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corpcounsel.com | June 20, 2018

## Does Compliance Really Have Different Interests Than Legal?

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*By Michael W. Peregrine*

Does compliance really have different interests than legal?

It's a question a prominent compliance industry thought leader is posing, and one that general counsel is well-advised to answer—not only to help compliance plan effectiveness, but also to avoid “role confusion” with her internal clients.

Recent public comments by well-known compliance consultant Hui Chen provide an important, if not also provocative, perspective on the role lawyers should play as part of a compliance team. Her very informed view is that the “legal mindset” may not be conducive to the development of an organizational culture of compliance. She also expresses concern with the lawyer’s lack of data focus, which focus she believes to be essential to effective compliance programming. These are views that merit attention.

According to media reports, Chen views lawyers as having a limited role on her “dream” compliance team. “With the exception of investigations, I probably wouldn’t hire a single lawyer.” Her preferred choice of team participants would



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include data scientists, auditors, social scientists, journalists, marketers and engineers. This view appears grounded in a perspective that lawyers are primarily focused on protecting the organization (i.e., meeting legal requirements) at the expense of evaluating any actual risk, and taking steps to manage that risk.

In a recent interview, Chen described how, in her view, compliance has different interests than lawyers (that presumably makes lawyers less valuable members

of the compliance team). She observed that lawyers, by nature and training, are primarily interested in what is necessary to protect the organization; a “tick-box mentality,” as she references. “Sometimes, that protection may be interpreted as, ‘We don’t want to know too much’... [Whereas] compliance always wants to know more.” She expressed concern that such a difference could present a conflict that could be resolved by assuring the independence of the compliance officer.

Chen's comments may surprise many general counsel who perceive their interests and responsibilities as much broader and more substantive than "see what the legal requirement is, and meet it." Indeed, the comments appear at odds with the Rules of Professional Responsibility (e.g., Rules 1.7(2), 1.13(b) and 2.1), with governance guidance from the American Bar Association, and with the increasingly accepted view of the general counsel as a "wise counselor" to management, and not just a "technical expert."

More importantly, her comments may not give sufficient weight to the long-recognized contributions attributed to lawyers in the compliance function. As a prominent corporate lawyer has noted as to that function, "Lawyers are a critical component in identifying legal risks, preparing the substantive training materials and in assisting with the education required to prevent violations of the law."

Indeed, Chen's position does not seem to acknowledge the vital role performed by lawyers not only in conducting the requisite legal analysis (under the attorney-client privilege) but also in advising on the appropriate response to the circumstances. This by necessity involves an evaluation of "what happened and what are the system weaknesses"—tasks that Chen apparently believes are best performed by compliance managers with their unique skill sets.

Those concerns notwithstanding, Chen's comments should not be dismissed. They reflect the views of a well-respected, highly experienced compliance consultant, and should be taken seriously—espe-

cially if the "tick box" view of the lawyer's role in compliance is gaining acceptance within the compliance industry. Her comments on a data-driven focus are particularly interesting. They suggest a different and perhaps controversial approach to staffing an organization's compliance program team.

But controversy regarding the respective roles and relationships of compliance and legal can lead to confusion and lack of coordination that can threaten the effectiveness of the overall compliance program. This should be resolved, but in a constructive and nonconfrontational conversation that involves senior management, and reflects the mutual respect that hopefully exists between the general counsel and chief compliance officer.

Such an internal dialogue could have the added benefit of reminding both compliance officials and corporate leadership of the ways in which the position of general counsel has expanded in recent years. As has been well articulated by Ben Heineman Jr. and others, the role of the general counsel has evolved from that of basic technical legal adviser, to business partner to management and "wise counselor" on ethical and moral considerations. In that latter role, the lawyer asks not only, "Is it legal?" but also, "Is it right?" In addition, it is increasingly recognized that the general counsel should occupy a position of prominence within the organizational hierarchy, at a position equivalent with the chief financial officer.

Serendipitously, at a recent program for compliance and risk professionals, Deputy Attorney General Rod Rosenstein offered

relevant observations on the role of lawyers in the compliance process. He noted that lawyers—as well as compliance officers, accountants and auditors—sometimes attract criticism for their seeming focus on loopholes, technicalities and issues of form over substance. Specifically referring to criticism of lawyers as "nitpickers," he referenced the late Supreme Court Justice Antonin Scalia's perspective on the role of lawyers: "one of the distinctive skills of our profession is to discern ambiguities, inaccuracies, and insufficiencies that would not occur to the ordinary" person. Those attributes would seem to be supportive of a role on the compliance team.

Both the general counsel and the chief compliance officer play critical roles in an organization's compliance program. How they interact with each other, and with the program, should be a source of continuing and supportive intra-organizational dialogue. Chen's recent comments on the role of the lawyer, while possibly provocative, are nevertheless constructive and ultimately contribute to that continuing dialogue.

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