

How Dow Chemical Centralized Its Investigations Process

By Andrew W. Singer

In a sprawling company of 43,000 employees spread across 175 countries, it is difficult at times to know just what is going on. And that applies to internal investigations.

More than 1,000 investigations take place annually at The Dow Chemical Company, the chemical and plastics manufacturing firm based in Midland, Michigan. Yet until recently, no single individual or office could say for sure just how many were taking place—or where, why, or how the investigations were being conducted. Not even Tom McCormick, who heads Dow’s Office of Global Ethics and Compliance and whose responsibility it is to make quarterly reports on investigations to the Dow board, knew. Indeed, McCormick figures he was aware of only about 20 percent of the investigations going on at any time when he first began to focus on the issue some four years ago.

McCormick set about to change things.

Thus was born the Dow Global Investigation Process, or DGIP, a comprehensive effort to track, monitor, and standardize the corporation’s investigations function.

Consistency matters

Tracking and monitoring of internal investigations would lead to consistency in investigations, and consistency was important. That was a key premise of the initiative. Why does consistency matter? Fairness is an end in itself, answers McCormick in an interview. Employees aren’t easily fooled. They can see if the company is fair and consistent in who and what it investigates, and which individuals are disciplined and how severely. If employees believe in the fairness of the process, they are more likely to report wrongdoing. And those internal reports can save the company much travail and grief down the road, notes McCormick, who is also the company’s associate general counsel. He has been working in the ethics/compliance sphere since Dow’s ethics initiative formally began in 1998.

All this would be helpful, too, as Dow developed its compliance risk assessments,

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Before the process was developed, McCormick was aware of perhaps 150 to 200 investigations a year. Now he might be tracking 1,500 annually.

which are required now under the revised Sentencing Guidelines for Organizations. The process could have consequences in other areas, too. Section 404 of Sarbanes-Oxley, for instance, emphasizes matters like the “tone at the top” of an organization, and how important that is to ensure compliance. Does a company have “double standards,” for instance, when it comes to discipline? A system like the DGIP could offer supporting documentation that all employees are subject to a single standard.

No centralized control

The situation that prevailed before the initiative was more or less helter-skelter. Many individual departments were conducting investigations at the company—human resources (HR), finance, security, law, and others. They were investigating everything from travel and expense (T/E) fraud to Foreign Corrupt Practices Act (FCPA) infractions, to abuses of the company’s “respect and responsibility” policy. The investigators were not under the control of the ethics/compliance office. “They were doing a good job, but they were all disconnected,” McCormick recalls.

When McCormick made his regular reports about investigations to the audit committee of the Dow board, they probably assumed that he knew more than he actually did. As noted, he estimates that he was aware of about 20 percent of what was really going on, and that 20 percent was almost exclusively because of reports made to him through the corporate hotline. His goal was to raise that ‘awareness’ figure to 80 percent, or higher.

There were inconsistencies in the way infractions were being dealt with. Take travel/expense reports. If an employee was found to have defrauded the company by \$5,000 or more on a travel/expense report, that individual—assuming he or she was based in the U.S.—could expect to be fired. That individual might even be referred to law enforcement authorities.

But overseas was often a different matter. In some regions local management could investigate and find a

blatant violation, “but not share the same reaction,” McCormick explains. They might not even terminate the violator. One argument in favor of a centralized system was that it would enable management to see readily where such inconsistencies occurred and to change things—even to the extent of changing the “culture” in certain regions, if that were deemed necessary.

Selling the program

Any attempt to centralize authority in a broad organization like Dow’s has to be handled carefully, of course. Local and functional managers often guard their prerogatives closely. McCormick’s first task, therefore, was to impress upon the leaders of Dow’s various functional groups—human resources, legal, financial—as well as regional leaders, why this was a good idea.

That part wasn’t particularly difficult. Dow isn’t

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really a turf-conscious company, says McCormick. He met with many leaders, making the case why this was good for the company. He walked them through the federal Sentencing Guidelines process. He argued that consistency in investigations would lead to consistency in discipline, which would benefit the company because it would be viewed increasingly as an organization where fairness abides.

There could be practical advantages for the departments, too. What if the board asked human resources, say, to provide it with HR's investigations data from around the world—could it even do it? Probably not. "We'll take that off your hands," McCormick offered. His group, Ethics and Compliance, would run those annual investigations reports for them and provide HR with "something you don't already have."

Seeking feedback

Things were more challenging at the local level—convincing that HR person in Germany, say, who typically conducted local investigations and was used to operating fairly autonomously, that this wasn't just another piece of corporate bureaucracy. Ethics and Compliance was careful, therefore, to seek input from those regions where Dow has a high number of facilities and employees, like Germany and Hong Kong. Among the key functions McCormick needed to bring on board were local operatives in Human Resources, Fraud and Investigative Services (a part of Finance), and Environment, Health & Safety.

In convincing them, he appealed to their high-mindedness. Dow is a "values-based" company, says McCormick. Many of its facilities are located in small communities. The company takes pride in being a good neighbor. This new system would help them operate better, with more evenness and equity, he argued.

This consultative, feedback-seeking period took some time—about one to two years. It was all managed by a three-person steering team that consisted of McCormick, the head of Internal Audit, and a senior HR manager.

Still conducted locally

It should be noted that McCormick and his team were not proposing to take over investigations—to do the actual sleuthing themselves. That would have been impossible. McCormick has only six professionals in his office, and Dow has 43,000 employees. Nor did the

In a sprawling company of 43,000 employees spread across 175 countries, it is difficult at times to know just what is going on. And that applies to internal investigations.

Ethics and Compliance office have the cultural knowledge to conduct comprehensive investigations across 100-plus countries. Investigations would still be conducted using local resources. But for reporting purposes, they would make sure that the local operatives were properly trained and were following a standardized process. They would monitor investigations from their higher perch in Midland, Michigan.

They did not need or want all the details about every investigation, either. Dow, like other companies, performs a kind of triage when it comes to investigations. It uses a flow chart. There is an order and pattern to investigations. First, a compliance subject matter expert (CSME) analyzes the allegation. If the allegation is substantiated, has the behavior violated a law or company policy. If it has, then the CSME will move in a certain direction; if not, he/she moves in a different direction. Facts are gathered, findings are presented, and the "appropriate decision-makers" determine what, if any, remedial action the company should take—whether it be a reprimand, suspension, termination, or some other act.

Under the old regime, the fact finding process and the decision-making process were often in the same hands—the compliance subject matter expert's. The local manager would ask the CSME at the end of the day: What should we do? What did we do in the past in such cases? And that might seem reasonable. The CSMEs have often logged many years in their areas of expertise, and they know the company's institutional history. "But their biases come in," notes McCormick. Under the new order, remedial action was to be discussed at a more formal employee review meeting.

Avoiding bottlenecks

McCormick didn't want the Global Ethics and Compliance office to be standing over every investigation. That would simply add another bottleneck to the process. An employee can be suspended from work while

Somewhere between 100 to 200 subject matter experts might be trained in the new investigations process.

an investigation is going on, and Dow doesn't want to postpone a resolution of the case any longer than is necessary. It was decided that the Global Ethics and Compliance office would present the various regions with a "range" of outcomes for certain matters based on past experience. The regions would then reach their own decisions and resolutions without interference from headquarters.

