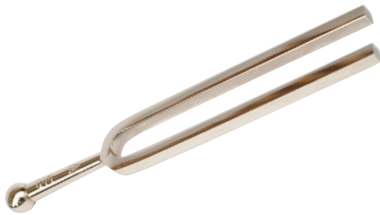


**NEW OBSTACLES
IN SETTING THE
TONE AT THE TOP**



**...AND
SOME SOLUTIONS**

Richard F. Ziegler



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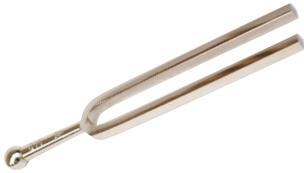
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NEW OBSTACLES IN SETTING THE TONE AT THE TOP ... AND SOME SOLUTIONS

Richard F. Ziegler

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PREFACE

Ron James
President and CEO
Center for Ethical Business Cultures

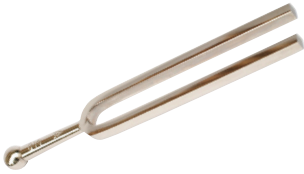
This millennia ushered in many high profile corporate breakdowns...WorldCom, Enron, Tyco and HealthSouth to name a few. Congress and the regulatory bodies including the Securities and Exchange Commission and the Public Company Listing Exchanges reacted swiftly with new rules and regulations. And as this decade has unfolded, we have seen many of the leaders of these organizations move from the board room to the courtroom to prison cells.

Yet when one reads the headlines over the last year, the now all too familiar pattern seems to repeat itself. Back dating of stock options, improper influence peddling, misstating financials results and creating slush funds to bribe foreign officials are but a few examples. Two chronic patterns seem to be apparent regardless of the time period: greed...putting one's own interests ahead of those you are entrusted to serve, and breakdowns in governance and oversight.

Legislation is not enough because try as we might, you can't legislate integrity. But what the legislation does astutely call for is setting the "Tone at the Top." It recognizes that for organizations to build and sustain ethical cultures, it must begin at the top...with the Board of Directors and top management. Boards are now responsible for providing oversight to both the integrity of the financials of the organization and the integrity of the culture.

But, as Boards begin to dig deeper in fulfilling this additional responsibility, they face many challenges. How does a board sort out and fulfill its regulatory responsibilities? How does the Board gauge the pulse of the culture? And how does it do so without micromanaging the organization?

Richard Ziegler, with years of experiences advising corporations and serving as a general counsel in a Fortune 100 company, brings keen insight into the role of the Board in setting the "Tone at the Top." We are grateful to Richard for sharing insights into the challenges and opportunities of the board in carrying out this responsibility.



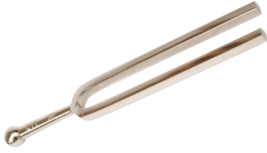
NEW OBSTACLES IN SETTING THE TONE AT THE TOP ... AND SOME SOLUTIONS

**Richard F. Ziegler, Executive Business Fellow
Center for Ethical Business Cultures**

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**Former Senior Vice President,
Legal Affairs & General Counsel
3M Company**

It is generally accepted by now that Boards of Directors and senior management must set the ethical “Tone at the Top” at their companies. Consensus has also developed around the key ingredients of a sound corporate ethics and compliance program in the post-Sarbanes-Oxley era. As companies develop real-world experience with modern compliance programs, several obstacles to a truly effective program have emerged. Some of these impediments are counter-intuitive—this paper labels them the “State-of-the-Art Dilemma” and the “Police State Dilemma,” while others are more straightforward but challenging nonetheless—the “Distant Board Dilemma” and the “Confidentiality Dilemma.” After a brief background section on the role of directors and officers in setting the “tone at the top,” this paper examines these four dilemmas and offers some solutions that directors and officers might consider implementing at their companies.



