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Ethical Considerations for In-House Counsel

Best Practices and Tips for Handling Internal Investigations and Related Issues

A wider lens on workplace law

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Ethical considerations in corporate investigations

- Who is the client
- When to conduct investigation
- Who should conduct investigation
- What is scope of investigation
- What communications should be made about investigation
- Ensuring evidence is retained

SC Rules of Professional Conduct

Preamble

- A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice

SC Rule 1.13(a) – Organization as client

- A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents

Deciding when internal investigation is necessary

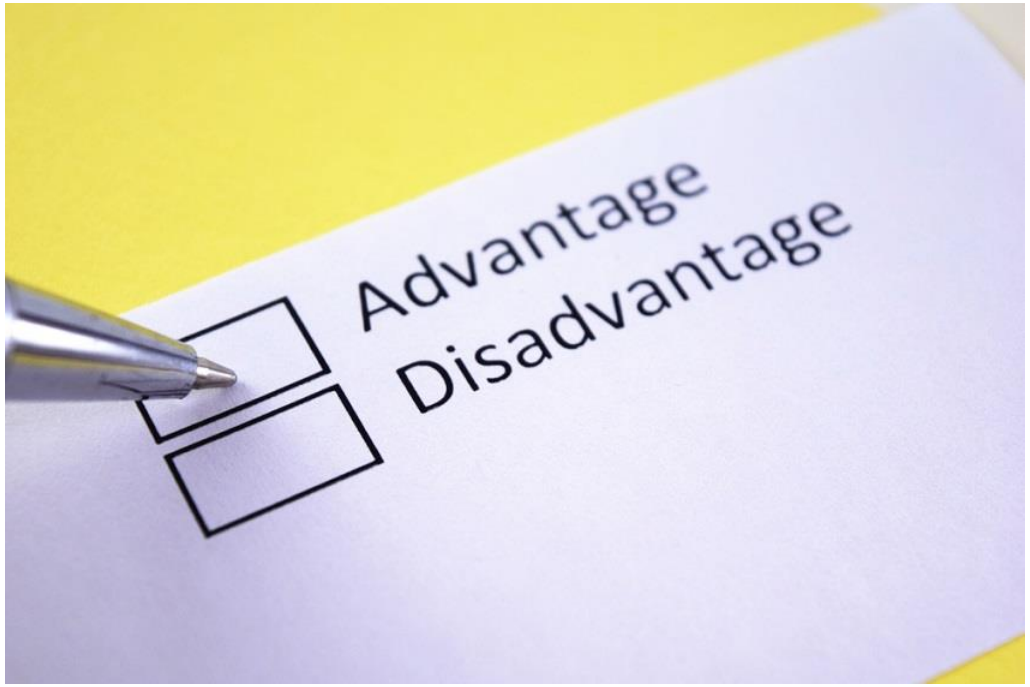
Triggering events

Certain events/circumstances can trigger the need to investigate

- Law enforcement inquiries
- Lawsuits
- Whistleblower complaints
- Hotline tips
- Exit interviews
- Any other circumstance giving rise to allegations of misconduct

