

# General Counsel, Outside Counsel, and Chief Compliance Officer: A Collaborative Approach



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## Presentation Outline

1. Differing Approaches to Navigating a Regulatory Problem
2. The Historical Context: The Compliance Function as Distinct From The Legal Function
3. Thinking Like a Compliance Officer v. Thinking Like a Lawyer
4. A Place for Both: Differences in Professional Obligations and Responsibilities
5. Authority and Internal Reporting Within the Organization
6. The Issue of Privilege and Recent Case Law
7. Agree to Disagree: Working Toward Productive Discourse Between Compliance Officer and Legal Counsel



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## Differing Approaches to Navigating a Regulatory Problem: A Compliance Fable



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### Hypo: Once More Into the Breach

Nurse X, a longtime hospital employee, was in a bind. That morning, he had needed to communicate a message about Patient A's medical condition and treatment plan to Patient A's daughter, who is Patient A's primary caretaker. According to Patient A's admissions records, such communications were to be made solely via the daughter's cell phone number. Although Nurse X thought he had left a message for the daughter at what he thought was an appropriate number, Nurse X had misread the record and mistakenly left the message on the general voicemail box at the daughter's place of work.

Nurse X had encountered the daughter later that day and the daughter was clearly unhappy. The daughter berated Nurse X for his mistake and said that she was considering speaking with her uncle, who had been "pre-law" in college, before his acting career had taken off following a particularly well-regarded performance in a carbonated beverage commercial.

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### Hypo (con't.): Once More Into the Breach

Nurse X had encountered the daughter later that day and the daughter was clearly unhappy. The daughter berated Nurse X for his mistake and said that she was considering speaking with her uncle, who had been "pre-law" in college, before his acting career had taken off following a particularly well-regarded performance in a carbonated beverage commercial.

GC's POV: Nurse X violated the hospital's confidential communications requirements. It's a terminable offense. Let's just end this issue today. I'll call the daughter and tell her we'll fire the staff member involved and offer her free food in the hospital's cafeteria for life to sign a release and non-disclosure concerning the matter. We had an embarrassing HIPAA breach last year that was reported in the local press. I don't want this getting out there even if it's a minor matter.

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### Hypo (con't.): Once More Into the Breach

CCO's POV: I think there is a bigger problem that needs resolution here. The misread phone number was human error, but Nurse X violated the minimum necessary rule by leaving a message detailing both Patient A's medical condition and treatment plan for the daughter. Better to be transparent about this and use the incident as a teaching opportunity. The hospital needs to clarify this issue for all employees and possible to implement new procedures in this regard. Our employees need specific training as to what information may be left in a voicemail message. As you mentioned, we've had HIPAA breach issues recently. We need to commence an internal audit of HIPAA-related matters and modify our compliance program accordingly.

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# Legal vs. Compliance: Some Historical Context



- ❑ The Notion of a Compliance Officer, as Distinct From a General Counsel, is Relatively New.
- ❑ What are the Regulatory Underpinnings of the Compliance Function?
  - CIAs and Deferred Prosecution Agreements
  - *U.S. Sentencing Guidelines Manual Ch. 8, introductory cmt. (1991)* (sets forth components of an "effective program to prevent and detect violations of law" and directs prosecutors and judges to assess the effectiveness of the compliance program in determining fines and considering the possibility of mitigation).
  - Later amendments underscore that compliance function must be overseen by "high level personnel of the organization" (2007) and direct reporting to the board of directors (2010).
  - *In re Caremark Int'l Inc. Derivative Litigation, 698 A.2d 959, 970 (Del. Ch. 1996)* (corporate directors obligated to ensure that corporation maintains effective "information and reporting system . . . and that failure to do so under some circumstances may, in theory, render a director liable for losses caused by non-compliance with applicable legal standards").

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## More History About the Compliance Function

- Department of Health and Human Services, *OIG Compliance Program Guidance for Hospitals*, Federal Register, Vol. 63, No. 35, Feb. 23, 1998, 8987, at 8993, fn. 35, ("Free standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institute's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel . . . a system of checks and balances is established to more effectively achieve the goals of the compliance program.")
- The OIG's point of view was reinforced in subsequent industry-specific guidance.




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## Even More History About the Compliance Function

- *OIG Supplemental Compliance Program Guidance for Hospitals*, Federal Register, Vol. 70, No. 19, Jan. 31, 2005, 4658, at 4674 (asking, "Is the relationship between the compliance function and the general counsel function appropriate to achieve the purpose of each?")
- U.S. Senator Charles Grassley in a letter to Tenet Healthcare Corporation:
 

"Apparently, neither Tenet (nor its General Counsel) saw any conflict in her wearing two hats as Tenet's General Counsel and Chief Compliance Officer...It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement."




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Okay... Okay...

So I Understand That I Need a Compliance Officer ("CO") to Oversee the Compliance Function...

But What Does That All Mean?

Don't I Already Have a General Counsel ("GC") to do Compliance Stuff? Can't the GC just do both?



