



CREATING AND MAINTAINING AN ETHICAL CULTURE IN YOUR ORGANIZATION



Agenda

- Why Have a Program?
- Overview of Laws & Regulations Mandating Ethics and Compliance Governance
- Overview of Rules of Professional Responsibility When Advising an Organization
- Best Practices

Disclaimer:

THIS IS NOT LEGAL ADVICE. CONSULT WITH AN ATTORNEY FOR LEGAL ADVICE. RULES OF PROFESSIONAL CONDUCT DIFFER BY STATE



WHY A COMPLIANCE & ETHICS PROGRAM?



Investigations

Leaks, feasts and sex parties: How 'Fat Leonard' infiltrated the Navy's floating headquarters in Asia

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LAWS & REGULATIONS REQUIRING A COMPLIANCE & ETHICS
PROGRAM



● Fed Govt Requirements

Executive Branch Ethics Program, 5 CFR 2638 et seq

Mission. “The primary mission of the executive branch ethics program is to prevent conflicts of interest on the part of executive branch employees.”

Responsible Parties: Employees, Supervisors, Human Resources, Ethics Officers, Agency Leader, Inspector General, Office of Government Ethics

Requirements: Training, Monitor Compliance, Investigate, Take Corrective Actions

● Fed Govt Contractors

- **FAR 52.203-13:** Contractor Code of Business Ethics and Conduct
- **FAR 52.203-3:** Prohibition on gratuities to Federal Government officials and employees
- **FAR 52.203-7:** Anti-Kickback prohibitions
- **FAR 52.203-11:** Prohibitions and disclosures on using certain federal money to influence government award decisions
- **FAR 52.222-22, 26:** Equal employment and affirmative action requirements

A GOOD CORPORATE CITIZEN....

- Oversight by high-level personnel
- Due care in delegating substantial discretionary authority
- Effective communication to all levels of employees
- Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal
- Consistent enforcement of compliance standards including disciplinary mechanisms
- Reasonable steps to respond to and prevent further similar offenses upon detection of a violation

US Federal Sentencing Guidelines, §8B2.1

● Components Of A Program

- Ongoing, documented ethics and compliance program
- Informed and committed leadership – a culture of ethics
- Assess risk of non-compliance
- Mitigate identified risks
- Written code of conduct
- Written policies and procedures
- Consistent and comprehensive training
- Regular communications
- Encouraging disclosing concerns and asking questions
- Prohibit retaliation for raising concerns
- Disciplinary response to transgressions
- Evaluate program effectiveness
- Monitor to detect and prevent non-compliant conduct
- Due diligence and oversight of business partners

One Size Does Not Fit All

- Formality and scope of actions... depend on the size of the organization

Large Organizations

- More formal compliance and ethics operations than a small organization
- Greater resource commitment
- Shall encourage small organizations with whom they have a business relationship to implement an effective program

Smaller Organizations

- Must demonstrate the same level of commitment as a large organization
- May rely on existing processes and resources
- May be more informal than a large organization – train during staff meetings; monitor compliance by observing existing operations; use available personnel rather than dedicated ethics & compliance team
- Should be similar to other similarly situated organizations

- US Federal Sentencing Guidelines, §8B2.1, Comments



RULES OF PROFESSIONAL CONDUCT



● Rule 1.13: Organization as Client

If a lawyer knows

- An officer, employee, or other person associated with the organization
- Engaged in action, intends to act, or refuses to act that violates a “legal obligation”
- It is reasonable the act or omission may be imputed to the organization
- Is likely to result in substantial injury to the organization

The lawyer shall proceed as is reasonably necessary in the best interest of the organization to include going to highest authority in organization.

● Rule 2.1: Attorney Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.

● Rule: 1.16: Terminating Representation

A lawyer shall not represent a client if:

It will result in violating the Rules of Professional Conduct or other law

A lawyer may withdraw if:

- The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- The client has used the lawyer's services to perpetrate a crime or fraud;
- The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled

● Rule 1.6: Attorney-Client Privilege

A lawyer shall not knowingly reveal a client's confidence or secret

A lawyer may reveal to the extent reasonably necessary:

- to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or
- to prevent the bribery or intimidation of persons involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

● Rule 1.6: Attorney-Client Privilege

When a lawyer reasonably believes a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

- to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or
- 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 the crime or fraud.

● Rule 1.6: Attorney-Client Privilege

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BEST PRACTICES IN FOSTERING COMPLIANCE &
ETHICS



Status Of Ethics & Compliance Program

- No program yet
- Centralized
- International
- Mature business
- Risk averse
- Assessing risk

OR

- Robust program
- Decentralized
- Only certain countries
- Entrepreneurial
- Welcomes risk
- No formal risk review

Assessing Risk

- Identify risks
- Prioritize risks
- Mitigate risks
- Drives the ethics & compliance program
- Drive business process improvement and/or cost savings
- Directs training, communications, process improvement
- Identifies resource needs - human capital, IT solutions, cost allocation etc.

