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# Body and Soul: Points of Convergence between Ethics and Compliance

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What is the appropriate relationship between business ethics and corporate compliance? To what extent are these two fields destined forever to compete with, and even contradict, each other? And, what are the points of convergence that do or could exist between them?

The two are certainly distinct, both in concept and practice, but I have long believed that many of the claimed points of conflict between ethics and compliance are exaggerated. Moreover, failing to see how each can support the other often weakens both. This article will review some of the often-cited tensions between compliance and ethics, and also explore ways in which the two are increasingly "joining hands." It will then examine practical strategies for fortifying a compliance and ethics program with appropriate elements of each.

## What's the difference?

The field of ethics – whether in business or elsewhere – is often characterized as:

- Focusing on individual decision making in the absence of rules
- Constituting a philosophical discipline
- Resting values/principles
- Requiring autonomy

By contrast, a characterization of corporate compliance might include:

- It consists of organizational policies and procedures to prevent violations of law, regulation, or rules.
- It focuses on process and enforcement.
- It serves as an internal legal system for an organization.[1]

## What is the perceived tension between the two fields?

First, some ethicists are concerned that a compliance perspective promotes conformity and a non-principled approach to issues of right and wrong – and thereby undermines the conditions and habits of mind necessary for ethics to flourish.

A second source of tension is resource-based. Specifically, ethicists have expressed the concern that compliance can "squeeze out" ethics, as a matter of both resource allocation and organizational attention span. That is, if companies feel they do not have the capacity to address both, when forced to choose, they tend to select the "necessity" of compliance over the "luxury" of ethics.

The third type of concern, which is the harshest, and is less commonly mentioned than the others, is similar to the Marxist concept of "false consciousness." Specifically, some ethicists feel that by addressing relatively straightforward issues and doing so in a mechanistic, rule-laden way, companies avoid dealing with harder and more meaningful questions of right and wrong that would have to be faced when using a more values-focused approach.

Of course, the concerns go in both directions. Indeed, those reflecting a compliance perspective are, in effect, the mirror image of all three of the ethicists' worries. That is, a traditional compliance view is that an ethical perspective is largely a distraction (in terms of real issues of right-and-wrong facing most companies) and can lead to wasted time and resource allocation, as well as wrongheaded thinking. A compliance-oriented practitioner might, for example, dismiss many ethics issues as a variation of "My boss isn't being nice to me," which distracts attention from preventing more hardcore corporate misdeeds.

## Is ethics unrelated to law?

Before examining whether these perceived differences are indeed irreconcilable, it is worth considering the role of law which, after all, is the foundation for the compliance perspective. Are the realms of ethics and law, in fact, unrelated to each other?

Clearly, they are not. One obvious point of convergence lies in the Federal Sentencing Guidelines, which in 2004 were revised to encourage companies to have a "compliance and ethics program" (emphasis added). Previously, the Guidelines had spoken of a "program to prevent and detect violations of law." Another is a regulation promulgated under the Sarbanes-Oxley Act (SOX) which, in effect, requires codes of conduct for publicly listed companies to provide for the ethical handling of conflicts of interest.

Also worthy of mention here is the New York Stock Exchange Listing Requirements Mandate, which says that codes of conduct should include fair treatment of employees, shareholders, suppliers, and competitors. Like the Sentencing Guidelines and SOX regulation, this contemplates some consideration of ethics.

These and other developments suggest that

a law-based system of approaching issues of right-and-wrong (which the U.S. is often said to epitomize) need not be seen as unwelcoming of ethical thought. And, the same is true in reverse, as the approaches of countries outside of the U.S. are, to some extent, increasingly embracing a law-related approach to preventing corporate wrongdoing. For instance, effective compliance programs can be a defense to corruption charges under an Italian statute passed in 2001, and Italian courts have indeed published decisions under that law with more useful compliance guidance for companies than can be found in many cases issued under the Sentencing Guidelines.[2] Similarly, a policy document issued in 2005 by the United Kingdom's Office of Fair Trade provides more competition-law compliance program guidance than anything ever promulgated by US enforcement personnel.[3] And an Australian compliance "Standard" which has semi-official status, is more detailed on compliance program requirements than any generic US policy.[4]

Moreover, it seems likely that the US legal system will increasingly focus on ethical issues. This is due, in part, to the mounting concern with corporate culture that is found not only on the Sentencing Guidelines, but also the expectations of various regulators.[5]

The increased attention being paid to ethics may also flow from the heightened risk-assessment expectations of regulators, as well as boards of directors and senior managers. Specifically, utilizing a narrow legal framework is, as a practical matter, not always sufficient for an effective legal risk analysis, because such a framework is often a "lagging indicator" of true legal risk, given the dynamism of US law. Indeed, the various major cases brought by Elliot Spitzer as New York Attorney General – regarding securities research analysts, mutual fund trading, mutual fund sales, and insurance brokerage compensation – all concerned practices that were relatively well known, but assumed by many to constitute "only" ethics-related risks, not legal ones. A fuller, ethics-based risk assessment addressed to these practices might, in fact, have revealed the legal peril that they posed. More generally, these and other examples suggest that a broader ethical focus can help an organization stay ahead of the law risk curve.