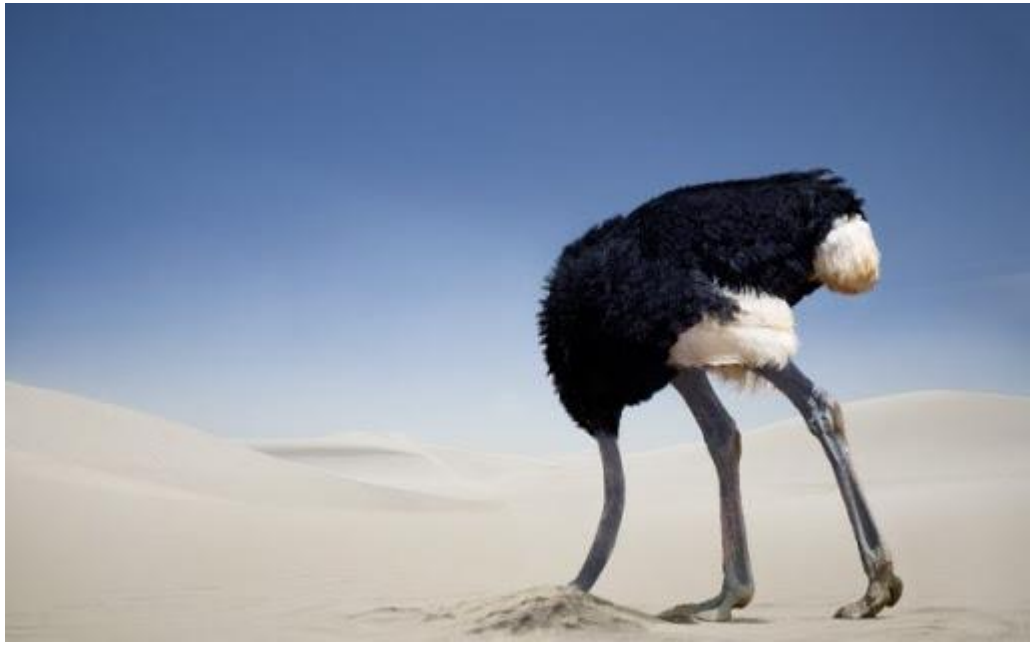
Benefits of investigating

- Knowledge is power
- Avoid damages
  - *Faragher/Ellerth* defense
  - Punitive damages



Consequences of not investigating

- Damages (knew or should have known)
- Surprised executives



Define scope of investigation

- Too narrow = may miss relevant facts and affect outcome
- Too broad = inefficient; wasteful
- Define parameters in writing

Determine who will conduct the investigation

- In-house counsel v. outside counsel
  - Generally, in-house counsel will have greater familiarity with the issues and personnel involved
  - Outside counsel can often more effectively establish and maintain attorney-client privilege and work-product protections
  - Be mindful that investigator may become a witness
  - For larger companies, stand-alone compliance departments have become a popular option for conducting investigations

SC Rule 4.2 – Communication with person represented by counsel

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

When employees are litigants

- In-house counsel cannot communicate with employees who are part of wage and hour collective action
- In-house counsel cannot communicate with employees identified as class members in EEOC litigation

Presence of employee's counsel

- What if employee to be interviewed during internal investigation requests that his/her counsel be present?
- Does Rule 4.2 apply?

Privilege & confidentiality considerations

SC Rule 1.6 – Confidentiality of information

- A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation . . . .

Comment to Rule 1.13

- When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6.
- Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.

Comment to Rule 1.13 - continued

- This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituent's information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client to carry out the representation. . . .

Upjohn v. U.S., 449 U.S. 383 (1981)

To be privileged, communications must be:

- Made by corporate employees
- To counsel for the company acting as such
- For the purpose of obtaining legal advice
- At the direction of corporate superiors
- Intended to be and were kept confidential

Who are "corporate employees"?

Every person employed by the company can be a "corporate employee" for privilege purposes

- C-Suite
- Middle mangers
- Hourly workers

Counsel "acting as such"

- Because in-house counsel may serve both legal and business functions, courts will scrutinize the nature of their communications before finding that the communications are privileged

Differentiate between legal & business advice

- Advice must be related to corporate legal interests
- Attempt to segregate business advice from legal advice
- Set out the legal purpose of your communication at the beginning of the email/document
- Train company executives on:
  - The difference between legal and business advice and when the privilege properly applies
  - How to request legal services vs. business advice

"Significant purpose" test

- As long as one of the significant purposes of the internal investigation communication is to obtain legal advice, then the attorney-client privilege applies
- *In re Kellogg Brown & Root, Inc.*, (D.C. Cir. 2014)

Keep it confidential

- If an employee prepares documents at the request of in-house or outside counsel, or does so to seek legal advice, those documents should be clearly labeled "privileged and confidential"
- Notes of meetings with counsel should be handled similarly
- However, do not be overly broad in labeling documents as privileged or confidential

Some cautionary notes

- "[T]he mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication . . . is necessarily privileged." *Komoulis v. Ind. Fin. Mktng. Group, Inc.*, 29 F. Supp 3d 142, 146 (E.D.N.Y. 2014).
- "[I]nvestigatory reports and materials are not protected by the attorney-client privilege or the work product doctrine merely because they are provided to, or prepared by, counsel." *Id.*
- If a company claims advice of counsel as a defense, all communications with counsel are subject to disclosure. *See Johns Hopkins University v. Alcon Laboratories, Inc.*, 2017 WL 5172395 (D. Del.); but see *KBR II*, 796 F.3d at 147.