Background The Meaning of “Tone at the Top” and the Board’s Role

The current emphasis on the “tone at the top” dates back at least two decades, when the National Commission on Fraudulent Financial Reporting (the Treadway Commission) used that phrase. Its study concluded that a company’s “culture” is causally linked to a company’s misbehavior and emphasized that a company’s leaders must create a culture that promotes appropriate business conduct.¹ A corporation’s “culture” is defined as the company’s “norms of daily behavior, heroes, rituals, stories and language”² and its “shared set of norms and beliefs.”³

The United States Sentencing Commission (USSC) embraced this concept in late 2004 when it amended the Organizational Sentencing Guidelines to state explicitly that “to have an effective compliance and ethics program...an organization shall... *promote an organizational culture* that encourages ethical conduct and a commitment to compliance with the law.”⁴ Regulators and legislators concur that the Board is expected to play an important role in fostering that culture. The revised Organizational Sentencing Guidelines require the involvement of the “governing authority” (the Board of Directors) in oversight of the compliance and ethics program. One Securities and Exchange Commission (SEC) Commissioner has noted that the Sarbanes–Oxley statute and the SEC’s rules implementing it were focused on “insuring that those who act on behalf of a company give life to the corporate conscience.”⁵

The courts have also affirmed the obligation of boards of directors to assure that their companies’ compliance programs are effective. In the seminal *Caremark* decision, the Delaware Supreme Court made clear that boards have an important role in making certain that management adopts procedures that can detect potential misconduct and address it, and that directors act at their peril if they

disregard the Organizational Sentencing Guidelines' compliance program criteria.⁶ In short, directors can face the prospect of personal monetary liability if they fail to discharge their obligations with respect to their companies' compliance programs.

Even the current stockholder activist approach to corporate governance lends force to the board's role in this area. While stockholder activists have pressed in various forums for the transfer of power from boards of directors to stockholders in many areas,⁷

Doing “the minimum required” is rarely sufficient in the ethics context.

it doesn't appear that any stockholders' rights advocate has proposed shifting to stockholders any responsibility for their company's ethics and compliance program or culture.

Does the Board satisfy its role in assuring that the company is promoting the right organizational culture simply by assuring that all the right compliance procedures are in place? There is some responsible authority

that the answer is “Yes.” The reporter for the Advisory Group whose recommendations for changes to the Organizational Sentencing Guidelines were relied upon by the USSC explicitly testified that “if you follow the seven steps that are articulated here, you will have done the minimum required both to satisfy the due diligence requirement *and* to satisfy this requirement that you must promote an organizational culture.”⁸

This is a lukewarm endorsement for the adequacy of the Guidelines' seven-step criteria. Doing “the minimum required” is rarely sufficient in the ethics context. The minimum is unlikely to be enough when the company is grappling with the aftermath of a major compliance problem. Indeed, it has become commonplace to note that Enron, WorldCom and other notorious malefactors had sound compliance procedures in place even while they committed their massive frauds.⁹ Instead, as one commentator has noted, a key question is whether the culture “indicate[s] to both insiders and outsiders whether the formal systems are actually implemented or merely a façade.”¹⁰

Four Dilemmas

The State-of-the-Art Dilemma

Ironically, as the business world has embraced formal compliance programs—spurred in part by the Sarbanes-Oxley statute and the compliance program criteria set out in the Organizational Sentencing Guidelines¹¹—a new risk has emerged: that a company’s workers will believe that the company’s state-of-the-art compliance program is simply the result of the company going through the motions required by regulators rather than a sincere reflection of a commitment to an ethical corporate culture.

Until recently directors could help set a good tone at the top not only in the selection of the chief executive officer and other senior officers but also by making sure that their companies were rolling-out newly-evolving compliance procedures and processes. As it becomes increasingly common for the average company to adopt a program that a decade ago would have been viewed as cutting-edge, companies can no longer count on employees perceiving that the adoption of the new processes reflects a sincere commitment at the top to lawful and ethical behavior. Put otherwise, the first company that adopted a code of ethics or a worldwide toll-free “helpline” to report suspected misbehavior likely impressed its workforce with senior management’s dedication to proper business conduct. However, the adoption of codes of ethics, toll-free “helplines” and all the other indicia of a modern ethics and compliance program loses that force once regulators expect it and every company’s peers have done it. With that point now essentially reached, there’s a risk that every company’s program, however procedurally up-to-date, may be perceived by the rank and file as a “check-the-box” effort or a “paper program.”

