



**Speakers:**

Naeun Rim – Partner, Bird Marella  
Aaron Lewis – Partner, Covington  
Nicole Diaz – Snap, Inc.  
Kim Miller – Northrop Grumman

# ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

**January 27, 2021**

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**Internal Investigations: Optimizing In House and Outside Counsel  
Collaboration to Best Protect Your Company**

# Pre-Investigation Considerations

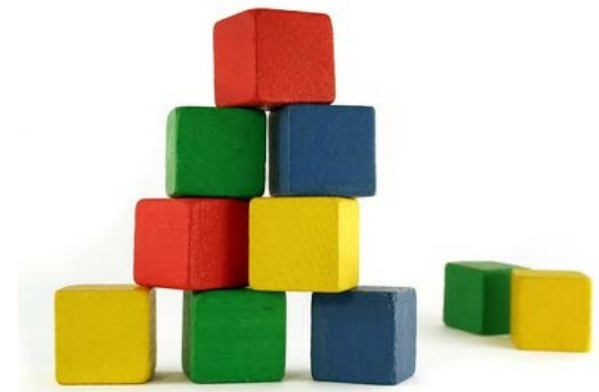
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## ■ Critical to have written policies in place

- Internal investigation protocols; data retention
- Compliance and standards of conduct

## ■ Policies must address

- **Process for receiving formal and informal complaints**
  - Help line
  - Escalating complaints to the right parties
- **Documentation**
  - Data request protocol



# When to Retain Outside Counsel

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- **Risk:** Potential for significant risk or financial impact to company.
- **Optics:** Outside counsel may be viewed by outsiders as being more independent or objective and therefore more credible.
- **Resources:** Typically have greater resources and staffing to devote to the investigation.
- **Expertise:** Expertise conducting internal investigations or with the laws/regs/disclosures implicated by the alleged misconduct.
- **Privilege Protection:** Courts less likely to find that a business purpose was the primary purpose of an investigation where conducted by outside counsel.

# When to Retain Outside Counsel

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## ■ Outside counsel often retained to lead investigations with:

- Potential for significant financial exposure to the company
- Possible criminal exposure or law enforcement activity
- Whistleblower complaint
- Involvement of regulator or government agency, including administrative or criminal subpoena
  - i.e., CMS, DCIS, OIG, FBI, SEC (for public companies), DOJ
- Likelihood of voluntary or mandatory disclosure
  - Regulatory requirement and/or for cooperation credit or settlement purposes
- Matter of first impression
- Seniority or prominence of the employee(s) and/or program/product that will likely be subjects of the investigation

# Keys To Effective Collaboration

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## ■ For Outside Counsel

- Align on scope, objectives, and outcomes
- Know your audience
- Prevent surprises



## ■ For In House Counsel

- Clearly establish constraints and expectations
- Give early feedback on what works and what doesn't
- Confront and resolve strategic disagreements

# Privilege and Work Product

## ■ Rule of Thumb: Assume the worst, plan for the best.

- Specify litigation purpose
- Regulators and DOJ consider willingness to waive



## ■ Ninth Circuit cases

- United States v. Sanmina Corp., 968 F.3d 1107, 1126 (9th Cir. 2020)
- In re Pac. Pictures Corp., 679 F.3d 1121, 1127 (9th Cir. 2012)

## ■ Law differs Circuit to Circuit

# Manner of Conducting the Investigation

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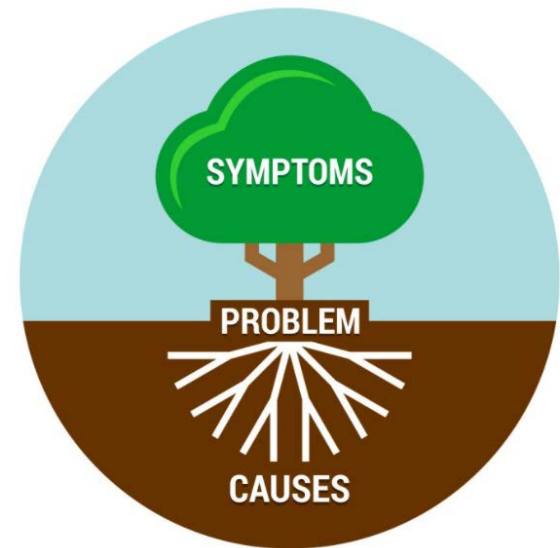
## ■ Scope the work early on

- Documents and witnesses
- Privilege
- Efficiency

## ■ Goals:

- Find the root cause
- Get accurate information
- Propose effective remediation

## ■ Style and tone matter



# Remediation

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## ■ Propose corrective actions

- Address root cause: punish the behavior, not the individual
- Outside counsel should be a detailed thought partner on the ground about corrective actions
- Consider what is realistic from a business perspective

## ■ Plan for follow-up

- Confirm corrective actions
- Follow-up trainings
- Re-audits







# **18th ANNUAL IN HOUSE COUNSEL CONFERENCE**

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