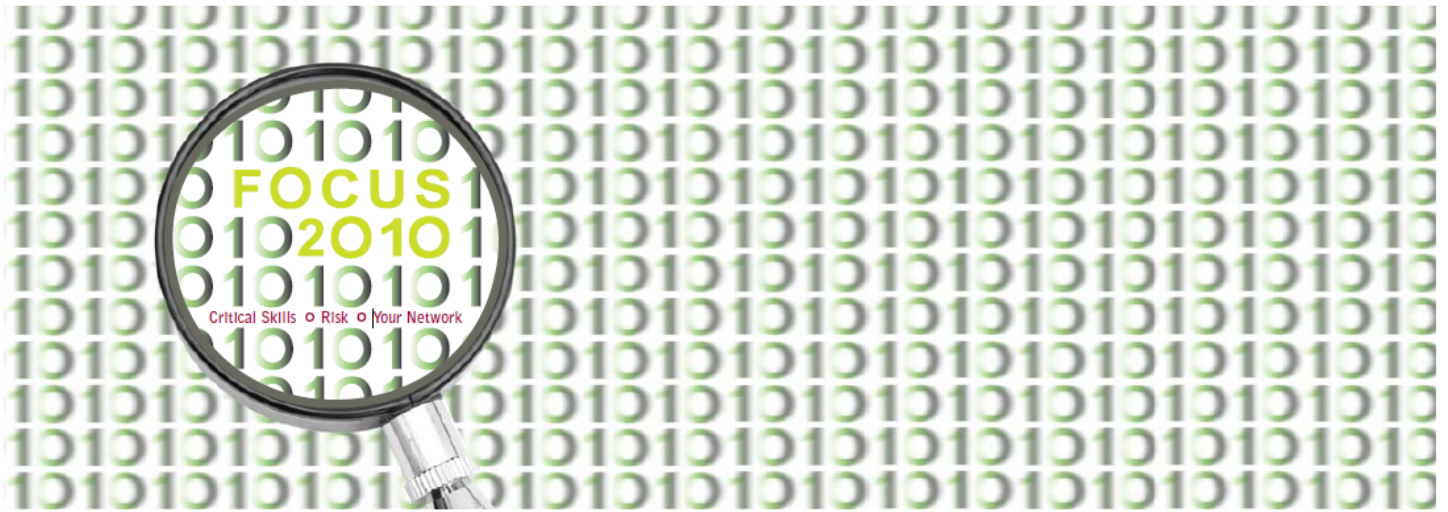


10th Annual SF ISACA Fall Conference

October 4 – 6, 2010



C24: Fraud In The Workplace: Three Mock Trials For Auditors & Whistleblowers

PW Carey, Moderator

Fraud In The Workplace: Three Mock Trials For Auditors & Whistleblowers

Part I of III



Cressey's Fraud Triad, **ISACA**[®]

Trust in, and value from, information systems
San Francisco Chapter

- **Perceived un-shareable financial need:**
 - This is the original motive. The person perpetrating the fraud has some financial problem(s) that they are unable to solve through legitimate means. The financial problem can be personal or professional. Examples of problems that commonly lead to fraud include:
 - Need to meet productivity targets at work
 - Need to meet earnings to sustain investor confidence
 - Drug or gambling addiction
- **Perceived opportunity:**
 - This defines the method by which the fraud can be committed. The person believes they can abuse their position of trust to solve their financial problem with a low expectation of getting caught.



Cressey's Fraud Triad (Continued)



- Rationalization:

- The vast majority of individuals committing fraud are first time offenders and they do not view themselves as criminals. The person justifies the crime in a way that makes it an acceptable or even justifiable act. Common rationalizations include:
 - “I am only borrowing the money.”
 - “I am underpaid.”
 - “My boss/employer (company)/supervisor/manager are crooks and deserve what ever they get.”