Thus under DGIP, Global Ethics and Compliance's role was essentially that of oversight and monitoring. They were not to micro-manage the process. They might decide to audit a certain number of cases each year, but they weren't to become absorbed in the details of every individual case.

That doesn't mean the regions could not consult the Global Ethics and Compliance office before rendering decisions. Something like this is happening at present with a Dow unit in Southeast Asia. It is struggling to be consistent, because it is a case of some importance, so it has been talking with Global Ethics and Compliance as the case unfolds. This is the choice of the local unit.

McCormick realizes, too, that Dow "won't have consistency in outcomes" across all national borders. Differences among legal systems preclude that. In France, for instance, the company may not be able to fire an employee, sometimes even for a serious violation—theft, say—given the anomalies (from a U.S. standpoint) of that country's legal system.

Regional ethics and compliance committees

Dow has what it calls Regional Ethics and Compliance Committees in all of its 14 geographic regions. Members include the regional president, counsel, finance chief, and head of human resources. McCormick is currently training these regional ethics committee members in the DGIP process. He was shortly to visit Argentina and Brazil to train the principals in those regions. All regional committee members will be trained by the end of 2005. The sessions address some of the practical questions that arise vis-à-vis investigations: If an issue arises, which subject matter expert will deal with it? How does one decide upon a remedial action

after an investigation is completed? And so on.

These training sessions aren't confined to investigations. They deal with other matters, too, like communications and leadership. They consist of two half-day sessions: An afternoon session, a dinner, and a morning session the next day. About three hours of the training sessions' eight hours deal with investigations.

Were the regional ethics committee members surprised at the extent of the investigations training? Many, particularly those based far away from the U.S., were "surprised how much attention the board pays to these matters," notes McCormick. They were impressed by the number of issues that Dow looks into on an annual basis. A single region might have only three or four travel/expense fraud issues a year, but multiplied by 14 regions, that becomes a substantial number.

Dow is also training the compliance subject matter experts within the various functional groups. Somewhere between 100 to 200 subject matter experts might be trained in the new investigations process, McCormick estimates, with 20-50 individuals within human resources alone. Among the functional areas are Human Resources; Fraud and Investigative Services; Security; Legal; Environment, Health & Safety; Emergency Services & Security; Diversity; and Labor Relations.

Inputting data

During an investigation, those in the field are required to input data regularly into the Office of Global Ethics and Compliance (OGEC) database. Looking at the DGIP flow chart, for instance, one notes that at stage four ("Review/Investigation Process") the compliance subject matter expert "inputs into OGEC database." At stage five, when the subject matter expert presents his/her findings, that person "updates OGEC database." At stage seven, when the case is closed, "decision-makers ensure OGEC database is updated."

If, before the DGIP process was developed, McCormick was aware of 20 percent of investigations company-wide—150 to 200 investigations a year—now he might be tracking 1,500 a year.

Not all of these 1,500 investigations are of great moment: "My supervisor is such a bully that he recently crossed the line with regard to our respect and responsibility policy," might be one complaint that will reach Midland through the OGEC database. Previously that

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Teaching Corporate Compliance: One Law School's Seminar Approach

By Paul E. McGreal

The 1991 adoption of the federal Sentencing Guidelines for Organizations spurred many companies to establish or re-evaluate their compliance programs. As the guidelines focused on legal risks, lawyers naturally played a key role in this process. And with passage of the Sarbanes-Oxley Act of 2002, creation of new government incentives for effective compliance, and the November 2004 amendments to the Sentencing Guidelines, compliance has become a growing area of practice for lawyers. Witness the 2005 annual meeting of the Association of Corporate Counsel, the national association of in-house lawyers. The October 17-19th program will be largely devoted to compliance programs and how they can be used “for a competitive advantage.”

Nonetheless, despite its growing importance, compliance still has little presence in the law school curriculum. A school's corporate law course may cover a board's duty to oversee compliance, while its labor and employment law course might cover sexual harassment compliance programs. Courses on antitrust, international trade, and other commercial laws might mention—often in passing—that prudent organizations will take measures to ensure legal compliance. But law schools typically have no course devoted to the what, why, and how of compliance.

This past spring I taught a full semester corporate compliance course at the South Texas College of Law (‘the College’). Because the subject was new to the law school's curriculum, I developed the course coverage and assembled the readings from scratch, which forced me to reflect on why and how the course ought to be taught. This article describes what I learned from that process.

Origins of the course

Eight years ago, the College's associate dean came to me with an unusual request: Could I teach a course on business ethics at the new Executive MBA Program planned for the Mays Business School at Texas A&M University. The request posed a unique challenge. On the one hand, to meet the Mays Business School's high standards, the unit had to be academically rigorous and challenging. On the other hand, because the EMBA students would be experienced business people, the material had to be practical. While not necessarily opposed, these twin objectives required careful selection of course coverage and reading materials.

The course we created combined coverage of corporate compliance, corporate governance, business ethics, and social responsibility. After teaching the EMBA course for some four years, South Texas asked me to develop a corporate compliance course for law students. In spring of 2003, I taught the law school course as a two-hour, upper-level elective with a final exam. Based on that experience, I re-designed

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The compliance canon included the federal Sentencing Guidelines for Organizations, the Thompson Memorandum, and the Delaware Chancery Court's Caremark decision.

the course into a skills seminar that I taught last spring.

The evolution from business school to law school course was key to the course's success. Whether a new course blossoms or withers on the vine depends greatly on the school's degree of commitment. The Mays Business School was highly committed to ethics and compliance four years before Enron became an epithet, and business culture linked Senators Paul Sarbanes and Michael Oxley. This gave me a home outside the law school to develop the course's content and pedagogy. Post-Enron, when my law school was looking for ways to expand beyond its narrow focus on advocacy and litigation, corporate compliance was an attractive option. And my experience teaching in the EMBA Program helped me convince the law school to offer a course on a subject largely ignored by legal academics.

Why a law school course?

When I first sought approval for the law school course, my pitch was quite simple—compliance is a rapidly expanding practice area not currently in the curriculum. Because our graduates who go on to practice as in-house or outside counsel will confront compliance issues, we should offer a course on that important subject.

My proposal articulated four goals for what students would take away from the course. First, they should understand what corporate compliance is and why it is important to business. Second, they should understand how compliance works in the real world. Third, they should learn some of the basic skills necessary to compliance practice.

The fourth goal was to give students a different perspective on the lawyer's professional role. Virtually the entire first year of law school is taught using the "case method," which means learning the law by reading court decisions. This method paints a "horses out of the barn" picture of law practice, where the lawyer arrives on the scene too late to prevent the client's legal

problem. The message is that lawyers analyze completed transactions or conduct, simply explaining where liability lies. While some law professors suggest how an attentive lawyer can help a client avoid trouble, that message is neither reliably delivered nor received.

The compliance course hopefully puts the students into a preventive mindset. While the compliance lawyer certainly must be prepared to investigate and analyze completed conduct, her greatest value lies in helping the organization to prevent and detect misconduct. Regardless of whether my students go on to practice compliance, they will carry the message that an ounce of prevention is worth a pound of cure, expanding their view of the lawyer's role.

What type of law school course?