An unexpected consequence as companies finish implementing modern programs is that the next phase is more difficult.

The unexpected consequence for directors is that as companies finish implementing all the ingredients of an effective program—including those effectively mandated by the amended sentencing guidelines—the next phase may be more difficult. It is incumbent on the directors to assure that the company’s compliance and ethics program is perceived by employees not merely as a compilation of rules and procedures but as reflective of the company’s fundamental values prizing appropriate business conduct and the senior leadership’s meaningful commitment to them.

The Department of Justice has said just this. It has made it crystal clear that before the government will give a company “credit” for having an effective compliance program federal prosecutors must not only “determine whether a corporation’s compliance program is merely a ‘paper program’ or whether it was designed and implemented in an effective manner” but also determine “whether the corporation’s *employees...are convinced of the corporation’s commitment to it.*”¹² The board’s and management’s task of convincing the workers of the company’s commitment is likely to be considerably more difficult than their work to date in addressing the “low hanging fruit” of making sure the company’s program has all the required procedural bells and whistles.

As discussed below, that objective is made all the more challenging by three additional dilemmas: the fact that in large companies the board is far removed from employees, that privacy and liability concerns make it difficult to share with employees the specific actions that show that the company is serious about its program, and the risk that the implementation of a sound compliance and ethics program may be perceived as imposing something akin to a “police state” on the company. But surmounting these obstacles is important if directors are to succeed in setting the tone at the top in an enterprise with a program that is already excellent on paper.

The Distant Board Dilemma

One dilemma boards confront in addressing this task is the simple fact that, at least in a large corporation, the board of directors

is far removed from employees. In the typical large company only members of senior management routinely meet with the directors. Even middle managers tend to view the board and its members as more of a theoretical construct than a group of managers like them. Board decisions frequently do not affect the day-to-day lives of the company's workers and consequently tend not to affect the "norms of daily behavior, heroes, rituals, stories and language" that comprise the company's culture.

The most visible action a board takes—the selection and compensation of the chief executive and other senior officers—is, of course, important in setting the corporate culture. Directors' personal conduct in their interactions with company employees must also be beyond reproach.¹³ Despite the typically distant role of the board any lack of candor or questionable conduct by a director will be spread quickly through the corporate grapevine.

The disconnect between the board and the company's day-to-day norms is significant.

Yet while getting these fundamentals wrong can certainly create the wrong corporate culture, getting them right will not, by themselves, lead employees to believe that the company's ethics and compliance program is meaningful and important to senior management. The disconnect between the board's activities and the day-to-day norms of the corporation is significant. Directors typically obtain their knowledge of the company from senior management and most directly influence senior management. While data is not available demonstrating a difference in perception between directors and front line employees, it is reasonable to extrapolate from the following employee responses from the *WorkTrends™ 2005* survey to illustrate the concept¹⁴:

Percent Favorable Response	Executive	Manager	Front Line
Senior management supports and practices high standards of ethical conduct.	78%	72%	49%
Where I work, ethical issues can be discussed without negative consequences.	75%	64%	41%
The behavior of the people I work with is consistent with my company's mission, vision and values.	72%	73%	35%
Where I work, people do not "get ahead" unless their behavior clearly demonstrates my company's values.	52%	46%	31%

As a result, the tone set by middle managers is likely to be far more effective in creating the corporate culture than steps taken by the Board.¹⁵ From the perspective of a board member who visits the company perhaps only a half-dozen times each year, the obligation to take affirmative action to affect the company culture may seem daunting, unrealistic and unfair. Nonetheless, as noted below, there are steps directors can take to maximize the prospect that the tone they set in their decisions and actions will in fact "trickle down" within the corporate hierarchy.

