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WHAT YOUR COMPLIANCE OFFICER IS – AND IS NOT

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In the strange way that thoughts connect and evolve, an experience I had on October 11, 2019 as a panelist for the University of Maryland Carey Law’s In-House Counsel Roundtable¹ just came back to mind as I read an online post from one of those accounting firms that sounds like people really wanting to be lawyers who are trapped in the license of accountants. Everyone is giving advice on what to do during and after our experience with COVID-19, and you have already heard from me on this point.² However, this particular measure of information is meant to address a disturbing trend highlighted in both my panel experience and in the accounting firm post, which is the misunderstanding of the separate roles of the compliance officer and counsel, and—of more immediate concern—the unhelpful (and in some cases dangerous) broadening of the role of the compliance officer into an all-laws inspector general for the healthcare enterprise.

THE MODERN ORIGIN OF THE HEALTHCARE COMPLIANCE OFFICER

In guidance issued in 1998³ by the Office of Inspector General (“OIG”) of the U.S. Department of Health and Human Services (“HHS”), the OIG strongly suggested that “effective internal controls that promote adherence to applicable

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1. Further details and information regarding this event can be found at: *Hot Topics for In-House Counsel at Health Care Institutions*, UNIV. OF MD. FRANCIS KING CAREY SCH. L., (Oct. 11, 2019), <https://www.law.umaryland.edu/Programs-and-Impact/Health-Law/Events/AHLA/>.

2. Barry Herrin, *Teleworking Due to COVID-19? Protect PHI From Security Threats, Starting with this Policy*, HERRIN HEALTH L., <https://herrinhealthlaw.com/teleworking-due-to-covid-19-protect-phi-from-security-threats-with-this-policy/> (last visited Feb. 3, 2021).

3. 63 Fed. Reg. 8987 (Feb. 23, 1998), as supplemented by 70 Fed. Reg. 4858 (Jan. 31, 2005).

federal and state law, and the program requirements of Federal, State and private health plans” will “significantly advance the prevention of fraud, waste, and abuse in these health care plans” and will permit the OIG to lessen any penalties imposed on a provider either under the Medicare program or under the False Claims Act.⁴ The OIG states in this guidance that compliance plans may have collateral benefits to a hospital, but it is clear that the focus of the compliance effort is for the hospital to “[fulfill] its legal duty to ensure that it is not submitting false or inaccurate claims to government and private payors.”⁵ Indeed, the guidance acknowledges that it “represents the OIG’s suggestions on how a hospital can best establish internal controls and monitoring to connect and prevent *fraudulent activities*.”⁶ This focus on fraud against the government and private payors explains why the elements of an “effective” compliance program are based on the Federal Sentencing Guidelines.⁷

Thus, at the outset, hospital compliance efforts were confined to billing and coding compliance, which necessarily involved medical record documentation issues as well as compliance with the federal Anti-kickback⁸ and “Stark”⁹ statutes and corresponding regulations, and other Medicare programmatic issues such as patient choice and “patient dumping” that would violate EMTALA.¹⁰

The guidance also explicitly states that “every hospital should designate a compliance officer to serve as the focal point for compliance actions.”¹¹ And, mirroring the modern military model of the Inspector General, the compliance officer when acting in that function¹² has to have direct access to the hospital CEO and governing body.¹³

This “strongly suggested” structure created a separate person independently responsible for managing billing, coding, and physician relationship risk. This person, who was not governed by the hospital’s general counsel or any other institutional risk managers, could independently affect hospital policy without the necessity of consulting with counsel before beginning an investigation into alleged wrongful conduct. The responsibility for coordinating the hospital’s risk response therefore became the sole obligation of the hospital’s CEO or governing

4. *Id.* at 8988.

5. *Id.*

6. *Id.* (emphasis added).

7. 18 U.S.C. § 1347 (providing expanded federal felony treatment to the defrauding of private healthcare payors under HIPAA); U.S. SENTENCING GUIDELINES MANUAL § 8A.2, cmt. n.3(k) (U.S. SENTENCING COMM’N 2018).

8. 42 U.S.C. § 1320a-7(b); 42 C.F.R. § 1001.952 (2021).

9. 42 U.S.C. § 1395nn; 42 C.F.R. § 411.350 (2020).

10. The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.

11. 63 Fed. Reg. at 8993.

12. The compliance officer can be a person with additional duties. *Id.*

13. *Id.*

body, which had to act affirmatively to involve counsel after a report had been made.

