# BEST PRACTICES IN CORPORATE GOVERNANCE

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## AGENDA

- Director Responsibilities
- Recent Rulings
- The "Yates Memo"
- Directors' Roles in Compliance
- Quality Oversight

# HEALTH CARE FRAUD STATISTICS

- During Fiscal Year (FY) 2014, the Federal government won or negotiated over $2.3 billion in health care fraud judgments and settlements.
- Justice Department recovered over $3.5 billion from False Claims Act cases in FY 2015.
- New York-Presbyterian Hospital and Columbia University Medical Center together on May 7 have agreed to hand over a whopping $4.8 million to settle alleged HIPAA violations after the electronic protected health information of 6,800 patients wound up on Google back in 2010.

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# DIRECTOR RESPONSIBILITIES

- Duty of Loyalty
- Duty of Care
- Duty of Obedience

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# DUTY OF LOYALTY

- **Act in good faith.**
- **Act in the best interests of the corporation.**
- **Conflicts of Interest**
  - Recuse himself or herself when appropriate.

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# DUTY OF CARE

- **Decision Making Function**
  - Example: Medical Staff Credentialing Issues
- **The Oversight Function**
  - Keeping a finger on the pulse of the activities of the organization
- **Quality of Care Issues**
- **Overseeing the Compliance Program**
- **The need to review corporate minutes**

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# BUSINESS JUDGMENT RULE

- The rule provides that a director will not be held liable for a decision made in good faith, where the director is disinterested, reasonably informed under the circumstances, and rationally believes the decision to be in the best interests of the corporation.
- Courts will not second guess the board members.
- Can rely on information from management unless they have a reason to believe the reliance is unwarranted.

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# DUTY OF OBEDIENCE

- Understand the mission and purpose of the organization.
- Directors are charged with the obligation to further the purpose of the organization.
- The concept of quality of care is inseparable from the mission of the organization.
- To obey the laws the organization is subject to!

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# LIABILITY OF A DIRECTOR

- **Liable for failing to reasonably oversee the organization's Compliance Plan or for acting as mere passive recipients of information.**
- **Liability arises when:**
  - The directors fail to implement any reporting or information systems or controls.
  - The directors consciously fail to monitor or oversee operations, thus disabling themselves from being informed of risks or problems requiring their attention.
  - Failure to provide oversight – not managing day-to-day affairs.

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# RECENT RULINGS

- **In re: Caremark**
  - Directors are potentially liable for a breach of duty to exercise appropriate attention if they knew, or should have known, that employees were violating the law, declined to make a good faith effort to prevent the violation, and the lack of action was the proximate cause of damages.
- **In re: Intuitive Surgical**
  - The Court held that Plaintiff offered sufficient particularized factual allegations that strongly support an inference that the entire board, or at least a majority, knew of violations of law committed by Intuitive and did nothing.

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# THE YATES MEMO

- **Sally Quinlan Yates**
  **Deputy Attorney General**
- **Issued September 9, 2015**

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# THE YATES MEMO (Cont'd)

- **Six key steps that strengthen pursuit of individual corporate wrongdoing:**
  - Cooperation credit requires identification of all individuals responsible for the misconduct;
  - Investigations should focus on individuals from the investigation's inception;
  - Criminal and civil attorneys should communicate with each other during the investigation;

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## THE YATES MEMO (Cont'd)

- **Six key steps continued:**
  - The DOJ will only release culpable individuals in extraordinary circumstances or in accordance with DOJ policy;
  - DOJ will not resolve matters without a clear plan to resolve related individual cases;
  - Civil attorneys should focus on individuals to evaluate whether to bring suit against an individual beyond consideration of ability to pay.

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## HOW A CORPORATION SHOULD RESPOND

- **Communicate and Educate**
- **Focus on the Compliance Program**
- **Address non-compliance promptly and appropriately**
- **Be prepared for more complex and drawn out investigations and settlement negotiations**
- **Prepare and issue Upjohn warnings**

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## BEST PRACTICES OF INTEGRATING DIRECTORS INTO A COMPLIANCE PROGRAM

- Act in good faith to exercise its oversight responsibility and make inquiries;
- Familiarize themselves with and follow the Federal Sentencing Guidelines, OIG's voluntary compliance program guidance documents, and OIG Corporate Integrity Agreements (CIAs);
- Stay abreast of the ever-changing regulatory landscape and operating environment;
- Raise their level of substantive expertise with respect to compliance matters by director selection and by consulting with experts;

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## BEST PRACTICES (Cont'd)

- Receive regular reports regarding the organization's risk mitigation and compliance efforts from those responsible for audit, compliance, human resources, legal, quality, and information technology;
- Conduct "executive sessions" with leadership from compliance, legal, internal auditing, and quality functions to encourage more open communication;
- Be informed of emerging trends in the health care industry to increase transparency
  - CMS Quality Compare Measures
  - Sunshine Act

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## BEST PRACTICES (Cont'd)

- Establish a committee or subset of the Board to monitor Compliance Program operations and regularly report to the Board;
- Have the Code of Conduct operate as a constitution for the organization;
- Ensure the proper infrastructure, power and reporting structure for the Compliance Program;
- Participate in compliance training;
- Ensure the Compliance Program has a standard for responding to violations; and
- Ensure the Compliance Program includes guidelines for reporting a violation.

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## QUESTIONS?

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