The Confidentiality Dilemma

Another significant dilemma for directors and their companies in demonstrating their sincere commitment to an ethical culture is the real-world impediment of informing employees that fellow employees have been meaningfully and appropriately penalized for violating the company's code of conduct. The textbook approach to an effective ethics and compliance program instructs that instances of misconduct and the resulting discipline should be made known within the company. Internal disclosure of appropriate discipline is the most effective means of proving to employees that

the company's program is a serious one and does not exist simply on paper. As former SEC Chairman Harvey Pitt advises, "[w]hen violations are found, employees should be made aware of the mistakes uncovered, any responses by the company, and an indication of the types of sanctions employed."¹⁶ Indeed, discharging an employee for serious misconduct is all well and good, but, if co-workers believe that the miscreant left voluntarily for other reasons, the compliance program's effectiveness may be undermined.

Unfortunately, privacy and liability concerns can make it very challenging for management to let employees know what discipline has been meted out, to whom and for what. All too often employees who lose their jobs due to misconduct are able to negotiate a separation agreement that includes a confidentiality commitment. Even where a discharge is not the subject of an agreement, companies typically fear the

expense and burden of defamation claims that might be asserted by the former employee (even though realistically such claims are unlikely to be brought) and voluntarily refrain from making any disclosure of the circumstances of the discharge. Where an employee's misconduct is not so severe as to warrant discharge and the appropriate penalty is a censure, reduction in compensation, deferral of promotion or the like, companies may fairly conclude that internal disclosure of such discipline is unfair to the employee and will jeopardize the employee's ability to perform his or her on-going job duties effectively. In other circumstances, disclosure will implicate the privacy interests of third parties — for example, internal disclosure that an employee has been demoted and transferred because of sexual harassment may risk identifying the victim of that misconduct. Finally, where the misconduct exposes the company to liability and the company has made the judgment that it need not report the matter to regulatory authorities, internal disclosure could well be viewed as contrary to

Privacy and liability concerns make it challenging for management to inform employees about the discipline imposed on others and why.

the company's interests.

Despite these countervailing interests, internal disclosure remains a critical component of an effective compliance program. Directors should assure that their companies consider taking the steps described below to make disclosure consistent without sacrificing the company's other legitimate interests.

A sound corporate ethics and compliance program is a means to assure proper conduct in the pursuit of the company's business objectives, not a free-standing private law enforcement enterprise.

The Police State Dilemma

One rarely articulated dilemma posed by an effective ethics and compliance program is the cost to the company of a poorly executed ethics and compliance program. It is clear that an important part of a compliance culture is the obligation of employees to report questionable conduct so that the company can correct, and ideally, prevent wrongdoing. While it is an unfortunate fact of life that any reporting program is susceptible to abuse by persons making baseless allegations in bad faith, there is

a line between, on the one hand, encouraging the reporting of good faith suspicions based on personal observations, and on the other hand, fostering a corporate environment of suspicion and mistrust. It should not be surprising that France, with its eighteenth century history of personal "denunciations" leading to the guillotine, initially objected to U.S. companies' efforts to implement in their French facilities the Sarbanes-Oxley requirement of an internal system for reporting suspected wrongdoing that assures anonymity to the reporter.¹⁷

Corporations are the consummate team organizations. They thrive when employees at all levels are motivated to work collectively for common objectives. Just as good corporate governance is a means to enhance shareholder value rather than an end in itself, so too a sound corporate ethics and compliance program is a means to assure

proper conduct in the pursuit of the company's business objectives rather than a free-standing private law enforcement enterprise.

As Jill Fisch has put it in the context of recent corporate governance reforms affecting board composition, a board that advises the CEO on business issues, develops the company's long-term strategy and lends its business expertise "is likely to enhance corporate profitability...more so than a board that merely prevents management from stealing....[T]here are obvious trade-offs between the board's ability to manage the business and its ability to act as an effective monitor."¹⁸ In devising the appropriate compliance program for an organization and in selecting the staff to operate it, companies must be sensitive to the need to tread a careful line between what Ben Heineman (General Electric's recently-retired general counsel) describes as "a self-cleansing culture that demands immediate discussions about what the right thing is to do—and requires immediate notification when the wrong thing is being done" and "a climate of fear and backbiting...."¹⁹ The former is the holy grail; the latter can be the result of a poor execution of an otherwise well-designed ethics and compliance program.



