

500+ Shades of Grey?



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This material originally appeared on BerryDunn's website and has been updated for inclusion in this publication.

Depending on how you ask Google the question, apparently, the human eye can distinguish more than 500 shades of grey. That seems like an exaggeration, but a stroll through the paint aisle at any big box home improvement store suggests it may be true. Whether it is perspective gained from being firmly ensconced in my fifth decade of life, or passing through the fifth anniversary of transitioning my career from hospital leadership roles into compliance consulting, as I've become more seasoned, I definitely see more grey. Specifically, an openness to subtle differences in interpretation, a recognition that there are often more options on the 'how' to solve a problem or operationalize compliance with a new requirement, once all the facts are known.

Naturally, some situations in healthcare organizations, particularly with respect to determinations of legality, are of the yes/no, black/white variety. Operationalizing and assessing compliance with the complex array of laws and regulations is where I live professionally and where seeing the shades of grey helps me develop options for my clients. Whereas a law or regulatory standard may limit variations as to baseline policies from one organization to the next, the procedures and day-to-day workflow to operationalize compliance can vary significantly. Factors such as an organization's culture, resources, and risk tolerance influence the shade leadership sees, the business decisions made, and ultimately the effectiveness of the compliance program. All other fundamental seven elements being equal, if there is one factor from my experience conducting external compliance program effectiveness assessments that differentiates an effective program, it is the ability of an organization's incumbent compliance officer to see the grey areas and provide options when collaborating with and advising operational and clinical leaders.

HIPAA is one salient example of the 'shades' involved with the 'how' of operationalizing compliance. The text of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, as well as the scores of sections detailing the HIPAA-related rules in the

Federal Register tell us the what, but not the how. HIPAA Covered Entities and Business Associates alike often engage experienced consultants to support implementing Privacy and/or Security Rule requirements because of the complexity and perceived risks associated with getting it wrong.

While having commonalities, an effective HIPAA compliance program for a medical practice will necessarily look different than that of a hospital or a DME provider because the operational day-to-day is different, risk profiles and resources are also different. I liken the difference/commonality continuum in HIPAA compliance to the ubiquity of prickly pear generally and particularly on the cocktail menus I encountered in multiple restaurants and bars while attending a compliance conference in the greater Phoenix, Arizona area. Multiple options with prickly pear as the primary flavor, different liquor bases, recipes, and glass shapes, but ultimately, prickly pear was the dominant flavor.

Patient financial assistance and charity care is another healthcare compliance domain in which I encounter resistance to shades of grey thinking from colleagues with a black/white perspective.

While a blanket policy of waiving or not attempting to collect cost-sharing obligations, whether the patient has Medicare, Medicaid, or is a commercial health plan member is certainly not a low-risk or compliant approach, it is also not forbidden to extend discounts, payment plans, or waive cost-sharing if under the auspices of a formally documented, reasonable, and consistently applied patient assistance policy.

The theory that too many choices can cause anxiety was popularized in the context of consumer goods by psychologist Barry Schwartz in his 2004 book, *The Paradox of Choice – Why More Is Less*.¹ Whether it's shades of grey, or variations on prickly pear, the options that delight when it comes to choosing paint or cocktails can cause stress or delay decision-making when it comes to healthcare compliance matters. Further exacerbating the situation is the idea that there is one perfect choice or approach that will eliminate risk. Given the healthcare regulatory environment is unlikely to become less complex anytime soon, how an organization navigates the grey is more important than ever to the effectiveness of their compliance program.

Endnote

1. https://en.wikipedia.org/wiki/The_Paradox_of_Choice.

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