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Promoting an ethical culture: The organizational ombudsman

By Charles Howard

The last decade is replete with examples of organizations in which people have not been comfortable raising workplace concerns and reporting misconduct or have been punished for doing so. Not surprisingly, the number of employees who observe misconduct and who fail or refuse to report it remains stubbornly high, and the 2009 recession exacerbated the situation. Indeed, the Supplemental Research Brief for the 2009 National Business Ethics Survey® documents the correlation between the cost-cutting measures taken and the significant increases in the number of employees who observed misconduct in companies that were prompted by the recession to adopt cost-cutting measures. In light of the findings of this report, now may be an appropriate time to reexamine both how we analyze the problem of employee reporting and the effectiveness of some of the tools that have been developed to encourage employee reporting. The organizational ombudsman is a tool that is particularly well adapted to address this issue.

My perspective on the issue of employee reporting comes from almost 20 years of experience in representing organizational ombudsman programs and from serving on the ad hoc advisory group that recommended revisions to the Federal Sentencing Guidelines in 2004. In researching and writing a book recently published by the American Bar Association, *The Organizational Ombudsman: Origins, Roles, and Operations-A Legal Guide*, I was struck by just how profound the changes have been in our work environment over the past half century. Although many of us are aware generally of the demographic, technology, and globalization forces that have transformed our society and work places, a brief review of just a few of these facts helps to inform the analysis. Consider, for example:

In 1950 the population of the United States was 90% white. By 2005, whites constituted only 67% of the population; and they are forecast to represent less than half by 2050.

Immigration has had a huge impact on our society. By 2000, over 30 million foreign-born persons had arrived in the United States in the previous few decades—with over one third of them in the prior decade alone—with the result that foreign-born Americans and their children represent approximately 1 in 5 Americans.

The role of women in the workforce has grown remarkably over the past 50 years—increasingly in management and professional roles—and combined with a generational shift that has brought with it changes in the aspirations and expectations of younger workers.

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These facts demonstrate that the demographics of the workforce have been under strain from many directions.

Added to the pressures from demographic change have been pressures on the workforce from the greater use of technology and the competition for knowledgeable workers. Gone are the days when one could reasonably expect a career of employment at one firm. Indeed, as of 2004 (and the number would certainly be higher today), a surprisingly high one in four workers had a "nonstandard work arrangement" in which they were on a flexible work schedule, part-time workers, or self-employed rather than a traditional "employee." With the advances in technology and remote access to work computer systems, approximately 80% of workers either work off-site themselves or work with others who work remotely.

Certainly, the workforce reductions that have occurred in the past two years have only increased this phenomenon and the sense of separation or alienation that many people feel between themselves and the organizations for which they work.

All of these forces of change have come together in the increasingly global nature of many of our businesses. Not only do many organizations have to bridge first- and third-world countries with their products and services, they have to link their first- and third-world workers in a common culture that is conducive to protecting their brand and reputation. As both recent history and examples over the years demonstrate, a disaster or breakdown in compliance in one location can have worldwide implications.

What is the point of all of this? It demonstrates that we have an unprecedented amount of diversity; pressure on both people and institutions from the need to compete globally; and a sense that while we may be connected 24/7 with our work, we are less invested in it or perceive our tenure to be short term or subject to forces beyond our control. At the same time, over the past 50 years, our organizations have had increasing pressure placed on them from developments in criminal law, corporate governance, and employment law. The pressures from all of these developments have converged to require organizations to develop codes of conduct, encourage reporting of misconduct, and to investigate and take corrective action where misconduct is uncovered.

Given the forces that have been exerting themselves on our workplaces, it is not surprising that workers still observe misconduct and fail or refuse to report it. This context also helps explain why some of the most common tools for combating misconduct (e.g., compliance officers, hotlines, and whistleblower laws and policies)—while necessary and appropriate—need to be supplemented. This context also suggests two additional observations or insights into the analysis of the problem of reporting misconduct.

The first relates to how we look at the problem. Organizations have tended to focus on reporting misconduct, rather than the broader category of concerns that workers often have. Moreover, institutional responses have often followed existing corporate structure and reporting lines. As a result, there has been a management tendency to view issues through "silos" of categories, such as, for example, "compliance" or "HR," because each of these issues has a different management and reporting structure in most organizations. In other words, organizations have addressed the problem from the top down through existing management structures, rather than looking at the issues from the perspective of the worker. With the current workplace being redefined by demographic and cultural diversity, remotely performed work, and new workers in new positions, it should not come as a surprise that there is anxiety and uncertainty among workers about issues such as:

- What resources are available to deal with problems?
- How can information about reporting workplace misconduct be obtained confidentially?
- How do we resolve disputes with co-workers or supervisors?
- What is the process for investigating or resolving a matter?

