

## **Grieving over the best practice for the compliance officer reporting relationship**

**By: Roy Snell**

Before I start into this article about reporting relationships (and get all the e-mails), I want to make sure you understand that I agree there are exceptions. I agree *any* reporting relationship for a compliance officer might work. I agree *one size does not fit all*. I agree compliance professionals don't need independence from others *all the time*. What I am concerned about is: What is the *best practice*? There is a preferred reporting model. It's also important for compliance professionals to have independence during a few key events each year. By definition, you can't report to someone (someone who does your annual review and has the ability to hire and fire you) and have independence when you need it. I understand all of the aforementioned exceptions. I am amazed how many people are in denial about what the best practice is. I am amazed at how many organizations could implement an effective model but don't, not because they can't, but because they don't agree or they don't think it's an important distinction.

I attended a conference. A short conversation I had, just before the luncheon speaker started, made the luncheon speaker's presentation all the more interesting. For some reason, I got into another controversial conversation with a person at my table about compliance personnel reporting to the General Counsel (GC). After these conversations get started, I always regret it. I wonder how I keep getting into them. I am sure that it's my fault. I am the common denominator in all these controversial conversations after all.

Essentially, I mentioned that the government didn't feel the compliance officer should report to the GC. It seemed to come as a surprise to this compliance professional. After further conversation, it clearly wasn't something he wanted to hear. I tried to make peace by saying it was controversial, and he was quick to agree. Given other nonverbal indications, I needed to get out of this conversation as soon as possible. Luckily, the luncheon speaker was soon introduced. He started his presentation by talking about the recently updated Federal Sentencing Guidelines (FSG). He is a very well respected and knowledgeable individual in a position of authority. I knew what was coming. He stated it more blatantly than I. Paraphrasing, "You can still get a break in penalties, even if senior leadership is involved in the crime. There is a catch, however. Your compliance officer must report to the Board to get credit for an effective compliance program."

The person I had been talking to looked at me and mouthed, "That's what you were talking about." We picked up the conversation again later (another big mistake on my part). By now I am already convinced that the individual was either a General Counsel or a compliance professional reporting to the General Counsel. The individual said, "He said this wasn't his rule," or something to that effect, implying that it really wasn't a big

deal. I don't recall him implying that he didn't support the changes to the FSG. That would have startled me. After all, his department had involvement in the process to change Chapter 8 of the FSG. I recall him saying, "You better pay attention to the perspective of the enforcement community." But then again, maybe we were both hearing a "spin" we wanted to hear.

Forget the fact that the speaker thought it was so important that he brought it up in the beginning of his talk. Forget the fact that enforcement agents in this country use the FSG to determine a settlement. Forget the fact that judges use the FSG to make decisions. Forget the fact that we have Senators making comments like, "It doesn't take a pig farmer from Iowa to smell the stench in that conflict." Forget the fact that compliance professionals, by definition, need independence. Forget the fact that we have the recent Pfizer Corporate Integrity Agreement, in which the government demanded that the compliance officer no longer report the GC because they are "filtering the reports." On the plane ride home, it crossed my mind that these conversations often sound like conversations with people who were grieving. The five stages of grief are:

- **Denial** (This isn't *happening* to me!)
- **Anger** (Why is this happening to *me*?)
- **Bargaining** (I promise I'll be a better person *if...*)
- **Depression** (I don't *care* anymore)
- **Acceptance**

This is what I have seen over and over for the last 15 years: People doing something the wrong way and hanging onto it. It's astounding that a compliance professional had not yet even heard about the proposed changes to the FSG, let alone any of the other reasons why the reporting relationship should be independent. They don't want to admit it's a problem. They are told in no uncertain terms that it is perceived as a problem by many people in the enforcement community. And yet, they still rationalize. Maybe they don't think the FSG or any of the other documents matters. That would be odd on its own merits, but it is even stranger now that other countries are adopting the basic elements of a compliance program as described in the FSG (i.e., the Organization for Economic Cooperation and Development, OECD.)

I have a story that really sums this all up. It is an instance in which a Board member ended up telling a compliance officer what the best practices were. It was a highly unusual example of the tail wagging the dog. I had one acquaintance that held the title of chief compliance officer (CCO) and GC. His form of denial/rationalizing was legendary. He got a professional association (of in-house and outside counsel) to write a "white paper" saying it was okay to report to the GC. They asked our organization to participate. After a we saw where it was heading, we bowed out. Their advice to their

members was contrary to the all of the other information on the subject. It really has not gotten a lot of attention. This was a case of a whole profession being in denial. This isn't a test of wills, it's a question of what is the best practice.

Oddly, shortly after the document was done, the CCO/GC approached me and said he was no longer going to do both jobs. He said a Board member had picked up one of the many government documents suggesting it was a bad idea. The Board member cornered him in the hallway and asked why they were not following the government's recommendation. If the rationalization he gave the Board member was the same as he gave me, my guess is that the Board member's blood pressure rose a little. It was one of those rationalizations that started with a bunch of words, had a bunch of words in the middle, and ended with a bunch of words. It left me thinking of just a few words, "Run that by me again?" Apparently his answer was not satisfactory and the Board member asked him, "Why would you expose our organization like this?" The Board member had the jobs separated shortly thereafter. Oddly enough, that was about five years ago and we are still having this conversation.

Like my discussion at the lunch table, when people are told what they are doing is wrong, they Deny that there is a problem. When the evidence becomes overwhelming they become Angry. They begin to Bargain by trying to explain that what they are doing is OK. When the Board member lowered the boom on my colleague, I am sure my colleague was Depressed. The last time I saw him, he was Accepting his fate.

These are very nice people. They really want to make a difference. Most of them eventually come around. Compliance is a young profession. Many, who were lost souls before, are now some of the best and brightest in our profession.