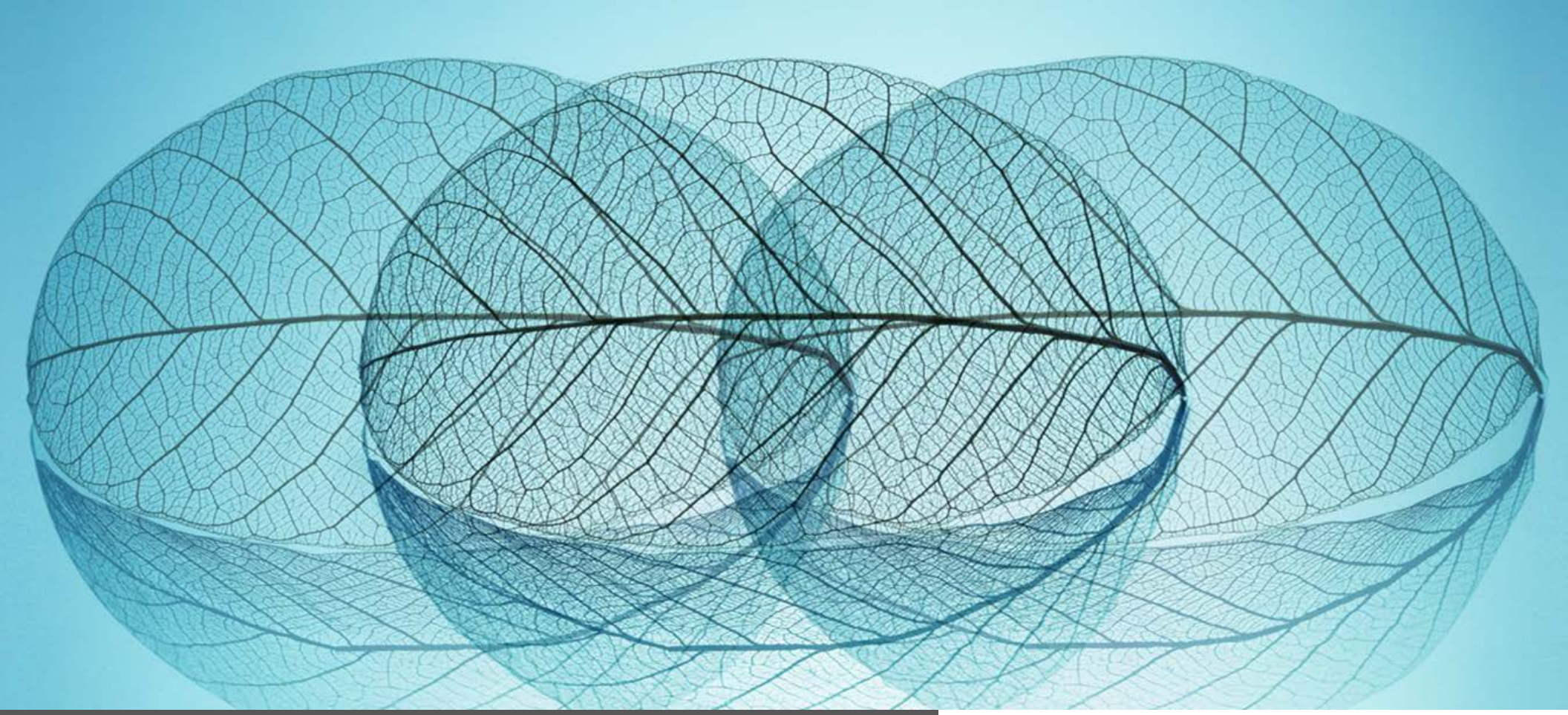

# Retaliation Under the False Claims Act: Compliance Officer's Perspective

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# Goals and Overview

**Goal:** Understand the Elements of a Retaliation Claim under The False Claims Act

**Goal:** Discuss the Elements under a Specific Scenario based on recent Case Facts

**Goal:** Apply concepts to Management and Litigation Perspectives

**Overview:** Basis of the Claim under the False Claims Act

**Overview:** Relationship with Employment Discrimination Statutes

**Overview:** Relator or not Relator? –Ethical Duties and Considerations

**Overview:** The Impact of the Compliance Program Under the Specific Scenario

# Scenario: Allegations in Recent Claim filed in the District Court

1. Plaintiff (a licensed attorney) was the Director of a managed care organization's Audit and Investigation Unit.

2. She reported directly to the Chief Compliance Officer of the Managed Care Organization (MCO).

3. As part of her duties, she allegedly investigated and brought to light "*suspicious practices by certain laboratories and physicians [contracted under the MCO's Medicare Advantage Plan], in which they charged for genetic testing services which were not medically indicated, for people insured by [MCO], including those for whom federal funds were disbursed*."

