

ADDO DOCKET

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Explain the “Why,” Not Just the “What”

Skills and Professional Development





Teaching and training are a part of everyday life for most in-house attorneys. Whether it's providing training to the company workforce, or completing continuing legal education (CLE) requirements, we've both led, and learned from, training exercises. I imagine many of you have talked to managers about how to give effective feedback to subordinates, how to educate sales teams to comply with the Foreign Corrupt Practices Act (FCPA), or how to talk to your boards about best practices in corporate governance.

One of the challenges we face when preparing training is that we're often trying to satisfy multiple objectives. We want the recipients to grasp the material and be able to apply it as they fulfill their work obligations. Sometimes we also want the record of the training itself, both the actual content and the proof that it was given. This can demonstrate that we fulfilled a compliance obligation, tried in good faith to mitigate an inherent risk, and gave notice to those we might subsequently need to oppose. I'll suggest this: There's a big difference between "you can't say I didn't tell you" and "I know you knew better." We owe it to our companies and our coworkers to educate, not just notify.

How much does the training we receive influence the training we provide? How much should it?

More important than using fancy vocabulary or legal jargon is the need to look for opportunities to speak to the underlying point of the law. Since my company is in the healthcare sector, let's take the US Anti-Kickback Statute, for example, and the word "remuneration" at the core of it.

The first half [42 U.S.C. § 1320a-7b(1)] reads: Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind —

- (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

- (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal healthcare program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than [US]\$100,000 or imprisoned for not more than 10 years, or both.

The second half of this couplet says essentially the same thing, but also applies to those who offer or pay remuneration.

I'll wager (and fervently hope) that almost none of you tosses "remuneration" into a sentence, spoken or written, that isn't either quoting from something or explaining the thing being quoted. We lawyers need to see and understand the statute as it's written, but does everybody? When training employees to comply with a law using a word like remuneration, why not just lead with the "anything of value" definition you'd likely use to explain the word, and follow it with real-world examples of such things? For example, "The kickback prohibition criminalizes behavior that almost every other entity in the retail business of selling merchandise freely engages in (e.g., buy one, get one free; lease a new car and get a flat-screen TV)."

Beyond defining the boundaries of acceptable conduct, I want to teach the principles that are the foundation of those boundaries — and which my students must understand if they are to comply with the law. In a recent training, I pointed out that a physician's prescription is, at heart, a recommendation, and that we instinctively rely on those whom we seek recommendations from to act in our best interest. I then gave examples from my own life. A neighbor sent me to "the best place for steaks in town," and I learned after a pretty good meal that the owner is his uncle. A doctor I saw for allergies examined me for 30 seconds, then wrote prescriptions for two medications that I'd just spent the previous 15 minutes listening to a pharmaceutical representative pitch to him right outside the examining room door. In both cases, I might have gotten the recommender's honest opinion about what's best for me. Yet I had doubts about the motivations behind the recommendation. I concluded the lesson explaining that this is why we have laws that prevent those who direct our medical care from making decisions influenced by personal gain.

After the training, a participant came up to me and said that she'd frequently been lectured on the "what," but this was the first time she recalled getting the "why."

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