Globalization is yet another phenomenon likely to lead more US-based companies to adopt ethics-based, as well as law-based, approaches. Among other things, for many companies doing business outside of the U.S. now means paying greater attention to:

- the rights of employees
- other human rights
- sustainable development

These are, generally speaking, more reflective of a traditional ethical view, rather than a legal view.

A final consideration pushing US companies to take a more ethics-minded approach arises from the fact that employees do not always distinguish between law and ethics. (This is frequently evident from reviewing the types of misconduct that are reported through help lines, and also what is raised in focus groups, much of which tends to be ethics-related, rather than law-related.) Given how employees often tend to view compliance and ethics as all of one piece, it is not surprising that when management fails to act ethically, it often sends a message that compliance requirements are hypocritical or even a sham. In other words, here, too, a focus on ethics may be necessary to maximize the effectiveness of the compliance part of a program.

## Making it work

Properly understood, ethics and compliance are not necessarily antithetical to one another. Each can be essential to completing the other. What then, are some practical approaches for "joining hands" between ethics and compliance?

First, companies should assess ethics, as well as compliance, risks. Several ways to assess risk include:

- Based on lessons learned from the Spitzer cases (which, it is not sufficiently appreciated, are often applicable beyond the realm of financial services) a company should examine whether it has any relationships of trust in which the need for candor or good faith generally might not be sufficiently understood by employees or others acting on its behalf. Relationships such as these may be rife with ethics risk possibilities. (An example would be a manufacturer that starts offering services and must ensure that customers are not misled into paying more than they should.)
- Determining whether there are areas where the pursuit of good ends might lead to wrongful means (i.e., issues of "right versus right.")[6]
- Asking employees the broad questions regarding: (a) What types of conduct have occasioned criticisms that the company has acted in an unfair manner? and (b) What are other areas of discomfort of a "right-and-wrong" nature?

Second, ethics should be prominently featured in training and communications. This means, among other things:

- providing true ethics training on methods for ethical decision making,
- using values-based communications,
- giving real-life (and ideally company-specific) examples that go beyond what the law requires/prohibits, and
- otherwise deploying training and other communications to show that ethical action is attainable in business.

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Indeed, an ethics-based message may be more appealing to employees, who often do not like programs that appear to be aimed mainly at "catching" people, than a narrow, compliance-based one. Messaging in this manner can thus positively impact the likelihood of employees reporting/raising compliance (as well as ethics) issues.

Third, following the old adage that what's measured is what counts, companies should measure ethics-related, as well as compliance-related, conduct. Such conduct should be included in personnel evaluations, employee surveys, and program assessments (self or external).

## Body and soul

Baron Thurlow, an English jurist of the 18th century, memorably expressed an early, traditional view of corporate social responsibility: "You never expected justice from a company, did you? They have neither a soul to lose, nor a body to kick." Clearly we now do expect more, but exactly how to pursue "justice" from modern corporations is still something of a challenge, albeit more of a practical than metaphysical one.

However, and in the interests of meeting that challenge, one might still borrow from Baron Thurlow to say that an ethics-based approach can give compliance "soul" by harnessing internal policies and procedures for more noble ends than the lowest common denominator of mere law abidance. And, operating within a compliance program framework can give an ethics approach "body" by utilizing effective organizational initiatives, and not just aspirational talk. Ethics in companies can be seen as less of a luxury and more of a necessity, which in reality, it always has been. ■

*This article is based on a presentation at the 2007 SCCE annual conference, "Joining Hands: The Convergence of Compliance, Ethics and Risk."*

1 This discussion on the differences and tensions between ethics and compliance draws in significant measure from Tansey-Martens and Barry, "Has Compliance Killed Ethics?", ethikos, July-August 2006, which was based upon interviews with various academics and practitioners in the fields of compliance and ethics.
2 For more information see Francesca Chiara Bevilacqua, "Corporate Compliance Programs under Italian Law", ethikos, November/December 2006.
3 For more information see Murphy, "Compliance Guidance from the United Kingdom," ethikos, May/June 2007.
4 AS 3806 (2006) (published by SAI Global).
5 For more information see Petry, "Corporate Culture and Compliance Programs," in Kaplan, Murphy, Swenson: Compliance Programs and the Corporate Sentencing Guidelines (West Thomson, 2007).
6 Rushworth M. Kidder: Moral Courage (HarperCollins, 2005)

## Protecting Attorney-Client Privileges

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ment shall maintain security and control over the documents, and (2) an agreement that the government entity will appear and support the corporation's efforts to preserve the privilege in any third party action. ■

