

The Ethical, Professional and Personal Challenges of Being Both A Company's Lawyer and its C&E Professional

SCCE Compliance and Ethics Institute

September 27, 2016

Odell Guyton, Esq.
VP, Global Compliance
Jabil Circuit, Inc.

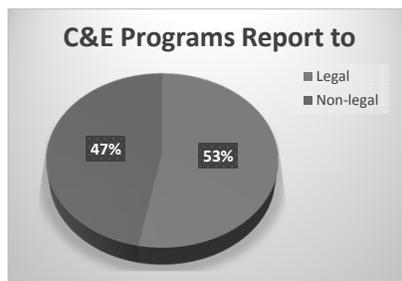
Carol Helliker, Esq.
Deputy GC and CECO
CenterPoint Energy, Inc.

Anne Tkacs, Esq.
Managing Director of E&C
Southern Company Gas

Rebecca Walker
Kaplan & Walker LLP

Lawyers and C&E

- Lawyers still dominate in the C&E field.
- According to a number of surveys, the majority of C&E departments continue to reside in the Law Department or to report up to the Law Department.



Data aggregated from several surveys, including from LRN, PWC and PLI.

Kaplan & Walker LLP

2

Lawyers Dominate

- So what's the problem with that?
- Does being both an in-house lawyer and C&E professional impact the level of independence of the C&E program?
- Does it create conflicts of interest?
- Does it contribute to the level of authority of the program?
- Are there natural synergies?
- Does it create confusion?



Kaplan & Walker LLP

3

Put Differently. . .

- Is there anything in our lawyer role that would interfere with our ability to be an effective C&E professional for an organization?
- And is there is anything in our C&E role that would interfere with our ability to be an effective lawyer for an organization?
- Would our professional responsibilities to either profession be compromised?



Kaplan & Walker LLP

4

One Opinion on the Question of Conflicts

“Apparently, neither Tenet nor [its GC/CCO] saw any conflict in her wearing two hats as Tenet's general counsel and chief compliance officer. As general counsel, [she] zealously defended Tenet against claims of ethical and legal non-compliance, e.g., the April 2001 qui tam suit, while as chief compliance officer, she supposedly ensured compliance by Tenet's officers, directors and employees. It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement.”

Sen. Charles E. Grassley
Chairman of the Senate Finance Committee
(2003)



Kaplan & Walker LLP

ABA Guidance

- “A prudent corporate governance program should call upon lawyers – notably the corporation’s general counsel – to assist in the design and maintenance of the corporation’s procedures for promoting legal compliance.”
- “The General Counsel of a public corporation should have primary responsibility for assuring the implementation of an effective legal compliance system under the oversight of the board of directors.”
 - Report of the American Bar Association Task Force on Corporate Responsibility (2003), www.abanet.org/buslaw/corporateresponsibility/financial_report.pdf



Kaplan & Walker LLP

6

Scenario 1



Your company has just completed an investigation that showed that several senior managers put extreme pressure on sales people to meet certain revenue goals, which led some sales people to engage in fraudulent behavior. There is no direct proof that the senior managers were aware of the fraud, but there is strong indication that they knew it would be hard for sales people to meet their targets honestly. Your quandary is that a) from a lawyer's perspective, it would arguably be preferable not to punish the senior managers because doing so could hurt the company in civil litigation, but b) from a C&E perspective, taking this route will contribute to a sense of organizational injustice – which, among other things, could deter employees from using the hotline in the future. How do you resolve this tension?

Kaplan & Walker LLP

7

Scenario 2



Your company recently discovered that it failed to comply with wage and hour laws several years ago – resulting in underpayments to employees of several million dollars in the aggregate. The discovery was made in the context of a routine audit. No claims have been made by employees or anyone else. You, as the CECO, consult with the General Counsel, who brings in an outside law firm to investigate. The outside lawyers advise the company to do nothing and let the statute of limitations run.

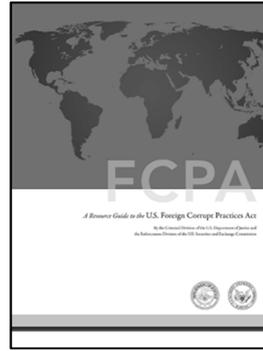
- What are your ethical duties as a lawyer?
- What are your ethical duties as a compliance professional?
- How do you resolve this situation?

Kaplan & Walker LLP

8

CECO Authority and Autonomy - Standards

- Compliance officer must have *appropriate authority, adequate autonomy and sufficient resources*.
- Adequate autonomy includes direct access to governing authority.
 - Justice Department/SEC Resource Guide to the FCPA
- CECO must have authority to report matters directly to independent monitoring bodies, adequate autonomy from management, authority to implement the program.
 - Anti-Bribery Guidance issued by Organisation for Economic Cooperation and Development



Kaplan & Walker LLP

9

Guidance from Securities and Exchange Commission

(in the context of discussing rules requiring investment companies to appoint compliance officers)

“I know that fund firms are now considering where the Chief Compliance Officer position should fit within the firm’s structure. I would not automatically assume that it should be placed within Legal or report through the General Counsel (remember that the Chief Compliance Officer also reports directly to the fund’s Board of Directors.) Intertwining the corporate legal duties and the duties of the compliance officer may create conflicts not only in the implementation of the compliance program but also in the examination of the program. If you decide that the Chief Compliance Officer will report to Legal, counsel will have to clearly articulate instances of client privilege and show great effort to segregate any dual responsibilities. Routine compliance monitoring is not subject to attorney-client privilege, and in particular, take note that the Commission recently reminded firms that all reports required under the federal securities laws are meant to be made available to the Commission’s staff for examination, and thus are not subject to the attorney-client privilege, work product doctrine or other similar protections.”

