



the
Healthcare
Convergence
Forum

Summary of Dialog
April 30, 2013

On Thursday April 30, 2013, the Healthcare Practice of Arnall Golden Gregory LLP organized a breakfast discussion for healthcare industry senior executives on the subject of operating a healthcare organization in an increasingly aggressive regulatory enforcement environment. We asked four healthcare leaders and influencers to serve as first among equals to jump-start the conversation:

- **Amy Berne, Esq.** – Assistant U.S. Attorney, United States Department of Justice. Ms. Berne is the Chief of the Civil Division for the Northern District of Georgia, where she coordinates healthcare investigations and False Claims Act actions on behalf of the federal government.
- **Robert M. Finlayson III** – Division Chief, Georgia Department of Community Health, Office of Inspector General. Appointed as the DCH Inspector General in 2008, Mr. Finlayson serves as the Division Chief over the State's Program Integrity Unit, Internal Affairs and the Audit Unit.
- **Mark Guza, Esq.** – Chief Compliance Officer, Piedmont Health System. Mr. Guza formerly worked with the Office of General Counsel of the Department of Health and Human Services.
- **Thomas F. O'Neil** – President, The Saranac Group LLC, a strategic advisor in the areas of corporate governance, business ethics, regulatory compliance, restoration of trust and monitoring. Mr. O'Neil is the former Executive Vice Chairman, General Counsel and Secretary of WellCare Health Plans, Inc.

This memo provides a brief summary of the dialog as we heard it. Please call or e-mail us with any additional information that we've missed and which you believe may be important for the group to recall. Thank you again for participating. We look forward to continuing the conversation.

SUMMARY OF DIALOG

Healthcare Regulatory Enforcement By The Numbers

- According to Modern Healthcare, the Department of Justice took in \$4.9 billion in collections and settlements through the False Claims Act in fiscal year 2012 — an all-time high, largely bolstered by over \$3 billion in collections from health care firms.
- Last year, there were 1,131 new criminal healthcare fraud investigations opened. 892 individuals and corporations were charged. There were 826 convictions, 367 civil actions.
- The Department of Health and Human Services Office of the Inspector General executed over 60 Corporate Integrity Agreements last year.
- For every one dollar that the government spent between 2010 and 2012 on healthcare fraud investigation, the government recovered \$7.90 from healthcare fraud settlements, fines and reimbursements.

The Origin of Cases

Amy Berne indicated that the biggest source of enforcement cases brought to the attention of her office is from qui tam complaints. Berne's team also gets referrals from the Office of Health and Human Services as well as from the Office of the Inspector General and the FBI. The Department of Justice is also doing more data mining of its own and developing more cases directly.

Rob Finlayson said that leaps in technology have enabled his office to aggregate and evaluate large data sets in a way that dramatically improves the odds of identifying problems. He added that the red flags which enforcement agencies look for in data are significant outliers in billing procedures from one year to the next or relative to the peer groups. Once a problem has been identified by an agency, the largest red flag is when a provider categorically denies that there's a problem.

An enforcement agency's mission, goals and incentives drive the rigor and volume of its case pursuit. The Georgia OIG – on its website - states its primary mission as follows: "The purpose of the Office of the Inspector General is to provide department oversight, audit, and provider enrollment certification services for the Department of Community Health so it can reduce fraud, waste, and abuse; increase assurances concerning the safety and security of the program members; and have confidence in the value to the taxpayer."

The OIG site goes on to describe the office's measures of success: "The Office of Inspector General Leadership Team members developed organizational goals, performance measures, and goal initiatives. By 2012, provider enrollment decisions will be made within 5 business days from the receipt of a completed application; By 2012, 80% of Program Integrity cases will be completed within 90 days; By 2012 there should be an increase on return on investment of the Office of the Inspector General 300.00% and by 2012 a balance scorecard evaluation system will be implemented division wide in order to evaluate OIG staff."

Finlayson also tracks the number of cases his staff has successfully identified to be a fraud case and referred to the fraud unit for them to successfully prosecute. While this measurement might incent a broadened definition of fraud, Finlayson added that his primary emphasis is "to be right...to come to the right conclusion."