“SCOPE CREEP” AND THE EVOLUTION OF THE ETHICS AND COMPLIANCE
OFFICER

To understand how the role of what started as a coding and billing compliance job evolved into what one hospital executive referred to as an “all-powerful freelance busybody,” it might be helpful to understand how hospital ethics started and then blended into compliance. In considering this evolution, ethics as a discipline is distinct from compliance in one critical respect: compliance is mandatory, whereas ethics are usually aspirational. Once an ethical principle is made mandatory, it ceases to be ethical and becomes a matter of compliance. A Forbes article written by Bruce Weinstein in 2019 quotes Carol Tate, the then director of Ethics and Legal Compliance for Intel: “Ethics goes beyond what the law requires. It involves doing the right thing and following both the spirit and not just the letter of the law.”¹⁴

In healthcare, both the American Hospital Association and the American College of Healthcare Executives have established codes of ethics which their respective members are “required” to follow.¹⁵ However, as these are voluntary membership organizations, their definitions of “right” have limited impact. Some hospitals have bioethics committees that decide end-of-life and other patient care matters, but those are often burdened by legal requirements that significantly constrain the conduct supposedly within the purview of the committee.¹⁶ Thus, the only way in which ethics create a burden on an organization is when a system of “mandated ethics” requires compliance *over and above* that compliance indicated by external laws and regulations. The old joke that business ethics is an oxymoron or the continual misunderstanding about why lawyers represent “guilty” criminal defendants both illustrate a practical aspect of this compliance/ethics dichotomy: who gets to decide what’s “right”?

This system of “government by good idea” is limited only by the ability of the organization to coerce its employees to do what the organization says is

14. Bruce Weinstein, *What’s the Difference Between Compliance and Ethics*, FORBES (May 9, 2019), <https://www.forbes.com/sites/bruceweinstein/2019/05/09/whats-the-difference-between-compliance-and-ethics/#5f3498347524>.

15. See, e.g., ACHE CODE OF ETHICS (AM. COLL. OF HEALTHCARE EXECS. Nov. 13, 2017), <https://www.ache.org/about-ache/our-story/our-commitments/ethics/ache-code-of-ethics>; GUIDELINES ON ETHICAL CONDUCT AND RELATIONSHIPS FOR HEALTH CARE INSTITUTIONS (AM. HOSP. ASS’N 1974), <http://ethics.iit.edu/codes/AHA%201974.pdf>.

16. See, e.g., *In re Baby K*, 16 F.3d 590, 598 (4th Cir. 1994). An example of such a decision is the withholding of medical care agreed to be clinically futile, but which is nevertheless required by federal law governing emergency treatment. See *id.* Even if higher-minded and grounded in deep principles, ethics always yields to compliance.

“right.”¹⁷ The Forbes article further quotes Carol Tate: “If the company has a poor culture, none of its controls, policies, or procedures will matter.”¹⁸ This, of course, presumes that the company’s ethics statements are pervasive in the company’s culture and not merely a statement in the employee handbook.

Converting a business’s beliefs about the world and its place in it to disciplinary offenses capable of investigation and punishment could rightly be seen as an expansion of the role of the human resources department or another branch of administration. Why did this authority accrue to the person in charge of billing and coding oversight? The short answer may lie in the way the government (other than HHS) views ethics as a part of compliance and particularly in how the government enforces the Federal Acquisition Regulations (“FARs”).¹⁹

Although the FARs specifically do *not* apply to Medicare,²⁰ the notion of “best practices”²¹ and the now-vogueish practice in health care of borrowing leadership and management insight from other industries²² may just have given the compliance “industry” the leverage it needed to expand its mandate. The FARs require that any contractor granted a contract subject to the FARs must have “a written code of business ethics and conduct” in place within thirty (30) days of the contract’s awarding and must at all times “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”²³ In this definition, ethics and compliance are clearly separate. However, although the FARs do not require reports to the government for violations of the code of ethics, the contractor is specifically required to undertake “reasonable efforts not to include an individual as a principal²⁴ whom due diligence would have exposed as having engaged in conduct that is in conflict with the contractor’s code of business ethics and conduct.”²⁵

17. Weinstein, *supra* note 14.

18. *Id.*

19. FAR 1.101-102 (2021).

20. 42 C.F.R. § 417.472(d) (2020).

