

The Impact Of The Sentencing Guidelines On The Healthcare Field And Beyond

The Editor interviews **Connie A. Raffa**, Arent Fox PLLC.

Editor: Would you tell us something about your healthcare practice?

Raffa: By way of background, I started my career in the Manhattan District Attorney's Office and then moved on to the federal government as an attorney in the Department of Health and Human Services. That was my introduction to healthcare law. Government lawyers are given a great deal of responsibility immediately, so my years of government service were extremely valuable. They include arguments in both the First and Second Circuits, and a great variety of work in just about every area of healthcare where the federal government has a presence.

Editor: You have also lectured and written extensively on healthcare topics. How do these two aspects of your career intersect?

Raffa: They fit together very well. Any attorney who practices in a specialized area has to work hard to stay abreast of new rules and regulations, the emerging case law and the trends in the industry. Being involved in teaching and writing forces me to stay on top of developments. That means I am able to bring to my practice a command of the subject-matter that I would not have if I were not engaged in speaking and writing on compliance, investigations, nursing home, hospice, palliative care and home healthcare issues and the like. I am well prepared in my practice because I do these things.

Editor: You are also a member of the firm's corporate compliance practice group. Would you tell us about the connection between this side of your practice and healthcare law?

Raffa: These two areas run along parallel tracks. On the healthcare side, hospitals and other providers have had compliance plans in place for a long time. There is considerable experience in the healthcare industry on implementing and updating such plans. Corporate compliance does not have quite so long a pedigree in non-healthcare businesses, but it has become popular over the last couple of years. Compliance also cuts across a variety of legal disciplines and practice groups. Being part of Arent Fox's corporate compliance group allows me to offer clients compliance programs in other aspects of their business such as labor and employment, tax, OSHA and business issues.

Editor: Much of your career has been spent advising the governing Boards of hospitals and other healthcare organizations on a variety of corporate governance issues. How has this practice been impacted by the passage of Sarbanes-Oxley?

Raffa: It has had a dramatic impact, although, strictly speaking, it is not applicable to many of the non-profit organizations which I represent. What Sarbanes does is bring together into one statutory framework a whole series of rules, regulations and practices that have applied to non-profit organizations, and healthcare organizations

in particular, for a very long time. It has served to underscore for non-profits what is really important. The Inspector General of U.S. Department of Health and Human Services has issued model compliance plans for a variety of industries, including hospitals, laboratories, physician groups, and so on. The enormous publicity that Sarbanes has had, albeit with respect to publicly traded for-profit enterprises, forces organizations in the healthcare world to take a long and very serious look at the regulatory structure to which they are subject. This includes Inspector General's model plans for the various healthcare industries.

About a year ago, the American Health Lawyer's Association and the Office of the Inspector General at Health and Human Services issued a document entitled *Corporate Responsibility and Corporate Compliance: A Resource for Healthcare Boards of Directors*. It is not very long, and it is written in plain English. The message is also very plain: when courts look to see whether the governing board of a hospital or healthcare organization is fulfilling its fiduciary obligations, they are concerned with the *process* of governance. Is the board proactive? Do the directors understand the industry? Do they deliberate the issues? Do they ask questions of management and demand answers?

In all of this there are trends that reflect the impact of Sarbanes-Oxley. The tax staff of the Senate Finance Committee has drafted proposals that relate to the oversight of non-profit organizations. Executive compensation at non-profits is a concern. Another proposal is for every non-profit organization to submit to an IRS review every five years to determine whether to continue tax-exempt status. There is a proposal that would have each organization post its Form 990 information returns on its website. There is a recommendation that the governing board disclose the number of times it meets in the *absence* of the CEO or Executive Director. That is particularly interesting in light of the fact that most non-profit boards have a very friendly relationship with their CEOs. The information they receive concerning the organization is, in most cases, transmitted by the CEO. Such a proposal is meant to encourage independence and best practices by the board. I do not think we would be discussing these issues if the corporate scandals, and the resulting statutory and regulatory structure, had not called a great deal of attention to how corporations in our society operate.

Editor: Is there a difference in the fiduciary responsibilities that trustees of non-profits must meet and those of directors of for-profit enterprises?

Raffa: Essentially, no. The duty of care is substantially the same, and the deliberative process by which decisions are supposed to be reached is the same. To be a good board member, you must have some knowledge of the industry – and if you do not, you must develop it – and you must be attentive to the organization and its needs. Conflicts of interest issues are pretty much the same in



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both arenas. In my practice, I see hospice boards that include representatives from the local hospital. They are there in order to participate in the operation of the hospice, which the hospital contracts with or refers patients to. Therefore, an ability to recognize and deal with conflicts of interest is essential. This is no different from what occurs with for-profit boards of directors.

