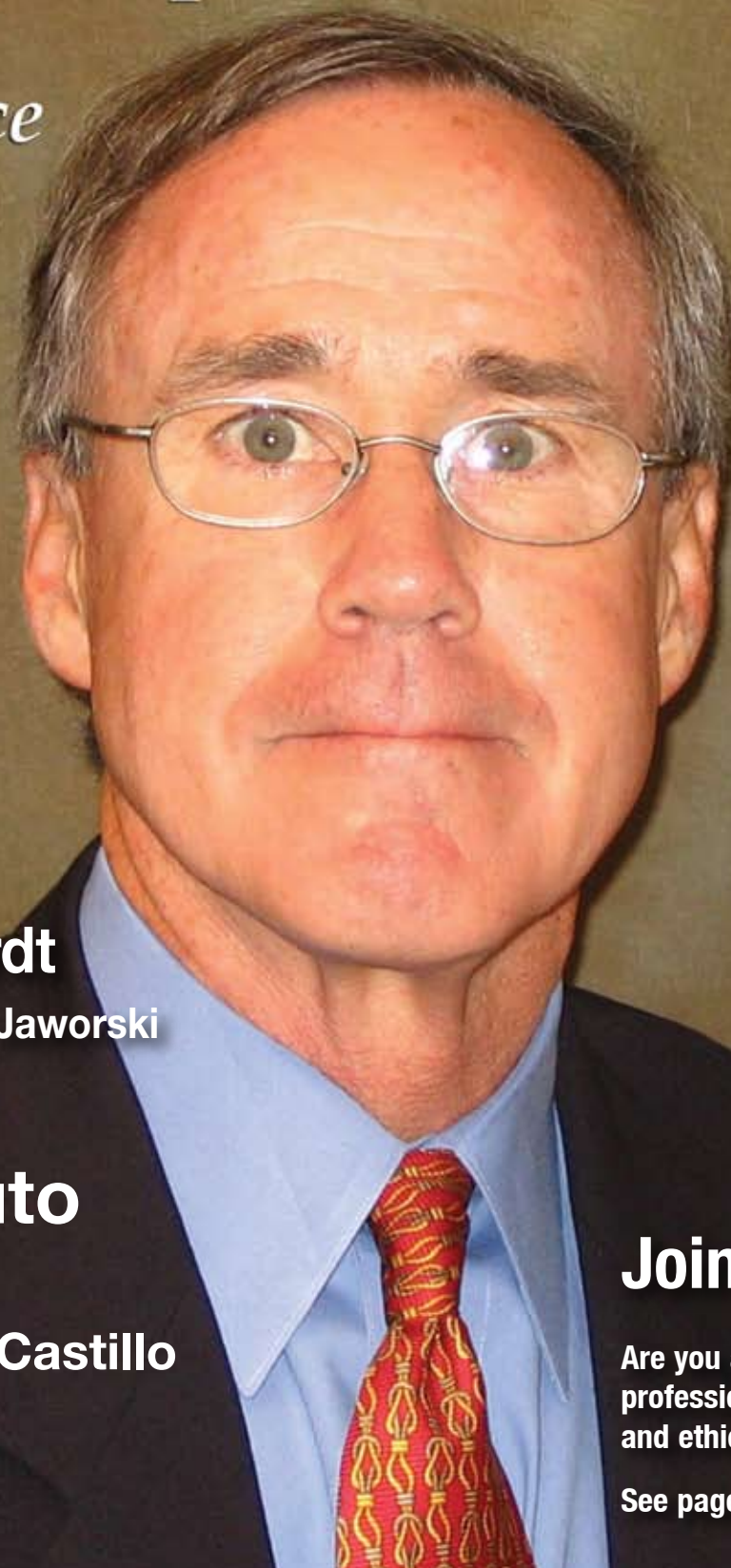




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The Chief Compliance Officer vs the General Counsel: Friend or foe?

By José A. Tabuena

Editor's Note: Mr. Tabuena is with the Center for Corporate Governance at Deloitte & Touche USA LLP and has previously served as a compliance officer and in-house counsel. He is a member of the Advisory Board for Compliance & Ethics.

Both the chief compliance officer (CCO) and the general counsel (GC) or chief legal officer perform crucial and related compliance functions for their organization, whether it is a public, private, or not-for-profit entity. There are still a fair number of companies where the GC also serves as the compliance officer. While this dual function is generally more prevalent in smaller companies, it is not uncommon in larger organizations.¹

Is there a real distinction between the two roles? Can an individual serve effectively as both general counsel and compliance officer simultaneously? What safeguards, if any, are needed if one does serve in a dual role? And where the two positions co-exist, how can they work together to help achieve the goals of the compliance program?

