

**THE
EFFECTIVE
COMPLIANCE
AND
ETHICS
OFFICER**



DAVID S. BARMAK JD

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By David S. Barmak, JD

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Med-Net Concepts, LLC

2019



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THE EFFECTIVE COMPLIANCE AND ETHICS OFFICER

Introduction

As early as my memories allow, I have been involved with the healthcare sector. Initially, my brother and I stuffed and sealed direct mail pieces for our father's healthcare advertising agency. Then there was the durable medical equipment company that my father and brother graciously invited me to join after I graduated law school and clerked for a judge. Later, I closed our company because our competitors committed fraud.

I spent a short stint as an associate administrator/general counsel for a certified home health agency, followed by the opening of my law practice. My first clients were physicians and physical therapists, and then skilled nursing facilities.

In 1997, a United States Department of Health and Human Services, Office of Inspector General, publication, "Model Compliance and Ethics Program Guidelines," caught my eye. "Of course," I thought, "how can a nursing home comply with any law and regulation (in this case fraud, waste, and abuse), unless it is operationally implemented?"

My operations background experience resonated perfectly with these guidelines. I hired a highly accomplished nursing home nurse and implemented my first Compliance and Ethics Program for a skilled nursing home. That was in the early 2000s.

My collaborative efforts with clients over the years to develop, implement, and monitor effective compliance and ethics programs have been an evolutionary process that began with fraud, waste, and abuse. After that beginning, I added privacy and data security, then employment, and then patient risk management. Capturing all of these risk exposures in a realistic role for the compliance and ethics officer is a challenge.

One concern that persists throughout my observations and experiences is that the healthcare sector, particularly skilled nursing facilities, is “light” on professional management, which potentially can place the healthcare provider at risk for various exposures that could be financially and legally devastating to continued operations. An effective compliance and ethics officer can help mitigate this risk exposure.

A compliance and ethics officer requires managerial competency to significantly contribute to an effective compliance and ethics program. Managerial competency includes knowledge about the requisite policies and procedures that address fraud, waste, and abuse exposures, and skills to educate employees as well as conduct auditing and monitoring to ensure outcomes. A knowledgeable compliance and ethics committee steers the program, providing a source for anonymous and confidential reporting for employees, patients/residents, and families, and a uniform and standard enforcement of policies and procedures.

I am most grateful, and attribute any insights I might share, to many professionals, colleagues and family who, throughout the years, consistently embody the values of the effective compliance officer.

My innumerable clients exemplify the successful application of these values on a day-to-day basis with caregivers and care receivers. Colev Gestetner, LNHA, stands out as my long-time mentor and friend. One of Colev's most important lessons has been to support employee morale while focusing on values. Employees will buy in to my efforts to support their values, but only if they recognize my genuine concern for them, both professionally and personally.

My employees throughout the years continue to amaze me. A few stand out among many wonderful professionals. Betty Frandsen, MHA, RN, NHA, CDONA, FACDONA, DNS-CT, IP-BC, has been my long-time mentor and friend. When I first met Betty as a nursing home administrator, I saw on a day-to-day basis how she applied her values which provided a model for the effective compliance and ethics officer. Marshall Goldberg, Sc.D., LNHA continues to amaze me, day in and day out, as he provides practical and compassionate compliance and ethics counseling for innumerable clients. When I first met Justine Corcoran, I immediately knew and shared with her that we would build a client relations team around her — and we have. She continues to personify professionalism with empathy and patience for all of our clients and their concerns.

My greatest influences have been my family—without whom I dare not imagine who I might be today—Len, my father; Phyllis, my mother; Saul, my stepfather; Karen, my wife; Josh and Elayna, our children; and Michael, my brother.

DAVID S. BARMAK, JD
October 1, 2019

Nursing Homes: The Challenge for an Effective Compliance and Ethics Program

I have provided legal and regulatory support as a healthcare attorney for nursing homes for thirty-five years, and my amazement grows daily at the changes occurring every minute, twenty-four hours per day, seven days per week, for three hundred sixty-five days per year.

A nursing home naturally tends toward a heterogeneous society, presenting the potential for disharmony because of the swirling presence of diverse elements changing with every patient admission, patient discharge, employee hire, and employment termination.

To skillfully transform a heterogeneous culture into a homogeneous culture, management must continuously meld together these ever-present diverse elements into a harmonious whole with a common culture of compassion, effectiveness, and compliance.

An effective compliance and ethics officer can consistently, successfully, and compassionately contribute to an effective compliant and ethical culture. This effort will transform a heterogeneous society into a homogenous one that will provide quality of life for residents, ensure a fair workplace for employees, satisfy compliance requirements of regulatory agencies, and achieve the nursing home's mission for the governing body.

The Search for a Qualified, Effective Healthcare Compliance and Ethics Officer: A Story about Determination and Integrity

The search begins with Marin, an aspiring young woman, recently graduated with a master's degree in social work (MSW). Soon after graduating, she begins working as a social worker at Happy Acres Nursing Home. Most people just call it Happy Acres.

Recently, Marin was “volunteered” by Happy Acres’ administrator, Lane, to be the nursing home’s compliance and ethics officer (“compliance officer”). Always eager to learn, Marin does some preliminary research to get a feel for what’s involved in a nursing home’s compliance obligations. Quickly discovering she knows very little about the role, she realizes that a good first step would be to find a professional role model and mentor, i.e., a qualified, effective healthcare compliance officer.

Marin shares her concerns with Lane. After a brief conversation, he encourages her to take a paid leave of absence from Happy Acres to explore and learn about the duties and responsibilities her new role entails. He also agrees that a role model and mentor would be very helpful; but, unfortunately, there is no such person working at Happy Acres. Lane does not have any suggestions about where Marin should look to find a role model and mentor. However, from what he has already observed of her work ethic and commitment to excellence in whatever she does (all reasons why he picked her for this role), he is confident she will meet this challenge

head-on, and that when Marin returns to Happy Acres, she will be equipped and ready to be an effective compliance officer.

Lane's confidence in Marin is spot-on. She never settles for mediocrity and is determined to be an effective compliance officer. So, before setting out on her journey, she takes time for a long talk with her ever-present companion, Layla, a two-year-old Bichon Poodle. Whenever Marin feels anxious, she talks her feelings through with Layla—an excellent sounding board, who always listens and rarely interrupts.



Layla is adorable. She has almond-shaped eyes, moderately long ears hanging around her head, and a short, round muzzle. Layla is, simply put, a small, wonderfully cuddly dog. Whether Layla can really talk with Marin, or Marin projects onto Layla that which Marin needs to hear, only Marin and Layla

know. Whatever the truth is, Marin and Layla are constant companions; and, fortunately for them, Happy Acres permits small, cuddly dogs. Otherwise, Marin—and Layla—would be employed elsewhere.

Marin's Search

With Layla walking alongside her, Marin begins her search from one end of the healthcare sector to the other. Along the way, she speaks with compliance officers from many nursing homes. She visits large, medium, and small nursing homes. After every meeting she considers the pros and cons of each compliance officer's perspective and approach to an effective compliance and ethics program ("compliance program"). Very quickly, two things become crystal clear to Marin—the overriding importance of integrity and effectiveness.

Although Marin meets many compliance officers, none of them seem to fit the image she has of being truly effective. She categorizes some as "letter of the law" compliance officers, clinging to the letter of the law but missing the spirit of the law.

Whenever Marin interviews one of these "letter of the law" compliance officers, she asks, "How effective do you see yourself as a compliance officer?" In response, most of them say things like:

"Oh, I'm very effective; I follow the letter of the law no matter what!"

“The way I see it is there is only one way to do things—the right way, the legal way.”

“I’ll have you know this: I have zero tolerance for anything other than the law.”

“It’s simple; you must consistently apply the law—no matter what!”

To Marin, these compliance officers seem a bit self-righteous and somewhat overzealous.

In contrast to the “letter of the law” compliance officers that Marin meets and interviews, she encounters what she categorizes as “spirit of the law” compliance officers.

As she does with the “letter of the law” compliance officers, whenever Marin interviews a “spirit of the law” compliance officer she asks, “How effective do you see yourself as a compliance officer?”

Their responses usually are something like:

“I’m a tolerant compliance officer—I look behind the law.”

“Compassionate is how I see myself.”

“I focus on what our values are.”

“In this world, you have to be flexible when applying the law.”

She recognizes that these compliance officers appear to want to support and care for their cowork-

ers—even if that means not applying the laws as required by their nursing home's policies and procedures.

In her search to find an effective compliance officer, Marin meets and talks with the coworkers of the many compliance officers in the different nursing homes she visits. She discovers a broad spectrum of opinions like: “approachable but ineffective,” or “effective but unapproachable.”

Marin also finds many who describe their compliance officers as approachable and supportive, even though some important compliance policies and procedures are ignored and the underlying laws unenforced.

Marin says to Layla, “Some of the staff think their compliance officers are effective; however, just as often, many consider their compliance officers ineffective in protecting their nursing homes. In boxing,” Marin says as she holds Layla up to her face, “this is what's called a ‘split decision.’ Besides being considered either ineffective or effective, some of these same compliance officers' coworkers consider them approachable while others see them as aloof.”

