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Writing compliance advice that employees can use, Part 2: Writing the advice

By Scott L. Garland, JD, CCEP

This two-part article focuses on lessons I 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 for advising about 120 attorneys on how to handle their investigations and trials ethically. A lot of my advice was written because of the high stakes involved: 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 just correct but also effective, memorable, and followable in real-time.

The first part of this article, in last month's issue, dealt with gathering the facts, specifically dealing with the advice-seeker's stress, understanding the facts and issues, and identifying the appropriate level of risk tolerance.^[1] This second part deals with how to actually write the advice.

Writing the advice

Similar to what I advised in Part 1 about writing down the facts, whether you write down your advice might depend on company practice and whether your written advice will be covered by attorney-client privilege or the work product doctrine. But if you do write it down, the following methods will make it more effective.

Analyze what the employee wants to accomplish, not just what they propose

In the first part of this article, I recommended that you first gather facts about the issues the employee thinks are important and then go beyond. That applies to your analysis too.

Going beyond often involves identifying issues the employee missed. But it should also include analyzing not just what the employee proposes *to do* (the what and the how) but also what the employee wants to *accomplish* (the why), which is often just as vital.

Sometimes the employee proposes something impermissible, or something permissible which is a bad idea. If you analyze only the proposed course of action, your answer will be "no." But if you focus on what the employee wants to accomplish, your answer will likely be, "not this way, but here are some other potential solutions." Even more useful than ruling out an unacceptable solution is suggesting acceptable alternatives.

Recommend control and mitigation strategies, both old and new

To help an employee or company navigate a tricky compliance situation, you often need to recommend control

and mitigation strategies to help prevent and detect possible missteps. Some might be part of your company's standard operating procedure. But consider whether others might also be prudent. Additional mitigations and controls might allow you to get to yes quicker or to offer a wider range of acceptable solutions. Or they might make stakeholders more comfortable about making a close call because the risk is managed through better safeguards.

Be careful, though, to specify which of your recommendations are mandatory and which, if any, are optional. Otherwise, others will assume that all your recommendations are mandatory.

Recommend discussing the advice with other stakeholders

When an employee seeks your advice, it is easy to get tunnel vision and focus solely on that employee and the problem-solving exercise. But your advice will likely concern others: not just those who must decide whether to follow your advice but also those responsible for, affected by, or needing notice of the situation and the solution.

So, identify those stakeholders and document that they should be told of your advice, that you are willing to discuss it with them, and that certain approvals are necessary (if any) before taking subsequent action. The situation and company practice will dictate who must communicate all this to the stakeholders: the employee, you, or someone else. But consider offering to help if the employee is nervous.

Discussing the advice with other stakeholders is a good idea, even if you or the employee can decide what to do without further approval. Keeping others in the loop can gain their support, teach them how to handle similar situations, and encourage them to seek your advice in the future and direct others to do the same.

Recommend documenting compliance decisions and actions

The emphasis on problem-solving that can focus you away from recommending proper communication can also focus you away from recommending proper documentation. But proper documentation is essential. Rock-solid advice and meticulous decisions and actions cannot guarantee freedom from subsequent complications or controversy. Things might still go wrong. That's why it's called "risk management" rather than "risk elimination."

If things do go wrong, documentation can prove to management or oversight officials that those involved paid proper attention to compliance and ethics and made reasonable choices at the time. So, include proper documentation as part of your standard written advice and recommend the employee document any compliance decisions and actions taken after considering the advice.

Be clear—but how?

Well-written advice is clear. But few tell you how to achieve clarity. These methods work.

BLUF: Bottom line, up front

Start with the "bottom line, up front" (BLUF), the military's tool to begin each communication with the information the reader needs to know, stripped of background and analysis. The BLUF allows a reader to quickly understand your recommendation without having to wade through how you got there; the reader can read further if they want to understand the background and analysis better. The BLUF also forces you, as the writer, to clarify in your own head what you are really trying to say.

Although your written memorandum begins with the BLUF, the BLUF might or might not be the first thing you

write. But it should be the last thing you review before finalizing your draft. Advice sometimes changes from draft to draft, so at the end, ensure your BLUF reflects your final thinking.

Use many headings and subheadings

Use headings and subheadings liberally. In fact, it often helps to write your headings and subheadings first. Doing so will help speed up the writing process as you separate tangled thoughts into more organized chunks.

Headings and subheadings also lead the reader conceptually and visually through your thought process. Don't worry about the extra page space that headings and subheadings take up. Better clarity more than makes up for the added space. They guide your reader to your point and through your logic in a way pure prose can't.

