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Writing compliance advice that employees can use, Part 1: Gathering facts

By Scott L. Garland, JD, CCEP

This two-part article focuses on lessons learned during the last four years of my nearly 20-year career as a federal prosecutor, when I was responsible not only for investigating and trying federal felonies but also advising around 120 attorneys about how to handle their investigations and trials ethically. As my office's professional responsibility officer (PRO), my responsibilities and tasks looked much like the responsibilities and tasks of many compliance attorneys and compliance professionals. I gave advice that touched on various laws and rules, prevented problems beforehand, addressed concerns midcourse or hindsight, trained employees, created controls and compliance resources, and dealt with oversight authorities.

However, a few aspects of the PRO job differed from standard compliance roles. First, a lot of my advice was written. I usually even followed up my oral advice with written confirmation. I did this because my advice was usually connected to potential or ongoing litigation; even when it wasn't related to litigation, an ethical misstep could interrupt or end an attorney's or investigative agent's career. Both my "clients" and I wanted to document the advice, how we'd arrived at it, and the factual circumstances to which it was limited. Finally, my advice often had to work in high-pressure situations that unfolded in real-time, such as during a hotly contested public trial or law enforcement officers' search for evidence at a home or business. So, I had to make my compliance advice not only right but effective, memorable, and followable in real time. Crisply written advice was necessary.

Nobody taught me how to do this. It helped to have a background in writing persuasive legal briefs. But writing analytical compliance advice using risk-management principles requires additional skills. At first, I modeled my written compliance advice on the exceptional compliance resources I had at hand: general memoranda on common compliance topics and memoranda that specialists would send me analyzing the specific situations I brought to them for additional guidance. Although these memoranda contained analysis that was encyclopedic and thorough, their analysis and recommendations were often difficult to apply to the facts at hand. Yet these were the models I had, and they shaped what I wrote.

That changed after I asked a compliance professional at the Federal Bureau of Investigation (FBI) to review one of my memoranda and tell me whether he agreed with its recommendations. He graciously told me that although he agreed with everything I had said, FBI agents would find it challenging to recall or apply encyclopedic and thorough advice in the middle of a live situation in real-time. They needed something quick, memorable, and actionable. They needed a recipe, not a treatise on cooking.

Once I realized my advice had to be effective in real-time, my process for giving compliance advice changed dramatically. My advice had to be simpler, clearer, more practical, and more memorable. So I developed a repeatable process for doing this. Once I did, I started receiving a lot more calls for advice.

I hope these self-taught lessons will help others who must provide written corporate compliance advice. The first part of this article addresses how to work with the advice-seeker to gather and focus on the facts. It might seem surprising for an article about writing useful compliance advice to begin by discussing how to deal with the advice-seeker's stress, how to gather the facts, and the importance of understanding the organization's level of risk tolerance. But it should make sense. When you write compliance advice, you are trying to solve a problem. You cannot identify the problem or acceptable solutions until you have dealt with the advice-seeker's stress, understood the facts and issues, and determined the appropriate level of risk tolerance up front. The work done during this phase lays the foundation for the analysis and for writing the advice.

The second part of this article, in next month's issue, will address the process for writing analysis and recommendations that the advice-seeker can use rather than ponder.

Gathering facts

The advice you give can be only as good as your understanding of the facts. Here's how to get them right.

The employee seeking advice is stressed—you can't be

An employee who seeks compliance advice wants help. They might not know what to do because they're confused or don't know the rules. Or they might know what to do but face pressure (cost, difficulty, embarrassment, or someone else's orders) to do something else. Regardless, they want help and are under stress.

You cannot match their stress level or add to it. The employee wants guidance, not recriminations. Reacting with "How could you" or "What a mess" will cause the employee to become defensive and clam up, depriving you of the information you need to do your job. And they won't return to you the next time they need guidance. They'll seek advice elsewhere or, worse, won't seek advice at all.

So act calmly and without judgment. Saying, "I'm glad you came to me with this," "I'm sorry you're going through this," "How distressing," or "What a tough situation" can help lower the stress level and demonstrate that you are on the employee's team.

Find out what issues the employee thinks are important

Facts are important. But before the employee starts telling you the facts, ask first for the most pressing issues of concern. For example, is it a conflict of interest, regulatory interpretation, accusation of misconduct, or something else? By identifying the employee's areas of concern up front, you will comprehend their story better, address what the employee thinks really matters, and might hear a compliance angle that you would never have considered. So, listen to the facts, but first get a brief explanation of what issues the employee thinks are important.

Go beyond the issues the employee thinks are important

Although you start with the issues the employee identifies as important, you often end up elsewhere. The most readily apparent issues aren't always the most important. Even simple factual situations can raise complex issues that cut across company policy, legal statutes, and regulations—not to mention concerns about personnel and personalities. The employee and the company need you to ferret the ultimate issues.

Do this even for the employee who wants just a two-minute consult on a narrow policy question. You know the sort: "Would the 'X' rule let me do 'Y' if 'Z' is true? I just need a 'yes' or a 'no.' I don't want to take up your time." It would be so tempting to answer the question without probing further. But this is exactly when to explore

deeper. Your company needs you to know how the question arose: idle curiosity, an emergency, an isolated incident, or a recurring problem? Moreover, the employee who asks for a quick consultation might quote you to someone else as justification for whatever action they take or don't take. You don't want to be quoted out of context. So ask for the context.

So always probe beyond the issues the employee thinks are important, especially on two-minute consultations. How do you handle that when the person is rushed? "This can be a tricky issue, and I want to give you the best advice. Can you tell me a little more?"

