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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.

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