

# COMPLIANCE HOTLINE™

THE NATION'S ESSENTIAL ALERT FOR HEALTH CARE COMPLIANCE OFFICERS

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## New responsibilities complicate compliance officer's job

*Experts say privacy, quality-of-care issues are transforming traditional role*

Privacy, quality of care, and research are among the emerging issues that are transforming the health care compliance landscape, warn the incoming officers of the Health Care Compliance Association (HCCA) headquartered in Philadelphia. But how compliance officers can cope successfully with change in these areas will vary greatly among organizations.

Incoming HCCA president **Gregory Warner**, director of compliance at the Mayo Foundation in Rochester, MN, says while most compliance efforts over the last three years have focused on Medicare billing and fraud and abuse issues, other areas such as research and quality of care increasingly are becoming the responsibility of compliance officers. That means hospitals must examine the way their compliance offices are organized, he says.

**Sheryl Vacca**, HCCA's new vice president,

says the role of compliance officers still is evolving. "Initially, it was very difficult to know what that role was because this was new to our organizations," explains Vacca, a director at Deloitte & Touche in Sacramento, CA. Today, it is difficult because of the growing list of responsibilities such as privacy and quality-of-care investigations.

According to **Michael Hemsley**, HCCA's second vice president, the emergence of these multiple responsibilities means the role of compliance officer increasingly involves coordination

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## Privacy officer: Another duty for compliance?

One question facing hospitals now that the medical record confidentiality portion of the Health Insurance and Portability and Accountability Act (HIPAA) of 1996 has hit the street is: "Who to appoint as privacy officer?" The privacy standards, released in December, require health care organizations to designate a privacy official who will be responsible for the development and implementation of policies and procedures surrounding privacy.

There is no single right answer to who should be the privacy officer, according to **Al Josephs**, director of corporate compliance at Hillcrest Health System in Waco, TX. Some organizations may give privacy responsibilities to the compliance officer, but whether that happens or not, the compliance officer should have a role in monitoring the organization's adherence to these rules, he asserts. "It has to fit well within the culture of the organization, and different organizations may

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## Court decision could boost 'advice of counsel' defense

While many defendants in civil False Claims Act (FCA) cases contend they should not be held liable for punitive damages and penalties if they sought and followed the advice of legal counsel, this defense is almost never accepted by the court, according to FCA expert **John Boese**.

But in what he calls an "unusual and important recent decision," Boese, of Fried Frank in Washington, DC, reports a physician succeeded in having FCA claims dismissed with prejudice by asserting the "advice of counsel" defense.

In this case, *U.S. v. ex rel. Bidani v. Lewis*, the relator alleged the defendant received illegal

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## New challenges

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and consultation as much as oversight. In fact, he says compliance officers who attempt to run all these tasks directly out of the compliance office on their own do so at their own peril.

"The government is throwing a wider net, and compliance officers must have a broader view of the organization's responsibilities," Hemsley says. "It is going to be largely a matter of coordinating more diverse groups within the organization because it is far more than one person can handle."

But moving responsibility and accountability beyond "the compliance suite" is no easy task, he warns. For one thing, compliance officers must maintain their role as leader and spokesperson for compliance within the organization even as compliance migrates into operations, adds Hemsley, who also is vice president of corporate compliance and legal services for Catholic Health East in Newton Square, PA.

According to Hemsley, managing the new privacy requirements mandated by HIPAA is only the latest example of expanding responsibilities. The same is true in the area of risk as the government extends its reach beyond billing and coding to other areas that implicate federal dollars. "The government has gone beyond billing," he asserts. "Now compliance needs to go beyond billing, although that is obviously still the highest-risk area."

Hemsley points out enforcement officials now are looking for patterns of problems with patients that deal with areas such as nutrition, nursing care, and staffing levels. "The question is whether the organization is identifying those problems, assessing the causes, and taking some remedial measures," he says.

But while that may be the only way to prevent these problems from becoming fodder for False Claims Act allegations, Hemsley says compliance officers must be careful not to try to manage that entire area alone.

Vacca warns it is no longer just the federal government but increasingly state and local agencies that now are scrutinizing hospitals. In addition, the Joint Commission for Accreditation of Healthcare Organizations (JCAHO) now is emphasizing patient safety standards.

While JCAHO always has played some role in this area, it is now formalizing that role and emphasizing performance improvement, outcomes measurement, and data analysis, Vacca reports. "I would not be surprised if some of these parties do not start working in more of a collegial fashion to identify the deficits in our industry," she adds.

The Joint Commission is getting mostly positive reviews on its recently approved standards focused on patient safety and medical error reduction in hospitals. But experts warn that integrating these new standards into existing safety protocols will be no easy task.

The new standards augment the nearly 50% of current Joint Commission standards related directly to patient safety. Requirements for establishing ongoing patient safety programs in organizations accredited under the *Comprehensive Accreditation Manual for Hospitals* will be added in the areas of leadership, management of information, and other functions. The anticipated implementation date for the standards is July 2001. ■

## Privacy officers

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have different skill sets."

"If the compliance officer is struggling to get the basic compliance program running, I don't think the answer is to lay another job on them," warns **Michael Hemsley**, vice president of corporate compliance and legal services for Catholic Health East in Newton Square, PA. "Then the question is, 'Who should do that, and how does that tie in

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to the larger compliance program?”

The Chicago-based American Health Information Management Association (AHIMA) this month attempted to offer some guidance in this area when it released a sample position description as a template for organizations to use as they develop privacy officer positions.

