

Whistle While You Work - How to Prevent Activity Leading to Whistleblower Actions and Protect Health Organizations and Medical Practices from Whistleblower Threats

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Presenters

- ▶ Linda S. Woolf, Managing Partner, Goodell, DeVries, Leech & Dann
- ▶ Jacqueline N. Bloink, Instructor for UMA and CEO of Jacqueline Bloink, LLC
- ▶ Christine Zack, Senior Vice President, Chief Risk Officer, Fundamental Administrative Services LLC
- ▶ Linda W. Taetz, Senior Vice President, Chief Compliance Officer, Mariner Health Central, Inc.

HCCA March 2017

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Recoveries in FCA Cases

- ▶ \$31.3 billion recovered by the DOJ under FCA since FY 2009.
- ▶ In FY 2016, the government recovered approximately \$4.7 billion in settlements and judgments.
 - ▶ Third highest in the statute's history

Recoveries in FCA Cases

FYI 2016 (continued)

- ▶ \$2.5 billion of the \$4.7 billion (or 53%) came from the health care industry, including drug companies, medical device companies, hospitals, nursing homes, laboratories, and physicians.
- ▶ Seventh consecutive year where recovery exceeded \$2 billion

Recoveries in FCA Cases

FYI 2016 (continued)

- ▶ \$1.2 billion came from the drug and medical device industry.
 - ▶ One manufacturer paid \$413.2 million alone to resolve federal FCA allegations (and an additional \$371.4 million to state Medicaid programs).
- ▶ Hospitals and outpatient clinics accounted for \$360 million in recoveries.
 - ▶ A major hospital chain in the United States paid \$244.2 million to resolve federal FCA allegations (and \$123.7 to resolve state allegations).
- ▶ Cases involving nursing homes and skilled nursing facilities accounted for more than \$160 million in settlements and judgments.

Recoveries in FCA Cases

FY 2016 (continued)

- ▶ Whistleblowers filed 702 *qui tam* suits in FY 2016.
 - ▶ Average of 13.5 cases per week
- ▶ The Department of Justice recovered \$2.9 billion in FY 2016 from *qui tam* suits filed in FY 2016 or earlier.
- ▶ Whistleblowers recovered \$519 million.

Recoveries in FCA Cases

- ▶ From January 2009 to the end of FY 2016, the government recovered nearly \$24 billion in settlements and judgments related to *qui tam* suits.
- ▶ The government paid more than \$4 billion in whistleblower awards during the same period.

Recoveries in FCA Cases

A glance at FY 2017:

Since September 30, 2016, the DOJ has recovered ~\$218 million in healthcare-related *qui tam* suits.

Challenge for Compliance Professionals and Their Counsel

- ▶ How to develop effective internal policies to proactively protect the company from becoming the target of a whistleblower investigation
- ▶ What steps to take if you receive a compliance-related complaint
- ▶ What steps to take if a whistleblower action is filed

How to Develop a Culture of Compliance

- ▶ This presentation will focus in part on the steps that compliance professionals can take to create a culture within the company that protects the organization and its constituencies
 - ▶ Jacqueline Bloink - the countervailing obligations to the public, the employing organization and the profession.
 - ▶ Linda Taetz - the goals and elements of an effective compliance program.

Internal Investigations Initial Steps

- ▶ A whistleblower action has been filed - now what?
- ▶ What are your obligations to various constituencies?
 - ▶ Board
 - ▶ CEO/Officers
 - ▶ Shareholders
 - ▶ Patients
- ▶ What if the whistleblower is an officer of the company - how does that impact the investigation, if at all?

Internal Investigations Who Conducts Them?

- ▶ When should outside counsel be retained? Pros/cons
- ▶ Who should be retained?
 - ▶ Pitfalls of retaining counsel who has previously represented the company
- ▶ How should investigation results be conveyed and to whom?
- ▶ Privilege concerns and what steps should be taken to protect the privilege?

Obligations to the Board and Shareholders

- ▶ When does the obligation to advise the Board and Shareholders kick in?
- ▶ What information should be conveyed?
- ▶ What are the privilege issues?
- ▶ What safeguards can be put in place to protect the privilege?

