

Try Your Luck: Solve a Complex Compliance Case Study

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Disclaimer

The materials and views expressed
in this presentation are the views of
the presenters and not necessarily
the views of Northwell Health



Objectives

- Networking
- Hone Compliance Knowledge and Skills
- Participate in Compliance Case Studies
- Have Fun!



Polling Question

Why did you come to this presentation?

- Nothing else to do at this time
- Would like to learn techniques on handling compliance matters
- Not sure



Government Enforcement Trends

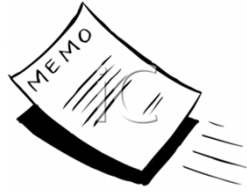
- More rigorous approach to pursue individual actors for liability
- DOJ has recovered over \$31 billion in FCA cases since January 2009
- Large increase in FCA penalties amount
 - \$5,500 - \$11,000 to \$10,781.40 - \$21,562.80 per claim



Investigation Tips

- Inform management early, but not for every complaint
- Don't jump to conclusions or rush to finish get internal/external counsel involved early on when appropriate
- Hire experience staff or invest in training
- Stay in control of the investigation
- Be mindful of resources and time
- Document the investigation
- Involve Risk Management





The Yates Memo

“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing . . . [accountability] it deters future illegal activity, it incentivizes changes in corporate behavior . . . and it promotes the public’s confidence in our justice system.”



The Yates Memo (cont.)

DOJ’s Key Steps to Implementing Yates Memorandum

- Corporations must provide all relevant facts relating to the individuals responsible for the misconduct in order to qualify for cooperation credit
- Focus on individuals from the inception of criminal or civil corporate investigation
- Close coordination between DOJ criminal and civil attorneys
- DOJ will not release culpable individuals from civil or criminal liability when resolving a matter (absent extraordinary circumstances or DOJ policy)
- Resolution with corporation should not occur without clear plan to resolve related individual cases
- Civil attorneys should focus on individuals and evaluate whether to bring suit against individual based on consideration beyond individual’s ability to pay



Yates Memo - Key Implications

- Shifts burden to company to focus its internal investigation on individuals
- Facts may be interpreted more negatively from outset
- Increased bureaucratic oversight
- More stern “Upjohn Warnings” to employees
- May receive less cooperation from employees
- Increased pressure to waive privilege/work product with respect to individuals
- Whistleblowers may increase



Compliance Officer's Authority



Are Compliance Professionals at Risk?

- Compliance professional's obligations
- Training/preparing the Board
- Conducting a risk assessment



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Case Study – Debbie's Dilemma

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Short Case Study – Debbie’s Dilemma

- Debbie, a contractor in ThisCo's IT Department called the company's compliance hotline to report that the General Counsel (GC) has colluded with the CFO, with whom he is also having an affair, by advising the CFO that it is acceptable to submit inaccurate information on the company's tax forms.
- Debbie did not provide much detail about the allegations, but provided an email from the GC to the CFO which contained credible information supporting her allegations.
- Debbie was inadvertently included on the email since she has the same last name as the GC. Debbie is not related to the GC.
- The Compliance Officer reviews hotline complaints and reports into the Board and the General Counsel.



Polling Question

Who should the compliance officer report the issue to first:

- (a) GC
- (b) CFO
- (c) Board
- (d) CEO
- (e) Someone else



Polling Question

Who should manage the investigation:

- (a) Board
- (b) Outside Counsel
- (c) Compliance Officer
- (d) a & c
- (e) a, b, & c
- (f) Someone else



Polling Question

If there is potential merit to the allegations, should the company provide separate counsel to the GC and CFO:

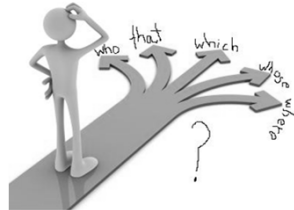
- (a) yes
- (b) no



Polling Question

Should the company place the entire investigation under privilege:

- (a) yes
- (b) no
- (c) only the tax form issue



Polling Question

Should the company agree to waive privilege if there is a government investigation:

- (a) yes
- (b) no



Polling Question

If we assume that the financial damages are minimal and that the main issue is embarrassment to the company, should the company agree to waive privilege in a government investigation:

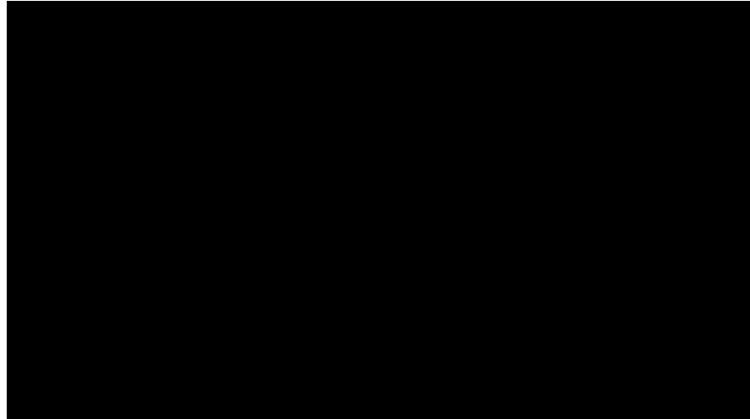
- (a) yes
- (b) no



Case Study – Legally Blonde



A/C Privilege Clip



A/C Privilege Key Requirements

- Confidential communication (oral or written)
- Related to legal advice or with the expectation of legal advice
- Made between privileged persons
- Without waiving the privilege



Common A/C Privilege Mistakes

- Flowing tongue
- Legal advice vs. business advice
- Legal Counsel is copied, it is ok?
- Labeling everything A/C privilege
- Reply All
- Email attachments
- Facts often not privilege



Case Study – Viva Las Vegas

Notable False Claim Act Settlement

- EClinicalWorks/certain employees paid \$155 million to resolve
- Both high-level and lower level employees part of settlement
- Alleged kickbacks to referral sources
- Alleged false statements and concealed facts from its regulatory certifying entity
- 5 year CIA
- <https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-155-million-settle-false-claims-act-allegations>



Case Study – The Art of Marketing



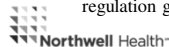
Related Stark Exceptions

- Non-Monetary Compensation Exception
 - \$407 limit applies to calendar year. https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/CPI-U_Updates.html
 - The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician
 - The compensation may not be solicited by the physician or the physician's practice (including employees and staff members)
 - The compensation arrangement does not violate the Anti-Kickback Statute or any federal or state law or regulation governing billing or claims submission
 - Limited exception if hospital inadvertently exceeds annual limit



Related Stark Exceptions

- Medical Staff Incidental Benefits Exception
 - Less than \$34 per occurrence. https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/CPI-U_Updates.html
 - The compensation is offered to all members of the medical staff practicing in the same specialty (but not necessarily accepted by every member to whom it is offered) without regard to the volume or value of referrals or other business generated between the parties
 - Except with respect to identification of medical staff on a hospital website or in hospital advertising, the compensation is provided only during periods when the medical staff members are making rounds or are engaged in other services or activities that benefit the hospital or its patients
 - The compensation is provided by the hospital and used by the medical staff members only on the hospital's campus
 - The compensation is reasonably related to the provision of, or designed to facilitate directly or indirectly the delivery of, medical services to the hospital
 - The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties
 - The compensation arrangement does not violate the Anti-Kickback Statute or any federal or state law or regulation governing billing or claims submission



Notable False Claim Act Settlement

- Hospital to pay \$7.5 million
- Alleged paying physician kickbacks in the form of marketing services in exchange for surgical referrals
- 5 year CIA
- <https://www.justice.gov/opa/pr/dallas-based-physician-owned-hospital-pay-75-million-settle-allegations-paying-kickbacks>



Case Study: The So-Called Compliance Effectiveness Report



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Polling Question

Is this Compliance Report sufficient?

- Yes
- No
- Not sure



GAO Report: Early Evidence of Compliance Program Effectiveness is Inconclusive

- Self-disclosures of potential misconduct
- Refunds of provided-identified overpayments
- Frequency of disciplinary actions for non-compliant employees
- Increased corporate awareness of compliance program



Methods to Assess a Compliance Program

Method	Pros	Cons
Self-Assessment	<ul style="list-style-type: none"> • Cost effective • Knowledgeable • Easier to organize 	<ul style="list-style-type: none"> • Lack of independence • Potential bias • Trend towards external
Peer Review	<ul style="list-style-type: none"> • Cost effective • Practical guidance • Learning opportunity 	<ul style="list-style-type: none"> • Difficult to find partner • Confidentiality • Potential bias if co-peer
Outside Consultant	<ul style="list-style-type: none"> • Breadth of client base • Independence • Credible if reputable firm used 	<ul style="list-style-type: none"> • Cost • Increase in process time • “Specific organization” operational expertise
Government Review	<ul style="list-style-type: none"> • Free if voluntary • Government insight • Good enough for government, good enough for us! 	<ul style="list-style-type: none"> • Costly if an investigation • Not all government agencies view issues the same • Risk if program fails • Disclaimer on “effective”