Identifying Stakeholders

- Employees
- Leaders
- Congress
- Legal
- Internal audit
- Taxpayers

Scope Of Review

- Operations and its unique risks
- Structure – matrixed or hierarchical
- Geographic locations of operations
- Existing processes, controls, procedures, audits, reviews, etc.
- Contractor relationships and related controls
- Leadership commitment to ethical decision making
- Employee awareness of and compliance with policies and procedures
- Effectiveness of training, communications, policies, procedures
- Compliance with laws, regulations
- Benchmark against other agencies
- Legal, ethical issues in industry where agency has relationships

Investigations vs Risk Assessments

INTERNAL INVESTIGATIONS

- Reactive
- Responding to a concern
- Aware of potential non-compliance
- Need attorney-client protection
- Move swiftly
- May require disclosure to government
- Make a finding
- Define and execute remediation
- Defined period of time
- Narrow group of stakeholders

RISK ASSESSMENTS

- Proactive
- No defined issue or concern
- Process improvement
- Consider attorney-client protection
- Broad scope
- Execute as defined in scope
- Identify gaps/risk
- Prioritize risks
- Define and execute remediation
- Broad group of stakeholders

Risk Assessment Drives...

- Internal Controls
- Resource Needs
- Policies
- Procedures
- Training
- Communications
- Business operations

Developing Internal Controls

Control Environment: Culture, values, competence, management philosophy and operating style

Risk Assessment: Identifying and managing risks

Control Activities: Policies and procedures that execute leadership directives

Information & Communication: Reports – such as financial and compliance

Monitoring: Assess quality of the system's performance

● Policies And Procedures

Policy: Fundamental principles or standards that require or restrict certain activities or establish terms and conditions for achieving certain business objectives

Procedures: The processes by which business objectives are to be accomplished

Work Instruction: Step-by-step instructions on how to complete a task

Owner/Developer: A competent individual with subject matter expertise or the individual who owns the activities or processes

Reviewer: Should be an attorney and the appropriate business leader

Training And Communications

Develop an annual curriculum for leaders and employees

- Document an annual training and communications plan
- Identify owners - business leaders should be included
- Identify topics based on risk exposure
- Include commitment to integrity and ethics
- Develops shared values

After an Acquisition/Merger/Joint Venture

- Senior leaders of the new organizations should be trained in person
- As many of the new employees as possible should be trained in person
- Allow for opportunity for questions
- Training needs to cover values and policies
- Furthers the integration process

Helplines

- Capabilities for anonymous reporting
- Case management system - track and close concerns
- Method to notify and close out with person who raised concern
- Clear message of no retaliation
- Broadly communicated across many mediums
- Method to run reports, queries
- Regular review for patterns and analysis of data
- Should help identify trends, needs for improvement
- Method to develop reports to leadership and to the board
- Outside parties should be able to report concerns and ask questions

THANK YOU

Policies Are Not Magic

Walking my dog the other day, I passed a “drug-free zone” sign and, smelling marijuana, smiled at the three guys standing there passing a joint. (Even with the new DC marijuana laws you still can’t light up on the streets, especially in front of the drug-free school zone.)

The three guys were not just standing there smoking weed, they, along with some other people, were watching a chess game. Right behind the table where the chessboard sat was a “No Loitering” sign.

It was all quite funny.

Now, lest someone think I am adhering to the direction of all signs, I did not pay attention to a couple of speed limit signs as I drove to the office this morning.

This got me thinking about policies and how so often organizations draft up a policy on something and then send it out to employees thinking that resolves the matter of following the law once and for all. It doesn’t.

Just as people will hang out and smoke pot in front of the drug-free zone and no loitering signs (policies if you will), employees will not follow policies.

There are a lot of reasons that employees don’t follow policies. Sometimes its because they are not quite sure what the policy means. For example, is playing chess and attracting a crowd that watches the game loitering? Is marijuana still considered a “drug”?

If your policies are too legalistic or use words and phrases that aren’t clear, you are at risk of your policies not being followed. People won’t follow them because they aren’t sure what the policies mean.

It’s important that your policies use clear, non-legalistic language so that employees know what they should or should not do.

Another reason people don’t follow policies is because the policies are simply too cumbersome to follow and do not really address the ill it is designed to prevent.

Again, using the chess game, if the sidewalk is really wide and the chess game is not blocking the sidewalk or the entrances to the stores does the no loitering really make sense? Isn’t a chess game exactly what we want folks to do to create a sense of community and to stay out of real trouble? If so, does the no loitering really work?

