

Beyond the Law: Business Ethics & the Compliance Officer

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Setting the Stage

- Federal Sentencing Guidelines (FSG), Chapter 8 sets out the basic structure of a compliance program
- Sec. 8B2.1: "Effective Compliance and Ethics Program"
- What does "and Ethics" mean in this context?

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The FSG

- “To have an effective compliance and ethics program...an organization shall...otherwise promote and organizational culture that encourages ethical conduct and a commitment to compliance with the law.” (emphasis added)
- The FSG goes on to set out the 7 classic “elements” of a compliance program
- What does “encourages ethical conduct” mean?

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Compliance vs Ethics

- Stepping back for a moment, we should ask, “what is compliance?”
- This is harder to answer than it seems
- Compliance is
 - “conforming an act to a standard”
 - “meeting specific standards”
 - “act in accordance with a command”

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What is Compliance?

- Three sources of compliance:

1. Law
2. Policy
3. Ethics

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What is the role of each of these?

- Law: statutes, regulations, agency guidelines
- Policy: the organization's choices for "operationalizing" the law – choosing Path 1 or Path 2 when the law allows it
- Ethics: fills in the gaps with law and policy are silent

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What is Ethics?

- At base...ethics is doing the right thing
- But...what is the right thing?
- This has filled thousands of books over millennia!
- Ethics in compliance programs is sometimes goes by the name of "business ethics"
- Before looking at concrete activities, let's look at ethical frameworks.

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Ethical Frameworks

- Decisions are made in the context of some framework (whether or not a person knows or appreciates the framework...and sometimes a mix)
- 3 generally recognized ethical frameworks:
 1. Consequentialism (Utilitarianism)
 2. Deontological
 3. Virtue Ethics
- Which framework do you use?
- Which framework should an organization use?

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Ethical Frameworks

- 3 generally recognized ethical frameworks:

1. Consequentialism (Utilitarianism)
2. Deontological
3. Virtue Ethics

“Business ethics” usually utilizes a form of “virtue ethics.”

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Consequentialist Ethics

- “The ends justify the means”
- An action is “right” based on whether the consequence is good.
- Most common variation: utilitarianism
 - The right action is whatever is best for the greatest number of people
- Representative thinkers:
 - John Stuart Mill, Jeremy Bentham, Peter Singer

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Deontological Ethics

- Command theory of ethics
- Duty oriented with no exceptions; absolutist
- The consequence of the action does not inform whether the act is right
- Example: “Always tell the truth.”
- Representative thinkers:
 - Immanuel Kant

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Virtue Ethics

- The right action is what develops excellence in character
- A virtue is a “good habit” (a “vice” is a bad habit)
- “Happiness” is the goal – as in meaningful satisfaction (not happiness as pleasure or a good feeling)
- Not subjective, but normative – but highly dependent on the facts
 - The standards used are the virtues, and the question “what would a virtuous person do?”
- Representative thinkers:
 - Aristotle, Thomas Aquinas, Elizabeth Anscombe

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What are the virtues?

- Aristotle, *Nicomachean Ethics*

1. Prudence

- *Balanced judgement*
- *Caution and balance of risk*

2. Justice

- *Giving every person his or her due*
- *Right relations*

3. Temperance

- *Self-respect*
- *Simplicity*
- *Humility*

4. Fortitude

- *Courage*
- *Magnanimity*

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Some contemporary versions

- Integrity
- Transparency
- Honesty
- Fairness

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Back to Compliance Programs...

- Ethics is the most under-developed aspect of compliance
- It is an amorphous area that many people are uncomfortable dealing with
- But isn't ethics something a person expects from...
 - Their supervisor
 - Their employer organization
 - Companies acting in the marketplace

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Back to Compliance Programs...

- Currently there are four ways compliance programs attempt to "encourage ethical conduct"
 - Code of Conduct – setting out broad principles and commitments
 - Tone at the Top – showcase difficult decisions made by leadership/managers in order to model character to the workforce
 - Hotline – promote a hotline that not only reports potential non-compliance but also can serve as an ethics consult
 - Non-retaliation Policies – prohibits retaliation against workforce for raising compliance and ethics concerns

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Examples

- University of Michigan Health System:
 - “We are committed to treating all persons with care, dignity and respect.” (emphasis added)
 - What does this mean?
 - “Keeping patient information confidential”
 - “Providing the ideal work environment with respectful interactions with our co-workers”
 - “Following the highest ethical standards in any research activities involving humans animals”
 - “Providing compassionate, high-quality care to our patients, without discrimination and while respecting their dignity, values and beliefs”
 - “Honoring patients’ right to participate and make decisions about their care”
 - “Encouraging our patients to express their concerns and complaints so we can address them”
 - “Ensuring that access to care, treatment and services is not compromised when patients share their concerns or complaints”

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Concrete Actions

- Compliance program ethics statements can look like platitudes, but sometimes so can laws
- “Principles” are generally abstract and then they are applied to specific facts and circumstances
- Ethics always occurs in concrete actions
- Compliance programs cannot anticipate all actions but they can educate and try to prepare

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Concrete Actions

- Some compliance program activities:
 - Ethics simulations
 - Ethics consults
 - Root causes analysis to determine if there are ethical breakdowns
 - Incorporate ethical points into policies and education

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Conclusions

- Ethics is an expected component of a compliance program
- But, it is under-developed as a component and the government agencies are still thinking through what their expectations are
-a work in progress.

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