Lori A. Richards, The New Compliance Rule: An Opportunity for Change (June 28, 2004)
Staff Remarks before the Mutual Fund Compliance Programs Conference

Kaplan & Walker LLP

10

Scenario 3

Your company has a very well-developed enterprise risk management process that is supported by excellent software and a small, experienced staff. While legal and compliance risks are part of the risk assessment process, they have never cracked the top ten risk areas, and there is therefore little senior-level focus on them. You are the head of C&E and want to do a compliance risk assessment, starting with your company's international operations. The General Counsel has serious concerns about asking questions and creating documents in a part of the world where bribery is rampant, although she assures you that she has never seen any evidence of bribery by the company's employees. She argues that risk assessment is already covered by another function at the company, and that the C&E Department should focus on policies and controls rather than assessing risk. You report to her. What do you do?

Kaplan & Walker LLP



Scenario 4

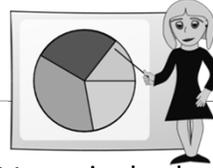
Your outside compliance counsel recently conducted an E&C program assessment, which involved a number of interviews. The outside lawyers explained to you at the beginning of the process that they typically do not reveal to the company which employee made which specific comment unless there is evidence of a legal violation that needs to be investigated. In other words, they do not reveal who told them what. During their interviews, the outside lawyers told interviewees the same thing – that, absent extraordinary circumstances, they will not source or attribute comments made by an interviewee to management or others when reporting on the interviews or the results of the program assessment.



Kaplan & Walker LLP

12

Scenario 4



When presenting the results of the assessment to senior leadership, the Firm included several quotes that were negative comments about senior leadership's support of the C&E program. The General Counsel later asks you to find out who made those comments. You go to the outside lawyers, who say they do not want to disclose the information. The General Counsel argues that both you (the Company's compliance lawyer) and the company's outside lawyers are lawyers *for the company*, so should facilitate getting to the bottom of this. He argues, in effect, that your fiduciary obligation to the company requires you to disclose the information if senior leadership asks for it. The General Counsel also indicates that the CEO wants the information.

- What should you do?

Kaplan & Walker LLP

13

Other Challenges



- C&E policies
 - How do you de-lawyerize your policies?
 - How do you learn to create an engaging Code?
 - Protecting the company v. efficacy
 - How do we understand how employees will understand these documents?
- Training and communications
 - That engages and works
- Employee confusion re the roles of legal v. C&E

Kaplan & Walker LLP

14

Publicizing Cases and Discipline

- Legal department pushback
- Legal risks
- Advantages
- DOJ/SEC FCPA Guidance: Many companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences.



Kaplan & Walker LLP

15

Scenario 5

You are the compliance lawyer at Exciting But Safe Company (EBS), which will soon be bringing a new product to market. An engineer recently came to you to express concern that the product needs more testing to determine whether it has a serious defect that could cause physical harm to consumers. The company has spent a lot of money developing and testing the product and is eager to get it to market. You approach management about this issue. They disagree with the engineer, arguing that “she’s always too conservative in her assessment of products.” They are ready to launch.

- As the compliance lawyer, what is your role?
- How do you handle this situation?



Kaplan & Walker LLP

16

Reporting Up

- MRPR 1:13: If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act
 - in a matter related to the representation
 - that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and
 - that is likely to result in substantial injury to the organization, then
- The lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Kaplan & Walker LLP

17

Reporting Up

- MRPR 1:13: Unless the lawyer reasonably believes that it is not in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Kaplan & Walker LLP

18

Reporting Out

- MRPC 1.6(b): A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

SOX 307

- The Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule-- requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
- If the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measure or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

SEC Rule 205

- An attorney who is appearing and practicing before the SEC in the representation of an issuer becomes aware of evidence of a material violation by the issuer, or by any of its officers, directors, employees, or agents of the issuer,
- The attorney must report that violation to the issuer's Chief Legal Officer (CLO) or to both the CLO and the CEO forthwith.
- In the alternative, the attorney can also report to a previously-established Qualified Legal Compliance Committee (QLCC).

CLO's Obligations

- The CLO shall inquire into the evidence to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur.
- If the CLO determines no material violation has occurred, is ongoing, or is about to occur, she shall notify the reporting attorney and advise the reporting attorney of the basis for the determination.
- Unless the CLO reasonably believes that no material violation has occurred, is ongoing, or is about to occur, she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof.

Reporting Attorney's Obligations

- Unless an attorney who has made a report reasonably believes that the CLO or CEO has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to the audit committee or another independent committee of the board of directors.
- If an attorney reasonably believes that it would be futile to report evidence of a material violation to the CLO or CEO, the attorney may report such evidence to the audit or another independent committee of the board.

Kaplan & Walker LLP

23

Disclosing Confidential Information

- An attorney may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
 - (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
 - (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, suborning perjury, or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
 - (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

Kaplan & Walker LLP

24