The next challenge was to define how the course would fit within the curriculum. Our law school has four basic types of course. First, there is the basic legal survey course, which provides an overview of an area of law, such as antitrust, contracts, or corporations. Second, there is the advanced substantive course that explores a survey subject in greater depth. For example, for students who have taken the basic corporations course, the College offers an upper-level elective on mergers and acquisitions. In both types of course, the goal is mastery of the underlying substantive law, and the student's grade is determined by a single final exam.

A third type of course is the writing seminar, which examines a subject in even greater depth than the upper-level elective. Unlike the first two types of courses, evaluation is based on a seminar paper and in-class discussion. Also, the seminar assumes a base of knowledge, devoting class discussion to critique and practical application of the material.

A fourth type of course is the skills course, where students receive real or simulated practice experience. For example, in a law school clinic, students (under the supervision of a licensed attorney) represent real clients. And in a trial advocacy course, students try a simulated lawsuit through its various stages. In each case, students learn practical skills that put their legal knowledge to the service of clients.

When I first taught the corporate compliance course at the law school, it was an upper-level elective with a final exam—the second type of course described above. The exam format proved to be a poor choice: Because the exam was the only graded work, students spent the

entire semester taking copious notes in preparation for the exam, neglecting the ungraded assignments and class discussion.

To increase the students' engagement with the material, I re-proposed the course as a mixture of all four types of law school courses. Parts of the course provide a survey of law, other parts assume mastery of a subject and examine the topic in greater depth, and still other parts teach practical compliance skills, such as interviewing and drafting. The course grade is based on a mix of class participation, performance on a series of skills exercises, and a twenty-page seminar paper. My experience last spring was that students put down their pens (or kept their fingers from their keyboards), and participated more actively.

Course structure and content

In its current form, the compliance seminar meets once a week for two hours. The College's semester is fourteen weeks long, and the seminar meets for thirteen of those weeks, with the extra week devoted to individual meetings on student papers.

The course coverage is divided into three basic parts. The first part introduces the subject of the seminar, with the students learning what corporate compliance is, why organizations would want a compliance program, and how lawyers contribute to that effort.

The second part, which occupies only a single class meeting, is a necessary digression from compliance. A major challenge in designing the course was to address the reality that compliance covers a wide array of legal risks—from antitrust to environmental law to workplace safety regulations to sexual harassment—that no student would be familiar with. How could students understand and critique various compliance materials if they did not know the underlying law with which the materials were trying to achieve compliance?

Focusing on the FCPA

My answer was to select a single law to serve as the compliance focus for the course: the Foreign Corrupt Practices Act (FCPA). For the uninitiated, the FCPA is a federal law that prohibits businesses and business people from bribing foreign government officials to get or keep business. So, whether we are talking about risk assessment, codes of conduct, employee policies, or compliance training, the FCPA is our common reference point.

Because compliance is costly and an organization's resources are scarce, compliance professionals must constantly make the case for devoting resources to their function.

I chose the FCPA for several reasons. First, it is a relatively short statute, which allows me to teach students the relevant law in a single two-hour class session. Second, no other course in the curriculum covers the FCPA (beyond a passing mention). And third, because the FCPA is a significant legal risk, I had a wealth of compliance materials from which to draw course readings.

The third part of the course, which took about three quarters of the semester, covered the various tasks involved in designing, implementing, and operating an ethics and compliance program. I devoted one two-hour class session to each of these tasks; the course coverage is listed below.

Reading materials

I included three types of readings in the course materials. First, I decided to construct what I call the "compliance canon": the sources—both legal and otherwise—that set forth the basic compliance standards known to most compliance professionals. Among other sources, the canon included the federal Sentencing Guidelines for Organizations, the Thompson Memorandum (which sets out the factors to be considered by prosecutors in determining whether to indict a corporation), and the Delaware Chancery Court's *Caremark* decision (which held that corporate directors who fail to take adequate compliance measures can face liability for breach of the fiduciary duty of care).

The idea behind the compliance canon was to make the students conversant with the major compliance sources, preparing them to play a meaningful, constructive role in an organization's compliance program.

Second, I assigned readings on compliance practice. These materials included practitioner articles and government guidance documents that explained the nuts and bolts of designing, implementing, and operating the various elements of an ethics and compliance program.

One seminar paper topic: Compare how firms in different industries address the same risk (e.g., compare money-laundering compliance at a bank and an insurance company).

Last, I assigned real world compliance materials that illustrated how the compliance standards we read are put into practice. For example, the readings included copies of a risk assessment check list, codes of conduct, and employee policies.

The best compilation of these sources I could find was a two-volume set from the Practising Law Institute's annual Corporate Compliance Institute. The books contain most of the relevant compliance standards as well as a good selection of practitioner pieces and sample compliance materials. Handouts supplemented the gaps in coverage.

Course coverage

Listed below are the topics covered during each week of the semester, with a brief explanation of what issues were covered.

Week 1 — Introduction: What is compliance?

To begin, I explained the format and ground rules for the course, including the grading system. Next, I introduced what is meant by a compliance program. We then discussed examples of recent compliance failures to illustrate the role of compliance and the consequences if and when it is lacking.

Week 2 — Review of vicarious liability

Because a major role of compliance is to eliminate or mitigate an organization's liability for the actions of its employees and agents, I refreshed the students' understanding of the law of vicarious liability.

Week 3 — Why have an ethics and compliance program?

This is where the course offered its first real world lesson. The students should *never* assume either (1) that an organization will want to have an ethics and compliance program or (2) even if the organization wants a program, that the necessary resources will be willingly allocated. Because compliance is costly and an organization's resources are scarce, compliance professionals must constantly make the case for devoting resources to their function. In this unit, we covered the

main reasons why an organization might want to have an ethics and compliance program.

Week 4 — Introduction to the FCPA

As explained above, I used the FCPA as the legal risk we would examine throughout the semester. This week was devoted entirely to understanding the statute and its various applications.

Week 5 — Risk assessments

I stressed two important practical lessons here: (1) the risk assessment sets the agenda for every compliance task that follows, and (2) the risk assessment must be updated periodically. To fully understand these lessons, the students had to gain a thorough, working understanding of what a risk assessment is and how it is conducted. To do so, I assigned a practice exercise that asked the students to perform a mini-risk assessment concerning the FCPA risks posed by the College's study abroad programs. The students reviewed relevant documents and interviewed the associate dean responsible for the College's study abroad programs.

Week 6 — Role of the Board

The basic content in this unit was the board's *Caremark* duty and the oversight role articulated by the Sentencing Guidelines. We also discussed the Sentencing Guidelines' new requirement that an organization train its board in compliance.

Week 7 — Structuring the compliance function

This unit covered the question of how an organization ought to staff the day-to-day operation of its ethics and compliance program. Should there be a single chief compliance officer, a compliance committee, or both? Who should serve as the compliance officer, and to whom should the compliance officer make direct and indirect reports? What does it mean for compliance personnel to have adequate experience, knowledge, independence, and resources to effectively perform their jobs?

Week 8 — Code of conduct

The two main topics here were first, what functions should the code of conduct perform, and second, how an organization drafts its code to perform those functions best. Continuing our FCPA thread, we discussed how an organization would decide whether to mention the FCPA in its code, and if it does so, what the organization should say about that risk.

Week 9 — Drafting compliance policies

This unit covered the drafting of organization poli-

cies, and then reviewed and critiqued two sample FCPA policies.

Week 10 — Training

Three main questions are covered during this week. First, what are the goals of training? Second, what are some of the practical challenges posed by effective training (e.g., consistency, timeliness)? Third, what options are available to train effectively (e.g., live training, videos, computer-based)? In addition to reading articles about training, we reviewed and critiqued sample FCPA training materials.

Week 11 — Monitoring, auditing, and evaluating the compliance program

This unit was divided between law and practice. On the law side, we covered various legal issues raised by these compliance tasks, including legal restrictions on information gathering and the ability to protect work product from disclosure. On the practice side, we discussed what steps an organization should take to effectively monitor, audit, and evaluate its ethics and compliance program.

Week 12 — Enforcement and discipline

This topic was also divided between legal and practical discussions. Without proper legal supervision, enforcement and discipline can lead to liability for wrongful termination, employment discrimination, or other legal wrongs. And without proper practical skills, enforcement and discipline may not discover the underlying facts or may cause a crisis in employee morale.

Week 13 — Corporate culture

This topic was scheduled last because it tied together the entire course. Beginning with our first class meeting, I emphasized that an ethics and compliance program should foster a corporate culture where legal compliance is assumed and employees aspire to higher organizational values. This last week reviewed how every topic we covered helps build and reinforce such a culture.

Additional topics

Throughout the course, I raised several important topics that do not have their own week. For example, instead of devoting a single week to privilege and work product issues, I covered those topics when applicable throughout the semester. When conducting a risk assessment, what should compliance personnel do (if anything) to try to preserve the privilege? How does the attorney work product privilege apply to internal inves-

Of all the courses I have taught in law school, the compliance seminar had the greatest yield of ‘get it’ moments. Students were constantly making links between the course material and what they read in the news.

tigations?

Skills exercises

Throughout the semester, I assigned six practical exercises that introduced some of the skills involved in compliance practice. As this was the first time I included such exercises in the course, I started with a few, modest projects, the goal being a written project due every other week. Five of the exercises were individual assignments, with one being a group assignment. In future semesters, I plan to increase the number of assignments, evening out the work load by making more of them group projects. I also plan to invite practicing compliance professionals to participate in and help evaluate the practical exercises. The following is a list of the practical exercises assigned last spring:

1. *Risk assessment interview*: The students interviewed an associate dean to assess the risk posed by the College’s study abroad programs.
2. *Board resolution drafting exercise*: The students drafted a board resolution that established the organization’s compliance program and tasked management to begin the process of designing and implementing the program.
3. *Code of conduct critique*: The students located the code of conduct for a Fortune 100 company and critiqued one aspect of the code (e.g., how well did the code identify channels for asking questions and reporting concerns?).
4. *Code of conduct drafting exercise*: The students drafted a code of conduct provision that addressed the FCPA.
5. *FCPA policy drafting exercise*: The students drafted an FCPA policy provision that addressed when employees were allowed to make facilitating (or “grease”) payments.

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Assessing Corporate Culture: Part II

By Ed Petry

The relevance of culture to the success of an organization's compliance and ethics efforts is reasonably self-evident, and, as we pointed out in Part One (see *Ethikos*, March/April 2005), it is increasingly reflected in legal standards, including the revised federal Sentencing Guidelines for Organizations. In that earlier segment we presented several specific steps that compliance and ethics officers can take to begin the process of identifying their organizations' culture, including:

- Conduct surveys, focus groups and interviews of employees and third parties to determine what people really think about the organization, what motivates them, what is rewarded and punished, and what are the 'unspoken rules' and corporate stories that they believe best illustrate acceptable and unacceptable behavior;
- Distinguish and describe the important subcultures within the organization;
- Identify what is really being heard by employees—which may be quite different from the message you and senior management are intending to convey.

Following these and others suggestions discussed in Part One, you can begin to identify trends and employee perceptions that, rightly or wrongly, help shape your organization's culture. Through surveys, focus groups and interviews, a picture of your existing corporate culture and subcultures will begin to emerge. This is a good first step and one that ought to be regularly repeated.

Exit interviews and employee surveys

Two additional, low-cost means of on-going cultural review are exit interviews (see *Ethikos*, "Exit Interviews: The Final Compliance Check," May/June 2005) and inserting ethics and culture questions into existing employee surveys. If nothing else, these two steps, along with the insights gleaned from your day-to-day discussions with managers and employees, should serve as the "canary in the mine shaft"—an alarm system to alert you if trouble is developing.

Ideally you should be continuously monitoring changes in corporate culture and periodically conducting a thorough review but, at the very least, a thorough culture review should be conducted following significant organizational changes, including new leadership, mergers and acquisitions, and major reorganizations.

Perhaps the most common method used to assess elements of corporate culture is the 'hard data' review that relies on readily available, easy-to-benchmark findings. Though commonplace and useful to a point, this approach tells only part of the story.

The limits of the hard data approach

An important question for any compliance and ethics officer to ask regularly is whether or not his or her organization has a culture where employees are able to report wrongdoing without fear of retribution.

One way to answer this question is to compile and benchmark helpline call

A thorough culture review should be conducted following significant organizational changes, including new leadership, mergers and acquisitions, and major reorganizations.

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volume and contact types (e.g., allegations vs. requests for guidance, or “top ten” contact issues). If the compiled hard data compares favorably with peer companies, or if the year-to-year trends seem positive, it is often concluded that, in this respect, at least, the corporate culture is sufficient to support compliance and ethics. The culture box is checked. But is that the whole story?

It is well known that numerous factors have an impact on call volume and contact type including whether or not there has been recent training or other ethics communications; the maturity of the compliance and ethics initiative; if there are corporate-wide labor or personnel problems; press coverage of scandals in your industry; and performance review cycles.

Have these and similar factors been considered before drawing conclusions from your data? Were these factors considered when compiling the data against which you are benchmarking? Do you know all of the factors and employee perceptions that might have an impact on your call data and that should also be taken into consideration?

Setting a context for assessment

Call data on its own is unlikely to provide sufficient context for analysis. In addition to the numbers, you need to know how the type of issues being raised track against your organization’s risk profile.

For example, if you are a retailer you should expect to see a high percentage of contacts regarding employee theft. Financial service companies should see more calls regarding conflicts of interest. Mature programs should see more questions than allegations, and as your program gains acceptance, the number of anonymous calls should also be trending downwards.

As the Sentencing Guidelines emphasize, an assessment of your internal reporting system—indeed assessments of any element of your compliance and ethics program—must be informed through company-specific, ongoing risk assessment. Before you assess any program element, including your helpline, you must have a clear sense of your company’s risk areas.

One of the ironies of the more narrow ‘hard data’ approach to culture assessment is that it risks reducing culture to yet another ‘check the box’ element for compliance and ethics programs. This is 180 degrees away from the direction that was intended by the revisions to the Guidelines. The culture requirement

Every compliance and ethics officer should ask regularly: Does the organization have a culture where employees are able to report wrongdoing without fear of retribution?

was added to the Guidelines to encourage organizations to look beyond the seven compliance and ethics program elements, and to recognize the importance of integrated, corporation-wide commitments to ensure effective compliance.

