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Business Issues and Compliance Issues are Inextricably Interrelated

You Can Take Steps to Proactively Defend Against Allegations of Fraud and Abuse

Latour "LT" Lafferty

Do you mind if I ask, what is your *business*? The typical response to this question is something like, "Well, I am a physician." Ah ha, I say. Medicine is your profession, but what is your *business*? What, you might say, is the difference? To demonstrate, please allow me to recall the story of famed McDonalds' founder Ray Kroc who in 1974 asked a group of young Masters of Business Administration (MBA) students after an inspiring talk to identify Kroc's business.

That is simple they said, because everyone knows that Ray Kroc, the founder of McDonalds, is in the hamburger business! Kroc, laughing, simply replied that although his day-to-day focus is to sell hamburgers, the most significant factor in the success of his business was real estate location. You see, Ray Kroc sold hamburgers, but his true business was real estate because the location of each hamburger franchise determined the overall success of his business!¹

So what single factor has the potential to drastically affect the success of your government subsidized health care practice? Compliance. Although your *profession* is medicine, as mine is the practice of law, the success of your *business* in the field of federally subsidized health care is through compliance.

In federally subsidized health care, business issues and compliance issues are inextricably interrelated. If you want to make your *business* more successful, then you need to make compliance an essential part of your business plan. The failure to recognize the role compliance plays in your business plan exposes you to audits, lawsuits, and potentially, the fight for the very survival of your practice if fac-

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ing criminal charges, treble damages, and exclusion from participating in federal health care benefit programs.

The modern business environment is one permeated with a myriad of both federal and state laws and regulations intended to ensure corporate integrity and responsibility, but most importantly the engenderment of public trust in America's economic infrastructure through heightened scrutiny of business activities. Quite simply, the failure to ensure compliance in this environment could lead to a range of criminal, civil, and administrative sanctions including imprisonment, fines, and exclusion from participating in the particular economic sector (e.g., exclusion from participating in the Medicare/Medicaid health benefit programs). In other words, corporate compliance is a prerequisite to economic success in today's business environment because the failure to ensure compliance with governing laws and regulations could lead to the demise of the corporate entity itself.

With this emphasis in mind, consider the federally subsidized health care industry as an example of the heightened regulation and scrutiny of today's corporate environment. Health care is the largest economic industry in the United States, and growing.² The United States spends more on health care services than any other nation including \$64 billion in 1970, \$245 Billion in 1980, and \$1.2 Trillion in 1999 — a 500 percent increase from 1980.³

Of this total, the federal government funds approximately 40 percent of the health care spending in the United States through federally subsidized health care benefit programs like Medicare.⁴ Nonetheless, the United States remains the only industrialized nation in the world without a comprehensive national health care system.⁵

More specifically, Medicare is the second largest federal entitlement program behind Social Security and covers approximately 41 million enrollees costing exorbitant amounts of revenue outlays.⁶ As an example of impact federal subsidization has

on our health care industry, consider that the United States' total Medicare spending included \$7.3 billion in 1970, \$36.4 billion in 1980, \$166 Billion in 1994, and \$281 Billion in 2003.⁷

As you can see, it is easy to project the amount of Medicare spending estimated for 2010, the year the 1945-65 baby-boomer generation comes of age (*i.e.*, eligibility for Medicare and Social Security benefits). It is estimated that Medicare will eventually consume 70 percent of all federal income tax revenues.⁸

In addition, consider that seven out of the top 10 future employment opportunities are in the health care industry's "affiliated personnel" segment.⁹ Not only is every aspect of the health care industry affected by governing laws and regulations, but every individual participating in this field, not just physicians and ethics officers, are required to know and comply with these laws and regulations as well.

So why is compliance such an integral part of your business success? Because, the United States' health benefit programs have a uniquely complex financing and payment system.¹⁰ The tremendous increase in the number and complexity of both federal and state laws and regulations governing the health care industry, the daunting intricacy of these laws and regulations, very few "bright lines" in the interpretation of these laws and regulations resulting in many "gray" areas, and the exorbitant amount of money at stake for both the industry as well as the federal government justifies heightened government scrutiny and necessitates an emphasis on compliance in your practice.

It is generally accepted that the federal health care benefit program claims processing and reimbursement system, which is likened to an "honor code," encourages fraud, abuse, and waste.¹¹ For example, it is estimated that in 1999 the United States lost in excess of \$12 billion in Medicare spending due to fraud, abuse, and waste.¹² This statistic is over five years old and reflects only

the amount lost to Medicare spending and does not account for other federally funded health care benefit programs such as Medicaid or CHAMPUS/TRICARE. The natural result is that business issues and compliance issues are in fact inextricably interrelated and generate "an era of heightened compliance awareness and regulatory enforcement."¹³

In order to combat this unacceptable loss to taxpayers, Congress required the U.S. Department of Justice (DOJ) and the United States Department of Health and Human Services, Office of Inspector General (OIG) to create a national health care fraud & abuse program when it enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996. This highly coordinated national law enforcement effort is intended to ensure the integrity of federally subsidized health care benefits.

This effort includes the focused development and funding of health care prosecutors and investigators coordinated on a federal, state, and local level for the purpose of enforcing a myriad of health care laws and regulations. In addition, this effort encompasses a full range of remedial measures including criminal, civil, and administrative actions.

For example, although it is readily apparent that a federal health care benefit provider may be indicted for submitting false claims for reimbursement to the United States, it may not be so obvious that this same provider is potentially liable for *treble* damages and penalties as well as disbarment for this very same conduct which not only subjects the culpable individual to incarceration and fine but can potentially be the economic death knell to the organization itself. In other words, the federal government's health care fraud & abuse program is designed to extract the fullest possible remedial measures from unscrupulous offenders.