Needing to process further with what she hears from the compliance officers regarding how they see themselves and the way that their coworkers see them, Marin, with Layla in her arms, finds a secluded spot to pull her thoughts together.

Marin says to Layla, “It seems to me that most compliance officers with whom we've met are either

focused on the letter of the law or the spirit of the law.”

Layla barks twice. Marin says, “Oh. So, you agree? Some are very rigid, and others just the opposite, compassionate and totally flexible!” Layla barks again in seeming agreement.



Marin strokes Layla carefully, thinking things through. Abruptly she jumps up, causing a startled Layla to jump up too. "Is it possible there is no 'best' approach, Layla? Or, even worse, is there no one we can look to as an effective compliance officer role model?"

Layla looks at Marin as if in deep thought. Her eyelids seem to half close, revealing beautifully long eyelashes. Then, in a heartbeat, her eyes open wide and seem to twinkle as she barks her knowing bark. Instinctively, Marin blurts out, "You're right Layla, we will find a compliance officer with an appropriate blend of both styles—a fully effective compliance officer—able to discern the most effective approach based upon the situation at hand."

Marin scoops Layla into her arms and whirls around, seemingly buoyed by Layla's encouragement.

The next day the search continues; but now, Marin is sure that both she and Layla have a better intuitive sense of what to look for and the style they feel will support both integrity and effectiveness. Their discussions continue as they search high and low, and far and wide for an effective and qualified compliance officer.

"Effective compliance officers," Marin says to Layla as they start out one morning, "develop, prevent, and minimize fraud, waste, and abuse while supporting quality outcomes through a compliance and ethics program that reflects both the letter of the law and the spirit of the law. This enables both

the nursing home and the employees to benefit from a reduction and mitigation of potential risk exposures.”

Layla blinks her eyes at Marin as if to say, “I couldn’t say it any better. I agree.”

As the search continues, they continue to encounter ineffective compliance officers who are either overly “supportive” or overly “rigid.” Occasionally, they follow a lead to someone whom they are told is an effective compliance officer; but, over and over these referrals lead nowhere. Some compliance officers even refuse to meet—as if skills and knowledge are secrets to protect at any cost.

Eventually, Marin’s discouragement surfaces and she begins to think that she will never learn to be an effective compliance officer. Layla would normally feel sad too, because her feelings are nearly always aligned with Marin’s; however, not today. Layla is happy, yipping and playful as if she has some good news to share with Marin.

Marin picks Layla up and asks, “Are you trying to tell me something Layla? Am I missing something? Now, what could it be?” Layla jumps out of Marin’s arms and heads down the hall of the nursing home they just entered. After passing the empty receptionist’s desk, Layla slides to a stop in front of an office with a nameplate on the door that reads, “Effective Compliance and Ethics Officer.” Layla looks back at Marin and barks. Marin hurries to where Layla is standing and looks at the nameplate on the door. She says to Layla, “Way to go! Let’s see if this

nursing home's compliance officer is exceptional." Layla barks as if to say, "Yes, let's find out!"

Marin says to Layla, "Before we speak with this compliance officer, I want to think about the glowing references we have heard about him." Marin remembers the most recent compliment she had heard about this compliance officer—that he effectively protects his nursing home from potential fraud, waste, and abuse risk exposures; and that staff highly regard him. "Layla," she says, "perhaps this compliance officer has mastered the ability to integrate both a 'rigid' approach and a 'supportive' approach into an effective compliance program." Layla barks again as if to say, "Yes, that's right!"

Suddenly, as if a wonderful revelation has occurred, Marin blurts out, "Wow! Could this be true?" Just as abruptly, she gasps, "But, what if the Effective Compliance and Ethics Officer will not share his wisdom with us?"

Layla barks repeatedly as if to press Marin to give this a shot.

Marin and Layla walk back to the main lobby and find a friendly looking young man sitting at the receptionist's desk. They approach him and ask to speak with the compliance officer. The receptionist immediately picks up the telephone and calls the compliance officer. After a moment of pleasantries, the receptionist asks if the compliance officer will accept two guests. He then walks Marin and Layla into the compliance officer's office. The Effective Compliance and Ethics Officer appears to be in his

early 60s, tall, and slim. What strikes Marin immediately is his broad, warm, and spontaneous smile, and his relaxed, yet energized, eyes. She introduces Layla and herself and gingerly asks if she might impose upon him for an appointment. He quickly responds with sincere warmth and interest, saying any time this week is fine other than 9–9:30 a.m., which is when he participates in a daily department head meeting.

“May we talk this morning?” she asks.

“Sure,” he responds. “I’m off to my morning meeting now, but please make yourselves comfortable, and I’ll be back in half an hour.”

Marin and Layla take a seat on his office couch, both excited with the possibility of reaching their journey’s end.

Precisely at 9:30 a.m., the Compliance Officer returns to his office and again warmly greets Marin and Layla by name. As he looks more closely at Layla, a big smile crosses his face. “A Bichon Poo?” he asks, reaching down to stroke Layla’s head. “She’s adorable!”

“Yes, thank you. She’s my constant companion, and her name is Layla.”

Almost before Marin can finish her sentence, Layla stands on her hind legs with her front paws resting on the front of the Compliance Officer’s legs.

He says warmly, “Oh, she’s beautiful—and so well behaved and attentive!”

Marin laughs, knowing that is not always the case with Layla—her adorability often making up for her lack of manners.

“Thank you again for making time to talk with us on such short notice,” Marin says. She relaxes as she realizes that the Effective Compliance Officer intuitively recognizes the bond between Layla and her, and she can see that he is very comfortable with Layla’s presence. In fact, he is so comfortable that he has placed Layla on his lap and is casually stroking under her chin while she reciprocates by licking his fingers.

“Of course! What can I help both of you with?” he says enthusiastically.

Marin tells him that she couldn’t help noticing that the nameplate on his office door says, “Effective Compliance and Ethics Officer.”

“I know,” he says. “I was fine with ‘Compliance and Ethics Officer’; however, my employees affectionately gave me that nickname and the nameplate at a holiday party years ago.” He laughs, and Marin smiles.

Marin summarizes how she was asked to be the compliance officer for Happy Acres Nursing Home, and her intense desire to be an effective compliance and ethics officer. She shares how Layla and she are on a mission to find a mentor.

“So far,” she says rather disappointedly, “I am unsuccessful, and I am almost ready to give up.”

He smiles and says, “I’m very happy to talk with you and share what I can that may be helpful. But first I want to ask you a question.”

“Sure. What?” Marin asks, a bit nervous.

“What do you think is the reason for including ‘ethics’ with ‘compliance’ in both my title and the program?” he asks, stressing the word “ethics.”

“Hmmm. I’m sorry. I don’t really know,” Marin almost gasps. “My goodness, I still have so much to learn!”

“No worries. We all do,” says the Effective Compliance and Ethics Officer. “We will have time to talk about ethics later. Please continue with any questions that either of you may have for me.”

Marin sighs, somewhat relieved. She reaches into her bag and pulls out her laptop, ready to take notes, and begin. “Earlier you mentioned a daily department head meeting. Do you also attend other regularly scheduled meetings with your coworkers?”

“You are very observant, Marin,” he says. “To answer your question, yes, I attend daily department head meetings, monthly Quality Assurance Performance Improvement committee meetings, monthly Compliance and Ethics committee meetings, and as many department meetings and events involving residents, families, and staff as possible. Oh, I also never miss a barbecue meal for residents, family, and staff.”

Marin responds, "What do you do at those meetings?"

"I listen to concerns, challenges, and accomplishments. Often, there are risk exposures based upon laws and regulations that must be addressed for our nursing home to be both successful and protected."

"Protected from what?" asks Marin.

He continues, "Protected from real or perceived fraud, waste, and abuse concerns. I also listen carefully for situations that may involve exposure of our residents' protected health information. Together, we discuss real or perceived risk exposures and develop strategies to move us safely forward toward compliance with our policies and procedures."

Marin asks if his input is taken seriously, and whether his strategies are considered mandatory by his employees.

"Absolutely," he says, and then he shares how his employees understand that the nursing home's governing body authorizes him to carry out his duties as the Compliance and Ethics Officer. He has the authority to speak as if he were the conscience of the nursing home, representing the laws and regulations embodied and expressed through the nursing home's policies and procedures.

"It is widely understood throughout our nursing home that policies and procedures form the foundation for all behavior and activity, and effectively implementing our policies and procedures ensures effective compliance with laws and regulations."

Marin pauses before she asks, “Do you consider yourself a ‘letter of the law’ compliance officer?”

“No, I don’t consider myself limited to the letter of the law.”

“Then you are more interested in the spirit of the law?” she continues.

“No, I don’t consider myself limited to the spirit of the law either. I can only bring about compliance with the letter of the law by focusing staff on the spirit of the law. I do both because they go together!”

Pointing to the wall behind Marin and Layla, he says “Look at that poster. I keep it on the wall in front of my desk to remind myself of a certain reality in my efforts as a compliance and ethics officer.”



The Compliance and Ethics Officer asks, "Marin, are you more likely to comply with a policy and procedure if you know the intent behind it?"