The Whistleblowers Handbook



- Seven mistakes are commonly made by those aiming to expose wrongdoing:
 - Trusting too much
 - Not having enough evidence
 - Using the wrong style
 - Not waiting for the right opportunity
 - Not building support
 - Playing the opponent's game
 - Not knowing when to stop.



STEPS IN A TRIAL

1. **Opening of the Court** -- The clerk of the court opens the court by announcing that the court is ready to begin and then introduces the judge.
2. **Swearing in the Jury** -- The clerk of the court or the judge asks the jurors to take their seats. Then:
 - Announces the case,
 - Asks them to swear or affirm that they will act fairly in listening to the case, and
 - Reads aloud some instructions about the case.
 - The judge asks counsel (the attorneys) to introduce themselves.
3. **Opening Statement or Argument by the Plaintiff's Attorney (or Prosecuting Attorney)** -- This lawyer begins by telling the jury the important information about the case. This includes the parties in the case and the facts that led to the lawsuit. The plaintiff's attorney presents an overview of the complaining party's version of the case (or the prosecuting attorney presents an overview of the prosecutor's or government's version) to the judge or jury.
4. **Opening Statement or Argument by the Defendant's Attorney** -- This lawyer begins by stating his or her name and the defendant's name. The jury is told that he or she will try to prove that the plaintiff's attorney or the prosecutor does not have a valid case. The defense attorney then presents an overview of the defendant's side of the case to the jury.



5

STEPS IN A TRIAL (Continued)

5. **Questioning of defendant's** witnesses by attorney for the defendant
6. **Cross-examination of defendant's** witnesses by attorney for the plaintiff
7. **Closing arguments** by both plaintiff's attorney and defendant's attorney
8. **During the trial**, the judge may intervene to help the witnesses and to respond to objections by attorneys.
9. **After both sides have rested** their cases, the judge should remind the jury of its obligations.
10. **Invite the jury** to deliberate in front of the class. The jury should submit a verdict in writing to the judge, who will read it aloud.
11. **The trial will end** with the jury's verdict, or, if found guilty, the defendant will hear what damages fines and penalties they must pay to the plaintiffs.
12. **The original jurors** will determine damages.



6

Part I of III - NetApps

Corporate Governance

- Introduction
- Network Appliance has long upheld a set of basic values to guide our actions. Among those values is the responsibility to conduct ourselves with the highest standards of ethical behavior when relating to customers, partners, employees, investors, and the communities where we work.
- We believe our corporate governance policies and practices meet or exceed the standards defined in proposed and recently enacted legislation.
- The Board of Directors of Network Appliance delegates authority to the following committees. The function of each committee is described below:
 - Audit Committee
 - Nominating/Corporate Governance Committee
 - Compensation Committee
 - As defined by our Corporate Governance Guidelines.



7

Witness For The Prosecution: At Issue

- According to the complaint, the contractor knowingly withheld information from GSA on discounts offered to commercial customers from 1997 to 2005.
- This constituted an alleged violation of the contract's price reduction clause punishable under amendments to the 1863 False Claims Act.
- In February 2003, a GSA analyst allegedly contacted Kapuscinski, then-manager of administration and procurement at NetApp, for help on a six-month review of orders.
- Kapuscinski notified NetApp senior managers of the request and told them NetApp had failed to give GSA the same price decreases offered to commercial customers, as required by law, according to the complaint.
- In addition, Kapuscinski allegedly encountered significant resistance from Anna Manzano, Senior Director of Americas sales strategies at NetApp. She threatened him with a demotion if he continued to push for the records.



8

Witness For The Defense: Rebuttal

- This company has been serving our government for many years providing the best is both services and product.
- We stand by our efforts to satisfy all regulatory and compliance expectations as spelled out in our Audit Charter.
- These efforts as attested to by numerous letter's of commendation and appreciation for exemplary service support this position.
- Mr. Kapuscinski was told on numerous occasions that his concerns were under review.