21. See Shane Snow, *Problem With Best Practices*, FAST CO. (Oct. 15, 2015), <https://www.fastcompany.com/3052222/the-problem-with-best-practices> (calling out this sort of “peer benchmarking” as “making you the average of everyone else that follows [those practices].”).

22. See, e.g., JOHN J. NANCE, *WHY HOSPITALS SHOULD FLY: THE ULTIMATE FLIGHT PLAN TO PATIENT SAFETY AND QUALITY CARE* (2008) (comparing the healthcare industry to the airline industry); CHARLES PROTZMAN ET AL., *LEVERAGING LEAN IN HEALTHCARE: TRANSFORMING YOUR ENTERPRISE INTO A HIGH QUALITY PATIENT CARE DELIVERY SYSTEM* (2010) (comparing the healthcare industry to the automobile manufacturing industry).

23. FAR 52.203-13(b) (2020).

24. See FAR 52.209-7 (2018) (defining principal as an “officer, director, owner, partner, or a person having primary management or supervisory responsibilities.”).

25. FAR 203-13(c)(2)(ii)(B) (2020).

So, even though the FARs do not mandate compliance with the contractor's code of ethics, the contractor is required to try to remove from any position of ownership or control any person who in the past (or at any time?) has done anything inconsistent with this once-aspirational code.²⁶ Contrast this with the approach taken by HHS with respect to Medicare participants, which only excludes persons from ownership or control positions who commit certain criminal offenses and program-related misconduct,²⁷ and you can see what an incredible broadening of the role and authority of the compliance officer occurred, going from simply billing and coding auditing to controlling the oversight of corporate governance and organizational mission, vision, and values — areas that in the main do not involve satisfying any legal requirements. As if by magic, culture is thus linked with the eligibility to receive government contracts, and the compliance officer can now enforce and punish lapses in what most businesses formerly thought were only goals and ideals.

THE USE OF LAW SCHOOL GRADUATES AS COMPLIANCE OFFICERS

With the growth of the oversight mandate of healthcare compliance officers came the need for broader training of and experience for these individuals. Into the void began stepping a variety of “credentialing” organizations, which collectively created an alphabet of new acronyms meant to “demonstrate” competence and expertise in this new hospital compliance “industry,” and each of which charge dues, exam fees, continuing education fees, etc. For example, there is the Certified Professional Compliance Officer, created by the American Association of Professional Coders; the Certificate In Healthcare Compliance, created by the Health Care Compliance Association; the Certified Compliance and Ethics Professional, created by the Society of Corporate Compliance and Ethics (which until recently was controlled by the same people that ran the Health Care Compliance Association); the Advanced Practitioner in Ethics and Compliance, created by the Ethics and Compliance Officer Association; the Certified Compliance Technician, created by the American Association of Healthcare Administrative Management; and surely others that escaped a ten-minute Internet search.

Make no mistake about it: I have plenty of initials after my name, and I personally think those have value. However, passing a test on certain discrete topics and sitting in unevaluated continuing education classes are no substitute for the academic rigor of the Socratic dialogue and the change in the way one thinks critically about issues and problem-solving conveyed in the formal professional education of — oh, I don't know — *lawyers*. So, rather than shrink

26. See *supra* notes 23–25 and accompanying text.

27. 42 U.S.C. §§ 1320(a)-7(a), 7(c).

the clearly overbroad scope of the ethics and compliance officer to one manageable by a person without a post-graduate legal education, the healthcare industry has doubled-down on the job description as expanded and now hires people with academic training in law to act — not as counsel — but as compliance officers.

Such a strategy might place highly trained critical thinkers in a position requiring that skill set, but it also unhelpfully blurs the line between counsel and compliance officer, especially when the compliance officer holds an active license as an attorney in the state where the enterprise operates. This is because lawyers have their own ethical and professional responsibilities that come with their license to practice law. The most important of these responsibilities is the maintenance of the attorney-client privilege when an attorney is consulted in his capacity as an attorney.²⁸ Unlike the armed services, civilian businesses do not enjoy the convenience of knowing which people in an executive meeting are functioning as lawyers simply by looking at their clothing.²⁹ The burden therefore falls on the licensed attorney to ensure that a client (who consults the attorney in his capacity as an attorney) gets the benefit of the privilege with an attorney when a businessperson (who consults a compliance officer in his capacity as something other than an attorney) does not.