Employee Issues

- ▶ Employees who corroborate the whistleblower's allegations
 - ▶ Do they need separate counsel?
 - ▶ Unique issues (e.g. communications with employee, depositions)
- ▶ Employees who threaten whistleblower action to gain strategic advantage in disciplinary proceeding
 - ▶ How to handle?
 - ▶ Role of in-house counsel, outside counsel, and HR department?

Claims by In-House Counsel

- ▶ Unique risks presented by in-house counsel/compliance professionals bringing or threatening whistleblower actions
 - ▶ Hold positions of trust
 - ▶ Have unique access to sensitive information
 - ▶ May threaten to place privileged and confidential information in the public record
 - ▶ "Self-Help" Discovery
- ▶ Blowing the whistle or just doing their job?

"Self-Help" Discovery

- ▶ What types of self help discovery have you encountered?
 - ▶ Theft of electronic evidence
 - ▶ Use of "moles"
 - ▶ Collusion between former employees
- ▶ How can a company protect against it?
- ▶ What can be done after it has happened?

Defending Against In-House Counsel as Relator

- ▶ *United States v. Quest Diagnostics* (2d Cir. 2013)
 - ▶ Former GC as Relator
 - ▶ Christine Zack will present on the intersection of state ethical rules with in-house and outside counsel's disclosure of protected client information to the government.

Questions and Answers



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CPC, CMRS
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Who Am I?



My Background ...
My Journey

Today... Devil's Advocate



Obligations

HCCA:

1. Obligation to the Public
2. Obligation to the Employing Organization
3. Obligation to the Profession

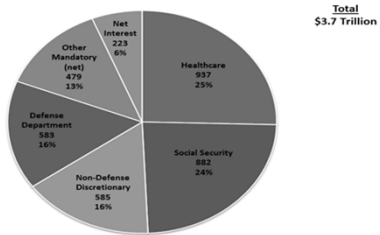


Obligation 1: Public



Dollars at Stake

U.S. Federal Spending – Fiscal Year 2015 (\$ Billions)



Source: Data: CBO Historical Tables, March 2016

Fraudsters

- ▶ Tyco
- ▶ Fannie Mae
- ▶ World Com
- ▶ Lehman Brothers
- ▶ Enron

Why isn't Healthcare Fraud viewed the same way? We are passionate about our pensions and fraud... why not about healthcare fraud?

Healthcare Crime: White Collar or Red Collar Crime?



**Obligation 2: Employer
How To Reach the Board?**



Play Fair

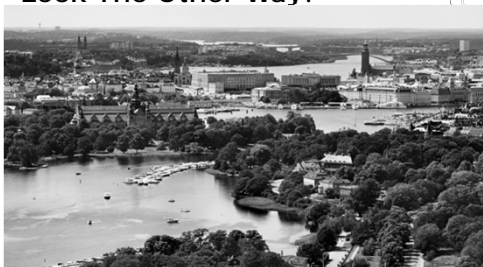


**Obligation of Employer to
YOU?**



Good Faith

Why Do Some Professionals Look The Other Way?



Some employees stand up to crime... *others look the other way.*
Many reasons why...

Slippery Slope



ACFE Report to the Nations, 2016: "The most prominent organizational weakness. Was a lack of internal controls (29.3% of cases) followed by an override of existing internal controls (20% of cases.)"

Obligation 3: Compliance Profession and YOU

When life brings
big winds of change
that almost blow you over...
close your eyes,
hang on tight,
and **BELIEVE.**



Obligation to Public, Employer and Our Self

Time to go....

**I'm not playing wit u
anymore**



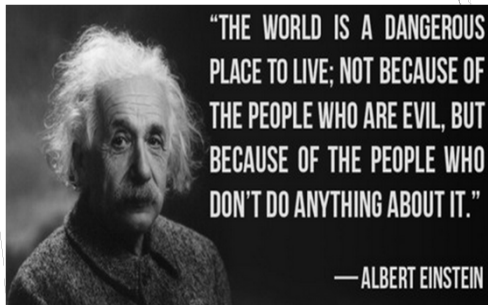
I'm going home

Effective Methods?