"Well, yes," she answers, and then adds, "I'm more likely to completely and accurately do what is required of me if I understand why I'm required to do something. Are you saying that when it comes to compliance issues, if employees understand why they are required to do something, they will be more likely to comply with the requirement?"

"Exactly. Yet the specific letter or language of the policy and procedure must also be followed because that's what is specifically required," the Effective Compliance Officer says. "Do you agree?" he asks.

"Yes," Marin answers a little hesitatingly. "But how do you do both?"

The Effective Compliance and Ethics Officer smiles, and says, "Please remember that compliance and ethics is more than just the quantity of effort made. It is also the quality of the effort made. To be an effective compliance officer, we must fully understand and follow our policies and procedures."

Marin and Layla are quiet, attentive, and deep in thought.

The Effective Compliance and Ethics Officer continues, saying, "One of the most important services a certified nursing assistant (CNA) performs is conducting a skin check when giving an elder a shower. By the way, we refer to our residents as 'elders' which we believe conveys a greater degree of

respect. A CNA can quickly scan an elder's body for pressure ulcers or reddened areas, and correctly say that this effort was done. That, however, only serves the quantity of effort, or let's say the letter of the policy and procedure. The quality of effort requires carefully viewing the elder's body for any change from the previous review, any reddened area, asking the elder how she feels, and if she's feeling any skin discomfort. Quality, or let's say the spirit of the policy and procedure, requires really seeing, hearing, smelling, and feeling—really being interested.”

“Well then, how would you describe yourself?” Marin asks.

He quickly replies, “I'm an effective compliance officer.”

“Why do you call yourself that?” she asks.

“Well, my employees call me this. But they do so because I effectively assess and support my staff's efforts to understand the spirit and the letter of the policies and procedures in our efforts to follow our fraud, waste, and abuse compliance and ethics program.”

“How do you do that?” Marin says, realizing the Compliance and Ethics Officer is sharing valuable insights.

“Have a seat,” he says, “and I'll share with you my three secrets to designing, implementing, and auditing an effective fraud, waste, and abuse compliance and ethics program.”

“Here we go,” he says as Marin leans in to listen, her hands on her laptop, ready to capture every word.

First Secret: The Effective Design of the Compliance and Ethics Program

“Effective design is the first foundation for an effective compliance and ethics program,” the Effective Compliance and Ethics Officer says. “In most nursing homes, when you ask staff what makes an effective compliance and ethics program, they don’t know. If you ask anyone in my nursing home, they will tell you that an effective compliance and ethics program is all about effectively implementing the facility’s specifically designed compliance and ethics program.”

“Implementing a designed compliance and ethics program? What makes up a design?” Marin asks.

The Compliance and Ethics Officer points to a simple yet elegantly framed poster on his wall, and reads the poster as he continues his explanation.

“An effective compliance and ethics program must be designed to include at least seven fundamental design elements:

1. Standards, Policies, and Procedures
2. Compliance and Ethics Program Administration

3. Screening and Evaluation of Employees, Physicians, Vendors, and other Agents
4. Communication, Education, and Training on Compliance and Ethics Issues
5. Monitoring, Auditing, and Internal Reporting Systems
6. Discipline for Noncompliance
7. Investigations and Remedial Measures

“I see,” Marin interjects, “But how did you develop this design?”

“I’m glad you asked,” he says. “An effective compliance and ethics officer must be a student of history. You must study, track, and trend the past and present, and predict the future to find systemic compliance and ethics exposures, as well as breathe life into your compliance and ethics program’s design. But to answer your question, these basic design elements stem from the United States Sentencing Commission, the United States Department of Health and Human Services’ Office of the Inspector General (OIG), and the Patient Protection and Affordable Care Act.”

Marin tries to control her excitement and asks, “How do you implement this structure?”

“I meet monthly with our compliance and ethics committee, and I also meet with the rest of my employees, sometimes as a group, and other times individually,” he explains. “Every time I meet with

an employee, either individually or as a group, I explain that these seven elements make up the design of our compliance and ethics program and that our work together is to effectively implement all seven elements.”

“So,” Marin says while typing very quickly, “The first element of an effective compliance and ethics program is its standards, policies, and procedures?”

“Yes, that’s correct,” he says, smiling at both Marin’s intensity and at Layla, who seems to be listening intently as well.

“Would you please explain the standards, policies, and procedures element?” she asks.

“Sure,” he continues.

Element Number One: Standards, Policies, and Procedures

Before he can begin, Marin asks, “What is the purpose behind the compliance and ethics program standards, policies, and procedures?”

“We have written standards, policies, and procedures in effect that describe compliance and ethics expectations that are embodied in our *Code of Conduct* or, as some people refer to it, our *Code of Ethics*,” he continues. “In most nursing homes, when you ask employees what they do and then compare what they do with their facility’s compliance and ethics program standards, policies, and procedures, you will often get two different sets of job respon-

sibilities. Usually any actual relationship between what employees think their compliance and ethics responsibilities are and what the compliance and ethics standards, policies, and procedures actually are, is purely coincidental.”

“Is that a problem?” Marin asks.

“It can be,” he says. “Should either federal or state fraud investigators come onsite and interview employees, if the responses of employees to compliance and ethics standards, policies, and procedures are significantly different, the nursing home could be evaluated as having an ineffective compliance and ethics program.”

Marin asks how he, as the compliance and ethics officer for his nursing home, helps his coworkers.

“As I mentioned earlier,” he says, “when I meet with our compliance and ethics committee, I review all of the compliance and ethics standards, policies, and procedures throughout the year. I fully explain and go over every single compliance and ethics standard, policy, and procedure, sometimes one at a time, and other times in groups of standards, policies, and procedures, with my coworkers. When I finish a discussion with any of them, I always want to come to an agreement as to what needs to be implemented in fulfillment of the discussed standard, policy, and procedure. I use basic managerial skills to focus on our goals and performance standards. Then I follow up with my coworkers continuously to help keep everything very clear. This gives me a chance to regularly review their progress.”

The Effective Compliance and Ethics Officer pauses, then says, “My coworkers and I must be confident that achieving the goal of implementing all seven of the elements will effectively support our efforts to develop an effective compliance and ethics program.”

“So,” Marin asks, “Do you have goals and performance standards for every compliance and ethics standard, policy, and procedure?”

“No,” answers the Effective Compliance and Ethics Officer. “I find that about 20 percent of the standards, policies, and procedures are critical to establishing about 80 percent of an effective compliance and ethics program; so, I set priority goals and performance standards with my employees for that 20 percent of the compliance and ethics standards, policies, and procedures.”

“Then your goals are limited to about 20 percent of all the compliance and ethics standards, policies, and procedures?” she asks.

“Yes, unless there’s a unique risk exposure that arises, in which case we set up a special goal.”

The Effective Compliance and Ethics Officer waits until Marin finishes typing and then says, “I want every employee to know what his or her responsibilities are, and what good performance is. Clear expectations and standards of performance are critical.”

“I am learning so much,” Marin says. “Would you please explain to me the other elements of your compliance and ethics program?”

“Sure,” he says. “But first, I want you to really understand the meaning behind Element Number One. Only then will you understand how standards, policies, and procedures form the foundation for an effective compliance and ethics program.”

Marin was surprised. She thought to herself, “How much more meaning could there be than the face value of the standards, policies, and procedures?” She says aloud, “Thank you. How do we do that?”

The Effective Compliance and Ethics Officer picks up his office telephone and calls the director of nursing. Marin hears some soft pleasantries, and then he says, “I’m sending Marin to your office to understand how you use compliance and ethics standards, policies, and procedures to support our effective compliance and ethics program. She’ll be there in a minute. Also, when you finish, would you please escort Marin back to my office? Thank you.”

Marin is a bit confused but excited as the receptionist escorts her to meet the director of nursing.

Marin’s first impression of her is a good one—she exudes confidence and has a warm smile.

“Hello, Marin. I’m the director of nursing.”

“Hi,” Marin replies. “Thank you for taking the time to talk with us. This is Layla.”

Amazingly, the director of nursing pulls out a small cookie for Layla, and says, “I’m glad to meet you both.” Smiling, she beckons to Marin and Layla

to sit on the couch in her office. Marin sits down and places Layla on her lap.

She continues, “So, you want to know about our effective compliance and ethics program, and in particular, how its standards, policies, and procedures specifically form its cornerstone?”

Marin takes a moment to respond to the director of nursing, then answers, “Yes, I believe that is what we came to find out. My head is swimming from my brief meeting with the Effective Compliance and Ethics Officer. All good things! Just a lot of new concepts, and yes, that is definitely what we came to find out. Thank you.”

The director of nursing sits on the couch next to Marin and Layla, and explains that laws, regulations, court decisions, social mores, and best practices are the sources of compliance and ethics requirements for standards, policies, and procedures.

Marin responds, “I never really thought about the reasons behind my nursing home’s standards, policies, and procedures. What you’re saying makes sense, now that you mention this.”

The director of nursing says, “This is very important from a compliance and ethics program perspective. How do we communicate what ‘doing the right thing’ means to our employees? Do we talk about specific laws? Specific regulations? Specific court cases? Sometimes we do, but most of the time our employees do not need to know specific legal citations.”

Marin's curiosity is now really aroused, and she asks, "How do you communicate the laws, regulations, court decisions, and all of the other sources for your compliance and ethics program standards, policies, and procedures?"