Both officers face challenges and tensions between the functions of the CCO and those of the GC. Both have compliance responsibilities, but they each have distinctive roles that can result in potentially conflicting professional obligations. Various reporting models and relationships exist between the two, and some considerations and approaches can be

"We both acknowledge it's a very close call and agree to disagree," say the General Counsel (GC) and Chief Compliance Officer (CCO) at a management meeting. In this instance, the CCO believes that a proposed contractual arrangement with a physician group poses some regulatory risk and potentially may run afoul of certain laws. The GC sides with executive management who are convinced that the deal is sound and has minimal likelihood of wrongdoing.

But what if the CCO is so sure of his position that he feels obligated to take the issue to the Board? Should the GC be concerned that her judgment would be subject to close scrutiny and could possibly be considered a violation of professional rules of conduct?

Increase the tension even further. What if the deal proceeds and a subsequent internal audit review results in adverse compliance findings? Beyond the question of a violation of law arising from the arrangement, can there also be divergence in opinion as to whether disclosure to the government is now required?



used to ensure that appropriate checks and balances are in place.

Because insights can be gleaned from experiences in health care, this discussion will refer to developments from the life sciences and health care sectors. Many health care compliance officers have gained stature and senior status in their organizations as a result of the intensive regulatory scrutiny faced in the industry.

Some Historical Context

The role of the CCO is relatively new in the annals of organizational management, especially compared with the GC who has a long history of serving a company as its consigliere or chief legal advisor. The dual role held by a single individual appears to be less common in health care,² which should not be surprising, given the pronouncements by government officials and regulatory authorities with oversight over health care industry sectors. The Office of Inspector General (OIG) compliance guidance and the U.S. Sentencing Guidelines for Organizations (the "Federal Sentencing Guidelines") make clear the role of the CCO in operating the compliance program and report-

ing to the board. When the OIG Compliance Program Guidance (CPG) first came out in 1998, it became apparent that health care authorities were of the view that a CCO should not be subordinate to a GC or a chief financial officer (CFO), because:

Free standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institute's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel or chief hospital financial officer (where the size and structure of the hospital makes this a feasible option), a system of checks and balances is established to more effectively achieve the goals of the compliance program.³

This OIG point of view was followed in subsequent CPGs issued for the various health care and pharmaceutical industry sectors. It was then reaffirmed in their 2005 Supplemental Guidance for Hospitals, where (in discussing the need to perform a regular review of the compliance program) the OIG noted, among other things, the following factor to consider:

- Is the relationship between the compliance function and the general counsel function appropriate to achieve the purpose of each?⁴

The concern by the government with how the GC should oversee and interface with the compliance function was also made abundantly clear following a now infamous quote by U.S. Senator Charles Grassley in a letter to Tenet Healthcare Corporation:

Apparently, neither Tenet (nor its General Counsel) saw any conflict in her wearing two hats as Tenet's General Counsel and Chief Compliance Officer... It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement.⁵

This sharp delineation between the compliance and legal roles, however, is not universal. For instance, the American Bar Association Task Force on Corporate Responsibility (ABA Task Force) focused solely on the role of the chief legal officer in an organization's corporate governance program and did not address the separate role and responsibilities of the compliance officer.⁶

In response to Enron and other corporate scandals, the ABA appointed the Task Force to "examine systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations which have shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States."⁷ The work of the Task Force overlapped with Sarbanes-Oxley and was done with consideration of its provisions. The work thus addressed the importance of engaging internal and external counsel in corporate governance and legal compliance matters that were raised by Section 307 of Sarbanes-Oxley. As noted by the OIG and the American Health Lawyers Association (AHLA) in a joint publication, the ABA Task Force recommended that:

The general counsel of a public corporation should have primary responsibility for assuring the implementa-

tion of an effective legal compliance system under the oversight of the board of directors.⁸

So, on the one hand, the Federal Sentencing Guidelines, the OIG, and Senator Grassley state that the CCO has a distinct compliance role that should be separate and independent from the legal function, while on the other, as set forth in Sarbanes-Oxley and by the ABA, it is the GC who is responsible for "legal" compliance.

Can these different perspectives be reconciled?⁹ Conceptual issues can be explored surrounding the role of a compliance program, its administration by the CCO, and the interface with the GC, along with the potential barriers and conflicts imposed by recent updates to the professional standards and duties of each respective position. To appreciate the organizational dynamics, it is helpful to first understand how the role of the compliance officer differs from that of the GC.

