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A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS
APRIL 2018

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by Scott Dahl

Improving the ethical culture: A worthwhile investment

» A weak ethical culture is bad for business; conversely, integrity can be a selling point.
» A thriving ethical culture has top-level support, staff buy-in, and a vibrant ethics program.
» Ethics training is more effective with interactive discussions and relevant examples.
» Vetting incentive programs would reduce the risk of unintentionally promoting unethical conduct.
» Implementing a credible process with a safe channel for reporting misconduct internally will help avoid incidents of external reporting.

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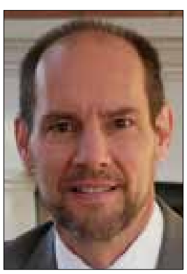
Recent corporate scandals involving Volkswagen, Takata, Wells Fargo, and others demonstrate that unethical conduct is ultimately bad for business. News articles and court records about several of these scandals reveal corporate cultures that allowed improper conduct to persist unabated for years. This article focuses on what management can do to improve and sustain an ethical culture and thereby reduce the risk of such a scandal emerging and harming the organization. A strong ethical culture can also have a positive impact on business and even provide marketing opportunities.



Dahl

What is an ethical culture?

The ethical culture is one part of the overall organizational culture. Inc.com defines "corporate culture" as follows:

> [T]he shared values, attitudes, standards, and beliefs that characterize members of an organization and define its nature. Corporate culture is rooted in an organization's goals, strategies, structure, and approaches to labor, customers, investors, and the greater community.[1]

The ethical culture is strongest when integrity is so ingrained at all levels of the organization that it becomes a part of how the company defines itself and how it operates. A thriving ethical culture extends beyond just following the rules and not committing fraud—the value of integrity informs business strategies and decisions.

Although this article focuses exclusively on the ethical culture, it is deeply intertwined with other aspects of the corporate culture, such as the treatment of gender/race/sexual identity, collaboration, diversity/inclusion, respect, trust, transparency, and others. A strength or a weakness in one cultural area will often indicate a corresponding strength or weakness in another. For example, allegations against the founders of Uber and Social Finance involved both sexual harassment/misconduct and ethical breaches.[2,3]

Why an ethical culture matters

Serious unethical behavior that comes to light can be very costly to the company, hurting the stock value, reputation, and credibility with customers. VW pled guilty to a felony (and two former officials recently received stiff prison sentences), paid more than $20 billion in fines and settlements, and lost significant stock value when the scandal broke. Takata also pled guilty to a felony, agreed to pay $1 billion in fines and settlements, and filed for bankruptcy protection in Japan and the U.S. And Wells Fargo paid more than $300 million in fines and settlements and suffered both declining stock value and lost customers.

The flip side—the value of an ethical culture—is also evident from companies using as part of their brand marketing strategy that they are honest, healthy, or socially/environmentally responsible, even including such values in their names. For example, the consumer products company, The Honest Company, set out to develop "one brand that we could go to for trusted products and information."[4] Being a good corporate citizen not only has appeal to a growing segment of consumers, it can also bolster a company's appeal to investors. The CEO of the world's largest money manager recently alerted corporate chiefs to be ready to show the "societal impact" of their products or services.[5]

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Businesses using ethics in their marketing made it onto the list of 2018 Trends by Fjord, the design and innovation unit of Accenture Interactive. Fjord names the trend, "The Ethics Economy," and predicts: "Making a difference will soon become a key point of differentiation and the potential for ethics as a business metric is already the topic of some industry debate."[6]

Improving and sustaining an ethical culture

Key ingredients of a strong ethical culture include: (1) clear, consistent, and repeated communication from leaders to employees that integrity is a priority for the organization; (2) staff engagement in defining the values of the organization; and (3) a vibrant ethics program. The three are closely connected—leaders can use the ethics program to communicate to staff about the importance of integrity, and the ethics program can be successful only if it has top-level support and buy-in from staff.

Leaders communicating the importance of integrity

Top leaders play an important role in shaping this culture by communicating their vision and ethos throughout the organization and setting the tone on ethics. CEOs will have the greatest impact on the ethical culture through their actions relating to integrity—and not just what they say during their annual message on ethics. As an agency head, I am mindful that employees, like all humans, could easily spot hypocrisy if my actions did not align with my words.