According to AHIMA, the privacy officer should oversee all ongoing activities related to the development, implementation, and maintenance of the organization's policies and procedures covering the privacy. That person also should be charged with ensuring that access to patient health information is in compliance with federal and state laws as well as the health care organization's information privacy practices.

AHIMA recommends the privacy officer's immediate supervisor should be the CEO, senior executive, or head of the health information management department.

Among the responsibilities outlined by AHIMA, the privacy officer must:

- ♦ provide development guidance and assist in the identification, implementation, and maintenance of organization information privacy policies and procedures in coordination with organization management and administration, the privacy oversight committee, and legal counsel;
- ♦ work with the organization's senior management and corporate compliance officer to establish an organizationwide privacy oversight committee and serve in a leadership role in the committee's activities;
- ♦ perform initial and periodic information privacy risk assessments and conduct related ongoing compliance monitoring activities in coordination with the entity's other compliance and operational assessment functions;
- ♦ work with legal counsel and management, as well as key departments and committees to ensure the organization maintains appropriate privacy and confidentiality consent, authorization forms, and information notices and materials reflecting current organization and legal practices and requirements;
- ♦ oversee, direct, deliver, or ensure delivery of initial privacy training and orientation to all employees, volunteers, medical and professional staff, contractors, alliances, business associates,

and other appropriate third parties;

- ♦ participate in the development, implementation, and ongoing compliance monitoring of all trading partner and business associate agreements to ensure all privacy concerns, requirements, and responsibilities are addressed.

AHIMA's entire sample position description is available at [www.ahima.org](http://www.ahima.org). ■

## FCA decision

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kickbacks by referring dialysis patients to supply companies owned and controlled by the defendant. Evidence was presented in a motion for summary judgment showing the physician relied on the advice of counsel about the legality of the disputed arrangements.

“It would seem to develop a new defense of False Claims Act cases,” asserts Houston health care attorney and former federal prosecutor **Michael Clark**. He says the one limitation is that the advice probably has to be measured against some type of standard to make sure it was reasonable.

While it can be viewed as a defense, Clark's partner **Lee Hamel** says it is more accurately “evidence” on the issue of defense. “If there is no contrary evidence in a summary judgment situation, the court can accept it as correct if it meets all specified criteria and could grant a summary judgment,” he explains. “I think it is very significant from that point of view because the summary judgment [is] based upon the issue of intent.”

Boese says while the court never decided whether the applicable statutes and regulations have been violated, it also stated the relator has the burden to show that defendants knew their conduct violated applicable regulations in order to satisfy the FCA requirement.

According to Boese, client memoranda and other attorney-client communications regarding the ownership relationship were considered by the court, which held that the only reasonable inference that could be drawn from the evidence was that the defendants had no actual knowledge that the common ownership arrangement was improper.

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Attorney/client memoranda have been an area of much concern for health care attorneys in recent years.

The issue drew significant attention in 1999, when two health care attorneys who represented Baptist Medical Center in Kansas City, MO, were charged with conspiracy as part of a kick-back and bribery investigation. However, the attorneys were acquitted, and the wave of attorney indictments anticipated by many at the time never materialized.

Hamel says the Kansas City case sounded a note of caution to those who advise their clients on anti-kickback and fraud and abuse issues. "They are now much more careful in my opinion," he reports. "You will never again see attorneys taking notes on their observations about their clients."

**Gabe Imperato** of Broad and Cassel in Fort Lauderdale agrees the most significant effect of the aforementioned case has been the sentinel effect rather than more direct enforcement actions against lawyers.

In fact, he says most counsel will no longer participate in arrangements between sources of referrals unless they can bless those arrangements with a bulletproof legal opinion.

Consultants also are seen as vulnerable. Clark points out in the *qui tam* suit against Columbia/HCA, the government alleged the accounting firm compiled a cost report that analyzed certain "soft spots," but filed a different one. "The government says that shows they intended to defraud," he explains. "But accounting firms always give analyses to their clients about gray areas."

In another case involving Columbia, the Sixth Circuit issued a decision last week that could increase the exposure of corporate directors who fail to give appropriate attention to potentially fraudulent activities. In *McCall v. Scott*, the Court of Appeals reversed the dismissal of certain claims against current and former directors of Columbia/HCA.

Boese says those claims were filed after Columbia's stock price declined significantly in the wake of news that the health care company was under investigation for a variety of Medicare and Medicaid fraud allegations. The plaintiffs alleged some members of the Columbia Board

intentionally or recklessly failed to stop allegedly fraudulent conduct in order to increase revenue and profits.

"I don't take it to be a shocking decision," says Imperato. "But it underscores the need for corporate directors to be on top of allegations of fraudulent or abusive conduct detrimental to the shareholders of a company."

Boese contends the McCall decision is "incorrect and unduly harsh," and predicts that few other courts will act in a similar fashion. Nevertheless, he says whistle-blower actions and criminal investigations mean that inside and outside counsel must be certain the board becomes aware of and carefully monitors allegations of fraud or illegal conduct, no matter how valid or accurate.

"No board of directors can afford not to inform itself of the relevant facts when such allegations are made," asserts Boese.

That means the board as a whole or through a designated committee should meet regularly with corporate compliance officers and inside and outside counsel to keep apprised of the status of allegations of fraud. ■

## EMTALA teleconference offers advanced solutions

On Thursday, March 29, the publisher of *Compliance Hotline* will offer the teleconference *Advanced EMTALA: Solutions to Today's Toughest Compliance Dilemmas*.

This advanced teleconference will bring you detailed answers you won't find anywhere else about the "patient-dumping" regulations. Speakers will discuss the role of nonphysicians in medical screening examinations and clarify complex challenges.

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