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ACC: NATIONAL CAPITAL REGION

## **Ethics Considerations for Internal Investigations**

## Panelists

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Today's remarks are the personal views of the panelists. They do not represent legal advice or necessarily reflect the views of their employers.

## Today's Topics

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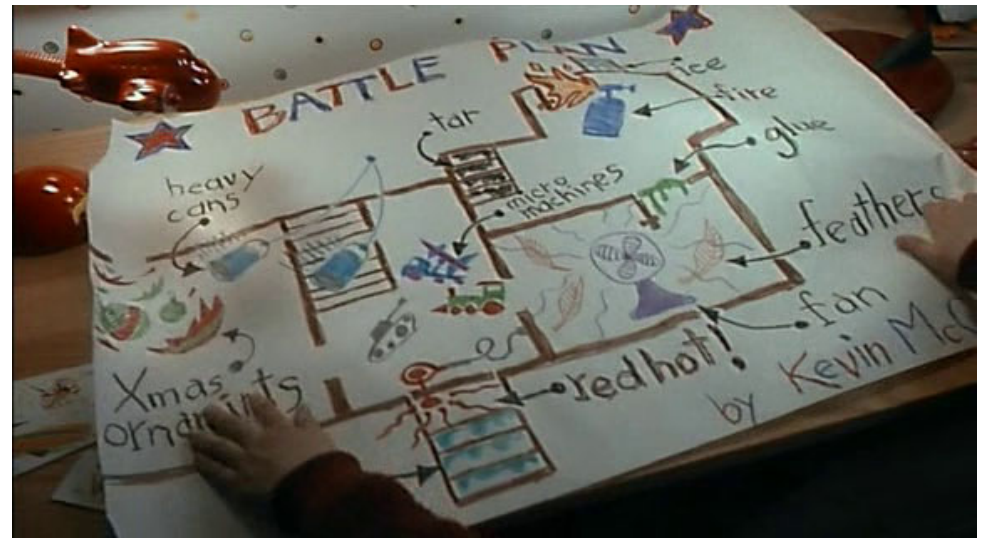
- Setting Up an Investigation
- DOJ Cooperation Guidelines
- Preservation Issues
- Employee Representation Issues
- Joint Defense / Common Interest Agreements
- Reporting an Investigation
- Working with Communications Personnel
- Looking Ahead

# **Part I: Setting Up the Investigation**

## Setting Up the Investigation

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- How did it arise?
- What are the goals?
- Who should conduct the investigation?
- To whom will the results be reported?
- How big do we think it is?



# How did the investigation arise?

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## What is the source?

- Internal:
  - Reporter
  - HR complaint
  - Regular reviews / internal controls
- External:
  - Government: Subpoena (civil or grand jury), CID, informal request
  - Press inquiry
  - Public information
  - External complaint



## Mixed-Purpose Investigations: Privilege Considerations

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- Where internal investigations are conducted pursuant to a company's policies and codes, privilege protection can be trickier to assess.
- Standards used by courts:

**The primary/predominant purpose**

v.

**One of the significant purposes**

## What are the goals?

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- Investigate, learn facts
- Assess credibility
- Assess legal and/or business risk
- Manage legal and/or business risk
- Remediation, policy improvements, prevention



## Who Should Conduct the Investigation?

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- Lawyer v. non-lawyer
- Internal v. External
- Considerations: issues presented, independence, expertise, in-house knowledge



# Who Should Conduct the Investigation?

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## Virginia Rule of Professional Conduct 2.1 Advisor

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

## Comment

### *Scope of Advice*

- **[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.** In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

## To Whom Will Updates/Results Be Reported?

- Considerations:
  - Content
  - Privilege
  - Timing
- Potential Audiences:
  - Management
  - Board
  - Reporter and other witnesses
  - Disclosures
  - Government



## ABA Model Rule 1.13(b) Organization As Client

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- (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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. **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.**

## Virginia Rule of Professional Conduct 1.13 Organization As Client

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- (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. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
  - 1) asking for reconsideration of the matter;
  - 2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
  - 3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

## ABA Model Rule 1.13(b) Organization As Client

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### Comment:

- [4] In determining how to proceed under paragraph (b), **the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.** Ordinarily, referral to a higher authority would be necessary. . . . If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. . . .

## How big do we think it is?

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- Number of personnel involved
- Domestic v. cross-border
- Potential disclosure event
- Likelihood of follow-on criminal and civil liability



## Cautionary Note – Assume Everything Discoverable



- No new bad emails
- Interview memos best practices
- No unforced errors



## Takeaways: Setting Up an Investigation


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- Not every investigation needs the bet-the-company treatment.
- Planning is worth it: Thoughtfully structuring the investigation with an eye on where it is likely to go will save headaches later.
- Think carefully about documentation and updates.
- Where privilege is a concern, run the investigation through in-house counsel with lawyers (inside or outside) as investigators, lawyers hiring vendors.