Interestingly, a corporate ethics official recently told me that, in her experience, the first-line supervisors have more influence on employees' ethical behavior than the senior leaders. This makes sense, because employees see and hear what these managers do and say day in and day out; they are also the ones who are pressing for performance goals and rewarding (or punishing) employees for how well they reach targets.

Involving staff in defining the values

Organizations are evolving to include greater employee engagement and staff involvement in developing strategic objectives and defining core values. The more substantial the staff's role is in defining the values, the stronger their buy-in will be. This will in turn have a more pronounced impact on the ethical culture, because the staff will be invested in the process and more willing to embrace the values. Staff-driven values have the added benefit of establishing influential peer norms for acceptable conduct, providing more pressure than a leader can exert on staff to measure up to those agreed-upon expectations.

Sustaining a vibrant ethics program

The ethics program is the most tangible artifact of integrity in the organization and therefore has the potential to significantly influence the ethical culture. A strong ethics program is similar to an emergency response plan that is put in place and practiced so that in the unlikely event of an incident, the plan is well-known and can be quickly activated. Even though the risk of an emergency is low, there is an elevated risk of harm during an event in the absence of a plan. Likewise with an ethics program, the risk of a corporate scandal might be low, but the harm could be severe from publicly revealed unethical conduct growing out of a weak program.

The specific attributes of an ethics program will vary depending on the size and type of business of the organization; however, some elements, such as training and accountability, are scalable and applicable to organizations of just about any size and industry. The other suggestions for improving the ethics program listed below have specific application to larger organizations, but they also could be modified to fit smaller companies. Even businesses that already have solid ethics programs can still improve and better sustain them.

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Interactive ethics training

Ethics training plays a critical role in an organization's ethics program, because it is the best way to ensure that everyone is on the same page. However, ethics training has traditionally been viewed as boring, useless, and relevant only to others. A collective groan usually accompanies the announcement of ethics training. In the past few years, many organizations have endeavored to make their ethics training more interesting and relevant to employees.

One of the most effective methods to engage an audience is using role-playing and real-world examples, because the audience actively participates in the teaching. In teaching ethics to law school students for more than two decades, I found that practical hypotheticals and role-playing exercises enabled students to better grasp the rules and concepts. This approach also helped prepare them for the ethical challenges they might encounter in their legal practice by being able to draw on "muscle memory" in reacting to those challenges.

Many companies have recognized that training is more meaningful and memorable for employees when fact-based scenarios are customized to the business or even unit. In addition, presenting the practical scenarios in groups allows the employees to get further confirmation about their views from peers and helps to establish norms. Group training and role-playing may not be logistically possible in larger organizations, and smaller companies may have resource constraints. However, there are inexpensive, high-tech alternatives that give the audience both a role and a voice in the training. An ethics official at a large company told me she plays a video of relevant ethical vignettes by professional actors and uses polling clickers to interact with large audiences. I have seen a phone app used by presenters to interact with audiences.

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In the federal government, the ethics training is overseen by the Office of Government Ethics (OGE) and is conducted at each agency by the Designated Agency Ethics Official, generally in the Office of General Counsel (OGC) or equivalent. Ethics training is required for new entrants and certain job categories, such as attorneys, procurement officials, investigators, and senior managers. OGE previously required in-person training every three years, which provided an opportunity for personal interaction with the training officials. However, this requirement was lifted several years ago.

The annual ethics training varies among agencies. When I was conducting training in the Department of Justice's Civil Division many years ago, we employed *Jeopardy*-type games to pique the audience's interest. Much of the training I have seen over the years is less scenario-based and more rule-based summaries and "dos and don'ts" lists. Even though now most online training for federal employees has examples to test familiarity with the standards, most employees—me included—quickly plow through the tests as a check-the-box exercise. I was pleasantly surprised this year to participate in a lively, interactive, in-person ethics training for senior leaders that used relevant scenarios in smaller groups. Attendees gave the sessions high marks, but these sessions were for a very limited audience.

