The Relationship between the Compliance Officer, In-House Counsel, and Outside Counsel: An Essential Partnership for Managing and Mitigating Regulatory Risk

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I. Introduction

On the surface, the distinct roles of compliance officer and counsel seem apparent: the compliance officer is tasked with preventing, detecting and disclosing potential ethical and regulatory violations, and counsel is responsible for defending the company in relation to those (and other) matters. In the healthcare space, however, these roles often overlap because of the complex regulatory environment in which health care organizations operate. So, the question becomes, how can individuals in these positions work together effectively in order to mitigate and manage regulatory risk?

Over the past few decades, the OIG has made its expectations regarding the role of the compliance officer very clear in the guidance it has published periodically for healthcare providers. In 1998, the OIG noted that a comprehensive compliance program should include the designation of a chief compliance officer who is charged with the responsibility of operating and monitoring the compliance program.\(^1\) The OIG also emphasized that the chief compliance officer should have direct access to the President/Chief Executive Officer (CEO) and the governing body of the organization.\(^2\) As the OIG has noted, there should not be a buffer between the compliance officer and the governing body.\(^3\)

Attorneys working for the organization provide advice to the organization, including the board and officers, and act as counselors to the organization. In addition to simply interpreting the law, today’s in-house attorneys also provide advice regarding ethical concerns and how best

\(^2\) Id.
to promote a corporate culture of compliance and integrity. The General Counsel also has primary responsibility for assuring the implementation of an effective legal compliance system under the board’s oversight. Outside counsel is often brought in to assist in-house counsel when the matter requires independence and/or specialized expertise.

II. Internal Relationship between Compliance Officers and In-House Counsel

Over the course of recent years, the role of in-house counsel has expanded and evolved. The role of general counsel in most health care organizations has transitioned from solely being an advisor to being a member of senior management. In-house counsel are required to have a deep understanding of the business environment in which their organizations operate, are more involved in making important business decisions, and often sit at the table with the members of the C-suite. In-house counsel wear many hats including those of advisor, strategist and business partner in additional to their traditional stewardship role. In light of this cross-functional role, in-house lawyers have a unique opportunity to contribute to all aspects of the compliance process. The more familiar in-house lawyers are with the nuts and bolts and operations of the compliance program, the better advocates and advisors they can be to the organization.

The chief compliance officer is responsible for developing and implementing compliance practices and procedures, overseeing and monitoring the implementation of the compliance program, and serving as a resource in regards to compliance issues throughout the organization.

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4 See Michael W. Peregrine and Joshua T. Buchman, Managing the General Counsel/Compliance Officer Relationship, AHLA Connections, October 2011, p. 34-39.
As the oversight and regulation of the health care industry has increased, so too has the role of the compliance officer. With more frequency, compliance officers are key members of the executive team. As members of the leadership team, they are responsible for identifying risk areas, strategizing about how to reduce and mitigate risk, and assisting in making business decisions in relation to those areas that affect compliance.

Therefore, despite efforts to separate and clearly define the roles of counsel and compliance officer, the boundaries and responsibilities are not so clear-cut in day-to-day operations. Both must make business decisions relating to how the compliance program operates, both must understand and measure the company’s compliance risks, and both have a hand in ensuring the company is protected from compliance risks. At the same time, it is important for both in-house lawyers and compliance officers to fully comprehend and appreciate their differing roles within the organization.

Mindful of the overlapping and intersecting roles of in-house counsel and the compliance officer, in recent years commentators have focused primarily on the reporting structure within organizations and the potential for conflict between the two roles. While the compliance officer must coordinate and investigate an organization’s response to compliance issues, in-house counsel is responsible for directing the organization’s response to actual or potential violations. The compliance officer must assess the status of the compliance program, the resources needed to operate the compliance program, and oversee the implementation of the compliance program. In-house counsel must act as legal counselors and often are in the position of having to
vigorously defend the organization after potential violations of the law have been identified. In light of these potentially conflicting roles, the government has taken the position that the best practice is for the compliance officer to report directly to the governing body and senior management as opposed to reporting to the general counsel. In addition, most health care organizations now agree that compliance officers should not be, or report to, the general counsel.

So while it is important for in-house counsel and compliance officers to have separate and distinct roles, they must also coordinate when appropriate. Therefore, the question becomes where does that balance lie? While the answer likely differs among organizations and depends on how the compliance and legal departments are structured, the ultimate goal should be making sure the governing body has all of the necessary information and guidance to make well-informed decisions that are in the best interests of the organization.

General counsel and the chief compliance officer must have a synergistic relationship with open communication channels. In an ideal world, the chief compliance officer and general counsel should have parity of status within the organization, and a parallel reporting relationship to senior management and the board. Parity of status and reporting structures in the best way to foster mutual respect, trust and teamwork between the individuals who hold these positions. These are necessary elements in ensuring that appropriate levels of coordination occur while at the same time maintaining a needed level of separation to avoid potential conflicts. General

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7 See AHLA/OIG Guidance.
8 OIG 1998 Guidance; see also Michael W. Peregrine and Joshua T. Buchman, Managing the General Counsel/Compliance Officer Relationship, AHLA Connections, October 2011, p. 34-39.
counsel, the compliance officer and their superiors should also work together in order to establish a communication plan. The individuals in these roles, working in concert with senior leadership, should decide ahead of time what information will be shared with one another, how such information will be communicated and how often. The exercise of creating a communication plan can also help establish and define the respective roles of compliance officer and general counsel. In addition to avoiding conflicts, having a clear understanding of each other’s responsibilities and the appropriate levels of overlap will have additional, practical benefits, such as avoiding duplication of effort and encouraging transparency.

Once the organization has a clear plan of communication and established reporting relationships, what next? How do the individuals in these roles help each other make decisions that are in the best interests of the company? There are a number of scenarios where the two can work together to support the compliance function.

First, health care organizations are subject to an increasingly broad and complex set of rules and regulations (e.g., Stark, the Anti-Kickback Statute) – regulations that can be challenging to interpret and difficult to “operationalize” from a business standpoint. In-house counsel can play a significant role in the development of compliance policies and training materials designed to educate employees about the risk areas unique to an organization’s business.

On a related note, there are times when the alleged “misconduct” brought to the attention of the compliance department requires the interpretation of complex rules and regulations. In-
house counsel can help the compliance department identify when allegations involve actual violations of the law, or are based on an incorrect understanding of the rules, and then act accordingly.

In cases where the alleged misconduct warrants self-disclosure to a regulator or government agency, in-house counsel can play a critical role in ensuring that the self-disclosure is complete and complies with the requirements of the particular agency’s self-disclosure protocol. In addition, if and when the determination is made to engage outside counsel for purposes of making a self-disclosure, the in-house attorney will typically coordinate the organization’s response, facilitate the collection of relevant information and materials, and work with outside counsel on the disclosure.

At the same time, the compliance officer will have an important role to play in any self-disclosure to the government. In the case of voluntary self-disclosures to CMS and the OIG, for instance, the disclosing organization will be required to describe how the violation occurred, how it was discovered, and what steps the organization has taken or will take to ensure that the violation does not occur again. This type of introspective “root cause analysis” and corrective action planning must involve the compliance function in order to be effective and sustaining. The OIG has repeatedly emphasized that a compliance program must be *dynamic* in order to be effective – and not just a static “paper” program that sits on a shelf. Thus, the hallmark of an effective compliance program is the ability of a program to identify, correct and obviate problems in real time – *i.e.*, in a way that effects meaningful operational changes within the organization, in response to identified risks.
A. When the Compliance Officer and General Counsel Are One and the Same

Despite the government’s general skepticism about the ability of in-house lawyers to effectively oversee the compliance function of an organization, not all health care organizations have the resources to employ both a separate general counsel and a chief compliance officer. Therefore, in many cases, as a practical matter one person must wear two hats.

In such a situation, the person acting as general counsel and chief compliance officer should understand the potential for conflict and consider the perception of the government when making decisions for the organization. When allegations of wrongdoing are made against the organization, some in-house attorneys may be tempted to put on their “defense lawyer” hats, rather than think proactively about whether the organization has a duty to disclosure or self-report the misconduct to the government. This temptation may be exacerbated by the expectations of senior management within the organization, depending on how the in-house attorney is perceived, and how she has chosen to define her role within the organization up to that point.10

On the other hand, if healthcare organizations are required to combine the roles of general counsel and chief compliance officer, some significant benefits may result. The combined role can promote efficiencies associated with the substantial overlap of the two positions and a corresponding reduction in overhead and cost. The individual in this position may also have a better handle on when and how to invoke the attorney-client privilege. Finally,

10 See David R. Singh and John Stratford, The General Counsel Faceoff: A Presidential Town Hall Style Debate, ABA Section of Litigation Annual Conference, April 9-11, 2014.
In smaller organizations where the same individual wears both hats and is well-integrated into the leadership team, the compliance officer/GC could be in a better position not only to identify problems within the organization more quickly, but to put in place processes and systems to correct the problem more quickly within the organization.

In such a situation, however, it is critical that the organization have well-defined compliance policies and procedures, particularly with respect to the reporting of misconduct. Having a clear protocol in place, and following that protocol to the letter, will protect the general counsel/chief compliance officer from any suggestion that they “covered up” a problem, instead of dealing with it in a forthright manner. Moreover, the steps taken in response to allegations of misconduct should be carefully documented – again, in order the disabuse any outside reviewer of the notion that the individual’s performance as compliance officer was tainted by his or her responsibilities as general counsel.

Finally, in any situation where the independence and/or biases of the in-house attorney/compliance officer might be questioned, it is critical that outside counsel be brought in to handle the investigation. Involving outside counsel is the best way for in-house counsel to protect themselves from any allegation that they improperly influenced the conduct or outcome of an internal investigation. Moreover, depending on the nature and seriousness of the allegations, it may behoove in-house counsel to include another member of senior management and/or independent board member on communications with outside counsel as the investigation progresses, to avoid any suggestion that in-house counsel somehow skewed or influenced the investigation by the manner in which they interacted with outside counsel. Again, whenever
one person is acting as both chief compliance officer and general counsel, it is important that this
person be mindful of how outsiders (i.e., the government) may ultimately view and evaluate their
handling of any internal investigation or allegation of wrongdoing – and to be very proactive and
thoughtful up front about how to obviate even the appearance of bias.

III. Attorney-Client Privilege in Compliance Investigations

Because the roles of general counsel and chief compliance officer tend to overlap, it can
be difficult sometimes to distinguish when compliance investigations and communications are
protected from disclosure by the attorney-client privilege – and when they are not (or should not
be). When is an investigation conducted “for the purpose of obtaining legal advice” (in which
case the privilege would apply)? When is an investigation conducted pursuant to routine
business policies or regulatory requirements (in which the privilege may not apply)? Like the
roles of in-house counsel and compliance officers, these concepts often overlap. Understanding
the contours of the application of the attorney-client privilege in the compliance space will help
organizations plan and develop strategies for protecting attorney-client communications from
disclosure, when it is appropriate to do so.

This is particularly important in the compliance space, because the inappropriate (and
excessive) invocation of the privilege can breed skepticism and mistrust among regulators. And
this is critically important in the healthcare world, where the rules and regulations not only favor
but mandate the self-disclosure of wrongdoing whenever there is a potential overpayment at
issue. The blanket and inappropriate invocation of privilege can undermine a company’s
relationship with regulators to the detriment of the organization, and in some cases even
jeopardize the organization’s ability to appropriately invoke the privilege (e.g., in cases where the government suspects that the privileged communications were related to the wrongdoing, and seeks to compel the production of privileged communications under the crime/fraud exception). It is therefore vitally important that healthcare organizations are thoughtful and judicious when deciding to invoke the attorney-client privilege with respect to compliance matters and internal investigations.

The seminal case involving the federal attorney-client privilege is *Upjohn v. U.S.*, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court rejected the more narrow control group test and held that the attorney-client privilege applies to communications between attorneys and non-management employees. Since *Upjohn*, federal courts apply something that may be broadly considered a subject matter test – *i.e.*, was the purpose of the communication for obtaining legal advice? Most cases take the view that the determination as to which communications are deemed to belong to the corporate client is to be made on a case-by-case basis, considering the purpose of the privilege.\(^1\) Accordingly, the analysis is dependent upon the specific facts of each case.

The result is that it is not as easy for organizations to predict and understand when the attorney-client privilege will apply. The waters become exceedingly murky in the context of compliance investigations. Is the in-house attorney merely assisting in the performance of true compliance functions, or is he or she giving legal advice? Is the compliance officer acting at the

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\(^1\) 26 A.L.R. 5th 628, Determination of Whether a Communication is From a Corporate Client for Purposes of the Attorney-Client Privilege (2014).
direction of counsel or is he or she simply performing routine job duties? Answers to these
questions affect whether or not the privilege applies.

