Hospice and Palliative Care

BEAT

THE

ODDS

Caesars Palace Hotel, Las Vegas

November 17-18, 2014
The Art of Ethics in Compliance & Clinical Concerns

Kathleen Hessler, RN, JD
Director, Compliance & Risk
khessler@Simione.com
(505) 239-8789
WHO IS SIMIONE?

• Team of home care and hospice experts with focus on solutions
  o Organizational
    • Operational Assessment, Strategic Planning, **Compliance & Risk:** Assessments and Audits, Ethics Mediations and Clinical Operations
  o Financial
    • Cost Reporting, **Compliance**, Revenue Cycle
  o Sales & Marketing
    • Assessment & Analysis, Referral Management, Training Resources, “Sales Boot Camp”
  o Technology
    • Assessment & Analysis, Guided System Search, Implementation Support, Process Engineering
  o Mergers & Acquisitions
    • Due Diligence & **Compliance Audits and Assessments**, Business Valuation, Market Assessment
• Strategic Planning, Executive Support, Process Engineering, and Simione Financial Monitor offered in all 5 core challenge areas
PURPOSE OF PRESENTATION

• After this presentation participants should be able to:
  → State one difference between an ethical analysis and a legal review
  → Name at least two laws that are intended to deter fraud and abuse in healthcare
  → State at least three core elements of a corporate Ethics and Compliance Program framework
  → Identify one benefit of an effective agency Ethics and Compliance Program
ETHICS DEFINED

- The word ethics comes from the Greek word ethos which means “custom” or “character”
- Principle of “right” or “wrong” conduct
- A set of rules or conduct governing a profession or business: ABA Model Rules of Professional Conduct for lawyers; ANA Code of Ethics for Nurses; AMA; Corporate Standards or Code of Conduct
- Set of social or religious norms and a way of life
WHO DECIDES?

- Ethical principles or judgments are closely related to moral judgments or principles
  - Based on values of individual, community or society
  - Values may differ in people, cultures, communities, countries

Laws are often based on a group of people’s ethical values
VALUES DEFINED

• A principle, quality or standard considered desirable and important
• Many types of values:
  → Social: i.e. social programs, security...
  → Religious: charity, sanctity of life...
  → Legal: order, justice, equality, freedom
  → Economic: frugality, financial security...
  → Cultural: sanctity of land, caring for elderly
  → Environmental: clean air, carpooling, other
VALUES ... CONTINUED

→ Corporation/Agency/Providers: quality, leadership, teamwork
→ Self Determination: autonomy, respect, responsibility, right to consent/refuse medical/health care
→ Other...
ETHICAL PRINCIPLES

• Principles:
  → Respect for Autonomy
  → Non-maleficence: do no harm
  → Beneficence: do good, duty to help
  → Distribution of Justice
THE LAW

• In our society, laws are written:
  → statutory,
  → regulatory
  → common law (case law)

• Alleged violation of laws are dependent on facts

• Accountability and punishment
ETHICS AND THE LAW

• Ethical and legal: discussions/decisions flow more easily
• Unethical and illegal: discussions/decisions flow more easily

• Unethical but legal: difficult discussions and decisions
• Ethical and illegal: difficult discussions and decisions
ETHICAL VERSUS LEGAL

• Difficult issues:
  → What is ethical may be illegal
  → What is legal may be unethical

• Less complicated issues:
  → Legal and ethical
  → Illegal and unethical

• Examples
ISSUES W/ LEGAL & ETHICAL CONFLICTS

- ACA: birth control
- Abortion
- Gay Rights/Marriage
- End-of life:
  - Informed Consent
  - Autonomy
  - Withdrawing & withholding treatment
  - Assisted Suicide
• History:

→ Pre-World War II
→ Post World Was II
→ Mid-1960’s-1970’s:

• Abuses in human experimentation exposed
• Quinlan Case, 1976
• 1976-1988: by one count, there were 54 reported decisions involving the right to refuse life-sustaining treatment
LANDMARK CASE: CRUZAN

