Perspectives from a Healthcare Whistleblower

NYCFE Spring Fraud Conference

April 28, 2023

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Outline

- The False Claims Act

- My Whistleblower Timeline
  - Why I filed --“Choice-less Choice”
  - Defense Fight, Culture, Retaliation
  - Observations of Unethical/Illegal Activity
  - Medical Coding/Auditing Examples
  - Bittersweet “Victory”

- Final Thoughts





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JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Tuesday, March 11, 2014

Florida Hospital System Agrees to Pay the Government $85 Million to Settle Allegations of Improper Financial Relationships with Referring Physicians

Halifax Hospital Medical Center and Halifax Staffing Inc. (Halifax), a hospital system based in the Daytona Beach, Fla., area, have agreed to pay $85 million to resolve allegations that they violated the False Claims Act by submitting claims to

Corporate Crime Reporter IN PRINT 48 WEEKS

Elin Baklid-Kunz TAF Whistleblower of the Year, Marlan Wilbanks Lawyer of the Year

Filed in **News** September 18th, 2014 @ 4:45 pm

Elin Baklid-Kunz is the Taxpayers Against Fraud (TAF) whistleblower of the year.

And her lawyer, Marlan Wilbanks, is the TAF lawyer of the year.



Elin Baklid-Kunz and Marlan Wilbanks

The two received their awards earlier this week at the 14th Annual Taxpayers Against Fraud Education Fund Awards Dinner held at the Mayflower Hotel in Washington, D.C.

Baklid-Kunz blew the whistle on false claims made by Halifax Hospital Medical Center and Halifax Staffing Inc. Earlier this year, Halifax paid $85 million to settle the allegations.

Wilbanks represented Baklid-Kunz in the false claims action.

Wilbanks and the law firms for which he has

Take Aways





"If you have integrity, nothing else matters. If you don't have integrity, nothing else matters." – Former Senator Alan K. Simpson

False Claims Act (FCA)

- $64B FCA recoveries since 1986
  - $2.2B in 2020 (Healthcare: $1.8B)
- Whistleblower/ Qui Tam Relator
  - FCA vs SEC
- Stark Law: Strict Liability
- *"Golden Rule of Compliance"*



Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Monday, February 11, 2013

Florida Physician to Pay $26.1 Million to Resolve False Claims Allegations

Steven J. Wasserman, M.D., a dermatologist practicing in Venice, Fla., has agreed to pay $26.1 million to resolve allegations that he violated the False Claims Act by accepting illegal kickbacks from a pathology laboratory and by billing the Medicare program for medically unnecessary services, the Justice Department announced today. The settlement is the largest ever with an individual under the False Claims Act in the Middle District of Florida and one of the largest with an individual under the False Claims Act in U.S. history.

FCA-Incentivizing Integrity

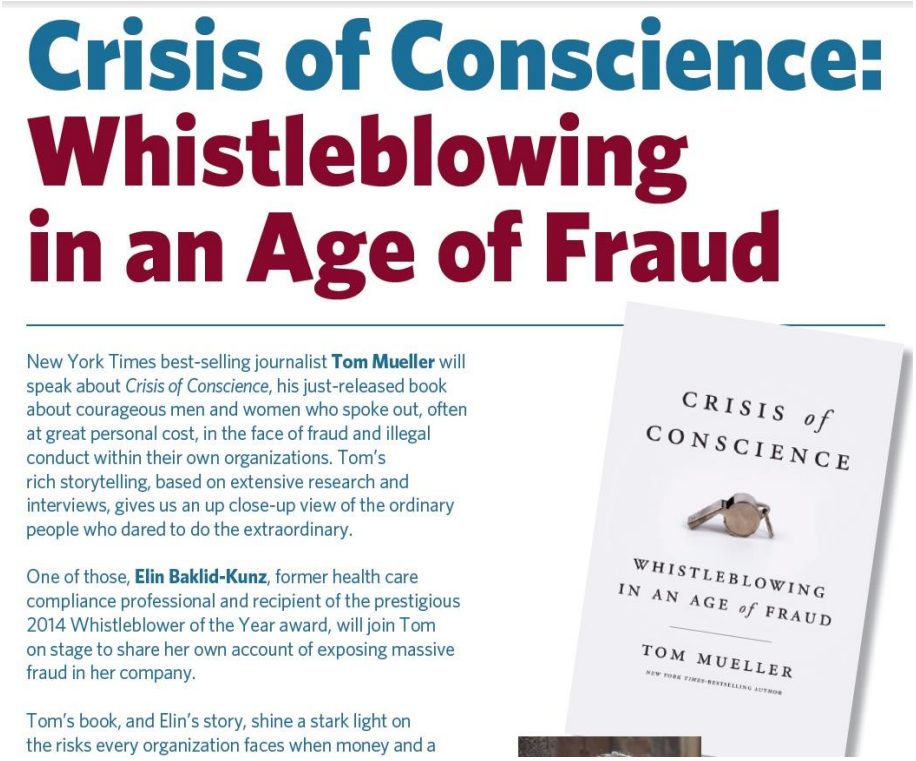
Ben Hallman, Huffington Post Article 6/4/2012:
"Whistleblowers, Beware: Most Claims End In Disappointment, Despair"