Best practices to avoid that dilemma

- Make a clear record of requests for legal advice and responses
- Separate legal from non-legal matters in written communications
- If communication is particularly sensitive, avoid extensive coverage of non-legal issues

Privilege issues during witness interviews

Upjohn warning

- It should be standard practice for in-house counsel to provide *Upjohn* warnings to all employees before conducting interviews to make sure the employees know about the limitations of attorney-client privilege
  - *Upjohn Co. v. United States*, 449 U.S. 383 (1981)

Sample *Upjohn* warning

- I am an attorney at/for Company.
- I am conducting this interview to gather facts to provide legal advice to the Company. I represent the company and not you personally.
- Your communications with me are protected by the attorney-client privilege. This generally means that no one can force you or me to disclose in court what we tell each other today. But the attorney-client privilege belongs solely to the Company, not you personally. That means that the Company alone may elect to waive the attorney-client privilege and reveal our discussions to third parties. The Company alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.
- For this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside the company. You may discuss the facts of what happened, but you may not discuss this discussion.
- Do you have any questions?
- Are you willing to proceed?

3 things witnesses should be told

- In-house counsel is the company's lawyer and not the employee's lawyer
- All communications with the employee are protected by the attorney-client privilege, but the company may choose to waive that privilege
- The employee should not disclose the conversation to any third party except for his/her own lawyer

Considerations for *Upjohn* warnings

- Have employee sign document with warning, acknowledging that it was explained
- Some employees may become suspicious after hearing an *Upjohn* warning
  - Make clear that this is a standard warning to prevent misunderstanding
  - Giving the exact same warning to all employees may help them feel at ease
  - Additionally, if all employees are given the same warning and only one person believes they are personally represented by in-house counsel, it would potentially be more likely a court would find that belief to be unreasonable

Additional interview considerations

- Explain process
- Emphasize truth
- Refresh, do not direct memory
- Distinguish between opinion, conjecture, or irrelevance from material facts

SC Rule 4.3 – Dealing with unrepresented person

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Advice to employees?

- Refrain from providing any legal advice to employees
- Even advice on whether the employee should retain separate counsel could potentially pose problems
  - "As the company's counsel, I cannot advise you on whether or not to obtain a lawyer."

Additional recommendations

- Explain that the company expects all employees to cooperate fully with the internal investigation and that failure to cooperate could subject the employee to discipline including potential termination
- After an employee interview has been conducted, counsel should make sure to include mental impressions when drafting any sort of after-interview memorandum consistent with the attorney work-product doctrine

Investigation reports

SC Rule 1.4 - Communication

- A lawyer shall
  - promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the Rules
  - Reasonably consult with the client about the matter which the client's objectives are to be accomplished
  - Keep the client reasonably informed about the status of the matter
  - Promptly comply with reasonable requests for information
  - Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by Rules or other law
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation

When to prepare written report

- Formal investigation
  - Possible legal exposure
  - Serious violation of policy
    - EEO
    - HIPAA
    - Safety
  - Documentation of investigation and conclusions needed

When to prepare verbal report

- Informal investigation
  - Minor policy infraction
  - Quickly resolved misunderstanding

Verbal report

Benefits

- Less likely to be discoverable
- Minimizes some risks of investigation, documents used usually work-product
- More likely to remain confidential

Risks

- Memory issues
- Harder to defend investigation and conclusion

Written report

Benefits

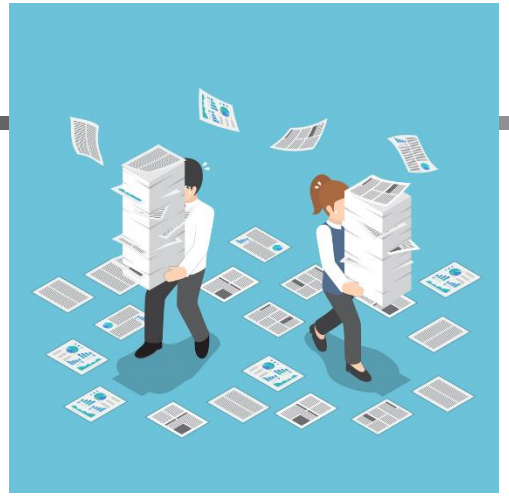
- Detailed assessment aids in justifying remedial recommendations
- Proof investigation was conducted

Risks

- May lose privilege
- Less flexible if discoverable

Voluntary self-disclosure

- Prior obligation to disclose?
- Conduct involve fraud, criminal behavior, affect customers or public?
- Is senior management of public company involved?
- If the company does decide to self-report, report only facts so ensure attorney work product protections are preserved
- Importantly, ensure disclosure is entirely accurate; greater harm could come from reporting false information than not reporting at all



