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# Navigating Ethical and Compliance Challenges

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Charise R. Frazier, Esq.
Shareholder
Hall, Render, Killian, Heath & Lyman, P.C

Josephine Nelson Harriott, J.D.
Director of Compliance for
Howard University Hospital
Adventist Healthcare

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Notes:

## Objectives

- Explore ethical considerations for attorneys working in non-legal positions
- Understand ethical obligations for in-house counsel
- Examine ethical issues in the use of technology
- Consider ethical obligations when the client veers into potentially illegal conduct



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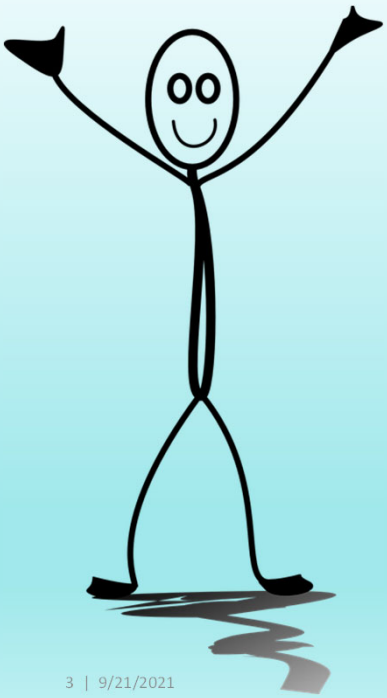
Notes:



# Meet Steve

- In-house counsel for Massive Health System in Southern California
- Massive: hospitals, physician practices, ambulatory surgery centers
- Handles mergers, acquisitions, and complex transactions
- Ready to go back to Western Maryland
- Ready for more responsibility



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Notes:

# Steve finds a great new job…

- Compliance Officer for Boomer Health
- Boomer: community hospital, urgent care clinic, ambulatory surgery center
- No in-house legal department
- In his hometown
- Steve sees a great opportunity to use his legal experience

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Notes:

# What could possibly go wrong?



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Notes:

**Model Rule 7.1 Communications Concerning a Lawyer's Services: Information about Legal Services**

- Was he honest about his experience?
- What is his role?

**DOJ Guidance Section II. Is the Program Adequately Resourced and Empowered to Function Effectively?**

- What are the duties of the Compliance Officer?
- Will he have access to competent counsel?
- What resources are dedicated to compliance?



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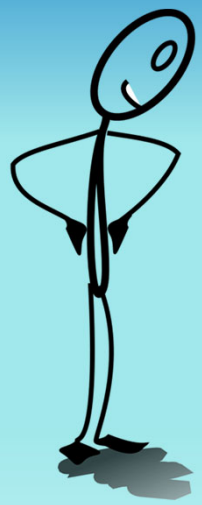
Notes:

# Day One



- Subpoena for Boomer records related to potential identity theft and insurance fraud;
- Treatment/billing records, claims, payments, staff records, and more;
- Staff give it to Steve, the big-time California lawyer;
- Steve's never handled a subpoena…



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Notes:

# How hard could it be?



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Notes:

## Model Rule 1.1 Competence

- Does he know what he's doing?
- How should he respond to the subpoena?
- Is he acting as lawyer or Compliance Officer?

## Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

- Is he licensed to practice in Maryland?
- Is a license required for a Compliance Officer?



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Notes:

## Maryland Rule 19.305.5 Unauthorized Practice of Law

- Is he acting in-house counsel?
- Is a lawyer required to help Boomer with a subpoena?



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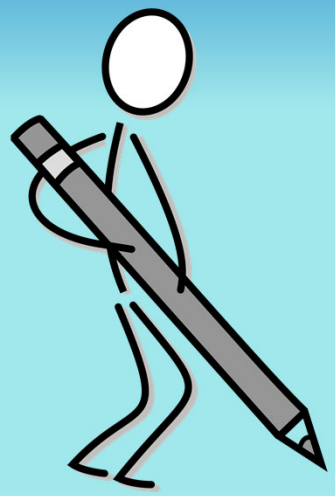
Notes:

# Day Two



- One of the staff members identified in the subpoena is the CEO's former daughter-in-law, a coder who no longer uses her married name;
- The coder was involved in an upcoding case in a former job and was excluded from federal healthcare programs;
- The CEO tells Steve that the subpoena doesn't apply since the name is wrong;
- Steve's response says Boomer has no employee by that name and signs as Compliance Officer.

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Notes:

# That wasn’t too hard…



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Notes:

**Model Rule 4.1 Truthfulness in Statements to Others**

- Is the response truthful?
- Is it that big a deal?

**Model Rule 4.4 Respect for Rights of Third Persons; Transactions With Persons Other Than Clients**

- Who does the incomplete response hurt?
- What are his obligations potential victims of the identity theft and insurance fraud?
- *See* Maryland Ethics Docket 2019-01.



