BROKEN WINDOWS AND KNIGHTS FOR RANSOM-THINKING ABOUT COMPLIANCE

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HOW WE GOT HERE: THE PATH TO MANDATORY COMPLIANCE

• Medicare Part C and D Mandatory Compliance Programs-2003
• Federal Acquisition Regulations-2008
• New York OMIG mandatory compliance
• IRS-Revision of Non-Profit Return 990-2008
• 2010-Obama Care-mandatory reporting of overpayments within 60 days
COMPLIANCE EXPECTATIONS-SENTENCING GUIDELINES

1. the organization exercises due diligence to prevent and detect inappropriate conduct by the Medicaid provider;
2. the organization promotes an organizational culture that encourages ethical conduct and is committed to compliance with the law; and
3. the compliance program is reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting improper conduct.

Failure to prevent or detect specific offenses does not necessarily mean that the program is not generally effective in preventing and detecting such conduct.

Federal Sentencing Guidelines most recent amendment effective 11/1/2010 Section 8B2.1(a)

FOUR CONCEPTS

• Why did the 100 Years War between England and France last so long?
• What can “broken windows” theory teach us about compliance?
• Why has crime in New York gone down by 80% over the past twenty years?
• What techniques from broken windows theory and the success of New York’s crime reduction can be adapted to encourage and support compliance?
100 years war-England and France

- 1337-1453-what were these (English) people thinking?
- The prosperity of the “poor knights and esquires of England” depends upon the war-Duke of Gloucester 1391
- The battle of Brignais “was a godsend . . To my companions. . . They all grew rich on the good prisoners and towns and fortresses . . .” Bascot de Mauleon

HENRY V at Agincourt –year 75, more or less, of 100 years

- We few, we happy few, we band of brothers;
- for he that sheds his blood with me
- Shall be my brother ---
- And gentlemen in England now a-bed
- Shall think themselves accursed they were not here
- And hold their manhoods cheap whiles any speaks
- That fought with us upon Saint Crispin’s day
- Henry V-Shakespeare speech
So what was this war about?

• What results did it achieve?
• What results was it expected to achieve?
• Was it worth the cost?

The fortunes of war-ransom

• French King captured at Poitiers-John II=500,000 pounds ransom
• 1,974 captives at Poitiers-13 counts, 5 viscounts, 21 bannerets.
• Prince sells three French lords for 20,000 pounds to his father
• Litigation about ransoms/butiners and controllers to allocate ransom receipts
• Corporate articles when soldiers sign up about allocation of ransom-rule of thirds-self, captain, king
• One knight ransomed 19 times (early insurance fraud?)
WAR AS OPPORTUNITY

• “The prosperity of the poor knights and esquires of England” depends upon the war-Duke of Gloucester, 1391
• “The battle of Brignais was a godsend to my companions, as they were very hard up. They all grew rich on the good prisoners and the towns and the fortresses they took...” Bascot de Mauleon (1415?)
• Collateral damage to population, economy

White collar crime as opportunity

• Prosecutors
• Defense counsel
• Consultants
• Whistleblower attorneys
• Agencies
• Elected officials
• Lobbyists
• Writers/media
• “wealthy malefactors badly scared”
MODERN RESULTS FOR THE SOVEREIGN?

- Criminal prosecutions and plea agreements of defunct subsidiaries
- Forfeitures
- Off-label case recoveries
- Fines
- Audit recoveries (RAC)
- FCPA recoveries
- False Claims/Qui tam recoveries
- How many convictions of individuals? Should that matter

So what are our current efforts against white collar about?

- What results do they achieve?
- What results is it expected to achieve?
- Are they worth the cost?
Which Administration?

• “Since the ______ Administration took office, the Department of Health and Human Services has taken a number of steps to implement a “a zero tolerance policy for fraud, waste, and abuse.” Senior Medicare official testimony

BEFORE BROKEN WINDOWS . . .

