HEALTHCARE REGULATION IN AN AGING UNITED STATES

HEALTH CARE COMPLIANCE ASSOCIATION
MINNEAPOLIS, MN

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ENFORCEMENT INCREASING - WHY?

65+

Costs

Enforcement

FCA  AML
ACA  RICO
AKS  Stark
Fraud  Anti-trust

Source: Average of AARP and Pew statistics, aarp.org/personal-growth, pewresearch.org/daily-number

NB – Hospital serv.s (.9B) = 32% of NHE
NB – Media (1T) = 35% of NHE
DEMOGRAPHY

Population Aging

- By 2050, 111% in US population > 65
- Approximately 9,000 people per day turn 65

Source: Average of AARP and Pew statistics

5 Washington D.C.s per year 2011 - 2029 (19 years)

DEMOGRAPHY

1. Age 65+ Growth - Increasing NHE from $2.8 T ($8915 per capita)
2. Medicaid – Expansion added 17M and 3% growth per annum


By 2020 US GDP

2012 US GDP

By 2020

All HC spending from gov’t programs 2020
TECHNOLOGY

Delay in Technological Advancements – Funding Barriers

2008

YOUR CLIENT AS MARKET ACTOR

- Reimbursement
- Market Share Revenue
- AKS SNR
LAW

Increase in Governmental Scrutiny – Other Statutes

FCA

AKS

AML

Penalties

Stark/Codey

DCA – Counties - Feds

RICO

Conspiracy

HCF

Commercial Bribery

LAW - FCA

1. States, 2. Self-Reporting, 3. 3d – Greber, no Mikes, first to file

Federal

States

UK
WHAT – CASE SELECTION

WHAT – CASE SELECTION
## COMPARISON OF INVESTIGATIONS

<table>
<thead>
<tr>
<th>Internal</th>
<th>External</th>
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<tbody>
<tr>
<td>Scheduled</td>
<td>Surprise</td>
</tr>
<tr>
<td>Control privilege</td>
<td>Not control privilege</td>
</tr>
<tr>
<td>Data Secure</td>
<td>Data Not Secure</td>
</tr>
<tr>
<td>No press nor reporting</td>
<td>Press and reporting</td>
</tr>
<tr>
<td>Staff calm</td>
<td>Staff frightened</td>
</tr>
<tr>
<td>Cost manageable</td>
<td>Cost unknown</td>
</tr>
</tbody>
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## WHY GOV’T PREFERENCES SW TO SUBPOENA

1. Originals – jury appeal
2. Additional – post-its, marginalia
3. Organization
4. Contemporaneous on-site interviews
5. Psychological – vulnerable, ignorant

Lesson – Be Prepared
MORE

1. How to protect privileged materials when raided
2. The Raid Card
3. Responding to a subpoena
4. Feeding the feds

Lesson – Be Prepared

ELEMENTS:
Five “C”s

COMMUNICATION

Client

Counsel
**ELEMENTS: Five “C”s**

Confidential

**COMMUNICATION**

For purpose of seeking or providing legal counsel

N.B. – Protects communications, not facts
N.B. – Protects communications both ways

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**Elements:**

**Client - What is scope of client for privilege purposes?**

Was communication made:

- **By EEs with info. necessary for corporation to secure legal advice?**
- **To EEs with a “need to know” the legal advice?**

**OR**

- Exec
- Tax
- HR
- Finance

- HR
- Exec


**Diversified Industries**, 572 F.2d 596, 609 (8th Cir. 1978)
Elements:
Client - What is scope of client for privilege purposes?
Corporate EE as 3d Party

Practice Tip: Avoid using “Reply All” if content involves seeking or providing legal counsel.
ELEMENTS:
Client - What is scope of client for privilege purposes?

Test if whether seeking, providing or transmitting legal advice.