For example, the revisions spell out responsibility of all leadership in the area of ethics and compliance, not just those with designated compliance and ethics responsibilities. As should be obvious, while there may be common themes and best practices from company to company, an integrated, corporate-wide commitment by your leadership team in support of a positive corporate culture must take into consideration critical elements that are unique to your organization: Your CEO’s vision, your corporate history and legacy, the personalities and styles of your senior leadership team, your organizational structure, how your employees best communicate, where the power lies within your company, your business model, incentive plans, geographic locations, industry, regulatory history, and on and on.

Beyond a standardized approach

The Sentencing Guidelines’ revisions also aimed at moving organizations beyond the increasingly popular standardized approach to ethics. While there may be some value in creating uniform, standard, ‘best practice’ models, the revisions emphasized the importance of company-specific, on-going risk assessment that requires continuous fine-tuning of all program elements to meet the actual, evolving risks faced by your company.

In setting the context for assessing your organization’s culture, there is no shortcut around company-specific risk assessment. Describing your company’s culture is the first step. Conducting a company-specific risk assessment to determine how your culture aligns with your risks is the second. Only then will you be in a position to determine if your culture enhances ethics and compliance and helps minimize

Mature programs should see more questions than allegations from their helpline call data.

risks or, on the contrary, is a risk factor itself.

Conducting a risk assessment is a necessary step in providing a context for culture assessment but, as significant as it is, it is not sufficient. As we emphasized in Part One, your culture should be a strategic corporate asset and, consequently, your compliance and ethics efforts should also be aligned with your strategic goals.

For example, if your organization is committed to growth and if your CEO has regularly emphasized innovation, capitalizing on opportunities, and making the most of synergies across the company, then your culture should be one that sustains innovation, the open sharing of ideas, opportunism, and optimism.

Returning to our analysis of call data, in this example you need to ask: What does your call data tell you about open communication within your company? If you receive a significant percentage of calls from employees complaining about managers that they believe are closed-minded, contrary to what you might at first think, such calls are in fact very good news. The fact that employees are calling with such concerns indicates buy-in by them in regard to the CEO's vision, and it demonstrates their active support for the company's strategic goals. It also provides valuable input toward an action plan to position compliance and ethics as a key strategic asset to further the goal of open communication and innovation. On the other hand, if such calls are few, or if your contact categories don't even capture such calls, then your data is largely useless and irrelevant from a strategic point of view.

Corporate Culture 'Deep Dive'

At the close of Part One we suggested one approach to assessing corporate culture: A 'deep dive' into your culture utilizing a series of questions and assessment tools that track the elements of the revised Sentencing Guidelines. While such an assessment can be done internally, it may be wise to select a third party that has experience conducting such assessments for other companies. In this way, you will not only gain valuable insights into your own organization, but the experienced third party will also be able to provide analysis

and benchmarking that will measure your culture against other comparable companies.

The Ethical Leadership Group, for example, includes the following as part of a series of questions in its 'deep dives' into corporate culture. The questions roughly track the elements of the revised Sentencing Guidelines:

- Is there consistency and clarity within your organization regarding the limits of acceptable behavior?
- Do employees feel they have sufficient guidance on ethical behavior? Are standards and policies not only thorough and clearly written, but are they also regularly discussed? If such discussions do occur, are they perceived to be a priority and are they positively received, or do employees view them as a necessity intended only to 'cover' the company in the event of trouble? Do employees talk among themselves about the limits of acceptable behavior? Is there a sense of "how things ought to be done here," or are employees uncertain about where the lines are drawn? Do employees often talk about "the way it used to be" but no longer is? Does this indicate that the company's stated values are no longer enforced? If yes, what has replaced them?
- Does the Board and management act in accordance with their responsibilities to build and sustain a commitment to ethics and compliance?
- Do employees hear their supervisors and managers discuss ethics and compliance issues? Are they credible? Are they proficient? Do the leaders feel it is part of their responsibilities as leaders to "talk about ethics" or do they see that as your job? Do managers at all levels set a good example of living up to the company's stated values and norms? Does leadership recognize the breadth of issues that employees think of as ethics issues (including fairness, respect, equity, and executive compensation) or are they out of sync with employees' view and persist in believing that 'ethics' is limited to a narrow range of issues including conflicts of interest and gifts and gratuities, and not much else?
- Are compliance, ethics or even legal requirements—or the people responsible for them at the company—marginalized?
- Do senior managers support compliance and ethics efforts, or do they believe these are an unfortunate necessity? Are jokes or disparaging comments

made about compliance and ethics? Is your ethics office provided with sufficient resources and clout? Are you a member of all committees and leadership groups that leaders and employees recognize as the seats of power and authority throughout the organization? Do you have all the access that is required?

- Do performance goals and incentives encourage and put unreasonable pressure on employees to act contrary to ethics and compliance standards?

- Do employees perceive the level of pressure to meet goals to be unreasonable? Do they often complain that performance reviews, downsizing or reorganization efforts are unfair or handled poorly? What is their perception of Human Resources? Do they believe they receive sufficient support? Do employees feel respected and valued or do they believe management thinks of them as commodities, not people? How is employee morale? Is it uniform throughout the organization or are there locations where it is low? If low, what is causing flagging morale? What is being done to address these risk areas? Are there indications that pressure may be pushing employees to bend rules? Do all employees seem to know stories of colleagues who have crossed the line because of pressure?

- Do employees feel they can ask questions or raise concerns?

- Are employees using internal reporting systems in numbers comparable to peer organizations? Are employees familiar with how the reporting system works? Is there trust in the system, or are they suspicious? When asked, do they demonstrate an understanding of how the system works and what happens when one calls? Do they understand and accept the necessary limits on confidentiality? Do they fear retaliation from supervisors? From peers? Do they have stories to tell about what has happened to friends who have called in? Are the stories positive? Negative? True or untrue? If you use a vendor to handle your helpline, do you regularly test the call-in, feedback and documentation services? Have you tried calling your switchboard and asking for the ethics officer? How was your call routed?

- Is bad conduct tolerated—especially at the senior level?

- Do employees believe that top performers who violate the company's code of conduct will neverthe-

If using a helpline vendor, do you regularly test the call-in, feedback and documentation services? Have you tried calling your switchboard and asking for the ethics officer?

less be “promoted or tolerated.” Are employees right? What methods—if any—are used to inform employees of disciplinary actions that have been taken?

Many compliance and ethics officers mistakenly assume that it is impossible to objectively measure these or similar cultural indicators. In fact, this has become a perennial comment heard at best practice conferences: “ethics can’t be measured” and “culture is too vague a concept to be meaningful.” Repeating these claims does not make them true, but the prevalence of this mistaken view does convince some who wrongly conclude that such an assessment would be impractical and purely subjective. Many are simply unaware that such assessments have been done for years, and that extensive databases of comparable, benchmarked results are available.

In sum, there are five key steps in assessing your corporate culture:

- First, begin by carefully uncovering and describing your culture and various subcultures.

- Second, once you have described your existing culture, you are in a position to turn to assessment. Avoid the temptation to rely exclusively on broad, ‘hard data’ benchmarks that, though helpful to a point, are limited in their usefulness.

- Third, integrate your culture assessment with your ongoing risk assessment. Aim at ensuring that your culture supports your compliance and ethics efforts and that those efforts are designed to meet your company’s actual risks.

- Fourth, assess your culture and your compliance and ethics initiatives in terms of your company’s strategic goals. This will ensure relevance for your work, improve buy-in, and clearly position culture, compliance and ethics as a vital business asset.

