

The relationship between the compliance officer and legal counsel

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Correcting the titles

- Rory Jaffe, MD MBA
 - Chief compliance officer
 - UC Davis Health System
- Anna Orłowski, Esq.
 - Health system counsel
 - UC Davis Health System

No conflict

- "The General Counsel of a public corporation should have primary responsibility for assuring the implementation of an effective legal compliance system under the oversight of the board of directors." – ABA task force on corporate responsibility



An integrated approach to corporate compliance

- DHHS – OIG
- AHLA
- Addresses the roles of the in-house corporate general counsel and an organization's Chief Compliance Officer in supporting the compliance oversight function of health care organization governing boards
- http://www.healthlawyers.org/oigahla/OIG_AHLA_CorpResp-CorpComp2.pdf

The lawyer vs. The compliance officer

- Lawyer
 - Protect client
 - Advise
 - Responds to trouble
 - Knows more about the law
- Compliance Officer
 - Protect everyone else
 - Change company
 - Looks for trouble
 - Knows more about the business

The lawyer and the compliance officer

- Help the organization comply with laws and regulation
- Develop policies and procedures
- Conduct interviews and investigations related to the compliance/non-compliance with laws, regulations and policies
- Interpret and advise on laws and regulations that affect the organization
- Report to the organization's principals on compliance matters and ensure the organization receives accurate information and candid advice
- Identify what other stakeholders in the organization may need to know (e.g., medical staff issues, health and safety matters)

Dual roles

- Fundamentally, the compliance officer *must* be able to act and report independently when needed
- A lawyer can be counsel or compliance officer, but the roles are different
 - Privilege belongs to counsel, not compliance officer
 - Conflict whenever compliance officer has two roles

Separation of duties

- "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 make this a feasible option), a system of checks and balances is established to more effectively achieve the goals of the compliance program." – DHHS OIG

Different forms of organization

Separate compliance officer

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graph TD; CEO[CEO] --- CO[Compliance officer]; CEO --- Counsel[Counsel]; CEO --- Everyone[Everyone else];
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Separate compliance officer

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graph TD; CEO[CEO] --- Counsel[Counsel]; CEO --- C?O[C?O]; CEO --- Everyone[Everyone else]; C?O --- CO[Compliance officer];
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AHLA's Suggestions

- Have the General Counsel involved in
 - periodic risk assessments
 - review of proposed policies and reports on compliance processes
 - conducting investigations
 - devising remedial measures to address violations of law
- Routine General Counsel reviews of matters being reported to the Board by the Chief Compliance Officer
- Require notice to, and consultation with, the General Counsel where there is independent authority for the Chief Compliance Officer to retain outside counsel and consultants.

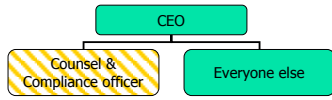
Compliance officer reports to general counsel

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graph TD; CEO[CEO] --- Counsel[Counsel]; CEO --- EveryoneElse[Everyone else]; Counsel --- ComplianceOfficer[Compliance officer];
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AHLA's Suggestions

- Establish alternative reporting mechanisms to provide the Chief Compliance Officer direct reporting to another member of senior management when necessary
- Procedures to have someone other than the General Counsel authorize the Chief Compliance Officer to pursue compliance investigations, including the right to hire outside counsel.
- Periodic direct reports from the Chief Compliance Officer to the Board, balanced by the General Counsel's prior review and consultation

Compliance officer is general counsel

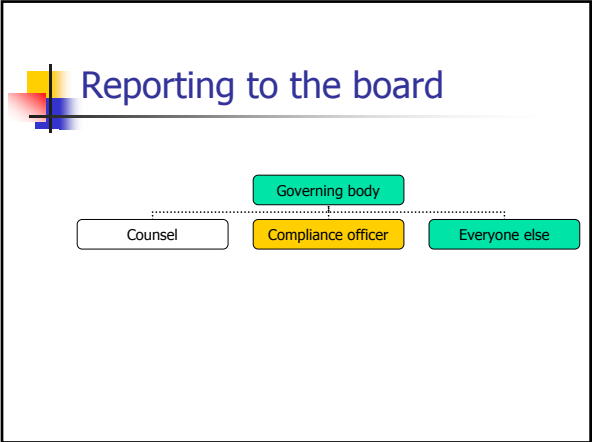


AHLA's Suggestions

- Adopt a process by which the General Counsel may recuse himself or herself from a compliance investigation, as well as alternative reporting processes, if the matter may implicate the General Counsel
- Periodic Board initiated third party audits or assessments of the compliance program
- Authorizing the Board Audit or Compliance Committee to retain outside counsel or consultants with respect to selected matters under Board approved criteria.