Get the facts right

The answer to many general compliance questions—like many legal questions—is "it depends." "Can I do 'X'?" It depends. "If I can't do 'X,' can I do 'Y?'" That also depends.

What do they depend on? The facts, usually. Can you accept lunch from a vendor? It depends on whether it's a Big Mac or filet mignon. Can you hire a relative? It might depend on whether it's your child or your spouse's third cousin and whether your spouse's third cousin has a side business with your spouse.

The facts matter—a lot. Here are some practical tips on how to get them right.

Distinguish early what someone knows from what they've assumed or heard from someone else

People often fail to distinguish between what they know personally, what they have assumed, and what they heard from someone else but didn't witness themselves. Usually, that's okay outside of court. In real life, assumptions and hearsay can be useful and reliable.

Except when they aren't. So, when the employee relates a compliance situation, clarify each vital fact. Did the employee witness it personally? Are they assuming it's true? If so, why? Did they hear it from someone else? If so, can you talk with them? Could any documents (emails, texts, reports, etc.) confirm or disprove the assumption?

Especially try to clarify when the employee claims to know something based on general knowledge, what "everybody knows." How does "everybody know" something? Personal observation or just a rumor? And is it actually known by "everybody" or by just a few people who benefit personally from asserting that fact?

Also, try to clarify when the employee claims to know another person's specific intent—that is, what the other person meant, intended, felt, or thought. How does the employee know that? It's very challenging without direct proof, such as the other person saying openly what they meant, intended, felt, or thought. When the other person doesn't say so explicitly, we must rely on proxies, such as facial expressions or tone of voice, or projecting onto that person how we'd think or feel in the same situation. But these can be poor proxies. How often have you assumed another's state of mind, only to be wrong—resulting in a misunderstanding?

So sift through the facts, hearsay, and assumptions. You'll understand what you actually know a lot better.

Confirm the facts; then reconfirm them

Once you have weeded through facts, hearsay, and assumptions and understand the facts needed to give advice or make decisions, consider writing them down and asking the employee (and anybody else necessary) to review and correct or refine them. Whether you write them down might depend on company practice and whether the attorney–client privilege or the work product doctrine will cover your written advice.

But if you do write them down, present the facts chronologically, even if the employee explained them out of

order. It can be tempting to first explain the current situation and then explain some past background. Avoid this. Start with the old facts and move forward in time. That's how humans understand stories best: from start to finish. How to handle a fact near the end of the story whose significance depends on remembering a fact earlier in the account? Simple: just remind the reader of earlier facts. E.g., "On May 1st, 'X' said that 'Y had done 'Z.' But that was inaccurate considering the email from three months earlier, previously discussed, that demonstrated that 'Y' had not done 'Z.'"

Also, break everything down into bite-sized pieces. As I suggest in the second part of this article, use lots of headings and subheadings (by date, by location, by compliance issue—whatever makes sense), use short sentences, number your paragraphs, and keep the paragraphs short. All this helps you and the employee focus on specific facts and mutually identify which need clarification or correction.

Explicitly premise your recommendations on your understanding of the facts

Make sure to say your recommendations depend on the facts and could change upon learning new facts or new understandings of old facts. This conveys to the employee how crucial it is to get the facts right and to get more advice if they aren't. And it covers your backside if your recommendations are off because the facts are off.

Identify the consequences of getting things wrong, select the level of risk tolerance accordingly, and identify it early on

Determine the company's level of risk tolerance in the area under discussion as soon as possible. The company should have no tolerance for taking unlawful action. So for the following discussion, assume that we are discussing an inquiry into whether the employee may do something that is permitted by law, policy, or practice or lies in a gray area. (I include permissible actions because not everything that's allowed is required or even a good idea.)

Understanding the company's level of risk tolerance and stating it clearly has several advantages, especially if done early. First, suppose the risk tolerance is low. In that case, you might save time that might otherwise be spent navigating through close facts and policy issues. Instead, you could make conservative assumptions about unresolved facts, forgo in-depth analysis of more risk-tolerant recommendations, and present the more conservative approaches. (This doesn't mean you shouldn't mention unresolved facts and less-conservative approaches. You should, but note that you are mentioning them only briefly because the company wants to act conservatively.) Second, identifying the level of risk tolerance to others will help them determine whether your perception of risk tolerance matches theirs. If not, they can correct you, and you can reconsider your advice. Third, when you make your recommendation, the company could benefit if you identify a range of potential strategies across the spectrum of risk tolerance levels. Stakeholders with a high level of risk tolerance might choose a less risky strategy if its cost/benefit balance is best. Or perhaps vice versa: stakeholders with a low risk tolerance might choose a riskier strategy if its cost/benefit balance is best. By identifying the perceived level of risk tolerance, a recommended strategy for that level, and a range of strategies across the spectrum of risk tolerance levels, you allow the company to choose what's right for it.

Conclusion

The second part of this article, in next month's issue, addresses how to actually write your analysis and recommendations. You already know that the analysis and recommendations should be clear. Next month will lay out a process for how to achieve that goal.

Takeaways

- Written compliance advice must be not only thorough but also simple, clear, practical, and memorable—in short, useful.
- React calmly and without judgment. The employee wants guidance, not recriminations. A defensive employee will clam up and won't return for advice the next time.
- Identify the employee's concerns, and then identify other significant concerns not identified by the employee.
- The facts are key. Distinguish between true knowledge, rumor, and assumptions. Then confirm and reconfirm the facts; premise your advice on those facts.
- Identify the organization's risk tolerance early on and, when appropriate and possible, offer a variety of solutions keyed to different levels of risk tolerance.

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