The Great Debate: Do Compliance Programs Empower Whistleblowers?

By Neil B. Caesar

Announcer: "Welcome to Great Healthcare Debates! Today our topic is whistleblowers!"

"One of a healthcare organization's biggest fears is finding itself stuck in the muck of a qui tam lawsuit under the Federal False Claims Act. Compliance officers and audit personnel often dread these messes. Many healthcare providers wonder whether compliance programs actually fuel whistleblowers, by giving them (1) clearer understanding of the provider's failings; (2) education as to the law and its dangers and the opportunities it offers; and (3) the tools against which to measure the organization's shortcomings. Is this a fair concern? What should be done about it?"

"Join us now for the Great Debate. Two of the greatest orators of our age, Whistleblower Wizard, JD, and Compliance King, Esq., opine away on these and other conundrums Please find your seats quietly. A hush settles over this standing-room only crowd… as our moderator begins…"

Health Law Center: "The False Claims Act has become perhaps the government's most powerful tool to seek and destroy healthcare fraud. Financial rewards for whistleblowers are often gigantic. Further, their availability is increasingly well publicized, including a substantial Internet presence. The majority of qui tam relators may be billing clerks who are asked to upcode or fabricate one line item too many. However, healthcare organizations continue to voice additional concern that their audit and compliance personnel, as well as other senior management, may be 'apprentice whistleblowers,' because of their increased knowledge, investment in the process, and frustration when recommendations are not accepted. Is this concern legitimate?"

Compliance King: "Many healthcare providers clearly believe that compliance activities increase the risk of whistle blowing. Right or wrong, many providers fear that their auditing, investigative, and monitoring initiatives will alert both their personnel and outside contractors about the existence of actual or potential violations of federal and state laws and reimbursement rules. They fear that the creation of a general awareness of this information potential for whistleblowers to gain huge rewards can create a vulnerability that would not exist but for the compliance efforts."

"I am of two minds about this fear. On the one hand, I believe it is far out of proportion to the danger because many safeguards can be built into an effective system that will reduce the likelihood of such whistle blowing. On the other hand, I do believe that this fear is not baseless, and it must be acknowledged and addressed. It is important to remember that this fear has a negative impact on effective compliance efforts. Further, I believe much of this fear is due to flawed communication by the government."

Whistleblower Wizard: "Here you go again, Compliance King, trying to stuff evils back into Pandora's Box. HCA/ Columbia, SmithKline, Tenet. Apria Homecare and many other healthcare entities have made headlines nationally over the past decade. Significantly, more than half of all government investigations in the healthcare field stem from whistleblower activity. Every survey shows that most Americans believe healthcare fraud is rampant within the system."

"Companies who think that personnel learn about these issues solely because of their compliance efforts are kidding themselves Aggressive compliance efforts and a tight ship are their best solution, not the cause of their problems."

Compliance King: "You totally missed my point, but thanks for agreeing with me. Most providers' fears stem from the contradictions in the government's messages about compliance. The government proclaims loudly and righteously that healthcare providers that create and run effective compliance programs will enjoy a significant degree of protection. They incur substantial costs both in time and money because of those protections. Yet, at the same time, the government encourages whistle blowing. The government encourages whistle blowing even for organizations, which have effective compliance programs. The government encourages whistle blowing even when providers try their best to do it right. The government encourages whistle blowing even when the whistleblowers contribute to the problem. No wonder the industry is schizophrenic!"

"Here is one way the conflict can play out: Compliance programs offer protection by reducing the likelihood and severity of rule violations. By their very existence, compliance programs allow the possibility of reduced sanctions when mistakes occur. The government has acknowledged that it cannot police all reimbursement errors and other aspects of potential healthcare fraud. Compliance programs are therefore essential for the government to combat problems."

"It is in the government's best interests to do everything it can to encourage self-policing, because fraud, as well as mere mistakes or patterns of mistakes, cannot be addressed effectively without self-policing. The message we hear is, *'If you self-police, we will treat you better, we will give you the benefit of the doubt, we will treat*

mistakes as mere mistakes, we will be lenient with any areas of fraud or abuse which you identified or tried to fix, and in general, we will reward your efforts.'