4. After litigation ensued by the MCO against the contracted providers for purposes of recoupment, a settlement agreement was entered with one laboratory; this required the laboratory provider to establish a compliance program and subsequent audits by the MCO. This agreement was labeled as confidential.

5. Plaintiff Director alleged that the Laboratory did not comply with the terms of the settlement regarding the establishment of the compliance program. She allegedly brought the matter to the compliance officer, to inside counsel for the MCO and to outside counsel, in charge of the litigation.

# Scenario: Allegations in Recent Claim filed in the District Court of Puerto Rico (continued)

6. The Director sent a letter to the provider terminating the relationship between the parties. It is not clear from the set of facts whether the Plaintiff Director made the decision by herself or if that decision was discussed and agreed to by the Chief Compliance Officer and /or the Legal Department.

7. In response to the contract termination, the legal counsel for the Laboratory sent a letter to the MCO's operating officer and legal counsel allegedly requesting reinstatement of the agreement and, more specifically, the separation of the Plaintiff Director from any oversight duties over the settlement requirements.

8. A few weeks later, and after alleged discussions of the appropriateness of the contractual termination with the provider, the Plaintiff Director was fired from the MCO.

9. Plaintiff Director files federal civil action under the Retaliation provision of the FCA. She does not file *a qui tam*. She alleged that she was fired because of her involvement in the initial investigation against the laboratory, her actual oversight of the settlement agreement and the decision to terminate the contractual relationship with the provider.

10. The MCO categorically denies such allegations, professed other reasons such as insubordination and counter-claims for breach of confidentiality of the terms of the settlement. She also sued the provider for tortious interference, but not under the FCA.

# Allegations: Fraud Against the Plan

1. Plaintiff was involved in the investigation of MCO's contractual disputes concerning the billing of genetic tests by specific providers.

    - *Alleged scheme: "runners and sales representatives from at least two laboratories based in the United States would approach patients at physicians' offices, including those insured by MCO, offering them a "free" test, which would not involve the payment of a deductible, since the cost would be assumed by MCO.*
    - *"These individuals would deliver the saliva samples from patients in the offices of the physicians to four laboratories in Puerto Rico which were MCO's contracted providers.*
    - *The four laboratories would send the samples to laboratories based in the continental United States.*
    - *The laboratories in Puerto Rico would then bill MCO for the procedure, although their only role was to send the samples to the State-side laboratories".*

# FALSE CLAIMS ACT AT A GLANCE (31 U.S.C. Sections 3729 through 3733)

- President Lincoln signed the False Claims Act (FCA) in response to scoundrels who sold the Union Army "gunpowder" kegs full of sawdust, uniforms sewn with used rags that disintegrated when wet, and boots made of cardboard that fell apart when worn.
- *Qui tam* is short for *qui tam pro domino rege quam pro si ipso in hac parte sequitir* — that is, that "who sues on behalf of the king as well as for himself."
- The FCA allows persons and entities with evidence of fraud against federal programs or contracts to sue the wrongdoer on behalf of the United States Government.
- It provides for treble damages, with a percentage of those damages payable exclusively to the relator: 15-25% if the government joined in prosecuting the case and up to 25-30% if the relator handled the case without government support.

# FALSE CLAIMS ACT AT A GLANCE (31 U.S.C. Sections 3729 through 3733)

## What Actions Are Considered Violations under the False Claims Act?

- Knowingly presenting (or causing to be presented) to the federal government a false or fraudulent claim for payment;
- Knowingly using (or causing to be used) a false record or statement to get a claim paid by the federal government;
- Conspiring with others to get a false or fraudulent claim paid by the federal government
- Knowingly using (or causing to be used) a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the federal government.