- Misconceptions
- US vs. Europe
- Winning the Lottery?
- Lump Sum Payment of Lost Career?

Crisis of Conscience: Typical WB Characteristics

- Mid-Career
- Courage
- Ethical Compass
- Sense of Public Service
- Strong Sense Empathy
- Family Support
- Higher Loyalty



Tom Mueller, Published September 2019
(interviewed over 200 whistleblowers)

Not a Typical WB Experience

Corporate Culture:
"Show me the Money"



- Largest Stark Settlement
- Teaching value based Compliance
- Window Dressing Compliance
- Internal & External Reporting
- Case unsealed early prior to DOJ intervention
- Stayed employed after settlement
- Retaliation: "Perceived"

U.S. ex rel. Baklid-Kunz vs. Halifax

<u>According to Daniel Levinson, Inspector General, HHS:</u>

"The $85 million settlement resulted because a compliance official who raised the issue about payments to physicians looking like they violated the Stark Act [was] not really being listened to . . ..**It struck me that what [Elin Baklid-Kunz] was doing was that she was leaning in in her work. . . . I subscribe to the notion that everybody in compliance should be leaning in . . .."**

Remarks to HCCA Compliance Institute, March 31, 2014 (citing Lean In: Women, Work, and the Will to Lead by Sheryl Sandberg (March 11, 2013))

https://oig.hhs.gov/newsroom/podcasts/index.asp

(Slide from Susan Gouinlock's presentation at Taxpayers Against Fraud (TAF.org) 9/16/2014)

Hospital's Cost of Business?

- Defense: "Baseless attack on the community's public, safety-net hospital"

- 5 Year Corporate Integrity Agreement (CIA)
- Settlement $86,000,000
- **Legal Fees $35,000,000**
- Bond Rating Downgraded
- Compliance reporting changed from legal
- Sanctions for Destroying Documents
  - **a behavior the judge called "reprehensible"**

Corporate Integrity Agreement (CIA)

- 5 Year Corporate Integrity Agreement (CIA)
  https://oig.hhs.gov/fraud/cia/agreements/Halifax_Hospital_03102014.pdf

- ***"Management Accountability and Certifications****. In addition to the responsibilities set forth in this CIA for all Covered Persons, certain Halifax officers or employees (Certifying Employees) are specifically expected to monitor and oversee activities within the hospital and* ***shall certify annually that the areas under their authority are compliant with applicable Federal health care program requirements*** *and with the obligations of this CIA."*

Case Specific Ruling

Case strengthened the law very significantly on the following points:

- Labeling a document as privileged does not make it privileged;
- In house counsel's involvement in paying illegal compensation renders his advice regarding the compensation not privileged under the **crime/fraud exception** to the privilege;
- Relator counsel may sequester potentially privileged documents while the case is under seal and then get the court to rule on their privileged status after the seal is lifted.
  - This is an important ruling because there was very little guidance on how to handle potentially privileged documents during the seal period.
- CIA one of the first to hold executives liable.