9

Witness For The Defense: Rebuttal

- This one particular event was nothing more nor less than an honest case of misunderstanding and a breakdown in communication.
- The circumstances surrounding this case is nothing more than an administrative oversight.
- Ms. Manzano does not recall having this sort of conversation with Mr. Kapuscinski.
- No members of the NetApps' Team can recall specific details of their conversations with the GSA, from their meeting in July of 2003, over six years ago.
- Several witnesses will state that they never heard Mr. Kapuscinski complain to them about pricing issues but do remember how he treated them as less than competent in their own job performance and how he complained to them about not getting the promotion he felt he deserved.



10

The Innocent Bystanders & How Did It All End?

- Employees
- Share holders
- Pension funds

The Envelope Please

\$128,000,000.00 = \$128 Million Dollars in Fines & Penalties

- Mr. Kapuscinski was entitled to (15%) of the final settlement, or \$19.2 million USDs.



11

Part II of III – Eli Lilly

Eli Lilly's Audit Committee Charter & Audit Charter

Purpose

- The audit committee's primary function is to assist the board of directors in fulfilling its oversight responsibilities by monitoring:
 - *The integrity of financial information which will be provided to the shareholders and others;*
 - *The systems of internal controls and disclosure controls which management has established;*
 - *The performance of internal and independent audit functions; and*
 - *The company's compliance with legal and regulatory requirements.*



12

Eli Lilly's Audit Committee Charter & Audit Charter

Auditing and Monitoring

- Lilly's compliance program includes ongoing efforts to monitor, assess, audit, and evaluate compliance with the company's compliance policies and procedures.
- Lilly notes that in accordance with the OIG Guidance, the nature of its reviews, as well as the extent and frequency of its compliance monitoring, assessing, and auditing varies according to a variety of factors, including new regulatory requirements, changes in business practices, and other considerations.
- Lilly's compliance program includes a risk-based monitoring program for sales and marketing activities, with an annually updated plan to monitor a statistically significant number of sales and marketing events based upon the total number of events planned to take place during the year.
- The plan is continuously tracked and updated throughout the year as necessary, as the number of events is changed by the sales and marketing organizations, and to reflect changes in the risk environment.
- Lilly's corporate audit services has a dedicated group that conducts both cause and risk-based audits on the sales and marketing functions.



13

For The Prosecution: At Issue

- According to the Sheller Complaint, some of the tactics used by Eli Lilly to push Zyprexa sales beyond the drug's approved use were:
 - During off-label lectures and audio conferences for physicians
 - Lilly sales people posed as persons in the audience who were interested in Zyprexa's expanded use and asked "planted questions;"
- While knowing the significant risk for weight gain posed by Zyprexa, Lilly minimized the connection between Zyprexa and weight gain in a widely disseminated videotape called "The Myth of Diabetes" which used "allegedly scientific studies of questionable integrity as well as the haphazard reporting of adverse events;"
- Providing evidence that, in the summer of 2003, Lilly management ordered the destruction of sales literature with misleading information, "core sales aids, flip charts and acetates;" and promoting the sublingual version of Zyprexa, called "Zydis," by claiming that it did not have the same weight-gain effects as Zyprexa.



14

For The Defense: At Issue

- Lilly has a long honorable tradition of serving the Life Sciences.
- Doing the right thing is non-negotiable at Lilly.
- Our belief in honest, truthful and straightforward business practices is well known throughout the industry as spelled out by our Charter.
- We believe in providing our customers with the most effective product we can deliver.
- When these allegations were brought to the attention of management, an extensive and exhaustive internal review of all pertinent information was immediately initiated. At the conclusion of this effort, it was determined that these allegations were the result of disgruntled employees who had either been passed over for an expected promotion and/or bonuses.
- In some cases, these same employees were discovered to have been less than truthful in cataloging their day-to-day tasks (as expected) during their employment.
- However, based upon our internal review, certain procedural enhancements were initiated and are on-going.