Do we change our compliance program when it is not effective? Or...do we get rid of the people that show us the flaws?

Relators



**"THE WORLD IS A DANGEROUS
PLACE TO LIVE; NOT BECAUSE OF
THE PEOPLE WHO ARE EVIL, BUT
BECAUSE OF THE PEOPLE WHO
DON'T DO ANYTHING ABOUT IT."**

— ALBERT EINSTEIN

What We Permit... We Promote



Who am I? Compliance, Educator, Consumer, Patient, Employee, Fighter of Fraud, Relator.... I am *Jacqueline Bloink. Thank You for coming today!*

Questions and Answers



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The Attorney as Whistleblower

A “Never Event”?

ABA MODEL RULES OF PROFESSIONAL CONDUCT CLIENT-LAWYER RELATIONSHIP RULE 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

RULE 1.6 Confidentiality of Information (continued)

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;

RULE 1.6 Confidentiality of Information (continued)

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**Fair Laboratory Practices Associates
v. Quest Diagnostics Inc. et al**

**United States Court of Appeals
for the Second Circuit
(2013)**

"The issues on appeal arise out of the tension between an attorney's ethical duty of confidentiality and the federal interest in encouraging "whistleblowers" to disclose unlawful conduct harmful to the government."

CONCLUSION

1) The False Claims Act does not preempt state ethical rules governing the disclosure of client confidences; therefore N.Y. Rule 1.9(c), which generally prohibits disclosure of confidential information of a former client, governs a New York attorney's conduct as relator in a qui tam action under the False Claims Act.

(2) N.Y. Rule 1.6(b)(2), which permits a lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to prevent the client from committing a crime, does not justify Bibi's disclosures in this case: Bibi reasonably could have believed in 2005 that defendants intended to commit a crime. His disclosure of Unilab's confidential information, however, went well beyond what was "necessary" within the meaning of N.Y. Rule 1.6(b).

(2) to prevent Unilab from committing a crime inasmuch as there was ample non-confidential information on which to bring an FCA action. Therefore, Bibi's conduct in this qui tam action violated his ethical obligations under N.Y. Rule 1.9(c).

CONCLUSION (continued)

(3) The District Court did not err or "abuse its discretion" in dismissing the Complaint and disqualifying FLPA, all of its general partners, and its outside counsel from bringing any subsequent related qui tam action, on the basis that such measures were necessary to prevent the use of Bibi's unethical disclosures against defendants.

"It was unnecessary for Bibi to participate in this qui tam action at all, much less to broadly disclose Unilab's confidential information . . . FLPA could have brought the qui tam action based on the information that Baker and Michaelson possessed as former executives of Unilab, or, if necessary, Bibi could have made limited disclosures. Instead, Bibi chose to participate in the action and disclose protected client confidences . . . in violation of N.Y. Rule 1.9(c).

ATTORNEY CHECKLIST

- 1 Protect the Organization
- 2 Ensure compliance with Rules of Professional Responsibility/Conduct
- 3 Other Ideas?

Questions and Answers



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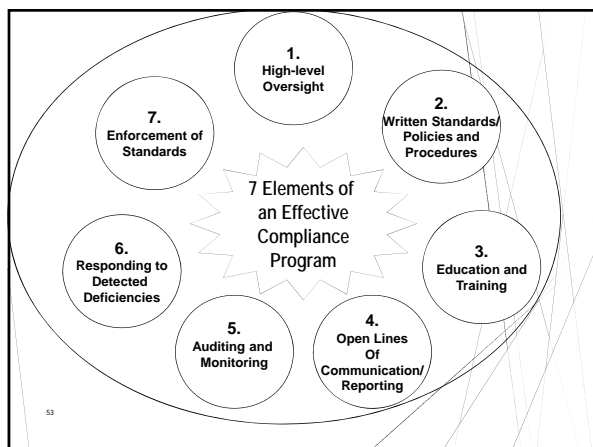
Goals of a Compliance Program

- Creation of a "Culture of Compliance"
- Prevent, detect and correct fraud and abuse
- Compliance is doing the things necessary to run the business effectively and to provide quality care, service or product

