

The CPA Journal

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May 2005

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Effective Governance in an Ethicless Organization

By H. Stephen Grace, Jr.

Can an organization whose tone at the top is either nonexistent or far removed from the norm have effective governance? If it is possible to have effective governance in what might be called an "ethicless" organization, what does this say about the factors that are critical to the effectiveness of an organization's governance process? The answers to these questions, particularly the latter, are important, because the focus on governance continues to intensify.

Criminal trials of senior management of a number of corporations are under way, investigations of the mutual fund industry and the insurance industry are in the media spotlight, and the requirements mandated by the Sarbanes-Oxley Act (SOA) are at their starting gate.

While an ethical tone at the top may not be sufficient to ensure effective governance, many currently assert that it is at least a necessary condition. Yet, should the answers to the questions posed here indicate that effective governance can occur in what would be considered an ethicless organization, the importance of tone at the top may be overstated, and the role of a rigorous set of checks and balances understated.

An Effective Ethicless Organization

The fact that effective, long-lasting organizations exist that are generally recognized to be by any measure devoid of traditional ethical or moral values is well understood. Examples are criminal organizations of various types, including drug cartels. So, in the traditional sense, the organizations have no ethical tone at the top. What, then, drives or underlies the effectiveness of these organizations? Careful inspection would indicate that over time they

have put in place highly effective checks and balances. Each individual has well-defined responsibilities, and the organizations make certain that each individual understands those responsibilities. The organizations demand strict accountability. Furthermore, each individual is expected to have an attitude of service, and the organization shows little if any tolerance for individuals with an attitude of entitlement. Backing up the requirement for accountability are well-understood consequences for those falling short in discharging their responsibilities. Even in the absence of an ethical or moral tone at the top, these organizations survive and often prosper because of these checks and balances.

Corporate Governance Consequences

What does the existence and effective operation of these ethicless organizations say for corporate and business governance? These organizations further confirm that the fundamental requirement for effective governance is a rigorous set of checks and balances. This—not tone at the top—is what lies at the core of effective governance processes. Recent events have, once again, confirmed the inappropriateness of relying on tone at the top. Quotes such as the following, all made by high-profile CEOs of companies that subsequently suffered severe problems and whose stockholders incurred major losses, indicate how the publicly announced tone at the top can sharply differ from

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the ethical and moral values actually observed within the organization:

■ "Boards should be absolutely certain that the company is run properly from a fiduciary standpoint in every degree. I am a great believer in the audit committee having full access to the auditors in every way, shape, and form."—former Sunbeam Chairman Al Dunlap

■ "You'll see people who in the early days ... took their life savings and trusted this company with their money. And I have an awesome responsibility to those people to make sure that they've done right."—former WorldCom CEO Bernard Ebbers (convicted in March 2005 on nine counts of fraud)

■ "We are offended by the perception that we would waste the resources of a company that is a major part of our life and livelihood, and that we would be happy with directors who would permit that waste. ... So as a CEO, I want a strong,

competent board."—former Tyco CEO Dennis Kozlowski

■ "It's more than just dollars. You've got to give back to the community that supported you."—Adelphia founder John Rigas (convicted in February 2005 on 18 counts of fraud)

■ "People have an obligation to dissent in this company."—former Enron CEO Jeffrey Skilling

Actions speak louder than words, and organizations' statements about their tone at the top have little influence on individuals who decide to either run over or circumvent their organization's stated ethical values. On the other hand, checks and balances stand as an obstacle to those who would attempt to set aside the organization's ethical values and principles.

A Highly Desirable Ingredient

The fact that effective governance is not only possible but actually occurs in organizations that basically lack any ethical

foundations has consequences for the proper structuring of organizations' governance processes on rigorous checks and balances, where the individuals involved understand not only their own responsibilities but also the responsibilities of the other key participants in the governance process, and are positioned to ensure that each of the involved parties properly addresses these defined responsibilities.

Even if tone at the top isn't a necessary ingredient of effective governance process, it's a highly desirable ingredient. A sound, ethical tone at the top permeates and inspires an organization. It must, however, be supported and enforced by checks and balances that, in times of temptation, would strengthen those inclined to stray. □

H. Stephen Grace, Jr., PhD, served as chair of Financial Executives International in 2003/2004. He is president of Grace & Co. Consultancy, Inc.

sound advice

Improving Negotiation Skills

By Philip Zimmerman

Although negotiation is a basic skill, practiced almost daily in all walks of life, very few have studied it. Last year, the CityBar Center for Continuing Legal Education and ALI-ABA sponsored a program, "Negotiation: Bargaining for Better Results," conducted by Charles B. Craver, a professor of law at George Washington University Law School.

Craver's insights included: "You don't get what you deserve, you get what you negotiate for"; "The negotiator who has the most confidence usually perseveres"; and "If you are an impatient negotiator,

you will not do as well as you could otherwise." His tips to improve negotiation skills include the following:

■ To be a good negotiator, you have to work at it.

■ If you are willing to walk away, you usually make a good deal.

■ When you negotiate, you need to know when to start, when to stop, and your bottom line.

■ Charge for things the other party wants even if they do not matter to you.

■ Puffery and embellishment are acceptable, but lying about what is essential ends trust and the hope of any future successful negotiation.

■ If the other party respects you, they will try harder to agree with you.

■ The other party will walk away from negotiating if an offer is so unreasonable

that someone else may offer a better alternative.

■ Know your "best alternative to a negotiated settlement" (BATNA).

■ Be aware of nonverbal communication, such as body language and significant changes in behavior.

For those who would like to learn more about negotiation, I recommend Craver's book, *The Intelligent Negotiator: What to Say, What to Do, How to Get What You Want—Every Time* (Prima/Crown, 2002). □

Philip Zimmerman, CPA, is an arbitrator and mediator on the American Arbitration Association's panels and in private practice. His website is www.mediatorpz.com.