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

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

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

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


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

AKS  FCA  RICO
AML  Penalties  Conspiracy
Misapplication  DCA – Counties - Fed  HCF
Stark/Codey  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>
</table>

### WHY GOV’T PREFERS 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

Confidential

For purpose of seeking or providing legal counsel

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

HR
Exec
Tax
HR
Operations
HR
Financ
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

CEO CFO GC CIO NY Sales AOC

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
   A. Gloucester Twp. v. Hurst, 146 F. Supp. 3d 492 (D.N.J. 2014)

Practice Tip – If using e-discovery method, prudent to employ and memorialize traditional vetting
N.B. - RPC 4(A) – if receive privileged material: Stop, Notify, Return
ELEMENTS:
Confidentiality - Dual Purpose Communications

If Severable, Sever
If Not Severable, Determine Primary Purpose

VS.

LEGAL

BUSINESS

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 LEGAL 2.
CAUTION

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

LEGAL

ELEMENTS:
Confidentiality - Dual Purpose Communications
"One of the Significant Purposes" KBR
**ELEMENTS:**
*Confidentiality - Dual Purpose Communications*


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**ELEMENTS:**
*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

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**ELEMENTS:**
*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**

- Holder
- One Tranche
- Third Party

Generally rejected by courts as manipulative. See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines, 951 F. 2d 1414, 1426-27 (3d Cir. 1991);

**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

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MASS ADVERTISING

Insurance Fraud = PRISON

INSURANCE FRAUD COSTS YOU
$1.300 EVERY YEAR

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PROSECUTION TRENDS

<table>
<thead>
<tr>
<th>Short-Term</th>
<th>FCA, AKS, Stark Diversion</th>
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<tbody>
<tr>
<td>Medium-Term</td>
<td>FCA, Standard, Necessity, HHA</td>
</tr>
<tr>
<td>Long-Term</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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