Defining the Role of Compliance

A useful starting point is clarity on how an organization itself defines the role and scope of the compliance program, and thereby, the duties of the CCO who is tasked with the day-to-day operations of the program. In many respects, the position is unique and relatively new to the modern organization. Most people can articulate what a lawyer or auditor does for a living, but the average employee may have difficulty defining "compliance."

In its strictest sense, both the compliance officer and GC have responsibility for the organization's compliance with laws, regulations, and other applicable

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rules and standards. The divergence is how they function to achieve this objective and the corresponding impact on their respective professional duties.

The GC generally provides legal advice on how the organization can comply with applicable laws while attaining its business objectives.¹⁰ It is this “legal advice” that is subject to licensure, regulation, and professional standards.

The CCO, by contrast, is a management function which incorporates legal considerations while influencing processes and practices of the organization.¹¹ One well-known commentator describes the distinction as follows:

Being general counsel and being CCO are very different things. A lawyer, ethically, has a duty to give sound legal advice and to represent the client’s interests “zealously.” The compliance officer’s mission is substantially different: it is to do whatever it takes to prevent and detect misconduct...While the lawyer may give legal advice, the compliance professional translates that advice into management action. While the lawyer must focus on what will result in success in legal battles, the compliance professional wants to prevent the very mistakes that result in legal battles...

Given this description, it is clear the functions are complementary, but not the same. Compliance is a management, not a legal function.”¹² Another way to view the distinction is that legal assists in defining and establishing the appropriate company standards, while compliance supports in implementing and monitoring those processes that ensure the estab-

lished standards are being met.

A compliance program can be viewed as a management tool relied upon by the Board to manage the operations of the company in a manner consistent with relevant rules and the organization’s own values and goals. Compliance relies heavily on legal expertise (and vice versa) but also involves management know-how in training, human resource matters, communications, auditing, and internal controls.

By creating and implementing the compliance program composed of the elements detailed in the Federal Sentencing Guidelines, the compliance officer is responsible for coordinating applicable policies and procedures, the code of conduct, employee training on ethics and compliance, oversight of internal reporting mechanisms (e.g., the helpline/hotline), coordinating compliance audits, investigations, and corrective action plans.

The compliance officer may also have an internal audit role. If resources are shared with the internal audit function, both the CCO and the chief audit executive (CAE) may report directly to the Board and deal with allegations of misconduct of very high senior officials. As observed by a noted authority, “the most powerful people in the corporation—CEO’s, CFO’s and even general counsels—may perpetrate the “most dangerous business offenses...you cannot expect someone to ‘police up.’ That is, you cannot expect a human being to tell a direct boss that she is wrong, when the boss is fully committed to a course of action (and ready to fire anyone who gets in the way).”¹³

As a result, the trend is for the CCO to be a senior level position with commensurate access to senior management and the Board, with sufficient budget and critical protections (e.g., termination of the compliance officer requires approval by the Board). Ultimately, the role of CCO involves more than just support for following the rules. Laws and standards have always existed, but given the volume of legal mandates and the regulatory incentives to comply, what has evolved is a distinct cross-disciplinary systems approach with considerable rigor in application, implementation, and management of a program. Apart from internal investigations and the addressing of misconduct, these compliance program processes are generally not within the purview of in-house counsel.

Moreover, the tendency to view compliance as another legal topic sometimes results in the underestimation of the management skills and organizational change required to effectuate a compliance program. This is often seen in the early stages of the program where there may be overemphasis on rule analysis and legalistic policy development.¹⁴ Consider the advice to compliance professionals from a leading authority in Australia:

To reach its full potential, the profession’s value must stem not from its role as a valuable, but resented policeman, but to an indispensable aid to running good businesses well. It will require both education of the market – employers and regulators– and personal growth.

For individuals, my advice is look at your personal skill bank. Can you own the room? Do you have courage of convic-

tion? Do you have great communication skills – particularly active listening? Can you change language, tone, and pitch to suit the audience? Can you read people? These skills and attributes will differentiate you from those who just know the rules and how to apply them. Lastly, do you really know the business—its drivers for cost, income and growth; its systems, processes, and culture? If you can say yes to all of these, you will inexorably move, if you have not already, from policeman to strategic ally.¹⁵

Only in recent history have organizations learned by trial-and-error to go beyond the advisory model of compliance as influenced by its legal heritage, to one that is about checks and balances, and of driving and influencing change on a wide spectrum of regulatory and ethical issues.

An effective compliance program enables objective sources of monitoring and advice through information, analyses, and recommendations that are free from undue influence and constraints. Having appropriate checks and balances in compliance reporting to ensure proper oversight is necessary regardless of who has formal responsibility for the program. The potential for disagreement between the compliance and corporate counsel is a real risk that an organization needs to address.