Simply stated, the attorney-client privilege is a rule of evidence that is owned by the client and protects an attorney's communications with the client from disclosure in legal and other proceedings.³⁰ It can only be waived by the client.³¹ It follows, therefore,³² that the role of the attorney as an attorney is critical to determining whether the attorney-client privilege actually is available. For example, there are judicial decisions making communications from a corporate employee or official with a duty to investigate incidents discoverable

28. Jackie Unger, *Maintaining the Privilege: A Refresher on Important Aspect of the Attorney-Client Privilege*, A.B.A. (Oct. 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/#:~:text=The%20attorney-client%20privilege%20is%20the%20backbone%20of%20the,the%20attorney%20to%20provide%20the%20best%20legal%20advice.

29. See, e.g., Memorandum from the Sec'y of the Air Force to Members of the Air Force on Air Force Guidance Memorandum to AFI 26-2903 Dress and Personal Appearance of Air Force Personnel (Feb. 15, 2020), https://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2903/afi36-2903.pdf (limiting the wear of the judge advocate insignia to those individuals appointed as and serving as military lawyers, the distinction being an "occupation badge" and not a "qualification badge").

30. FED. R. EVID. 502.

31. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (AM. BAR ASS'N 2003) ("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).").

32. "As clear as is the summer's sun," said the Archbishop of Canterbury in recounting a tedious description of French heraldic descent. WILLIAM SHAKESPEARE, *Henry V* act I, sc. 2 l. 88.

and not subject to any confidentiality restrictions.³³ One such decision is *Long v. Anderson University*, in which a federal court in Indiana compelled the production of internal investigative materials because the investigation was conducted in accordance with the university's harassment policy, and not specifically at the direction of counsel in anticipation of litigation.³⁴ In addition, another federal court in Minnesota explained, the delegation of "ordinary business obligations" to a licensed attorney does not result in the application of the attorney-client privilege.³⁵ And, as if these rulings are not sufficiently damaging, other federal courts have held that the privilege would not apply to "any communication that would have been made because of a business purpose even if there had been no perceived additional interest in securing legal advice."³⁶ A broad mandate for a compliance officer to investigate breaches of policy and internal guidance would certainly fall into these categories, and it would not appear to make any difference to the courts that the compliance officer was a licensed attorney: everything the compliance officer did would be discoverable by the government, by the plaintiff's bar, or (if the hospital is a public entity) by its competitors in an open records request.

THE GENERAL COUNSEL AS COMPLIANCE OFFICER

As if the growth in the portfolio of the healthcare compliance officer is not bad enough for organizations and their management (or mismanagement) of the attorney-client privilege, many have decided to get more "bang for the buck" and have lawyers functioning in the dual role of compliance officer *and* general counsel.

For the attorney-client privilege to attach, the communication (a) must relate to a fact communicated for the purpose of receiving legal advice and (b) must be communicated to the attorney in his capacity as an attorney and not in some other capacity.³⁷ Courts around the country are singularly unforgiving of this line-blurring duality. Thus, in *In Re Grand Jury Proceedings of Browning Arms Co.*, the Eighth Circuit held that the privilege was inapplicable to communications between the corporation and an attorney serving on its board of directors because the relationship was not explicitly that of attorney and client.³⁸

33. *Long v. Anderson University*, 204 F.R.D. 129 (S.D. Ind. 2001).

34. *Id.*

35. See *Lumber v. PPG Indus., Inc.*, 168 F.R.D. 641, 646 (D. Minn. 1996) (Memorandum Order, Aug. 16, 1996) ("[The] mere involvement of an attorney, in the ordinary business activities of a party, cannot legitimately shield those activities from discovery [and would] create a blanket obstruction to discovery of its claims investigation.").

36. *McCaugherty v. Siffermann*, 132 F.R.D. 234, 238 (N.D. Cal. 1990) (citing *Fisher v. United States*, 425 U.S. 391, 403 (1975)).

37. FED. R. EVID. 502.

38. 528 F.2d 1301 (8th Cir. 1976).

