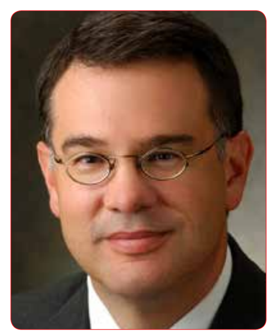
Your lawyer may be part of the compliance problem

BY CRAIG D. GALLI



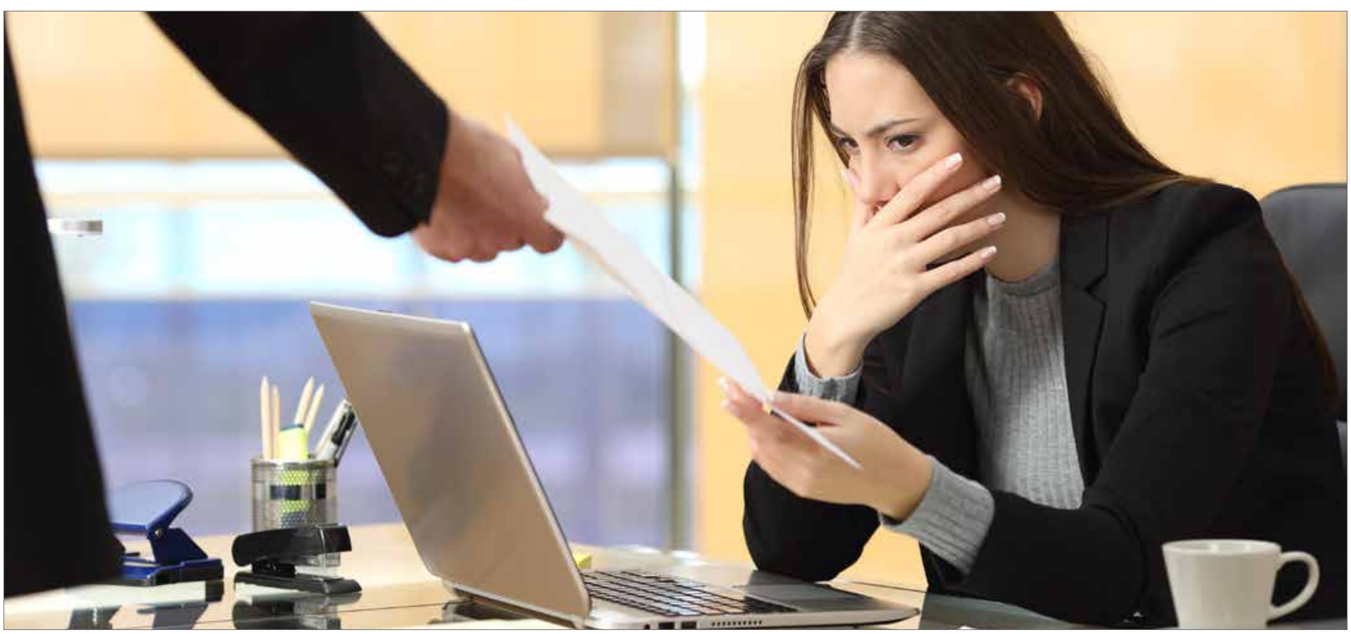
At times lawyers enable the commission of fraud and corporate crimes through negligence or complicity. But the manner in which some lawyers perform routine compliance tasks and their attitude towards business ethics can also diminish a corporate client's legal compliance and ethical performance.

For example, the recommendations from counsel offered at the conclusion of an internal investigation may actually disserve the corporate client. Here's how that commonly occurs. After an internal investigation, many companies desire to take corrective measures and implement enhancements to their compliance programs. They may request that in-house lawyers or outside counsel who conducted the internal investigation of a serious compliance matter make recommendations regarding corrective actions to reduce the risk of repeat violations. Lawyers typically recommend that the company discipline or terminate culpable employees, develop additional compliance policies and procedures, and implement expanded employee training. But what if the non-compliance relates more to dysfunction in a company's culture than to a missing procedure or errant employee? What if the non-compliance resulted from a senior officer in the company whose acts or omissions facilitated the non-compliance?

The default assumption that non-compliance can be cured with a thicker set of operating procedures and termination of a few blameworthy low-level employees reflects a simplistic approach to compliance and ethics. Most companies have already implemented basic compliance policies and controls. While compliance programs can often be improved, it is not possible to write a policy or procedure covering every scenario. More importantly, rules themselves do not change behavior. Imposing rigid compliance procedures may stifle deliberation and creativity needed to tackle complex compliance problems. Depending on the nature and cause of the non-compliance, a better response may be to improve the flow of information and increase collaboration with only minor adjustments to existing compliance policies and procedures. And unless the non-compliance was caused by a truly rogue employee, disciplining or terminating employees may serve to chill future reporting and discussion of compliance problems. Internal investigations that place excessive focus on blaming individuals may distract from identifying systemic or cultural dysfunction within the organization that led to the non-compliance.

IMPOSING RIGID COMPLIANCE PROCEDURES MAY STIFLE DELIBERATION AND CREATIVITY NEEDED TO TACKLE COMPLEX COMPLIANCE PROBLEMS.

A company's culture, including its compliance culture, starts at the top. MIT Sloan School of Management professor Edgar Henry Schein suggests that the primary mechanisms that create organizational culture include (a) what leaders pay attention to, measure, and control; (b) how leaders react to critical incidents and organizational



crises; (c) how leaders allocate resources and rewards; (d) deliberate role modeling, teaching, and coaching by leaders; and (e) how leaders recruit, select, promote, discipline and terminate organization members. Note that *all* the primary mechanisms that create organizational culture relate to the conduct and attitude of the organization's leaders. These factors outweigh in importance secondary mechanisms such as policies, procedures, reporting chains, and organization charts.