Surmounting the Dilemmas

Taking all these considerations into account, there are numerous steps well-intentioned directors can consider taking—and assure that management is taking—to discharge their "tone at the top" responsibility in the modern corporation with a seemingly state-of-the-art compliance program. Assuming the company has adopted all the procedures recommended by the amended Organization Sentencing Guidelines and is applying them in an appropriate manner, here are some additional key items that directors (and senior management) should consider:

Director Action

While “talking the talk” is never a substitute for “walking the walk,”²⁰ directors—like management—must not only model ethical behavior personally but should also communicate the company’s values when they get a chance.²¹ Senior management has many more occasions to talk about ethical issues than the board does, but directors have more opportunities than they may generally appreciate. Rather than confining discussion of compliance and the company’s ethical culture solely to the periodic report to the Audit Committee from the compliance professionals or senior management, directors

Directors have more opportunities than they may appreciate to talk about the company’s values.

should think about some other direct forms of communication that would aid in overcoming the “distant board” dilemma discussed above. For example:

- Directors, on occasion, can question management on issues reflecting sensibility to the company’s ethical culture during board meetings. If such question or comment occurred at a majority of the board’s meetings it is likely management would learn to be prepared to address such issues. This in turn would become known to the middle managers who assist senior management in preparing their remarks to the board.
- When the board visits the field—a production facility, a subsidiary abroad, a key office—directors can make an effort to find a question or comment that emphasizes the company’s values.²²
- Board members could periodically produce a video expressing their views about the company’s values and ethics. It can be posted on the company’s intranet site and/or used in the company’s internal ethics and compliance training program.
- The Audit Committee, which typically has responsibility for the company’s compliance program, could meet on occasion with

middle managers to learn first-hand their views on company culture, the effectiveness of the ethics and compliance training, the sincerity with which they view the company's commitment, and whether the compliance program is being administered sensibly or perhaps is being mis-implemented to foster a culture of back-biting.

Each of these steps could help a board foster the needed "trickle down" effect and promote the notion within the company that the board is serious about the company's values and compliance commitment.

Other steps suggested seem likely to be less productive: one is having the promulgation of the company's code of conduct be attributed to the board, and another is the establishment of an "ethics committee" of the board.²³

The CEO's role in establishing and nurturing the corporate culture is, if anything, more critical than the board's, and it is important that the CEO be closely associated with the company's statement of its core principles and its business conduct policies. While the board can approve those statements and policies, it is important that the CEO and senior management be responsible for them.

As to the establishment of a new "compliance" or "ethics" committee of the board, although that vehicle may reinforce the notion that the board cares about the subject, the other actions of the board suggested above seem more likely to have a meaningful effect within the company than a procedural step that merely transfers existing responsibilities from one committee to another. Nor is the creation of such a committee costless. It will add to the already-difficult scheduling burdens as committees with overlapping membership struggle to find sufficient time to discharge their functions responsibly. More important, removing responsibility for the non-financial compliance function from the jurisdiction of the audit committee, which will inevitably need to retain at least some responsibility for compliance in the financial reporting context, seems unduly cumbersome and likely to create uncertainty in the

scope of each of the board committees.

Internal Disclosure

The single most effective step management can take to persuade employees that the company is sincerely committed to its values and compliance program is to publicize when their colleagues have been penalized for failing to live up to those values and policies. Disclosure is straightforward enough when the company is itself the victim of the misconduct and the amount at stake warrants a referral

The company can publish internally statistics on its ethics and compliance program discipline, listing the number of terminations, deferred promotions, etc., that have occurred.

for a public criminal prosecution but, for all the reasons discussed above, it is rare that companies make disclosures of other types of misconduct on a regular basis. Boards should consider assuring that the company at least takes the following steps:

- The company can readily publish internally statistics on its ethics and compliance program discipline. The number of terminations, deferred promotions, reduced option grants and the like that have occurred each quarter or annually can be disseminated without triggering the countervailing concerns noted above. Such data can also, in most cases, be associated with the specific business conduct policy whose violation triggered the discipline. Audit committees or the full board increasingly review such statistics as part of their routine review of the company's ethics and compliance program, and there appears to be little reason that such data should not be shared more broadly within the company, particularly in the course of periodic ethics and compliance training sessions.
- The company can periodically make internal reports that describe actual factual circumstances that have recently led to

significant discipline, with names withheld and specific facts modified where necessary to avoid inadvertent disclosure of the actual participants or the actual misconduct. Such altered fact descriptions should make interesting reading if disseminated on a regular basis through the company's e-mail, or by posting on the intranet.