She says, "I explain to our staff that what they need to focus on is our standards, policies, and procedures. If they do that, they will be following our state and federal laws, regulations, and court decisions; following best practices and their licensing practice requirements; and they'll be making a good faith effort to do the right thing. From there, we move forward."

"I think I understand," Marin says. "The straightforward message you convey to staff to do the right thing starts with following the standards, policies, and procedures."

"Yes!" the director of nursing responds.

Marin realizes she is beginning to understand the wisdom behind the compliance and ethics program, or at least Element One. Eager to discuss her understanding further with the Effective Compliance and Ethics Officer, she profusely thanks the director of nursing and with her help finds Layla and her way back to the Effective Compliance and Ethics Officer's office.

The Effective Compliance and Ethics Officer sits silently for a moment after Marin seats herself in front of him with Layla on her lap. He breaks the silence by asking, "How was your meeting with the director of nursing?"

“Excellent!” Marin enthusiastically responds. “I better understand the perspective that you shared with me earlier.”

“And what perspective was that?” the Effective Compliance and Ethics Officer asks.

“That standards, policies, and procedures are the foundation upon which an effective compliance and ethics program is built, and that focusing on these also simplifies the message to staff about compliance and ethics, and how to do the right thing.”

“Exactly,” says the Effective Compliance and Ethics Officer. “All messages need to be simple, straightforward, and tangible. Following our standards, policies, and procedures accomplishes all of that.”

Marin says that she is starting to see things a little differently, and the Effective Compliance and Ethics Officer nods in agreement.

After a few moments of silent contemplation by both of them, the Effective Compliance and Ethics Officer says, “Ready for Element Two?”

“You bet!” says Marin. “I’m ready to build on the foundation I’ve learned about standards, policies, and procedures.”

“There’s a lot more to come!” he says with a huge grin. “I’m going to arrange for you to learn firsthand about Element Two, which involves designating a compliance officer and a compliance committee. Just give me a moment, please.” The Effective Compliance and Ethics Officer picks up his telephone and places another call.

Marin listens as the Effective Compliance and Ethics Officer talks to the person on the other end of the telephone call.

“Hi. How are you? Yes, I’m fine. Have a few minutes? Good. I’m sending Marin to see you. Marin is a visiting colleague and is eager to learn. Please share with her your expectations of the compliance committee and my role as our compliance officer. Then, if you would, please escort her back to my office. Oh, and she’s bringing Layla. Layla is both Marin’s and my friend. Thanks.”

The Effective Compliance and Ethics Officer makes eye contact with Marin and says, “I think it best for you to hear our administrator’s opinion about the compliance committee and my role as compliance officer. I know you’ll have a productive discussion. Please come back here after you finish talking with him.”

He then asks his receptionist to walk Marin and Layla to the administrator’s office.

Element Number Two: Compliance and Ethics Program Administration

The administrator warmly invites Marin and Layla into his office and beckons Marin to have a seat at a table.

Marin introduces Layla and herself, and then thanks him for taking a few moments of his valuable time to help broaden her understanding of the meaning behind the compliance and ethics pro-

gram elements. She follows that expression of appreciation by asking, “What is compliance and ethics program administration?”

The administrator smiles at Marin’s eagerness and replies, “Compliance and ethics program administration starts with the compliance and ethics officer who is entrusted with responsibility for the day-to-day operations of the compliance and ethics program. The key to that role, however, is effectiveness.”

“That’s the message I’m getting,” replies Marin.

He asks Marin, “What’s your impression of our compliance officer at this point?”

Marin thinks for a moment and says, “Confident.” Layla gives a single bark as if in agreement.

“Hmmm. I like that description. Confident about what?”

“Well,” after first pausing to think about her response, “He seems to be completely confident, comfortable, and knowledgeable about anything and everything involving the compliance and ethics program. I feel completely assured that I will learn what I need to know from him.”

The administrator laughs and says, “That’s why we call him our ‘Effective Compliance and Ethics Officer’. The compliance officer is a high level, governing body-appointed leader who plans, reviews, monitors, evaluates, and improves our compliance program from beginning to end. As a leader in our nursing home, he always keeps a few points in mind.

First, the compliance and ethics program is primarily about detecting and preventing fraud, waste, and abuse of government money. Second, the only way to have an effective compliance and ethics program is with and through people—our staff, independent contractors, vendors, residents, families, and volunteers among others. Finally, our compliance and ethics program is all about culture—our culture of doing the right thing must be as tangible as our culture of nurturing our residents and staff.”

Marin thinks for a moment and then says, “Yes, that makes absolute sense.”

He continues, “Compliance and ethics program administration requires that our compliance and ethics committee must also be effective. It is the driving force behind our having an effective compliance and ethics program.”

“So, who attends compliance and ethics committee meetings?” Marin asks.

“The Effective Compliance and Ethics Officer leads our meetings, and I attend as the administrator along with our director of nursing. Others who attend our meetings are the medical director, the assistant director of nursing, the MDS coordinator, a representative from the accounting department and business office, the social work director, the admissions director, the maintenance director, the housekeeping director, the human resource director, the activities director, the rehabilitation director, and the food service director.”

“Is there a key to having effective compliance committee meetings?” Marin asks.

“Well,” says the administrator, “the key is that participation by committee members is mandatory. No ifs, ands, or buts. Absolutely no excuses. Each committee member attends the compliance committee meeting every month. It is expected that committee members make this meeting a priority and not schedule conflicting meetings. Attendance is recorded, reinforcing that participation is expected. Guests are invited to attend based on the agenda, but everyone must adhere to the confidentiality rule to protect information that is discussed.”

“Anything else?” Marin asks.

“Yes.” Our compliance officer circulates an agenda in advance of the meeting, and he holds every member of the compliance committee accountable for being prepared, actively discussing the agenda, and identifying risks and opportunities for improvement. It is important to note that the facility governing body periodically receives a report from the compliance committee summarizing key issues.” He pauses, and then says, “I realize this is a lot to consider. I encourage you to call me anytime I can be of further assistance to you.”

“Thank you so much for your insights,” Marin says, as she offers her hand to the administrator. He warmly shakes it.

“My pleasure,” he says. “You know, I look forward to every compliance committee meeting because I learn something new every time. I know we

are doing everything we can possibly do to detect and prevent fraud, waste, and abuse and ensure quality outcomes.” He pauses, and then says, “May I give Layla a treat?”

“Thank you so much. You are so thoughtful,” says Marin. Layla barks with approval.

He gives the treat to Layla and then says, “May I escort you two back to the Effective Compliance and Ethics Officer?”

“Yes, please,” says Marin.

Element Number Three: Screening and Evaluation of Employees, Physicians, Vendors, and Other Agents

The Effective Compliance and Ethics Officer is not in his office when the administrator escorts them back to the office. Marin and Layla are grateful for a moment to relax on the Effective Compliance and Ethics Officer’s couch, and reflect on the lessons they have just learned. As Layla’s eyelids start to close, a warm and friendly “hello” greets them both. The Effective Compliance and Ethics Officer has returned and he moves quickly toward his desk. Without a moment’s hesitation, he begins his lesson on the third element: Screening and Evaluation of Employees, Physicians, Vendors, and Other Agents.

“A compliance and ethics officer colleague learned a few months too late that his nursing home had hired a CNA without following the new hire

screening policies and procedures. It was too bad because the CNA was great. Unfortunately, when the new hire screening was finally done, my colleague learned that her name and state-issued certification number were listed on the OIG's, List of Excluded Individuals/Entities, also known as LEIE or 'Exclusion List'."

"I'm sorry. I don't understand," asks Marin. By this time Layla has woken fully and is paying close attention.

"Well, all prospective and current employees, as well as vendors, are supposed to be checked against the OIG and our state's exclusion lists. We do this upon hire and monthly thereafter."

"How come?" asks Marin.

"That's an excellent question. The OIG has authority to exclude individuals and entities from any and all federally and state funded healthcare programs, including Medicare and Medicaid. The OIG keeps a list of all currently excluded individual and entities. This list, as I just mentioned, is called the List of Excluded Individuals/Entities (LEIE). If anyone, including our nursing home, hires an individual or entity on the LEIE, the employer may be subject to civil monetary penalties as well as needing to return all improperly received governmental monies.

Marin and Layla now recognize the seriousness of the exclusion list. They both realize that civil monetary penalties are not something to fool around with because the Civil Money Penalties Law authorizes

the United States Secretary of Health and Human Services to impose civil money penalties, an assessment, and program exclusion for various forms of fraud and abuse involving the Medicare and Medicaid programs.

“What are some of the reasons for the OIG-imposed exclusions?” Marin asks.

“There are a couple of different types of exclusions,” says the Effective Compliance and Ethics Officer. He continues by saying, “Let’s start with mandatory exclusions. The OIG is required by federal law to exclude from federal and state health-care programs all individuals and entities convicted of criminal offenses involving Medicare or Medicaid fraud, as well as any other federal and state health-care programs. The prohibited behavior is nearly endless. To give you an idea of the types of prohibited behavior, consider resident neglect, abuse, or exploitation; theft; financial misconduct; and felony convictions for healthcare related theft, fraud, or other financial improprieties. Felony convictions involving the unlawful manufacturing, distributing, prescribing, or dispensing of controlled substances will also wind up on the Exclusion List.”

