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The role of the compliance professional in healthcare transactions

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Traditionally, compliance has focused on preventing bad things from happening. Before we talked about compliance, we talked about risk management, which had the same objective. An example of risk management is identifying bad physicians—those with too many bad outcomes—and restricting their activities, requiring continuing medical education or proctors, or otherwise trying to prevent bad outcomes.

For compliance professionals, as you know, the bad things to prevent include adverse audits and recoupments. However, preventing a loss will never be as interesting to a CEO as making a profit or, for the nonprofit practice, having a margin after expenses. In either case, black ink is better than red ink. It's about survival.

I believe this is why compliance officers are usually not found in the C-suite.

The tension between compliance and profitability

The things compliance professionals say can't be done—unbundling of services, upcoding, and the like—don't enhance profitability and the chance of survival in a world where the bottom line determines who survives and where those who cut corners on compliance and bend or break the rules often seem to prosper (until they don't, of course). Even the nonprofits have to worry about the bottom line. I remember, as a young lawyer, talking to a CEO of a large community hospital about a joint venture he had with a group of wealthy psychiatrists for the creation of a psychiatric hospital for their well-off patients. When I asked him about how this project fit into his charitable mission, he responded: "No margin—no mission."

Traditionally, compliance professionals have not been seen as allies in the quest to make money, rather as simply necessary players to help prevent losses in the form of fines, suspensions, or recoupments.

However, in an era of consolidation, the compliance professionals are becoming important players in helping to make the deal happen, which is, increasingly, the key to survival. My message today is this: You can be an important part of the deal-making process—be it a loan or a merger. The opportunity to be a part of making a margin can empower you in your quest to fulfill the mission of compliance, which I like to define as quality care billed honestly.

Due diligence in commercial and healthcare transactions

Commercial transactions require due diligence. This is the process by which, for example, the lawyers, accountants, and consultants for a bank, an acquiring organization, or other potential business partners assess the risk of doing business with your hospital, ambulatory surgery center, or medical practice. This is how they determine whether the deal is worth the risk. In the past, performing due diligence meant reviewing financial statements, including income statements, to look at revenues, expenses, and trends in profitability; reviewing balance sheets to assess the level of debt; and possibly reviewing accounts receivable aging reports to evaluate the revenue cycle process. Traditionally, due diligence also included reviewing title to real estate. Bottom line questions included:

- Is the organization making money?
- If not, can it be turned around?
- Does the organization have clean title (a.k.a. clear title) to its real estate, land, and buildings?
- Is it in compliance with its contracts?
- Is there pending litigation, and, if so, does it pose a threat to the business?

In the case of hospitals and other similar institutions, this probably would not have included a sophisticated analysis of malpractice claims. In the past, banks generally considered hospitals and other similar facilities to be the same as the other commercial business enterprises and without much appreciation for the unique aspects of healthcare. Often it led to them being unaware of the important and unique risks associated with the business of providing healthcare services.

In short, the traditional process of due diligence known to business lawyers ignores important issues that keep compliance professionals awake at night, such as fines, suspensions, and other restrictions on services, loss of licensure, loss of the 501(c)(3) status, loss of accreditation, large malpractice claims, billing and coding audits, prepayment reviews, and payment suspensions and recoupments. However, banks making loans and private equity firms providing funds for consolidation of medical practices, to name a few, are increasingly asking more questions and requiring due diligence to consider the unique risks associated with doing business with healthcare organizations.