Developing something beyond an annual training session of one hour would improve training effectiveness. A good practice that some companies have followed is to supplement annual training with shorter sessions spread throughout the year. A county official recently shared with me that his office hosts a monthly ethics forum where ethical issues that were collected are then discussed, allowing the groups to focus on what interests them.

One way for top leaders to communicate their views of the importance of ethical conduct is to participate in an ethics training session with employees. As most organizations have transitioned to more cost-effective online training, the opportunity for employees to see senior leadership participation is lost. An approach to recapture this powerful communication tool is for the head of the organization to be part of the video or training materials, possibly as an actor in a scenario. That would almost certainly provide more entertainment, and as a consequence, have greater impact on the staff.

Accountability

For the ethics program to be credible, there must be real consequences for unethical behavior. As public flogging is no longer an acceptable approach, the organization needs to demonstrate to employees that offenders at all levels are held accountable for serious ethical defalcations.

This is much easier in the government context. All federal employees must adhere to the Standards of Ethical Conduct, which are specific, provide examples, and are used for imposing criminal, civil, and administrative remedies. Furthermore, nearly all federal agencies have an Office of Inspector General (OIG) that investigates serious ethical misconduct, and when substantiated, either supports the criminal prosecution of very serious misconduct, or if misconduct does not reach that high threshold, the OIG refers investigative findings to management to act on.

In addition, many OIGs publicize their misconduct findings and may identify senior officials by name. This serves as a deterrent to unethical behavior, because employees see that those found culpable are held accountable and suffer consequences. Some government agencies also periodically send out an "ethics newsletter" that references actions taken for ethical defalcations across the government.

In the private sector, consequences for unethical conduct are not as visible as in the government, and therefore, the deterrent value is diminished. In smaller companies, word does spread fairly quickly if someone is escorted out of the building by security, carrying the contents of their desk in a cardboard box, never to return. Several large companies have started to use periodic newsletters to generally describe misconduct and action taken, and steps like this will help to deter misconduct.

One method to demonstrate that the organization is serious about ethical behavior is to include as an element in employees' performance appraisals how well they uphold the value of integrity in their work and interactions. Upholding integrity may be difficult to quantify in the annual assessment, but specific criteria could be developed to help managers rate an employee under this element, such as, "The employee was honest, candid, and respectful in dealings with others." Another strong message would be to institute a policy that allows the company to reverse or "claw back" bonuses given to officials and employees if it is established that the person received bonuses during a time or relating to an activity in which the person engaged in unethical conduct. This policy must be consistently applied though, no matter how senior the official.

Recognition

On the opposite side of compliance, organizations can find ways to reward good behavior. Some may view this as unnecessary—why recognize people who are acting ethically when we want that as the norm? However, rewards are routinely used to drive desired outcomes. Therefore, coming up with a method for recognizing ethical behavior could help reinforce its importance to the organization. For example, adding a category to the organization's award or recognition program, such as the "Integrity Award" for the employee who best exhibited integrity in the workplace, would highlight integrity as a desired attribute for employees to aspire to.

Safe channel for reporting misconduct

Federal OIGs all have hotlines that receive complaints from employees (and the public), allowing the complainants to remain anonymous and offering the protection of confidentiality. The OIG then reviews these complaints to determine if they warrant investigation or should be referred to management to handle. The federal government also has strong whistleblower protection laws, now extended to government contractors and grantees. Both the OIGs and the Office of Special Counsel have authority to investigate allegations of reprisals for disclosing misconduct to the proper entities, and in fact, the OIG serves as Whistleblower Ombudsman for the agency.

If a corporation does not have a credible process for employees to report misconduct internally without fear of reprisal, it runs the risk of employees feeling the need to report misconduct externally, such as to the media, Congress, or government authorities. The *WSJ Magazine* reported on a Theranos whistleblower's unsuccessful attempts to have senior management address product problems he identified, and ultimately, he went public with his allegations, triggering government investigations.[7]

A good corporate ethics program will have an office that performs a similar role as the OIG—reviewing and investigating allegations of misconduct and alerting senior management. As an additional step, this office could also be empowered to protect employees against retaliation for reporting misconduct, which in most situations would be against company policy and in some contexts would be illegal. Furthermore, some companies already have hotlines or the equivalent, and the ones that don't should consider providing employees a safe method to report misconduct internally. A best practice would be to ensure anonymity for those reporting misconduct, which some do by outsourcing the hotline management to a third party.