15

The Innocent Bystanders & How Did It End?

- Employees
- Shareholders
- Pension Funds & Pensioners

The Envelope Please

\$1,400,000,000.00 = \$1.4 Billion Dollars in Fines & Penalties

- In today's settlement, Lilly will pay: \$800 million in civil penalties and plead guilty to criminal charges, paying an additional \$600 million fine. The six whistleblowers who brought the Complaint against the drug company will share in approximately **18 percent** of the federal and qualifying states' recoveries.
- Doing the right thing is non-negotiable at Lilly." In a written response to questions from Bloomberg News, Lilly said, "Lilly entered into a very narrow guilty plea. Even though the company disagrees with and does not admit to the allegations, Lilly agreed to settle the dispute." Lilly paid \$1.42 billion for a fine and penalties in the January settlement with federal and state governments. That included the largest criminal fine in U.S. history. Lilly Chairman and CEO John Lechleiter said after the settlement that the company was devoted to acting responsibly, he said.



16

Part III of III - Pfizer

Pfizer's Audit Committee Charter

- **Status**

The Audit Committee is a committee of the Board of Directors.

- 12. Review:
 - (a) the status of compliance with laws, regulations, and internal procedures; and
 - (b) the scope and status of systems designed to promote Company compliance with:
 - laws,
 - regulations and internal procedures,
 - through review of reports from management,
 - legal counsel, and
 - third parties as determined by the Audit Committee.

17



The Pfizer Board: Audit Committee

Under the terms of its Charter, the Audit Committee meets at least six times a year, including periodic meetings held separately with:

- Management,
- The internal auditor and the
- Independent auditor.

The Audit Committee represents and assists the Pfizer Board with the oversight of the integrity of the Company's:

- Financial statements and
- Internal controls, the
- Company's compliance with legal and
- Regulatory requirements,

The independent auditor's qualifications and independence, the performance of the Company's internal audit function and the independent auditor.

18



For The Prosecution: At Issue

- According to the complaint, Pfizer Inc. ignored a 2005 FDA warning letter to stop promoting its antibiotic Zyvox® as clinically superior to the significantly less expensive, generic vancomycin
- When its own FDA-approved label indicated otherwise, Kopchinski, appalled by Pfizer's tactics in selling the pain drug Bextra, filed a "qui tam" lawsuit in 2003, sparking federal and state probes.
- "In the Army I was expected to protect people at all costs," Kopchinski said in a statement. "At Pfizer I was expected to increase profits at all costs, even when sales meant endangering lives.
- The drug giant also defrauded federal and state taxpayers by marketing Zyvox® **off-label**, according to a *qui tam* whistleblower complaint.



19

For The Prosecution: At Issue

- Under a later Pfizer regime, he was selling the epilepsy drug Neurontin
- When a previous whistleblower suit was filed against the company over similar illegal promotion tactics that led to stiff penalties and a form of corporate probation.
- At the time he was told by managers that the Neurontin suit would be in the news and any physicians who asked questions should be told it was just complaints from a disgruntled former employee, Kopchinski said.
- Ironically, after filing the Bextra suit, "I was the disgruntled former employee," he said.



20

For The Defense: At Issue

- Pfizer has a long tradition of good governance and as a good citizen of the community.
- Our business integrity is considered exemplary throughout our industry,
- When questions of compliance and governance are raised within our day-to-day business practices they are investigated immediately.
- We have an established Hotline for anonymously reporting any malfeasance which is followed up on a timely and diligent manner.
- Each of these points of contention are a result of the following:
 - Many of the conversations which the Prosecution allegedly took place can not be determined as being a fair and accurate representation of what in fact was the message being conveyed at that time.
 - Employees who had fallen out of favor with their peers and managers.
 - Several cases where these disgruntled employees were undergoing counseling and therapy for depression.
 - Several of these same employees had been reprimanded for poor performance and were being reviewed for possible disciplinary action or termination.