"Yet, simultaneously the government embraces whistle blowing with passion and zeal. CMS, OIG, and DOJ officials defiantly proclaim that a whistleblower's character and motivations are not relevant to the government's ability to utilize their information against the affected healthcare organization. Even more important than specific instances where the government has embraced the "bad guys," the government has never, ever indicated that whistle blowing is or should be discouraged when a compliance program is in place, and when a healthcare organization is trying sincerely to do things the right way."

"Let me repeat—the government has never suggested that whistle blowing be discouraged when an effective compliance program is in place."

"So, healthcare organizations don't fear that whistleblowers may learn that whistle blowing rewards exist. Healthcare organizations don't fear that whistleblowers may learn about the law because of compliance initiatives. Rather, healthcare organizations fear that they will create compliance initiatives which do their job effectively—that is, dig out information, analyze it, craft a carefully considered course of action, implement it—and then discover that they have instead excavated, polished, and turned over to a whistleblower a thoroughly researched, well-organized evidentiary package, for delivery to the government."

Whistleblower Wizard: "What a bunch of hooey! What the heck is a 'carefully considered course of action'? The law requires that any healthcare provider that receives an overpayment must tell the government about that overpayment. If the provider fails to do so, it violates the law, civilly and/or criminally. A 'carefully considered course of action' should involve voluntary disclosure that is thorough and complete. Period. Only when internal assessment transmutes into internal cover-up does a provider become exposed to whistleblower liability. Which is as it should be."

"In fact, one might say that the contradiction is not in the government's message, but in the healthcare industry's message. On the one hand it says, *'Trust us, be nice to us, and be kind to us, because we have a compliance program.'* On the other hand, it says, *'But we will decide for ourselves how much to tell the government, how much to give back to the government, and the circumstances under which we will do so.'* This refusal to lay the true facts out fully and honestly is what creates the incentive for internal whistleblowers. Further, it is this refusal to deal with violations fully and directly which makes whistle blowing an important weapon in the enforcement armory."

Compliance King: "You're knocking down your own Straw Man when you talk about 'clear overpayments.' Much of the time, providers aren't concerned that they might ignore evidence of clear wrongdoing. Rather, providers are often concerned that they might run afoul of ambiguous and confusing nuances and details from the health care laws and reimbursement rules generally."

"The CMS official position is that healthcare providers must 'comply with all rules.' Unfortunately, the application of many Medicare/Medicaid rules to real life situations is frequently unclear. When should a provider interpret a rule broadly? The answer will, and should, depend on a number of factors. Is the risk of government challenge merely one of repayment? Or, would the government perceive this to be an attempt to defraud? Is this a matter of medical necessity within statutory coverage parameters, or is it a matter of technical noncompliance with some CMS reimbursement minutiae?"

"At the end of the day, it essentially comes down to the provider's good faith belief in the reasonableness of its interpretations of the Rules—or, at least, it should. Disagreements with government agencies or with fiscal intermediaries are not necessarily evidence of fraud. Mistakes are not necessarily evidence of fraud."

"However, the government has made clear that it believes providers should come forward with voluntary disclosure whenever they identify anything not 100 percent in compliance with all of the technicalities of the Medicare/Medicaid rules. If in doubt, disclose. If you are choosing the right way to interpret any unclear or ambiguous rule, choose the way which results in less money for the provider."

"But the law does not require every such disclosure. There is a substantial difference between remedying an unequivocal violation of the rules, and disagreeing with the government about an unclear regulation, an inconsistent intermediary policy, or any other ambiguity. There is a substantial difference between remedying a 'wrong' claim—duplicate billing, incorrect code, not medically necessary, etc.—and seeking payment (or keeping payment) or an 'imperfect' claim."