Courts have also held communications with an attorney who is functioning as an attorney, for the purpose of obtaining political rather than legal advice, are also not subject to the privilege.³⁹ Additionally, communications about legal procedures and case status, when legal advice is not being sought, also are not protected.⁴⁰ Furthermore, if the attorney is consulted about business advice rather than legal advice, the privilege does not apply.⁴¹ And, just to make sure there are no misunderstandings, courts have also held merely having an attorney in the room does not convert everything said in the room to a privileged communication.⁴²

And it's not just the courts that are critical of this dual hat approach. Guidance issued by the Centers for Medicare and Medicaid Services clearly states that, for Medicare Advantage organizations,⁴³ "the compliance officer should be independent [and] not serve in both compliance and operational areas (e.g., where the compliance officer is also the ... general counsel)," because this leads to "self-policing in the operational area" and a conflict of interest.⁴⁴ There is other evidence of disapproval in the text of several corporate integrity agreements ("CIAs") that resolve federal fraud and False Claims Act cases. One such CIA with Pfizer in 2009 explicitly stated that the organization have a "Chief Compliance Officer [who] shall not be, or be subordinate to, the General Counsel or Chief Financial Officer."⁴⁵

WHAT TO DO?

With respect to the "scope creep" of healthcare compliance officers, the best solution is to limit their role to that required by federal and state law governing billing, coding, and physician relationship compliance matters. If organizations are not required by the FARs or some other legal construct to blur the distinctions between ethics and compliance, they should not ever do that voluntarily. Organizations should separate compliance enforcement and investigation from lapses in aspirational business goals and ideals, for the simple reason that if you think it is hard for attorneys with lots of specific training on

39. *Republican Party of North Carolina v. Martin*, 136 F.R.D. 421, 426 (E.D.N.C. 1991).

40. *Hartsell v. Hartsell*, 393 S.E.2d 570, 578 (N.C. Ct. App. 1990), *aff'd per curiam*, 403 S.E.2d 307 (N.C. 1991).

41. *Ray v. Cutter Laboratories*, 746 F. Supp. 86, 87 (M.D. Fla. 1990).

42. *United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998), *cert denied*, 525 U.S. 1088 (1999).

43. Press Release, Centers for Medicare and Medicaid Services, Medicare Advantage and the PI Program FAQs (on file with agency).

44. Centers for Medicare and Medicaid Services, *Medicare Managed Care Manual*, C.M.S. Pub. 100-16, Ch. 21, §50.2.1 (2013).

45. Corporate Integrity Agreement between Office of the Inspector General and Pfizer, Inc. (Aug. 31, 2009).

this subject to sort out when something is covered by the privilege or not, it is going to be even more difficult for a compliance officer not to approach ethics issues with the same investigative zeal if they are all within his mandate. Remember that the issue of compliance ultimately is a legal one, so compliance officers need to have their excitement checked by counsel, even if the federal government has constructed a framework that all but certainly removes factual compliance findings from the protection of the attorney-client privilege. That means that compliance officers should not be permitted to say there is a “breach” or a “violation” or anything of that sort: they gather facts and present them to the governing body, which then asks for a legal opinion from counsel.

When lawyers act as compliance officers, or as both general counsel and compliance officers, this kind of dichotomy will be almost impossible to avoid. Bright lines being the easiest to see and avoid, the absolute best practice would be not to let compliance officers who are trained as lawyers act as lawyers, going so far as asking them to place their licenses in inactive status so that they are incapable of practicing law. Failing that, not allowing compliance officers to use their “J.D.” degree description in their official signature would help. If that particular sacred cow is already out of the barn, whether or not it’s kicked over the lamp,⁴⁶ then the burden really falls on the attorney to manage his two-hatted wardrobe.

So, if the enterprise insists on having a general counsel act as compliance officer, then there are some steps one can take to help the privilege attach when it is important for it to do so:

- In board minutes, clearly identify when the attorney is acting as an attorney and delineate what discussions are asking for and receiving legal advice.
- Segregate privileged and nonprivileged communications, perhaps by using different signature lines or different email accounts.
- “Flag” communications which contain legal advice or in which legal advice is sought.
- In all cases, the attorney must be clear on what role he is playing in the conversation; his actions may inadvertently cause a misperception about whether the privilege applies to a particular conversation or not.

Perhaps the best quote on this subject I have found comes from Chancellor Strine of the Delaware Chancery Court:

46. See RICHARD F. BALES, *THE GREAT CHICAGO FIRE AND THE MYTH OF MRS. O’LEARY’S COW* (2002) (referring to the urban legend behind the Great Chicago Fire of 1871).

The fact that much of the legal advice in this country is now sought and rendered by thumbs on fruit devices ... that's something that's going to lead to, frankly, more things people think [are] privileged that are not. And the mixing of lawyer roles with business roles is a danger.⁴⁷

Let's be careful out there.

47. Intel Corp. v. NVIDIA Corp., C.A. No. 4373-VCS (Del. Ch. Apr. 5, 2010).