WAIVER CULTURE: THE UNINTENDED CONSEQUENCE OF ETHICS COMPLIANCE

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THE PASSAGE of the U.S. Sarbanes-Oxley Act (2002) spawned a series of compliance and ethics programs—the revised Principles of Federal Prosecution of Business Organizations known as the Thompson Memo (Thompson, 2003), the revised Federal Sentencing Guidelines that included the Effective Compliance and Ethics Program and the corporate "culpability score" (U.S. Sentencing Commission, 2004), and another revision of the Principles of Federal Prosecution of Business Organizations now known as the McNulty Memo (McNulty, 2006). These programs were meant to shift business toward an "organizational culture that encourages ethical conduct and a commitment to compliance with the law" (U.S. Sentencing Commission, 2007).

These developments spurred human resource departments and legal counsel to draft new workplace policies to embrace, implement, and monitor compliance programs. There was a dramatic increase in the number of businesses with some kind of ethics training: from 44% in pre-guideline 1987 up to 92% in post-guideline 2005 (Berenbeim, 2006). An organization under investigation could turn to its newly minted compliance programs and its cooperation as a shield. Compliance with the McNulty Memo and Federal Sentencing Guidelines can substantially reduce an organization's sentence of improper conduct or cause the government not to prosecute (Berenbeim, 2006).

But these federal guidelines lacked a clear definition of an organization's "cooperation" and whether a lack of cooperation could be viewed as obstruction of justice and thereby increase punishment of that organization. In this void, organizations being investigated would submit to prosecutorial pressures to turn over protected documents under the auspices of "cooperation." Cooperation, and thus leniency, became defined by how quickly an organization would waive one of

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the most revered canons of our justice system: the attorney–client privilege. The waiver culture had been born.

Diminished Attorney–Client Privilege

The protection of communications between client and lawyer, as embodied in the attorney–client privilege, has been a bedrock principle of our justice system for centuries. Originally based on the concept that an attorney should not be required to testify against the client and thereby violate his or her duty of loyalty to the client, it has evolved to cover written, oral, and nonverbal communication between lawyer and client (Silverman, 1997). Today, the privilege is held and waived by the client only and based on several closely related policy considerations, all of which are crucial to the full administration of justice.

But as compliance investigations of organizations have dramatically increased, so has the concern waivers. A survey conducted by the Association of Corporate Counsel (ACC, 2005) found that approximately 40% of in-house counsel and 63% of outside counsel represented companies against which the government (federal or state) had initiated some form of investigation into allegations of wrongdoing in the past 5 years. Though the government protested that requests for waivers were exceptions to the rule, the evidence from the ACC study suggests otherwise. Nearly three fourths (73%) of outside counsel and 66% of in-house counsel said that the expectation was communicated and not inferred. And of those outside counsel respondents, 26% said that "waiver was requested . . . along with an indication that waiver was a condition precedent for the company if it wishes to be considered cooperative" (ACC, 2005, p. 7).

The ACC study also found that the "vast majority" of respondents who experienced such erosion "do not work for mega-corporations with extremely high visibility and the potential for 'blockbuster' failures; they work for a wide variety of differently-sized businesses, representing the full spectrum of industries" (ACC, 2005, p. 4). Thus, waiver has become a phenomenon that affects a broad spectrum of organizations.

It is not surprising then that a "commanding 73% of respondents agree that a culture of waiver has evolved with respect to the corporate

attorney-client privilege" (ACC, 2005). Remarks by outside counsel participants are revealing:

> I think the forced waiver and related policies have become a problem of Constitutional proportions. There are many examples of government pressuring companies to waive privileges…under pain of corporate destruction. . . . If the corporation does not partner with the government to prosecute individuals, the government views it as obstruction. This view is becoming part of the culture, having begun with the Thompson, Holder, and USSG pronouncements. It's simply wrong. (ACC, 2005, p. 5)

Another respondent wrote,

> As a result of our experiences, we now routinely advise our clients that there is no such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds. (ACC, 2005, p. 15)

Conclusion

McNulty and the Federal Sentencing Guidelines created a compliance, ethics, and reporting system that defines current best practices for corporate America (Burrows, 2005). Human resources professionals have responsibly infused these standards into their corporate cultures. But these systems work only if employees feel comfortable about reporting their own misdeeds or those of others during a full, frank, and *confidential* discussion. Now, in this "culture of waiver," attorneys are forewarning employees and board members that anything said will be disclosed to investigators as part of the company's "cooperative" strategy. It is a strange result indeed from a program created to encourage ethical business practices.

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