Goals of a Compliance Program

- Responsibility to patients, clients, employees, vendors and business partners for Compliance oversight
- Defines government laws and regulations
- Provides consequences for illegal activity
- May result in lower penalties if wrongdoing occurs and government takes enforcement action

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Benefits of an Effective Compliance Program

Compliance programs help to prevent and detect fraud and abuse and have the following benefits:

- Assists the organization in identifying and improving a weakness in internal controls or management
- Reinforces the organization's shared values
- Improves the quality of patient care or service provision
- Avoids liability and negative publicity

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Benefits of an Effective Compliance Program (continued)

- Promotes awareness and compliance with laws and regulations
- Creates an engaged workforce by providing a process for reporting, investigating and resolving issues
- Reduces potential penalties if a violation occurs

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Abuse and Fraud Prevention

- ▶ A robust Compliance Program is responsible for the prevention, identification, investigation, remediation and possible reporting of fraud and abusive practices or conduct

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Abusive Practices

- ❑ BILLING FOR SERVICES NOT PROVIDED
- ❑ BILLING FOR SERVICES THAT ARE NOT MEDICALLY NECESSARY, OR PROVIDING AN INACCURATE DIAGNOSIS TO OBTAIN PAYMENT
- ❑ BILLING FOR INADEQUATE, IMPROPER OR SUBSTANDARD QUALITY
- ❑ CLAIMING UNALLOWABLE OR IMPROPER COSTS ON A MEDICARE OR MEDICAID COST REPORT
- ❑ BILLING FOR CARE OR SERVICE THAT IS NOT PROPERLY DOCUMENTED
- ❑ PAYING OR RECEIVING ILLEGAL KICKBACKS IN EXCHANGE FOR BUSINESS OR REFERRALS

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What is Fraud?

- ▶ Fraudulent activity:
 - ▶ May involve material false statements or representations of facts in order to obtain payment or other benefit
 - ▶ Can be for one's own benefit or for the benefit of another
 - ▶ Can be knowing, willful, reckless or intentional
- ▶ Civil fraud violations usually involve sanctions and financial penalties
- ▶ Criminal fraud violations may involve fines, penalties, imprisonment or probation - including individual prosecution

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Examples of Fraud

- ▶ Billing for services not provided
- ▶ Billing for services that are not medically necessary, or providing an inaccurate diagnosis to obtain payment
- ▶ Billing for inadequate, improper or substandard quality of care to our residents
- ▶ Claiming unallowable or improper costs on the Medicare cost report
- ▶ Billing for services that are not properly documented
- ▶ Paying or receiving illegal kickbacks in exchange for business

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False Claims Act (FCA)

- ▶ FCA is a Civil War-era statute enacted in response to unscrupulous government contractors selling shoddy goods (e.g., mules, horses, fences)
- ▶ Now used to enforce false or fraudulent claims submitted to the government for payment in many different industries (e.g., defense, health care, homeland security)
- ▶ Civil statute providing for damages and penalties for the knowing submission of false or fraudulent claims to the government for payment

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Written Standards/Policies and Procedures

Written standards include:

- Code of Conduct & Employee/Vendor Handbooks
- Compliance-related policies and procedures:
 - Training and Education Requirements
 - Compliance Audits
 - Quality of Care - Patient Protections & Rights
 - Vendor Relations
 - Disclosure Programs
 - Reporting Overpayments and Reportable Events

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Code of Conduct

Purpose and Objectives of the Code

- Provide a framework for making the right decisions and taking appropriate action
- Create an environment that promotes the highest standard of ethics and Compliance
- Communicates commitment to furthering shared values through individual actions and responsibility
- Maintains the highest professional and ethical standards in the conduct of business

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Scope of the Employee Code of Conduct

The Code includes guidance on a broad range of topics including:

- Legal and Regulatory Compliance
- Commitment to Quality of Care or the provision of a service
- Relationships with Referral Sources
- Business and Financial Records
- Workplace Conduct and Employment Practices
- Our Business Activities
- Conflicts of Interest and Business Relationships
- Compliance and Ethics Program
- Employee Compliance Resources and Contact Information

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Who is Covered by the Code of Conduct?