Also, don't worry if any of your subsections consist of only a sentence or two. The reader won't mind. Readers prize clarity and brevity.

Separate your advice

Here are the headings to start with: the BLUF, the question, the facts, the rules and principles, the analysis, and your recommendations. This scheme is similar to how lawyers are taught to analyze legal questions. Separating these related areas gives each its due. A separate fact section helps you identify whether you've gathered all the important facts and understand them the same way the employee does. (How often have you advised someone based on one set of facts, only to have the employee return with a fact that alters the whole analysis?) A separate rules and principles section forces you to make them plain and consider whether you've covered the necessary ones. A separate analysis section forces you to engage in real analysis and not rely on rote reflexes. And separating the recommendations from the analysis helps you focus on drafting a clear action plan or set of alternative solutions contingent on different levels of risk tolerance. Separating these sections detangles assumptions, clarifies reasoning, and limits the advice to the situation presented.

Use bullet points or—even better—numbered paragraphs

Numbering your paragraphs helps you and your reader efficiently discuss the advice with attention to specific language. Without paragraph numbers, you and your reader must count pages and paragraphs yourselves to identify a particular sentence or phrase. Nobody likes doing that, especially in an email that lacks page numbers and requires scrolling from paragraph to paragraph. It's much easier to refer to "point 2.4" or "point II.D" or whatever numbering convention you use.

Use short sentences

Use short sentences as often as possible. Conjunctions, colons, semicolons, and dashes can be impressive and sometimes even helpful, but rarely in compliance advice. Longer sentences usually present too many facts or analytical points at once. They are harder to tame, make memorable, and make clear. So, when you see a longer sentence, test whether splitting it into two or more smaller sentences makes things clearer.

Tell people both what to do and what not to do

Give compliance advice two ways: say what to do, and then say what *not* to do. If advising about what to do at a red light, don't just say, "Put your foot on the brake pedal and keep it there until the light turns green." Also say, "Do not take your foot off the brake pedal unless the light is green, and definitely don't put it on the gas pedal."

Why state the advice both positively and negatively? First, everybody prefers a “yes” to a “no.” Starting with a yes shows that you’re an enabler, not a hindrance. Second, repetition makes the advice more memorable. The positive might be more memorable than the negative, or vice versa. The employee will remember whichever resonates more with them. Third, stating the advice both positively and negatively helps to avoid ambiguity and rule out unintended exceptions. (“Well, they told me to do ‘X,’ but they never said explicitly that I couldn’t do ‘Y.’”)

So, give advice both positively and negatively. Don’t skip one or the other.

Make the recommendations as direct and brief as possible

What ultimately makes compliance advice useful is a clear set of recommendations. Although your analysis can be thorough and encyclopedic, your recommendations should be stripped down to simple, direct, succinct bullet points. They should, as mentioned, look like a recipe, not a treatise on cooking.

Your recommendations should therefore be shorn of most analyses. They should instead specify what absolutely must be done, what absolutely must not be done, what choices can be made among optional solutions (identified by the level of risk tolerance for which the optional solutions are appropriate), and the order in which to take these steps. This might require several bullet points and sub-bullets. But they should be easy to follow if each is brief, direct, and unambiguous.

Identify which recommendations are appropriate for which levels of risk tolerance

As noted in Part 1 of this article last month, while gathering the facts it can be helpful to identify the company’s level of risk tolerance around the issues you’re advising upon. Now is the time to recommend a strategy appropriate for level and identify other potential strategies across the spectrum of risk tolerance levels that the company could choose from. You don’t necessarily need to go into detail about these alternatives. But identifying them nonetheless might spark further discussion about which option to choose.

Tell people when to stop and come back for more advice

One of the hardest parts of giving compliance advice for an unfolding situation is knowing when to stop. This often happens when advising an employee how to respond to a situation that might take several turns, each of which might require a different response, and then perhaps another. You want to cover all the contingencies to give the employee the best chance of success. If you can do so clearly, then go ahead.

But if your advice looks like an if-then flowchart of rectangles and spaghetti, it might be too complex. Everyone wants to game out the first chess moves. But it’s hard to go much further. The possible situations and responses can multiply geometrically; the specific facts matter and can be hard to predict. So, trying to game out multiple possible situations can cause you to spin your wheels, take too long to write, and write increasingly useless advice.

The solution: tell the employee when to stop and come back for more advice. That way, they know that your door is open and that there will be more advice when needed.

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