Some Ways to Measure Effectiveness

Item	2018 Results
<ul style="list-style-type: none"> ▪ Active Compliance Help-Line 	<ul style="list-style-type: none"> ▪ Over [X] calls ▪ Within industry average ▪ All issues resolved
<ul style="list-style-type: none"> ▪ Effective compliance training program 	<ul style="list-style-type: none"> ▪ ~ [XX]% completed the training ▪ Won national award ▪ ~ [XX]% of employees found it effective ▪ [XX]% of employees received a passing test score
<ul style="list-style-type: none"> ▪ Strong voluntary disclosure program*** 	<ul style="list-style-type: none"> ▪ [X] disclosures - ~ \$X million
<ul style="list-style-type: none"> ▪ Robust audit function ▪ Implemented new data mining tools 	<ul style="list-style-type: none"> ▪ Conducted [X] coding audits ▪ Confirmed [X]'s focus is correct ▪ Decreased error rate by [X] ▪ All CAPs completed
<ul style="list-style-type: none"> ▪ Written policies, procedures, standards of conduct 	<ul style="list-style-type: none"> ▪ [XX]% completed annual Code of Conduct certification ▪ [X] revised or new compliance policies



Some Ways to Measure Effectiveness (cont.)

Item	2018 Results
▪ Employees Awareness of Compliance Program	<ul style="list-style-type: none"> ▪ [X]% employees knows the Compliance Officer by name ▪ [X]% of employees know how to contact the compliance office ▪ [X]% do not fear retaliation
▪ Risk Assessment and Work Plan Process	<ul style="list-style-type: none"> ▪ Formal semi-annual review ▪ Interviewed and surveyed [X] employees and managers
▪ Exclusion Screening Process	<ul style="list-style-type: none"> ▪ Monthly review ▪ [X] findings ▪ Audit of this process was favorable
▪ Favorable benchmarking against similar area providers	<ul style="list-style-type: none"> ▪ Outside firms' praise
▪ Outside validation by government agencies	<ul style="list-style-type: none"> ▪ Government conducted [X] audits ▪ [X]% Financial error rate compared to revenue audited

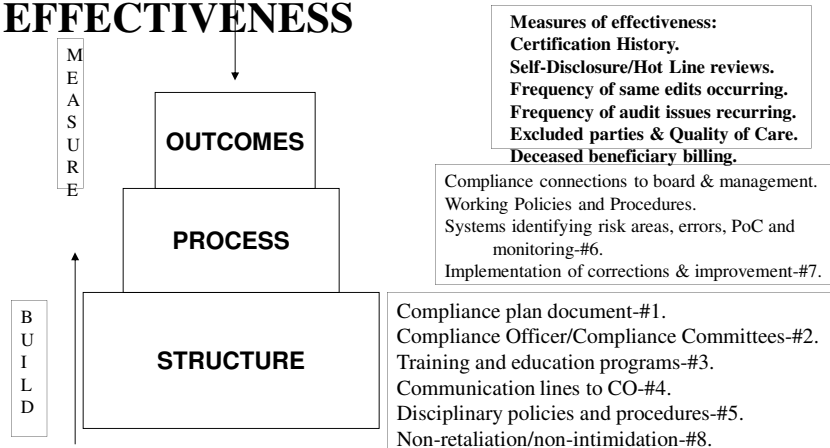


OMIG - Compliance Program Effectiveness

- **Compliance Program Assessment Results**
<https://omig.ny.gov/compliance>
- **Compliance Guidance for Hospitals**
<https://omig.ny.gov/compliance>



HOW TO BUILD AND MEASURE A COMPLIANCE PROGRAM FOR EFFECTIVENESS



From OMIG Presentation



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DOJ's New Corporate Compliance Guidelines

- Applies within context of a criminal investigations
- Focuses on operation rather than appearance
- Another checklist
- Useful roadmap
- <https://www.justice.gov/criminal-fraud/page/file/937501/download>



guidelines

New HCCA-OIG Compliance Resource Guide

- Compliance 2.0
- Neither a “standard”
- Nor a “checklist”
- Nor a “best practice”
- Nor a “template”
- One size truly does not fit all
- <https://oig.hhs.gov/compliance/101/files/HCCA-OIG-Resource-Guide.pdf>



NEW OCR PROTOCOL

- OCR Phase II HIPAA Audit Program
- Desk audits vs. On-site audits
- <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/protocol/index.html>



What to Report to the Board



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- Educate on industry developments
- Prioritize
- Risk assessments and work plans
- Audit status reports
- Annual, semi-annual or quarterly reports
- Proactive vs. reactive information

Polling Question

At the break would you rather?