Record retention, spoliation, and litigation holds

Record retention

- Do not need to save everything forever, but it is better to keep records too long rather than not long enough
- 3 things to think about:
  - Length of preservation
  - Contractual obligations of employer
  - Industry-specific requirements

Benefits of a good record retention policy

- Limits expense of storing documents
- Simplifies a company's ability to locate documents efficiently
- Avoids sanctions for the improper destruction of documents
- Avoids consequences in litigation of retaining documents that should not have been subject to retention in litigation
- Acts as a useful roadmap in the event of litigation or regulatory review

Additional retention considerations

- For the retention policy to work smoothly in conjunction with litigation, document destruction must be suspended upon the earlier of:
  - when the company should have reason to know that the information may be relevant to future litigation
  - an official investigation into the company
  - threat/start of litigation

Litigation holds

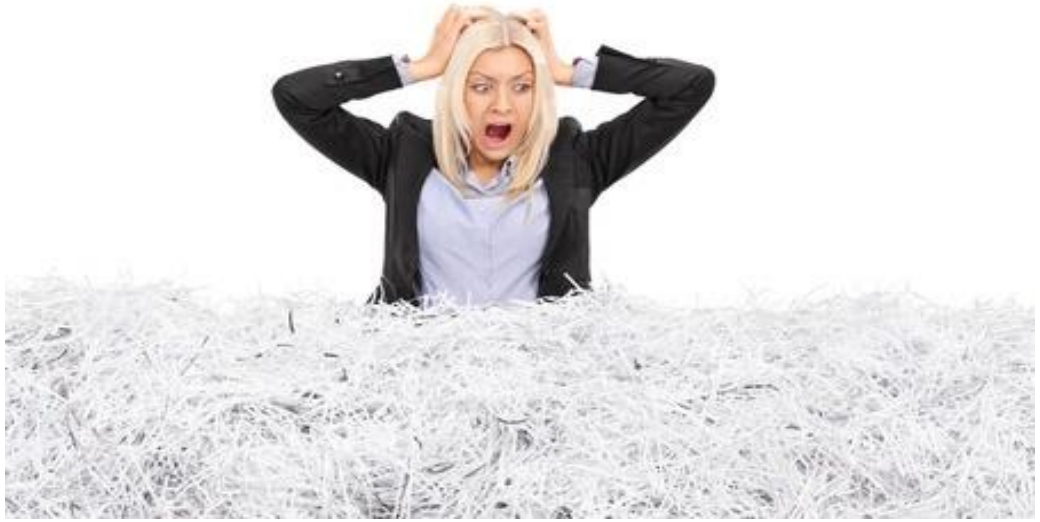
- Once a company reasonably anticipates litigation, it should immediately issue a litigation hold letter to employees involved in the relevant dispute and its IT department to suspend the destruction of documents that may be relevant in the potential dispute
  - Company decides to pursue litigation
  - Served with lawsuit, charge, demand letter
  - Notice of government investigation (EEOC, OFCCP, OSHA, DOJ, etc.)

Litigation hold considerations

- Preserve tangible documents & electronically stored information
  - Suspend any automated destruction policy
  - Contact custodians
    - Identify dispute
    - Identify date range of documents to be preserved
  - Identify methods of collection
    - Internal IT person
    - Custodians
    - Third-party vendor
- Follow-up with individuals tasked with preserving and compiling documents during process

Spoliation

- The destruction or material alteration of evidence, or potentially the failure to preserve property for another's use as evidence in litigation that is pending or foreseeable



Potential sanctions for spoliation

- Additional discovery
- Monetary sanctions
- Rebuttable or mandatory inferences
- Exclusion of evidence
- Striking defenses
- Dismissal or default
- Federal prosecutors may use 18 U.S.C. § 1519 to prosecute in-house counsel who participate in the destruction or concealment of evidence during (or even before) a government investigation

Ways to avoid sanctions

A company may demonstrate that it took reasonable steps to avoid destruction, and thereby avoid or minimize sanctions, with a clearly-defined and enforced document management policy, institution of a litigation hold, and the speedy collection of potentially relevant information.

A company that has destroyed information it had a duty to preserve may also defeat sanctions by showing that there was no prejudice caused by the destruction of the documents, although this is often a difficult path given that the information no longer exists.

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