A recent case in the D.C. Circuit Court of Appeals provided some guidance as to when
the attorney-client privilege applies in a compliance investigation. *In re. Kellogg Brown & Root,
Inc. (KBR) et al.*, 2014 WL 2895939 (June 27, 2014) was a False Claims Act case in which the
relator requested documents related to KBR’s internal investigation of the alleged fraud. The
internal investigation was conducted pursuant to KBR’s Code of Business Conduct, and
overseen by the company’s legal department. KBR argued that the investigation was conducted
for the purpose of giving legal advice and, therefore, the documents were protected by the
attorney-client privilege.

Initially, the District Court determined that the attorney-client privilege did not apply
because KBR did not show that the communication would have been made “but for” the fact that
legal advice was sought. This led the District Court to find that the investigation was undertaken
pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal
advice. In overturning the District Court’s decision, the Court of Appeals ruled that, like
*Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the
law after being informed of potential misconduct, and the investigation was conducted under the
auspices of KBR’s in-house legal department. Therefore, the Court of Appeals held that the
attorney-client privilege applied because one of the primary and significant purposes of the
internal investigation was to obtain legal advice.
The Court of Appeals ruled that the “but for” test applied by the District Court was not the appropriate test. The Court of Appeals noted that the attorney-client privilege can still apply even if there were other “business” purposes for the investigation and even if the investigation was mandated by regulation rather than simply being an exercise of company discretion. The KBR case is instructive and supports the proposition that the attorney-client privilege applies so long as one of the significant purposes of an internal investigation is to obtain or provide legal advice.

On the other hand, some courts have narrowly construed the attorney-client privilege on public policy grounds, because it stands as an obstacle of sorts to the search for the truth. In contrast to the KBR decision, Szulik v. State Street Bank and Trust Co., 2014 WL 3942934 (Aug. 11, 2014), held that the attorney-client privilege did not apply to internal corporate emails relating to an internal investigation. The email chain at issue involved communications between corporate employees who were reviewing documents at the request of counsel in furtherance of the company’s compliance with a document subpoena issued by the U.S. Attorney’s Office for the Southern District of New York. The Court ultimately held that the company failed to establish how emails among its own employees, which had not been communicated to counsel, satisfied any of the elements of the attorney-client privilege.12

So, as a threshold matter, in order to invoke the attorney-client privilege, healthcare organizations must consider how to make it clear to outsiders (such as lawyers or judges in the unfortunate event of a False Claims Act case or other potential litigation) that an internal

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12 Note that the Court ultimately prevented disclosure of the email chain pursuant to the attorney work product doctrine, which prevents disclosure of materials collected or prepared in anticipation of litigation.
investigation was conducted in order to obtain or provide legal advice. The following tips may help protect documents and other communications from disclosure:

- **Education** – make sure employees understand the nature and purpose of the privilege and know to make it explicit when requesting legal advice
- **Planning** – plan who will oversee and direct legal communications or communications at the direction of legal counsel; attempt to separate discussions relating to legal decisions as opposed to business decisions
- **Documentation** – make clear the purpose for which the document was created; note that just as copying in-house counsel on every email does not ensure that all such emails are privileged, labeling every document as privileged does not prevent disclosure; be careful not to overdo copying of legal counsel or labeling documents as privileged as this may dilute the organization’s position as to application of the privilege

Ultimately it is important that in-house counsel and compliance officers be thoughtful about the purpose of an internal investigation, and judicious about the invocation of the attorney-client privilege. Internal investigations can be undertaken in response to a routine compliance matter (e.g., a call to the organization’s hotline), or in response to a government subpoena or lawsuit. In most instances, it is understood and expected that the privilege will be invoked in cases where there is a pending government investigation or threatened or actual litigation with third parties. At the other end of the spectrum, however, are those internal investigations that are undertaken in response to allegations that arise in the ordinary course of overseeing the compliance function. In those routine compliance matters, asserting the privilege with respect to every document generated during the course of that investigation will be more difficult to justify.
IV. Conclusion

Over the past decade, the compliance and regulatory challenges facing healthcare organizations have grown, and the roles and responsibilities of in-house counsel and compliance officers have evolved in response to these challenges. The individuals in these roles (or the individual who must wear both hats) must be prepared to identify all of the regulatory risks that impact their organizations, provide guidance and advice to their executives and boards of directors about how to avoid those risks from an operational standpoint, and develop policies and procedures that create and promote a culture of compliance within their organizations. Despite the government’s longstanding skepticism about the potential for conflict between these roles, the reality in today’s increasingly complex healthcare environment is that these roles can and should be synergistic – and if managed effectively, this critical partnership will help healthcare organizations maintain more effective compliance programs.