• Focus on individuals
• Focus on how individuals committed fraud
Edwin Sutherland 1939

• “white collar crime” = a crime “committed by a person of respectability and high social status in the course of his occupation.” Sutherland also included crimes by corporations

1981 DOJ DEFINITION OF WHITE COLLAR CRIME

• [n]onviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government.
CORE DIFFICULTIES

• With individuals, justice system makes informed judgment about the person, not only the violation, at time of sentencing
• With corporations, no assessment or judgment ever about the “person”-only about specific violations (frequently involving a guilty plea by defunct subsidiary to a misdemeanor violation)
• Corporate “broken windows”

CORE DIFFICULTIES

• Multiple agencies, multiple sovereigns
• Resources, coordination
• Collateral damage
• Risks, responses not predictable for corporations
• Regulatory overdetail (e.g., Stark law)
• Limited measurement, recognition of effective compliance programs
"BROKEN WINDOWS" (1969)

- Philip Zimbardo, a Stanford psychologist, arranged to have an automobile without license plates parked with its hood up on a street in the Bronx and a comparable automobile on a street in Palo Alto, California. The car in the Bronx was attacked by "vandals" within ten minutes of its "abandonment." The first to arrive were a family—father, mother, and young son—who removed the radiator and battery. Within twenty-four hours, virtually everything of value had been removed. Then random destruction began—windows were smashed, parts torn off, upholstery ripped.
- The car in Palo Alto sat untouched for more than a week. Then Zimbardo smashed part of it with a sledgehammer. Soon, passersby were joining in. Within a few hours, the car had been turned upside down and destroyed.

"Broken Windows” Clean and Safe Streets program (1970’s)

- Newark, NJ
- Foot patrol over car patrol-focus on disorder
- Public perception-neighborhoods safer
- But reported crime did not go down-why?
- “The essence of the police role in maintaining order is to reinforce the informal control mechanisms of the community itself. The police cannot, without committing extraordinary resources, provide a substitute for that informal control.”
Corporate Broken Windows

• BP
  – 2005, fire and explosion at BP’s Texas City Refinery killed 15 workers and injuring more than 170 others (OSHA, EPA, criminal misdemeanor)
  – 2007 BP Exploration, Alaska (BPXA) pled guilty to negligent discharge of oil (over 250,000 gallons) a misdemeanor under the Clean Water Act and was fined US $20 million.
  – 2010 BP Deepwater Horizon Gulf rig explodes, kills 11 workers and spill 170 million gallons

Corporate Broken Windows

• MASSEY ENERGY –
• Since 2005 the U.S. Mine Safety and Health Administration has cited Massey’s Upper Big Branch Mine for 1,342 safety violations totaling $1.89 million in fines
• 2008 Massey agreed to pay a $20 million fine to the Environmental Protection Agency in settlement of (at least) 4,500 violations of the Clean Water Act.
Corporate Broken Windows

- 2008, Massey-owned Aracoma Coal Co. agrees to $2.5 million criminal fine and $1.7 million in civil penalties, the largest combined payment ever in a coal-mining death case
- 2010-29 workers killed at Massey Upper Big Branch mine explosion
- 9/2011-foreman convicted of obstruction and false statements-investigation continues

Corporate Broken Windows

- W.Va. accident investigation, commissioned by Governor Earl Ray Tomblin, blames disaster on Massey's "total and catastrophic systemic failures... in the context of a culture in which wrongdoing became acceptable, where deviation became the norm."
- Sanitized safety inspection books
- Advance warning system of inspections
Corporate Broken Windows

- Massey Energy-sold to Alpha Natural Resources
- Alpha-$210 million settlement w/ DOJ
- Monitor reports marked “business confidential”

Corporate Broken Windows

- National Medical Enterprises/Tenet
  - 1994 settled fraud charges with the United States and 28 states involving payments of $380 million; federal guilty pleas on eight criminal counts by two of its units.
  - 2004-Redding Medical Center unnecessary cardiac surgeries on 600 patients
  - 2006-upcoding and overbilling Medicare patients-$900 million; corporate integrity agreement and compliance program
  - 2010-self-reported scheme to move patients after surgery to more expensive hospitals-result of mandated compliance program
Corporate Broken Windows-Wellcare

- June 2006-Sean Hellein, data analyst, files FCA whistleblower complaint
- August 2006 Sean Hellein meets with FBI.
- Hellein wore a camera/recorder for the FBI for 18 months, and recorded 650 hours of conversations.
- January 2007 “The golden meeting” = “you have to be careful-this is fraud.”
- May 2007-Berdey’s zero tolerance policy
- October 2007-federal search warrant-200 agents visit Wellcare

Corporate Broken Windows

- Wellcare
COMPSTAT FOR NYC

• THE NYPD SUCCESS
• SIMPLE GOALS: MEASURE, REDUCE CRIME IN DEFINED CATEGORIES
• TRADITIONAL LAW ENFORCEMENT GOALS: RESPONSE TIME, ARRESTS, CONVICTIONS, TOTAL POLICE NUMBERS
• NEW NYPD: WHERE DO CRIMES OCCUR? HOW DO WE PREVENT THEM FROM OCCURRING?