“Thank you. I believe we understand. What is the second type of exclusion?” asks Marin.

“The other type is called a Permissive Exclusion. In this situation, the OIG has discretion to exclude individuals and entities for various reasons. The OIG may exclude an individual or entity for misdemeanor convictions related to healthcare

fraud, even if the fraud does not involve Medicare or our state's healthcare program; any fraud in a non-healthcare program as long as the program is funded by a federal, state, or local government agency; misdemeanor convictions relating to controlled substances; the providing of substandard or unnecessary services; suspension, revocation, or surrendering of a healthcare provider's license involving professional competence, professional performance, or financial integrity; submitting false claims for reimbursement to a federal healthcare program; or participating in unlawful kickbacks involving referrals of residents in exchange for anything of value," explains the Effective Compliance and Ethics Officer.

"Wow! Those are a lot of reasons to exclude someone or an entity from reimbursement. I understand that the common denominator is, excuse my language, 'ripping off' our federal or state governments involving healthcare reimbursement," says Marin.

"You've got it! The OIG advises individuals and entities, in order to avoid Civil Monetary Penalty liability, to routinely check—at least monthly—the exclusion list to be sure that prospective hires and current employees are not excluded. I also want both Layla and you to understand the additional consequences if our nursing home were to hire someone on the exclusion list. Our nursing home would receive no payment for any services or items provided or prescribed by an excluded individual or entity and would be required to return all payments

involving any involvement by an excluded individual or entity.”

“Hmmm. The OIG has a really effective way to motivate compliance!” says Marin.

“Yes. Turns out most states also have a similar exclusion list and apply the same financial consequences if an excluded individual or entity is involved with providing services or items involving state healthcare programs, I think we’ve covered a lot of ground today. Are you available to meet again tomorrow morning at 11 a.m.?”

Marin immediately responded, “Absolutely! Thank you so much for today. See you in the morning.”

“Thank you. See you in the morning. We’ll move on to element number four.”



Element Number Four: Communication, Education, and Training on Compliance Issues

At 11 a.m. the next day, Marin finds herself seated in front of the Effective Compliance and Ethics Officer. As usual, Layla is on her lap, clearly enjoying the edible treats she was hoping she'd receive from the Effective Compliance and Ethics Officer. He is at his desk, looking at four computer screens, smiling slightly, and absorbed in whatever lies before his eyes. After a full minute, Marin politely coughs.

Without even pausing, the Effective Compliance and Ethics Officer dispenses with pleasantries and dives right into Element Number Four.

“Let’s go forward,” he says. “Incidentally, have you ever heard that phrase before?”

“Go forward?” Marin asks.

“Yes,” he says.

“Why, sure, of course I have,” says Marin, a little less sure of the reason for the question than her awareness of the phrase.

The Effective Compliance and Ethics Officer says, “I’m glad. Do you realize that a famous American was known for his affinity in using that phrase?”

“Oh really? I didn’t know that. Who?” asks Marin.

“Why Davy Crockett,” he says, smiling, “American Congressman and frontier explorer, but best known for his ill-fated defense of the Alamo in 1836.”

Marin, somewhat perplexed, says weakly, “Thank you. I’ll, uh, remember that.” She gives Layla a quick glance and Layla returns her glance with an almost imperceptible shrug of her tiny shoulders. Marin smiles back at Layla.

The Effective Compliance and Ethics Officer clears his throat and says, “Marin, whatever effectiveness I have achieved as a compliance and ethics officer is due, in large part, to my curiosity. I’m curious about everything—people, history, and the law are just the start. For example, my knowledge about Davy Crockett. Relevant to our compliance program? Perhaps not. Interesting? By all means! My experience has been that the foundation for self-actualized education starts with curiosity. My challenge is to stimulate our staff to first recognize the need to learn, then appreciate the opportunity to learn, and ultimately to be curious to learn. I know I am succeeding when I can sit back and watch education turning from a noun to a verb.”

He pauses, then says, “It’s time to talk about Element Number Four—Communication, Education, and Training on Compliance Issues. An effective compliance and ethics program cannot possibly exist without knowledge.”

“Knowledge about what? The standards, policies, and procedures?” Marin asks.

“Yes,” he answers, “but it’s more than that. Standards, policies, and procedures form the foundation for our compliance and ethics program; however, that’s just part of the design. We must implement

it among our staff, our residents, our families, and our vendors. To do that, we need to understand how to apply our standards, policies, and procedures on a day-to-day basis.

“For example, let’s take the federal Anti-Kickback Statute. If you’re not aware, this is a healthcare fraud and abuse statute that prohibits the exchange of remuneration of anything of value for referrals for services that are payable by a federal program like Medicare.

“When introducing our standard, policy, and procedure dealing with the federal Anti-Kickback Statute, we must also understand how resident referrals occur between referral sources and our nursing home. We must understand how third-party reimbursement, physician ownership, and the prohibition of self-referrals come together, and how providing a safe environment fulfills federal and state residents’ rights laws and regulations.

“Curiosity may have killed the cat, as the old saying goes, but curiosity here is essential. Knowledge, to me, is like a ball of yarn—you start at one end and slowly keep pulling until you get to the other end.”

“Hmmm. A lot to take in. I suppose that’s why you have four computer screens?” asks Marin, half joking.

“Ha! You noticed! I’m trying to make sure that every employee, independent contractor, vendor, and volunteer has received our mandatory compliance and ethics program education and training,” he responds. “We use a combination of live and e-learn-

ing modules for education and training. We nearly always use case studies—my favorite teaching tool and the most interesting for our staff. However, a lot of coordination is needed. My success has been dependent upon insisting on the mandatory aspect of the education and training, as well as accurate and retrievable tracking.”

Marin asks, “What e-learning system do you use?”

The Effective Compliance and Ethics Officer responds, “Med-Net Academy, LLC” (www.mednet-compliance.com).

Marin asks about the topics used in education and training.

“Well,” continues the Effective Compliance and Ethics Officer, “at least on an annual basis we must train and educate on the overall elements of the compliance and ethics program plus specific laws, regulations, and court decisions. We also provide training and education on the Health Insurance Portability and Accountability Act, more commonly known as ‘HIPAA’. We educate and train our employees monthly. There’s so much to learn and such little time!”

Marin asks, “What about human resources as a training topic?”

“That’s very thoughtful and curious of you!” he exclaims. “Yes. Certain employment standards, policies, and procedures must be a part of our education and training. For example, criminal background checks on new hires are required in some

states, as well as what we discussed about Element Three — checking for possible exclusion by state fraud units and the federal Office of the Inspector General.”

Continuing, he says, “I consider these and some other human resource standards, policies, and procedures as part of the compliance and ethics program, and therefore we must provide education and training.”

“I notice that you did not ask me to meet with a department head to talk about Element numbers Three and Four. How come?” Marin asks.

“You really are curious to know, aren’t you?” he says, smiling. “Well, Elements Three and Four are MY favorite subjects. I find great value in screening and evaluation of employees, physicians, vendors, and other agents, as well as communication, education, and training. I have a lot of respect and quite a lot of awe as to the importance that arises from doing these elements very well.

“I enjoy personally making sure that our human resource staff, in-service coordinator, and I provide effective screening and evaluations, as well as periodic education and training on a wide variety of compliance and ethics exposures. This is my way of ensuring that we meet the expectations that our federal and state authorities have for our compliance and ethics program’s operations.”

Element Number Five: Monitoring, Auditing, and Internal Reporting Systems

The Effective Compliance and Ethics Officer then pivots simply but smoothly into Element Number Five: Monitoring, Auditing, and Internal Reporting Systems. Always patient in his demeanor, he says, “Marin and Layla, we need effective lines of internal reporting to collect compliance data for review, analysis, and presentation to the governing body as well as to enable and give all associates the ability to freely communicate their concerns to our nursing home. Our telephone ‘Hotline’ offers callers the option to remain anonymous. Whether anonymity is chosen or not, confidentiality is always preserved.”

Marin asks, “What is your preferred internal reporting method?”

“That’s simple,” he says. “I prefer our telephone ‘Hotline’ and apparently our employees do too. I know our employees value this anonymous and confidential internal reporting option, because it is often used to report compliance and ethics exposures.”

The Effective Compliance and Ethics Officer continues, saying, “Our compliance and ethics program rests upon the ability of our employees to openly and freely report issues of concern to their supervisors, to the compliance and ethics committee, and to me as the compliance and ethics officer. We are committed to developing and supporting all lines of reporting in our efforts to detect, address,

and prevent compliance and ethics exposures. Our ‘Hotline’ is an incredibly important means for such reporting. We also stress, and this is absolutely critical, that there should never be any intimidation or retaliation, and no getting even, for reporting a concern.”

Marin senses that the “Compliance and Ethics Hotline” may very well be the linchpin that ensures an effective compliance and ethics program. She asks if this is true.

“Absolutely,” he says. “A confidential ‘hotline’ is as important to an effective compliance and ethics program as the ability to petition a judge in our legal system—both are ‘means of last resort for fairness’.”

