

# Last Line of Defense: The Role of The Hotline in Ethics Programs

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Ethics programs have been praised roundly for the effect they have had on the engineering and construction (E&C) industry, shoring up the reputation of firms, and bringing stricter oversight and regulation of work practices. But all ethics programs are not equal. In a firm dedicated to promoting lasting cultural change through the ethics program, reporting rates will be higher, and incidences of ethical violations will be lower. Conversely, it is possible to have in place the facade of an ethics program, and yet harbor a dishonest and retaliatory culture that discourages ethics reports. In this case, your last line of defense is your anonymous hotline.

Just 59 percent of employees who witness misconduct report it, according to research by the Ethical Resources Center (ERC),<sup>1</sup> leaving their company vulnerable to deleterious relationships with clients, fellow contractors, employees and the law. In the worst-case scenario, a company actually risks debarment from federal contracts. An estimated three percent of reports come through the company hotline, while 46 percent of reports go to supervisors, and 29 percent come through higher management. The importance of having a trustworthy mechanism in place to receive that last three percent of reports cannot be understated. A phone call or email may be an employee's only chance to make a report.

Stage one of FMI's ethics research, which involved around 20 members of the Construction Industry Ethics and Compliance Initiative (CIECI), looked at key elements of a successful ethics program ("Ethics programs: Federal mandate, cultural opportunity").<sup>2</sup> Stage two of FMI's research comprises an investigation into the reporting systems associated with ethics programs. The research team spoke with general counsels, senior vice presidents, and compliance officers from 22 construction firms to determine their processes for dealing with reports of ethical misconduct. In the course of this paper, we will establish best practices for running an efficient and effective reporting system, with specific regard to hotlines. Your employees are your best source of business intelligence — are your lines open?

## How healthy is your ethics program?

The introduction of the Federal Sentencing Guidelines in 1987 precipitated a wave of interest in fraud detection and whistle-blower protection. Changes in recent years to the Federal Acquisition Regulation (FAR) have further driven investments in compliance and ethics initiatives. However, statutory language leaves room for interpretation as to what constitutes a reasonable effort to uncover wrongdoing, for example, or to promote an "effective" ethics program among employees. Although hotlines are mandated for government contractors, the information (or lack thereof) coming in can provide vital intelligence as to the health and effectiveness of your ethics program.

## Who will blow the whistle?

Research by the ERC has shed light on key differences in how various demographics will respond to witnessing ethical misconduct.

**Women report more than men:** Women have consistently reported incidents of ethical misconduct at a higher rate than their male counterparts (66 percent to 60 percent respectively, in the 2009 survey), indicating a higher sensitivity to certain violations, specifically misconduct that has an interpersonal effect — sexual harassment, substance abuse, abuse and stealing.

### **Seniority positively impacts reporting rate:**

Management employees report at a higher rate than non-management employees on every specific type of misconduct measured in the survey. However, 2009 ERC data showed that in five of six cases, first line supervisors are more likely to report than middle managers. This weakness in the pipeline has greater implications for employee development beyond the base ethics program.

### **Younger employees witness more misconduct:**

Rates of observed misconduct decreased as employee age increased.<sup>4</sup> Younger employees also tend to have a less positive impression of their company's ethical culture than elder employees in the same firm. The research also suggests that Millennials (born after 1980) are less sensitive to violations of privacy, due to their focus on social media and "sharing."

### **Perceptions about the likelihood of retaliation will affect how many violations are committed in the first place:**

Fifteen percent of employees who observed then reported misconduct experienced retaliation in response to their actions.<sup>5</sup> Strong leadership is the greatest antidote to a weak ethical culture, in which retaliatory behavior for speaking up is rampant, and may take the form of psychological abuse, physical abuse, mistreatment of property and dismissive behaviors.

### **Employees with a bigger stake in a company have a higher reporting rate:**

Stockholders have a higher reporting rate, as do employees who have a positive attitude about their company and its leadership.

