

B. Todd Jones, Chair
Advisory Group on Organizational Guidelines
To The United States Sentencing Commission
c/o Office of Public Affairs
United States Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle, NE
Washington, D.C.20002-8002

October 29, 2002

Dear Mr. Jones:

I am writing in response to question 6 “ Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes as opposed to technical compliance that can potentially circumvent the purpose of the law or regulation?” While my response is “yes”, I would like to comment on the question itself without, I hope, parsing it too much.

The question sets “fostering ethical cultures” in opposition to “technical compliance.” It isn’t clear to me whether this is a literary device or, in fact an indicator of one of the unfortunate divisions that takes place when we turn to this subject. An ethics program or compliance effort that includes one to the exclusion of the other isn’t complete.

RULES AND VALUES ARE ALLIES

Business ethics is often defined by a description of two main components, namely, values or the ethical environment on the one hand and compliance with laws and regulations on the other. The difference can be described in terms of that between rules-based and values-based programs. Discussion of the relationship between these two elements has focused largely on their differences and the suggestion that they are divergent dynamics. The problem of defining “rules” and “values” as divergent program approaches rather than necessary program components, means that embrace of one may be considered, of necessity, exclusion of the other. This dichotomy has consequences in implementation of the program.

A recent study of phone line systems that employees can use to contact their companies helps illustrate this. The title “Hotline” which implies a regulatory compliance emphasis resulted in less use by employees than “Helpline” which implies openness to inquiries, counseling of employees and an emphasis on a more open culture.

Codes of Conduct are not legal documents although they may be documents that are

useful in legal actions. While more detailed rules may be found in a company's policies and procedures, Codes of Conduct are communication documents. The danger is that some codes can be too legalistic for employees to read or on the other extreme not augmented by policies and procedures that specify the regulatory framework.

I'd like to suggest that the dichotomy between compliance and values oversimplifies the issue. Now that a number of programs have reached a level of maturity, it may be useful to step back and take a complete look at the elements that make up a good ethics program and how those elements relate to each other. The effort will, I believe, lead to a program that sees rules and values as allies.

WORKING ENVIRONMENT

Law, regulation and company policy do address some issues and questions clearly and decisively. It is equally true that some issues and questions reside in "gray areas" presenting challenges that rules do not address as clearly. Employees need guidance in making decisions where rules do not apply, where the application is not clear and especially where the employee may be unaware of the existence of an applicable rule. In those cases we need to provide two things. The first is communication to help develop ethical awareness and resources to get help. The second is a set of values that permeates the culture and enables an employee in such a quandary to say: "I better get help because I don't know what to do. But what I do know is: "That's not the way we do things around here."

I believe that the commission has shown more than informal interest in this approach. The commission has joined with the Ethics Officer Association, an organization that embraces this broader approach in presenting workshops around the country. Judge Richard Conaboy, the first Chairman of the Commission seemed to commit himself to this in a speech in September 1995. He said: "You must take on the obligation to lead this effort, to be in the forefront, not only by working to ensure that your company's employees follow the law but by embracing and placing at the very top or your company's priorities the basic good citizenship values that make law abidance possible." Judge Diana Murphy made a similar point in a speech to the Conference Board Meeting earlier this year when she asked the rhetorical question: "Can a compliance system work if it doesn't have ethics at its heart?" Our Chairman at Northrop Grumman, Kent Kresa embraces exactly the same sentiment in a statement in which he describes ethics thus. "It's about creating the kind of climate in which people are encouraged to make the right decisions in the first place."

RECOMMENDATION

I would conclude that the Guidelines should send the message that a legal compliance approach is necessary but not sufficient. Companies must encourage the good values the overwhelming number of our employees bring to work. The need to develop and foster structures and a climate that reward employees for following those values at work is as

essential to a healthy corporate ethos as respecting privacy and honoring freedom is to our national ethos.

All that having been said, the task of incorporating this into the guidelines which are essentially a legal scheme will be a challenge. The FAR might guide the way. In regulations on Anti-Kickback Procedures, it offers a number of “reasonable procedures” that a company or organization might have in place to indicate due diligence without mandating any one. This approach, in my view, accommodates the significant differences that companies and organizations have such as size, style of management, demographics etc.

Thus, it would seem to me that a statement that attention to whether or not a company has fostered an atmosphere that promotes ethical activity and gives priority to, in Judge Conaboy’s words, the basic good citizenship values that make law abidance possible should be included. There are a number of “reasonable procedures” a company might have in place separately or together that could offer evidence that this has been done, for example :

- A Code of Conduct that communicates basic company values to all levels of employees.
- Periodic presentations by organization leaders of the importance of values and integrity to the business and to the way we do business.
- Regular sensing of the climate through surveys and audits to assess the ethical climate.
- A confidential company resource that enables employees to get advice, information and counseling as well as make reports.

I am reluctant to suggest that any of these steps should be a requirement or to suggest that any of them are in themselves fail safe but each one is an indicator of an effort to send important messages. Persons examining such evidence would have to exercise due diligence of their own to ensure that what you see is what you get.

Thank you for the opportunity to have this input. I look forward to testifying.

Sincerely,

Francis J. Daly
Corporate Director, Ethics and Business Conduct
Northrop Grumman Corporation.