

# WHAT A GENERAL COUNSEL SHOULD KNOW ABOUT COMPLIANCE

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What it sometimes seems like



And What People Think When You Explain





# The Reality Is More Like



On one of the largest trading floors in the world we have 424 trading stations at which professional men and women trade equity and debt securities, including:

Common Stocks	Treasury Bill Futures
Equity Options	Treasury Bonds
Equity Futures	Bond Futures
Convertible Bonds	Agency Obligations
Corporate Bonds	Commercial Paper
Euro-bonds	Certificates of Deposit
Municipal Bonds	Bankers Acceptances
Municipal Notes	Euro-certificates of Deposit
Treasury Notes	Money Market Futures
Treasury Bills	Repurchase Agreements

# Teaser Questions

- *What is compliance?*
- *Is compliance a legal matter requiring client confidentiality?*
- *Who is a compliance officer's client?*
- *Does a compliance officer owe fiduciary or other duties to his employer?*
- *Can a general counsel or his staff be "friends" with compliance staff?*

# Similarities and Differences

- General Counsel should provide:
  - Knowledgeable advice to client
  - Representation of client
  - Protection of client
  - Candor with client
- Consistent with delegated duties from controlling entity
- Consistent with ethical canons tied to licensure

# Similarities and Differences

- Compliance Officer should provide:
  - Knowledgeable advice to client
  - Protection of client
  - Candor with client
- Duties owed are similar to GC

# Similarities and Differences

- Representation of Client – begs question of who is the client?

- Confidentiality

- Attorney Client Privilege –

- 5 C's – confidential communication by counsel counseling client

- K.S.A. 60-426 (a)

- Confidentiality due to ethical canons – Rule 1.6

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”



# First Question: Should the Legal Function be Separate from the Compliance Function?

- Are the knowledge bases for each professional different?
- Does an attorney have the same focus as a compliance officer?
- Litigation Differences – Attorney Client Privilege - *Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.*

Second Question: If Legal and Compliance functions are to be combined, does the organization's structure / operations lend itself to manageable legal and compliance issues?

- Can you wear too many hats?
- Specific Areas of Concern
  - Securities
  - Sarbanes Oxley
  - Corporate Crime
  - HHS OIG Corporate Integrity Agreements
  - Hybrid Entities

Third Question: Should a GC promote a robust compliance program as a legal defense strategy?

- Rhetorical Answer – **YES**
- *In re Caremark Int'l., Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996)

# Specific Compliance Areas that Require Competence by both a GC and a CCO whether combined or separated

- HIPAA / Privacy Act
- Reporting
- Licensure
- Financial
- Records Retention
- Social Media

# Epilogue – “Authorized Representative”

- Person on Medicaid for a number of years.
- Person had a DPOA for healthcare decisions and representative payee for Social Security
- Person dies leaving a home valued at \$60,000
- State has an estate recovery claim for \$100,000 for 5 years of Medicaid payments
- State starts an estate proceeding as a creditor and seeks to sell the home to recover against the previously paid Medicaid payments.
- The state’s probate claim includes an itemization of paid medical reimbursements.
- A hospital, who has an unpaid medical bill for services provided to the decedent from 3 years back, asks the state for the decedent’s Medicaid records.
- Do you provide the records?