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NATIONAL CAPITAL REGION

Hogan Lovells

Pulled from the headlines: An insider's view of ethical issues in high-profile investigations

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Agenda

1. Introduction: Ethical issues in high-profile investigations
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INTRODUCTION

Ethical issues in high-profile investigations

High profile investigations are multi-faceted

High profile investigations raise a variety of ethical issues

Client identification
- Organizational client (Rule 1.13)
- Duty to warn

Privilege and waiver issues
- Protecting privilege in course of Congressional investigation
- Risk presented by global investigations
- Note taking practices (Rule 1.1)

Duty of Candor
- Candor to the tribunal (Rule 3.3)
- Interaction with Rule 1.6 confidentiality obligations
- General honesty obligations under Rule 8.4 and Rule 4.1

Joint defense agreements
- Common interest doctrine and joint representation privilege
- D.C. Rule 1.6(c)

Scenario 1

Managing an internal investigation

Managing an internal investigation

Hypothetical facts

- Your boss, General Counsel for a global defense contractor, informs you that she received a call from law enforcement informing her that your company is under investigation for allegedly coordinating bids for government contracts with other contractors
- The allegations relate to contracts with the U.S. government and foreign governments
- You are asked to manage the internal investigation

Question 1

What can you do at the outset to try to ensure your investigation is well managed?

Managing an internal investigation

Practical tips: Initial decisions about internal investigations are often complex, tricky, and sensitive. If the wrong course is taken at the outset, it is often difficult or impossible to re-route or undo the problem later.

It is generally wise to consult with another lawyer with expertise in this field.

Managing an internal investigation: Initial considerations

Are facts needed to support a legal strategy?

Are there possible ongoing violations of law?

Is there a need to build a record to support personnel actions that may be necessary?

Additional initial considerations

Who within the company needs to be informed?

Who will make decisions with respect to how this matter is handled?

Who should supervise the investigation?

- In-house counsel or outside counsel?
- Forensic accountants or other outside professionals?
- Audit committee or a special committee of the company's board of directors and/or their independent counsel?

Take steps to preserve privilege and confidentiality

Take steps to preserve hard copy and electronic documents

Determine how much to cooperate with the government

Evaluate potential parallel proceedings

- Shareholder litigation
- *Qui tam* action
- Government contract suspension or debarment

Question 2

Who is your client?

In-house counsel generally represent the company

- D.C. Rule 1.13 (a), Maryland Rule 1.13(a), and Virginia Rule 1.13(a) all provide:
- A lawyer "employed or retained by an organization represents the organization acting through its duly authorized constituents"
- Identifying client of government lawyers can be more difficult. Could be:
  - "Public interest"
  - Entire government
  - Branch of government or agency employing the lawyer
  - A particular government official (either the office or the individual)

Practical impacts of client identification

- Duty to warn
- Up the ladder reporting
- Privilege
- Shapes conflict of interest analysis

Question 3

If you interview the CEO or other senior officers, must you warn them that you are not their personal counsel?

Duty to warn

- Under some circumstances, you must warn the CEO (or other corporate constituents) that you represent the organization and not him or her
  - MD and VA: Only when the CEO's interests "are adverse" to the company's. Rule 1.13(d)
  - D.C.: "When it is apparent that the organization's interests *may be* adverse to those of the constituents with whom the lawyer is dealing" but not if "no reason to believe" any possibility of adversity. D.C. Rule 1.13(c).
  - D.C.: Also must warn if you know or reasonably should know unrepresented person misunderstands lawyer's role. In such circumstances, counsel shall make "reasonable efforts" to correct the misunderstanding. D.C. Rule 4.3(b).

Duty to warn (continued)

- DOJ Yates Memorandum underscores intent to target individuals and require companies to disclose information about individual misconduct in order to receive cooperation credit
- Prudent to warn the CEO
  - Any information he provides you about the investigation is privileged and confidential
  - Privilege belongs to the Company and not the individual
  - Anything the lawyer learns from the CEO may be disclosed to and/or used by the Company to defend the Company to the detriment of the CEO
  - CEO should consider hiring personal, independent counsel

Question 4

When do you have a duty to report what you learn to higher ups?

Up the ladder reporting obligations

- Rule 1.13 provisions in D.C., MD, and VA require in-house counsel to take action if they "know" an employee "is engaged in" or intends to act in a way that that:
  - (1) violates the employee's legal obligation to the corporation or is a "violation of law" that could be imputed to the corporation;
  - (2) is related to the lawyer's representation of the corporation; and
  - (3) is likely to subject the corporation to "substantial injury" to the organization.

