EXECUTIVE SUMMARY OF THE REPORT OF THE TRANSITION COMMITTEE ON MEDICAID FRAUD CONTROL SUBMITTED BY HON. CHARLES J. HYNES DISTRICT ATTORNEY OF KINGS COUNTY TO HON. ANDREW M. CUOMO ATTORNEY GENERAL OF THE STATE OF NEW YORK

On January 5, 2007, New York State Attorney General Andrew M. Cuomo requested Kings County District Attorney Charles J. Hynes to conduct a study of the New York Medicaid Fraud Control Unit, a branch of the Office of the Attorney General. In his request, he asked for a review of and suggestions regarding the Unit's legal, enforcement and investigative functions, its relationships with other law enforcement agencies as well as county and federal officials, and its technological systems. He also asked for any guidance, changes and initiatives the Medicaid Fraud Control Unit might undertake to serve the people of the State of New York more effectively, and for recommendations regarding specific legislative initiatives that might enhance the Unit in achieving its goals of prosecuting fraud and making money recoveries.

The Attorney General requested Mr. Hynes to conduct this study because Mr. Hynes was the first Special State Prosecutor in the nation to investigate Medicaid fraud in a state's health care industry. In 1975, he was appointed by former Governor Hugh L. Carey and former Attorney General Louis J. Lefkowitz to investigate the New York nursing home industry. That investigation was soon expanded to include all Medicaid providers. In 1977, Mr. Hynes helped secure

the passage of federal legislation that to this day provides 75% reimbursement for state Medicaid Fraud Control Units, and he became the first President of the National Association of Medicaid Fraud Control Units.

To assist him in the study of the Medicaid Fraud Control Unit, Mr. Hynes enlisted five members of the senior staff who served under him during the early years of the Medicaid fraud investigation: Robert Hill Schwartz, the Chief Assistant Special Prosecutor; Harry Blair, the First Assistant for Audit, Finance and Budget; Anthony Scuderi, the Assistant Chief Investigator; Michael Jaeger, the Assistant Chief Auditor; and Hillel Hoffman, the Director of Patient Abuse and Adult Homes Investigations. He also enlisted the assistance of Anne J. Swern, the First Assistant District Attorney of Kings County.

During its review of the work of the Medicaid Fraud Control Unit this Transition Committee had the complete cooperation of the staff of the Unit. William J. Comiskey, the Deputy Attorney General in charge of the Unit, was interviewed by Mr. Hynes, Robert Hill Schwartz, Hillel Hoffman and Anne Swern. Chief Investigator Vito R. Spano was interviewed by Anthony Scuderi, and Deputy Chief Auditor Wesley Bauman was interviewed by Michael Jaeger. Deputy Attorney General Comiskey also provided the Transition Committee with voluminous information concerning the work of the Unit, including numerous reports, charts, tables, closing memoranda, testimony at hearings, letters and responses to written questions.

Based on interviews with senior staff of the New York Attorney General Office's Medicaid Fraud Control Unit, and a review of voluminous materials

submitted by the Unit, the Transition Committee submitted a report to the Attorney General containing recommendations for improving the performance of the Unit.

The following is an executive summary of recommendations made by District Attorney Hynes and the Transition Committee in their Report.

1. **The relationship between the Attorney General and the Director of the Medicaid Fraud Control Unit should be clearly defined with respect to the Unit's investigative priorities, the management of its caseload, and its staffing.**

At its inception in 1975 and for twenty years thereafter, the Medicaid Fraud Control Unit was a semi-autonomous branch of the State Attorney General's office. The Deputy Attorney General in charge of the Unit reported only to the Attorney General and to the Governor, who had authorized certain investigations under Section 63(8) of the Executive Law. Before it became the Medicaid Fraud Control Unit, the Unit was known as the Office of Special State Prosecutor for Health and Social Services. It had its own offices, hired its own staff, dealt with the State Legislature and the federal government on health care issues, established liaisons with advocacy groups and had its own public information office.