• Right to consent and right to refuse treatment evolves...
• Cruzan case: 1980’s
  → Car Accident: coma to persistent vegetative state
  → Feeding tube inserted for hydration and nutrition
  → Parents claim a “somewhat serious conversation” with Nancy in which she stated that she did not want to be kept alive unless she could have a halfway normal life
  → Supreme Court: “clear and convincing evidence” needed
  → 1990-Missouri courts; Nancy allowed to die
COMPLIANCE WITH THE PATIENT SELF-DETERMINATION ACT

• Federal Patient Self-Determination Act 1991
• State laws follow:
  → Living Wills, Health Care POA’s, also known as advance directives
• 1990: Terri Schiavo collapses and falls into a coma – she is 27 years old.
• Coma to unconscious state
• Malpractice case
• 1994: Husband accepts diagnosis of persistent vegetative state (PVS); he limits tx and enters DNR order
• 1998: Petition to discontinue treatment; parents fight petition….
• 2000 Court rules that Terri would want tube removed….multiple appeals/petition—regarding feedings
• 2005, March feeding tube removed… Terri dies…
ETHICS OF INFORMED CONSENT

• Consent: Informed and Implied
• Informed Consent and Refusal of Care
  → Capacity
  → Competency
Surrogate decision-makers have an obligation to make decisions based on:

→ Substituted Judgment
→ Best Interests
HEALTH CARE DECISIONS

- Patient has capacity
- Legal or natural guardian
- Appointed agent
- Health care surrogate based on state law—order of priority
- Health care provider based on futility issues...
BIOETHICS DISCUSSIONS

• Discussion of values in light of:
  → **Medical issues**: current condition, prognosis,
  → **Patient wishes/preferences**: Surrogate decision-maker’s knowledge of patient wishes, or if unknown, best interests
  → **Patient quality of life issues**
  → **Outside issues**: financial resources, legal, family, other
  → See Albert Jonsen’s Clinical Ethics, 1992 and later editions, McGraw-Hill, Inc.
• Ethical principles apply to corporate and business dealings:

→ Ethical issues include but are not limited to:

• Conflict of Interest
• Appearances of impropriety
• Managing people
  – Bullying; harassment; gender
• Disciplinary issues
• Working environment
• Other
DOES DOING THE RIGHT THING MEAN MORE REGULATION?  WHY? WHY NOT?

• **Who is subject to more regulations?** Medicare Certified providers/Medicaid
  → Home Health & Hospice Agency Providers

• **What:** Government oversight and enforcement
  → DHHS Centers for Medicare (CMS) and Office of Inspector General (OIG) compliance mandates & monitoring; investigations & enforcement actions; MACs, RACs, state laws & state Medicaid fraud units; Department of Justice (DOJ)

• **Where:** Everywhere
  → All regions across the United States

• **When:** Past, present & future
• **Why**: Government is on watch for fraud, abuse and waste in health care
  → Medicare spends billion of dollars each year on hospice and home health care services
  → The Government has confirmed many reports of fraud, abuse and waste in home health & hospice provider practices resulting in settlements for millions of dollars every year…
  • Roadmaps: OIG reports & Work Plans, fraud alert, corporate integrity agreement (CIAs)
  → New regulations dictate new compliance practices
  → See government enforcement actions (Department of Justice)
BRIEF HISTORY: FRAUD, ABUSE AND WASTE

• Operations Restore Trust (ORT) Pilot 1995
  → Successful recoveries in 5 states
    • 42.3 million
  → 35 Criminal convictions & 18 Civil settlements

• Focus on Anti-kickback Statute (Criminal)
  → Statute: 42 U.S.C. Sec. 1320a-7b(b)
    • Whoever knowingly …offers or accepts remuneration for …referrals…

• False claims
  → Statute: 31 U.S.C Sections 3729-3733
    • Knowingly, deliberate ignorance, reckless disregard
  → Other federal statutes
  → State laws
WHY A COMPLIANCE & ETHICS PROGRAM?

• Patient Protection & Affordable Care Act (PPACA) also known as ACA 2010
  → Requires all certified Medicare providers to establish and implement a compliance program that contains....core elements established by...DHHS CMS (Section 6401 (a) (7))

  → History of OIG voluntary guidance
  • Home Health Agencies: 63 Fed. Reg. 42410; August 7, 1998
  • Hospice: 64 Fed. Reg.54031; October 5,1999
Programs may allow providers to mitigate risk and negotiate a more favorable outcome if OIG investigation implicates providers or, if provider self-reports.