- At times, the company should be prepared to accept the possible disadvantages of accurate and full internal disclosure and simply let the workers know that certain unacceptable behavior has occurred and the participant has been discharged as a result.

On this last point Ben Heineman writes, “GE’s senior managers and officers knew the CEO was serious [about the company’s “fundamental integrity principles”] because, as it turned out, every year or so, a senior manager who had knowingly or recklessly violated company rules for commercial or personal reasons was terminated.”²⁴ Apparently those annual discharges were internally reported in a manner that linked the termination decision to the misbehavior at issue, at least within the ranks of senior managers and officers. This example suggests that other companies may be unduly cautious in declining to ever share the facts of discipline internally.

The Risk Assessment Process

One of the new steps set out in the 2004 amendments to the Organizational Sentencing Guidelines is that a company “shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify [its compliance program] to reduce the risk of criminal conduct identified through this process.”²⁵ As reported, “[a] risk assessment thus now occupies a central and strategic position in the compliance universe,” but the Guidelines “are conspicuously thin on *how* one goes about doing a risk assessment.”²⁶ As a result, companies have considerable latitude in the means by which they perform the necessary compliance risk

assessment. For starters, many broaden the risks at issue so that the assessment encompasses not only the risk of criminal misconduct but legal compliance issues generally—and even the risk of violation of internal business conduct policies that go beyond legal obligations.

Although not intuitive, the risk assessment process itself can be used as a means to help persuade employees of the company's commitment to its ethical culture. A step directors can take is to assure that their companies apply a broad definition of compliance risks in the periodic assessment process. Beyond that, however, the way the company chooses to undertake the assessment can pay dividends internally. Precisely because there is no one prescribed manner in which to perform a compliance risk assessment, companies inevitably make a choice in how they accomplish the task. That choice should be managed carefully.

The risk assessment process itself can be used as a means to help persuade employees of the company's commitment to its ethical culture.

For some, the choice will favor a “top down” exercise, in which the senior compliance professional, perhaps assisted by a handful of other staff (including in-house counsel), will identify the legal and business conduct policy risks confronting the company and evaluate the effectiveness of the company's processes that address them. For others, the process may be an “outsourced” one, in which outside counsel, or one of the growing number of compliance consultants, is retained to provide the assessment. The outside resources presumably will provide their assessment after interviewing the senior compliance professional and some others at the company.

A third method is available, however, and it is the one that is likely to maximize for some companies the usefulness of this periodic exercise: a “bottoms' up” review. In that approach employees in each of the company's business and staff units are assigned to work with the compliance professionals and in-house (and perhaps outside) counsel and are integrated into the assessment process.

Any assessment, regardless of who performs it, should involve compiling and reviewing information about past violations, the results of external and internal audits and inspections, claims asserted in litigation and by employees through the company's hotline, the results of employee surveys and perceived vulnerabilities. By enlisting the businesses to play a key role in the assessment, business leaders will become considerably more familiar with this information than would likely otherwise be the case. More important, arranging to have the business leaders participate in the formulation of the identification of risk areas is likely to "yield some considerable tangible and intangible benefits, such as: gaining 'buy-in' for the goals of the risk assessment and ownership among the business leaders for the related mitigation activities."²⁷

In conjunction with the "bottoms up" approach to risk assessment companies should consider having the employees who participated in the risk assessment process present the resulting findings and recommendations to a group of very senior management or perhaps the Board. Having such a step as the final part of the risk assessment process should help signify to the participants the importance that the company attaches to it. The combination of a "bottoms up" approach to the periodic risk assessment exercise and a culminating presentation to senior management promises to be an effective means to persuade the participating employees—and by extension, their colleagues—that the company is committed to its ethical values.