In 1977, Congress enacted legislation creating the national Medicaid Fraud Control Unit program and providing federal reimbursement for units that

satisfied the criteria in the federal statute. The New York office was widely considered the model for that program.

The Medicaid Fraud Control Unit has a unique mission and a unique federal funding source. That mission is to investigate and prosecute all aspects of fraud in connection with the provision of medical assistance and the activities of providers under the State Medicaid plan, to recoup misspent Medicaid funds and to review and act upon complaints of abuse and neglect of patients in health care facilities that receive payments under the State plan. In pursuit of these activities, the Medicaid Fraud Control Unit is eligible to receive federal reimbursement of 75% of its budget, up to a limit set by statute.

In view of the substantial federal funding the Unit receives to perform its massive responsibilities of identifying, investigating and prosecuting instances of Medicaid fraud, recouping and returning to the State treasury huge sums of money each year, examining the expenditures of hundreds of providers, and protecting thousands of citizens in nursing homes and other facilities from abuse and neglect, the Transition Committee believes that the Medicaid Fraud Control Unit is a unique arm of the Attorney General's Office, unlike all other bureaus within the Department of Law. Thus, the Attorney General should personally supervise the Medicaid Fraud Control Unit and together with the Unit Director decide the best way to run the Unit. This includes making decisions involving the opening and closing of cases, and utilizing a separate public information officer to

answer questions from the media about pending cases and to prepare periodic reports about health care issues.[1]

The Unit Director must be permitted to staff the Unit with attorneys of sufficient quality and experience to match their adversaries hired by Medicaid providers. Simply speaking, the Unit should not be out-gunned by well-funded, white-collar law firms. The Unit also should be permitted to recruit more experienced auditors, especially those with CPA or CFE credentials, at higher salary levels to compete with businesses recruiting those professionals for compliance with federal legislation and other accounting reforms.

2. The funding for the Medicaid Fraud Control Unit should be increased, as well as the Unit's focus on civil recoveries.

The Medicaid Fraud Control Unit has a staff of about 300 employees. This is the same number of employees that the Unit had when the State Medicaid budget was only one-third of its current size.

An increase in funding for the Unit should be a priority because the Unit recovers more than it costs the State to fund it, and because the Unit receives a 3 to 1 match from the federal government for every state dollar invested in staff.

Under its own federal funding stream, the Unit is eligible to receive federal reimbursement of 75% of its budget, up to a limit set by statute. Based on an estimated Medicaid budget of approximately $46 billion, the maximum

[1] Such an office is necessary to deal directly with media inquiries concerning pending matters, but, of course, any public announcements of indictments, civil lawsuits, or policy should be issued in the name of the Attorney General

reimbursable budget for the New York Unit under federal law is approximately $153.3 million, consisting of $115 million in federal dollars (1/4 of one percent of $46 billion), and $38.3 million in state dollars (25% of the total sum of federal, state and local expenditures).

This federal funding stream was one of the singular achievements of the Office of the New York Special State Prosecutor for Health and Social Services. In 1976, Deputy Attorney General Charles J. Hynes testified before the United States Senate Special Subcommittee on Aging. He recommended that the federal government provide funding for state law enforcement efforts, an idea first proposed by the late James Scheuer, a thirteen-term Congressman from New York. Working with attorneys general and prosecutors from other states, the New York office helped draft proposed legislation to create a Medicaid Fraud Control Unit program and to define the qualifications for participating in the program.

Under federal law a qualifying Medicaid Fraud Control Unit was entitled to receive 90% federal reimbursement for its first three years of operation, and 75% reimbursement thereafter – a provision that is still in effect today. Under federal law the amount of federal reimbursement for each quarter is capped at one-quarter of one percent of the sums expended by the federal, state and local governments during the previous quarter in carrying out the state's Medicaid plan.