Compliance Reporting Models: Developing a Complementary Set of Responsibilities

The board committee overseeing the compliance function, and the entire board itself, should understand how these two roles interface as they both support the directors by ensuring that they receive accurate and candid advice. Ultimately

“[i]t is the Board’s responsibility to reconcile these potentially conflicting views into a complementary set of responsibilities and reporting relationships.”¹⁶

Essentially there are three models for structuring the relationship between the compliance and legal functions in an organization:

- The CCO and the GC are one and the same;
- The CCO reports to the GC; and
- The CCO does not report to and is independent from the GC¹⁷

There are pros and cons for each reporting structure and each presents different considerations on how to manage compliance issues.

Dual roles: one person, two hats

The recently amended Federal Sentencing Guidelines provide more exacting requirements for the staffing of a compliance and ethics program, but they also recognize that the small and mid-size organization often do not have the resources to create an entirely new officer-level position to manage the program. The Federal Sentencing Guidelines recognize this practicality by offering an endorsement for utilizing existing officers rather than creating a new CCO position.¹⁸ And when a new role is not created, often the compliance responsibility is assigned to the GC.

The dual role is not limited to smaller companies. As noted earlier, a fair percentage of surveyed organizations have a CG who has the additional role of COO.¹⁹ Clearly, the size and sophistication of the legal staff is relevant and impacts the structure and nature of the organizational interactions on legal and

compliance matters.

There are obvious advantages to a dual role, especially for the resource-strapped organization. Most compliance (and ethical) issues have legal ramifications and combining the positions can promote operational efficiency. Attorneys provide guidance on how laws impact business operations, and compliance personnel incorporate that advice into the ethical practices of the organization. Arguably, the compliance role is an inherently legal one.

An additional benefit is that legal privileges and discovery protections readily apply and can be more easily managed when the CCO is also the GC. Further, there can be the advantage of authority and influence with the perception that, if the GC is involved, the matter must be significant. Conversely, government regulators are concerned that the professional role of the GC can serve as a shield to limit government access to information.

As compliance professionals in health care are well aware, the government clearly takes the view that unification of the positions creates an untenable conflict. Still, it is not universally accepted, even within health care, that the GC should never function as the CCO. Others have commented that an individual can serve both roles, although care must be exercised to ensure that an individual “clearly differentiates his or her actions as general counsel from those as compliance officer.”²⁰ The difficulty here, as with other situations involving multiple hats, is that the degree of care applied to keep the roles distinct is dependent, to an extent, on the individual wearing the hats. Moreover, there is often the hurdle

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of finding the two complementary skill sets in a single person.

Assuming it is better to have a formal compliance program with a designated compliance officer than to not have one at all, and given the reality that the compliance role may be held by the GC, what steps can an organization take to allay the concerns expressed by the OIG? The resource guide developed by the OIG and the AHLA provides recommendations that can help ensure that the objectives of the compliance program (and not just the legal department) are met. The recommended considerations²¹ include the following:

- Adopting a process where the GC may recuse himself or herself from a compliance investigation, as well as other alternative processes if the matter involves the conduct or judgment of the GC;
- Periodic board initiated third-part audits or assessments of the compliance program; and
- Authorizing the Board and Audit Committee to retain outside counsel or other experts with respect to selected matters under Board-approved criteria.

Another consideration to ensure a compliance system with appropriate checks and balances is to have substantial involvement by a management-level compliance committee. In some organizations, compliance is functionally operated by committee—multiple individuals sharing a single hat—with the GC receiving support and coordination from managers, such as the chief financial officer, human resource leader, chief audit executive, and key business unit leaders.

With small nonprofits whose legal depart-

ment may consist of the GC as the sole in-house attorney, there may be no better alternative. For many smaller companies, it may make the most sense if the compliance officer is also the GC, because there is sufficient overlap in their roles.

Keep in mind that no matter what the tone is at the top, the risk remains that a particular individual in a dual role will have a limited perspective. In other words, when one is acting in the primary capacity as counsel for the organization, there may be an inherent bias to filter or censor (consciously or unconsciously) critical information that should be reported to the Board. An active compliance committee and the measures noted above can mitigate such risk while providing added credibility and buy-in support for compliance program activities.

Two Functions: Separate but Unequal

Where the CCO is a separate individual but reports to the GC, additional challenges emerge. Again, the OIG has expressed concern about compliance programs where the CCO is subordinate to the GC.

Having one function report to the other can solve some checks-and-balances problems, and commentators point to the operational efficiencies attendant such a structure, especially when the GC is senior to and more experienced than the CCO.²¹ Overall, the GC and the CCO must work closely together and a direct reporting relation can make operational sense. Additionally, the added resource enables the CCO to focus on compliance operational responsibilities, which can be relief to an overburdened GC.