— DATA DRIVEN

LEARNING FROM THE COMPSTAT SUCCESS

• 2011-”SAFEST DECADE IN RECORDED CITY HISTORY” –MAYOR BLOOMBERG
• SINCE 1990-
  – Homicides down 80%
  – Robbery down 83%
  – Burglary down 86%
  – Auto Theft down 94%
LEARNING FROM THE COMPSTAT SUCCESS

• INCARCERATION SINCE 1990
  – IN US, UP 65%
  – IN NYC, DOWN BY 28%
  – “If the City had followed the national trend, it would have locked an additional 58,000 persons at an annual cost of well over $2 billion.” “How to Stop Urban Crime Without Jail Time” Prof. Franklin Zimring, UC Berkeley in January 29, 2012 Wall Street Journal

COMPSTAT TECHNIQUES

• Crime is opportunistic, situational and contingent; if you prevent today’s robbery at 125th Street, that is probably one less robbery for the year.
• Mapping, analysis of crime statistics
• Targetting hot spots
• 80/20 rule “Catch sharks, not dolphins” Jack Maple, former Deputy Police Commissioner
Professor Franklin Zimring, “The City That Became Safe” (Oxford University Press, 2012)

- New York has shown that crime rates can be greatly reduced without increasing prison populations. New York teaches that targeted harm reduction strategies can drastically cut down on drug related violence even if illegal drug use remains high. And New York has proven that epidemic levels of violent crime are not hard-wired into the populations or cultures of urban America.

“NEW YORK CITY’S ANTICRIME RECORD HAS A LOT TO TEACH THE NATION”

- Over the past 20 years, the City has seen no major changes in the factors . . . cited as the ‘root causes’ of crime. Unemployed young men, single parent families, educational problems, illegal drug use—they all remain.”
- “New York’s success is contagious. It’s a new chapter for urban life in America.”
- Professor Franklin Zimring
NEW YORK CITY MODELS

• Data driven decision making is one of the reasons New York City is the safest big city in America,” said Mayor Bloomberg. “Just as data helps us reduce crime, prevent fire fatalities and keep incarceration levels low, we believe understanding data can help us work with judges and criminal justice agencies to further improve the effectiveness and efficiency of our criminal justice system.”

Using Broken Windows theory and New York City experience in compliance

• The police officer foot patrol-increasing direct contact with the community-perceptions and expectations of order-FCPA enforcement
• Reporting and repairing broken windows promptly
• Setting clear goals and developing data tools to measure progress-Obama improper payments program;”zero is a bad number”
• Targeted harm reduction strategies-identify targeted, situational, and contingent violations – FCPA Manual
FOUR CONCEPTS—How did we do?

• The 100 Years War between England and France and the “ransom culture”
• “broken windows” theory, public order, and compliance-visible, informal, prompt action
• Why has crime in New York gone down by 80% over the past twenty years-clear goals-measure, reduce crime in specific categories
• What techniques can be adapted to encourage and support compliance?

GOVERNMENT TOOLS TO ENCOURAGE COMPLIANCE

• Public reporting and disclosure (IRS 990)
• Condition of contract (CMS,FAR)
• Certification requirement—my compliance program is effective
• Mandated reporting of identified overpayments (OMIG, Affordable Care Act)
• Public disclosure of compliance failures (OMIG deceased patients project, reporting in corporation on violations and discipline)
• Mandated compliance plans-structure and performance (CMS, OMIG)
• Measurement and evaluation of mandated compliance programs (OMIG and CMS)
FEDERAL ACQUISITION REGULATIONS-
MANDATORY DISCLOSURE, COMPLIANCE
AND ETHICS PROGRAMS

  Mandatory Disclosure for Federal Contractors-also
  requires compliance and ethics programs for certain
  contractors, and reporting violations of criminal law
  and false claims.