Longitudinal research published by the ERC<sup>3</sup> has revealed that in a weak ethical culture, employees are more likely to go high up in the hierarchy to report misconduct. Conversely, in a company with a flourishing ethical culture, employees feel comfortable reporting abuse and misconduct to their immediate supervisor. Heavy use of the hotline by reporters and a scarcity of reports to supervisors therefore may indicate a compromised ethical culture. Note that a wealth of reports overall does not indicate a staff run amok, but rather demonstrates the accessibility of reporting mechanisms to staff.

Working to educate your employees about your code of conduct is an ongoing challenge — they must understand not only what is expected of them, but what they can do if they witness a colleague breaking the rules. If company leadership regularly articulates the importance of high ethical standards and the availability of report mechanisms then, when the time comes, that employee will be more likely to pick up the phone, speak to a supervisor, or contact management (for more on reporting behavior, see the side bar: "Who will blow the whistle?").

## Helping employees make the call

Armed with knowledge about the standards expected by your company, an employee will have a better shot at identifying wrongdoing — remember that many violations will occur in ambiguous situations and require a judgment call. Training employees on scenarios, and discussing specific areas of risk with employees will help them make the right call.

Once an employee has identified wrongdoing, it is crucial that they feel they are safe to report it. According to ERC data, 15 percent of employees who observed then reported misconduct experienced retaliation in response to their actions.<sup>6</sup> Such perceptions are countered by strong ethical leadership, and by safe, anonymous reporting mechanisms, the most fail-safe of which is the hotline.

An effective phone-call hotline mechanism should offer the reporter:

- 24-hour availability, seven days a week
- Toll-free accessibility in alternate languages, as required
- Anonymity and confidentiality through data encryption
- A secure system within which a report is distributed to relevant authorities
- An audit trail that details treatment of the report, along with a means to follow up anonymously with the reporter
- Alternate encryption methods for sharing documents as the report is investigated
- An escalation process within the company

If an employee makes a report, the system has already worked, so to speak, though the responsibility for a proper investigation of that report now falls to the relevant authority.

<sup>3</sup> Ethical Resources Center. "Reporting: Who's telling you what you need to know, who isn't, and what you can do about it." NBES 2009.

<sup>4</sup> Ethical Resources Center. "Millennials, Gen X and Baby Boomers: Who's working at your company, and what do they think about ethics?" NBES 2009

<sup>5</sup> Ethical Resources Center. "Retaliation: The cost to employees and your company." NBES 2009.

<sup>6</sup> Ibid./

### Escalating a report

In each of the firms FMI contacted for this study, the first point of contact for a report varies. The general counsel, HR director, ethics/compliance officer, CFO, COO, chief administrative officer, or CEO may handle the initial report from the hotline. For firms that outsource management of the hotline, the report is often already sorted by case type (e.g. human resources, financial audit, legal) and forwarded to the manager responsible for reports of that variety. In most firms interviewed, a team comprised of individuals from the list above will work to jointly assign the report to one area of responsibility.

“We have a written protocol and a process that determines how compliance matters are handled,” explains Jan Gillespie, associate counsel/compliance officer at Mortenson, commenting on the procedures followed on initial receipt of a report. “We have open communication. The moment it comes in, compliance counsel and counsel responsible for human resources matters will review and discuss the allegation to determine responsibility for handling the matter. Sometimes we’ll work together, sometimes we’ll determine the matter falls more within compliance or falls more within human resources. That whole process is a documented part of the compliance program.”

For virtually all of the firms interviewed, the triage process for incoming reports relies heavily on the good sense and judgment of senior personnel, rather than on a cut-and-dry theoretical process. “We do not have written guidelines,” says Brad Gordon, senior vice president and general counsel at Gilbane. “We do have policies in effect that guide us with respect to particular types of issues. For example, we have an ethics code that lays out requirements that are applicable to the employees and how they conduct themselves. And if there’s a breach of one of those ethics code provisions, in that case that would guide us in how we respond and what the severity of the issue may be. But we don’t have a step-by-step guide because these issues vary so dramatically.”

Given the potential ambiguity or compromising nature of incoming reports, some feel that outsourcing management of the hotline is the best option. “Over the last two years, we upgraded the entire process and one of the recommendations was that if you’re going to have a hotline, you should have it through an outside vendor just because it’s more independent,” says a general counsel from a major international construction management firm. “There’s less likelihood that it could be abused internally by not reporting. We know that if someone makes a report we’re going to get it.”