- Fifth, periodically conduct a ‘deep dive’ into your organization’s culture and take full advantage of the available benchmarked information. □

The Touchy Issue Of Intra-Office Romance

By Emily Layzer Sherwood

In March 2005, Chicago-based airplane manufacturer Boeing stunned the corporate world by firing CEO Harry Stonecipher 15 months after recalling him from retirement. Stonecipher, who was hired to clean up Boeing's ethical behavior in the wake of defense contracting scandals, was fired, ironically, because of a breach of his own ethics. The 68-year-old Stonecipher had been carrying on a long distance, extramarital affair with Boeing's Washington-based lobbyist, Debra Peabody, an indiscretion revealed when a whistleblower forwarded an explicit e-mail correspondence to Boeing Chairman Lewis Platt. According to Platt, it was not the affair itself that provoked the pink slip, but rather "'issues of poor judgment' that impaired Stonecipher's ability to lead the company."¹ Stonecipher had essentially violated the very code of conduct he'd signed on to protect, a code that explicitly asserts that "employees will not engage in conduct or activity that may raise questions as to the company's honesty, impartiality, reputation, or otherwise cause embarrassment to the company."²

Like office e-mails, the workplace romance is one freedom that faces increased scrutiny and regulation.

Boards 'are not going to be as tolerant'

Pundits, lawyers, and the business ethicists have been quick to weigh in on the significance of the Boeing action. According to Gregory M. Davis, a partner representing labor and employment law matters at the Chicago-based law firm of Seyfarth Shaw, LLP, "The recent corporate climate is such that boards of directors are not going to be as tolerant." Sarbanes-Oxley regulations are holding CEOs to ever higher standards of behavior. Yet, some fear that Orwell's Big Brother has arrived at the workplace, and that mature, consenting adults should be given some rope in deciding whether to trust or not to trust.

Most would agree, however, that companies should have a clearly articulated dating policy, whether written or unwritten, to set standards for employees' behavior in an increasingly moralistic and litigious business climate.

'As old as Genesis'

To be sure, dating one's colleague is not a new phenomenon. "It's as old as Genesis," asserts Joan Dubinsky, ethics officer for the Washington, DC-based International Monetary Fund. "People will continue to fall in love and in lust in the workplace." According to a Society for Human Resource Management (SHRM) white paper, "office romances are nothing new, but the frequency is. In our 24/7 work world where people spend more time at work than they do anyplace else, it's no surprise to find that intra-office romance is on the rise."³

Statistics bear this out. Career publisher Vault, Inc. found in its 2005 *Office Romance Survey* that some 58 percent of employees sampled from a variety of U.S.

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industries say they have been involved in an office romance, up from 46 percent in 2003. Twenty-two percent of Vault's respondents stated that their office romances ended up in marriage or significant long-term relationships. Similarly, the American Management Association's (AMA) 2003 *Survey on Workplace Dating* revealed that 30 percent of managers and executives have dated someone from work; 44 percent of them reported that their dating resulted in marriage.

Most have no written policies

Few companies want to ban love unconditionally, and most choose to set limits that are not cast in the stone of compliance codes or personnel policies. AMA's 2003 survey found that 84 percent of American businesses have no written policies on employee dating. Of those 16 percent of firms *with* written policies, 92 percent prohibit employees from dating subordinates.

Dallas-based Southwest Airlines is an example of such a company. Southwest is proud of its huggy corporate culture; 1,000 married couples, many of whom met on the job, work at the self-proclaimed "LUV Airline." Yet despite the fact that "nepotism is encouraged" at Southwest, "we don't allow you to supervise, either directly or indirectly, someone you're involved with," according to Southwest spokesperson Ed Stewart. "We use the common sense approach," says Stewart, noting that "there is no written policy [on intra-office dating] per se."

Magazine and book publisher Time, Inc. agrees with the non-written approach toward dating policies. "Otherwise, you have a cookie cutter model that doesn't serve people well," says Marcie Jacob, Vice-President of Employment Law in Time's Human Resources (HR) Department. And like Southwest, Time prohibits superior/subordinate dating because it can "put a cloud over salary increases, performance reviews, and promotions." Co-workers might assume that the subordinate is promoted because of his or her amorous connection with the superior. In addition, such top-down intra-office dating can be a "morale destroyer," affecting work climate and ultimately productivity, and it could pose the threat of lawsuits from disgruntled co-workers, says Jacob.

Time's Human Resources Department also investigates non-superior/subordinate relationships "that can negatively permeate or poison the work environment." Jacob notes that, "in a lot of ways, these relationships

AMA's 2003 survey found that 84 percent of American businesses have no written policies on employee dating. Among firms with written policies, 92 percent prohibit employees from dating subordinates.

are more problematic than a clear-cut subordinate relationship." No one wants to see two of their colleagues canoodling at an offsite work function, for example, or being overly flirtatious at the office. This can be a bigger problem if one or both of the parties is married. If rumors are circulating about one or both of the parties, that could form the basis for a sexual harassment lawsuit when the relationship ends (it usually does). Post-relationship obsessiveness or despondency is another potential pitfall.

Four problematic relationships

IMF's Dubinsky outlines four workplace relationships that she believes ought to be either cautioned against or prohibited: (1) superior/subordinate relationships; (2) relationships where one individual has some form of oversight over the other's job, be it in the area of finance, promotion, or performance review; (3) relationships between subordinate/superior and subordinate/superior's boss, with "second generation supervisory relationships just as problematic as first-hand ones"; and (4) relationships where one individual can have influence over another's career progression, such as the ability to pick a co-worker to serve on a team or committee. Dubinsky firmly believes that such dating policies should be written, preferably in a company's personnel policies, which tend to be more normative than the code of conduct.

David Gebler, President of Massachusetts-based Working Values Ltd., an ethics consulting firm, says that dating policies should be clearly written in a company's code of conduct—specifically, within the "conflicts of interest" section. "I'm a big believer in treating the code of conduct like a constitution," says Gebler. "And it should be broad enough to cover the full spectrum of types of behavior that come up in an organization." He adds that "HR policies should be consistent with the code."

'It's the obligation of the more senior person to disclose [an inappropriate dating relationship] and seek administrative remedy,' says Dubinsky.

Most ethics and human resources officers agree that the key to an effective dating policy, however, is not whether or where it is written in a company's policy manual, but rather, how well the human resources and/or compliance personnel go about investigating ethical breaches and effecting a remedy. Time's Marcie Jacob believes that it is the job of HR personnel to approach each case with an open mind and "an appreciation for nuances." Investigative questions should include:

- Is the relationship in the reporting line?
- How long has it been going on?
- Has there been any attempt at deception?

If the relationship is in the reporting line, then Time allows one of the parties to transfer to another unit if that's feasible. There is no presumption that the more junior of the two will do the moving. However, "status quo is not an option," adds Jacob.

Like Jacob, Dubinsky believes that the initial investigation should be within the purview of the HR Department, but she adds a slightly different twist to the dynamics. "It's the obligation of the more senior person to disclose [an inappropriate dating relationship] and seek administrative remedy," she says. Once the relationship is disclosed, the two parties are given six months to seek a remedy, which usually involves the lateral transfer of one of the parties to a non-reporting chain of command within the firm. "They work it out themselves. We're grown-ups. HR is not *in loco parentis* on this....But if they can't, HR will do it for them."