In the late 1990's, the Medicaid budget for New York State was less than $15 billion a year. During that period the Medicaid Fraud Control Unit had a staff

of approximately 300 employees. By 2005, the Medicaid annual budget for New York State had tripled to $44.5 billion, but the Medicaid Fraud Control Unit remained at approximately 300 employees as a result of a job freeze imposed by the Division of the Budget.

In the 2007-2008 Executive Budget for New York State, the authorized staff of the Medicaid Fraud Control Unit has been raised from the previous year by 23 employees, from 322 to 345, and the overall budget of the Unit increased by $2,745,000. The proposed budget for the Unit is $51,505,000, consisting of $37,480,000 in federal funds and $14,025,000 in state funds.

Given the past history of the New York Medicaid Fraud Control Unit in helping to obtain federal funding for state Medicaid investigations, and given the enormous cost of the New York Medicaid program, the Transition Committee recommends that the Attorney General request a substantial increase in the funding for the Medicaid Fraud Control Unit. While the amount proposed in the Executive Budget was a welcome increase in the number of staff and the amount of appropriation, the Transition Committee believes that the Unit would be in a far better position to fulfill its mission if it were fully funded to the limit of the federal cap.

In a letter submitted to the New York State Legislature in 2005 in connection with hearings the Legislature held on Medicaid fraud, the Attorney General's office noted that a report on the New York program prepared by the federal Centers for Medicare and Medicaid Services and Center for Medicaid and State Operations Finance, Systems and Budget Group based on a federally

overseen audit found that the payment accuracy rate was 98.5%, and the inaccuracy rate, including medically unnecessary services, duplicate claims and billing for non-covered services, was 1.5%. *[Letter of Deputy Attorney General Peter B. Pope, dated November 21, 2005, fn. 4].*

Taking the lowest rate of 1.5% still leads to the shocking conclusion that the Medicaid system is hemorrhaging. This unacceptable condition must be aggressively redressed. At an "inaccuracy rate" of 1.5%, the amount of fraud and waste in New York's $47.3 billion program could conceivably be $709 million per year. This amount is more than thirteen times larger than the $51.5 million of federal and state money that is budgeted for the Medicaid Fraud Control Unit for the next fiscal year, and four and a half times larger than the federal cap of $153.3 million.

An expansion of the Medicaid Fraud Control Unit budget to the $153.3 federal limit would result in a $24 million increase in the state share from $14 to $38 million. However, this increase would more than be offset by a higher level of recoveries in criminal and civil fraud cases.

Also, as noted above, the Executive Budget for 2007-08 calls for a substantial increase in the staff of the Medicaid Inspector General – adding 100 new auditors and 57 other personnel. It is inevitable that if this significant increase is approved by the Legislature it will have an impact on the number of audits conducted by the agency and the speed with which it can refer cases to the Medicaid Fraud Control Unit. Unless the Unit's resources are increased to the

federal cap allowance, it will be swamped with referrals from the Medicaid Inspector General.

The Transition Committee also recommends an expansion of the civil recovery operations of the Unit. The Transition Committee recommends that the Attorney General increase the size of the Civil Division of the Unit so that it will have enough staff to recover a much larger portion of the billions of dollars that may be lost to fraud and abuse, and to enable the prosecutors in the Unit to focus more attention on criminal cases.

The Transition Committee recommends that the Unit, in seeking increased funding to bring it up to the federal cap, consider hiring attorneys, auditors and investigators at a salary scale that will attract highly experienced professionals to enhance the Unit's performance. The salaries of these professionals should be based on merit and experience and not on the salaries paid to other employees of the Law Department.

New York should fund the Medicaid Fraud Control Unit to the limit of the federal cap. The money is there to pay higher salaries and expand the Unit's operations. It will be a wise investment that will more than pay for itself.

3. Protocols between the Medicaid Fraud Control Unit and the Office of Medicaid Inspector General should be established.

In 2006, the New York Legislature added a new title to the Public Health Law creating an office of Medicaid Inspector General in the State Department of

Health. The Medicaid Inspector General has the duty to prevent, detect and investigate fraud and abuse in the medical assistance programs run by the Department of Health and other state agencies that participate in the Medicaid program.

