

## **A New Arrow in the Quiver for Physicians Facing Dual Civil and Criminal Fraud Investigations**

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At a time when doctors face increased pressure from competition, reduced fee schedules, and greater scrutiny from insurance company Special Investigative Units (“SIUs”) and State Office of Insurance Fraud Prosecutors (“OIFPs”), a recent holding from the United States Supreme Court may provide creative arguments to stop, or at least slow, the continued trampling of physicians’ rights in tandem civil-criminal fraud investigations. The prevalence of these dual investigations is significantly increasing, so it is critical for physicians to utilize all potential tools in their arsenals, including constitutional challenges to statements made in civil proceedings that are later used in a criminal proceeding.

In late June 2015, the United States Supreme Court rendered a decision touching upon the Constitution’s Sixth Amendment Confrontation Clause.<sup>1</sup> Specifically, in *Ohio v. Clark*,<sup>2</sup> the Supreme Court refined the “primary purpose” test and concluded that certain statements made by a child to his teachers about an adult’s abusive conduct were “non-testimonial,” and therefore such statements were admissible at trial against the adult abuser. While those statements were deemed admissible under the particular facts and circumstances of that case, the rationale underlying the *Clark* decision may arm physicians being subjected to civil investigations by insurance company SIUs with compelling arguments to preclude the subsequent use of such evidence against them in a criminal investigation.

Often, physicians investigated for fraud by SIUs will make incriminating statements elicited in the context of a civil or administrative proceeding, and less formally in pre-litigation cooperative efforts to resolve the investigation. Such civil statements, often innocently made, are provided in the absence of Fifth Amendment and other protections. Often, these statements, once the civil matter is resolved by the

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<sup>1</sup> U.S. Const., amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

<sup>2</sup> *Ohio v. Clark*, 135 S.Ct. 2173 (2015).

SIUs, are then provided to State OIFPs examining parallel criminal fraud allegations against the same physician. The OIFP then utilizes such statements in subsequent criminal proceedings which, of course, can carry prison, disbarment, and other significant legal and financial costs. This practice effectively circumvents all protections traditionally afforded to criminal targets and/or defendants whereby they are not compelled to make statements which could be used against them and, moreover, are in fact provided constitutional protections, under the Fifth Amendment specifically, to protect against incriminating statements. When SIUs collect (in a civil context) and then later transfer incriminating physician statements, they morph into an appendage of the State by virtue of the collection and use of that evidence. However, the holding and application of the Clark decision may provide a new type of argument to combat the SIU-OIFP two-headed investigative monster.<sup>3</sup>

In *Ohio v. Clark*, a three-year-old boy, identified as L.P., was discovered by one of his preschool teachers to have several unusual looking marks and bruises on his body. When his teachers questioned him about the apparent injuries and who caused them, L.P. identified “Dee”, which was the nickname of Darius Clark, the boyfriend and pimp of L.P.’s mother. Clark was questioned about the injuries when he came to pick up L.P. from school that day, yet denied any such allegations. The next day, a social worker visited L.P. and found additional injuries to his body, as well as several more on L.P.’s 18-month-old sister. Clark was ultimately indicted on charges of assault, endangering children and domestic violence. At trial, and in lieu of L.P. testifying (as a result of Ohio law precluding testimony from children under the age of ten), the State introduced the out-of-court statements L.P. had given to his preschool teachers as evidence of Clark’s guilt. Clark’s application to exclude that testimony under the Constitution’s Confrontation Clause was denied, as the trial court believed those statements were not “testimonial” and thus outside the scope of the Sixth Amendment’s Confrontation Clause, which affords a criminal defendant with the right to confront the witnesses against him at trial. Clark was convicted and sentenced to 28 years in prison. He appealed to the Ohio Supreme Court and ultimately to the United States Supreme Court.

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<sup>3</sup> Recent examples of such increased scrutiny include a June 9, 2015 United States Office of the Inspector General fraud alert targeting physician compensation schemes potentially violating the federal Anti-Kickback Statute, and a September 25, 2015 federal court opinion wherein a group of doctors was denied their application to dismiss civil RICO claims asserted against them by GEICO.

The United States Supreme Court found that the primary motive for the teachers' questioning of L.P. was not for a criminal investigation, but rather to assist in the ongoing emergency of L.P.'s suspected child abuse. The Supreme Court also looked at the "formality" of the interrogation: a formal examination is more likely to be viewed as "testimonial" (and therefore subject to Sixth Amendment protections requiring counsel) than the relatively informal questions asked of L.P. by his teachers at his school. Having found no clear indication that the "primary purpose" of the informal conversation between L.P. and his teachers was to gather evidence in connection with Clark's future criminal prosecution, L.P.'s statements were deemed "non-testimonial" and thus not subject to scrutiny under the Confrontation Clause at trial. With that as a backdrop, how can a physician utilize the *Clark* decision in the context of fraud investigations?

The *Clark* Court's analysis of L.P.'s out-of-court statements under the "primary purpose" test raises arguments for physicians subject to dual SIU-OIFP civil-criminal investigations. In the typical situation, an insurance company's SIU, acting akin to a State actor, will first civilly investigate a physician who they suspect of engaging in misconduct, typically in the form of medical insurance fraud, e.g., over-billing, unnecessary procedures, sham procedures, and kickback schemes. During the course of such an investigation, the physician is subjected to formal questioning or depositions, whether written or oral. Because those interrogations arise in a *civil* matter, the physician is reluctant to utilize any Fifth Amendment self-incrimination protections, lest they be penalized with an adverse inference by the presiding court or the insurance company deems their silence as lacking cooperation, thus jeopardizing the provider contract.

Later, after the SIU's investigation of the physician has advanced, or is more likely resolved through payment by the physician, it will typically make a referral, whether required under State statutes or voluntarily, to the particular State's OIFP for investigation and possible criminal prosecution. In contrast to a civil deposition, criminal targets and/or defendants may freely invoke their Fifth Amendment rights against self-incrimination during such interrogations. But if the SIU provides the physician's earlier civil statements to the OIFP for use in the criminal proceeding, the physician's Fifth Amendment protections are circumvented. In effect, this is an end-run around the physician's constitutional rights.

In light of the *Clark* decision, however, we believe physicians have a legitimate argument that the statements provided to SIUs in civil investigations are "testimonial" and cannot later be introduced in an OIFP's criminal case. The "primary purpose" of the civil interrogation in such situations is obviously geared towards ultimately supporting

the State's criminal pursuits, as opposed to resolving some "emergency" situation (as in *Clark*), and the testimony is clearly elicited in a formal setting, often in the presence of a stenographer or court reporter. This stands in stark contrast to L.P.'s statements in *Clark* that were made in response to the informal questions from teachers concerned about his emergency-like injuries. While such statements were deemed admissible in *Clark*, we submit that the same rationale, when applied to SIU-OIFP investigations, compels the exclusion of such civil testimony in subsequent criminal matters.

Unfortunately, the time to utilize such *Clark* arguments is when a physician is already facing criminal prosecution and when part of the evidence consists of the statements they made earlier to an SIU. At such time, an application to the Court relying upon *Clark* is warranted.

The lesson to be learned is to always be forewarned when SIUs seek statements in an investigation. Those statements can, and likely will, be used against you in a criminal proceeding. When and if they are, you should pursue all available arguments challenging the collection and use of those statements as improper under the Constitution.

### **About the Authors**

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