Berne said primary driver of Department of Justice healthcare pursuits is to identify and pursue cases that will significantly impact the district in terms of the integrity of the healthcare system. In a February 2013 statement, Attorney General Eric Holder said the initiative was about, "safeguarding our world-class health care programs from abuse."

Managing Compliance

For compliance program leaders, it can be quite difficult to strike the balance between sustaining your independence and integrity on one the hand and on the other hand, really become enmeshed in the operations and adding value. Mark Guza said, "My general rule is, when we're in the room with operations and they're putting a new service or procedure together, I will commit to procedures but I will not commit to numbers. So if they're trying to achieve a certain goal financially, I will not commit to that. What I will commit is I think this procedure will work. If it doesn't get the financial results that they want, that's nothing I can guarantee or participate in. You have to be careful so as not to be drawn too much into the design of the system. So that you can still have the objectivity, you can come back in six months and audit it and say it's not right."

Tom O'Neil added, "It's really no different than the concept of in-house counsel that was pioneered really in the '70s and '80s. If you're perceived by the business as adding value because you mitigate risks in a reasonable way, at least 90% of the time, they will come to you for advice because they realized long-term whatever they embark on is going to be sustainable. Your compliance program and the government's expectations ought to be aligned with the shareholders of the company because what the government wants to know is, does the compliance program effectively mitigate the risks? If it does, most likely it will be grounded in integrity. It will award transparency. It will impose institutional and personal accountability. People will be responsible for what they do. People will effectively self-police the organization. Then it will have a process for effective self-reporting at the end of the day. You shouldn't need the government to come in and do this work if you really want to be sure that you can retain your profits long-term."

And, O'Neil was quick to emphasize where the ultimate compliance responsibility is held, "I think everyone needs to understand that the buck stops in the boardroom whether you're a privately held company or a publicly traded company or a non-profit or a for profit. At the end of the day, the heart of the oversight responsibility will lie with the board."

Surviving Government Investigation

- Our panelists highlighted a multitude of attitudes, behaviors and initiatives which increase the odds of a more positive resolution to a government investigation or, better still, avoiding one altogether.
- Maintain a compliance culture and a rigorous and comprehensive compliance program
- Make compliance and the ethic of "honor" an integral part of the organization
- Ensure your Compliance team's objectivity by keeping them clear of getting too drawn in to planning of new procedures and engaging in financial decision-making regarding operations
- Senior provider executives should not be taken by surprise by compliance problems
- Track Recovery Audit Contractor reviews and agendas
- Track what government is looking at in enforcement efforts
- Pay attention to reimbursement structure and related incentives and their unintended consequences
- The buck stops in the boardroom: the heart of the oversight responsibility will lie with the board
- Compliance program effectively mitigates risks, is grounded in integrity, awards transparency and imposes both institutional and personal accountability.
- Demonstrate that you have a Board comprised of independent talent, perspective and expertise
- Board exercises its responsibility to oversee compliance and risk mitigation in the most prudent manner without a system that's presumptively antagonistic to management.
- Board members are educated so they understand their oversight responsibilities and are actively involved in it.
- Board has to have a highly tuned ear to what they're hearing from management and whether or not they're hearing "spin."
- Raise and sustain organizational awareness of your compliance program and team
- Foster an environment where employees feel comfortable and safe confiding in compliance staff
- For smaller physician practices, make sure competent professionals are doing your billing and keeping your books.
- Conduct regular internal audits
- Do baseline, preventative monitoring of higher risk activities such as coding
- Be quick to develop, enact and communicate corrective action plans and resolutions
- Voluntarily disclose problem matters
- Take a cooperative, transparent approach in working with the investigating government entity
- When internal investigations occur, they must be demonstrably broad and extensive
- Demonstrate that you made a good faith effort to assess the scope of the problem, how long it existed, how widespread it was in the organization, how far back it went, document when that problem started and how you remedied it.

We look forward to seeing you at future events.