If reporting does not stop illegal conduct:

- If in-house counsel reports all the way up the ladder, but the company continues to engage in clearly illegal conduct, lawyer may resign. *See* D.C. Rule 1.16 (b(1)-(b)(2); Maryland Rule 19-301.12 (b)(2)-(b)(3).
- The Virginia Rules permit a lawyer to resign or "decline to represent the client *in that matter*"
- Virginia in-house counsel have an important option – rather than quitting their jobs, they may instead choose to withdraw *from the matter at issue*

Up the ladder reporting and confidentiality obligations

In Virginia and D.C. the "up the ladder" reporting requirements of Rule 1.13 do not alter in-house counsel's confidentiality responsibilities

Counsel reporting "up the ladder" must examine the limited exceptions to a lawyer's confidentiality obligations in Rule 1.6 and tailor their actions accordingly

Maryland and Virginia Rules may permit additional disclosures when the client is a government organization. *See* Virginia Rule 1.13, Cmt 9 and Maryland Rule 19-301.13(a), Cmt 8.

"when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved"

In D.C., government lawyers have additional flexibility to disclose client confidences or secrets when "permitted or authorized" by law. *See* D.C. Rule 1.6(e)(2)(B).

This exception *does not apply* when government lawyers are assigned to a specific individual (*e.g.* public defenders, government lawyers representing a defendant sued for damages in their capacity as a government employee, military lawyers representing a court-martial defendant, etc.)

Up the ladder reporting and confidentiality obligations

MD Rules also explicitly authorize a lawyer to reveal information if the organization's highest authority "insists upon action, or refuses to take action, that is a clear violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization, and is reasonably certain to result in substantial injury to the organization"

and the lawyer reasonably believes that:

the highest authority in the organization has acted to further the ***personal or financial interests*** of members of the authority which are in conflict with the interests of the organization; and	revealing the information is necessary in the best interest of the organization.

Question 5

How does organizational client identification impact attorney-client privilege?

Does client identification impact attorney-client privilege?

- Generally the privilege protects confidential communications between attorney and client if made for the purpose of obtaining or providing legal advice
- Information provided by employees in course of investigation typically protected under *Upjohn Co. v. United States*, 449 U.S. 383 (1981) if:
  - (1) communication made to counsel acting as counsel; (2) at direction of management for the purpose of securing legal advice; (3) concerning a subject within the scope of employment; and (4) employee knows the purpose of the communication is for corporation to procure legal advice.

Scenario 2

Multi-jurisdictional investigation and note taking

Multi-jurisdictional investigation and note taking

Hypothetical facts

- In the course of your investigation, you travel to China to interview a regional VP
- He asks you not to take any notes documenting your conversation

Question 1

If you were to take notes documenting your interview, are they likely discoverable?

Privilege law: No global consensus

No global consensus

- Who qualifies as “attorney” and “client” differs

Common law countries

- Generally client can waive

Civil law countries

- Often *may not* be waived

Definitions of “lawyer” and “client” differ

Risk of discoverability of your notes

In Chinese litigation

- China largely does not recognize privilege protections that parallel the U.S. attorney-client privilege and work product doctrines
- Chinese lawyers have a duty of confidentiality that is subject to a number of exceptions
- However, that duty of confidentiality would not likely apply to a U.S. lawyer visiting China or extend to in-house counsel working for the company in China
- Thus, significant risk that your notes would be discoverable in Chinese litigation

Risk of discoverability of your notes (continued)

In U.S. litigation

- U.S. choice of law rules usually will shape analysis
- U.S. courts often apply a "touching-base" analysis that attempts to identify:
  - What jurisdiction has the "predominant interest in whether [the] communications should remain confidential,"
  - "The place where the allegedly privileged relationship was entered into"
- Typically if communications (1) relate to legal proceedings in the U.S. or (2) reflect the provision of advice regarding U.S. law, courts apply U.S. privilege law (even if the communication is with a foreign attorney)
- Public policy considerations may dictate a different outcome than the "touching-base" analysis would initially suggest. *See Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (2002).

Practical tips

- Disclosure to enforcement agencies in pursuit of leniency may risk waivers in that agency's jurisdiction and *other jurisdictions*

- U.S. law generally draws no distinction between the roles of in-house counsel and outside counsel but many jurisdictions *do not* protect communications with in-house counsel. Even in foreign jurisdictions that afford privilege protections to in-house counsel, they may not apply if the in-house counsel does not hold a license to practice law (a common practice in some jurisdictions).

Question 2

What ethical considerations should shape your decision about whether you should or should not take notes?