As with the dual roles, the down-side

of this reporting structure is that it can be overly dependent on the individuals in the two positions. CCOs who report to more seasoned and higher-level GCs can face undue pressure if they disagree with their bosses. The tension is obvious and more pronounced when one is not on equal footing and is dependent on another for their livelihood.

As observed previously, “the most powerful people in a corporation...may perpetrate the most dangerous business offenses...”²² By structuring the compliance program in a way that makes the primary compliance monitor beholden to another superior in the C-suite can be a risky proposition, especially if it is a particular GC who has undeniable clout and when the CCO is viewed as ineffectual.

The OIG and AHLA convey the following recommendations²³ that can attenuate this risk:

- Provide alternative reporting mechanisms that formally provide the CCO direct reporting to another member of senior management as deemed necessary by the CCO;
- Establish procedures to have someone other than the GC authorize the CCO to conduct compliance investigations, including the right to hire outside counsel; and
- Require periodic direct reports from the CCO to the Board, balanced by the GC’s consultation, so that both may report to and advise the Board, consistent with their responsibilities.

For a new compliance function, it may be appropriate for the compliance officer to initially be part of the legal department and administratively report to the GC. At this stage, the newly minted

CCO can benefit from the experience, resources, influence, and exposure that the GC can provide to support the compliance program. With additional reporting considerations that provide a level of independence for the CCO, this subordinate structure may work very well for some organizations.

As an additional safeguard, the company can protect the compliance officer from an unusually powerful GC (or other senior executive), by requiring Board approval before a CCO can be terminated.²⁴ This is in line with protections afforded to CAEs who face similar challenges of maintaining independence and objectivity when dealing with the highest levels in the organization.

As the compliance function evolves and develops its own resources, an assessment of this initial reporting structure should be undertaken. Depending on the size and complexity of the organization, it may ultimately be advantageous for the compliance function to be wholly independent and separate from legal.

Two Separate Complementary Functions

If an organization has sufficient resources to establish a comprehensive compliance program, ideally it should be free-standing to minimize the negative consequences that may arise if the GC and CCO roles have conflicting professional obligations. The clear trend, especially in health care, is for the compliance officer to occupy a senior-level position with commensurate protections, budget, support, and access. If the CCO and GC are essentially given equal stature, there can be enhanced oversight by the Board, because it is more likely to receive bal-

anced and unvarnished information.

When a compliance officer has such senior-appropriate protections, the likelihood is improved for the appropriate reporting up (or out) that may be more difficult for in-house counsel. It is ironic that the term “oversight” is a suitable double entendre in this situation, meaning either to oversee or to have overlooked or missed something important. A Board in ensuring appropriate oversight should assure itself that its CCO is able to provide objective information, analyses, and recommendations. Having a compliance officer who is independent from the GC provides the surest checks and balances in the compliance reporting process.

Considerations still need to be kept in mind when the CCO is independent from the GC. Even the role of the compliance officer needs to be counterbalanced against unchecked zeal in rooting out noncompliance and unethical conduct. Recommendations from the OIG and AHILA²⁵ include the following:

- Have the GC involved in an advisory capacity in core compliance processes such as: 1) program risk assessments; 2) policies; 3) help-lines and investigations; 4) corrective action to address violations; and 5) reports on compliance processes;
- Include the GC in routine reviews of compliance matters being reported by the CCO—of course, excluding matters in which the GC is the subject of the report; and
- Requiring notice and consultation with the GC when the CCO has independent authority to retain outside counsel and consultants.

An effective CCO will be expected to

have the experience and judgment to exercise authority and discretion in an appropriate fashion. A CCO will need to know when an issue needs the direct involvement of the GC and/or outside counsel, for instance, when the application of legal privileges needs careful consideration. When handling compliance audits, help-line calls, and internal investigations, the CCO will undoubtedly need the full support and close coordination of the legal function.

Conflicting Professional Obligations?

Relationship tensions are likely to arise in the handling of a potential legal violation. If a compliance officer has a reputation for integrity within the organization, employees may be more willing to raise and divulge sensitive issues to the compliance department. Company attorneys may not benefit from the same degree of openness, because they are typically viewed as representing the organization and not the individual employees. The CCO is often perceived as more of an ombudsman to the employee.

However, corporate counsel are well situated to become aware of instances involving “material violations,” because they are often involved in directing internal investigations (to preserve legal privileges) or providing advice on legal consequences. For publicly traded U.S. companies, attorneys who appear before the SEC (whether in-house or external counsel), are now required to escalate certain types of violations.