Few lawyers have the courage to identify decisions or conduct of the company's senior leadership team as the proximate or contributing cause of an ethical lapse or compliance failure, but prefer the safer course of faulting company procedures or lower level employees. Nor do lawyers typically have the training needed to accurately diagnose and advise corporate clients on how to enhance corporate culture.

Moreover, most lawyers do not see themselves as ethics gatekeepers. Such shortsightedness allowed GM's in-house lawyers to ignore for years information they had received regarding ignition switch problems. Today sophisticated companies demand that their employees and outside service providers adhere strictly to the company's code of ethics and report non-compliance to laws and company policy to the corporate compliance officer or ethics hotline. Lawyers should be treated no differently, though their reporting obligation may be to the chief legal officer and restrictions exist on reporting a client's non-compliance to law enforcement.

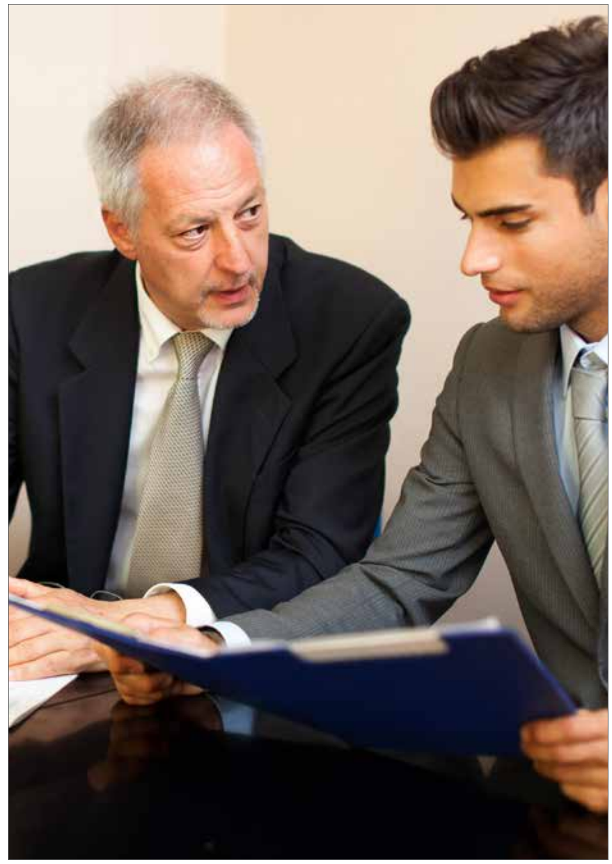
Corporate executives can take three steps to ensure that their in-house lawyers and outside counsel strengthen rather than weaken the company's corporate compliance and business ethics:

- **Ethics Gatekeeping.** When onboarding in-house lawyers or engaging new outside counsel, company managers should emphasize that all employees and outside service providers, without exception, must adhere to the highest

levels of legal compliance and ethical standards. Corporate clients should insist that when their lawyers dispense legal advice, they also flag issues of business ethics and any other activity that could damage the company's reputation or brand in addition to conduct creating legal exposure. In short, the company should expect its lawyers to function as trusted advisers, not merely as hired legal guns.

- **Post-Investigation Candor.** An internal investigation often places counsel in an ideal position to detect ways in which the company's senior leaders contributed to the compliance or ethics failure. Witness interviews may reveal attempts by lower level supervisors to report compliance problems but were rebuffed because a domineering senior leader in the company hierarchy had suppressed discussion, refused to delegate to lower level managers, or created a culture of people pleasers rather than troubleshooters. If such a climate exists at the top of an organization, lawyers themselves may remain quiet or become servile. Senior management charged with overseeing an internal investigation should impress upon counsel the need for total candor regardless of whether the evidence identifies weaknesses in or conduct of senior management.

- **Corporate Culture.** Lawyers who routinely conduct internal investigations of compliance issues typically focus on the underlying facts, the laws and company policies violated, and persons involved. Few internal investigation reports expressly address corporate culture. A notable recent exception was the Jenner & Block law firm's investigation of GM's defective ignition switch which described the now famous "GM nod," wherein everyone nods in agreement during staff meetings but nobody is assigned responsibility thereby indefinitely and repeatedly kicking the proverbial can down the road. Though lawyers may not be trained in organizational psychology, their investigations may reveal symptoms of corporate culture dysfunction such as silo mentality, employee disengagement, implementation paralysis, or chilling



discussion. The findings from an internal investigation may alert senior management of the need to engage an organizational behavior consultant who can conduct anonymous employee surveys, identify subcultures within the organization that may be out of harmony with overall company objectives, and provide recommendations that include benchmarking, best practices, and leader coaching.

Implementing the standard recommendations lawyers give after an internal investigation may give senior management a false sense that the company's compliance problems have been adequately addressed, when in fact the root causes may not have been identified. To achieve the full lessons learned opportunity from an internal investigation, senior management must demand complete candor from their lawyers regarding the causes of compliance problems which may include painful evaluation of senior management's leadership style and the company's culture. They must also require that the company's in-house lawyers and outside counsel step up sensitivity to ethical considerations which often precede serious compliance problems that can bring down a company. ■

Craig D. Galli (JD, Columbia University) is a partner in the Salt Lake City office of Holland & Hart LLP, and a former Senior Trial Lawyer at the U.S. Department of Justice in Washington, DC.