

Top 10 Habits of Successful Corporate Counsel: #9 Having a Compliance Mindset and Backing Up the Pitcher

Law Department Management



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Many years ago, I looked at my mortgage statement online and noticed that I had a zero-balance investment account as well. I recall thinking this was odd because I did not open any such account. It was a fleeting few seconds for me, one that caused me no harm, but it turned into years of legal and compliance challenges for my bank. Wells Fargo was charged civilly and criminally with alleged wrongdoing in opening “phantom” investment accounts on behalf of customers. This brings me to the #9 top habit of successful in-house lawyers as part of my top 10 series for the *Docket:*

#9. You thoroughly understand your company’s compliance and corporate governance, including the ability to take off your legal hat and put on your compliance hat to gain a better understanding and perspective on the problem.

To avoid problems like those faced by Wells Fargo, it is my firm belief that the very best corporate lawyers deeply appreciate the differences between the laws and regulations with which companies must comply versus the compliance and governance setting forth how they will comply. You should consider the law and compliance separate languages as different as Chinese and French. The more that you have that appreciation, and begin to truly study and become articulate in both languages, the better and more effective the in-house lawyer that you will become.

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What is the reason for this view? There are many, but I will give you a few key ones. First, lawyers cannot feign understanding of compliance and governance. Compliance has blossomed into a vital skill and profession with now decades of best practices that have been refined and improved.

I encourage you to find a compliance “buddy,” a compliance colleague to have lunch with once a month and pick their brain about the different compliance components of the company’s internal control framework (risk assessment, written standards and controls, training and communication, management monitoring). This will help not only your compliance lingo, but gain a greater sense of how these tools work inside the business to prevent things going sideways.



Find a "compliance buddy" to engage with once a month to become more knowledgeable on the company's compliance and corporate governance. Asia Images Group / *Shutterstock.com*

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Second, if you are not familiar with the company’s compliance and governance, you are seen as not familiar with the business. Compliance has become such a deep and rich part of a corporation’s fabric. In many ways, it is far more embedded into the business than lawyers and the legal function. Some form of compliance check touches every company transaction in one way or another. Legal touches a fraction of those transactions. If you want to get close to the business, get close to compliance.

Third and most importantly, you become a more well-rounded problem solver. In general terms, compliance and governance seeks to prevent liability — encouraging transparency and good

decision making in the process. Legal seeks to lessen liability. The best lawyers move past the obvious overlap between the law and compliance — instead embracing the differences in providing their advice on the law versus seeking compliance with that law.

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Compliance is like backing up the little league pitcher

My son loves baseball. When children are younger, even simple plays like the catcher throwing the baseball back to the pitcher after each pitch is an adventure. The coaches taught my son, as the second baseman, to back up the pitcher on *every* throw from the catcher as a safety check in case the throw to the pitcher was errant, allowing runners to advance. I always thought a great compliance officer who was moonlighting as a little league coach came up with this approach. It is a system to prevent a liability.



Backing up the little league pitcher is a metaphor for how successful compliance officers minimize risks. Taira / *Shutterstock.com*

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This baseball concept helps explain why I think the best in-house counsel master compliance and governance as best they can. Increasingly, our legal advice has depended on attempting to prevent the liability altogether or minimizing as much as possible. The risks and potential damages and fines are so large, so potentially material to the company, that damage control AFTER the fact is less and less acceptable. Wells Fargo faced more than US$3.5 billion in fines from its alleged conduct. When you are advising the company, the mitigation steps have become the core of the advice and where most business executives are laser-focused on how to prevent a potential legal problem. I have found that my legal advice and mitigation steps are far more effective and relatable to the business when I *force myself* to take off my lawyer hat and attempt to put on a compliance hat or consult my compliance buddy. I need a system to prevent a liability.

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I encourage you to push your compliance and governance understanding beyond where it is today. If you are working through a legal problem, you should start by understanding how that issue cranks through the compliance systems and processes all the way from starting in the business to governance and oversight by the board of directors. If you start with that end-to-end view, separate from the legal issues that need to be addressed, you will begin to see things differently and change the perspective of your legal advice. You will find and see systems to prevent or lessen liability. But they will be less tied to the law and regulations underpinning your advice and more closely tied to the way the business works.

I spoke to my compliance buddy, Neil Falkingham, chief compliance officer at GSK. I asked him to give our readers his best tips on how lawyers can look at problems with more of a compliance lens. He recommended the three Cs:

Culture

- Do you understand the country, company, or business culture? What leader behaviors reinforce culture (good and bad)?

Common sense

- What was expected? Policies, processes, and systems are there to help reinforce doing the right thing, albeit not always in the easiest way!

Controls

- Do you understand what controls were or should have been in place? Were these ineffective, obviated, or not in place/ in use?

Just last month, Wells Fargo had consent order restrictions removed by US regulators for this

conduct identified in 2016 (for which the company and its employees should be immensely proud, and I remain a loyal customer). Warren Buffett famously said that it takes decades to build a reputation and five minutes (5Ms) to destroy it. It can also take decades to rebuild your reputation. Understanding compliance better will help you give greater meaning to your legal advice. You will see solutions that you did not see before. You will bring greater clarity to your mitigation steps. Use the three Cs to avoid the 5Ms.

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