

## When Compliance and Legal Don't See Eye to Eye

### The Compliance Strategist

*Donna Boehme, Corporate Counsel*

May 8, 2014



Lawyers are trained to view everything through a legal lens. Which is pretty much like anyone who is trained to do something at a high level: your eye sees what your brain has been taught to look for.

In my family, when someone has a gardening question, they call the cousin who is a gardener because that's the expertise they need. Within organizations, it's the same thing. When businesses need legal advice, they go to the experts with the mandate to advise and defend the company, and to provide its professional expertise through a legal eye.

Similarly, corporate compliance needs to be managed and overseen through a professional compliance lens. Compliance has a distinct advisory and control mandate, and uses very different competencies, skillsets, mindset and priorities to achieve it. Most aspects of compliance have nothing at all to do with the legal function. A modern compliance function is neither a subset nor extension of legal.

Within a typical company, there are several advisory functions, including legal and compliance. The mandate of legal is to provide legal advice and defend the company. Compliance's mandate is to find, fix and prevent problems, and to support a culture of transparency and accountability. Both are important, and each serves as a healthy check and balance, and a line of defense against organizational threats.

Usually, these two separate mandates are mutually supportive. However, compliance and legal do not always see eye to eye or have the same priorities—and when that happens, neither should automatically veto the other. As the chief counsel for the U.S Department of Health and Human Services' inspector general [said to Pfizer Inc.](#): “Lawyers tell you whether you can do something, and compliance tells you whether you should. We think upper management should hear both arguments.”

Some in the in-house legal community don't want to talk about the conflicts in mandate when legal tries to manage compliance. When asked about this, they become defensive and say that the idea is “ridiculous” and that a general counsel can't be “biased” because they are governed by a lawyers' code of professional responsibility.

Really?

When was the last time that a GC, before deciding to “hush up” an internal bribery investigation by referring it back down to the local counsel who approved suspected payments in the first place, consulted his professional responsibility code for guidance? Should an internal whistleblower have confidence that a professional code will stop an in-house attorney from retaliating against that very whistleblower?

And I wonder, what does the professional code tell lawyers about a need-to-know list for investigations, the cultivation of ethical leadership, or the need for transparency in a compliance program? When legal and compliance differ on the details of an employee engagement survey or have opposing input on a disciplinary case, what does the professional code say about that?

If I were a GC, I would not want to have responsibility for compliance. I would want an independent, collaborative sister function with 100 percent focus on the mandate of compliance. I would want fewer reasons for others, including plaintiffs, regulators and the media, to suggest that the company's legal or compliance decisions were “conflicted,” or investigations less than robust, arms-length and professional. I would want employees to have more confidence, and less fear, when

coming forward with real concerns that could be important early warnings of problems. I would want prosecutors, business partners and investors to be impressed with my company's commitment to a strong, independent compliance function with unfiltered reporting to management and the board of directors.

But maybe that's just me.

The compliance profession has some work to do, too. It needs to put forward senior-level, highly experienced individuals with business savvy, gravitas and the ability to counsel the board and the C-suite on the big picture of compliance and culture, not just day-to-day implementation, training and the hotline.

The modern chief compliance officer must be a fully formed—and informed—member of the C-suite who carries critical information and perspective to senior management, in a manner that is both measurable and actionable. As these individuals join the upper ranks of management and show value, the debate about CCO independence, like the debate about internal audit independence, should fade to black.

There are miles of difference between compliance operated solely through a legal lens and compliance operated through a compliance lens that fully incorporates legal as risk owner and subject matter expert for legal risks.

That difference was clear to the prosecutors in the Pfizer case and a long line of settlement agreements in the last decade. It was equally clear to at least five big banks that have recently [separated their compliance and legal functions](#). And evidently, after two years and more than \$400 million spent fixing its compliance problems, it looks like [Walmart has gotten the memo, too](#).

Currently, in the deadly General Motors ignition-switch scandal, we are learning that [in-house GM lawyers may have had a significant role](#) in delaying a recall and were “quietly negotiating” settlement agreements with victims' families. I think we can all agree: “quiet” “recall.”

As the GM lawyers, deeply ensconced in their “defend” mandate, got to work on the issue, who was minding the store for compliance? Who was carrying the torch for finding, fixing and preventing future problems? Who was breaking down silos, championing these concerns to senior levels and trying to prevent future danger? Could an independent compliance function have taken GM down a different path?

Every day, compliance officers make dozens of decisions, great and small, to support and oversee an effective compliance program. The critical question for companies is: Should those decisions be made through a modern independent compliance lens, with input from legal, HR, audit and others, or from a purely (subordinated to) “protect and defend” legal lens?

Anyone who thinks those lenses are the same either has an imperfect understanding of compliance, or just hasn't been paying attention. Because even when compliance and legal don't see eye to eye, the company benefits from a fully transparent discussion of the worldview seen by two independent advisors.

*Donna Boehme is an internationally recognized authority in the field of compliance and ethics, designing and managing compliance and ethics solutions for a wide spectrum of organizations. Principal of [Compliance Strategists](#), a N.J.-based consulting firm, Boehme is the former chief compliance and ethics officer for two leading multinationals. She has been named to *The Top 100 Thought Leaders in Trustworthy Business 2014* by *Trust Across America*, and can be reached at [dboehme@compliancestrategists.com](mailto:dboehme@compliancestrategists.com).*