ELEMENTS:
Confidentiality – General Rule

Disclosure
To 3d Party = Waiver

In Re Teleglobe, 493 F.3d 345, 361 (3d Cir. 2007);
**ELEMENTS:**

**Confidentiality - Inadvertent disclosure**

1. **F.R.E. 502(b)** – applies “reasonableness” standard to inadvertent disclosure
   A. Purpose of rule is to reduce costs of privilege review and associated motions
   B. Practice Tip – Complement rule with court-approved confidentiality agreements
2. **Factors Re Reasonableness**
   A. Efforts to prevent disclosure
   B. Efforts to rectify disclosure
3. **Courts often resolve through finding limited waiver**

**Practice Tip** – If using e-discovery method, prudent to employ and memorialize traditional vetting

**N.B. - RPC 4.4(b)** – if receive privileged material: Stop, Notify, Return

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**ELEMENTS:**

**Confidentiality - Dual Purpose Communications**

If Severable, Sever
If Not Severable, Determine Primary Purpose

VS.

LEGAL

BUSINESS
ELEMENTS:
Confidentiality - Dual Purpose Communications

KBR Changed Standard

Facts: 1. 2007 Qui Tam FCA suit alleging fraud
2. 2004-2006 COBC Internal Investigation
3. Investigation led and conducted by non-lawyers, under umbrella of Legal Dept.
4. Attys involved only upon prep. of reports of findings

ELEMENTS:
Confidentiality – Dual Purpose Communications
Practice Tip To Educate Clients
Regardless of standard, protect by separating.

1. BUSINESS
2. LEGAL
1. Will KBR be followed by other circuits?  
   Spectrum – sole, principal, significant
2. How will significance be measured?  
   Bearing on decision? Major-minor? Totality?

CAUTION
ELEMENTS:
Confidentiality - Dual Purpose Communications

“One of the Significant Purposes” KBR

LEGAL

ELEMENTS:
Confidentiality - Dual Purpose Communications

ELEME N TS:  
Confidentiality – Protecting Privilege In Investigations

1. Staffing - Attorneys supervise internal investigations
2. Structure - compliance reporting to legal to ensure that company’s attorneys are involved early
3. Document – Upjohn letters & warnings
   A. Confidentiality agreements
   B. Prefatory language re legal issues
   C. Conspicuously mark privileged material
4. Investigation report – identify legal issues
5. Polestar – Seeking or providing legal advice

ELEME N TS:  
CONFIDENTIALITY – SELECTIVE WAIVER
POWER TO ASSERT/WAIVE THE PRIVILEGE

1. Resides with management  
2. Permissive disclosure - ABA Rule 1.13 creates up-the-ladder reporting and approval prior to any disclosure
**ELEMENTS:**
**Confidentiality – Selective Waiver**


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**ELEMENTS:**
**Confidentiality – Re Government**

Prosecutors neither request nor credit waiver.

Their focus on obtaining relevant facts.


B. Principles of Federal Prosecution of Business Organizations – Filip and Yates iterations

C. Search Warrant - segregate for taint argument

D. N.B. – Not apply to privates such as PCAOB & FINRA
OFFENSE AND DEFENSE

Proactive Investigations, Date

RAYSCAM

October 2014 - Present
- First Degree
- 35 Defendants
- Including numerous physicians
CONFIDENT CARE SERIES

October 2014 - Present
- Services Not Rendered
- 5 of 6 Defendants Pled Guilty
- Upcoming trial

STATE V. PEGLER

June 2014
- Workers’ Comp Fraud
- President To Prison
FRAUD PROSECUTOR - DETERRENCE

1\textsuperscript{st} First Time

2\textsuperscript{nd}

3\textsuperscript{rd}

4\textsuperscript{th}

Tripled APS
.996 to 3.365 yrs

MASS ADVERTISING

Insurance Fraud = PRISON

$1,300 EVERY YEAR
### Prosecution Trends

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<table>
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<tr>
<td><strong>Short-Term</strong></td>
<td>FCA, AKS, Stark Diversion</td>
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<tr>
<td><strong>Medium-Term</strong></td>
<td>FCA, Standard, Necessity, HHA</td>
</tr>
<tr>
<td><strong>Long-Term</strong></td>
<td>Drones, A.I. (SODDI)</td>
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### Coming Healthcare Regulatory Issues

- **Robotics/Drones**
  - Telemedicine
  - Drones
  - Oshbot, 10/28/14 WSJ, B3

- **Immigration**
  - Qualifications
  - Licensure
QUESTIONS?
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