

# **The Dynamic Duo: Ensuring Partnership Between Legal and Compliance**

By:

*Ritu Kaur Cooper, Shareholder, Hall Render Killian Heath & Lyman, PC*

*Kashish Parikh-Chopra, Associate, Hall Render Killian Heath & Lyman, PC*

*Marc Goldstone, Vice President and Associate General Counsel, CHSPSC, LLC*

*Teresa Williams, Vice President, Regulatory Services, Corporate Compliance, and Privacy Officer,  
INTEGRIS Health, Inc.*

The General Counsel and Compliance Officer of any health care organization have a special relationship – not simply to the organization itself, but to one another's functions. Legal and Compliance have often been uttered in the same breath, as if having blended together in the psyches of industry; however, in reality Legal and Compliance have important distinguishing responsibilities and roles towards the oversight and administration of a health care entity. These two roles, for all their overlapping interests and distinctly different responsibilities, should be the dynamic duo of a health care organization – together, championing adherence to laws, regulations, and standards. It is imperative for organizations, particularly Boards of Directors, to appreciate the differences between these functions and to support structural tools to ensure partnership, collaboration, and independence for their collective success.

## **I. Fighting the Same Fight**

Legal and Compliance are naturally paired together in perception and operation. Like a team of superheroes, both Legal and Compliance are responsible for ensuring the entity's compliance with laws, regulations, and standards. After decades of increased scrutiny and deepening regulatory complexity, the health care industry carries significant penalties for non-compliance and requires skilled professionals to navigate strategy and operations.<sup>1,2</sup> Federal Sentencing Guidelines as well as Department of Health and Human Services Office of Inspector General (OIG) guidance are clear that governing Boards have oversight responsibility for an organization's compliance program and must be engaged and well-informed of compliance operations.<sup>3</sup> The Board relies on General Counsel and the Compliance Officer, through their roles, operations, and reporting structures within the organization, to meet its various oversight duties.

## **II. What's Your Superpower?**

Though Legal and Compliance share a similar mission in an organization, they take very different functional action in an organization. If you ask an employee what the Legal Department does, you will likely receive an explanation that generally expresses Legal as the attorney for the organization. If you ask that same employee what the Compliance Department

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<sup>1</sup> U.S. Sentencing Commission, 1991 *Federal Sentencing Guidelines Manual*, p. 352, § 8A1.2, Application Note (k), available at [http://www.ussc.gov/sites/default/files/pdf/guidelinesmanual/1991/manual-pdf/Chapter\\_8.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelinesmanual/1991/manual-pdf/Chapter_8.pdf).

<sup>2</sup> Cheek III, J.H., et. al., *Report of the American Bar Association, Task Force on Corporate Responsibility*, 2003, available at [https://works.bepress.com/lawrence\\_hamermesh/13/download/](https://works.bepress.com/lawrence_hamermesh/13/download/).

<sup>3</sup> Office of Inspector General, American Health Lawyers Association, *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors* (Apr. 2, 2003), available at <https://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf>.

does, more than likely you will be met with a stumble of thoughts and confusion on how Compliance is different than Legal and what "superpowers" each department really has.

The Compliance Officer has a unique role in that no other individual has the primary responsibility for the day-to-day operations of the compliance and ethics program.<sup>4</sup> Compliance serves the organization by promoting the prevention, detection, and resolution of conduct that does not comply with laws, regulations, policies, or accepted standards.<sup>5</sup> Compliance is a management function, but is often confused by employees as a legal function.

The General Counsel, naturally, serves a legal function, but is also leveraged as a key strategic business partner. General Counsel provides legal advice on how the organization can attain its business objectives and strategic priorities while complying with laws, regulations, and standards.<sup>6</sup>

### **III. Diverging Interests**

Although the Compliance Officer must have an understanding of the health care laws and regulations, Compliance does not act in the capacity of counsel for the organization even if the Compliance Officer is an attorney by background. General Counsel, through its unique role as counsel for the entity, must advocate zealously for its client's position by protecting the organization from non-compliant transactions and ensuring that its advice is compliant with relevant laws.<sup>7</sup> A General Counsel's sole client is the organization itself. Though General Counsel will provide legal advice to the entity and work for the strategic achievement of business goals, Compliance guides management action and the prevention, detection, and correction of misconduct. Legal and Compliance have very distinct objectives and operations in an organization, although they share a common mission to uphold laws and regulations as a whole.

OIG compliance program guidance documents are the fundamental authoritative guidance on health care compliance programs.<sup>8</sup> In the absence of a government-approved model compliance program upon which health care providers may rely, the seven (7) elements are the most reliable guide for entities to use when establishing effective health care compliance programs: (i) high level oversight and management, (ii) written compliance guidance, (iii) open lines of communication, (iv) effective training and education, (v) auditing and monitoring, (vi) consistent enforcement/sanction screening, and (vii) response to detected offenses and corrective actions.

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<sup>4</sup> Office of Inspector General, American Health Lawyers Association, *An Integrated Approach to Corporate Compliance: A Resource for Health Care Boards of Directors* (Jul. 1, 2004), at 3, available at <https://oig.hhs.gov/fraud/docs/complianceguidance/Tab%204E%20Appendx-Final.pdf>.

<sup>5</sup> *Practical Guidance for Health Care Governing Boards on Compliance Oversight* at 6.

<sup>6</sup> Office of Inspector General, American Health Lawyers Association, *An Integrated Approach to Corporate Compliance: A Resource for Health Care Boards of Directors* (Jul. 1, 2004), available at <https://oig.hhs.gov/fraud/docs/complianceguidance/Tab%204E%20Appendx-Final.pdf>.