Marin asks, “How do you convey to your employees the importance of the ‘hotline’?”

The Effective Compliance and Ethics Officer pauses a moment to collect his thoughts and then says, “I have a basic mantra for our employees:

‘If you have a question or concern involving your license, your certification, or your reputation, you must do something.’

“I tell them, over and over, ‘Go to your supervisor. Go to your department head. Go to any department head. Go to our administrator. Come to me as your Compliance and Ethics Officer. Know that as a last resort or, if necessary, as a first resort, the

Compliance and Ethics Hotline is always available.’ I remind everyone, including through compliance posters on walls throughout our nursing home, that our reporting procedures are readily accessible to all persons associated with our nursing home, including employees, independent contractors, employees, vendors, senior managers, governing body members, residents and their families, and members of the general public.”

Marin asks, “When might an employee use the Compliance and Ethics Hotline as a first resort?”

“Well, if there’s a concern about sexual harassment by a supervisor, an employee may not want to confront the supervisor and may not be comfortable contacting senior management. The Compliance and Ethics Hotline may then be used as a means of first response.”

Marin immediately realizes how passionately the Effective Compliance and Ethics Officer is about the importance of his nursing home’s internal reporting system. Sensing that he is finished, Marin thanks him for his passion and insights into the critical importance of Element Five.

“Well the good news,” he says with a huge smile, “is that we’re not done yet with Element Five. Let’s talk about monitoring and auditing.”

Marin says, “Auditing is my favorite task. How do you fit auditing into your effective compliance and ethics program?”

The Effective Compliance and Ethics Officer responds with obvious approval, “Excellent! Audit-

ing and monitoring are the cornerstones of effectiveness. A system for the routine identification of compliance and ethics risk areas is essential. The key is to identify the individualized risk areas that are specific to your nursing home.”

“A risk assessment evaluates the inherent risk of doing or not doing an activity, and then carefully considers what controls are in place to mitigate that risk.” He pauses and smiles as he says, “I find this process fascinating because it requires looking at past data, present situations, and forecasting the likely future. For example, determining residual risk, which is the amount of risk that exists after internal controls are in place, requires looking at the past and seeing what happened in the same or a similar situation. Next comes the need to consider the current situation and then project going forward.”

Marin has a puzzled look on her face. The Effective Compliance and Ethics Officer says, with a great deal of understanding, “I’m probably not explaining this clearly. I want you to talk with the nursing home’s risk manager. She’ll explain more clearly how important integral risk assessments are to an effective compliance and ethics program.”

Half an hour later, Marin and Layla are escorted into the risk manager’s office. She greets both Marin and Layla warmly.

“Hi. I’m the risk manager, and I provide compliance and ethics monitoring and auditing services for our nursing home. The Effective Compliance



and Ethics Officer asked me to share our approach to monitoring and auditing with you.”

“Thank you. We would appreciate that very much,” Marin replies.

“But first,” she says while gazing down at Layla, “who is this?”

“Layla is my professional and personal companion. Wherever I go—she goes too,” says Marin, with a warm and loving smile directed toward Layla.

“Well, I’m sure Layla will find our discussion as exciting as I sense you will. The first step of monitoring and auditing is to identify and create compliance risk assessments. Then we have something to monitor and audit.”

Marin and Layla's attention is focused completely on the risk manager.

“Right now,” she says, I’m working on a privacy risk assessment. The Effective Compliance and Ethics Officer insists that all risk assessments be simple, efficient, and effective.”

Marin asks her about the methods she uses.

She responds that risk assessments take many forms, but all involve a gap analysis—the difference between what is in place and what should be in place. She continues by explaining that risk processes can be formal and occur only once a year, or they may be informal and occur every quarter or on an as needed basis.

She says, “A risk assessment is basically a mechanism used to identify and evaluate critical exposures in terms of weaknesses and vulnerabilities, as well as developing action plans for reducing risk from a broad compliance and risk management perspective.”

Marin asks if she might take a sneak peek at the privacy risk assessment that she is working on. The risk manager is delighted to share it with Marin. During the next thirty minutes, she discusses potential privacy exposures. The discussion ranges from health records left open at nurses' stations that provide unauthorized residents and families easy access to other residents' protected health information, to conversations involving protected health information during elevator rides with strangers.

“Thank you so much,” Marin says, clearly appreciative of the proactive approach to assessing risk that she has shared with her.

“My pleasure.” Now, I’ll take you back to the Effective Compliance and Ethics Officer.”

“I trust you’re getting a better sense as to how all of these Elements fit together?” says the Effective Compliance and Ethics Officer when Marin returns to his office.

“Yes, I am,” Marin says. “It seems as if one Element interlocks with another Element. They all seem to reinforce each other while still being, well, independent. I know that sounds a little silly because we’re talking about processes.”

“Not at all,” he says. “An effective compliance and ethics program is dynamic, not static. I feel as if each Element has its own style, its own timing, and its own individualization. I think we’re ready for the next Element—Number Six. Do you have time now to talk this through?”

“Yes!” says Marin enthusiastically.

Element Number Six: Counseling and Discipline for Noncompliance

The Effective Compliance and Ethics Officer says something that resonates deeply within Marin’s experience. He says very emphatically, “Standards, policies, and procedures must be taken seriously, and the only way to do that is to expect and hold employees accountable for their behavior.”

Marin responds that she, too, sees the wisdom in what he just said.

The Effective Compliance and Ethics Officer continues, “Counseling and disciplinary policies must be enforced to encourage good faith participation in the compliance and ethics program. Unfortunately, not everyone is ethical and self-actualized, so we need to counsel and discipline as needed. My experience is that without counseling and discipline there is no effective compliance and ethics program.

“The key in understanding this Element,” he says, “is to understand the difference between counseling and discipline.”

“Oh!” Marin exclaims, “I thought they were more or less the same thing.”

“There is a significant difference.” says the Effective Compliance and Ethics Officer. “That’s why I’m bringing this up.”

He continues, “Counseling is a discussion between a supervisor and an employee about an employee’s performance. The counseling discussion may address a specific incident, an aspect of the employee’s performance as part of a performance improvement plan, or the employee’s behavior or performance from an overall perspective. My goals during a counseling discussion include trying to understand the ‘root cause’ of the employee’s behavior to help the employee improve his or her performance. As you can see, counseling should be constructive and collaborative,” he says, and pauses for her response.

Marin nods her head and says, “I understand. How would you explain what discipline involves?”

“Okay,” he says. “Counseling is not discipline. Unlike counseling, which tries to correct performance behavior through positive interaction, discipline attempts to correct inappropriate, unacceptable, or unsafe behavior through the imposition of consequences, i.e., being dismissed, write-ups placed in a personnel file, re-training, and additional supervision. Counseling should, for the most part, be tried first. Disciplinary actions typically are tried only when counseling fails. At times, it may be necessary to impose discipline before counseling, for example, when an employee’s behavior involves illegal, dishonest, unethical, or highly inappropriate activities such as resident abuse, accepting or giving a kickback, verbal or physical assault, certain levels of insubordination, theft, or destruction of property.”

Marin notes his serious demeanor, much more evident than at any time since they first met.

He continues by saying, “Our compliance policies and procedures have been integrated with our operational policies and procedures, so that a violation of one is automatically a violation of the other. Our Code of Conduct summarizes all of our standards involving integrity and ethics with synchronized consequences.”

“Thank you for highlighting the importance of this Element,” says Marin. She is visibly moved by the need to hold employees accountable for their

behavior. She also appreciates the invaluable and practical guide that both the compliance and ethics program's policies and procedures and the Code of Conduct provide for employees to know right from wrong.

Element Number Seven: Investigations and Remedial Measures

“Marin,” the Effective Compliance and Ethics Officer asks, “How important do you think it is to investigate compliance and ethics exposures?”

She responds quickly, “I would say prompt investigation is essential.”

“Right on!” he says, elated that Marin—and probably Layla too—grasps the importance of what he just said. “Everyone, especially our employees, needs to know that if and when a potential or actual exposure is identified, our immediate response is to investigate and take appropriate corrective action.”

Marin says, “How to proceed with an investigation is outlined within the compliance and ethics policies and procedures, right?”

“That’s right,” he says, and then adds, “As well as all of the Elements that we’re discussing.”

Marin is quiet for a long moment before she says, “I have heard horror stories about investigations that did not result in exposures being addressed and instead, they resulted in the person who complained being fired. May I ask what your perspective is on this?”

“Of course,” he says. “Please feel free to ask me anything. You see, I recognized early in my career that the only way to have an effective compliance and ethics program is to know about as many compliance and ethics exposures as possible. I discovered that the only way to do that is to enlist the support of my employees, and the only way they will do that is if I do two things:

1. Keep my employees’ identities confidential
2. Do everything possible to implement a compliance and ethics program policy and procedure that promotes non-intimidation and non-retaliation for good faith participation in our program.”

“You’re referring to ‘whistleblowing’ aren’t you?” Marin asks.

“Yes, and a lot more,” he says. “I need my employees to report compliance and ethics exposures, and to participate in self-evaluations, audits, remedial actions, and reporting as required by state and federal agencies.”

Marin seems lost in thought.