- Sleep
- Grab some fresh air
- Do more case studies

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BREAK

Interview Tips

Be prepared

- Know what to ask before you go in
- Know the subject matter
- Brainstorm with colleagues

Etiquette

- Remain professional
- Use appropriate language
- Be empathetic but loyal to the objective

Interview Techniques

Be open-minded

- Don't formulate biases based on allegations
- Need to make an accurate decision after the interview

Focus

- Interviewees may go off on tangents
- Record interesting facts for a later time and accomplish the task at hand

Body language

- Pay attention to visual and verbal cues

Be a good listener

- Try to pick up on cues



Interview Techniques

First steps:

• Introduce yourself

- Name
- Title
- Role
- Why you are here

• Try to make the interviewee comfortable

- Chances are the person is nervous and might not be willing to share information

• Understand their processes

- Walk in their shoes to better understand the circumstances



Interview Techniques

Interview Structure:

• **Silence is golden**

- Leave a lot of open silence between questions
 - Helps you gather your thoughts
 - Human nature will try to fill awkward silence

• **Deeper Dive**

- Pay attention to cues
- Focus on details
- Ask interviewee to repeat parts of the story that may seem inconsistent



Interview Techniques

Interview Structure continued:

• **Slow and Steady**

- Do not drill the point home too hard

• **Open-ended questions**

- Makes the interviewee speak more



Coding and Billing

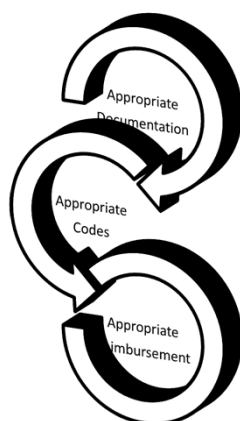
- Try to look at the whole picture
 - Global approach to the issue
- Limit the timeframe/objectives of the audit
 - Audit should be a snapshot in time
 - Don't bite off more than you can chew
 - Clear and concise objectives
- Choose an appropriate audit sample
 - Probe audits are best to start routine audits
 - Implement routine monitoring
- Understand the subject matter
 - Use knowledgeable coders/auditors
- Use recognized resources
 - AHA Coding Clinic
 - CPT Assistant
 - Official Coding Guidelines



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Coding and Billing

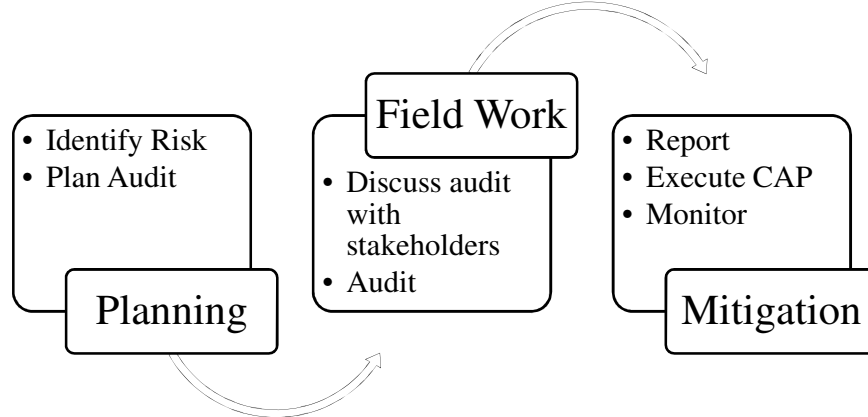


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Coding and Billing

Concise Audit Process



Coding and Billing

- Look at your data - What is the story that it tells?

- Aberrancies in trends over time?

- Denial trends?

- High volume codes?

- High volume providers?

Coding and Billing

Listen to your coders - What is the story they tell you?

Where are provider's issues?

What do you see in documentation?

Where do you need education?

How do you learn how to code new procedures?