Likewise, if policies fail to account for the actual processes and practices that exist and create cumbersome requirements employees will ignore the policy and work around it. Or, if the policy does not address any real concern or legal requirements, employees will quickly figure that out and not follow it.

This often happens when the policy drafter has no idea how things actually work or fails to consult with the employees who own the procedures at issue.

Again, it is just like the guys playing chess. They know their loitering is not blocking anyone’s access to stores and the sidewalk is wide enough for people to walk around them.

Sometimes people don’t follow policies because they know they won’t get caught.

Those guys have been playing chess in front of that no loitering sign for a couple of years and the guys have been smoking weed in that exact location even before the new DC marijuana laws. So, they know there are no ramifications for loitering or smoking weed, at least on that street corner.

Now, you don't need a version of DC Metro Police trolling the hallways or inspecting employee's computers.

I have worked with clients who have had enforcers who do that and the "police officer" quickly becomes someone everyone avoids. But, you do need some way to detect when policies are violated.

Then, when an employee is found to have violated policy, you need swift, appropriate and fair discipline. Most importantly, everyone needs to be treated the same when they violate policy.

Inconsistent discipline for policy violations will quickly erode your employees' trust in your organization.

Finally, although I believe in the goodness of people and their desire to do the right thing, the reality is there will always be those who will not comply with the law or policies.

Like me, I just keep speeding. Even though I know the speed limits and sometimes even get tickets, I keep speeding to get where I am going faster.

Some of your employees will violate policies or law because they will incur some benefit that in their minds makes it worthwhile to do so. For these types of policy violators, you need to have a way to demonstrate that they knew about the policy.

You do that through effective and consistent training and communications on the policies. You also do that through having employees certify annually that they understand your policies and have followed them.

And, if despite this, they intentionally violate your policies, your organization needs to identify those employees and either get them in compliance or manage them out of the organization.

These are not the only reasons people either break the law or ignore policy but they are some of the reasons.

As an organization builds its ethics and compliance program and drafts its policies, it should consider why employees may not follow policy and try to develop approaches to minimize non-compliance.



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White-Collar Crimes and the Story of Fat Leonard

Given my practice area, people often ask me why people commit white-collar crimes. I ask myself this question; and, just as often, I ask myself how can I help my corporate clients mitigate the risks of committing a crime? Despite my lifelong quest to answer both these questions, I have no good answers.

Unfortunately, the U.S. Navy must ask itself these same questions.

The Navy is dealing with a massive bribery scandal that involved countless officers and went on for years. Navy officers succumbed to the offerings of “Fat Leonard”, a non-U.S. citizen owner of a U.S. defense contractor who, in exchange for Navy contracts and information on the movement of U.S. ships (that is classified information), provided Navy officers –you name it – watches, vacations, wine, whiskey, duck confit, prostitutes, hotel rooms, vacations for their families, and purses for their wives.

As the U.S. Attorney for the Southern District of California, who is handling many of the cases, put it when discussing a Navy officer who recently pled guilty: “[The Navy officer] deliberately, methodically, and repeatedly traded his public office for entertainment expenses and the services of prostitutes, and in so doing, aligned himself with a foreign defense contractor over his Navy, his colleagues and his country.”

So, the question is: why would a significant number of Navy officers, over the course of years, “align themselves with a foreign defense contractor rather than with “the Navy, their colleagues and their country” in exchange for parties and prostitutes?

That question may never be answered and quite frankly, when those Navy officers get arrested and face a judge, they will likely ask themselves that question, without a good answer. It is hard to believe that a person, who dedicates a career to serve this country, is willing to give away state secrets for booze, sex, and food. But, as hard as it is to believe, it’s a tale as old as humankind.

Let’s put that question aside because there is another question the Navy needs to ask itself: Why didn’t its policies, procedures, culture, whatever you want to call it, prevent or catch the behavior? It appears that whatever was going on, it actually enabled the behavior to go undetected for years involving dozens of Navy officers.

One event, in particular, demonstrates that something was not working for the Navy. According to the Washington Post, in February 2006, as a Navy ship prepared to dock in Hong Kong, a military lawyer sent a message to senior officers on the ship reminding them to take care to avoid bribes from defense contractors while in port. Instead of heeding the message, one of the senior officers forwarded the message to Fat Leonard, the bribing defense contractor himself. According to reports, Fat Leonard is alleged to have gone on bribing the officer who forwarded the message and others for years.

The Navy regularly trains its people about gifts, meals, entertainment, bribery, and ethics. In fact, to facilitate learning, the Department of Defense, Office of General Counsel, at times publishes an Encyclopedia of Ethical Failures (always an interesting read). So that message was not the first time the Navy officers on that ship, or any ship, were told that they cannot accept gifts over \$20; that they cannot accept bribes of any amount; and that they cannot give away classified information; etc.

Yet it happened.