Most incentive programs have completely legitimate purposes, such as motivating or rewarding performance or encouraging acceptable risk.

Vetting incentives and initiatives

In certain industries, particularly the financial sector, the powerful pull of financial incentives could potentially lead a small number of employees to engage in unethical conduct. Most incentive programs have completely legitimate purposes, such as motivating or rewarding performance or encouraging acceptable risk. However, there will always be a few who, in pursuit of incentives, cross the line into unethical conduct. For example, Wells Fargo offered financial incentives for staff to aggressively market the bank's services. Some staff, to obtain these bonuses, decided to engage in improper practices of forging customer's names for accepting services the customers didn't authorize.[8] How does an organization ensure that acceptable risk-taking doesn't morph into illegal actions?

One option is to require certain incentive programs to be vetted by the OGC or Compliance Office to ensure internal controls are in place to mitigate the risk that an incentive could result in employees engaging in unethical conduct. Where that vetting is not feasible, OGC could send out guidance to managers about what types of programs pass muster and which don't.

Attorneys alone may not even be best equipped to conduct a risk analysis of these incentive programs. One option is to create a risk management council that could perform such risk assessments of incentive programs or significant initiatives and determine whether there are sufficient and effective internal controls in place. Preferably, the risk management council would be led by the chief risk officer with OGC participation. In addition, for companies that have an internal audit function, OGC can tap into the auditors' findings concerning sufficiency of internal controls to know where the weaknesses are and be able to target those units.

Measuring program effectiveness

Measuring intangibles like ethical behavior is tricky. Yes, there are simple output measures, such as the percentage of attendance at training sessions, but those outputs don't really tell you how effective the program is or whether it is having any impact on the ethical culture. In contrast, outcome measures can demonstrate efficacy in a program.

For outcomes, a company could look at the number of disciplinary actions to see if there has been a decrease (or an increase), but there may be multiple root causes for any change. Likewise, counting the number of misconduct complaints reported may simply indicate how safe the employees view the reporting process. There is a benefit for the OGC or the Compliance Office to track patterns and trends of ethical misconduct complaints, because that data would inform what and where to target the ethics program.

A more effective outcome technique would be to establish a baseline using an anonymous survey tool that asks employees several questions targeted to ascertain their awareness of the ethics program and applicable standards, and even their assessment of the ethical culture. Then these baseline results could be compared to surveys that use the same questions in subsequent years to chart changes in the results. This would provide data about what is working and not working in improving the ethical culture.

Conclusion

A strong ethical culture will boost a company's defenses against succumbing to the ethical scandals that have irreparably harmed several major companies over the last few years. Having a robust ethics program will also establish integrity as an important value the organization embraces in all that it does. ✳

The views expressed are personal and do not necessarily reflect those of the Department of Labor or the United States.

1. Inc.com Encyclopedia: definition of "Corporate Culture." http://on.inc.com/2EAICMo
2. Zoe Kleinman: "Uber: The Scandals that Drove Travis Kalanick Out" *BBC News*, June 21, 2017. http://bbc.in/2nBlO6U
3. Nathaniel Popper and Katie Benner: "'It Was a Frat House': Inside the Sex Scandal that Toppled SoFi's C.E.O.," *New York Times*, September 12, 2017. http://nyti.ms/2EDw9HP
4. The Honest Company website at http://bit.ly/2nytKpv
5. Sarah Krouse: "BlackRock CEO to Companies: Pay Attention to 'Societal Impact'" *Wall Street Journal*, January 16, 2018. http://on.wsj.com/2nwUUxO
6. Fjord – Design and Innovation from Accenture Interactive: "2018 Fjords Trends: The Ethics Economy" http://bit.ly/2DSAhlW
7. John Carreyrou: "Theranos Whistleblower Shook the Company – and His Family" *Wall Street Journal*, November 18, 2016. http://on.wsj.com/2nD2SEV
8. Mathew Wisner: "Wells Fargo CEO on account scandal: We had an incentive plan that drove inappropriate behavior" *FOXBusiness*, September 13, 2017. http://fxn.ws/2nze4Cv