Your competency obligation

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *See* D.C. Rule 1.1, Maryland Rule 19-301.1, Virginia Rule 1.1.
- No requirement to document every conversation
- What do you need to record what you need to provide competent representation?
  - Perhaps includes things you will need to recall for the client's benefit
  - No requirement to document admissions of past wrong doing
- Consider whether request that you *not* take notes is a red flag of some kind

Scenario 3

Protecting privilege in a congressional investigation

Protecting privilege in a congressional investigation

Hypothetical facts

- The U.S. House Armed Services Committee has opened an investigation and has issued a subpoena to your company
- Counsel for that committee asserts that Congress is not bound by common law rules protecting attorney-client privilege and work product protections because
  - (1) Congress has broad inherent constitutional powers to investigate that have been recognized by the Supreme Court
  - (2) The attorney-client privilege and work product doctrine are common law rules developed in the judiciary that Congress, a separate branch of government, is not bound by

Question 1

Is the committee staff right that the attorney-client privilege and work product protections do not necessarily extend to congressional investigations?

Must Congress respect attorney-client privilege/work product law?

- No court has squarely addressed this question
- Absent court guidance, congressional committees (in practice their chairpersons), assert broad discretion to decide when to recognize these protections
- A 2017 Congressional Research Service (CRS) report explains committees typically weigh legislative need, public policy, and their oversight duties against any possible injury to the witness

Must Congress respect privilege/work product law?

According to CRS report, committees may consider

- How pertinent the requested document is to the investigation
- The availability of the privileged information from another source
- The validity of the claim of privilege (i.e., would it be upheld in a judicial forum)
- The general cooperation of the witness

Question 2

Given the Committee's assertion of broad discretion, how should you proceed to protect privileged materials and work product as much as possible?

Negotiating to protect privileged materials

Congress (like other government agencies) may respond to a company's assertion of privilege by taking a more aggressive posture

Your client may want to avoid the stigma associated with a public fight to shield information from Congress and the American public

Best strategy may be to resolve privilege assertions through negotiations and compromise

Negotiating to protect privileged materials (continued)

Effective negotiation to minimize disclosure of privileged documents can involve

- Examining the relevant committee or subcommittee's past practices
- Raising early your concerns that disclosure could injure your witness
- Promptly producing non-privileged, responsive documents
- Attempting to narrow the scope of the document request
- Clarifying the scope of any privilege claim
- Negotiating the terms of any "in camera-like" review
- Negotiating confidentiality

Practical tips

- As suggested above, a similar approach may be appropriate when negotiating about providing potentially privileged documents to DOJ, the SEC, or other enforcement agencies

- These agencies may view a refusal to produce documents negatively and may even draw a negative inference from your refusal to produce requested documents
- Counsel must weigh these possibilities against any potential waiver risk

Question 3

What should you do if you have reason to believe that a witness will provide false testimony to Congress or during a deposition?

Candor toward the tribunal

- Rule 3.3 of D.C., Maryland, and Virginia Rules requires "Candor Toward the Tribunal," which prevents lawyers from making "a false statement of fact or law to a tribunal" or from offering "evidence that the attorney knows to be false"
- Action required only if counsel *knows* the evidence provided (or intended to be provided) is false. A reasonable belief or suspicion of falsity is not enough. *See* Virginia Rule 3.3., Comment 8.
- If lawyer offers evidence believing it is true then learns it is false, or is surprised by witness testimony the lawyer knows is false, remedial measures must be taken
  - The remedial measures required differ by jurisdiction

Candor toward the tribunal: Remedial measures

Virginia and Maryland

- Counsel may withdraw from representation but if that is not permitted "or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done." *See* Virginia Rule 3.3, Comment 10; *Accord,* Maryland Rule 19-303.3, Comment 12.

D.C.

- May not disclose information otherwise protected by Rule 1.6, unless the facts trigger one of the exceptions outlined in that rule. *See* D.C. Rule 3.3(d).
- If a lawyer is unable to dissuade the client from providing false testimony or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion. But lawyer may not "elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument." *See* D.C. Rule 3.3(b).

Candor toward the tribunal: Congressional hearing

- A congressional hearing is not likely a “tribunal” as contemplated by these rules
- But, crime-fraud exception to the attorney-client privilege could be implicated by client’s false testimony
  - Generally applies when a client in the process of committing or intended to commit a crime or fraudulent act, communicates to the lawyer an intent to further the crime or fraud, or to cover it up
  - This could be the case if a lawyer assists a client in preparing to provide false testimony to Congress. "Knowingly and willfully" making "any materially false, fictitious, or fraudulent statement or representation" in congressional testimony is a felony. *See* 18 USC 1001. Thus, if a client communicates with his or her counsel in the process of committing that crime, those communications may not be privileged.