The legislation further requires the Medicaid Inspector General to "refer suspected fraud and criminality to the deputy attorney general for medicaid fraud control and make any other referral to such deputy attorney general as required or contemplated by federal law. At any time after such referral, within ten days written notice to the deputy attorney general for medicaid fraud control, or such shorter time as such deputy attorney general consents to, the inspector may additionally provide relevant information about the suspected fraud or criminality to any other federal or state law enforcement agency that the inspector deems appropriate under the circumstances." *[Public Health Law, Sec. 31, subd.7].*

In light of this statutory mandate requiring the Medicaid Inspector General to refer suspected fraud and criminality to the Medicaid Fraud Control Unit, and in light of the proviso that the Medicaid Inspector General may refer cases to other law enforcement agencies after ten days written notice to the Unit, it is imperative that the relationship between these two fraud detection agencies be clarified as quickly as possible.

Governor Eliot Spitzer's 2007 budget proposes increasing the Medicaid Inspector General to 300 positions. Hence, the Medicaid Fraud Control Unit must be prepared to handle the flow of cases referred by the Medicaid Inspector General. The Medicaid Inspector General should provide the Medicaid Fraud

Control Unit with estimates of referrals to assure agency efficiency and coordination, and to assure the capacity of the Medicaid Fraud Control Unit to meet or exceed the Medicaid Inspector General's referral rate.

The Medicaid Fraud Control Unit and the Medicaid Inspector General should agree to new protocols that will provide for rapid and ongoing referrals of cases, sharing of information wherever appropriate, an appeal process to reconcile any differences of opinion, and possible cross-designation of employees to the extent permitted by confidentiality requirements.

These measures must be the initial step.

4. Interagency relationships should be established.

The Attorney General should establish better working relationships with other law enforcement agencies. The Medicaid Fraud Control Unit advised the Transition Committee that its working relationship with the four United States Attorneys was either minimal or non-existent. The Transition Committee recommends that the Attorney General take steps to improve these relationships.

The Transition Committee believes that the presence of the Attorney General at meetings with the United States Attorneys will be helpful in fostering s spirit of cooperation and equality. The presence of the Attorney General may promote other areas of cooperation with the federal government in addition to Medicaid fraud control.

The Transition Committee recommends that the Unit develop working relationships with the other federal agencies that have authority to investigate whether federal laws have been violated by Medicaid providers, including the Department of Health and Human Services, the Department of Justice, the Federal Bureau of Investigation and the Internal Revenue Service.

Partnerships with state district attorneys also should be a priority. The Attorney General has initiated a partnership with the Nassau County District Attorney. This effort should be expanded to other counties, especially those that have been given authority by the State to audit their own Medicaid claims.

The Transition Committee recommends that the Attorney General convene a “summit conference” with the county executives and the local district attorneys to develop uniform practices and procedures for the investigation and prosecution of Medicaid cases developed by the local authorities. The Transition Committee recommends that the Attorney General consider forming a Task Force comprised of representatives of each of the participating counties and a representative of the New York State District Attorneys Association (or the New York Prosecutors Training Institute) to draft a memorandum of understanding to establish protocols that are acceptable to all of the parties.

The Attorney General also should insist on being a party to any agreements that are reached between the counties and the Office of Medicaid Inspector General regarding the investigation and prosecution of cases developed by the counties. In addition, many counties have forged relationships

with private attorneys to recover Medicaid fraud. The Attorney General's office must review these relationships and establish uniform policies and guidelines.

5. The Medicaid Fraud Control Unit should expand its investigations of large providers that account for a substantial portion of the Medicaid budget.