Corporate Integrity Agreements (CIAs)
MANDATORY COMPLIANCE REQUIREMENTS

- CMS Conditions of Participation (CoPs)
  → Oct 06, 2014: proposed rule for changes to CoPs
- Medicare Administrative Contractors (MACs)
- ZPIC (Zone Program Integrity Contractors)
- CMS Regulations, Notices, Transmittals, other
- Case Law
  - Jimmo v. Sebelius Settlement Agreement-Program Manual Clarifications (Fact Sheet)
- State laws regarding background checks/Medicaid fraud/Other
HOW TO IDENTIFY HIGH RISK COMPLIANCE AREAS

• CMS New Regulations & Rules
• CMS Transmittals & Change Requests
• Review OIG CIAs, Enforcement Actions
• Review OIG Work Plans
  → 2013
  → 2014
GOVERNMENT OVERSIGHT ONGOING HH & HOS

- Billing for services not rendered = false claims
- Falsifications of care plans
- Certifications/re-certifications
- OASIS
- Face to Face
  → Signature & Narrative
- Quality reporting
- Kickback issues
  → Inappropriate referrals
  → Beneficiary inducements
- Therapy
- Other
GOVERNMENT OVERSIGHT FOR HOME HEALTH

- 2013-2014 OIG Work Plan (www.oig.hhs.gov/reports)
  - Face to face encounters
  - Employment of home health aides (HHA) with criminal convictions
  - OASIS
  - MAC: Claims oversight
  - Home health PPS requirements
  - State survey and Certification/Quality
  - Trends in expenses and revenues
    - Cost report analysis
GOVERNMENT OVERSIGHT FOR HOSPICE

• 2013-2014 OIG Work Plan (www.oig.hhs.gov/reports)
  → Marketing practices
  → Financial relationships with nursing facilities
    • Mandatory contract language
  → Hospice in Assisted Living Facilities
  → General Inpatient Care (GIP) services
    • Services billed but not received
    • Increase utilization
WHAT SHOULD YOU NAME YOUR PROGRAM?

1. Written policies and procedures to include written standards/code of conduct; policies must cover high risk areas of practice; include anti-kickback, conflicts...

2. Effective oversight by provider/company compliance officer & governing body & compliance committee

3. Effective development and implementation of regular, applicable education and training for all affected employees;
4. An effective reporting system such as a hotline to receive complaints and to ensure effective communication between the compliance officer and employees. Option for anonymity.

- **Most Common:** Telephone
- **Other:**
  - Email
  - Mail
5. Use of audits and or other systemic practices to monitor compliance, identify problem areas, and implement corrective action measures: contracts; pre-billing checks, Face-to-Face, Internal & external compliance audits, etc.;

6. Establish disciplinary measures to enforce standards of conduct, address violation and apply applicable sanctions;

7. Effective policies that ensure prompt investigations, reporting and corrective actions;

Annual assessment of plan.
IS THERE A TEMPLATE PLAN?

• One size does not fit all
• Ethics & Compliance plans evolve and change
  → Ethics Committees
  → Compliance Committees
CASE DISCUSSIONS

• Issues arise (bioethics/corporate ethics):
  → clinical, end-of life, quality of care, family, conflict of interest, appearance of impropriety, employee, management

• Convene an ethics consultation or;

• Schedule ethics & compliance committee meeting

• Identify individuals, clarify role/interests, values

• Determine clinical, legal, financial, other issues

• Facilitate discussion to provide information and to seek resolution
ETHICS PROCESS

- **Clarify & Comprehend**: Points of View of all individuals
  - Patient, providers (nurse, physician, therapist), family, healthcare facility, employee, other
- **Commit**: to a list of most important values
- **Choose**: Align values and actions
- **Communicate**: Communication of the decision Facilitate discussion
- **See**: A Field Guide to Good Decisions, Values in Action, 2006; Bennett and McIver Gibson
This presentation is for education purposes only and should not be construed as providing legal advice.
THANK YOU!

• Thank you for your time and attention; we know you are busy!

• For additional questions or inquiries please contact:
  Kathleen Hessler, RN, JD
  Director, Compliance & Risk
  → khessler@simione.com
  → 800.653.4043 x 249
  → Cell (505) 239-8789