

CEP Magazine – April 2020 Compliance and legal: Different but aligned

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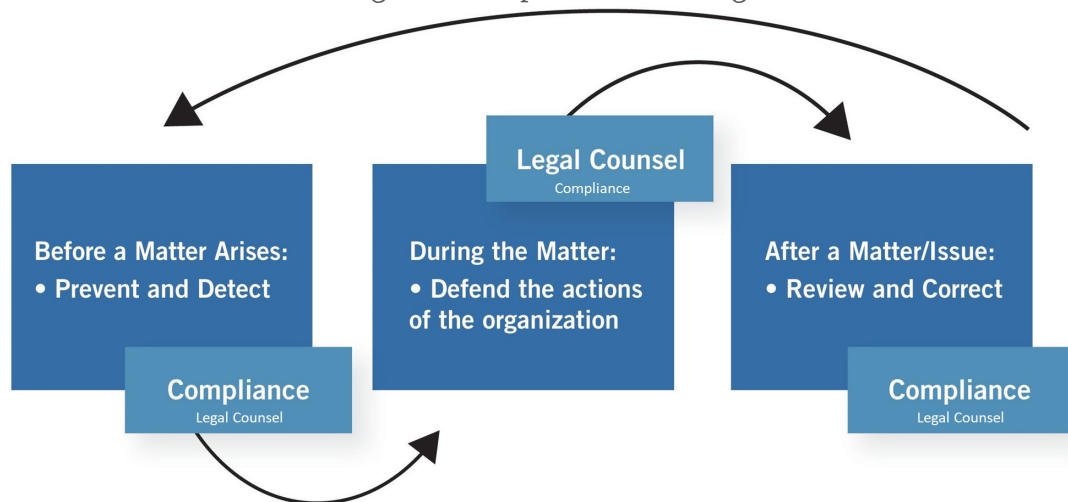
What’s the difference between an organizational legal function—legal affairs, general counsel, etc.—and the compliance function? Several years ago when Deena, a compliance professional, was hired by Destinee, a general counsel, to build the first-ever compliance program in the organization’s history, Deena heard this question a great deal. Even the most experienced compliance professional may still have questions, and there are several possible answers depending on who you ask. We believe it is worth sharing an answer to that question that worked for us.

The different functions

Personnel-wise, a legal function often includes attorneys, paralegals, legal assistants, etc., while the compliance function includes compliance officers, directors, analysts, and other professionals. It is understandable why these differences get confusing, because both of these groups deal with laws, statutes, regulations, and other rules. However, in our view, what distinguishes these two functions is *how* each group deals with these rules.

In a past presentation for the Society of Corporate Compliance and Ethics (SCCE),^[1] Destinee described the difference between compliance and legal using “the matter.” The matter is a legal problem, which could be criminal charges, a lawsuit, an Office for Civil Rights (OCR) complaint, or any other type of action against an organization that requires a legal defense. Figure 1 provides an overview of this difference.

Figure 1: Compliance versus legal



Before the matter

“Before the matter” is when compliance takes the lead by designing and implementing policies and processes designed to *prevent* matters from occurring in the first place. But legal counsel is not absent from this phase. When questions arise as to whether a proposed policy or procedure would keep the organization “in compliance,” legal counsel is invaluable in providing just that—legal counsel. A counselor is best equipped to know what she could defend in a legal proceeding versus what she could not defend.

In addition, during this phase, compliance professionals also design measures that will *detect* and *correct* issues before they become “matters.” According to the U.S. Sentencing Guidelines on Effective Compliance and Ethics Programs (USSG § 8B2.1), often referred to by compliance professionals as the Federal Sentencing Guidelines, prevention and detection are the key responsibilities of an effective compliance program. And because compliance is all about laws and regulations, attorneys support compliance professionals in their prevention and detection responsibilities by providing legal counsel on whether the proposed measures will have the desired prevent-and-detect effect.

During the matter

“During the matter” is the primary domain of traditional legal counsel. In short, something was not prevented (not everything can be), and it became a “matter.” It is here that attorneys and their teams provide legal representation and defend the actions of the organization. This may be via hearings or other judicial and administrative proceedings.

To accomplish this defense, they gather factual evidence, report and provide updates to their internal clients, and negotiate on behalf of the organization. If the matter is compliance related, compliance professionals provide support by gathering compliance-related evidence and providing it to the legal team. Ideally, compliance leaders have or know where to find evidence that shows that the organization had the policies and procedures in place to prevent the matter (i.e., a compliance program, but someone did not follow it or ignored it).

After the matter

“After the matter” compliance once again takes the lead. Using the legal advice received from attorneys, compliance leaders ensure that policies are changed, procedures get created or enhanced, training is conducted, or any number of other activities. The goal of these adjustments are corrective in nature with a goal of preventing the matter from occurring again.

Different but aligned

Thus, compliance and legal functions are different *but aligned* (see Table 1).

Legal	Compliance
<ul style="list-style-type: none">• Advise and protect the organization from legal problems• Defend the actions of the organization	<ul style="list-style-type: none">• Proactively prevent and detect legal/regulatory misconduct• Oversee the integrity of the organizational compliance program and protect internal compliance systems• Support a culture of accountability (especially in management)

Table 1: Legal versus compliance

The goal of this alignment is to provide an organization with reasonable assurance that it is “in compliance” with all the laws and regulations that the organization is required to follow. Compliance and legal are inseparable partners in this work, and both provide services that protect the organization—the ultimate objective.

Takeaways

- One way to look at the difference between legal and compliance is *how* each function deals with laws, statutes, and regulations.
- The *how* can be understood by using “the matter” (i.e., any type of action against an organization that requires a legal defense).
- “Before the matter” compliance takes the lead by designing and implementing policies and processes that prevent matters from occurring in the first place.
- “During the matter” means something was not prevented (not everything can be). Here attorneys provide legal representation and defend the actions of the organization.
- “After the matter,” compliance again leads by making adjustments that are corrective in nature with a goal of preventing the matter from occurring again.

¹ Destinee Waiters and Deena King, “Yin and Yang—Leveraging the Strengths of Legal and Compliance,” 2018 Compliance & Ethics Institute, Las Vegas, NV, <http://bit.ly/3b2xRBZ>.

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