

601 Teamwork |

The Relationship Between Compliance Officers, In-House Counsel, and Outside Counsel During Internal Investigations

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Overview

- Understanding and managing the internal relationship between compliance officers and in-house counsel
- Understanding the investigation process
- Navigating the investigation's aftermath

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Compliance/Counsel Relationship

- On the surface, the distinct roles seem clear:
 - The compliance officer is tasked with preventing, detecting, and disclosing potential ethical and regulatory violations.
 - Counsel is responsible for defending the university in relation to those and other matters.

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Compliance/Counsel Relationship

- In practice, roles often overlap because of the regulatory environment.
- How can individuals in these positions work together effectively in order to mitigate and manage risk?

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Compliance/Counsel Relationship

- The more familiar university counsel are with the nuts and bolts and operations of the compliance program, the better advocates and advisors they can be to the organization.
- Both need to fully comprehend and appreciate their differing roles within the university.

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Compliance/Counsel Relationship

- Reporting Best Practices
 - Should compliance officers report directly to the governing body and senior management or to general counsel?
- Open Communication Essential – How to Ensure Coordination of Efforts
 - Parity of status between compliance and legal counsel
 - Parallel reporting relationship to senior management
 - Establish a communications plan

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The Compliance/Counsel Relationship in Practice

Hypothetical: News outlets erupt with reports of a national higher education scandal involving the bribing of athletic coaches and other university officials to ensure admission to certain applicants. Initial reports do not reference your University, ABC University.

- For a hefty price, a coach would designate the identified student as an athlete of a particular sport – even if they did not play or were not qualified to play at the collegiate level.
- The student would receive early admission and/or admission where their grades and test scores alone would not have been sufficient.
- At many institutions coaches have some leeway in admitting athletes who might not meet the institution's regular admissions requirements.

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Hypothetical, cont.

Though relieved that ABC University was not named in any of the media reports, the President of ABC University requests a meeting and briefing on the potential issues first-thing the following morning.

- What are the compliance conversations?
- What are the legal conversations?
- Who is involved in the conversations?
- Who should be included at the President's meeting?

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Hypothetical, cont.

- During the meeting, it is disclosed that the compliance department identified a number of students who were admitted as early admission athletic recruits, but who never showed up to play and were subsequently removed from team rosters.
- It is also learned that a member of ABC University's athletic department noticed the anomaly last year and brought it to the attention of the former Athletic Director, who is no longer employed by ABC University.

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Early Assessment

- University counsel and compliance personnel should work closely to identify the nature of the allegations and whether they involve possible or actual violations of the law, violations of policy, or violations of any rules the University is accountable for.
- If the issue is a result of an incorrect understanding of the rules, appropriate training and mitigation may be required.

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Compliance/Counsel Relationship

- University counsel will typically coordinate the University's response, facilitate the collection of relevant information and materials, and work directly with outside counsel.
- Compliance personnel will also help with the collection and analysis of relevant information.

[11]

Understanding the Investigative Process

- The Investigation Plan
- Communications
- Scoping interviews and understanding the problem
- Gathering evidence and witness interviews
- Reporting out

[12]

The Investigation Process

- Important Role of Compliance
 - Help identify how the misconduct or issue occurred
 - How it was discovered
 - Why it occurred
- And what steps the university can take to ensure that the violations do not occur again

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Attorney-Client Privilege During Investigations

- Identify the overall, primary, and significant purpose of the investigation:
 - For the purpose of obtaining legal advice; OR
 - Example – responding to a government subpoena
 - Pursuant to routine policies or regulatory requirements
 - Example – responding to a hotline or ethics complaint

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Attorney-Client Privilege During Investigations

- Tips to Help Protect Documents and Communications
 - Educate university employees about the nature and purpose of the privilege and how to make it explicit when requesting legal advice.
 - Plan who will oversee and direct legal communications regarding the investigation.
 - When creating documents, make clear the purpose for which the document was created.

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Hypothetical, cont.

The original whistleblower discloses that she told a member of ABC University's legal department about the anomaly she discovered in the athletic department's recruiting practices.

- Legal counsel for ABC University interviewed one of the involved coaches, obtained an admission, and failed to report within his chain of command.

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Navigating the Investigation's Aftermath

- Reporting findings
- Gathering appropriate recommendations
- Contemplating disclosure of the report
- Organizational Response

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Organizational Response

- Development of new policies
- Updating of existing policies
- Creating training materials

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