21

For The Defense: At Issue

- Based upon a self-imposed internal review of the facts as stated earlier the following points are raised:
- As a result of multiple acquisitions, we inherited several areas where the business practices of the acquired entity was not in-line with Pfizer's culture of best practices in the areas of Governance and Compliance.
- These areas of deficiency, which can be a result of large M&As (Mergers & Acquisitions), are under review and where deemed necessary are being brought in-line with Pfizer's culture of ethical and honest best practices.
- The company has stopped what it calls "mentorship's" in 2005.



22

Innocent Bystanders & How It All Ended?

- Employees
- Shareholders
- Pension Funds & Pensioners

The Envelope Please

\$2,300,000,000.00 = \$2.3 Billion Dollars in Fines & Penalties

- Kopchinski and five other whistleblowers will earn more than \$102 million in payments from the U.S. government under the False Claims Act through which individuals can reap rewards for exposing corporate wrongdoing.



23

For Whistleblowers & Auditors, The Road to Redemption And Proving Fraud Can Be A Long Hard Slog (aka: avg. 6.5 to 8.3 years or more...)

- Despite the potential for huge rewards, however, life can be hellish for whistleblowers and the Auditors who are legally required to support them...
- If this were easy everyone would be a millionaire...



24

Solutions

- **Do The Right Thing** (Even When No One Is Watching...or Possibly Cares)
 - Honor your ethical, professional and legal contractual obligations and seek counsel from your company.
 - Do not communicate your concerns to the client without first communicating your concerns with your company.
 - Remove yourself from the audit if you are unable to meet these obligations and be prepared for future developments.
- **ISACA's Code of Professional Ethics:**
 - Serve in the interest of stakeholders in a lawful and honest manner, whilst maintaining high standards of conduct and character, and not engage in acts discreditable to the profession.
 - Maintain the privacy and confidentiality of information obtained in the course of their duties unless disclosure is required by legal authority. Such information shall not be used for personal benefit or released to inappropriate parties.
- **IS Auditing Standards: S9 Irregularities and Illegal Acts:**
 - The IS auditor should document all communications, planning, results, evaluations and conclusions relating to material irregularities and illegal acts that have been reported to management, those charged with governance, regulators and others.
- **COBIT Mapping** to ISO/IEC 17799 & ISACA's Information Security Management Audit/Assurance Program
- **ITIL:**
 - Risk
 - A possible Event that could cause harm or loss, or affect the ability to achieve Objectives. A Risk is measured by the probability of a Threat, the Vulnerability of the Asset to that Threat, and the Impact it would have if it occurred.
 - Risk Assessment
 - The initial steps of Risk Management. Analysing the value of Assets to the business, identifying Threats to those Assets, and evaluating how Vulnerable each Asset is to those Threats. Risk Assessment can be quantitative (based on numerical data) or qualitative.
 - Risk Management
 - The Process responsible for identifying, assessing and controlling Risks.
 - See Risk Assessment.
- **Know & Understand** the jurisdictional laws affecting your client's site as laws vary based upon the jurisdiction.



25

Solutions (Continued)