Editor: Would you tell us about the proposed Sentencing Guidelines for Organizations recently sent to Congress by the United States Sentencing Commission?

Raffa: The original Sentencing Guidelines were enacted in 1991. They are guidelines used by federal judges to determine what punishment is appropriate to impose on an organization, as well as individuals, who have been convicted of a federal offense, including healthcare fraud. A sentence is mitigated if a business has an effective compliance plan. They include a statement of the elements constituting a basic compliance plan. These elements include such things as a code of conduct, compliance officers, compliance training, internal reporting systems (for example, a hotline system), disciplinary sanctions, limitations on the delegation of discretionary authority to employees, internal reviews to ensure that compliance is being implemented, and so on. The proposed revised Guidelines attempt to strengthen the standards implicit in these elements. For example, the 1991 Guidelines state that the organization should not hire people who have a propensity to engage in illegal conduct. The new language states that the organization should exclude from key positions any person "*whom the organization knew, or should have known through the exercise of due diligence, has in the past acted contrary to the dictates of compliance and ethics.*" This is meant to strengthen the hand of the compliance officer who sometimes must deal with a CEO who may be more concerned with growing the business than addressing compliance concerns, such as additional staffing or funding for quality assurance staff. If that discussion does not bear fruit, and the compliance officer feels compelled to go to the governing board – something which takes a certain amount of courage, incidentally – the proposed revised Guidelines are meant to enable him or her to at least make a case to the board. The governing board has oversight responsibility with respect to the organization's compliance plan, which many directors and trustees may not know.

Editor: What constitutes an "effective" compliance plan?

Raffa: The best compliance plan in the world is only a document. It takes the right person in the position of compliance officer to implement the plan for the plan to be effective.

Editor: What kind of background would that person have typically?

Raffa: I know the government does not want the compliance officer to be a lawyer. My sense of the position is that it need not be tied to a specific background. It must be someone with integrity, someone who has the respect of his or her colleagues and someone approachable so that any one in the company will feel they are able to con-

fide with the compliance officer on a confidential basis. In addition to the right person, the plan must have the right mechanism of communication, including a way to make a complaint anonymously. Finally, and probably most importantly, there must be a perception that legitimate complaints will be addressed. If such a complaint is made, and then perceived to have been swept under the carpet, the plan will be seen as nothing more than window dressing. This type of culture in a business encourages whistleblower suits.

Editor: What do the Guidelines mean by "an organizational culture that encourages ethical conduct and compliance with the law?"

Raffa: That language addresses a culture which encourages corrections of mistakes, and voluntary disclosure, if appropriate. For example, in my field it is not unusual for a healthcare organization to receive reimbursement from Medicare or Medicaid and later discover an issue that clearly indicates they were not entitled to the reimbursement at all. An organization operating within an ethical framework responds by returning the money, and addressing the error so that it does not happen again.

Editor: And the elements constituting a basic compliance plan evidence such an organizational culture?

Raffa: Yes, and the proposed revisions to the Sentencing Guidelines are meant to strengthen compliance plans, but do not revise them in any fundamental way. It is essential that a healthcare provider have a compliance plan. However, the plan must have a meaningful role in the ongoing operations of the organization, and not sit on a shelf from year to year and only see the light of day when the government comes calling. That means that the organization's personnel, including members of the governing board, must be sensitive to the issues the plan addresses, must know how the plan is supposed to work, as well as their responsibilities when its provisions are invoked and, of course, must respond in such an eventuality.

Editor: What about the future? How effective do you think the Sentencing Guidelines will be in preventing the kind of behavior that led to the corporate scandals that have had such an impact on corporate America?

Raffa: The extent to which a statutory or regulatory scheme is effective in preventing intentional wrongdoing is always an open question. What I see in my practice most of the time is unintentional mistakes. These things happen, and the threat of prison should not be used as a deterrent. In my view, that is not a helpful response. In contrast, a good compliance plan catches inadvertent mistakes while they are manageable. If there is such a plan, the error is caught, corrected, disclosed to the appropriate authorities, and steps are taken to prevent repetition. Only then will the intention of the Sentencing Guidelines, both literal and in spirit, be met. To this extent, the Sentencing Guidelines represent a positive step forward addressing the ways in which organizations operate their business.

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