According to Dubinsky, if upon investigation, the senior executive has not disclosed the existence of an ongoing intimate relationship, "then you're veering into misconduct and an ethical breach," and the ethics officer is likely to get involved. That situation, reminiscent of the Boeing scenario, raises "questions about the managerial and moral judgment of the executive, about his or her fitness to hold some form of managerial responsibility," she adds.

But ethics are not the only reason companies are

taking a hard line on these situations. Non-disclosure of an intra-office affair can create an additional risk for a company in the form of costly litigation should the relationship ultimately sour. Particularly in the case of a supervisor/subordinate romance that's gone bad, one of the parties could instigate sexual harassment litigation, claiming that he or she was pressured into the relationship or variations on that theme.

Some companies are resorting to "consensual relationship agreements," more commonly known as "love contracts," to protect themselves against expensive sexual harassment suits. The San Francisco-based law firm of Littler Mendelson, one of the nation's largest labor and employment firms, pioneered love contracts ten years ago in response to such corporate concerns. Partner Stephen Tedesco claims that his firm has written "hundreds" of such contracts in the past decade.

Tedesco explains the three parts to a typical love contract, which is signed by both parties: (1) everything that's gone on before the contractual signing was consensual and welcome (*ergo*, not sexual harassment); (2) both parties understand the company's sexual harassment policies and agree to abide by them and behave professionally; and (3) if, in the future, the nature of the relationship changes and becomes unwelcome or harassing, then the complainant has the right and responsibility to report it to the firm.

In most cases, a company is considered to have an affirmative defense in a sexual harassment suit as long as it maintains a sexual harassment policy on the books, offers an open door policy for the complainant, offers employees prompt and effective remedial action, and trains employees in all rules.

In sum, carefully articulated policies and procedures are advisable to avoid ethical violations, conflict-of-interest situations, lowered employee morale, potential productivity lapses, and costly or embarrassing sexual harassment suits. As David Gebler points out, in the post-9/11, post-Enron workplace, Americans are more willing to give up privacies once deemed inviolate. Like office e-mails, the workplace romance is one such freedom that faces increased scrutiny and regulation. □

Footnotes:

¹ Associated Press, March 7, 2005.

² *Economist.com*, March 10, 2005.

³ Society for Human Resource Management White Paper, "Office Romance: HR's Role," by Andrea C. Poe. □

Caremark and Tenet's Prescription: 'Live' Ethics Training

By Andrew W. Singer

While computer-based ethics and compliance training would appear to have much to recommend it—it is relatively inexpensive, easy to track, and allows for flexibility (employees can be trained on their own time)—some companies remain committed to “live” employee training. Two of these made the case for traditional classroom training at the Conference Board’s 2005 Business Ethics Conference, held May 25, 2005 in New York City. The session was titled, “Best Practices in All Employee Training.”

Tenet Healthcare Corporation (Dallas), which introduced ethics training for employees in 1994, has always used the ‘live’ approach. Employees prefer it, maintains Sandra Lawrence, Director, Operations and Training, Ethics and Business Conduct Department. The company tried computer-based training for a non-hospital-based group several years ago. “It was not real successful.” The issues tended to be cast more in black and white and there was less room for nuance, she suggests.

Increasing visibility

Among the advantages of live training is that it increases the visibility of compliance staff, notes Dan Untch, Vice President, Compliance Operations, Caremark Rx Inc. (Nashville, TN). At almost every session where he appears, someone comes up before or after the class and raises an issue with him. Sometimes compliance terms aren’t clearly understood. An employee may not have fully comprehended the term ‘retaliation,’ for instance. These can be clarified during or after the sessions.

The workforce at Caremark, a healthcare company that provides pharmaceutical services, recently increased from 5,000 to 12,000 as a result of a merger. The company is committed to annual ‘live’ compliance training for all 12,000 employees, says Untch, a “huge commitment.” Caremark uses ‘real world’ case studies in its sessions, and also employs wireless keypads. Among other things, the keypads allow Caremark’s trainers to do some immediate polling, e.g., “Have you read the code of conduct?”

Tenet Healthcare owns and operates 74 acute care hospitals and related health care services. It has 83,000 employees across 13 states. The company’s ‘all-employee’ training sessions are attended mostly by hospital employees, 60 percent of whom are nurses. Other participants are employees in maintenance and administration, as well as technicians. Non-hospital employees—who work in business offices and regional and corporate offices—account for only 10 percent of the total.

In the program’s early days, Tenet made use of overheads and case scenarios. Later video scenarios were introduced. Power Point presentations were subsequently melded with the video scenarios. The most recent innovation has been wireless keypads, sometimes referred to as the Audience Response System (ARS).

Tenet Healthcare conducts 2,000 ethics training classes annually. Its ethics facilitators visit every Tenet hospital three times a year.

Caremark has asked itself: 'How do you develop a culture of ethics?' It has concluded that part of the answer, at least, is live ethics training.

Ethics training at Tenet takes place initially during employee orientation—in the course of a worker's first 30 days at the company. It is typically delivered in the hospital by a human resources officer. This is followed by "initial" ethics training during the first 120 days of an employee's tenure. These two-hour sessions are conducted by an ethics facilitator.

All Tenet employees also take "annual update" training, 75-minute sessions conducted by ethics facilitators. Sessions are two hours for managers.

Tenet Healthcare conducts 2,000 ethics training classes annually. Ethics facilitators visit every Tenet hospital three times a year. They expect roughly one-third of the facility's population to be trained with each visit.

Tenet has assigned ethics training contacts to each hospital, usually someone in human resources. That contact person secures the training room, solicits attendees, and tracks attendance, among other things.

Full-time ethics trainers

In the past, the company used managers in the facilities themselves to conduct the training. It was important that the program be seen as "hospital owned." Today, training is done by ethics facilitators—three full-time, and two who work on a "per-diem" basis.

Why the change? The facilitators can stage a more skilled program. Many have developed good relationships with the hospital. Moreover, it's okay now to be seen as a "corporate program," says Lawrence. With the ARS technology, this is a more viable approach. It would be costly to outfit each hospital with a system.

Management support of the program is critical. The company expects each class to be introduced by senior local management—the hospital's CEO, CFO, COO, or head of nursing. The training video opens and closes with remarks from Tenet Healthcare's CEO. The company's Chief Ethics and Compliance Officer is also featured on the video.

Ethics training session schedules are posted on the company's website. Class size can't exceed 60 because

of the availability of wireless keypads. Tenet expects 95 percent attendance by the end of the year. Facilities are updated during the year on where they stand attendance-wise.

Training scripts are developed by a task force of individuals from several disciplines, including ethics and human resources. Topics are generated from issues raised on the company's Ethics Action Line which gets some 700 calls a month—healthcare companies tend to log more calls than other companies—and also from Tenet's employee surveys. The videos are filmed in Tenet hospitals, often in Dallas. Professional actors are hired for the speaking parts. Slides are developed to prompt discussion.

One video might present a scenario where a vendor is trying to procure information about doctors from the hospital's nurses' station. He offers two theater tickets to a recently hired nurse, Maria, if she will supply him with the doctors' names.

"What should Maria do?" asks the slide:

- 1: Nothing, it's none of her business.
2. Take the vendor up on his offer.
3. Tell the vendor he shouldn't ask for the information.
4. Tell the vendor not to ask for the information and tell her supervisor about the incident.

