A Compliance Crisis Is a Terrible Thing to Waste: Counsel's Role to Enhance Corporate Culture

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Following a major oil spill, industrial accident, or other compliance crisis, sophisticated companies typically conduct a thorough internal investigation using legal counsel. After the investigation, the company takes corrective actions based in large part on counsel's recommendations, which often include additional training; new policies and procedures; and increasing monitoring, audits, and inspections—all designed to reduce the risk of recurrence. But what if the compliance crisis had more to do with a dysfunctional corporate culture than a missing operating procedure? Can additional bureaucracy actually increase the risk of noncompliance? This article explains how legal counsel can use a compliance crisis to examine the role of corporate culture and take actions that better reduce compliance risks.

Corporate culture consists of the set of shared beliefs and behaviors that determine how an organization conducts business and how it treats its employees, customers, and stakeholders. It is the secret sauce that makes an organization unique, the glue that holds it together, or the flaws that weaken it. An organization's culture reflects the dominant leadership and governance styles, language and symbols, definitions of success, standards of behavior, reward and recognition systems, legends of the founders, rituals, and any other tangible evidence of what the organization values. Culture is informal and unpublished, but can be detected through close observation as well as formal processes such as focus groups and anonymous surveys.

Corporate culture may or may not reflect written organizational charts, policies, and procedures. For example, a company may paste "safety first" logos on hardhats, company vehicles, and restroom walls. But if safety standards are routinely disregarded to meet production goals, and those who do so climb the advancement ladder the fastest, corporate culture weakens safety performance. In contrast, some companies pride themselves in successfully aligning safety policies with the behavior of employees and even outside vendors and counsel. More than once when I received calls from employees of a large energy client while driving, I was instructed to pull over or the call would be postponed, and I quickly learned not to protest. That company, in fact, has a strong culture that values safety as the highest priority.

A strong and healthy corporate culture can result in competitive advantages. Virtually every issue of the *Harvard Business Review* and best-selling business books tout the importance of a strong corporate culture to increase employee retention, engagement, creativity, and alignment with the company's objectives. Companies with a strong culture generate substantially higher annual revenues and customer loyalty than similarly situated companies with a weak culture. A strong corporate culture increases the predictability of employee behavior, shared responsibility, ownership for outcomes, and trust between employees and senior management. Organizations with weak cultures sometimes attempt to compensate with increased formalization of organization structure and more stringent policies and procedures that reduce discretion. These efforts tend to stifle creativity and teamwork and drive off the most talented and upwardly mobile employees, thereby further weakening the company and its culture.

A strong corporate culture also creates a climate in which employees more likely maintain high ethical standards, comply with the law and company policies, and avoid common workplace temptations such as embezzlement of company property. The importance of corporate culture is now reflected in the Federal Sentencing Guidelines for Organizations, which are designed to "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." Part B2.1 of the Guidelines identify seven key elements of an effective compliance program that companies must demonstrate to obtain leniency in sentencing: (1) procedures that prevent and detect criminal conduct; (2) leaders vested with authority and responsibility who understand and oversee the compliance program to verify effectiveness; (3) procedures that deny leadership positions to those who have engaged in misconduct; (4) effective training that communicates standards and procedures of the compliance program; (5) monitoring and auditing compliance and maintaining reporting mechanisms; (6) providing incentives and disciplining misconduct; and (7) responding quickly to allegations and modifying the compliance program as needed.

More than one company has hired consultants to draft a code of ethics, prepare a written compliance program, and roll out the program with speeches and fanfare. New employees may receive training that informs them where to find compliance program documentation on the organization's website. But the company's formal compliance program may never influence behavior and form part of the fabric of the corporate culture. Instead, the written compliance program sits idle on a bookshelf, largely forgotten. Written compliance program documentation constitutes a less important "secondary mechanism" for embedding culture. According to MIT Professor Edgar Schein, the more important "primary mechanisms"

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to create organizational culture include (1) what leaders pay attention to, measure, and control; (2) how leaders react to critical incidents and organizational crises; (3) how leaders allocate resources and rewards; (4) deliberate role modeling, teaching, and coaching by leaders; and (5) how leaders recruit, select, promote, discipline, and terminate organization members. Edgar H. Schein, *Organizational Culture and Leadership* 236 (4th ed. 2010). If each primary mechanism listed above does not reflect the high value placed on compliance and ethical conduct starting at the top of the enterprise's leadership, a company's compliance program may never become ingrained in the company's culture.