The Effective Compliance and Ethics Officer pauses, then picks up his telephone and calls the social work director. When she answers, he says, “Hi. Would you please come to my office now for fifteen minutes if convenient for you?” He then hangs up the telephone.

A moment later, the social work director walks into his office. With a beaming smile and very warm demeanor, she introduces herself to Marin and Layla.

“Thank you so much for taking a moment to assist our guests, Marin and Layla, with your insights into the importance of the Seventh Element, its unique and sensitive nature, and its significant contribution to an effective compliance and ethics program.”

With intensity and conviction, she says, “Responding promptly to detected offenses and undertaking corrective actions is so critical. Please don’t laugh when I say that Element Seven is my favorite among all of the Elements.”

Marin says tentatively, “You also have a favorite Element? Sounds kind of, well, personal.”

She gives a relaxed and understanding laugh. “Well, my work is rather personal, and the more I understand and implement all of the Elements, the more I experience an effective and positive impact with our employees. I like that! For me, the compliance and ethics program is an effective means to a valuable end.”

Marin and Layla listen carefully to every word she is saying.

“Work the Program!” she says somewhat forcefully, and then adds, “When that is done, I consistently see, year after year, that all of our nursing home’s goals are achieved—improved quality of

care and quality of life for our residents, improved communication with our families, and improved workplace culture for our employees. Last, but not least, we effectively detect and prevent fraud, waste, and abuse.”

Marin feels the last vestiges of her doubt evaporate. Now, feeling firmly convinced as to the compliance and ethics program’s value, and recognizing the golden opportunity to learn from the social work director, she unabashedly asks for even more clarification of the Seventh Element.

The social work director continues, “One of the primary aspects of an effective compliance and ethics program is a response system. No matter how noncompliance is discovered, whether through the reporting system, or auditing and monitoring, it is critical that all suspicions of noncompliance are taken seriously.”

“For example,” she says, “we recognized early on that we must have a system for responding to issues as they arise, including investigation, corrective action, counseling, and discipline. The key is to investigate on a timely basis and do it fully, thoughtfully, and objectively. We take all complaints seriously, and promptly investigate all suspicions of noncompliance to ensure that real issues are properly identified and resolved.”

Marin asks, “Who typically investigates compliance and ethics-related issues?”

“Our Effective Compliance and Ethics Officer typically will promptly investigate all complaints of

noncompliance. Depending upon the issue and the department, he will first meet with the most knowledgeable department head, and together come up with an investigation plan.”

“What is a typical procedure?” asks Marin, somewhat in awe of how knowledgeable the social work director is and how quickly and passionately she responds.

“Well, let me think. That’s a good question,” she says. “First, we assess the issue reported, no matter where it comes from. Then, we create an investigation plan and move forward from there. Ultimately, we complete an investigation form. After that, if the Effective Compliance and Ethics Officer determines that the individual(s) being investigated should not be working during the investigation, that person(s) will be suspended pending completion of the investigation.”

“So,” Marin asks curiously, “How would you summarize the investigation process?”

The social work director gathers her thoughts before thoughtfully explaining. “The investigation may include interviewing the person or persons involved in, or having knowledge of, the potential noncompliance. The investigation includes reviewing related documentation, and, where needed, reviewing relevant statutes, regulations, and policies. It may also involve collaborating with an internal oversight authority, and at times contracting with an external authority; for instance, outside counsel,

auditors, or our healthcare compliance and ethics program consultants.”

Marin asks, “You have healthcare compliance and ethics program experts?”

She responds by saying, “Yes, Med-Net Compliance is our consultant.” [Add link]

Marin responds by sharing her understanding that investigatory goals include determining if the allegations are well-founded. She says, “It seems to me the question to ask is: Was there a violation of law, rule, regulation, or company policy? This is followed by determining what the nursing home’s reporting requirements to federal or state agencies should be.”

She is pleased and says, “Yes. Exactly! Then we must determine what, if any, corrective action should be taken. Right?”

Marin smiles and says, “Right!” She feels she is getting into the groove of the compliance and ethics program perspective and, for the moment, she feels like Layla and she are welcome members of the Effective Compliance and Ethics Officer’s team.

The social work director continues to describe appropriate corrective action: “If noncompliance is detected, our nursing home must take all reasonable steps to report appropriately and accurately, and to prevent future offenses.”

Marin, thinking about the First Element of the design process, asks if this might include changes to existing standards, policies, and procedures.

She is clearly pleased that Marin is making the connections between the Elements and the broader design process, says with a huge smile, “Absolutely! Corrective action applies to processes as well as individual or group behavior.”

Marin wonders what other impact corrective action might have on the remaining Elements of an effective compliance and ethics program. Before she can open her mouth to ask her question, the social work director anticipates and answers her question. It is as if she is knowingly leading Marin to her next thought.

“Any changes to policies and procedures potentially require modification to our auditing and monitoring processes, which impacts our staff training effort to ensure that they are aware of all updated standards, policies, and procedures,” says the social work director.

At this moment, as if on cue, Layla, who is resting comfortably by Marin’s leg, moves closer to her. In one smooth, careful sweep, the social work director lifts Layla into her arms. Instead of seeming startled, Layla looks as comfortable as if she were home with Marin lying on a blanket atop the ottoman in their living room.

Marin is so absorbed in thought she hardly notices Layla’s obvious explicit approval of the social work director and her concepts. Marin asks, “How often are employees reminded about responsibility and accountability for compliance?”

“Continuously,” she replies. “Employees are reminded during training, and through the use of posters, contests, announcements. It’s endless because compliance is more than a concept and more than a training session. Compliance is our culture. It involves accountability, responsibility, and authority for compliance, with awareness of one’s own behavior as well as that of employees, residents, and families. Most importantly, we are all responsible for reporting noncompliance.”

“Is discipline integral to your effective compliance and ethics program?” Marin asks.

She responds, “Discipline is a necessary part of the compliance and ethics process. Although it’s rare, we do at times need to subject employees to disciplinary action for violations of our standards, policies, and procedures. It is important to realize and consider that our standards, policies, and procedures are easier to understand than articulations of laws, rules, and regulations.”

Marin asks, “How important is applying discipline consistently?”

“Incredibly important,” she answers. “Discipline must be applied consistently and in accordance with our well-publicized policies and procedures. We go through the same basic steps for a compliance and ethics issue as we do for any other issue. The first step is oral and always documented. The next step is written—having employees express their observations of the issue and their understanding of the circumstances in writing. The final step involves

suspension to allow time for the investigation to be completed. Finally and unfortunately, if the investigation determines it to be necessary, employment will be terminated.”

At this point, the social work director very gently pets Layla and asks Marin, “Are there other questions that I may answer?”

Marin is beginning to feel overwhelmed, but in a positive way. Her mind is flooded with concepts, images, and gratefulness that her journey to find a mentor has led her to the Effective Compliance and Ethics Officer and his wonderful team. Marin replies, “No. Your team and you are amazing, and I need time to take everything in and process it.”

The social work director smiles. Marin smiles. Layla even appears to smile.

“Well, no need to walk you back to the Effective Compliance and Ethics Officer’s office since we are already here.” The social work director gets up from her chair and reluctantly and gently hands Layla to Marin. “My pleasure in meeting both of you!”

“Thank you so much,” Marin says as she holds Layla.

A few moments later, the Effective Compliance and Ethics Officer returns to his office and begins to talk, unhurriedly. He seems to instinctively understand what Marin is feeling right now, trying to integrate and process all the new concepts flooding her mind.

“We have now discussed the First Secret, the design of the Seven Elements that make up an effective compliance and ethics program,” he says. “I’m ready to share with you my Second Secret—the thoroughness of the compliance and ethics program implementation.”

Marin, somewhat taken aback, smiles and says, “There’s more?”

The Effective Compliance and Ethics Officer returns her smile and says, “Yes, there’s more, but the hour is late. Would you be available to continue tomorrow morning?”

“Of course!” Marin is relieved that she will have the evening to think over and process all that Layla and she have learned so far. “Thank you so much for your team and your wisdom and time. We will see you same time tomorrow morning.” She gathers up Layla under her arm, and heads out.

Later that night, Marin finds it hard to sleep—she is so excited, and her mind is racing in a million directions! She looks at Layla, already asleep on the bed, nestled up against Marin’s legs.

“Finally,” she says to herself, “I met someone who has explained the concepts behind an effective compliance and ethics program.” She smiles. “Even better than that,” she continues to herself, “he has simplified the concepts and given me the tools to use. Each of the Elements seems straightforward, but also probably very challenging to implement, let alone audit. That’s why I need everyone to par-

ticipate in good faith. Perhaps everyone needs to be trained to act and think like a compliance officer.”



Marin closes her eyes.

Before she knows it, morning comes, and she finds Layla and herself again waiting for the Effective Compliance and Ethics Officer in his office.

“Good morning, Marin,” the Effective Compliance and Ethics Officer says as he approaches with a big smile on his face. “I trust you were able to put everything we discussed completely out of your mind and got a good night’s sleep?”

“Well, at least one of us was able to do so,” she says as she smiles and looks down at Layla. “Quite

the opposite for me. I couldn't clear my mind so easily. I was counting Elements instead of sheep because I saw a glimpse of how the Elements complement each other and seem to flow one into the other, and the need to effectively implement most of them."