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**Legal vs. Compliance: Differing Objectives?**

□ Some Commentators Believe that the GC and CO Have the Same Objectives. But is This Accurate?

□ What's a GC's Role?

> Model Rules of Prof'l Conduct R. 1.13 (2017) (emphasis added):

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is . . . violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.



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**Legal vs. Compliance: Differing Objectives?**

□ Proceeding in the "Best Interests of the Organization" Sounds a lot Like "a Lawyer Zealously Asserts the Client's Position Under the Rules of the Adversary System." Model Rules of Prof'l Conduct: Preamble and Scope [Para. 2] (2017).

□ The ethical duty to give sound legal advice and to zealously represent your client(s).

□ Ethical responsibilities and duties primarily derived from the Model Rules of Professional Conduct

□ Model Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

□ Model Rule 1.6 Confidentiality of Information

□ Model Rule 1.13 Organization as the Client

□ Model Rule 4.1 Truthfulness in Statement to Others



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### Whatever the Objectives, Different Ways to Get There.

- ❑ The GC Gets There Through the Traditional Definition of an Attorney's Role:
  - Providing Legal Advice and Advocating on Behalf of the Organization.



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### So Where Does this Leave the GC?

- ❑ Provides Counsel on Legal Matters and Implications to the Organization
- ❑ Participates Managerially as a Business Strategist
- ❑ Provides Transactional Advice
- ❑ Negotiates and Approves Key Contracts
- ❑ Provides Litigation Advice
- ❑ Manages and Oversees Outside Counsel
- ❑ Supervises Internal Legal Department Staff



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### Differing, but Complimentary, Roles and Responsibilities

- ❑ The CO Gets There Through Management:
  - Creating, Implementing, and Maintaining an Effective Compliance Program Designed to Prevent, Detect, and Respond to Potential Violations of Laws, Regs, ....
- ❑ The CO Takes the GC's Legal Advice and Translates it Into Managed Action For Which Staff is Held Accountable.



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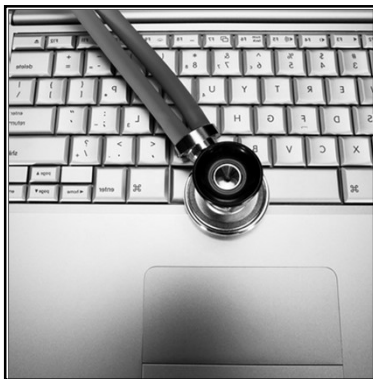
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### So How Does This Look on the Ground?

- ❑ What Does a CO's Day-to-Day Look Like?
  - Policies and Procedures
  - Education and Training
  - Auditing and Monitoring
  - Incident Investigation and Resolution
  - Hotline
  - Internal Reporting and Communication
  - Compliance Matter Response and Correction
  - Compliance Infrastructure
  - Guidance
  - Designing and Assessing Internal Controls
  - HR Management

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**Organizational Hierarchy: Different Models of Authority and Reporting**

- ❑ **Option #1:**
  - The CO is Subservient to and Reports to the GC.
- ❑ **Option #2:**
  - The CO Operates in Parallel to the GC and Reports Above or Around the GC.
- ❑ **Option #3:**
  - The GC and CO are the Same Person.

✓ Let's Talk Pros and Cons...

✓ Is There a Right or Wrong Way?




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**OIG and DOJ Think so ...**

- ❑ "OIG believes an organization's Compliance Officer should neither be counsel for the provider, nor be subordinate in function or position to counsel or the legal department, in any manner." *OIG, AHIA, AHIA, and HCCA, Practical Guidance for Healthcare Governing Boards on Compliance Oversight (2015) at 7.*
- ❑ "Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors? . . . If not, how has the company ensured their independence?" *DOJ, Evaluation of Corporate Compliance Programs (February 8, 2017) at 3.*




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**But Not Everyone is Comfortable With That...**

- ❑ "The general counsel of a public corporation should have primary responsibility for assuring the implementation of an effective legal compliance system under the oversight of the board of directors." — *Cheek III, J.H., et al., Report of the American Bar Association, Task Force on Corporate Responsibility, 2003 at 32.*
- ❑ "Our hypothesis, one clearly borne out by the data, is that generally speaking, the dedicated [Chief Ethics & Compliance Officer] today has neither the corporate stature nor the internal relationships associated with the GC" and is, therefore, less effective in an independent role. — *LRN 2015 Ethics and Compliance Effectiveness Report.*
- ❑ "Our data also shows [sic] that compliance and ethics functions most often report organizationally to the chief legal counsel—this reporting structure occurs in 36% of companies, up 5 points from 2015." — *PwC State of Compliance Survey (2016).*




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**Maybe What's "Right" Depends on the Organizational Objective**

- ❑ What's the Goal of Your Organization's Compliance Function?
- ❑ Reduce Liability?
- ❑ Detect and Prevent Regulatory Violations?
- ❑ Are These Always Consistent Goals?
- ❑ Do They Ever Conflict?