Attorneys typically receive no training in corporate culture and organizational behavior as part of their legal education, and rarely do they consider corporate culture as a factor contributing to ethical lapses and noncompliance. For many lawyers and their institutional clients, corporate culture falls more in the domain of business consultants. An entire cottage industry exists of organizational behavior consultants and leadership coaches dedicated to helping companies transform corporate culture to improve performance, profitability, and recruiting and retention of employees. But most companies typically do not call such experts as "first responders" during a compliance crisis. Instead, after mobilizing the proverbial HAZMAT team and other technical experts, most senior management call in-house attorneys and outside counsel to help manage, investigate, and resolve serious compliance issues. This approach makes sense from many perspectives. In-house attorneys and longtime trusted outside counsel usually understand the intricacies of the business and idiosyncrasies of key personnel. Specialized white collar counsel can augment the team and provide objectivity. The legal team will have a front-row seat to the crisis at hand and can usually best lead the internal investigation. However, a narrowly tailored traditional internal investigation may miss the bigger picture.

Internal investigations necessarily focus on the important short-term purposes of quickly identifying and resolving compliance issues and responding to high-stakes government investigations and enforcement actions that can result in substantial exposure to the corporation and its officers and senior managers. *See generally* Craig D. Galli, *Internal Investigations of Environmental Crimes*, 45 Envt. L. Rep. (Envtl. L. Inst.) 10352 (Apr. 2015). As important as these short-term objectives may be, legal counsel and their clients miss an extraordinary opportunity if they do not use a compliance crisis as the vehicle to ask hard questions regarding whether systemic weaknesses in corporate culture contributed to the compliance crisis at hand. Embracing a compliance crisis to address deficiencies in corporate culture may be a company's best opportunity to make long-term changes to reduce risk.

When lawyers conduct internal investigations after a compliance crisis, they primarily focus on the facts surrounding what happened, including specific failure mechanisms, laws and policies violated, and persons involved. The fact finding and recommendations generated by internal investigations (or compliance audits) generally focus on the secondary mechanisms affecting corporate culture. Few internal investigation reports expressly address the aspects of corporate culture that contributed to the violation. Jenner & Block's internal investigation of GM's defective ignition switch constitutes a noteworthy exception. That report catalogues the dysfunction in GM's corporate culture and management style (at least of low-level managers), including persistent reluctance to raise concerns, fear of retaliation, failure of lawyers and engineers to elevate significant issues to key decision makers, reluctance to take notes during meetings for fear of discovery in litigation, proliferation of meetings and committees to study the problem in lieu of developing action plans, silo mentality, and the now famous "GM nod" (everyone in the room nods in agreement but nobody is assigned responsibility or held accountable for plan implementation).

Importance of the "Burning Platform"

Over time, most companies undergo culture changes for a variety of reasons. As a company grows in size and complexity, to avoid chaos company founders must impose more structure and regimentation. Shifts in the competitive market, technology advances, and mergers and acquisitions all impact corporate culture—for good and bad. Most experts believe that external forces can affect and change corporations and their cultures more readily than internal, strategically driven initiatives. An organization's response to external forces can result in growth or stagnation of corporate culture depending on the organization's response to externalities. Failure to value and nurture the strengths of an organization's culture during times of crisis, and general lack of institutional commitment to continuous improvement, can result in diminution of an organization's cultural strengths over time.

Deliberately and strategically adjusting the primary mechanisms to strengthen corporate culture in order to improve performance can prove extremely challenging. Even in weak cultures, employees resist change. Employees fear instability and disruptions in equilibrium and routine. Senior management and coalitions of employees fear any change that may require them to relinquish power and privilege. Most people are reluctant to alter behaviors and habits if they believe what worked in the past will work in the future, unless they see an imminent threat that triggers strong emotions and motivates a change in behavior.