"Excellent! However, not most of them—ALL of the Elements must be implemented together. ALL of the Elements must be effectively implemented. I recognized early on in my development as a compliance officer the almost puzzle-like interrelationship of the Elements.

"Every Element, like a piece of a puzzle, must come to bear on a compliance and ethics exposure for effective resolution. What a perfect segue into our discussion for this morning."

The Second Secret: The Thoroughness of the Compliance and Ethics Program Implementation

The Effective Compliance and Ethics Officer reveals his second secret by saying, "The thoroughness of the implementation is the Second Secret for an effective compliance and ethics program." He stops as if to let Marin and Layla take in the full impact of what he has just revealed.

"In most nursing homes," he continues, "management either forgets or never learns that program design is essential; however, that's only the beginning. The program must then be implemented to

have a chance to effectively work. Implementation is essential to an effective compliance and ethics program.”

“After all, Marin,” he uses her name as if to emphasize what he is saying, “our compliance and ethics program is effective only when our staff are effective. Proper implementation is necessary to ensure effective compliance and ethics performance, and a critical part of managing is to let staff know not only what they need to do, but to also train and educate them on how to do what they need to do. Implementation means training and educating staff so that they know when they are doing their job properly, and what to do when they are doing their job improperly, and then to document this training for ready retrieval and review.”

“So, training and educating staff is very important?” Marin asks.

“Yes, it’s essential to train and educate,” he states. “And, don’t forget the importance of feedback, both positive and negative, regarding how staff performance relates to effective goals. Remember, an effective compliance officer must also be an effective leader and manager.”

The Effective Compliance Officer continues by saying, “I prefer to require return demonstrations whenever possible, along with plenty of positive feedback for my co-workers, particularly whenever they are doing tasks that show they have implemented the compliance and ethics program Elements. I believe that successful implementation

moves our nursing home, and everyone involved, closer to an effective compliance program.”

Marin asks, “Following up to ensure that each of the Elements is implemented, that’s the formula for an effective compliance and ethics program?”

“Yes,” says the Effective Compliance and Ethics Officer. “I must be sure that I have thoroughly implemented all Elements of our compliance and ethics program.”

“Sometimes,” the Effective Compliance and Ethics Officer says, “staff make a significant compliance and ethics mistake and do not perform in a way that is consistent with an effective compliance and ethics program. When that happens, I first use my best management practices with staff to discuss the who, what, when, where, why, and how of the change that is needed. Then, I ask if staff understand what we are discussing, and together we develop a plan of action.”

He pauses, then says, “The systemic issues are more challenging and worrisome. But now let’s take a break if you don’t mind. I have another meeting to attend. Would Layla and you mind waiting a short while for me to return?”

“Not at all,” says Marin. “We are very grateful for all of the time your management team and you have spent with us. We will gladly wait for you.”

“Excellent!” he says. “I have a Third Secret to share with you that is also essential in creating and sustaining an effective compliance and ethics program. See you shortly.”

The Third Secret: Auditing the Actual Impact of the Compliance and Ethics Program

Returning within thirty minutes, the Effective Compliance and Ethics Officer jumps right in where he left off saying, “My Third Secret is that we must, as compliance and ethics officers, continuously audit the compliance and ethics program.

“Auditing involves periodically checking to ensure that the design and implementation are current, comprehensive, and correct. I do this for each of the program’s Elements. I am satisfied that we have an effective compliance and ethics program only after I successfully audit every Element. Auditing allows me to tell if the design and implementation of each Element of the compliance and ethics program is effective. Only when every Element is effective, do I believe the entire compliance and ethics program is effective.”

Marin asks the Effective Compliance and Ethics Officer if he believes he is currently successful in developing, implementing, and monitoring an effective fraud, waste, and abuse compliance and ethics program.

He smiles, and replies, “Our nursing home has an effective compliance and ethics program, not because of me, but because of our staff. I know this is the case because my audits indicate every Element’s design and implementation is current, comprehensive, and correct. Beyond this, there’s nothing more

our staff and I can do. As of today, I consider our compliance and ethics program to be effective.”

He continues by saying, “My unique contribution has been to continuously insist on using this process—my Three Secrets—to confirm that we have an effective compliance and ethics program. Please remember that real compliance with our policies and procedures comes from our staff, not me.

“As our nursing home’s compliance officer, my role is really to be a facilitator for our staff, and to do that, I must also use sound management practices. I believe that all of our staff want to do the right thing, to act professionally, and to comply with laws, regulations, and best practices. They sometimes just don’t know the right thing to do, what it looks like to act professionally, and what the laws, regulations, and best practices are that make up the policies and procedures.

“That’s where I come in as the Effective Compliance and Ethics Officer. When I perform my role properly, I help our staff perform their roles properly, and the result is that our nursing home has an effective compliance and ethics program.”

Marin is silent as she takes in everything the Effective Compliance and Ethics Officer is saying. She intuitively recognizes the fundamental reasonableness of what he is sharing with Layla and her.

She looks down at Layla, resting comfortably on her lap; and, as she gently strokes Layla’s back, softly says out loud to Layla, “After all, people are people, and if we are going to accomplish some-

thing significant, like having an effective fraud, waste, and abuse compliance and ethics program, we must work with and through people who individually must be compliant with our policies and procedures in order for our nursing home to be compliant with its policies and procedures.”

Layla seems to smile in agreement.



Mentally, Marin goes through a list of the compliance and ethics program components she has learned from the Effective Compliance and Ethics Officer and his management team. She also consid-

ers that implementing all of the Elements makes perfect sense because without implementation, the compliance and ethics program is useless and might as well sit on a shelf and gather dust.

She then says to herself, “Continuously auditing the Elements and the implementation also seems obvious in determining whether the compliance and ethics program is current, comprehensive, and correct.”

Mentally wrapping up this experience with the Effective Compliance and Ethics Officer, Marin smiles and says to him, “Thank you so much for the time you and your team have taken to share your ‘Secrets’ with us. I now understand that to have an effective compliance and ethics program, I must be an effective compliance and ethics officer, and my role is to assist our staff with their understanding and implementing of our compliance and ethics program policies and procedures, along with my auditing the policies and procedures, plus the execution of all seven Elements.”

“You are very welcome,” he says somewhat affectionately. “I have every confidence that you will, indeed, be a very effective compliance and ethics officer. Please don’t forget to call me anytime,” he says. I’d like to offer to meet again in a few months after you’ve had a chance to implement my Three Secrets.”

Marin asks softly, “There’s more?”

The Effective Compliance and Ethics Officer smiles and says, “Yes. We need at some point to talk

about how to measure the effectiveness of the compliance and ethics program. Step one — implement my Three Secrets. Step two — show competency by earning a CO-Q credential, step three — come back and we'll go from here.”

Marin asks, “What is CO-Q?”

The Effective Compliance and Ethics Officer says, “CO-Q means Compliance Officer Qualified. It is a credential earned by professionals who have demonstrated a high level of proficiency in the core standards of compliance and ethics management. Then you will have a competency that is recognized by peers.”

Marin asks, “Where do I become credentialed?”

“Med-Net Academy is where I received my credentials,” he said. “In our sector ongoing education shows competency. For compliance and ethics program competency we've all become credentialed. I will send you the information.”

“Thank you so much!” Marin says excitedly, anxious to begin.

The Effective Compliance and Ethics Officers says, “You are very welcome.” He shakes Marin's hand and then offers a cookie to Layla who, never shy about accepting such offers, willingly accepts the treat.

Marin eagerly looks forward to returning to her nursing home, sharing everything with Lane, her administrator, and working with her staff to incorporate the model she has learned from the Effective

Compliance and Ethics Officer and his management team. She knows that the Three Secrets and the Seven Elements she has learned will make a huge positive contribution to the success of her nursing home's compliance and ethics program. Her curiosity, however, can hardly be contained — what else will she learn when she comes back to meet with the Effective Compliance and Ethics Officer in three months?



“Compliance and Ethics” are “must-haves” for any medical and long-term care sector enterprise—particularly those dependent upon government-provided funding. This book, written by one of the sector’s leading experts, provides a realistic guideline using the fictional experiences of a young woman and her search to achieve the goal of being an effective compliance and ethics officer.

Using an easy-to-read, unique methodology of instruction, this book will help healthcare providers achieve an effective compliance and ethics program and provide a tool for the prevention of fraud, waste, and abuse—evolving to include privacy and data security, employment, and risk management.

“One concern that persists throughout my observations and experiences is that the healthcare sector, particularly skilled nursing facilities, is ‘light’ on professional management, which potentially can place the healthcare provider at risk for various exposures that could be financially and legally devastating to continued operations. An effective compliance and ethics officer can help mitigate this risk exposure.

“A compliance and ethics officer requires managerial competency to significantly contribute to an effective compliance and ethics program. Managerial competency includes knowledge about the requisite policies and procedures that address fraud, waste, and abuse exposures, and skills to educate employees as well as conduct auditing and monitoring to ensure outcomes.

“A knowledgeable compliance and ethics committee steers the program, providing a source for anonymous and confidential reporting for employees, patients/residents, and families, and a uniform and standard enforcement of policies and procedures.”—From the Introduction.

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