Any risk assessment process is fraught with the potential for identifying and describing issues that may be sensitive for the company and may be subject to attorney-client privilege or other legal protection from external disclosure. As a consequence, regardless of the approach a company selects for performing its risk assessment it is important that inside or outside counsel be involved in the process to avoid waiver of such protections.



Conclusion

As discussed here, multiple challenges—the state-of-the-art dilemma, the distant board dilemma, the confidentiality dilemma and the police state dilemma—pose very real obstacles to the board’s and senior management’s ability to set an effective and meaningful “tone at the top.” As outlined above, directors can take some specific actions on their own that will help assure that employees understand that the company really “means it” and that the compliance program isn’t a mere façade. By also assuring that the company is making thoughtful internal disclosure of discipline and taking appropriate advantage of the periodic risk assessment process, directors can meaningfully help achieve that objective. That is the essence of the board’s role in setting the “tone at the top” in today’s corporation.

Endnotes

- ¹ The Committee of Sponsoring Organizations, *Report of the National Commission on Fraudulent Financial Reporting*, October, 1987 at 32.
- ² Linda Klebe Trevino, Symposium: Corporate Misbehavior by Elite Decision-Makers Symposium, 70 *Brooklyn Law Review* 1195 (2005) at 1202.
- ³ Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, Oct. 7, 2003, at 52.
- ⁴ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (emphasis added).
- ⁵ Cynthia A. Glassman, *Sarbanes-Oxley and the Idea of 'Good' Governance*, Address Before the American Society of Corporate Secretaries, Sept. 27, 2002, available at <http://www.sec.gov/news/speech/spch586.htm>.
- ⁶ *In re Caremark Intl. Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).
- ⁷ Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 *HARVARD JOURNAL OF LAW & PUBLIC. POLICY* 39 (2004-05) at 47.
- ⁸ Statement of Julie O'Sullivan, Advisory Group Reporter, Presentation of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines before the United States Sentencing Commission, Oct. 7, 2003, at 48 (emphasis supplied). The seven procedural steps identified at § 8B2.1(b)(1)-(7) of the Guidelines are establishing standards and procedures to prevent and detect misconduct, assuring that high level personnel including the governing authority are knowledgeable and responsible, assigning the right personnel to the program and providing adequate resources, communicating and training, monitoring, auditing and evaluation, providing a retaliation-free system for reporting, enforcing the standards consistently, and responding appropriately to misconduct. The next section of the guidelines, § 8B2.1(c), also requires the periodic assessment of compliance risk.
- ⁹ Paul Fiorelli, Will U.S. Sentencing Commission Amendments Encourage A New Ethical Culture Within Organizations?, 39 *WAKE FOREST LAW REVIEW* 565 (2004) at 567; Stephen M. Cutler, Speech by SEC Staff: Second Annual General Counsel Roundtable: Tone at the Top: Getting it Right, Dec. 3, 2004, available at <http://www.sec.gov/news/>

speech/spch120304smc.htm.

¹⁰ Trevino, note 2.

¹¹ Sec. 301, Sarbanes-Oxley Act of 2002) (requiring that public companies adopt written ethical codes and anonymous reporting procedures); U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (as amended November, 2004) (note 8 above summarizes the various procedural steps recommended by the Guidelines.)

¹² Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys, re: Principles of Federal Prosecution of Business Organizations, 14 (Dec. 12, 2006) (emphasis supplied); available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf

[“McNulty Memorandum”].

¹³ Ben W. Heineman, Jr., *Avoiding Integrity Land Mines*, HARVARD BUSINESS REVIEW, April, 2007 (“Companies are preternaturally attuned to leadership hypocrisy”).

¹⁴ *Kenexa WorkTrends 2005*, a survey administered to a normative sample of 10,000 working adult Americans.

¹⁵ See Paul Fiorelli and Ann Marie Tracey, *Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm*, 32 IOWA JOURNAL OF CORPORATE LAW 467, 485 (2007); Reatha Clark King, *Sense of Ethics: An Essential Quality for Individual Board Member Performance*, available at <<http://ethisphere.com/sense-of-ethics-an-essential-quality-for-individual-board-member-performance/>>.