What is any organization to do to prevent criminal and unethical behavior?

Realizing that part of this question is the first question I asked – why do humans do what they do? – and best left to psychologists, philosophers, and artists who contemplate our human existence, lets focus on what an organization can actually do to avoid this type of mess.

Without going all legal – and citing to the laws and regulations that require an organization to have an “ethics and compliance” program to mitigate this type of risk; without talking about the compliance buzz words of “culture”, “tone at the top”, “leading by example”, “training” etc., what can a business do?

At the most basic, the Navy or any organization, needs to:

1. Create a workplace where it is easy to follow the rules by:

- Creating defined rules. “Do not accept gifts valued at over \$20 – ever”
- Instructing on the rules. Teach through training and through emails but also teach in business meetings, unrelated to the rules, teach and discuss at mandated social events, at an office happy hour for example. (It can happen. I had a client call from a holiday party because they spied an uninvited government official at the party and were calling for guidance on how to kick the government official out. And, my client did kick the government official out.)
- Improving the rules to make sure they are clear. Be critical of rules to assure they are understandable and easy to follow. Be agile enough to quickly fix rules that are hard to follow or that don't address the problem.

2. Provide employees competent, courageous professionals to help them follow the rules, professionals who:

- Know the rules (the law)
- Can speak and write about the rules in plain English (not in legal mumbo jumbo)
- Can creatively apply the rules instead of delivering an easy “no”
- Listen to what is being said, how it is being said, and what is not being said. (Often, an employee who knows that the “writ” has hit the fan or that it is about to hit the fan, floats a trial question to see if the organization will listen and act.)
- Will give discrete, actionable guidance rather than lecturing or judging
- Are not too busy to answer the questions (in other words hire enough professionals)
- Have the courage to fight for employees trying to follow the rules
- Are rebellious and courageous enough to challenge both ineffective rules and leaders who do not think the rules apply to them
- Will take action to address the issue

3. Develop methods to catch people who don't follow the rules, for example:

- Have lawyers attend meetings so they can hear who is doing what
- Have lawyers who question what is going on – lawyers who have a spidey sense (So in the Navy situation, when photos keep appearing with Fat Leonard and Navy officers at fun parties and Navy events, someone actually thinks “what's up with that?”)
- Have controllers, auditors and CFO's who do the same thing
- Have HR professionals who do the same thing
- Investigate when the spidey sense goes off
- Audit your policies and procedures for compliance – your expense policies, gift policies, hiring and promotion policies, etc.
- Review and audit expense reports and invoices
- Have more than one person sign off on expenses, invoices, entertainment, hiring, etc.
- Review emails randomly for select words (For example hunt for “lap dance”, a phrase that does not come up regularly in most business communications. If nothing else, it may cut down on your business paying for “adult entertainment” and save you some money. And, if you think employees don't email about unethical behavior and criminal acts... you are wrong – they do.)

4. When the writ does hit the fan:

- Investigate and figure out why
- Then start addressing the above
- Then get rid of leaders who knew or should have known and did not stop it – that gets you one step closer to an ethical and compliant culture, out of the newspapers and out of court.

In the end, the Navy won't be able to explain why some of their own "deliberately, methodically, and repeatedly" chose dinners, trips, and prostitutes over their career, the Navy and this country but, it should determine why so many could do it for so long, and fix it whatever it was.

A sad and accurate quote from Mark Frost, the creator of the police drama Hill Street Blues as well as many other creative works:

"Crime has always been a regrettably consistent element of the human experience."



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SELECT RESOURCE LINKS TO FEDERAL AND STATE ETHICS LAWS AND REGULATIONS

[National Conference of State Legislatures](#)

www.ncsl.org

An organization focuses on states' interests. The site includes legal reference and links to laws and regulations, by state, on political, campaign, lobbying, ethics, corruption, conflict, gift as well as other laws and regulations.

[Office of Government Ethics](#)

www.oge.gov

Federal agency charged with providing guidance and oversight of the executive branch on federal laws and regulations on conflicts, ethics, gifts. (Note: many states have similar agencies.) The site includes links to federal ethics laws as well as Office of Government Ethics opinions and guidance.

[Federal Elections Commission](#)

www.transition.fec.gov

Federal agency charged with overseeing elections. This link provides access to the FEC's guidance and links to election, campaign, ethics and similar laws and regulations.

[Department of Defense Standards of Conduct Office](#)

www.ogc.osd.mil/defense_ethics

The Department of Defense Standards of Conduct Office provides guidance and opinion on Department and federal ethics and standards laws, regulations and policies. This link provides resources on these requirements.

[Council on Governmental Ethics Laws](#)

ww.cogel.site-ym.com

An organization of government ethics administrators. This resource provides policy insight and other guidance on ethics, freedom of information, elections, lobbying, and campaign finance laws and regulations.