Under Sarbanes Oxley § 307 and SEC Rule 205, material violations of law should be directed to the chief legal officer, who is then responsible for develop-

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CORPORATE COMPLIANCE & ETHICS: GUIDANCE FOR ENGAGING YOUR BOARD

“This video provides an overview of the Board’s role in compliance.”

Odell Guyton

Senior Corporate Attorney,
Director of Compliance,
Microsoft Corporation

“It’s pretty clear that the best compliance program in the world is meaningless, even if it’s funded with a good well-meaning compliance officer, if the leadership of the company is not behind it and isn’t supportive...”

Honorable

Michael E. Horowitz
Commissioner, United States
Sentencing Commission



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ing an appropriate response. This is the genesis of the duty of in-house counsel to report evidence of a material violation committed by a corporate officer “up the ladder.”²⁶ If the GC or CEO does not respond appropriately, then the counsel must report the evidence to the board of directors.²⁷ Similarly, the ABA report provides recommendations for attorneys to report potential problems of legal non-compliance.²⁸

Therefore, more explicitly than before, a major compliance function of the GC and the in-house attorneys is to bring issues of wrongdoing to the attention of appropriate authorities within the organization. Yet the new professional standards raise difficult questions about the extent to which counsel must disclose information and risk breaching the attorney-client privilege.

Conceivably, in-house counsel may find themselves at odds and in conflict with the company’s CCO. As noted, the CCO as ombudsman typically has sensitive information that may require him or her to report at the Board level without executive knowledge. Ideally, the CCO and GC should work closely and trust each other on complicated matters that require difficult judgment calls. But if there is an outright disagreement, how can the competing obligations be handled, especially if the alleged material violation is a close call? This concern was already problematic before Sarbanes-Oxley and the amended ABA rules, when the attorney-client privilege was perceived as preventing the obligation of reporting up²⁹ or out.

It is useful to evaluate the dilemma in the context of the applicable professional

obligations and standards of professional conduct. In stark contrast to the licensed attorney who may become disbarred, the compliance officer lacks a similar professional and disciplinary body that could restrict his or her livelihood.³⁰ Further, no specific laws or regulations currently provide guidance on professional conduct issues for compliance professionals, comparable to what exists for attorneys.

The closest the compliance profession has to a code of professional conduct in the United States³¹ is the Code of Ethics for Health Care Compliance Professionals adopted by the Health Care Compliance Association (HCCA) in 1999. Although an accepted code of ethics can help elevate the status of a profession and strengthen the field,³² the HCCA currently lacks an enforcement body and doesn’t require a licensing credential before one can work the field (though the association does have a professional certification in health care compliance). For a code to have credibility, it usually has to be more than a vague set of aspirational statements. A code should provide guidance for the professional to address difficult situations.

The HCCA Code of Ethics is considered effective, because it provides guidance on dealing with difficult compliance dilemmas.³³ For example, the HCCA Code describes the compliance professional’s obligations to the public as “beyond [that of] other professionals” due to the responsibility of preventing misconduct. The Code goes on to describe the significant steps for considering resignation and reporting a matter to public officials.³⁴

If there is a disagreement between the

CCO, GC, and/or management on a specific compliance matter, a conflict ensues due to differing reporting obligations, especially when the compliance officer feels compelled to “go public.” The imposition of reporting obligations on in-house counsel raises some challenging issues. Practical steps for the GC and CCO to resolve differences of opinion and to secure consensus need to be carefully considered, and this is a currently developing area of corporate governance and compliance.

The Compliance Officer and Counsel as Whistleblower

Apart from the consequences that counsel or a CCO may face from their professional affiliation or licensing body, reporting out or whistleblowing can be a career limiting event. As a practical matter, Sarbanes-Oxley can be viewed as creating a conflict between an attorney’s duty of confidentiality to the client and his or her own personal interest in avoiding discipline or indictment.

In-house attorneys, and not just the high ranking GC, should be concerned with the risks for not reporting up. Recently the government has been bypassing the GC—and indicting lower ranking in-house counsel—for alleged involvement in corporate fraud.³⁵

But are company lawyers and compliance professionals protected if they do opt to speak out in good conscience and after exhausting internal options? A variety of federal statutes provide protections against retaliation for private sector employees who make good faith reports of an employer’s conduct that violates criminal or civil laws. Most states also have some form of laws

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that protect employees from retaliation. And Section 806 of Sarbanes-Oxley provides protection for employees of publicly traded companies.

Here there may also be divergence on the impact on counsel versus the compliance professional. Presumably, compliance officers would be covered by Section 806 if they faced retaliation for providing information to the government on certain types of misconduct. In reality, a CCO does not face the same professional restrictions of protecting “privileged” and confidential information as counsel does.

