

Code of Conduct Drafting or Revision Best Practices: The Critical Advantages of Using Outside Counsel

OVERVIEW

You have just been tasked with drafting or revising your organization's Code of Conduct. You start thinking about outside resources that can assist your team. While some training vendors and consultants offer Code of Conduct services using internal consultants, your best move often is to work with outside counsel.

So why use a law firm to write or review your Code of Conduct? Because your Code is a critically important guide for your organization. Outside legal counsel is well suited to help you develop this important statement of policy and values. Below are just some of the many reasons why.

EXPERTISE ON CRITICAL LEGAL SUBJECTS

Codes of Conduct directly impact your organization's efforts to comply with key laws including the Federal Sentencing Guidelines, the Federal Acquisition Regulations, and the Sarbanes-Oxley Act. Effective counseling and guidance from qualified, practicing lawyers is essential to ensure that your organization complies with and gets the maximum legal protection provided by these important legal requirements.

COORDINATION AND INTEGRATION WITH OTHER IMPORTANT POLICIES & TRAINING

Your Code of Conduct is not just a stand-alone document, but instead should be viewed as a key part of your organization's overall compliance effort. All too often, Codes of Conduct are not integrated with, and in some cases even conflict with other compliance policies, such as employee handbooks, workplace harassment policies, and policies related to the use of company assets. According to Nick Linn, Esq., Of Counsel to Littler Mendelson and a member of the firm's Corporate Compliance practice group, "In my experience, organizations can get so focused on working on drafting or revising their Code that they forget to check their other policies, and their compliance training programs, to ensure they all are updated, work together, and support each other." Outside counsel often knows an organization's other compliance policies and training (and may have even helped draft them), and therefore can be of invaluable assistance in ensuring that all these compliance tools are consistent and effectively work together.

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In many cases, vendors and consultants offer Code development services that rely heavily on templates and “prepared in advance” tools and checklists. However, your Code of Conduct should be unique to your organization, its culture and its specific legal and compliance risks. Developing a truly effective Code requires the interactive, strategic and confidential discussions that can best take place within the confines of a protected attorney-client relationship. While developing a Code, it is not uncommon for the writer to be exposed to sensitive internal information, including possible complaints and incidents. When working with outside counsel, these disclosures can be privileged. When working with a consultant, they are not. Even more importantly, Code review by experienced practicing lawyers ensures that real world experience is put to work. These lawyers see the trends “in the trenches” as they develop; consultants or training vendors can lack that critical and ever-evolving real-world perspective.

WHO WILL GO WITH YOU TO COURT?

Your Code is not only a statement of your organization’s values, but can become a legally operative document. You need to be absolutely confident that your Code would stand up if it is ever challenged in a legal proceeding. You need to be equally confident in the credentials of the person who helped draft or revise your Code in the event he or she had to go to court on your organization’s behalf.

WILL THE AUDIT COMMITTEE ACCEPT THIS?

Does your organization have an Audit Committee? If so, you need to consider whether your Audit Committee members, who have specific legal obligations to the organization, are going to be comfortable having your Code developed or reviewed by a consulting firm as opposed to qualified and experienced attorneys. The reality is that the Audit Committee, which expects you to use well qualified resources, may not support exposing the organization to potential risk because the best resources were not used, or because corners were cut in drafting or revising the organization’s Code.

DO YOU REALLY UNDERSTAND THE STAFFING AND CREDENTIALS OF OUTSIDE CONSULTANTS?

Be aware that many of these organizations are thinly staffed and rely heavily on form templates. Ask tough questions about who may be working on your Code, their credentials, and the process they will use to ensure your Code is a true reflection of your values and key compliance needs. Query how the consultant will address the concerns raised in this article, including the Code’s integration and coordination with other workplace policies, as well as confidentiality and privilege issues.

ABOUT ELT, INC.

Established in 1997, ELT provides online training solutions to help employers manage their most important workplace compliance challenges. Training topics include workplace harassment, ethics and Code of Conduct, whistleblowing and retaliation, anti-bribery & corruption, EEO, diversity and inclusion, union awareness, and wage and hour. Our state-of-the-art programs have been used by more than 5,000,000+ learners in 2,000+ leading organizations across the globe.



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