¹⁶ Harvey L. Pitt, *Instilling A Corporate Culture of Integrity Ethics and Compliance – Setting the Tone at the Top*, COMPLIANCE WEEK, Sept. 28, 2004.

¹⁷ Commission Nationale de l'Information et Des Libertés, *Guideline document for the implementation of whistleblowing systems in compliance with the French Data Protection Act of 6 January 1978, as amended in August 2004, relating to information technology, data filing systems and liberties*, (Paris, Nov. 10, 2005).

¹⁸ Fisch, note 7 at 43.

¹⁹ Heineman, note 13.

²⁰ Cutler, note 9 at 5.

²¹ *Id.*, at 3-4, (“...whenever your CEO is delivering a state-of-the-

company address to company employees, or offering remarks at a company event, she should be talking about the company's values as well as its profits.”)

²² King, note 15.

²³ David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICHIGAN LAW REVIEW 1781, 1809 (June, 2007) (“[t]he next step in this line of reforms should be to require a board level ethics committee.”); Pitt, note 16 (compliance committee rather than audit committee should oversee compliance and “tone”).

²⁴ Heineman, note 13.

²⁵ U.S. Sentencing Guidelines Manual, § 8B2.1(c).

²⁶ John M. Spinnato, Debra Sabatini Hennelly and Steven A. Lauer, *A General Counsel and His Experts Tackle Risk Assessments*, METROPOLITAN CORPORATE COUNSEL, October, 2006 (quoting McGreal, *Legal Risk Assessment After the Amended Sentencing Guidelines: The Challenge for Small Organizations*, CORPORATE COUNSEL REVIEW, Jan. 19, 2005 at 115).

²⁷ John M. Spinnato, Debra Sabatini Hennelly and Steven A. Lauer, note 36.

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About the Author

Richard F. Ziegler is Managing Partner of Jenner & Block's New York office. He is a member of the Firm's Litigation Department and its Intellectual Property, Business Litigation, Securities Litigation, White Collar Defense and Counseling and Corporate Counseling and Governance Practices. Mr. Ziegler concentrates in complex civil litigation and government enforcement matters, including intellectual property and securities

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Mr. Ziegler joined Jenner & Block from the 3M Company in St. Paul, Minnesota, where he served from 2003 – 2007 as Senior Vice President, Legal Affairs and General Counsel. Mr. Ziegler was responsible for all of 3M's legal affairs worldwide, counseled the Board of Directors and its Audit Committee, and led a department of more than 150 lawyers. He also served on the Company's senior management Operations Committee. During his tenure as General Counsel he oversaw changes in 3M's corporate governance and business conduct processes, its largest-ever acquisition and significant litigation involving intellectual property, antitrust, product liability, employment and environmental matters.

Before joining 3M, Mr. Ziegler was a partner at Cleary, Gottlieb, Steen & Hamilton in New York for more than two decades, serving as coordinator of its New York litigation practice and a member of its worldwide Executive Committee. He previously served as an Assistant United States Attorney in the Southern District of New York and as Deputy Chief Appellate Attorney in that office.

Mr. Ziegler was Chairman of the Committee on Professional Ethics of the New York State Bar Association. He has taught a seminar on ethics and complex litigation at Columbia Law School and has been a member of the faculty of the trial advocacy program at Cardozo Law School.

Mr. Ziegler graduated from Yale College *summa cum laude* in 1971, where he became a member of Phi Beta Kappa. He received his J.D. from Harvard Law School *magna cum laude* in 1975 and was an editor of the Harvard Law Review. Mr. Ziegler also clerked for Federal District Court Judge Milton Pollack in Manhattan. He is a member of the bar of New York and Minnesota, the United States Supreme Court and numerous federal circuit and district courts.

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The Center for Ethical Business Cultures (CEBC) adds value for its member companies and the community by:

- *Creating and Delivering Services* that assist companies in creating and sustaining ethical cultures. Its services help assess, embed and reinforce values within organizations.
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Founded in 1978 by business leaders in Minnesota, CEBC is one of the oldest business–founded and business–led centers focused on business ethics and corporate citizenship in the nation.

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