<sup>7</sup> American Bar Association, *Model Rules of Professional Conduct*, Preamble 2, available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html).

<sup>8</sup> Office of Inspector General, *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. 8987 (Feb. 23, 1998), available at <https://oig.hhs.gov/authorities/docs/cpghosp.pdf>.

The seven (7) elements highlight the different roles of Legal and Compliance in compliance program effectiveness. For example, the responsibility for developing compliance policies and procedures rests with Compliance, not Legal. Legal may provide the framework for the legal guidelines and feedback on compliance policies to ensure they are consistent with such laws, but it is not their functional responsibility in the organization. As explored below, auditing and monitoring as well as enforcement of disciplinary action are also illustrative examples.

#### **IV. Checks and Balances**

The reason it is so imperative to appreciate the unique roles of Legal and Compliance comes down to a health care organization's version of checks and balances. Health care, at its core, is not so different from other industries as its management aims to drive opportunity, growth, and influence change – be it through beneficiaries, consumers, or the market itself. As the dynamic duo, Legal and Compliance are balancing forces:

Free standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institution's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel or chief hospital financial officer... a system of checks and balances is established to more effectively achieve the goals of the compliance program.<sup>9</sup>

Independence of the Compliance Officer and Compliance function is central to the system of checks and balances within health care entities. OIG provides that "an organization's counsel and compliance officer should collaborate to further the interests of the organization while still maintaining their independence."<sup>10</sup> Compliance has ownership and responsibility to actively conduct auditing and monitoring of compliance-related operations, such as compliance with health care laws, regulations, and internal policies and procedures. No other function is deputized to actively examine, investigate, and discover misconduct and non-compliance in an organization. Compliance independence is pivotal in its ability to proactively examine and combat compliance risks facing the organization. Corrective action plans are ultimately the responsibility of management to implement, though Compliance should monitor and track corrective action through to completion. Legal may be leveraged depending on audit results and depending on the type of corrective action that needs to be taken.

Compliance hotlines and investigations are collision points for Legal and Compliance. Compliance is responsible for investigating allegations of misconduct in the organization and must report on such allegations to the Board. Systems designed to detect and respond to suspected offenses of misconduct hinge on Compliance's independence and authority to investigate and report to appropriate channels, including the Board, as needed in an organization. Thinking back to the elements of an effective compliance program, Compliance is charged with ensuring effective and open lines of communication in an organization along with mechanisms for individuals to report actual and suspected violations of misconduct. It is imperative for

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<sup>9</sup> Office of Inspector General, *supra* note 8 at fn. 35.

<sup>10</sup> *Practical Guidance for Health Care Governing Boards on Compliance Oversight* at 1.

Compliance to have clear protocols regarding the investigation of compliance concerns, inquiries, and suspected misconduct. Legal and Compliance should establish protocols and expectations of who is responsible to investigate matters, when to reach out to one another during an investigation, when an investigation should be cloaked under the attorney-client privilege, and how to effectively work together.

## **V. Checklist for Ensuring a Successful Partnership Between Legal and Compliance**

### Defining Roles:

- Does the Compliance Officer have a defined job description stating that the role does not oversee legal operations?
- Do the Legal Department and Compliance Program Charters explain the mission and role of each function within the organization?
- What safeguards have been established to protect the Compliance Officer from members of senior management? Is Board approval required before the Compliance Officer can be terminated?
- Does the Compliance Officer have a direct line to the Board? Does the Compliance Officer report to the Chief Executive Officer rather than General Counsel or the Chief Financial Officer?
- Does General Counsel have a role in compliance program risk assessments?
- Does Compliance have authority to retain outside counsel and consultants?
- What are Legal and Compliance's role for potential privacy breaches? Security incidents? Internal Investigations?

### Communication is Key:

- How are employees educated on Legal and Compliance resources?
- Do employees know when to reach out to Compliance versus Legal? Who do employees and stake holders in the organization reach out to for legal questions or for compliance questions?
- Are employees given education on Compliance issues and concerns?
- Is there open communication between General Counsel and the Compliance Officer? Do they meet regularly?
- Is there open communication between the attorneys in the legal department and the compliance officers and staff?

### Legal and Compliance Protocol:

- Has a Legal Counsel and Compliance Officer Protocol Policy been established? Does each function understand the protocol?
- When does Legal assume responsibility for an investigation? Will investigation progress, memorandum, and results be communicated between departments? On an ongoing basis? Upon completion?
- Is Legal responsible for notifying Compliance of any compliance related inquiries, offenses, or investigations?
- What happens if General Counsel is named in a hotline complaint or as part of an investigation? The Compliance Officer?

- Under what circumstances should Compliance consult with Legal to bring a matter under privilege? How soon should Legal be looped in?

## **VI. Practical Considerations**

The dynamic duo are natural compliments to one another. If the two collaborate, cooperate, and support one another's roles, Legal and Compliance become the forces driving strategic achievement and compliance program effectiveness. Like all great partnerships, Legal and Compliance's diverging interests may result in conflict. The key to a successful partnership and collaboration between Legal and Compliance is clearly communicating roles and responsibilities while establishing trust. Accordingly, organizations should establish a Legal Counsel and Compliance Officer Protocol Policy. This type of document is similar to establishing a treaty between two parties, acknowledging overlapping interests but clarifying each party's roles and responsibilities in circumstances that will arise. Organizations who do not prudently develop clear expectations between these functions risk Legal and Compliance "turf wars" over operations with shared interests. There are enough capes for every superhero in the organization. Legal and Compliance do not need to fight over the same one.