Media Examples: "Stole *Documents*"

Attorneys for Halifax Health Medical Center in Daytona Beach, Fla., claim an employee improperly obtained documents to create a whistleblower suit filed in 2009, according to a *Daytona Beach News-Journal* report.

Attorneys say Elin Baklid-Kunz, the hospital's current director of physician services, solicited advice from Halifax's legal department and then filed suit in "an intentional, clandestine act," according to the report. They contend the documents Ms. Baklid-Kunz used to craft her whistleblower action are protected by attorney-client privilege and work-product laws, meaning they cannot be used in court.

In her suit, Ms. Baklid-Kunz claims Halifax improperly admitted patients for unnecessary inpatient care and collected higher Medicare and Medicaid reimbursements. She also alleged the hospital had financial agreements with certain physicians that were in violation of the Antikickback Statute. The Department of Justice intervened in the False Claims Act suit in September.

Daytona Beach News Journal 3/11/14:

*The agreement states the hospital **admits no liability in the settlement, except that it violated the Stark Law**, which bars paying doctors based on referrals and volume.*

A federal whistleblower lawsuit that cost Halifax Health $120 million in settlement and legal expenses boiled down to a single sentence in a contract, hospital leaders said Monday during their first of three town hall meetings.

My Whistleblower Timeline
"Choice-less Choice"

1. Jun-2008 –Promoted to Director of Physician Services
2. Oct-2008 --Triggering event
3. Mar-2009 --Decision & Legal Advice
4. Jun-2009 --"Blowing the Whistle"
5. **Oct-2010 --Retaliation (Unsealed Jun-2010)**
6. **Sep-2013--US DOJ Partial Intervention**
7. Mar-2014 --First Settlement $85M (Bittersweet)
8. Jul-2014 --Resigned after 20+ years

Jun 2009 - Jul 2014:
Partnership attorneys,
Department of Justice (DOJ) &
Office of Inspector General (OIG)

What is Medical Coding?
Dirty Dancing "The Time of My Life"



- ICD10-CM
- ICD10-PCS
- CPT
- HCPCS

ICD9-CM* Code:
E005.9 Activity involving dancing and other rhythmic movement
(*2015 ICD10-CM: Y93.4)

Coding Complexity & Ambiguity

Known or should have known



Source: Office of Inspector General (OIG) Health Care Fraud Prevention and Enforcement Action Team (HEAT)
http://oig.hhs.gov/heat/

Compliance Program Elements: Voluntary or CIA?

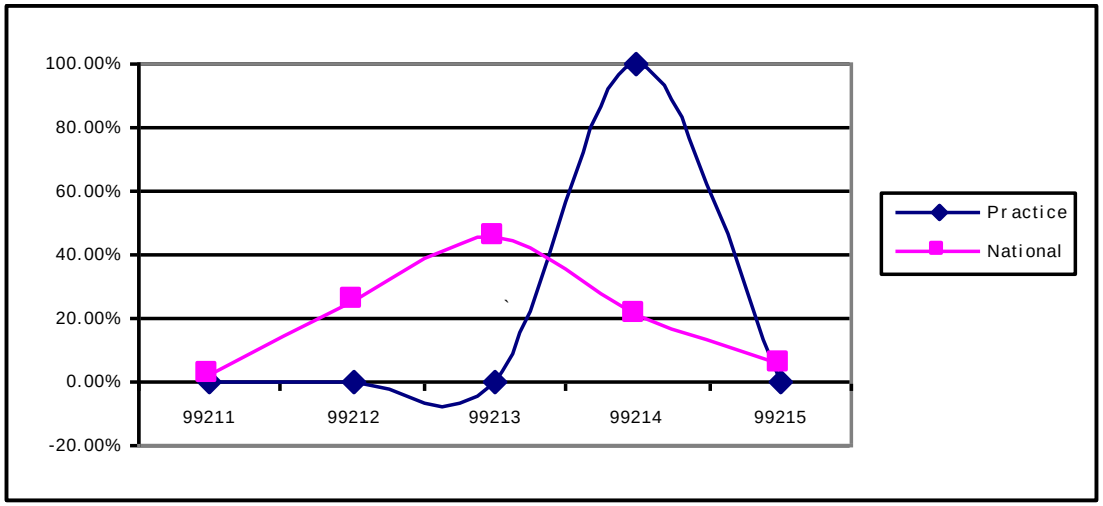
1. **Conduct internal monitoring and auditing**
2. **Implement compliance and practice standards**
3. Designate a compliance officer or contact
4. **Conduct appropriate training and education**
5. **Respond appropriately to detected offenses and develop corrective action**
6. Develop open lines of communication with employees
7. Enforce disciplinary standards through well-publicized guidelines