Case Study – On the Job Training



References

OIG - USE OF MODIFIER 59 TO BYPASS MEDICARE'S NATIONAL CORRECT CODING INITIATIVE EDITS

<https://oig.hhs.gov/oei/reports/oei-03-02-00771.pdf>

UNITED STATES OF AMERICA, *ex rel.*) JENNIFER WORTHY, VS. EASTERN MAINE HEALTHCARE SYSTEMS, MERCY HEALTH SYSTEM OF MAINE, MERCY HOSPITAL d/b/a MERCY MEDICAL ASSOCIATES, CALIFORNIA HEALTHCARE MEDICAL BILLING, INC., and ACCRETIVE HEALTH, INC., (pp.11-13)

<https://ecf.med.uscourts.gov/docpub/09101988266>

CMS MLN SE1418 January 3, 2018 Proper Use of Modifier -59

<https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/se1418.pdf>



Tips on Self Disclosures

- Which federal or state agencies to disclose to?
- Factors to consider
- <https://oig.hhs.gov/compliance/provider-compliance-training/files/HandoutSD>





Case Studies:
The Minutia of Minutes
The Quality Quagmire

Polling Question

Are these Board minutes sufficient?

- Yes
- No
- Not sure

Scope of Compliance Roles

Board of Trustees – Oversee the management of the Compliance Program

Management – Actively support the Compliance Program and to ensure implementation of the Compliance Program activities

Corporate Compliance – Operational responsibility of the Compliance Program which primarily includes education, conducting audits, implementing other proactive monitoring tools, and responding to compliance inquiries (i.e., Medicare and Medicaid)

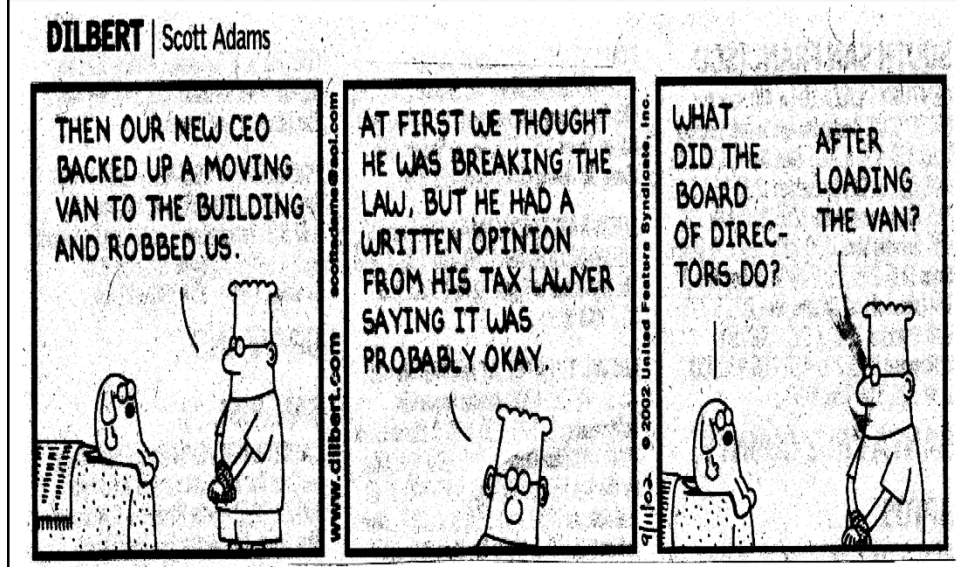


Role of the Governing Board

Board “shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.”



Business Judgement Rule



NY OMIG Board Compliance Responsibilities

Q: What is the board's role in the oversight of compliance programs?

A: "The most significant role is becoming sufficiently educated about the topic to ask appropriate questions and determine whether management has the expertise, the will and the metrics to provide reasonable assurance of compliance, and for board members to review intelligently the responses and submissions of management."



NY OMIG Board Compliance Responsibilities *continued...*

“Non profit board members can face personal financial and professional exposure and embarrassment from membership on a board which fails in its oversight responsibilities.”



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NY OMIG Board Compliance Responsibilities *continued...*

Q: How many times a year to you recommend reporting to the full board?

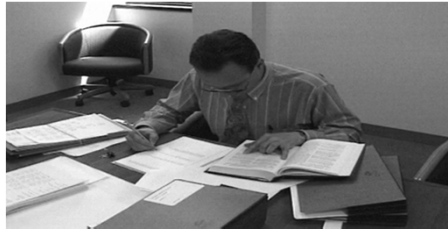
A: “In the absence of a specific, major compliance issue, I would recommend a quarterly report, in writing with an opportunity for questions, to the full board by the subcommittee, and at least an annual in-person presentation by the compliance officer to the full board.”

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SCCE/HCCA April 2010 Report – The Relationship Between the BOD and the Compliance Officer

- Proper board and compliance officer relationship is critical
- Executive session meetings relatively uncommon
- Compliance reports substantively edited by General Counsel or others



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Polling Question

How did you feel about this presentation?

- Don't Care
- Glad it's over
- Happy you came

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Thank You

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