

# Batten Down the Hatches: Practical Tips for Conducting or Cooperating with Investigations in a Crisis

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# Agenda

This session will focus on:

- Determining when it is appropriate to conduct an investigation
- Defining the purpose of the investigation
- Deciding how to properly conduct the investigation, including when to handle it yourself or to outsource
- Judging when and how to share results
- Considering how to respond if the government is investigating your organization

# When it is appropriate to conduct an investigation

- Who is your client? Do you have multiple clients? Is it:
  - CFO
  - Sally from the finance team
  - Do Good
  - Do Good Foundation
  - The Board
  
- Who is your audience?

# When it is appropriate to conduct an investigation, *continued*

- Why is this important
- Who makes client decisions?
- Duty of confidentiality
- Attorney-client privilege
- Up the ladder reporting; out of the company reporting

# When it is appropriate to conduct an investigation, *continued*

## ABA Model Rules of Professional Conduct

- CLIENT-LAWYER RELATIONSHIP
  - RULE 1.13: ORGANIZATION AS CLIENT
    - (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

# When it is appropriate to conduct an investigation, *continued*

## ABA Model Rules of Professional Conduct, *continued*

- What if the constituents are not acting in the best interests of the corporation?
  - (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

# When it is appropriate to conduct an investigation, *continued*

## ABA Model Rules of Professional Conduct, *continued*

### Comment to Rule 1.13

“There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent...that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.”

# Defining the purpose of the investigation

- Investigate facts
- Make recommendations
- Be prepared to address constituents
- Compliance
- Protection
- Set precedent



# Conducting the Investigation

## Corporate Upjohn Warning

- What is it?
- When do you use it?

“I represent the company. I only represent the company and not you personally. Your communications with me are covered by the attorney-client privilege but that privilege belongs solely to the company, not you. That means that the company alone may decide to waive the privilege and disclose the content of this meeting to a third party. This meeting is confidential and you are not permitted to share the substance of this interview to anyone. Do you have any questions?”

# Conducting the Investigation, *continued*

## ABA Model Rules

Rule 1.7 entitled "Conflicts of Interest: General Rule" provides that "[a] lawyer shall not represent a client if the representation of the client will be directly adverse to another client."

# Conducting the Investigation, *continued*

## ABA Model Rules, *continued*

### Rule 1.13

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

# Conducting the Investigation, *continued*

## ABA Model Rules, *continued*

### Up the Ladder

"(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a **violation of a legal obligation to the organization**, or a violation of law which reasonably might be imputed to the organization, and is **likely to result in substantial injury to the organization**, the lawyer shall proceed as is **reasonably necessary in the best interest of the organization....**" (emphasis added).

# Conducting the Investigation, *continued*

ABA Model Rules, *continued*

Up the Ladder, *continued*

Rule 1.13

"...Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall **refer the matter to higher authority in the organization**, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law." (emphasis added).

# Conducting the Investigation, *continued*

## When to Go Up the Ladder

### Two triggers under Rule 1.13

- Violation of law or duty
  - Violation of duty to the company
    - Duty of loyalty
    - Duty of care
- Likelihood of substantial injury

# Conducting the Investigation, *continued*

## Outsourcing

- While the practice of outsourcing has been common across most industries, attorneys face unique issues when doing so.
- Attorney remains ultimately responsible for advice given pursuant to Rule 1.1.
- And “make reasonable efforts to ensure that the conduct...is compatible with her own professional obligations as a lawyer”.  
ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 08-451 (Aug. 5, 2008).

# How to Convey Results

- Orally
- Writing
- Full Board vs. Committee
- Internal messaging
- External messaging

*Assume the Government and Public Will Read Everything*



# What if it is the Government

- How to identify a government investigation
  - Subpoena, letter from DOJ or other agency, contact from (former) employees or other entities related to the investigation contacted by the government
- Engage outside counsel – the earlier the better
- Manage government investigation + conduct internal investigation
  - Keep in mind government investigations involve unique risks from regular litigation
  - Engage with the government throughout
  - Most government investigations arise from whistleblowers – avoid unlawful retaliation



# Government Subpoena

- Review subpoena to determine topics at issue, legal claims, individuals involved, and time period
  - Grand jury subpoena, civil investigative demand, agency
  - Target, subject, or witness
- Issue litigation hold to persons involved
- Create process to identify, collect, review, and produce requested documents
  - Depends on the scope of the requests, discussions with requesting agency, volume of documents responsive to search terms, and government timeline
  - Conduct key interviews

# Voluntary Self-Disclosure & Cooperation Credit

- This year, DOJ introduced new, immediately effective national policies regarding corporate voluntary self-disclosure
  - *United States Attorneys' Offices Voluntary Self-Disclosure Policy*, U.S. Department of Justice (February 23, 2023)
- Included updated guidance on the Evaluation of Corporate Compliance Programs (ECCP)
  - *Evaluation of Corporate Compliance Programs*, U.S. Department of Justice, Criminal Division (March 2023)
  - Factors considered when evaluating corporate compliance programs for a “culture of compliance”
- Substantial impact on charging decisions & cooperation credit
- Review internal policies, training, and management compensation structures to maximize compliance & benefit

# Key Take-Aways

- Always be clear about who is the client, especially:
  - if you represent multiple entities/subsidiaries
  - in an internal investigation, give the Upjohn warnings as appropriate
  - You do not represent individual employees, executives, board members
- Rely on outside counsel before you go too far
- There are problems that should NOT be kept in-house, e.g., a government investigation
- Social media is everywhere – Assume your client will be part of that world

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