Effective or Window Dressing?

(CIA) Corporate Integrity Agreement

Example: Physician Coding Pattern

- 2012 OIG Report identified 1,669 physicians (1%) who billed the highest level E/M codes within a visit type at least 95% of the time.
- In 2010 Medicare paid an average of $250 more per beneficiary and $43 more per E/M service to these physicians.



Presumptive Coding: Only using one code in a category

Example: Hospital Reimbursement Inappropriate Admission

Implantable cardioverter defibrillator:

- Inpatient stay (HIPPS) Medicare Part A
  - DRG 226 approximate payment **$33,000**.

- Outpatient stay (HOPPS) Part B
  - APC 0108 approximately **$25,000**
  - Once denied, the hospital would only be allowed to rebill for certain ancillary services under Part B.
- Physician reports same CPT codes (MPFS)

HIPPS (Hospital **Inpatient** Payment System), HOPPS (Hospital **Outpatient** Payment System)
MPFS (Medicare **Physician** Fee Schedule) & CPT (Current Procedural Terminology)

Example: Coding & Contracts

CODE	CPT DESCRIPTION	MEDICARE FEE	MEDICARE REIMB. ($)	SAMPLE CONTRACT 200%	NOTES
22612	LUMBAR SPINE FUSION	$1,572	$ 1,572	$ 3,144	50% Multiple Discount
22630	LUMBAR SPINE FUSION	$1,528	$ 764	$ 3,056	50% Multiple Discount
63047	REMOVAL OF SPINAL LAMINA	$1,078	$ 539	$ 2,156	
22842	INSERT SPINE FIXATION DEVICE	$ 810	$ 810	$ 1,620	
22851	APPLY SPINE PROSTH DEVICE	$ 432	$ 432	$ 864	Included in CPT 63047
69990	MICROSURGERY ADD-0N	$ 230	$ -	$ 460	Not payable by MC
20396	SPINAL BONE AUTOGRAFT	$ -	$ -		Not payable by MC
20930	SPINAL BONE ALLOGRAFT	$ -	$ -		
Total		$5,650	$ 4,117	**$ 11,300**	**275% of MC Reimb Plus $1200 for call**

*The Current Procedural Terminology (CPT) was developed by the American Medical Association(AMA)

Example: Surgical Global Payment

- **CPT 22612 Lumbar Fusion**
  (Arthrodesis, posterior or posterolateral technique, single level; lumbar)
  - **90 Global Days (Major Surgery)**
  - **$1,572 Total Medicare Payment**

Physician Rockstars!

Pre Op	Intra Op	Post Op
10%	69%	21%
$157	$1,085	$330

If the surgeon provided only the surgical portion of the procedure, the reimbursement would be based on **69%** of the approved fee schedule amount, **$1,145**