Change is so difficult that some commentators suggest that crisis conditions provide the best—and perhaps the only—opportunity for effectuating corporate cultural transformation. This approach, known as the "crisis theory of change," stresses the deployment of heightened emotional responses and activation of survival instincts that occurs during and immediately following a crisis situation. A crisis lays bare the collective strengths and weaknesses of the deepest elements of an organization's culture. It can force management and employees to reassess, discredit, and unfreeze dysfunctional elements of the current dominant culture.

The metaphor commonly used to describe the sense of urgency needed to stimulate change is the "burning platform," which originates from the 1988 Occidental Petroleum Piper Alpha offshore oil platform tragedy in which workers were forced to decide whether to remain on the exploding platform where they faced certain death, or jump 150 feet into the freezing North Sea. One hundred and sixty-six crew members and two rescuers perished. Subsequent investigations revealed that the accident resulted from poor design, Occidental's decision to continue production rather than shut down operations during a major maintenance project, and the crew's faulty belief that they lacked authority to shut off production even when they could see the platform burning around them. Since then, the burning platform metaphor in organizational and business literature describes the urgency and commitment felt by leaders and their employees to attempt major organizational change rather than lose the enterprise.

Some experts in corporate culture transformation are quick to point out that the urgency and commitment to effectuate change may be facilitated by an actual crisis, but change can occur without a crisis; it is just more difficult to develop the emotional commitment and sense of urgency to support change. However, they warn against intentionally manipulating information to fabricate the appearance of crisis in order to instill urgency. Such an approach lacks authenticity, rarely works, and is usually counterproductive. Rather, the critical ingredients to effectuate change include an accurate, insightful view of current reality and the risks facing the organization coupled with the courage and resolve to take the plunge into the icy waters of uncertainty inherent in any fundamental shift in collective behavior and attitude. Legal counsel's thoughtful teasing out of possible cultural factors that contributed to a compliance breakdown can provide the impetus senior management needs to launch a thorough, critical reassessment and rebuilding of an organization's culture.

Even though a compliance crisis may not be necessary to effectuate improvements in corporate culture, failing to embrace a compliance crisis as a catalyst for change not only constitutes a lost opportunity but may trigger psychodrama that further entrenches corporate dysfunction. Professor Edgar Schein notes that some companies develop a type of organizational neurosis and become chronically dysfunctional from repeatedly failing to learn from and positively respond to a series of crises. Such organizations develop a systemic bias against proactive problem solving.

In-house and outside counsel normally do not, and cannot, assume the role of change agent to guide the culture transformation process. But an internal investigation of a compliance crisis places counsel in an ideal position to champion senior management's critical self-examination of the company's culture. Counsel may have the best view of the burning platform and the best opportunity to document it if they know how to recognize the red flags of corporate culture dysfunction.

Identifying Corporate Culture Red Flags

Business schools routinely include case studies of the cultural dysfunction that contributed to the ethical lapses at Enron and other failed companies. Even without this training, counsel conducting internal investigations can and should become attuned to the commonsense indicia and red flags of serious corporate culture weaknesses. The following describes five leading indicators of corporate culture dysfunction that can be reflected in the findings of internal investigation reports or at least orally reported to senior management. Most of the red flags identified below may be ascertained during witness interviews, document review, and observations. Confirming impressions with trusted human resources personnel and senior managers is a valuable but sometimes overlooked technique for spotting cultural dysfunction.

Widespread employee disengagement manifests itself with high employee turnover, absenteeism, and high accident rates; general lack of enthusiasm, creativity, team effort, and sharing of information across departments; overqualified employees doing menial tasks; widespread customer or stakeholder dissatisfaction; marginal discretionary effort by employees; and departure of the most talented employees to work for competitors. During one internal investigation, several employees conveyed a general malaise: "it feels like the ship is slowly sinking," "nobody seems to care," and "everyone has their resume on the street." Not surprisingly, the compliance record of the operation was abysmal. While counsel would not normally ask whether or not an employee felt engaged or disengaged, indications of employee disengagement may naturally surface during interviews. Counsel should note when employees state that they do not feel their concerns are taken seriously, do not have sufficient resources to do their work, or do not feel coworkers or management are committed to doing quality work. Such comments correspond to the classic indicators used to measure employee disengagement. Whether counsel communicates these observations and findings in writing or orally to senior management is a decision that requires careful consideration beyond the scope of this article.