Once the case has been assigned to an officer, the veracity of the claims is investigated, usually under the watch of specific business leaders — frequently the general counsel — or the ethics committee. Outside counsel is considered for more serious, complex cases, including criminal allegations, litigious issues, or when senior personnel are involved. Gillespie says the decision to seek external counsel rests on a few factors. “The nature of the allegation may make outside review more appropriate. It will depend on the severity or nature of the allegation and who is potentially involved or impacted. A decision to consult with outside counsel is made in conjunction with the legal department and the business leaders.”

*“It’s always a fact-based inquiry. Depending on the facts, you draw a conclusion as to what the law is regarding that specific situation. Or it may not always be the law, it may be a matter of company policy. But you assess the facts and measure what the facts show against what the company policy or what the law is and then you make a determination as to what is an appropriate response.”*

Randy Nye, Senior Vice President/General Counsel, Sundt Construction

*If an ethical breach is substantiated, what steps do you take to protect the company's reputation?*

*"One of the things we do is we don't shy away from it. We deal with it head on. If it requires a call or a meeting or an explanation to an outside party whether it's a customer or a subcontractor or supplier or team member on a project we tend to deal with it direct on. And it's often a difficult situation, but we don't shy away from dealing with the issue head on."*

Trevor Ladner, Vice President/General Counsel, Alberici Group

As mentioned, the reporter may need to be contacted by investigators through a secure and anonymous means. The question at this time is: are the allegations true? Questioning the involved parties is not an attempt to interrogate personnel; rather to allow discrepancies to come to light. "It's a cross-examination almost," explains Gordon. "You've got to probe the issues and determine credibility based on a number of factors, most of which are intangible. It's body language, its corroborating information from other people who have no interest in lying, basically. It's more art than science. You can't always be sure you're right."

### **Dealing with ethics violations**

When a company receives and verifies a report of ethical misconduct, management should view the incident as a cultural opportunity. Once the perpetrator is identified, an appropriate disciplinary response (e.g. termination, suspension, probation, rehabilitation) will reinforce your ethical standards to the rest of the company, and demonstrate that misconduct will not be tolerated. Further, the reporter will find their actions affirmed.

The nature of the violation also comprises crucial business intelligence, and should be used to strengthen the company's risk mitigation strategies. Ethics training and corporate policies, in particular, need to be updated per current vulnerabilities and trends. New issues may crop up at any time, and the training modules and sessions should be similarly plastic to minimize risk. Perhaps next time, a similar report should be investigated in a different manner: according to Charles Hardy, general counsel, Austin Industries, each case is unique. "It depends on what's being alleged. For example, if the allegation is a theft or something like that, then we will conduct an investigation that could be done by internal audit in collaboration with a private investigator. We use a variety of ways depending on what the circumstance is. There really isn't any one size fits all response."

All information gathered during the investigation is typically kept up until ten years, depending on the nature of the case. The investigative team may choose to keep the reporter abreast of their response to the report, using direct or anonymous channels. "They have a vested interest in knowing the complaint was taken seriously," says Colleen Goff, vice president and general counsel with Zachry. "Depending on what the complaint was, you might not tell them everything that was done to address the issue. You might be selective about the amount of information you share with them. But we would always get back with someone and give them some amount of information so they knew the complaint had been dealt with."

Once an issue is resolved, many of the firms FMI spoke to noted that there is a place for issuing a public response to widespread rumors of misconduct. Doing so is at the discretion of the managerial staff, and it is noted that the propensity of gossip to travel through an employee base will often ensure that the resolution to a crime or incident will also become known through unofficial means. Many companies use sanitized content from an ethical breach in their training materials, without including specific details. If the breach leads to a policy change, management will likewise advise staff of the change, but avoid violating anyone's privacy. If a client is impacted (e.g., overcharging), the decision to inform them about the ethical breach is critical. Leaders believe that clear, honest communication and a promise to rectify the situation is the best service a company can offer their client.

