.36.050 – Reckless Endangerment	A person, (name of suspect), of (name and address of facility)	Same		
	On or about _____, to _____, recklessly engages in conduct that creates substantial risk of death or serious physical injury to another person.			
RCW 9A.08.010(1)(c) - Recklessness	A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.	YPIIC 10.03 - Recklessness Same.		

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45	RCW 9A.04.110(4)(a)	"Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;	Bodily Injury, Physical Injury , Bodily Harm [WPIC 2.03] Same.		
	Likely Defenses	Evidence to overcome argument (physical / testimonial).	Source / witnesses to overcome.		

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## Accept or Decline – Counseling Services

- ▶ Lack of documentation/conflicting stories regarding missing documentation
- ▶ Clear services not rendered—substantiated by MCE member interviews before referral
- ▶ Provider requested immediately to be terminated with the referring MCE once documents were requested for audit
- ▶ Most members were dual eligible so fraud hit both Medicare and Medicaid

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## Accept or Decline – Dental Care

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- ▶ Lack of documentation issue
- ▶ MCE auditor recommended education/overpayment collection
- ▶ Low dollar exposure (\$13K) with no previous education regarding documentation requirements

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## Accept or Decline – Lab Testing

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- ▶ Clear indication of record alteration after submission during pre-payment review
- ▶ Education via pre-payment review but no behavior change
- ▶ Prior settlement for false claims due to unnecessary drug screens

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### Accept or Decline – Pediatric Care

- ▶ Low dollar exposure (under \$5K)
- ▶ Overpayment had already been collected
- ▶ Provider was no longer practicing

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### Accept or Decline – Dental Care

- ▶ Majority of records appear to be upcoded
- ▶ No documentation for most restorations and extractions being billed
- ▶ Multiple instances where no documentation was submitted for the audit

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# Questions?

