

Ethical Dilemmas Facing In-House Counsel in Light of Sarbanes-Oxley and Other Recent Developments

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- “Up The Ladder”
 - The Duty to Report
- The Qualified Legal Compliance Committee
- Whistle Blowers
 - Can Preventative Measures Help?
- Litigation: Spotting Potential Conflicts of Interest and Privilege Issues

“Up the Ladder” The Duty to Report

- The SEC Rules of Professional Conduct
 - 17 C.F.R. Part 205
- Report “Evidence of a Material Violation”
 - of what?
 - to whom?
 - and if they don’t respond appropriately?

“Up the Ladder” The Duty to Report

- “Reasonably Likely” requires evidence more than a mere possibility, but **not** “more likely than not.”

“Up the Ladder” The Duty to Report

Consequences and Cases

- Electro Scientific Industries, Inc.
 - Penalty and cease and desist orders
- Google
 - David Drummond, General Counsel

The Qualified Legal Compliance Committee

- An Alternative Reporting Structure
- Chief Benefits
 - streamline reporting process
 - encouraged by SEC to institutionalize practice of assessing evidence
 - protects attorney/client privilege

The Qualified Legal Compliance Committee

- Chief Requirements
 - an audit committee member
 - 2 or more outside directors
 - written procedures
- Drawbacks

Whistle Blowers Can Preventative Measures Help?

- Section 806, prohibits retaliation against an employee for providing information “the employee reasonably believes” constitutes fraud ...
 - *Cardinal Bankshares* case
 - Properly document discipline and termination

Litigation: Spotting Potential Conflicts of Interest and Privilege Issues

- If the company and individuals are named defendants
 - When *should* they have separate litigation counsel?
 - When *must* they have separate litigation counsel?
- Will the General Counsel's communications be privileged and who can assert the privilege?

Questions?