In his testimony submitted to the New York State Senate at its hearing on Medicaid Fraud in September 2005, former Deputy Attorney General Peter Pope stated:

"According to *[Department of Health]* data, the top providers in 2004 were hospitals (18% of the program), managed care providers (16%), skilled nursing facilities (16%), and drugs (14%), with those four together accounting for 65% of Medicaid dollars spent. * * *

"I have attached a list of the top 200 recipients of Medicaid dollars and their receipts. That list represents the main players in our system of delivering health care to the poor. There is not an individual provider among them. * * * "

The Transition Committee examined the number of auditors that were assigned by the Unit to each of its offices. Based on these assignment figures, and based upon information from the Unit's Director that auditing hospitals and nursing home cost reports was a highly labor intensive undertaking, it was apparent to the Transition Committee that the Unit needed more staff to audit hospitals and other large institutional providers.

In light of the substantial amount of Medicaid money that is paid to large institutions, the Transition Committee believes that it is essential that the Unit have the commitment and sufficient staff to audit and investigate these providers. The Transition Committee believes that this increased responsibility is an important reason why the Attorney General should request additional funding – up to the federal cap – for the Unit.

6. **A request of the federal Department of Health and Human Services to allow the Medicaid Fraud Control Unit to randomly "data mine" provider data should be made.**

The Secretary of the United States Department of Health and Human Services should be asked to rescind the federal regulation that prevents state Medicaid Fraud Control Units from randomly analyzing claims submitted for payment of Medicaid providers – a practice known as "data mining." The rule was adopted by the federal government to prevent duplicate payments to the single state agency that administers the Medicaid program and to the Medicaid Fraud Control Unit for performing the same function.

The Transition Committee believes that elimination of the regulation on data mining should be a top priority of the Attorney General. Although there may have been a legitimate concern on the part of the federal government in not paying the states twice to perform the same function in the early days of the Medicaid Fraud Control program, the regulation makes no sense in New York

since the Medicaid Fraud Control Unit has state of the art computer equipment and the ability to use it. The regulation also has spawned the unfortunate perception that data mining may be prohibited even if the State paid for it with its own funds.

The federal rule does not advance any public policy. It is a waste for the very agency that has a federal mandate to investigate Medicaid fraud and abuse to be prevented from accessing evidence of fraud lying in the State's computer data banks.

7. Investigations of private proprietary homes for adult should be increased.

The patient protection and abuse unit of the Medicaid Fraud Control Unit should increase its focus on private proprietary homes for adults.

Many residents of adult homes are Medicaid recipients. Abuse and neglect of residents of adult homes, especially released mental patients, has been an on-going problem for the past 30 years. The Medicaid Fraud Control Unit has the resources and historical experience to prevent and prosecute cases of abuse and neglect of these vulnerable residents.

8. The Medicaid Fraud Control Unit should expand the use of electronic surveillance and other law enforcement techniques.

Employees at three nursing homes in Rochester, Cortland and Queens have been charged by the Unit with abuse and neglect of patients based on evidence obtained by hidden cameras, placed with the consent of the patients' families.

The use of hidden cameras by the Unit is a welcome tool in fighting patient abuse and neglect. Expanding this program would result in more criminal charges against employees who mistreat patients and would act as a deterrent to staff members who ignore patients and falsify patient records.

The Unit advised the Transition Committee that it has a criminal informant and "shopper" program that is administered by a senior investigator. The Unit advised that it has the capability of setting up all kinds of authentic identification to enable the informant or shopper to have the necessary documentation to carry out his or her assignment.

Apart from the hidden camera program in nursing homes, and the information about the shopper program, the only other instance of an undercover operation was a reference in a summary of the Unit's activities from 2002 to 2006 in which the Unit stated that it was the first unit in the nation to use court-ordered wiretaps.

The Transition Committee recommends that the Attorney General expand the undercover and electronic surveillance operations of the Unit, such as

wiretapping or wearing a recording device, by seeking more technical staff, more equipment, more training and, where appropriate, more joint investigations with other law enforcement agencies.

Dated: March 23, 2007