Numerous work conditions contribute to employee disengagement, including excessive internal competition, micromanagement, arbitrary decision making, perceived injustice, nepotism, hostile work environment, careerism, tribalism, tunnel vision, bunker mentality, turf consciousness, and many others. The most frequent reason given for low employee engagement is dislike or lack of trust of one's immediate supervisor. The darkest side of employee disengagement has been humorously compared to a crew team on the Potomac River where three people are rowing their hearts out, five are taking in the scenery, and two are trying to sink the boat. A security manager for a large utility reported that the majority of vandalism and sabotage incidents in his company originated from disgruntled current and former employees. A corporate culture that contributes to employee disengagement can foist far-reaching negative consequences on a company's compliance record, whether the disengaged employees are merely joy riding rather than manning their oar, or are deliberately trying to sink the boat.

The dysfunctional compliance approach of some companies can be best described as a pervasive attitude of defiance. While the company may have a compliance program; chief compliance officer; and environmental, health, and safety manager, the disdain for regulators and governing regulations may be palpable at every organizational level. Officers and senior managers send mixed messages to mid-level managers and supervisors, which employees interpret to mean "meet production goals at any cost, just don't get caught." Employees who cut corners on legal compliance and ethics may receive no discipline, but instead receive subtle rewards and encouragement. One commentator described companies with a pervasive disrespect for the law and ethical standards as a Wild West "Yahoo Culture." *See* Marianne M. Jennings, *The Seven Signs of Ethical Collapse* (2006).

A culture of neglect also evolves in some organizations. Rather than overt defiance of legal requirements and ethical standards, little effort is made to advise employees regarding the existence of legal requirements, company standards of ethics, or of a compliance hotline. No one seems ultimately responsible for identifying and managing risks, updating policies and procedures to reflect changes in the law, or monitoring compliance. The EHS manager focuses almost solely on matrices such as lost time rates. A certain compliance blindness and unintentional ethical failure grow over time. The cause of this culture can often be found in a senior leader who is incompetent, inexperienced, preoccupied with personal affairs, or near retirement and effectively checked out. The organization drifts listlessly without oversight and accountability, giving way to unintentional although severe noncompliance. During the internal investigation, it may become readily evident that otherwise well-meaning and engaged employees are unfamiliar with legal requirements and do not know who is responsible for compliance.

During an internal investigation, employees may readily say, "that is not my job," "we don't have access to that information," or "our safety manager is responsible for that issue," which are all symptoms of a silo mentality. In silos, each business unit may have its own distinctive subculture and speak distantly, despairingly, or not at all of other departments. Employees lack an ethos of teamwork and trust, a shared vision of the organization's values and objectives, and joint commitment to success and continuous improvement. Employees jealously guard their own piece of organizational turf. Nothing in the company's reward system incentivizes proactive effort to cooperate or consider anything outside one's narrow job description. Compliance problems may be widely known among rank and file employees, but never reported up the chain. Employees prefer to keep their heads down and may even ignore significant compliance problems. When crisis strikes, fingers point. The internal investigation may reveal that had information been shared between departments, noncompliance might have been averted.

Internal investigations can also uncover *implementation paralysis*. Responsible employees may have accurately identified a serious compliance issue, reported it to senior management, prepared a thoughtful corrective action plan, and allocated sufficient resources for plan implementation, but somehow the problem never reaches final resolution. Unresolved compliance issues drag on for months or years, exposing the company to substantial regulatory liability for repeat violations and punitive damage claims from third parties. The cause of implementation paralysis may be one of the most difficult forms of cultural dysfunction to diagnose and remedy because there are many possible combinations of causes, including an autocratic leader who does not know how to trust, delegate, and empower those responsible for implementation; excessive bureaucracy, which creates chokepoints that delay or disrupt project implementation; unclear roles and decision modes; lack of process to resolve disputes regarding project implementation; subtle or overt punishment of innovators; failure to prioritize projects; and organizational hubris, which assumes the organization possesses the internal expertise and experience necessary to design and implement needed improvements when outside expertise and perspective are desperately needed.