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Notes:

## Model Rule 1.2 Scope of representation & Allocation of Authority Between Client & Lawyer

- Doesn't the client decide how the representation will be pursued?

## Model Rule 1.13 Organization as Client

- Must he follow the CEO's direction?
- Should he go over the CEO's head?



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Notes:

## Model Rule 8.4: Misconduct: Maintaining The Integrity Of The Profession

- Is the response legal?
- Are actions taken as Compliance Officer subject to disciplinary action?



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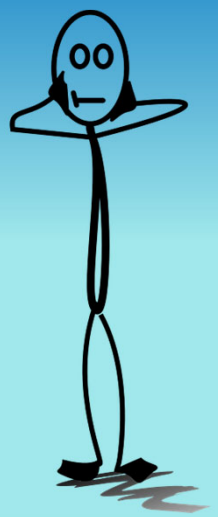
Notes:

# Day Three

- Response required via email to Teri Friar, Esq., attorney for the state Medicaid agency;
- Steve uses his personal Outlook email because Boomer's is outdated;
- He mistakenly sends the letter and records to Tony Fring;
- Teri Friar calls the next day demanding documents.





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Notes:

# OOPS!



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Notes:

## Model Rule 1.6 Confidentiality of Information

- Is the response "client information"?
- Were his actions reasonable?

## Model Rule 1.1 Maintenance of Competence

- Does it matter who received the email?

## ABA Formal Opinion 477R (2017) Securing Communication of Protected Client Information



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Notes:

# Day Four

- Tony Fring reads the misdirected email;
- Tony is Boomer's Director of Coding and Billing;
- He has concerns about billing practices at Boomer;
- The billing practices are related to the clinical decision support tools in the electronic health record system.



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Notes:

# Also on Day Four

- Tony is excited that Boomer finally has a Compliance Officer;
- He shares his concerns with Steve that the CDSS was set up to overstate acuity of patients;
- Boomer's inpatient reimbursement has significantly increased;
- Steve doesn't understand much about technology stuff, but he's pretty sure the CEO isn't going to like this…



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Notes:

What he doesn’t know won’t hurt him.



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Notes:

## Model Rule 1.4 Communications: Client-Lawyer Relationship

- Must he tell the CEO?

## Model Rule 1.3 Diligence

- Must he investigate the potential billing situation?
- What if the CEO wants to bury it?



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Notes:

# Day Thirty-Five

- Steve does a few compliance webinars;
- He knows he is in way over his head;
- His headhunter found him another transaction position in Florida;
- He's preparing to leave as soon as the offer is finalized.



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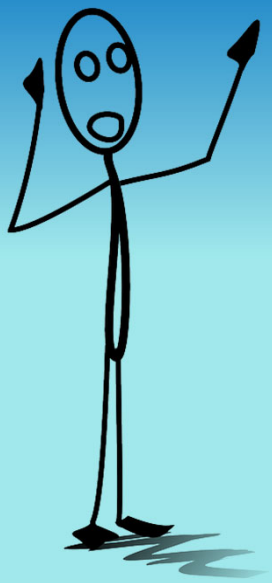
Notes:

# Also on Day Thirty-Five

- He's seen potential issues with Stark, Anti-Kickback, False-Claims, and Excluded Individuals;
- He doesn't want to be blamed if there is trouble, but he wants to keep his options open;
- One of those webinars included information about whistleblower lawsuits;
- He's saving documents in his Drop Box and forwarding emails to his Gmail account.





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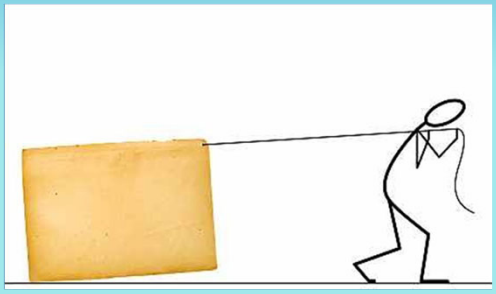
Notes:

# How do you pronounce Qui Tam?





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Notes:

## Dropbox? Gmail?

- Model Rule 1.1  Competence
- ABA Opinion 483-Lawyers' Obligations After an Electronic Data Breach or Cyberattack"

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***Steve as Qui Tam Relator?***

Model Rule 6.1 Confidentiality

Model Rule 1.13 Organization as Client

Model Rule 1.16 Declining or Terminating Representation

***Steve Representing a Relator?***

- Model Rule 1.9 Duties to Former Clients
- ABA Opinion 497 Conflicts Involving Materially Adverse Interests



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Notes:

**Charise R. Frazier**
cfrazier@hallrender.com

**Hall, Render, Killian, Heath & Lyman, P.C.**
(317) 977-1406

**Josephine Nelson Harriott, J.D.**
jharriot@adventisthealthcare.com

**Howard University Hospital**
(202) 865-3810

# Thank you!



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Notes: