Permissible vs. Proper: The fine line between rules and values

an interview with Michael Josephson, President and Founder, Josephson Institute of Ethics and 2014 Compliance Institute Keynote Speaker

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Compliance and quality of care, Part 2: The physicians’ perspective

» Learn strategies for educating physicians about compliance issues.
» Key teaching principles have proven useful in educating physicians.
» Identify the most common compliance and quality risks for physicians and include them in educational materials.
» Make compliance a solid and real concept for physicians by pointing out the role of compliance in preventing malpractice claims.
» Malpractice insurance carriers are starting to offer privacy breach insurance as well.

“Physicians drive compliance. A major concern for compliance officers continues to be ensuring that physicians understand their role in preventing fraud, abuse, and waste…”

This quote, written by a physician/attorney and a compliance officer, clearly illustrates the need for compliance officers to educate physicians. It also addresses a key concept: Physicians can drive compliance and quality at the intersection of physician and patient, where effective care is delivered and the fundamental acts of compliance occur. The quote further illustrates that an aware physician recognizes that compliance occurs (or fails to occur) at the moment care is delivered and documented in a manner that allows an organization to bill for services provided.

Educating physicians about compliance is an ongoing challenge for compliance officers and organizations. At the heart of that challenge lays the task of making compliance a solid and real concept. Patient care providers are justifiably focused on delivering the medical care that is needed to treat a patient’s condition. As their primary, if not only, focus they usually fail to consider compliance and potential risk management issues concurrently, or prospectively for that matter.

One issue keenly understood by physicians is that of medical malpractice. Most physicians have been or will be involved in malpractice lawsuits during their career. Healthcare organizations obtain lists...
of malpractice actions when considering providers for medical credentials. The National Practitioners Data Bank (NPDB) maintains a list of all providers involved in malpractice indemnity payments, along with descriptions of the incidents involved. This permanent record follows a doctor throughout his/her career. The OIG frequently cites medical malpractice lawsuits as an indicator of overutilization or improper utilization. Compliance officers must clarify the connection of medical malpractice, quality, and compliance to physicians. Good compliance can equal fewer malpractice lawsuits. The career implications of this equation are crystal clear to physicians and are a profound motivator.

The need to educate physicians is more acute for many healthcare organizations in the wake of the past several years of medical practice acquisition, ongoing practice management, and physician employment arrangements. Compliance officers face a need to provide education to an increasing pool of doctors, all of whom are providing care to patients while trying to learn about compliance. Physicians are highly independent, self-reliant, and have a sense of personal responsibility. These characteristics are inculcated throughout their training and education. They also create unique challenges for compliance officers.

Authors Moses and Jones documented specific tenets of an effective educational program for physicians. An essential step in the process of developing and implementing an educational program for physicians is to comprehend how physicians think and communicate, and to recognize that physicians receive little training with regard to fraud, abuse, or medical malpractice issues.2

Key teaching principles that have proven effective with physicians include:
- maintaining a positive approach that encourages and compliments, while avoiding confrontation and intimidation;
- providing “case study” examples of compliance violations and the consequences of those violations;
- encouraging physicians to share their experiences and concerns, especially during group teaching sessions;
- rating physicians against their peers (using a system that protects individual identities, but allows a doctor to determine if they are an “outlier”); and
- requesting, reviewing, and implementing feedback from physicians.

Physician perspectives vary on compliance issues, and many do not understand compliance as a discipline or how it relates to their primary concern, providing care to patients. To better understand how physicians think, compliance officers and healthcare counsel should consider the following:
- Physicians are taught to assess, diagnose, and implement correct treatment, and be individually responsible for outcomes.
- Physicians are competitive, detail-oriented, and over-achievers and/or survivors.
- Physicians have little tolerance for ambiguity.
- As scientists, physicians respect facts and data supported by quoted research.
- Physicians understand, but often dislike, peer review.
- Physicians dislike being embarrassed, especially before their peers.
- Physicians generally want to do the “right thing.” As far as compliance is involved, they frequently may not know the right or correct approach.

To make compliance “real” to physicians and other providers of care, educational programs should focus on the areas of concern they deal with on a daily basis. Physicians in particular are attuned to professional medical liability and malpractice issues. Recognizing
how failures in quality of care could be both compliance and malpractice concerns is an effective means of making the case for compliance and quality.

Physicians need to understand the following areas of risk exposure:

- **Electronic medical records (EMR)** — With the advent of EMR, and a rush to implement electronic health record (EHR) systems in all types of healthcare organizations, physicians are working with systems that allow them to use drop-down box lists and pre-populated templates. OIG Work Plans and other investigative documents detail concerns about cloned medical records and systems that “optimize” coding.

- **HIPAA Privacy and Security** — Many healthcare providers are uncertain about what information they can safely communicate and be consistent with the Privacy and Security Rules promulgated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Department of Health and Human Services (DHHS) Office of Civil Rights (OCR) maintains an effective summary that can be useful as a teaching tool for physicians.

- **Informed consent** — A Top 10 medical malpractice allegation for all medical specialties is inadequate informed consent. Discussion of this issue should include analysis of the current process used by healthcare organizations and physicians. The analysis should consider who takes consent, who signs documents, and how appropriate the education and timing of education is for patients.