## Building a better reporting mechanism, and stronger ethics program

The performance of your ethics program depends on how engaged your employees are with the company in general, and ethics in particular. This in turn depends on how your company seeks out and responds to reports of ethical misconduct. Following are a list of best practices regarding ethics programs, and the reporting mechanisms that underpin them.

**Continuous improvement:** An informed executive team can make informed decisions about training, risk mitigation and management issues. The more intelligence they are able to gather through any means — employee feedback, questions, hotline reports — the better they can understand and proactively address the challenges of the workplace for their employees. Promoting an “open-door” policy is the easiest way to ensure a transparent ethical culture, and ensure policies are up to date, deterring fraud and dishonesty in the process.

**Prepare your employees:** Once a company makes ethics the lynchpin of its culture, customers, employees and contractors respect those standards. A holistic commitment to ethics, though driven by management, requires the entire employee base to be literate in the code of conduct and operational guidelines. Ongoing training, updated to reflect new risks, will impress upon employees the importance of ethics to the company, and their role within that structure.

**Promote your hotline:** While management may promote an “open-door” policy, the specifics of employee or hierarchical relationships may prevent a face-to-face report. It is therefore crucial that an alternate and inviolable mechanism for feedback exists. As mentioned in “Helping employees make the call,” the hotline must be anonymous, accessible and secure. Employees should be encouraged to use the hotline for queries as well as reports to familiarize them with the system.

**Ensure a thorough investigation:** Nothing will dissuade future reporting behavior than a report that goes ignored or unaddressed. Ensure the veracity of the investigative process, as well as adequate oversight by a board or committee, so nothing goes unchecked.

**Prepare for the next report:** Even a report that is ultimately dismissed can shine a light on an area of vulnerability or ambiguity. It is the responsibility of the investigative parties or ethics/compliance officer to ensure that the system (training, materials, processes) is updated to actively prevent future incidents.

## Conclusion

In spite of the technological underpinnings of hotlines and fraud detection systems, the best defense against wrongdoing remains old-fashioned — a strong corporate culture and open communication. This does not devalue the role of the hotline. Rather, by providing a hotline and associated reporting infrastructure, a company demonstrates to its employees that it is absolutely committed to safe and confidential reporting behaviors.

Gordon explains that the hotline is “only one piece” of an ethics program. “You have to have an ethical culture to be successful,” he says, “and I think one of the reasons we’ve had so few calls and reports is because we have a good strong ethical culture in the company, which we’re always trying to reinforce. The CEO, Tom Gilbane, and I have taught our ethics training for all new employees for several years jointly. And that sends a message about what’s expected.”

“The hotline is just one piece of it,” echoes Gillespie, who emphasizes the importance of the vested interest and commitment to compliance by executives in their company. “We have an open-door culture, which is where most activity occurs.” Driving the importance of abiding company policy and reporting wrongdoing out to the distal reaches of a company requires repeated demonstrations that the leadership is behind it. Employees need to know that if they make a report, the company, at all levels, is committed to compliance and doing the right thing and reports will be handled appropriately.

As will be apparent, ethics is not a cut-and-dry issue of compliance. The personal investment, judgment and sensitivity required to adhere an entire organization to an ethical system is significant. “Obviously the sentencing guidelines require certain things,” begins Goff. “But, after that, I think that compliance has to be based on an ethical culture, an ethical way of dealing, not only with complaints, but how you run your business. And that has to be determined in a way that fits you and your culture.”

The gamut of interviews conducted for this study, as well as the research that preceded it, point toward the ongoing importance of a vital ethical culture within each company. Ethics is not an end point, but an ideal that must be communicated, discussed, referenced and investigated. The ethics program is a vehicle through which you can reach and influence your employees, clients and competitors. It might start with an anonymous phone-call, but it can end with a cohesive staff, united openly against wrongdoing for the good of their company. ■

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For more information on how FMI can help you tackle the acute challenges facing your firm, please contact: **Andy Patron**, Senior Consultant, at 919.785.9239 or [apatron@fminet.com](mailto:apatron@fminet.com), or **Sabine Huynen Hoover**, Senior Research Consultant, at 303.398.7238 or [shoover@fminet.com](mailto:shoover@fminet.com)

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