Candor toward the tribunal: Deposition

- Depositions are more clearly covered by Rule 3.3
- Depositions are recognized as an ancillary proceeding of a court and therefore covered by Rule 3.3. *See e.g.*, Virginia Model Rule 3.3, comment 10.
- When a client offers or intends to offer false evidence, it creates a conflict between counsel's obligation to keep a client's confidences and counsel's duty of candor to the tribunal. A comment to Virginia Rule 3.3 explains:
  - If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Scenario 4

Joint defense agreement

Joint defense agreement

Hypothetical facts

- Early in the investigation the company enters a joint defense agreement (JDA) with a regional sales manager who was responsible for bidding on the U.S. contracts at issue and is alleged to have coordinated his bids with those of other bidders

Question 1

When, if ever, should this joint defense agreement be severed?

Joint defense agreements

- JDAs are contracts through which two parties agree to exchange confidential information for their mutual benefit
- Such agreements typically aim to take advantage of the common interest doctrine, which operates to prevent a waiver of attorney-client privilege protections that would protect these communications if they were not shared with a third party

When does common interest privilege apply?

Jurisdictional rules differ, but common requirements include

An underlying privilege (such as the attorney-client privilege) protects the communication

Parties disclosed the communication at a time when they shared a common interest

- Generally a legal one not solely a business one
- Must relate to a collaboration in pending or future litigation

Parties shared the communication confidentially in furtherance of that common interest

Parties have not waived the privilege

When should joint defense agreement be severed?

- The agreement should be severed when the parties' interests are no longer "substantially similar"
  - When one member advises the other members that they intend to disclose a communication outside of the JDA, any information provided to that member thereafter is not protected by the common interest privilege
  - When this happens, continuing to share information through the JDA could waive otherwise applicable privileges
- In this hypothetical, it's possible the interests of the company and the sales manager were never aligned and no joint defense agreement was ever appropriate

Question 2

What other ethical issues can be raised by JDAs?

Ethical issues raised by JDAs

Fallout from a withdrawal

- Some courts have held that information obtained from a party who withdraws prior to such withdrawal may not be used in the cross-examination of that cooperating witness by counsel for the remaining parties to the JDA
  - Courts reasoned that JDAs at issue created implied attorney-client relationships between counsel and all participants to the agreement that precluded cross-examination

Obstruction concerns

- Actions taken by the company to encourage continued cooperation with a former employee could be viewed as obstructing justice
  - Promising payment of legal fees, a coveted job, or other things of value to a potential witness could be viewed as inappropriate if tied to cooperation with the company
  - The D.C. Rules specifically permit counsel to reveal client confidences or secrets in order to prevent the bribery or intimidation of witnesses. *See* D.C. Rule 1.6(c).

Practical tips

- Your company may want to preserve its right to disclose information learned from employees or former employees to the government in order to secure cooperation credit

- Including language in JDAs explicitly authorizing such disclosure may:
  - Discourage employees/former employees from cooperating
  - Support an argument that the JDA is illusory because it negates the central requirement for an effective JDA—that the parties actually have a common interest

Scenario 5

Speaking to the press

Speaking to the press

Hypothetical facts

- The CEO feels the company is getting beat up in the press
- She asks you to do a series of interviews with legal and business news outlets

Question 1

What ethical issues should you consider when talking to the press?

Ethical concerns when speaking publicly

Candor/honesty

- General obligation to avoid engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation." *See* Rule 8.4.
- VA, D.C., and MD Rules all prohibit counsel from knowingly making "a false statement of material fact or law" to third parties in the course of representing a client. *See* Rule 4.1.

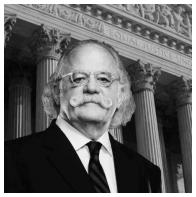
Protect privilege

- Client can always choose to waive privilege
- But if counsel inadvertently does, could be subject to malpractice claim

Avoid saying anything that could be viewed as an effort to intimidate witnesses or otherwise obstruct justice

- D.C. Rules and Maryland Rules also require that lawyers avoid engaging in conduct that "interferes with the administration of justice." *See* D.C. Rule 8.4(d), *accord* Maryland Rule 19-308.4(d).

Presenters



Ty Cobb

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Ty Cobb is currently handling selected complex litigation matters. He recently served in the government as an Assistant to the President of the United States, serving as Special Counsel to the President through from July 2017 until June 2018.

Until July 2017, he was a partner for 29 years in the Washington, D.C. office of Hogan Lovells. He served on the firm's Executive Committee. Ty also ran Hogan Lovells' practices involving white collar criminal litigation, DOJ, and SEC enforcement matters (with an emphasis on cases involving insider trading and the Foreign Corrupt Practices Act), and Congressional investigations and hearings for over 20 years. Ty, a former federal prosecutor and DOJ official, is a Fellow, of long standing, in The American College of Trial Lawyers, an early inductee by the Ethisphere Hall of Fame for his contributions to compliance and ethics.

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