

Choose Your Words Wisely: Hearsay Rules, Conspiracy, and Healthcare Fraud

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The day-to-day operations of healthcare and the Rules of Evidence might seem unrelated, but in today's enforcement environment, legal and compliance professionals can find, in evidentiary rules, best practices for creating a compliant, lawful organization and mitigating risk. A recent decision underscores the importance to those in healthcare—and their legal advisors—to carefully choose words when discussing potential business ventures and new vendor relationships.

In September 2024, the Eleventh Circuit elaborated on the breadth of an evidentiary rule (the coconspirator exclusion to the hearsay rule) that allows an out-of-court statement of a coconspirator made during and in furtherance of the conspiracy to be offered at trial for the truth of the matter asserted in the statement. In *United States v. Holland*, No. 22-14219, 2024 WL 4284225, 2024 U.S. App. LEXIS 24383 (11th Cir. Sep. 25, 2024), the Eleventh Circuit reversed the District Court's ruling that a proffered coconspirator statement is inadmissible unless the proponent of the statement shows that the underlying conspiracy is unlawful. The Eleventh Circuit explained that a conspiracy does not have to be unlawful for a coconspirator statement to be admitted.

The case involved the prosecution of executives at clinics and hospitals for violations of the Anti-Kickback Statute (42 U.S.C. § 1320a-7b). The government alleged the clinic defendants referred patients to the hospital defendants in exchange for contracts to provide translation services (i.e., kickbacks) for the referred patients. To prove this system of kickbacks, the government sought to introduce out-of-court statements of unindicted individuals, alleging the statements were admissible under Federal Rule of Evidence 801(d)(2)(e) because they were "made by the party's coconspirator during and in furtherance of the conspiracy."

The defendants argued to the District Court that those out-of-court statements were inadmissible hearsay because the government had failed to show the unindicted individuals were part of a criminal conspiracy with the defendants to willfully violate the Anti-Kickback Statute. The District Court agreed, finding the government failed to show

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that the underlying 801(d)(2)(e) conspiracy was illegal.

The Eleventh Circuit, however, disagreed, explaining that conspiracies for purposes of the coconspirator hearsay exclusion in Rule 801(d)(2)(e) need not be illegal and include any “act of working together toward a shared goal (i.e., a joint venture).” The Eleventh Circuit then observed that the unindicted individuals and the defendants had contractual relationships between their clinics and hospitals and that such relationships may be a sufficient “joint venture” for the out of court statements to be admitted. The Eleventh Circuit remanded the case to the District Court to determine “whether the out-of-court statements are offered against an opposing party and were made during and in furtherance of a joint venture with that party.” If so, the statements are admissible.

This coconspirator exclusion is broader than the other Rule 801(d)(2) exclusions to the hearsay rule. Those other exclusions apply only if a party opponent made the out-of-court statement, adopted the out-of-court statement in some form, or their agent or employee made the out of court statement during the course of their agency or employment. By contrast, the coconspirator exclusion requires no personal connection or relationship between the out-of-court declarants and the defendant other than working together for a shared goal, whether legal or illegal.

Why does this matter? The purpose of the prohibition against hearsay is to ensure that declarants of the out-of-court statement are subject to cross-examination and rigorous challenge. When the hearsay exclusion applies, the out-of-court statement is admitted through someone other than the declarant, thereby depriving the party against whom the statement is admitted from cross-examining the declarant.

This rule can be particularly troublesome in the healthcare industry, where business executives communicate daily about new initiatives, revenue streams, and vendor relationships. Imagine, for example, that Company A has a lawful business relationship and contract with Company B, and they are working together toward a shared goal. Assume Company A and some of Company A’s and B’s employees have been accused of violating the Anti-Kickback Statute or the False Claims Act (31 U.S.C. § 3729 *et seq.*). Out-of-court statements made by employees working for either company during and in furtherance of the shared goal might be admissible at trial against Company A and the accused Company A and Company B employees. Such a scenario – with no opportunity for cross-examination – could have serious consequences for Company A and the accused employees.

The coconspirator exclusion applies in civil cases as well, and the consequences could be just as significant.

For healthcare legal advisors, the decision is a good reminder of what to continue to preach internally:

- First, vet the organizations or entities with which your company is going to work toward a shared goal—due diligence and risk awareness in business partnerships remain the first line of defense for potential legal jeopardy.

- Second, when a healthcare business partnership does evolve beyond initial discussions, clearly defining the goals of the potential joint venture or relationship can cabin risk. Because coconspirator statements must be made “during and in furtherance of” the shared goal to be admissible, you may be able to limit the types of statements that can be admitted against your company simply because they are outside of the scope of your shared goal.
- Third, it is important to remind employees to be truthful, factual, and accurate in their communications with others working on the shared goal, inside and outside the company, and to avoid speculation, gossip, and rumors. This discipline will help mitigate the chance that others working on the shared goal misinterpret your company’s actions or intentions, thereby lessening the chance that inaccurate or misleading statements are made about you out of court.

Healthcare fraud remains a key priority for law enforcement—industry players can de-risk being inadvertently caught up in the dragnet by good hygiene and best practices.