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**Biggest obstacle for many CCO's is the privilege question and "legal advice"**

- ❑ CCO is not legal counsel for corporation
- ❑ Split in roles must be recognized
- ❑ Manage expectations and scope of role




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### Recent Case law

- ❑ U.S. *ex rel* Barko v. Halliburton Co., 2014 WL 1016784 (D. D.C. 2014)
- ❑ *In re* Kellogg Brown & Root, Inc., 2014 WL 2895939 (C.A. D.C.2014)
- ❑ U.S. *ex rel* Baklid-Kunz v. Halifax Hospital Medical Center, 2012 WL 5415108 (M.D. Fla. 2012)

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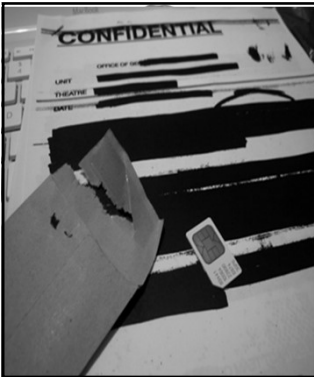
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### Barko

- ❑ Addressed application of attorney-client privilege to internal investigation
- ❑ Could privilege attach to investigation related to company's compliance program? - NO
- ❑ Investigations not tied to seeking advice from outside counsel
- ❑ Interviewed employees not informed of purpose of investigation
- ❑ Applied "but for" determination, i.e. the communication would not have occurred if not seeking legal advice

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### Barko Concerns

- ❑ Undercut many common practices and assumptions
- ❑ Called into question scope of attorney-client privilege
- ❑ Involvement and direction of legal counsel very important
- ❑ Can investigations driven by regulatory compliance be privileged?

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### Kellogg Brown & Root (KBR)

- ❑ Appellate decision reversing Barko
- ❑ Restored previous expectations regarding attorney-client privilege
- ❑ Four key takeaways:
  - ❑ Being in-house counsel does not dilute privilege
  - ❑ Investigations by non-attorneys at attorney's direction can still be privileged
  - ❑ No "magic words" needed
  - ❑ Investigation pursuant to regulatory requirements can still be privileged

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### KBR – Takeaways

- ❑ Review policies and procedures regarding internal investigations
- ❑ Contact counsel when internal investigation needed
- ❑ Let attorneys direct investigations
- ❑ Document attorney's involvement and fact investigation for seeking legal advice
- ❑ Despite no requirement for "magic words," let employees know purpose of investigation
- ❑ Include attorneys in all communications
- ❑ Mark privilege on documents

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in-house  
counsel



### Halifax Health

- ❑ Discovery decision addressed applicability of attorney-client privilege to emails and other communications
- ❑ Among documents are issue were created by or directed to in-house counsel and compliance personnel
- ❑ Court held that communications to in-house counsel and corporate employees **not** entitled to presumption of privilege

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### Halifax Health

- ❑ Court found following types of communications not privileged:
  - ❑ Compliance logs
  - ❑ Audits and fair market value communications by compliance, finance and case management departments
  - ❑ Emails from in-house counsel and compliance personnel – compliance not considered legal

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### Halifax Health Takeaways

- ❑ Non-lawyers should explicitly ask for legal advice or that info is to help with advice
- ❑ Just copying lawyer on email will not usually get privilege applied
- ❑ Clearly state when non-lawyers are acting at the instruction of an attorney
- ❑ Involve outside counsel

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### Real Life Examples

- ❑ Medical Assistants billing
  - ❑ Billing for services directed by physicians
- ❑ HIPAA violations involving a resident
  - ❑ Inappropriate access of medical records
- ❑ Resident billing questions
  - ❑ Billing for services performed by residents and supervision requirements
- ❑ HIPAA violation involving a vendor
  - ❑ Question whether patient information provided to medical equipment company
- ❑ Division Chief billing but not performing services
  - ❑ Billing for services not personally performed

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### Lessons Learned

- Involve counsel whether it be internal or external
  - Earlier the better
- Attorney's ethical obligations may drive a different result than client wants
  - Client skirting the edge creates complex situation
- Open and honest relationship very helpful
- Attorney, in most instances, must respect client's wishes

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### Productive Discourse Between the CO and GC: A Happy Ending?

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### Let's Tease Things Out ... What are the Items in Conflict Here?

- Who Controls the Balance Between Protection From Liability vs. Program Transparency and Aggressive Detection and Prevention?
- Who Gets to Control the Allocation of Financial and Human Resources?
- Who Gets to Quarterback the Response?
- Who Gets Heard by the CEO/Board with regard to the issue(s)?
- What Constitutes a "Win"?
- Where Does "Legal" End and "Compliance" Begin? How do they each revisit the issue later?
- Who is "In-Charge" at the Points of Overlap?




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Thank You

Thank You. Questions?

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**NM1** Nick Merkin, 10/1/2014