"If a healthcare organization's compliance program is operating effectively, all these ambiguities, inconsistencies, and risk-rewards questions generally will be identified, and then analyzed and evaluated in the ordinary course of business. Sometimes a healthcare organization will decide to exercise a conservative approach, refunding overpayments or correcting technical mistakes that do not go to medical necessity or entitlement issues. Sometimes a provider will decide to embrace this attitude for all situations, as a matter of philosophy or policy. But, other times a healthcare organization will legitimately decide to disagree with the most conservative interpretation of the rules, under a good faith belief that its interpretation is not incorrect, not inappropriate, or not unpersuasive. And sometimes a healthcare organization will conclude that a more conservative interpretation is appropriate to resolve a problem going forward, but that past mistakes do not require disclosure and/or repayment."

"Therefore, in a well-run, effective compliance program, there will likely be many times when a healthcare organization is willing to risk a payment challenge, with perhaps interest or even penalties as a potential cost of embracing a more liberal interpretation of the Medicare/Medicaid rules. These disagreements are not examples of cover-ups. They do not necessarily suggest ongoing fraud, nor even abuse of the system."

Whistleblower Wizard: "Man, you sure do talk a lot. You go right ahead and keep dancing on the head of that pin. A healthcare organization with a genuinely good faith belief that its interpretation of a regulation is correct should allow that interpretation to see the bright light of sunshine. Why not disclose the provider's interpretation of the rules? Hold it up to confirmation by CMS or the fiscal intermediary! If the healthcare organization is correct, there is no problem. If the healthcare organization is wrong under those conditions, there

would only need to be repayment because of the voluntary disclosure."

Compliance King: "Oh, give me a break! That is so naive! I have advised my clients for years that the danger of government scrutiny comes from the fact of the investigation, regardless of the result. Monetary costs are substantial, time investment is frequently staggering, and reputations are impaired or ruined by the mere existence of the scrutiny. To suggest that healthcare organizations should welcome the opportunity to air their internal laundry under the sunshine of a government investigation is totally at odds with my experience."

Whistleblower Wizard: "Thank you for making my argument for me, my unintentionally ironic friend. If a healthcare organization's goal is to avoid investigation by concealing its 'internal laundry,' some of the laundry is not only likely to look bad, but to smell bad. Because it is, in fact, filthy. The filth, of course, would be illegally obtained overpayments."

"I am concerned that an aggressive 'minimal disclosure' position would lead the healthcare industry to more investigations and more intrusive investigations, not less of them. Healthcare organizations have reported good experience with the voluntary self-disclosure program. These organizations have developed rapport and credibility with the OIG office. The disruption and expense of investigations for these organizations have been minimized."

"The purpose of an investigation is to determine facts. If a healthcare organization bills in a certain way, discloses to the OIG that it is doing so, and explains its rationale, there may be debate, but there would not be any investigation at all because the facts are not in dispute. In the example you describe, where there is agreement about what happened and disagreement only about what rules apply, there will be a debate, but no investigation, no costs and no harm. Or at least far less harm than arises from a whistleblower litigation."

Compliance King: "Well, I've counted at least five things you've said that are absolutely incorrect. But congratulations. Only four of them are stupid as well."

Whistleblower Wizard: "I am surprised that you can count up to five. Look, I understand that many healthcare organizations are frightened. Perhaps the government wants them to be frightened.

I realize that it is an uncomfortable feeling, but the plain truth is that whistleblower litigation is intended to have a deterrent effect. After all, this is about law enforcement. Years of persuasion and pleading have not gotten the healthcare industry to clean up its act. If healthcare organizations had taken this seriously a long time ago, they wouldn't be looking over their shoulders now."

Compliance King: "Oh, yeah?"

Whistleblower Wizard: "Yeah!"

[At which point the discussion broke off into a new format, more physical and without words.]

Health Law Center: "Thank you to our enlightened participants. We will continue this debate at a later date. Please note that portions of this discussion were inspired by an actual debate in 1999 between attorneys Neil Caesar and Mark Allen Kleiman. The ideas first presented there have been updated and expanded. Any resemblance by Compliance King or Whistleblower Wizard to any real persons is entirely coincidental."

"As the police have now entered the auditorium to persuade the participants to continue their debate at another location, we bid you farewell." ▪

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