

# DOCKET

*INFORMED. INDISPENSABLE. IN-HOUSE.*

## A Remedy to Ethical Ignorance in the C-Suite

### Compliance and Ethics





I've taken some time recently to reflect on the last 28 years of my professional life as in-house counsel and compliance officer for seven multinational corporations and the many business professionals I've had the privilege to work with. One observation I've made is that the directors and senior executives I encountered during these years all shared some common attributes. They were highly intelligent, energetic, conscientious, disciplined, and decent human beings. Most were also ethically ignorant.

By "ethically ignorant" I don't mean they had no moral compass or did not strive to act in an ethical manner. To the contrary, with very few exceptions, every business leader I worked with genuinely sought to do right by others and adhere to the law. The ethical ignorance I'm referring to is their near uniform lack of knowledge about the answers to the following basic questions:

- What defines the "arrow of goodness"?
- What are the key attributes of a strong ethical leader?
- What are the elements of an ethical business decision?
- How is the strength of an organization's ethical culture measured?
- How is the effectiveness of a compliance and ethics program determined?
- What are the fundamental drivers of human behavior in an organization?
- How is the reliability of critical compliance management systems measured and monitored?
- What are the essential questions you should ask your chief compliance officer and other corporate department heads?

Moreover, as often as not, I've observed that corporate executives outside of the law department

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and other corporate functions generally lacked an understanding of existential legal requirements that, if transgressed, threaten the company's survival. I have, for example, worked with top leadership in medical device and pharmaceutical companies who were ignorant of the US Anti-kickback Statute and False Claims Act — two statutes that in 2017 alone cost the healthcare industry US\$2.7 billion in fines and hundreds of millions more in attorney fees and opportunity costs. I have even encountered general counsel who opined that "it was expecting too much for senior leadership" to understand these rules.

The following are three reasons for the persistence and ubiquity of ethical ignorance in the board room and the C-suite.

## **Ethical intuition**

Corporate executives, like the rest of us, possess ethical intuition; a very powerful innate ability to rapidly make moral judgments. It is much easier for senior leaders, who are often pressed to their limits by their day-to-day responsibilities, to rely upon their "gut" to make moral judgments rather than engage in a rigorous process of ethical reasoning. And, although not perfect, the ethical intuition of an experienced and conscientious corporate executive can hit the mark — or come close enough to it — in most circumstances. Consequently, in the absence of a serious legal or ethical crisis, business executives do not feel the need to improve the level of their game.

## **Lack of formal training**

Most corporate executives have never received formal training about how to answer the questions listed above. Consequently, they operate with an incomplete understanding of the actual state of their firms' control environment. Only once in my career did I work with a CEO who was passionate about building an information pipeline regarding the reliability of key compliance controls. I have yet to encounter a board member who knew the right questions to ask me as a compliance officer. Many corporate executives may have taken an ethics course in college or business school. However, such courses are often taught by philosophy departments that ground their curriculum in a canon of moral discernment that is not particularly useful in making business decisions. When is the last time you heard a business leader make a tough call based on the teachings of Aristotle, Hume, Kant, Hegel, Bentham, Mill, or James? Please send me an email if you've witnessed this — I'll stand corrected.

## **Arrogance and social dominance**

The corporate executives I've worked with all possessed healthy egos. This is not hard to understand. Most were exceptionally intelligent and experienced. To win a top job in any organization, one needs to project confidence. And, of course, their egos were stroked by their designation as one of the "anointed ones" with big paychecks and plush offices. As social scientists have observed, it is very common for those put in positions of power over others to believe that they are actually "better" than their subordinates. This makes it exceedingly difficult for more knowledgeable employees in the lower ranks to teach their leaders new skills and less likely that leaders will request tutoring.

Despite these headwinds, reducing leaders' ethical ignorance is an essential task in building an effective compliance and ethics program. We corporate counsel and compliance officers are in a unique position to pursue this end. Consider taking the following steps to do this vital work.

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## Become an expert

You can't teach what you don't know. Before you can help your leaders, you must do the work necessary to find practical answers to the questions detailed above that will work in your organization. There are many possible sources of this information — including the articles I've penned for this publication for the last 15 years.

## Eat your own dog food

Before advocating an ethical decision-making framework, ethical leadership model, compliance program metrics, or monitoring program, try it on for size yourself. For many years I've advocated the use of a systems evaluation methodology grounded in the Federal Sentencing Guidelines' seven elements of an effective compliance and ethics program. Before foisting it on the business or other corporate functions, I applied it in my own department. This not only facilitated the development of an annual action plan, it also helped my team and I optimize the methodology's utility. Do the same in your department and you'll greatly improve the chances that others will follow your lead.

## Take a courage pill

Approaching your board or your senior management team with a recommendation that they improve the level of their game will take guts. But you face a Hobson's choice: You can either play it safe and permit your leaders to wallow in their ethical ignorance, or you can seek an effective way to administer the "medicine" they need and get them to swallow. Despite the near impossible challenge of persuading arrogant, self-assured superiors to change life-long habits and embrace new ones, I strongly recommend you take the latter course.

Taking the steps outlined above to help your leaders reduce their ethical ignorance and pursue ethical excellence will never be easy. However, doing so may be the best hope you have of providing your leaders the information and the reasoning skills necessary to avoid the "rocks" and safely guide the ship you and your colleagues aboard to its intended destination.

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