To accomplish this goal to ensure the integrity of the federal health care benefit programs, the DOJ has created affirmative civil enforcement (ACE) units within its lo-

cal U.S. attorney's offices. These ACE units are staffed with attorneys, auditors/investigators, and paralegals tasked with the responsibility of initiating lawsuits to enforce federal laws, particularly health care fraud and abuse laws. Quite simply, health care fraud is a major focus of the federal government's ACE activities.

The federal False Claims Act (FCA) is the principle weapon in the ACE arsenal and authorizes the recovery of *treble* damages and penalties. Most notably, however, the FCA authorizes whistleblowers, or private bounty hunters called "relators," to file lawsuits on behalf of the United States against unsuspecting health care providers that the whistleblowers allege are committing fraud and abuse. The United States, through DOJ and the OIG, as well as other law enforcement agencies, are statutorily required to investigate these unsubstantiated allegations which are kept under seal by the court pending the government's investigation (many times for years) while the unsuspecting health care provider continues to subject itself to potential criminal, civil, and administrative liability and near certain economic demise.

The health care fraud & abuse program's effectiveness cannot be disputed. The OIG statistics for fiscal year 2004 reveal 533 successful criminal prosecutions, savings of approximately \$30 billion, 3,293 Medicare program exclusions, and 268 civil actions, including FCA, unjust enrichment suits, civil monetary penalties law settlements and administrative recoveries.¹⁴ These results are even more impressive when noting that the United States recovered \$2.1 billion in FCA damages in fiscal year 2003, of which \$1.7 billion were in the health care industry.

Four of the 10 largest FCA settlements in history (the FCA dates back to the Civil War) are health care cases. Total FCA health care fraud recoveries have more than tripled since 1999 (*i.e.*, \$500 million to \$1.7 billion in 2003).¹⁵

Finally, the DOJ's Middle District of Florida, which encompasses Florida from

Jacksonville to Ft. Myers including Orlando, regularly leads the nation in FCA whistleblower cases and has included many of the nations top FCA whistleblower settlements including HCA/Columbia totaling \$731 Million in December 2000, HCA/Columbia totaling \$631 Million in June 2003, Vencor, Inc. totaling \$105 Million in March 2001, Quorum Health Group, Inc. totaling \$95.5 Million in October 2000, and Gambro Healthcare totaling \$53.1 Million in July 2000. Recently, the U.S. Attorney for the Middle District of Florida, in a Florida Trend article praising the district's health care fraud successes, stated, "We shall continue to vigorously prosecute those who try to scam the government."¹⁶

Why should this concern the Medicare health care provider? Because whistleblowers typically make allegations such as the provider engaged in a "pattern and practice" of requiring a daily Medicare billing quota." Considering that the health care industry is indeed a *business* and that most physicians find the economics of providing health care to be more and more taxing due to student loan debt and costs attributable to the practice, such as malpractice insurance, office staff, and insurer mandated collection write-offs, it is not surprising that the profession runs like any other business.¹⁷ As one surgeon eloquently stated, "The risk is that if you don't have enough business, you'll starve."¹⁸

Finally, Congress recently authorized the creation of "recovery audit contractors" (RACs), akin to bounty hunters, in the 2003 Medicare Prescription Drug Improvement and Modernization Act, to collect administrative overpayments for a three-year test period in Florida, California, and New York. These RACs will operate independently from the regular Medicare contractors currently authorized by the Centers for Medicare and Medicaid Services (CMS) to audit Medicare claims for overpayment identification and collection. Most importantly, however, the RACs will be compensated by letting them retain "a percentage

of the overpayment recoveries."¹⁹ Characterized as a "bounty hunter's incentive" by the Florida Medical Association (FMA), physician representatives are concerned that paying RACs based on a percentage of their findings of overpayments will result in questionable audits.²⁰

You see, the success of any federally subsidized health care practice in today's business environment must emphasize compliance. Although the consequences of failing to recognize this point may appear draconian to some, it is indeed a reality confronting every health care practitioner. The solution to this heightened regulation and scrutiny, particularly in the health care industry, is the incorporation of an "effective" compliance program in every aspect of your business activity.

Competent legal counsel, one that is both knowledgeable and experienced in both criminal and civil regulatory compliance matters, can assist providers in ensuring corporate compliance through timely advice, the implementation of compliance programs, and conducting both proactive and reactive internal investigations and audits, as well as defending those charged with committing criminal or civil offenses. In essence, competent legal counsel can assist providers in avoiding, investigating, and defending allegations of fraud, abuse, and waste through the use of effective compliance programs.

The reality is that "[w]hile nobody enjoys thinking about possible criminal or civil violations of the law, they sometimes happen even in good organizations."²¹ Clients that choose to make compliance an essential part of their federally subsidized health care practice's business plan are proactively defending against, and deterring, allegations of fraud, abuse, and waste "by providing evidence that your organization intended to operate in compliance with applicable laws."²²

More importantly, however, you will enjoy the public's trust, operate with visible integrity, and thus avoid unnecessary and

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costly employee complaints (e.g., whistleblower actions) and enjoy economic success. Consequently, an "effective" compliance program is an essential and critical part of every federally subsidized health care practice's business plan.²³ Although your profession is medicine, in federally subsidized health care, your business is compliance!

Footnotes:

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QUINNIPIAC HEALTH CARE CERTIFICATE

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nouncing the Quinnipiac's program accreditation, Debra Troklus, President of the Health Care Compliance Board stated, "The site visit was very positive, and the commitment and enthusiasm for the program was demonstrated by everyone we had the opportunity to meet. This endeavor is very exciting for the Compliance Association, and we look forward to working with Quinnipiac in establishing and enhancing compliance as a profession."

