



## Risk, an Existing Law and New Technology: Preventing Bad Things from Happening to People and Organizations

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#### **Situation**

- Sexual harassment and assault, authority figures having sex with minors, defalcation, fraud, discrimination – outright racism, theft, bribery, safety and security breaches, violations of law, policies, and procedures - it seems that at least one such incident makes the news every week. We are becoming inured to what has been infamous, but to the victims the implications are very real and may be horrifying. And for every incident in the news there are hundreds that never become public knowledge. All of them share four common characteristics:
  - They were caused by an individual's or individuals' aberrant behavior. (Of the over one hundred incidents that we studied closely, there was documentation that all except one had passed a recent background check.)
  - Others knew of the behavior.
  - The behavior undermined the organization's performance, in some cases catastrophically.
  - Virtually all the harm to the victim(s) and the organization would have been avoided if the behavior had been promptly addressed.
- The lack of a basis to trust providers and employers is a gnawing and growing issue in American households.

#### **The Law**

- What has not been reported and is little known is that Sarbanes-Oxley directed the U.S. Sentencing Commission to ensure that their guidelines "are sufficient to deter and punish organizational criminal misconduct."
- The associated and routinely revised Sentencing Guidelines are well-crafted, compelling and require all organizations, including corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments, and nonprofit organizations to have an effective compliance and ethics program and system *to prevent and detect criminal conduct*.
- There are no legal consequences if a nonpublic entity does not have an effective compliance and ethics program unless there is an incident that the guidelines are



intended to prevent and detect. In such cases organization leaders may be personally charged and will likely face severe civil consequences.

- Organization leaders are held responsible for the acts, including decisions, of their agents and employees and may face criminal charges whenever an employee or agent commits an illegal act, within the apparent scope of his or her responsibilities, even if they acted directly contrary to policy and instructions. However just having an effective compliance and ethics program can protect an organization and its leaders from prosecution, reduce a fine by up to 95% or a sentence in the event of prosecution. A system also provides a significant defense in civil and administrative litigation.
- The Commission outlines seven key criteria for establishing an effective program:
  1. Clear and accessible standards and procedures to effectively prevent and detect criminal conduct.
  2. Board or equivalent ensures that the program is implemented and effective. High-level personnel delegate operational responsibility to, and adequately support, senior individual(s).
  3. Individuals known, or should be known through due diligence, e.g., background checks, to have engaged in conduct inconsistent with the program are not given substantial authority.
  4. Periodically communicate standards and procedures and other aspects of the program to leadership, all employees, and agents by providing resources, training, and information.
  5. Monitor program effectiveness and provide a system which facilitates reporting or seeking guidance regarding potential or actual criminal conduct without any adverse effects.
  6. Promote and enforce program through appropriate incentives and disciplinary measures for criminal conduct and for failing to prevent or detect criminal conduct.
  7. When criminal conduct has been detected, respond appropriately to prevent further similar incidents, including making any necessary modifications to the program and system.
- Any organization which coordinates, supervises, or exercises control over policy, or assists or advises one or more chapters, members, or affiliates of an association or group could be found at least civilly liable, if they have not compelled the subordinate entities to have an effective notification program and system, and a subordinate entity has an incident that the guidelines are intended to prevent and detect.
- Franchisors can now expect to be held criminally and civilly liable, if they have not compelled their franchisees to have an effective notification program and system, and a franchisee has an incident that the guidelines are intended to prevent and detect.
- The American Bar Association notes that in addition to avoiding liability, programs to raise and address problems are a good business practice and regardless of governance



or size, every organization should voluntarily implement them. “Should the benefits of compliance not be significant, avoiding liability should be.”

**Research and Solution**

- Look 1st has been studying organization behavior for decades and evaluated and consulted on these types of incidents. In over 98% at least one other person knew of the behavior and in 93%, multiple people at least strongly suspected the aberrant behavior. In more than half of all incidents it was considered “common knowledge.”
- We have spent the last six years conducting seminal and extensive research on why people do not report serious issues and what it would take for them to do so, to optimize reporting.
- Based on the research, applications were developed, tested, and refined to increase serious issue notifications. NOTIFY 1.0 includes all ten of the features identified in our original research. NOTIFY enables people to communicate when they want, how they want and what they want. And responding to continual input from populations that may have critical information to report will set an ever-higher standard for effectiveness. Organizations provided input regarding functionality including dashboards and reports.
- Recent research indicates that all surveyed populations are far more likely to report serious issues using Look 1st’s NOTIFY than they would with designated procedures:

<b>Will Submit Serious Issue Notifications</b>				
<b>Group</b>	<b>N</b>	<b>Current Procedure(s)</b>	<b>NOTIFY 1.0</b>	<b>Variance</b>
B2B	3,712	3.6%	89.5%	2381%
Candidates	12,504	6.5%	93.4%	1335%
College Students	14,818	9.4%	94.7%	907%
Consultants/Contractors	4,275	3.1%	90.5%	2787%
Consumers	7,263	4.4%	86.4%	1848%
Employees	8,364	8.1%	94.1%	1056%
Management	1,849	13.7%	95.3%	594%
Nonprofits	6,759	8.8%	95.8%	991%
Parents	11,072	8.7%	96.2%	1005%
People of Color	6,073	3.5%	92.7%	2531%
Seniors	3,849	5.6%	90.2%	1507%
Teens	10,147	6.3%	94.9%	1409%
Temporaries	8,122	6.4%	88.3%	1285%
Vendors	2,649	4.8%	89.6%	1784%
<b>TOTAL</b>	<b>101,456</b>	<b>6.9%</b>	<b>92.1%</b>	<b>1235%</b>



- There is already anecdotal data that NOTIFY has the prophylactic effect that psychologists and law enforcement predicted.
- Publicity about the research led to a group of mothers assuming the role of Look 1st advisors and asking – demanding a means to know if schools and youth programs had an effective compliance and ethics program and notification system to protect their children. (Similarly, a CEO asked the exact same question about protecting her company in our founder’s book, [Outsourcing: The Definitive View, Applications, and Implications](#).)
- The parents proposed and designed seals which are now incorporated into all applications.
- Virtually all organization academics and consultants surveyed consider an effective notification system essential for all organizations. There is no dissension whatsoever.
- Over 90% of both consumers and employees strongly agree that an effective notification system is the foundation of trust in any organization.

## Conclusions

- Although the benefits of compliance are significant, only about 4% of nonpublic entities report that they have an effective compliance and ethics program.
- Until recently nonprofits and small organizations ignored the most serious implications of these incidents, but that is changing. The National Federation of Independent Business, for example, is offering programs on sexual harassment; 60% of their members have between one and five employees.
- Organizations should ensure that their partners, suppliers, contractors, and borrowers have at least an effective compliance and ethics program. The lack of a program, for example, is responsible for over \$60M in bank losses from an oil and HVAC provider.
- Rules are not enough. Pennsylvania, for example, “mandates” educators report suspicions of abuse and neglect. U.S. Senator Casey has proposed a similar, national [SPEAK Up Act](#) yet while Look 1<sup>st</sup> was meeting with his staff about our research a Springfield Township Pennsylvania teacher was arrested for having sex with two middle school students. Innumerable students, teachers and administrators knew of the increasingly inappropriate relationships months before the sex.
- Predators and other criminals know that procedures, policies and even laws alone are unlikely to result in anyone reporting their illegal behavior.
- **Laws, policies, procedures, and training, without a system people trust, are ineffective.** Preventing and detecting any wrongful behavior without a system is as difficult as preventing and detecting fires without a smoke detector.
- Effective notifications systems do not just prevent and detect wrongful acts, they also provide a critical conduit for positive communication.



## References

- [Sarbanes-Oxley Act of 2002](#)
  - Sec 805 (a) (5)
- [U.S. Sentencing Commission, 2018 Guidelines Manual](#)
  - [§8A1.1. Applicability of Chapter 8 1.](#)
  - [§8B2.1 – Effective Compliance and Ethics Program, \(a\) \(1\) and \(b\) \(5\) \(B\) \(C\)](#)
- [An Overview of the Organizational Guidelines](#)
- [\*Comprehensive Analyses of Factors Associated with Communicating Serious Issues, Feedback and Suggestions, Why Serious Issues Go Unreported and How Leaders Can Protect Their People and Organizations from Devastating Consequences\*](#)

## Timeline

- March 1964, circumstances associated with the murder of Kitty Genovese are the origin of the bystander effect or Genovese syndrome.
- 1968, first academic reference to bystander effect.
- Sarbanes–Oxley Act of 2002.
- October 2009, *SuperFreakonomics* published and documents that there was no bystander effect associated with Kitty Genovese’s murder.
- November 2011, Penn State child sex abuse scandal breaks.
- 2012, Look 1st begins researching why serious issues are not reported.
- 2013 First USA Gymnastics lawsuit filed.
- 2014, Look 1<sup>st</sup> begins researching what would optimize the reporting of serious issues.
- 2014, Publish first edition, *Comprehensive Analyses of Factors Associated with Communicating Serious Issues, Feedback and Suggestions, Why Serious Issues Go Unreported and How Leaders Can Protect Their People and Organizations from Devastating Consequences.*
- 2016, U.S. Sentencing Commission Guidelines Sentencing of Organization Chapter updated.
- 2016 - 2018, Look 1st applications developed and tested.
- 2019 - 2020, Look 1st rollouts and begins refining applications.
- 2021, Using the same service-oriented architecture (SOA) as Experian Partner Solutions uses for the entire identity management industry including LifeLock, Look 1st begins licensing its technology platform for geographic and vertical markets.
- 2022, Look 1st will begin partnering with academics to take the research to another level and present a whitepaper to U.S. Senators Casey and Toomey for the Securities and Exchange Commission and the U.S. Sentencing Commission including scope and delivery considerations.



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