The class punches in answers on the wireless keypads. Their responses are immediately displayed on the screen. Different responses are discussed, and it is explained why '4' is the correct answer.

The keypads are also used to review company policy. On the screen appears:

"Which of the following is acceptable to receive?"

1. A television worth \$150 provided by a pharmaceutical company.
2. A \$50 gift certificate from a patient.
3. Pens and notepads with a vendor's company logo for the staff on his 'favorite unit.'
4. An offer by the vendor to pay for the head nurse to travel to a seminar to learn about a new piece of equipment.

One talking point with this particular scenario ('3' is the correct answer): While gifts of some nominal value (like pens and notepads) can be accepted from vendors, *no gifts at all* may be accepted from patients.

Sometimes a facilitator will divide the training class into two groups, and they will compete, keeping score via the ARS system. This can make for a livelier session.

Trainees are invited to make comments after the sessions. "We get a lot of issues off the comment

sheets,” says Lawrence. A raffle is held, too, at the end of each session. Among 60 attendees, six might win a prize, something like a portable radio emblazoned with the Tenet logo.

Tenet has separate training programs for senior hospital management, as well as corporate managers and directors. The most senior Tenet managers undergo separate ethics training. Hospital physicians, usually not Tenet employees, mostly do not take ethics training.

Program established in 1993

Caremark’s compliance program, established in 1993—it is one of the oldest in the healthcare industry—was designed to conform to the standards established by the U.S. Sentencing Commission, says Untch, who has been with the company for six years and in the healthcare industry for 20 years. Live ‘integrity’ training, used from the beginning, is viewed as cornerstone of the program.

In the early days training was “one size fits all,” using the trainers at each facility, such as learning development people, recalls Untch. Later the company employed compliance staff to deliver the training. They developed specific content based on the audience. Today, Caremark has six or seven training modules—one for salespeople, another for operations people, another for trade relations people, and so on.

The number of employees per location varies, from three in a Hawaii location—to more than 2,000 in Caremark’s largest centers. Most employees are in operations or production environments, like call centers. The company also has employees who work out of their homes; they may train via CD-ROM, “the method of last resort,” according to Untch.

A recent training video featured two Caremark

employees who had worked previously at Arthur Andersen, the scandal-plagued accounting firm that was charged with obstruction of justice in connection with the Enron affair. The government indictment effectively drove the firm out of business.

“I was proud of working for Arthur Andersen,” says one of the former Arthur Andersen/current Caremark employees, who expresses her “utter disbelief that it could happen to us.” Elsewhere, “No one felt Arthur Andersen could actually fail...” Overall, the employees talk about their “disappointment and loss” in connection with the Arthur Andersen experience. It is an object lesson for all employees who may be hesitant to do the right thing.

Certifying attendance

Caremark’s participants are required to sign a form certifying attendance at the training session. A status report is provided to the CEO. Last year, all but 12 of the company’s 12,000 employees were trained. The CEO “wanted the names of those twelve people,” says Untch.

Caremark has separate training for managers at the vice president level and above. They gather in a room once a year for four to six hours. The CEO requires everyone to attend, notes Untch.

He refers to a recent Ethics Officer Association report which found that 35 percent of employees say they have encountered an unethical circumstance, while 78 percent felt they were unprepared to handle the situation. That clearly points to the need for more training, in his view.

Caremark, notes Untch, has asked itself: “How do you develop a culture of ethics?” The company has concluded that part of the answer, at least, is live ethics training. □

Teaching Compliance . . . Continued from page 9

6. *Training exercise:* The students drafted a five-question FCPA quiz that would be used in training employees about the FCPA.

Seminar paper

The seminar paper must be at least twenty pages, double-spaced. Students must hand in various stages of the paper (i.e., preliminary outline, detailed outline, first draft, and final draft) as graded work product. The papers are to examine in detail some aspect of a real

organization’s compliance program. Students could take one of several approaches:

- Review one aspect (e.g., code of conduct, training, etc.) of an organization’s compliance program.
- Review how an organization handles a specific legal risk (e.g., antitrust, FCPA).
- Compare how several firms in the same industry perform the same compliance task (e.g., how petroleum companies do environmental training).
- Compare how firms in different industries address the same risk (e.g., compare money-laundering

compliance at a bank and an insurance company).

For each approach, the core task was to explain and critique how an organization or industry adapted the general compliance tasks to its size, legal risk, and business. In short, how did the organization put what we learned during the semester into practice? Having just graded those papers, I saw how the students' research helped them take the topic outside the four walls of the classroom.

Parting thoughts

In my decade of law school teaching, I have noticed that students are never as motivated about a subject as

when they "get it"—that is, when they see how what they are learning applies in the real world. They feel empowered, knowing they have something of value to contribute after graduation.

Of all the courses I have taught in law school (at last count, that total stands at twelve), the compliance seminar had the greatest yield of "get it" moments. Students were constantly making links between the course material and what they read in the news, saw at work (many were part-time students), or saw and heard while researching their papers. In the end, that is perhaps the best reason to keep the course in the law school curriculum. □

Dow's Investigations . . . Continued from page 4

protest might have remained in Germany or Hong Kong or South America. Because it is now a part of the central database, it should be easier for the company to discern trends. It might suggest that a certain region or unit needs to do more training in the company's Respect and Responsibility policy, for instance. (For the record, this policy states: "Dow shall provide all employees an employment and business environment built on mutual respect and individual responsibilities that is free from any form of harassment. Harassment and discrimination of any form is unacceptable and will not be tolerated.")

McCormick expects to reap real benefits from the tracking regimen, but it was still too early (in May) to talk about results. Because of IT (information technology) security screens and privacy issues, Dow might limit access to the investigations data for the time being. Eventually it should be a significant resource within the company. The Ethics and Compliance office could run annual reports for the geographic regions: "Here's what happened in your region this year...There were so many instances of T/E fraud..." The region might have to beef up its training in this area as a consequence.

McCormick was asked if corporations are doing more investigations than in the past. No, he doesn't necessarily see more investigations being conducted. Nor are there more incidences of wrongdoing than in the past. What there are more of, arguably, are whistleblowers. "The incidence is up," compared with three years ago. "We are in a whistleblowing age."

People read in magazines and newspapers about

Regarding whistleblowing, 'The incidence is up,' compared with three years ago. 'We are in a whistleblowing age.'

others who have reported wrongdoing, and they are encouraged to do it themselves. "They feel that they can do it anonymously better than before, and more believe the company will take action." This encourages them to call the helpline or speak up when something is wrong.

Still, it's one thing to be more consistent in areas like investigations and discipline; it's another thing to get people to believe that the company actually will act with resolution. Corporate communications are critical. When it comes to things like fraud or theft or abuse, McCormick wouldn't necessarily be adverse to publicizing within the company a few more real cases, assuming they could be sanitized so Dow wouldn't run afoul of privacy and defamation rules. (One might remove the names and identifiable circumstances, much like DuPont does with its internal compliance "bulletins." See *Ethikos*, January/February 2004, "DuPont's Daring Communications Formula.") This might entail "more risk and more public hangings," but it might also send the message that the company really takes these matters seriously.

Overall, McCormick has been surprised at the amount of on-going communications work that is required. The people in the field, he says, are "crying out for more information and guidance." □