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Meet

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Letter from the CEO

Conflict of Interest

A civil complaint was recently filed against the General Counsel of a major organization by the Department of Justice in Florida. Actually, the individual named in the complaint was the General Counsel and Compliance Officer. The complaint appears to be with regard to the General Counsel's role. This case has the in-house legal community up in arms. Two outside counsel have told me that they received calls from concerned in-house counsel right after the civil complaint was made public. Many are worried about their personal liability. The civil complaint could amount to millions of dollars.

The complaint states that the General Counsel was required to sign an annual attestation disclosing all current internal investigations. The attestation was a part of their Corporate Integrity Agreement from a previous settlement. It is likely that the defendant will argue that the investigation was privileged and did not require disclosure. The DOJ believes they have a case anyway. The intellectual legal banter in the compliance and legal community is vigorous. The case has been tried and resolved over dinner many times.

The case may or may not be solid, but the point that everyone seems to be missing is that the government is sending a message. I have read the civil complaint and the Corporate Integrity Agreement which together are approximately 100 pages long. I could go on for pages about this situation. I am just going to get to the point.

Senator Grassley once said "It doesn't take a pig farmer from Iowa to smell the stench in this conflict." He was referring to an individual who held both the Compliance Officer and General Counsel titles. In fact, he was referring to the General Counsel named in the complaint brought forth by the Florida DOJ. I am sure this is nothing more than a coincidence.

The government claims that the General Counsel signed a statement indicating that the company had disclosed all internal investigations. They claim that one investigation was not disclosed. Two years later, someone told the government about the problem that was under internal investigation but not yet resolved or disclosed. The government claims that the company defended the case even though they (from the government's perspective) knew they had a problem. It appears that the government felt that this was disingenuous. The company settled the undisclosed case with the government.

There was a third settlement with this company, and as a part of the settlement, the government requested and received protected documents. The government's allegation states that they have two memos and a report from outside counsel stating the General Counsel knew the problem existed two years prior to the government's investigation. What appears to have the government's nose out of joint is: how can you defend a problem that you (allegedly) acknowledged in writing you had? What's more, if your Compliance Officer was involved in the defense of a known problem, it would appear that your Compliance Officer was conflicted and lacked independence."

> However, it appears that if your Compliance Officer's collaboration with the General Counsel also limits their independence, you might just be increasing your chances for a series of unfortunate events.

In summary, under the first settlement, the company agreed to annually disclose internal investigations. There was a second investigation about a matter that the company allegedly knew about for two years, did not disclose, defended, and then settled. As part of a third settlement, the company released to the government three protected documents that allegedly show that they knew that they had a problem two years before it was investigated.

The message here seems to go beyond the facts of the case. Everyone is arguing that there is no case because the company did not have to disclose protected investigations. That is important, and may result in the case being dropped, but it is not the key message. Although there may be many issues the government is upset about, there seems to be one that rises above all others, and is one of the most important messages. It appears the government, from the DOJ to the Senate, is upset that a company that was required to hire a Compliance Officer as a part of the first settlement, gave the job to the General Counsel.

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Auditing and Monitoring, Part 5: ...*continued from page 23*

Last, any number of additional recommendations beyond auditing for evaluation and management (E/M)-level accuracy or the appropriate capture of surgical codes, are critical to overall medical group coding compliance. Examples include:

- Appropriate units of service, medications and injectables, which experience indicates are a constant source of risk for many medical groups;
- Modifier usage;
- Physicians at Teaching Hospitals (PATH), which remains a consistent deficiency in spite of, or perhaps because of, the industry having grown comfortable with this issue;
- Use of templates via electronic medical records (EMR) to ensure "cut and paste" components of the record are supported by the rest of the record and, ultimately, that the documentation and coding are appropriate; and
- Review coding policy and habits to ensure that accurate codes are selected relative to the documentation, not what will be paid or "because we've always done it that way."

Conclusion

This topic brings together a wide range of the recommendations made throughout the series – from carefully defining the auditing plan to diligently meeting that plan and following up on identified deficiencies, including taking disciplinary steps for coders who put the organization at risk.

There's an old proverb that says, "Bad habits are like a soft bed, easy to get into, but hard to get out of." Maintaining a truly effective auditing program that consists of equal diligence with respect to hard and soft coding issues is the most important single element of getting out of those bad habits and achieving compliance effectiveness. ■

Letter from the CEO ...*continued from page 20*

Although the General Counsel's role is, in part, to defend their company, it appears that the government is angry about conflict created by combining the positions. The government appears to be sending a message that if you don't have independence between the Compliance Officer and the General Counsel, you are making a mistake. If the Compliance Officer's role is ineffective because of a lack of independence, they are not going to be impressed. There appears to be no question that the General Counsel and the Compliance Officer should collaborate on a regular basis. However, it appears that if your Compliance Officer's collaboration with the General Counsel also limits their independence, you might just be increasing your chances for a series of unfortunate events. ■

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