# DOJ 2017 False Claims Act Recovery Statistics

**HHS RECOVERIES**

| *HHS FCA RECOVERIES* | | FY 2017 | FY 2016 | FY 2015 |
|---|---|---|---|---|
| **Total Settlements & Judgments** | | **$2.5 Billion** | **$2.6 Billion** | **$2.2 Billion** |
| *Qui Tam* Settlements & Judgments | Where U.S. Intervened | $2.06 Billion | $2.44 Billion | $1.49 Billion |
| | Where U.S. Declined | $380 Million | $72.9 Million | $472.6 Million |
| | **Total Qui Tam** | $2.44 Billion | $2.5 Billion | $1.96 Billion |
| Non-*Qui Tam* Settlements and Judgments | | $32.6 Million | $97.5 Million | $154.7 Million |
| **Total Relator Share Awards** | | $282.8 Million | $457.3 Million | $405.1 Million |
| Relator Share Awards Where U.S. Declined to Intervene | | $32.5 Million | $20.5 Million | $132.2 Million |
| Relator Share Awards Where U.S. Intervened | | $250.3 Million | $436.8 Million | $258.8 Million |
| **All New Matters** | | **544** | **572** | **452** |
| New *Qui Tam* Matters | | 491 | 503 | 426 |
| New Government Led Matters (Non-*Qui Tam*) | | 53 | 69 | 26 |

"Of the $3.7 billion in settlements and judgments, $2.4 billion involved the health care industry, including drug companies, hospitals, pharmacies, laboratories, and physicians. This is the eighth consecutive year that the department's civil health care fraud settlements and judgments have exceeded $2 billion."
*https://www.justice.gov/opa/pr/*

# Basis of the Claim under the False Claims Act

The FCA provides protection against discharge, demotion, suspension, threats, harassment, or other discrimination in the terms and conditions of employment resulting from lawful acts under the Act. 31 U.S.C. § 3730(h).

The statutory language in the Georgia False Medicaid Claims Act ("GFMCA") mirrors the language in the federal False Claims Act, and courts generally look to federal case law to decide issues under the GFMCA.

## REMEDY

- Reinstatement with the same seniority status
- 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination
- Litigation costs and reasonable attorneys' fees

## STATUTE OF LIMITATION

- 3 years after the date when the retaliation occurred
- Action under this subsection may be brought in the appropriate district court of the United States

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# Basis of the Claim under the False Claims Act

***PRIMA FACIE* CASE:**

## 1. Protected Conduct

- The relator must show that his or her conduct was protected under the Act

## 2. Knowledge

- the employer knew about the relator's conduct and

## 3. Retaliatory Behavior

- the employer engaged in retaliatory behavior **because** of such conduct

# Question?

***Does the Plaintiff have to file a parallel qui tam action to proceed with a retaliation action?***

# Answer

NO. The definition of protected activity was amended in 2010. Since then, the courts have interpreted the phrase “activities that “reasonably could lead” to an FCA action” to include:

1. investigations,
2. inquiries,
3. testimonies or
4. other activities that concern the employer's knowing submission of false or fraudulent claims for payment to the government.

U.S. ex rel. Hagerty v. Cyberonics, Inc., 95 F. Supp. 3d 240, 272 (D. Mass. 2015), aff'd sub nom. Hagerty ex rel. United States v. Cyberonics, Inc., 844 F.3d 26 (1st Cir. 2016)

# Question?

*Consider the definition of "Protected Activity" under the FCA:*

*"lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts **to stop** 1 or more violations of this subchapter". 31 U.S.C.A. § 3730 (h)*

*Consider these elements of the Director's allegations:*

*1.- brought to light alleged fraud from the providers;*
*2.- discussed the issue with state and federal agencies for purpose of disclosure;*
*3.- oversight of the compliance requirements under the settlement*
*4.- terminated the contract for lack of compliance*

***In our scenario, did the Plaintiff Director engage in protective conduct or activity?***

# Answer

Could go either way.

Arguments for "YES"

1. By bringing to light the fraud;
2. By talking to the authorities;
3. With regards to non-compliance with the settlement requirements, by discussing it with the Chief Legal Counsel and outside counsel;
4. By terminating the agreement with the provider who allegedly was committing fraud.

Arguments for "NO"

1. Fraud committed by third party, not by employer;
2. Her conversations with the authorities were part of her duties;
3. Her conversations with Chief Legal Counsel and outside counsel regarding non compliance of settlement were part of her duties.

# Question?

***Does the Plaintiff have a cause of action under the FCA against the MCO employer although the alleged fraud was committed by the provider?***

# Answer

YES

- What determines causation is whether or not the plaintiff was engaging in protected conduct, whatever that is, and the motivating factor for the retaliation was such behavior.

- The plain language of the FCA does not limit retaliation claims to those situations where the whistleblower's employer is actively involved in defrauding the government.