- **History and physical (H&P)** — Failure to obtain a complete H&P is common and frequently cited in medical malpractice allegations. Failure to obtain a complete H&P often drives improper allocation of evaluation and management (E&M) codes from the American Medical Association’s Current Procedural Terminology,® Version 4 system (CPT-4®) used by physicians. As it relates to EMR, physicians must be cautious when using cut-and-paste features, to avoid transferring incorrect information or appearing to expand the actual level of service provided.

- **Abnormal test results** — Many organizations encounter frequent failures in how abnormal test results are identified, transmitted to providers of care, and acted upon. The process of notifying patients is frequently haphazard and may be incomplete.

- **Medication management** — Patients have more comorbidity and are taking more medications than in the past. Errors in medication management occur throughout healthcare organizations and, frequently, are driven by failures to obtain complete medication lists and failures to assess medications for contraindications.

- **Patient handoff** — The process of transferring patients from one provider of care to another is a significant opportunity for error. The handoff process must be scripted and timed carefully, providing specific information in a controlled manner from one doctor to another. Immediate followup must be provided by the receiving physician and support staff.

When working with physicians, the authors found that the most effective means of communicating compliance concerns to doctors involves a physician educator paired with a compliance officer. A physician educator offers the teaching advantage of sharing real time practice experiences as they relate to compliance issues. When addressing a physician audience, this enhances credibility of compliance issues for everyone involved in
the teaching process. As a team, the physician educator and compliance officer can provide real world examples with both perspectives, and analyze how failures in quality of care can become both compliance issues and potentially medical malpractice issues.

Moreover, not only is compliance the right thing to do, but very soon, it will be mandatory. Under the Patient Protection and Affordable Care Act (PPACA), compliance programs that were once voluntary will be mandatory for providers who participate in any federal healthcare program. For example, skilled nursing facilities were required to have compliance plans in place by March 23, 2013. Although the regulations have yet to be published, the Office of the Inspector General (OIG) has issued compliance guidelines for the different segments of the healthcare industry. These guidelines may very well be what the DHHS uses when formulating its regulations.

OIG also offers a free web-based course entitled *A Roadmap for New Physicians: Avoiding Medicare and Medicaid Fraud and Abuse* designed to educate physicians about the fraud and abuse laws that apply to them, including the False Claims Act.

**Insuring healthcare compliance**

Many providers may be unaware that some forms of compliance are now insurable. Medical malpractice carriers may offer certain types of coverage for breaches of protected health information (PHI) under the Privacy and Security provisions of HIPAA.

As the range of fines and penalties is fixed and there is published data on the number and frequency of data breaches, insurance carriers are able to actuarially project loss costs and thus, are able to offer coverage as “breach insurance.” In some cases, a malpractice carrier simply added coverage cost to existing insurance policies using an “opt out” method. If the purchaser did not opt to deny coverage, it was added to the policy. One area of concern for healthcare counsel should be the actual coverage provided. It is limited to defense expense cost, but in many policies, the actual amount provided may be inadequate to defend or does not contemplate the full exposure if a data breach of over 500 medical records occurred. The remedies for a large scale data breach are onerous and costly, including ongoing credit monitoring for each patient involved in a loss of data.

Insurance coverage also may be obtained for Recovery Contractor (RC), formerly Recovery Audit Contractor (RAC) audits. By using off-site data monitoring, RC and other...
types of audits assess utilization of services. Contractors then contact providers and organizations seeking repayment of services deemed to be over-utilized. Auditors retain a percentage of as much as 15% of any overpayments recovered. Repayments are required within 60 days of notification.10

Most RC audit coverage is limited to a fixed amount of defense and response cost. Again, counsel should analyze if the amount provided is adequate to provide an effective defense. Coverage for fines and penalties assessed for non-compliance is not available through current insurance markets.

Conclusion

Educating physicians on regulatory compliance issues has always been, and will continue to be, a great challenge for compliance programs and compliance officers. The new paradigm of employment by a healthcare system may serve to exacerbate education challenges rather than improve them. Many physicians employed by health systems have the impression that issues like billing, collections, and compliance are being dealt with by someone else. They can now concentrate on seeing patients and let billing and compliance people worry about those issues.

Central to a successful education program is the core concept that physicians drive compliance. Reaching out to doctors and teaching them, based on educational concepts that work for high-level professionals, is a key goal for compliance programs today. If the compliance officer keenly understands the audience, it is more likely an educational program will be effective and achieve meaningful results. The concepts outlined in this article have been used by the authors to teach groups of hundreds of physicians and are well received by this unique, driven, and time-constrained audience.

Grounding compliance education in concepts important to doctors—those of improving quality of care, avoiding National Practitioner Data Bank reports, and avoiding medical malpractice lawsuits—are key means to reach the audience in a way that is important to them and their careers.11

2. Id.
3. The OCR website is located at http://1.usa.gov/IAIddl.
4. Patient Protection and Affordable Care Act (ACA), §6401.
5. ACA, § 6201.
7. OIG web-based course. Available at http://1.usa.gov/1htG6Yo
8. The Department of Health and Human Services Office of Civil Rights maintains an effective summary of the Privacy Rule at http://1.usa.gov/IAJiSV. The summary contains direct links to the actual statute and relevant laws and regulations.
10. CMS maintains a comprehensive informational site on RAC audits at http://go.cms.gov/1eQ1WSu

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