ISSA Code of Ethics

- Perform all professional activities and duties in accordance with all applicable laws and the highest ethical principles;
- Promote generally accepted information security current best practices and standards;
- Maintain appropriate confidentiality of proprietary or otherwise sensitive information encountered in the course of professional activities;
- Discharge professional responsibilities with diligence and honesty;
- Refrain from any activities which might constitute a conflict of interest or otherwise damage the reputation of or is detrimental to employers, the information security profession, or the Association; and
- Not intentionally injure or impugn the professional reputation or practice of colleagues, clients, or employers.
- **NIST SP 800-66**, Revision 1, An Introductory Resource Guide for Implementing the Health Insurance Portability and Accountability Act (HIPAA) Security Rule, INFORMATION SECURITY
- **NIST 800-30** Risk Management Guide for Information Technology Systems Recommendations of the National Institute of Standards and Technology, Gary Stoneburner, Alice Goguen, and Alexis Feringa, C O M P U T E R S E C U R I T Y, Computer Security Division, Information Technology Laboratory, National Institute of Standards and Technology, Gaithersburg, MD 20899-8930, 1Booz Allen Hamilton Inc., 3190 Fairview Park Drive, Falls Church, VA 22042, July 2002
- **CITYA.M.** (Issue 1,194 Monday 9 August 2010) www.cityam.com---FT Financial Times
 US TO PAY BIG FOR WALL ST TIPS
 New US whistleblowing incentives within the Dodd-Frank financial reform bill – that could net informants multimillion dollar pay-outs – are likely to generate a surge in allegations against US-listed companies and Wall Street banks, lawyers say. The SEC is expecting a sharp increase in tip-offs from senior employees and third parties.



26

Questions

- What am I supposed to do when nobody within the organization supports me?
- What is the definition of illegal or fraudulent activities?
- What are the key signs of fraudulent activities?



27

References & Resources

- **nextgov** TECHNOLOGY AND THE BUSINESS OF GOVERNMENT, Government wins \$128 million settlement from GSA contractor, By Gautham Nagesh, 04/14/09
- **U.S. Department of Justice**, United States Attorney, Eastern District of Pennsylvania, 615 Chestnut Street, Suite 1250, Philadelphia, Pennsylvania 19106-4476, (215) 861-8200, For Immediate Release January 15, 2009, PHARMACEUTICAL COMPANY ELI LILLY TO PAY RECORD \$1.415 BILLION FOR OFF-LABEL DRUG MARKETING, Criminal Penalty is Largest Individual Corporate Criminal Fine.
- **REUTERS**, Pfizer whistleblower's ordeal reaps big rewards, Wed, Sep 2 2009, By Bill Berkrot.
- **NIST 800-30** Risk Management Guide for Information Technology Systems Recommendations of the National Institute of Standards and Technology, Gary Stoneburner, Alice Goguen, and Alexis Feringa, C O M P U T E R S E C U R I T Y Computer Security Division, Information Technology Laboratory, National Institute of Standards and Technology, Gaithersburg, MD 20899-8930, 1Booz Allen Hamilton Inc., 3190 Fairview Park Drive, Falls Church, VA 22042, July 2002



28

References & Resources (Continued)

www.isaca.org---www.issa.org---www.fbi.gov---www.gao.gov---www.hhs.gov---www.fda.gov

- **Report to Congressional Requesters**, United States Government Accountability Office
- **GAO, WHISTLEBLOWER PROTECTION PROGRAM**, Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency, January 2009
- **"The whistleblower's handbook: how to be an effective resister"** by Brian Martin. Published in 1999 by Jon Carpenter in Charlbury, UK and Envirobook in Sydney, Australia. This book went out of print in 2008. This is the original text, with minor changes, a different format and page numbering (89 pages instead of 167), and omission of the list of contacts (now on the web) and index.
- **Other People's Money: A Study in the Social Psychology of Embezzlement**, by Cressey, Donald R., 1953.
- **Emotional Intelligence** by Daniel Goleman, 1995
- **Social Intelligence** by Daniel E. Goleman, 2006.
- **Mind Rules** by John Medina, 2008
- **Your Brain At Work**, by David Rock, 2009
- **Blink: The Power of Thinking Without Thinking**, by Malcolm Gladwell, 2005



29

Thank you all for hanging in there...
Respectfully yours,
Pw Carey

Pw Carey
CISA Consultant SAP GRC Life Sciences
pwc.pwcarey@gmail.com
pwcarey@complysys.com
Office: 1-650-278-3731
Compliance Partners, LLC
www.complysys.com

Copyright © Compliance Partners, LLC 2010 Version 1.0



30