  - *Townsend v. Bayer* Corp., 774 F.3d 446, 459 (8th Cir. Dec.17, 2014) See also, O'Hara v. Nika Technologies, Inc., 2017— F.3d —-2017 WL 6542675 (4th Cir. Dec. 22, 2017).

# Question?

***What about the timing of her termination, does it come into play considering the proximity of her employer receiving the letter/ request from the third party and her dismissal?***

# Answer

YES. As stated by the 11th Circuit: a retaliation claim fails "[i]f there is a *substantial delay* between the protected expression and the adverse action in the absence of other evidence tending to show causation."

*Albers v. Georgia Bd. of Regents of Univ. Sys. of Georgia*, 330 Ga. App. 58, 62–63 (2014).

Nevertheless, it is just part of the analysis of causation. "But-for" requirements may come into play if future cases in Georgia are to follow the 3rd Circuit. (See discussion below).

# Question?

***The third element refers to the employers' knowledge of the action. What does this mean and what is the standard for Compliance Officers and In House Counsel?***

# Answer

- Under an FCA retaliation claim, the employer must have known that the employee was engaging in protected conduct.

- Usually the standard is flexible: requiring the employee to show that he/she communicated to her superiors that he/she was actively engaging in the protected conduct (by emails, testimony, acknowledgements, etc.).

- NEVERTHELESS, for compliance officers and in-house counsel, the standard is higher:

> *"This is because compliance employees are presumed to be acting in accordance with their job duties. To prove that their employer knew the employee was engaging in protected conduct, plaintiffs must show that they went beyond their normal job duties."*

*Maturi v. McLaughlin Research Corp.*, 413 F.3d 166, 172-73 (1st Cir. 2005)

# Relationship with Employment Discrimination Statutes

Retaliation claims under the FCA statutes are analyzed under the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green, 411 U S 792, 93 S.Ct. 1817, 36 LE2d 668 (1973)*. This is the same as age discrimination cases and, in some jurisdictions, as Title VII cases.

To establish a prima facie case of retaliation, a plaintiff must prove that:

1) the employer is **covered** by the act at issue,
2) the employee engaged in **protected activity**
3) the employee suffered **adverse action**, and
4) there is an inference of **causation** between the protected activity and the adverse action.

Once this is established by the plaintiff, it raises a presumption that the employer is liable to the employee, and the burden of production, but not the burden of persuasion, shifts to the employer to articulate a legitimate, nonretaliatory reason for the employment action.

# Relationship with Employment Discrimination Statutes

**Burden of Persuasion**

According to the standards applied by the Georgia courts, once the employer has presented a reason for the employment action then the burden returns to the plaintiff to prove that the employer's reasons are **pretextual.**

The employee can meet this burden in two ways:

1. **Directly**: by persuading the court that a discriminatory reason more likely **motivated** the employer or;

2. **Indirectly**: by showing that the employer's proffered explanation is unworthy of credence."

> If the proffered reason is one that might have motivated a reasonable employer, the employee "must meet" that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason."

*Murray v. Community Health Systems Professional Corporation*, 345 Ga.App. 279 (2018)

# Question?

***So, in our scenario, if there were other factors or reasons that supported the Director's dismissal, but her protected conduct was also factored in, can she still hold the claim for Retaliation?***

# Answer

*Quare* (meaning that currently it could go either way).

"YES" Argument: As of today, the 11 Circuit has hold that if the termination was reasonably motivated by the protected activity, among other factors, then the Plaintiff complies with the burden of persuasion required by the *McDonnell Douglas framework.*

*Murray v. Community Health Systems Professional Corporation*, 345 Ga.App. 279 (2018)

"NO" Argument: The recent decision of the 3rd Circuit Court of Appeals may change the FCA interpretation of the 11th Circuit Court: employee's protected conduct has to be the "but-for" cause of the adverse employment action, not merely a motivating factor.

*DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 78 (3d Cir. 2018)

# Relator or not Relator? – Ethical Duties

**BASIC PREMISE**: Both a Compliance Officer (whether attorney or not) and an in-house counsel can be relators under the False Claims Act.

**THE QUESTION**: What information can such relators use to establish the case and when can such relators disclose.

**HCCA Code of Ethics**: R.1.4; R.2.6 and R.3.2. Disclose to highest authority; resign; maintain confidentiality unless to prevent a crime or required by law.