1 Best in Show, Cross-Industry Corporate Compliance Survey Results, Enst & Young, 2003. See also, Universal Conduct, An Ethics and Compliance Benchmarking Survey, The Conference Board 2006.
2 2007 Chief Legal Officer Survey, Altman Weill, Inc, LexisNexis Martindale-Hubbell.
3 Upjohn v. United States, 449 U.S. 383 (1981).
4 Id. At 394-395.
5 United States. v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). To extend attorney client privilege to an accountant retained as an expert to assist the attorney, the accountant's services, "must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications. Mere convenience is not sufficient." Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002).
6 In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036-1038 (2d Cir. 1979).
7 2006 West Law 3733783 (W.D. Wash. 2006)(not published in F.Supp.2d).
8 Upjohn, supra, at 397
9 See, e.g., United States v. Gangi, 1 F. Supp.2d 256, 264 (S.D.N.Y. 1998).
10 On December 11, 2007, Senator Patrick Leahy, Chair of the Senate Judiciary Committee, introduced S. 2450, a bill adding new Evidence Rule 502 to the Federal Rules of Evidence. The legislation addresses waiver of the attorney-client privilege and work product protection and is identical to proposed Evidence Rule 502, which was approved by the Judicial Conference of the United States and transmitted to Congress for its consideration in September 2007.
11 See, e.g., Chevron v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992); Ferko v. National Association for Stock Car Auto Racing, Inc., 218 F.R.D. 125, 134 (E.D. Tex. 2003).
12 As of the date of this article, there is legislation pending before Congress entitled the "Attorney Client Privilege Protection Act of 2007" (S.186, HR 2013), which would prohibit the government from requiring waiver of attorney client privilege as a condition of cooperation. In 2006, the U.S. Sentencing Commission deleted language from the Application Notes to the Sentencing Guidelines which would have permitted sentencing courts, in limited circumstances, from considering the waiver of attorney client privilege as a factor in corporate sentencing.
13 Only one court has upheld the "selective waiver" of attorney client privilege to the government while preserving the privilege as to third parties. Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978)(en banc).
14 For extensive discussions of the Self Critical Evaluation Privilege, see Corporate Legal Compliance Handbook, ¶5.08, Banks and Banks (Aspen Publishers 2006); Note, The Privilege of Self Critical Analysis, 96 Harv. L. Rev. 1083 (1983).

## Professional Liability Insurance:

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1 See, Working for Integrity, Society of Corporate Compliance and Ethics, 2006; and Ethikos and Corporate Conduct Quarterly, January/February 2006.
2 See "Practices of Business Consultants" Special Advisory Bulletin, Office of Inspector General, Department of Health and Human Services, June 2001.
3 Paul D. Krause, "Professional Liability Insurance Including "E&O" and "D&O" Policies," 673 PLI/Lit 77, 90 (April 2002).
4 Emerald Partners v. Berlin, 787 A.2d 85 (Del. 2001).
5 18B Am. Jur. 2d Corporations § 1583 (2007).
6 See "D&O Insurance: What Directors and Officers Should Be Thinking About in the Sarbanes-Oxley World," Fried Frank, Client Memorandum, March 11, 2003.
7 John Copeland, "Corporate Directors get 'SOX'ed by Insurers" Journal of Insurance, Risk & Public Risk Management, Spring 2005.
8 Towers Perrin, 2006 Directors and Officers Liability Survey, p. 53, April 2007 (reporting that 49% of the claims against participating public companies were brought by shareholders).
9 See Mitchell Auslander and Leah Campbell, "Coverage for Corporate General Counsel Under Directors and Officers Liability Insurance Policies" Willkie Farr & Gallagher LLP, March 27, 2007, for discussion of issues regarding applying D&O coverage to the general counsel and other in-house attorneys. Claims against in-house counsel generally combine allegations of corporate officer wrongdoing with legal malpractice.
10 USSC Federal Sentencing Guidelines for Organizations, §8B2.1. Effective Compliance and Ethics Program, (b)(2).
11 USSC Federal Sentencing Guidelines for Organizations, Commentary to §8B2.1.
12 OCEG (http://www.oceg.org/) is a nonprofit organization that provides thought leadership on corporate culture and the integration of governance, risk management, and compliance processes.
13 Pamela A. MacLean, "Record Number of General Counsel Charged in 2007" The National Law Journal, Oct. 2, 2007.
14 Sue Reisinger, "Aiming Lower" Corporate Counsel, April 1, 2006.
15 United States v. Sulzbach, Case No. 07-61329 (US District Court, Southern District of Florida, Sept. 18, 2007). For a period of time, the former general counsel was also the chief compliance officer serving in a dual role.
16 Memorandum Opinion and Order, United States v. Caputo, No. 1:03-CR00126, p. 26 (N.D. Ill. Oct. 16, 2006). The Chief Compliance Officer was also the Vice-President of Regulatory Affairs.
17 See the criminal complaint brought in California involving the Hewlett-Packard pretexting incident, Felony Complaint, DA No: 061027481, Oct. 4, 2006.
18 AIS Health Business Daily, Hospital Compliance Officer Indicted for Alleged Mail Fraud and Awarding Compliance Consulting Contracts to Herself, Nov. 1, 2007.
19 For a discussion of the potential benefits of adopting an E&C program, see Jeffrey M. Kaplan, "The Sentencing Guidelines: The First Ten Years," Ethikos and Corporate Conduct Quarterly, November/December 2001.
20 For discussion on the HCCA Code see Joe Murphy, "Ethics for Ethicists? A Code for Ethics and Compliance Professionals" Ethikos and Corporate Conduct Quarterly, March/April 2004.