- The Code, in addition to all statutes, regulations, guidelines and employee Policies and Procedures apply to and must be observed by everyone including:
 - Employees
 - Volunteers
 - Contractors and vendors
 - Board of Directors
 - Anyone else acting on behalf of employee

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Quality of Care

- Hire employees, contractors, physicians and vendors with appropriate qualifications to perform in a competent and professional manner
- Pre-employment screening
- Individual responsibility to maintain appropriate licensure and other qualifications and requirements

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Individual Rights and Privacy

Employee does not tolerate any type of abuse, discrimination or neglect, including:

- Discriminatory admission tactics or improper denial of access to care
- Verbal, mental or physical abuse, corporal punishment or involuntary seclusion
- Inappropriate use of physical or chemical restraints

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Individual Rights and Privacy (continued)

- Denial of a resident's right to participate in care and treatment decisions
- Failure to safeguard the privacy of residents protected health information from improper use and disclosure
- Failure to safeguard residents' financial affairs

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Education & Training

Education and Training programs include:

- Compliance training for all employees, officers and Directors
- General compliance training for new employees early in employment
- Ongoing communication
- Specialized training in certain areas for those employees with high-risk duties, such as negotiating, approving and managing transactions with referral agencies, vendors and business partners

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Open Lines of Communication/ Reporting

Employee's open lines of communication include:

- Various resources for obtaining guidance and reporting concerns, such as:
 - Supervisors, and others in the chain of command
 - Human Resources representatives
 - Compliance and Legal personnel
 - Compliance Hotline
- On-going communication about policies, procedures and regulatory updates

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Open Lines of Communication and Reporting

Compliance Hotline

- Toll-free number that is available 24/7
- Allows for confidential and anonymous reporting
- Intended to supplement, not replace other reporting channels
- Should be used when:
 - ▶ Other avenues of communication are exhausted
 - ▶ Individual is uncomfortable disclosing his or her identity when reporting a concern

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Auditing and Monitoring

Auditing and monitoring processes should include:

- Self-monitoring
- Periodic internal reviews of key activities utilizing accepted audit tools and measurements
- Follow-up on all results to ensure action is taken and identified issues do not recur
- Regular reporting to Compliance Committee and Board of Directors

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Responding to Detected Deficiencies

Response to allegations of improper/illegal activities includes:

- A defined timeframe for review of all reports of alleged misconduct
- An investigative process coordinated between Compliance, Law, Internal Audit and Human Resource Departments, as appropriate
- A commitment to report misconduct to the appropriate government agency if necessary
- A consistent approach to corrective action

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Enforcement of Standards

Employee emphasizes ethical behavior in the enforcement of established standards by:

- Performing frequent reviews of the OIG and General Services Administration Exclusion Lists for:
 - All pre-hire and existing employees
 - All vendors
- Consistently documenting and enforcing compliance-related violations
- Taking appropriate disciplinary action for violations, including termination, as appropriate

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Written Policies and Procedures

- ▶ Employee must follow written policies and
- ▶ Employee's policies and procedures are intended to govern conduct and direct relevant job functions
- ▶ Failure to follow policies and procedures potentially result in disciplinary action, including termination

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Written Policies and Procedures

- ▶ Copies of all of employee's policies and procedures are available in each administrative office
- ▶ Questions about policies or procedures should be referred to the Chief Compliance Officer or General Counsel

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Guidelines for Doing The Right Thing

- There may be times when there is uncertainty as to whether an activity or a situation is unethical, illegal or a violation of employee or vendor policy
- Directions should include asking for guidance from a supervisor, the Chief Compliance Officer or General Counsel, or report concerns to senior management personnel until confident that concerns have been addressed or that the right person has the facts and is addressing the situation

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Guidelines for Doing The Right Thing

- Use caution when someone says:
 - "Well, maybe it's okay just this once."
 - "Everyone does it."
 - "We've always done it this way."
 - "No one will ever know."
- Instead, stop and ask yourself:
 - Does this activity violate a law, regulation, employee or vendor policy or Code of Conduct?

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Report Without Fear of Retaliation

Remember!

No disciplinary action or retaliation will be taken against an individual for reporting a perceived issue, problem, concern or violation "in good faith"

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Questions and Answers