Reporting to the board

- "Ultimately, it is important that a Board receives a sufficient flow of information to effectively conduct its compliance oversight."



The problems with privilege

Overusing attorney-client privilege

- "Blanket or routine assertions of the work product or attorney-client privilege in routine auditing and compliance monitoring activities may undermine the vitality of the asserted privilege and diminish the credibility of the compliance program and the organization."



Privilege contrary to good compliance practice

- Open communication to rapidly fix problem
- Dissemination of information to other areas to ensure problem not repeated
- Transparency



Golden rule of compliance

- If you worry about results of an investigation leaking out, something is wrong
 - Facts
 - Conclusions
 - Business process changes
- Preliminary impressions different issue



More privilege trouble

- The attorney is running things

When attorney-client privilege should be asserted

- Reasonable probability of administrative, civil or criminal action
 - Not simply a repayment
- Reasonable probability of malpractice suit

What is privilege?

Privileges in general

- What's the Big Deal?
 - Privileges are contrary to the general rules that all relevant and competent evidence is admissible in court and that every citizen has an obligation to give evidence in a judicial proceeding.
 - Privileges also hinder the basic function of the judicial system, which is the search for truth.
 - Therefore, privileges only exist to serve important interests and relationships, they are construed narrowly, and new ones are rarely created, at least by the courts.

Privileges applicable to attorneys


- Attorney-Client Privilege
- Attorney Work-Product Doctrine

Attorney-client privilege

- Cal. Evidence Code Sections 950-962.
- What is the Privilege:
 - The client has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between client and lawyer. Evid. section 954.
 - A "Confidential Communication" means information transmitted between a client and his/her lawyer in the course of that relationship and in confidence by a means which, discloses the information to no third persons, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. Evid. section 952


Attorney-client privilege

- Who is the "client" when the attorney is in house counsel for a health system or corporation?
 - Ultimately, the corporation
 - Practically, any employee but only within their capacity and actions as an employee of the organization




Attorney-client privilege

- How do I make sure that my information is protected by the Attorney-Client Privilege?
 - Seek "LEGAL" Advice.
 - Separate from business advice.
 - Fully Document when seeking legal advice.
 - Examples: label memo/emails:
 - "FOR THE PURPOSE OF RECEIVING LEGAL ADVICE"
 - If there is a concern litigation may develop – note in writing.
 - Confidentiality will only exist when information is given to an attorney or attorney's agent with the intent that the information will not be conveyed to a third party.



When the attorney-client privilege will not apply

- When the client intends that the information provided to the attorney is intended to be disclosed to a third party
- When the communication between the client and lawyer is for business, public relations or other non-legal advice
- If the client waives or surrenders the attorney-client privilege



When the attorney-client privilege will not apply


- When the attorney is acting as a business negotiator for the client
- When the attorney is giving business advice to the client

Attorney-client privilege

- If you intend to work under the attorney-client relationship do not distribute information to others.
 - Do not send a memorandum dealing with legal matters to anyone who is not directly working on or involved with the problem.
 - If absolutely necessary to distribute, document reasons for distribution.


Attorney work-product doctrine

- Cal. Civil Code Section 2018(c)
- Privilege applies to:
 - product of attorney's effort,
 - research, and
 - thought in preparation of client's case.
- Privilege includes results of his own work and that of his agents in investigating:
 - both the favorable and unfavorable aspects of the case,
 - legal theories and strategy as reflected in interviews, statements, memoranda, correspondence, briefs, and
 - any other writings reflecting attorney's impressions, conclusions, opinions, research, or theories




Attorney work product

- An investigation may be conducted by an agent of the attorney:
 - The attorney may assign an individual to investigate the matter. That individual will be acting as an agent for legal counsel – which means that the information would likely be subject to the attorney-client privilege.
 - The investigation must be done under the direction of counsel.
 - Investigation results must be directed back to legal counsel.

 **Attorneys are still useful**

- Writing policies
- Interpreting laws and regulations
- Risk analysis in grey areas
- Dealing with recalcitrant witnesses
 - Labor rules (with HR)
 - Medical staff rules
- Second set of eyes for big issues

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