From the perspective of a worker, these issues are often intermingled and not seen as distinct, as many reporting structures would seem to require.

Efforts to promote ethical cultures go a long way in addressing these concerns, but organizational culture is a "macro" response, whereas the issues that often must be addressed before a person is willing to make a "report" are essentially the "micro" concerns of an individual in a particular circumstance. Before some people are willing to take action, they may simply want to find out some information without alerting management or HR that they are looking for it, or they may need to be able to talk through their concerns with someone else. Finally, they may need or want to discuss what would be involved if they were to make a report and how it may affect them before they are willing to come forward. If their only choice is to go to an official channel that also starts an investigation or results in official action, at least some of the people with questions or concerns will not come forward, out of fear that they will become embroiled in an unknown process that could adversely affect them. Indeed, this is only human nature and illustrates a limitation in viewing a failure to report as primarily a compliance issue.

The second observation on why people do not report misconduct stems from limitations of the current best practice methods for dealing with a problem. Compliance officers are necessary and have evolved to become a critical element in our corporate world, but they are still the "police." No matter how much they may try to encourage reporting, there will still be those who are reluctant to start the investigative machinery rolling. This may be because they come from a cultural background where reporting on others is discouraged, because they are uncertain whether their suspicions are correct, or for a variety of other reasons. Hotlines do help people raise issues anonymously and confidentially, but the experience of many organizations, documented in a variety of survey results, is that hotlines are used by a very small percentage of workers and rarely for the types of compliance issues that prompted their establishment. In fact, hotlines often receive complaints concerning workplace relationships that are more appropriately within the scope of HR, rather than Compliance, and calls that are ill-suited to the "report and investigate" assumption underlying hotlines.

Likewise, while it has become imperative for organizations to have whistleblower policies (and there are over 250 whistleblower laws in the United States), most of these policies have not really protected whistleblowers. There is very little that such policies can do to address the essentially feudal nature of our workplaces (most people still work for a "boss" even though their paycheck may come from the organization). There is also the problem of retaliation by peers, and the fact that whistleblower policies are hard to reconcile with the acculturation process that we have all gone through (and in some cultures more than others) of not being the "rat." The data from a variety of sources indicate that whistleblowers pay a high price for coming forward; and even if that were not the case, there is a widespread perception that they suffer adverse consequences most or some of the time from making a report. This, of itself, inhibits whistleblowing activity. And finally, even when whistleblower laws do provide coverage, the remedies often come after the damage is done to the whistleblower's reputation and working relationships—damage that cannot easily be undone. Indeed, a study recently published in *The New England Journal of Medicine*[1] reported similar findings for whistleblowers—particularly inside employee whistleblowers—who had successfully used the False Claims Act to obtain recoveries in the pharmaceutical industry.

For all of these reasons, an organizational ombudsman program can be a good tool to fill the gap resulting from the limitations of the other best practice tools. If it is created to be an independent, neutral, informal, and confidential resource, it is a place where workers can go to get information and learn about options for raising issues or reporting misconduct, without having to categorize first it and without compromising the confidentiality of their concerns or starting the investigative process. Organizational ombudsmen help individual workers identify options to deal with any workplace issue, and thus do not require workers to make a decision on their own about whether their issue is a compliance problem, an HR issue,
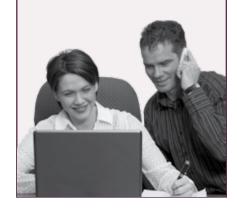
or something else. In this sense, they are an ideal first stop for many people who would not otherwise come forward with a concern, whether out of fear or lack of information.

Organizational ombudsmen are also much better suited to deal with the kinds of coaching, counseling, and mediation that is responsive to many of the non-compliance concerns brought to hotlines. Moreover, by being knowledgeable about the formal channels for dealing with compliance or HR problems—without being the reporting or resolution channel themselves—organizational ombudsmen can help workers find a formal channel to address their concerns with a better understanding of the process. And, since the ombudsmen do not themselves conduct investigations or make management decisions or policy, they supplement existing resources, such as compliance officers, hotlines, and whistleblower policies. They can, in short, be a very effective additional tool in helping to create and preserve an ethical culture. ✦

Notes:

1   Kesselheim AS, Studdert DM, Mello MM: Whistle-blowers' Experiences in Fraud Litigation against Pharmaceutical Companies. *N Engl J Med* 2010; 362(19):1832-4

Editor's note: Charles Howard is a Partner of Shipman & Goodwin LLP, a Connecticut law firm, where he was Chair of the Litigation Department from 1985 to 2000. He has served as independent counsel for ombudsman offices at major corporations, universities, research facilities, and other organizations throughout the United States for almost 20 years. He may be contacted at choward@goodwin.com.