**ABA Model Rules of Professional Conduct**: Rule 1.6 (Maintain confidence); R. 1.13 (organization as a client).

**See also Sarbanes-Oxley Act Of 2002 Sec. 307.**

**TAKEAWAY**: - *Relators who are also attorneys should make every effort to base an FCA complaint on nonconfidential information if the alleged fraud is not ongoing. In contrast, a retaliation claim under the FCA may rely on confidential information pursuant to Rule 1.6, but state retaliation law varies with respect to former in-house counsel standing to sue.*

# Requirement of a Compliance Program within Healthcare Entities

- Although the OIG Guidelines “recommend” the establishment of a Compliance Program, in this day and age it is mandatory under the Medicare/Medicaid various regulations and as extended by Part C requirement's. Managed care plans are required under statute to implement a compliance plan to guard against fraud. See 42 C.F.R. § 438.608. The plan must include the Seven Elements

1. **Exercise Effective Compliance and Ethics Oversight**
2. **Establish Effective Policies, Procedures and Controls**
3. **Train and Educate Employees on Compliance and Ethics**
4. **Establish Effective Lines of Communication**
5. **Ensure Consistent Enforcement and Discipline of Violations**
6. **Monitor and Audit Compliance and Ethics Programs for Effectiveness**
7. **Appropriate Response to Incidents and Corrective Actions**

# The Impact in Litigation of the Compliance Program Under the Specific Scenario

## Element I. Oversight

a. The complexity of the organizational structure of the Compliance Program (Fraud Unit);

b. The hierarchy and reporting responsibilities will also be scrutinized (communications between in house counsel and chief compliance officer);

c. The sufficiency of oversight on provider activity (timing of identified improper billing and/or overpayments).

## Element II. Policies and Procedures

a. Were policies and procedures in place that would guide the investigation / was it followed?

b. If the basis for termination was that the plaintiff did not follow proper procedure for provider cancellation, were those procedures pre-established?

# The Impact of the Compliance Program Under the Specific Scenario

## Element III. Training and Education

a. Was there a specific protocol pre-established for the Fraud Unit that required specific training?

b. What was the training required from the providers prior to the allegations?

## Element IV. Effective Lines of Communications

a. How was the overpayment identified? Hotline? / Audit?

b. What was the communication protocol with the provider once the misconduct was identified? What was the communication protocol afterwards?

c. Was the communication protocol followed? With the Provider? With the federal authorities? (Interaction with the Legal / Compliance Departments).

# The Impact of the Compliance Program Under the Specific Scenario

## Element V. Consistent Enforcement and Discipline of Violations

a. Was there a specific protocol pre-established by the Fraud Unit that required specific enforcement?

b. Did the plaintiff follow such protocols?

c. Were these protocols not applied consistently with the co-defendant provider?

d. Does this has to do with the reason for termination?

## Element VI. Monitoring and Auditing

a. How was the overpayment identified? Hotline? / Audit?

b. Was effective monitoring previously implemented? Will this be a reason for termination?

# The Impact of the Compliance Program Under the Specific Scenario

## Element VII. Appropriate Response to Incidents and Corrective Actions

a. Perhaps the most important factor in this litigation.

b. Did the settlement agreement with the provider contain requirements truly similar to a CIA? **Is this the standard required from MCOs?**

c. Was the MCO's response appropriate? Did the representative of the MCO (plaintiff) proceed accordingly?

d. Was there special consideration by the MCO in the case of the co-defendant provider?

**TAKEAWAY: The strength of the Compliance Program will serve as a mechanism for offense or defense in litigation, be it *qui tam* or of a retaliatory allegation nature.**

# Key Takeaways for Managers

- Managerial Lines of Communications must be open;
- Policies on Investigation Methodology and Resolution must be in place;
- When in Conflict, allow other areas such as Human Resources to lead and document the Investigation;
- Treat all Investigations using the same standards for response and resolution. (Key issue in this case is whether the provider received special treatment);
- Document insubordination.

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**Jorge Pérez-Casellas** is a Senior Director at Ankura with experience in healthcare regulatory matters. He provides compliance and privacy advisory services as well as interim compliance support services. He recently completed a tenure as Interim Chief Compliance Officer at Presence Health, Chicago, and currently serves as consultant for various clients including third party billing companies, health systems and private practitioners.

Jorge completed the LLM degree in healthcare law with a compliance concentration at Loyola University Chicago School of Law. His thesis focused on the federal government's use of extrapolation methodologies to enforce penalties under the False Claims Act. Jorge is experienced in policy development and interpretation, an expert in Stark Law and the Anti-Kickback Statute, as well as analytical solutions to system-wide compliance glitches, and the implementation of tailored compliance programs.

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## CERTIFICATIONS

Certified in Healthcare Compliance