Counsel's Role to Enhance Culture

As part of an internal investigation, counsel can undertake five activities to assist an organizational client enhance its corporate culture. First, after compliance crisis strikes, counsel can recommend to senior management that the scope of the internal investigation include identification of any indicators of corporate culture dysfunction. If any are identified, counsel may recommend engaging organizational behavior consultants to assist in formulating a longer-term process to more formally assess and address corporate culture deficiencies after the crisis has abated. These experts routinely perform the following tasks as part of routine evaluation of compliance programs or in response to a serious noncompliance event or ethical lapse: analyze compliance history and ethics hotline reports; conduct a gap analysis of ethics policies, training, and reporting procedures; conduct anonymous employee surveys, interviews, and focus groups; identify subcultures within the organization that may be out of harmony with the desired overall corporate culture; analyze employee recruiting, retention, and training; and provide a report with recommendations that include benchmarking, best practices, and leader coaching.

Second, counsel should avoid the temptation of recommending additional written policies, procedures, monitoring tasks, training modules, and increased bureaucratic oversight while reducing operator discretion without carefully evaluating the adequacy of the existing compliance program elements and how they are implemented. The default assumption that noncompliance can be cured with a thicker set of policies and procedures reflects an old-school naïve approach to management and leadership. Few sophisticated companies today operating in heavy industry or natural resource extraction lack "secondary mechanisms" of a compliance culture. Additional detailed compliance tasks imposed in a top-down autocratic manner without consensus building may do nothing to reduce compliance risks. The rigidity of formalized and detailed procedures might actually stifle the core competency of teamwork and creative problem solving needed to tackle complex compliance problems. Depending on the nature of the noncompliance issue and findings of the internal investigation, a better response may be to improve the flow of information and increase teamwork with only minor adjustments to existing policies and procedures.

Third, one of the most difficult decisions facing senior management in the aftermath of a compliance crisis is employee discipline. Some companies routinely terminate all employees who had any causative role in the serious noncompliance event. This approach may increase compliance problems: employees may become loath to self-report compliance issues or cooperate with candor in an internal investigation. Other companies view noncompliance as a necessary cost of doing business. If an employee is productive and highly valued, management forgives and forgets even the most egregious and intentional noncompliance. This approach can prove disastrous. Prosecutors view management's failure to terminate an employee guilty of serious compliance violations as evidence that management condoned the illegal conduct. Legal counsel can assist the client understand the risks of excessively punitive and overly lenient approaches to employee discipline.

Fourth, counsel may discover or confirm as part of the internal investigation that the leadership style of a senior officer or manager discourages candid feedback and communication. Autocratic or insecure leaders (and some of the worst leaders exhibit both traits) routinely shoot the messenger and surround themselves with servile middle managers who pressure others in the organization to conform. Autocrats sometimes display genuine surprise when the internal investigation reveals that the noncompliance was widely known within the organization but unreported up the chain. If counsel has the leader's trust and confidence, she may tactfully help the dysfunctional leader recognize how his leadership style may chill the sharing of critical information. Where this message cannot be delivered with candor to the leader, counsel may recommend engagement of an outside management consultant to conduct an anonymous 360-degree review of all senior and mid-level managers.

Fifth, counsel must be role models and gatekeepers of ethical conduct. If the company's lawyers do not have the reputation for complete integrity, they will assuredly lack the credibility needed to conduct internal investigations or provide guidance regarding ethics and compliance. Recent corporate scandals include numerous examples of lawyers participating in or leading the unethical conduct within their organizations, eliminating any positive role they could have played to check unethical behavior.

Today, more than ever, sophisticated organizations need counsel who calmly and confidently encourage the client that the platform burning around them provides a unique opportunity to assess and improve corporate culture. A thoughtful, probing approach to an internal investigation of a compliance crisis that connects the noncompliance with indicators of corporate culture dysfunction can provide senior management the impetus needed to reassess, reboot, and strengthen the organization's culture in a manner that reduces future compliance risks. Counsel and the corporate client may need courage to utilize a compliance crisis and the internal investigation that follows in this manner, rather than focus exclusively on the traditional short-term purposes of an internal investigation—but a crisis provides a rare opportunity to meaningfully transform corporate culture.