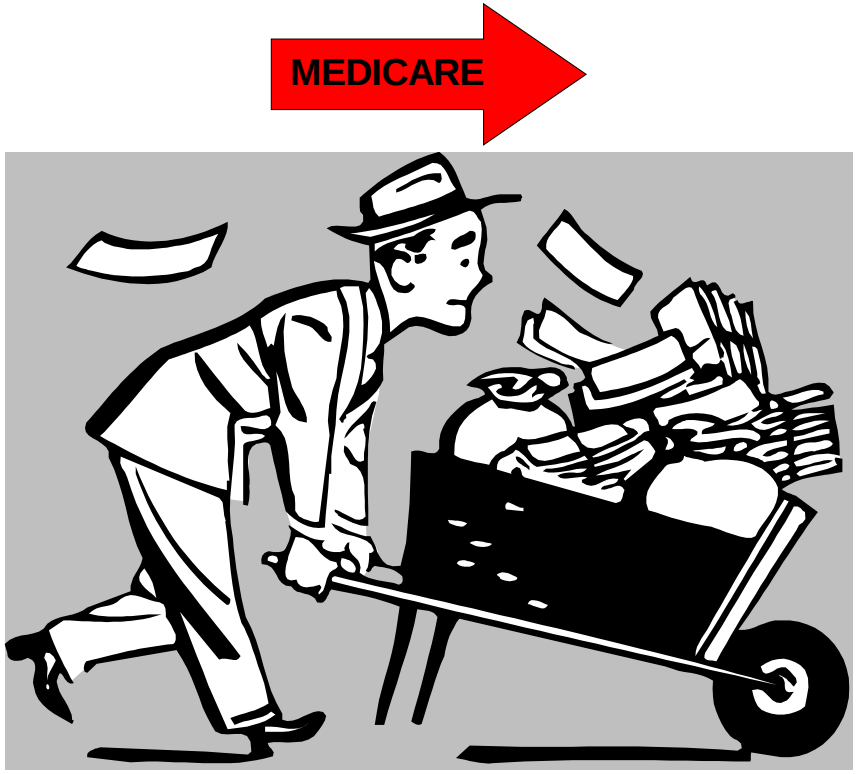
Example: Monitoring
Critical Care Services Checklist

Month:		**Physician:**		**Met criteria:**	
Patient:		**Reviewer:**		**Payer:**	

ACCOUNT:	DOCUMENTATION TASK	YES	NO
Critical Care (CPT 99291-99291) If the answer is "no" to any of the questions, do not report critical care 99291-92.			
Clinical criterion	Does the patient have acute impairment of one of more organ systems and have a high probability of imminent or life threatening deterioration?		
Treatment criterion	Documentation of direct personal management, frequent assessment and manipulation (not generally a once-day visit)?		
	Does the record demonstrate work performed during the encounter that is more intense than the work for other E/M codes?		
	High-complexity decision making to assess, manipulate and support vital system function(s) to treat single or multiple organ system failure and/or prevent further life threatening deterioration in the patient's condition.		
Time	Is time specifically documented? 99291 30-74 minutes		
	Is time specifically documented? 99292, additional 30 minutes? 75 to 104 minutes		
	Is time documented reasonable considering the documented work performed?		
	If time includes spent with family, was family member operating as surrogate decision-maker because the patient is unable to make decisions?		
Bundled procedures	Bundled procedures (included in critical care time) are not billed for separately? o Interpretations of cardiac measures (93561,93562)		

Example: Audits Reports

- Not all coding auditors are the same (CPC vs. CCS)
- Hospital Compliance vs. Internal Audit
- Electronic Documentation
- Audit Reports:
  - Hospital Inappropriate Admissions
  - Peer review-"inappropriate relationship" (August 2014 Town Hall meetings)
  - 100% Error Rates
  - *"Fraud"*



Best Practice

- Compliance Effectiveness vs. Window Dressing
- Create environment for employees to speak up
  - Listen when they do
  - Storytelling of when they do
  - Specific examples for grey areas
- Careful internal audits and follow up
- Careful with external reports
- Widespread knowledge & discussion of problems
- Disclosures can be your friend (if robust and complete)
- Careful Fair Market Value and consulting firms

Final Thoughts

- Do we need Whistleblowers?
  - Medicare “Pay and Chase” payment system
  - based on trust & limited resources
- Confusing rules & regulations
  - How will you know if you are doing the right thing?
  - Can you defend your decision?
- Normalizing WBs
  - Should WB be compensated?
  - Would you want someone to speak up?
  - Would you hire a WB?

Good Ethics is Good Business!



Questions/Comments?

Thank you!

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