Attorneys would appear to be protected under Sarbanes-Oxley, though how much protection that affords remains to

be seen. The issue for lawyers is whether whistleblower laws permit a claim against a former employer despite laws and ethics rules that permit an employer to discharge a lawyer for almost any reason. And if former counsel were to bring a claim, can the lawyer use privileged information in proving such a case? At the moment, there is considerable variability in how these issues are addressed.

Overall, these issues present no small challenges for both the CCO and the GC. Especially for counsel, there is a balance between the traditional duties of client loyalty and the emerging expectation that counsel will act to influence compliant behavior and report as needed. This perceived conflict between professional duties and public expectations supports the need

to separate the roles of the GC and the CCO in large complex organizations.

Conclusion

In difficult situations, a CCO’s perspective about a controversial transaction or event would obviously be unnoticed, if that person was also serving as the GC who happened to agree with executive management. As company counsel, the GC is likely to be more focused on supporting the organization’s business objectives while staying within the bounds of the law, and less likely concerned with shaping the ethical practices of the organization.

Without an authoritative compliance officer there would be less effective and unconstrained monitoring. The potential for receiving prudent advice contrary to

Reporting Structures

- Enhancing system of checks and balances to meet objectives of the compliance & ethics program. All structures benefit with participation by an active *management compliance committee*.

Model	Considerations for Mitigating Structural Risks
One Person, Two Hats (Dual role)	<ul style="list-style-type: none"> • Process for GC recusal during a compliance investigation • Alternative processes for investigating and reviewing matters involving the GC • Periodic Board initiated 3rd-party assessments of the compliance program • Allowing Board / Audit Committee to retain outside counsel and experts
Separate but Unequal	<ul style="list-style-type: none"> • Alternative mechanisms that provide the CCO direct reporting to another member of senior management • Procedures to have someone other than the GC authorize the CCO to conduct investigations, including retention of outside counsel and experts • Require periodic direct reports from the CCO to the Board
Separate and Complementary	<ul style="list-style-type: none"> • Having the GC involved in core compliance processes such as: 1) risk assessments; 2) policy development; 3) internal investigations; and 4) devising remedial measures to address violations of law • Include the GC in routine review of compliance matters • Requiring consultation with the GC when the CCO has authority to retain outside counsel and consultants

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the determined business plans of management, as supported by a similarly inclined GC, declines. Certain unique business and professional responsibilities need a system of checks and balances that are more difficult to achieve by locating all responsibilities, perspectives, and knowledge within one person or even one function. We're just now starting to see a rash of implicated GCs and other in-house attorneys in major allegations of misconduct (e.g., Medicaid fraud, backdating of stock options, the use of pretexting to obtain personal data, etc.).

In providing legal analysis and advice on how the organization can comply with applicable laws, the GC has a certain vantage point for guiding an entity toward attaining business objectives. In comparison, the CCO is first a manager of a corporation's actions—in implementing a compliance plan, with legal considerations as a backdrop. He or she must do whatever it takes to prevent and detect misconduct.

As seen in health care, strict regulatory requirements and a unique operational environment require close coordination and cooperation between the legal and compliance functions. The key to a successful partnership is a clear understanding of each other's role and the mutual dependencies of each. In the final analysis, a Board needs to be confident that, through the structure of its compliance system, it is receiving a sufficient body of information to exercise its oversight role to prevent corporate governance failures. On balance, a compliance program must correspond to the organization's own structure and business imperatives. In more and more organizations, a robust compliance and

