

Danger, Danger: Compliance Documentation as a Weapon

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by Roy Snell, CHC

Remember that old TV show, "Lost In Space"? It was about a group of people lost in space with their "pet" robot. Whenever the robot got a hunch that there was trouble coming, he would make odd noises, spin his head around, and flail his arms. He would cap off this visual malady by saying, "Danger, danger...danger, danger." Everyone on the show would start to run in all directions.

The robot did not explain what the danger was-he was essentially just saying, "We're in big trouble." Lately, I feel like making odd noises and flailing my arms, and the words "danger, danger" keep rolling around in my head. I sense big trouble coming our way in the compliance industry.

Beyond the Scope?

A few compliance professionals have recently told me that an outside investigator (the Department of Justice, Office of Inspector General) asked for their compliance documents as a part of an investigation. Danger, danger!

Compliance documents can be requested for two general purposes:

- to establish if your facility has an active compliance program and if you take compliance seriously
- if the documents can be used to find new problems to pursue or to help close a case currently under investigation

It is fair for an agent to review your compliance program to understand your commitment to compliance. However, we are in for some trouble if the compliance documents will be used against our organizations. The compliance professionals that I have talked to think that the agent is fishing for other problems or using the compliance documents to bolster their criminal or civil case.

The documents obtained include policies, procedures, hotline logs, and audit reports. Compliance professionals know that if our hotline logs were routinely obtained by outside investigators and used against the organization, it could damage the trust we have established with our employees. It's already difficult to get people to turn in their concerns promptly without the threat of the information being obtained by an investigator and used against the organization. It's ironic that those who insist on effective compliance programs in healthcare could be unintentionally hindering our progress.

Protecting the Process

The part of this trend that most concerns me is that outside observers (such as the media) may not understand how harmful this practice may be. Outside investigators seem unaware of the damage they could cause just checking that a facility follows up on everything reported to the hotline. It seems harmless enough, but it may not have dawned on the investigators how damaging using compliance documents to prosecute a case could be to an organization.

A government agent's point of view is that compliance is based on the theory that we are looking for our warts and if we find them, we should expose them to the world. That is hard to argue with. However, outside observers may not understand why healthcare facilities want to protect potentially damning information. They wonder why we want to conceal problems until we can resolve them. But few people understand that compliance is a terribly long journey and it takes time.

Healthcare organizations need to walk before they can run. We need time to take care of day-to-day compliance challenges. We need to convince doctors and administrators that compliance is the right thing to do. We need to convince people that self-discovery is better than attorney-client privilege and settlements. It is tough to get our organizations to allow compliance professionals to search for problems, but it will be more difficult if each self-audit could be used by the government to prosecute the facility.

Similarly, our policies and procedures are being used against healthcare to reach settlements. Doctors and administrators who find themselves in an investigation are being shown their organization's compliance documents to prove that they knew or should have known that what they did was wrong. The intent is to escalate the charges to fraud and abuse. In the meantime, how can compliance officers get the policies and procedures we need passed by the facility's board of directors if the government uses them against us?

Self-policing the Best Option

The government has the right to ask for any documentation it wants, but it would be more helpful to the healthcare industry in the long run not to use compliance documents against healthcare organizations. The banking industry's compliance programs have matured to this point, but healthcare's have not.

Why does healthcare lag behind other industries in compliance activities? Because there is no other industry with such a complicated billing system. Each patient encounter is like a snowflake-no two are the same. Each healthcare organization has thousands of products to price and bill for, from bedpans to brain surgery, and each payer has a different set of rules.

It is better for the healthcare industry that we police ourselves rather than having hundreds of agents doing it. If we police ourselves, then the government can go after other systems within our society that do not self-police. Compliance programs and self-examination are more effective than hiring hundreds of agents, but they take time. Compliance programs need time to mature and be accepted. And given enough time and resources, we can take care of our own problems.

Healthcare has come a long way with its compliance programs. If the documents we create to solve our own problems are used against us, the road to compliance will be longer.

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