ethics program with a high-level CCO is proving necessary. ■

1 See Corpedia and the Association of Corporate Counsel Compliance Program and Risk Assessment Survey of 2005, p.10, where 61% of surveyed companies have a CCO with 48% of those having the dual role of general counsel; see also Corpedia and The Conference Board 2006 Compliance Program and Risk Assessment Benchmarking Survey, p.10, where 38% of the CCOs were reported to also be the general counsel.
 2 Health Care Compliance Association Eighth Annual Survey: 2006 Profile of Health Care Compliance Officers, pp.17, 30, where 13% of CCOs are also the general counsel/attorney.
 3 Department of Health and Human Services, OIG Compliance Program Guidance for Hospitals, Federal Register, Vol. 63, No. 35, Feb. 23, 1998, 8987, at 8993, f.n. 35.
 4 OIG Supplemental Compliance Program Guidance for Hospitals, Federal Register, Vol. 70, No. 19, Jan. 31, 2005, 4858, at 4874.
 5 Grassley Investigates Tenet Healthcare's Use of Federal Tax Dollars, Sept. 8, 2003, Press Release providing text of his letter to Tenet Healthcare Corporation.
 6 It didn't help that Sarbanes-Oxley failed to formally acknowledge the role of compliance programs and professionals despite the long-standing existence of the U.S. Sentencing Guidelines for Organizations (see comments of attorney Joe Murphy in Tabuena, J., Meet Joseph Murphy, Compliance & Ethics, March 2006, pp. 28-29).
 7 Cheek III, J.H., et al., Report of the American Bar Association, Task Force on Corporate Responsibility, 2003.
 8 Id. at 32.
 9 See U.S. Department of Health and Human Services OIG and AHLA, An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of Directors, July 1, 2004. The OIG/AHLA resource describes three models of the relationship between corporate counsel and the compliance officer, including steps to mitigate perceived negative consequences from combining the two roles.
 10 Demetriou, A.J., et al., Compliance Roles for Counsel to Corporations, American Health Lawyers Association Topical Insight Series, July 2005, p. 13. Similar to the OIG/AHLA resource, supra note 9, this publication provides discussion on the relationship of in-house counsel to compliance officers.
 11 Id. at 13.
 12 Quote of Joseph Murphy from Tabuena, J., Compliance & Ethics, supra note 6 at 28.
 13 Id.
 14 This is not to denigrate the legal professional, because the compliance function needs access to good attorneys and their advice. However, the skills required for an effective lawyer do not necessarily translate into those required for a competent compliance officer.
 15 Tabuena, J., Meet Mike Lotzof, Compliance & Ethics, June 2006.
 16 Tabuena, J., Meet Mike Lotzof, Compliance & Ethics, in press, June 2006. Mr. Lotzof is formerly the Chief Executive officer of the Australasian Compliance Institute which has established an accreditation program with three levels of certification for compliance professionals.
 17 Supra, note 9 at 6.
 18 Federal Sentencing Guidelines, 8B2.1, Application Note 2(c)(iii), providing that using available personnel rather than employing a separate staff or organization to carry out compliance and ethics activities is an acceptable alternative for the small organization.
 19 Supra, note 1.
 20 See comments of respected healthcare attorney Gary Eiland in Snell, R., Gary Eiland Discusses the Relationship of Compliance with Other Departments, Journal of Health Care Compliance, July-August 2004, at 38. Mr. Eiland opines that the OIG is more concerned with whether such duality would limit access to information and documents if an investigation were to ensue.
 21 See note 9, supra, An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of Directors at 8.
 22 See note 20, supra. Mr. Eiland observes that often the general counsel is the more senior and experienced of the two officers but nevertheless, "the compliance officer should have dual reporting lines in order to report directly to the chief executive officer and board compliance committee, as appropriate".
 23 Supra, note 6 at 28.
 24 See Note 1, supra, An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of

Directors at 8.
 24 See Murphy, J., Questions to Ask About an In-House and Ethics Job Offer, *ethikos* and Corporate Conduct Quarterly, November/December 2004, at 9.
 25 See note 9, supra, at 8.
 26 17 C.F.R. § 205.2(i), 2003 (17 C.F.R. Part 205 contains the rules promulgated by the SEC in response to Section 307 of the Sarbanes-Oxley Act.
 27 For a detailed analysis of the impact of the Sarbanes-Oxley standards of professional conduct on in-house attorneys, see Noordhash, K., Sarbanes-Oxley Act and In-House Counsel: Suggestions for Viable Compliance, *Georgetown Journal of Legal Ethics*, Summer 2005.
 28 ABA Model Rules of Professional Conduct, Rule 1.13. While the focus of the ABA Task Force was on public companies, many of its recommendations as well as the amendments to Model Rule 1.13, apply to non-profit and privately-held corporations.
 29 The traditional rule did not impose sanctions, as Sarbanes-Oxley now does, on an attorney who chose not to report up the ladder, so long as nothing was done to further or abet the illegal conduct.
 30 While a CCO may be a licensed attorney or Certified Public Accountant, they are usually not functioning in a professional capacity in which the designation is held (i.e., a compliance officer is not dispensing legal or accounting advice).
 31 For the compliance professional certifications in Australia, one of the mandatory requirements is adherence to the Australasian Compliance Institute ("ACI") Code of Ethics. The ACI has an ethics committee which hears issues and a defined hearing and appeals process.
 32 Murphy, J., Ethics for Ethicists: A Code for Ethics and Compliance Professionals, 17 *ethikos* 8, March/April 2004.
 33 Tabuena, J., Meet Joseph Murphy, Compliance & Ethics, supra note 1 at 25.
 34 HCCA Code of Ethics for Health Care Compliance Professionals, R1.4.
 35 Reisinger, S., Aiming Lower, *Corporate Counsel*, April 1, 2006.

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