## **Part II: DOJ Cooperation Guidance**

# Principles of Federal Prosecution of Business Organizations

- Justice Manual section 9-28.000
- The “Monaco Memo” from September 2022
- Further clarifications in early 2023

	<b>U.S. Department of Justice</b> Office of the Deputy Attorney General
The Deputy Attorney General	Washington, D.C. 20530
	September 15, 2022
MEMORANDUM FOR	ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION DIRECTOR, FEDERAL BUREAU OF INVESTIGATION DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS ALL UNITED STATES ATTORNEYS
FROM:	THE DEPUTY ATTORNEY GENERAL <i>Lisa Monaco</i>
SUBJECT:	<u>Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group</u>

## Monaco Memo Changes – “Timely Disclosure”

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In particular, it is imperative that Department prosecutors gain access to all relevant, non-privileged facts about individual misconduct swiftly and without delay. Therefore, to receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals. Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Companies seeking cooperation credit ultimately bear the burden of ensuring that documents are produced in a timely manner to prosecutors.

## Monaco Memo Changes – Prioritizing Individual Disclosures

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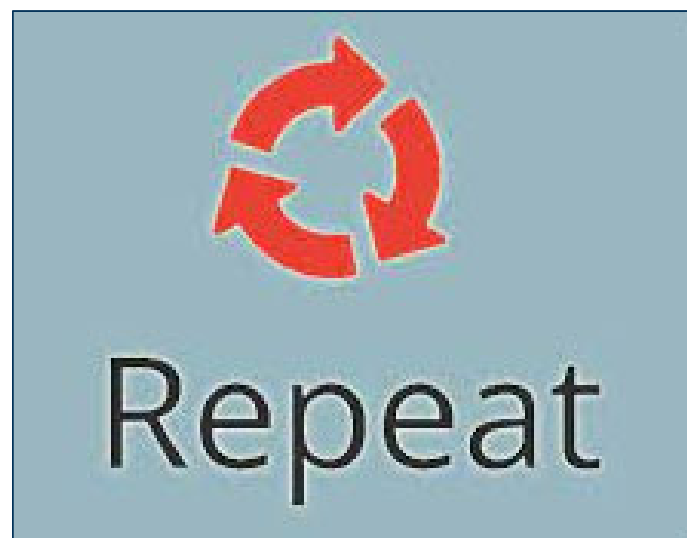
- “[P]roduction of evidence to the government that is most relevant for assessing individual culpability should be prioritized.”
- “[P]rosecutors must strive to complete investigations into individuals-and seek any warranted individual criminal charges – prior to or simultaneously with the entry of a resolution against the corporation.”



## Monaco Memo Changes – Guidance Regarding Past Misconduct

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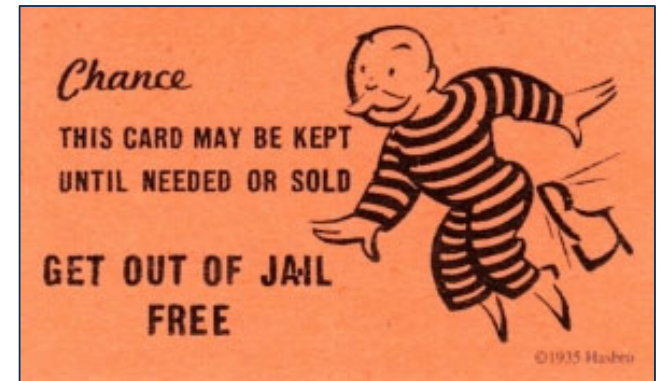
- Not all naughty acts are the same
- Factors include:
  - US criminal resolution
  - Prior misconduct from same people
  - Date of prior misconduct
  - Apples to Apples
  - Compliance
  - Limits on DPAs



## Monaco Memo Changes – Benefits of Cooperation – Declination

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- The voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct;
- At the time of the misconduct and the disclosure, the company had an effective compliance program and system of internal accounting controls that enabled the identification of the misconduct and led to the company's voluntary self-disclosure; and
- The company provided extraordinary cooperation with the Department's investigation and undertook extraordinary remediation.



## Monaco Memo Changes – Benefits of Cooperation – Second Best

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- If company self-discloses and fully cooperates but can't meet the standard for declination, it is still possible to receive:
  - At least 50% and up to 75% off of the low end of Sentencing Guidelines for fine; and
  - Generally will not require a guilty plea.



## Not-So-Hypothetical: Company Cooperation

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- Deferred prosecution agreement (DPA) requires Company to cooperate extensively with the government, both in general and in the government's prosecution of a particular indictment.
- DPA gives the government the “unqualified right” to demand from company the production of any document within Company's control, unless they are privileged.
- Individual defendant demands that the *United States* broadly produce files from Company pursuant to Fed. R. Crim. P. 16 because they are within the government's “possession, custody, or control.” (Note: Normally, third party discovery would be more limited under Rule 17(c).)
- Government and Company both resist.

**Does the government have “possession, custody, or control” over Company's documents, obligating production in the case?**

## Not-So-Hypothetical: Company Cooperation

- Bank and its outside counsel coordinated extensively with the SEC, the CFTC, and the DOJ.
- Government directs an interview with an employee, who did not have discretion to refuse to talk to the investigative team. Bank policy provided that an employee must “fully cooperate” with investigations.
- Employee interviewed three times without counsel, but given *Upjohn* warnings.
- Defense counsel interacted with the government nearly a thousand times, including some 230 phone calls and 30 in-person meetings with Government officials. For the final 14 months of the Bank's internal investigation, counsel held joint weekly update calls.



**Were the employee's statements made to the Bank's counsel compelled statements pursuant to *Garrity* and therefore not admissible at trial?**

## **Part III: Preservation Issues**

## **Preservation Rules - Virginia**

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### **Virginia Rule of Professional Conduct 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

## **Preservation Rules – ABA Model Rules**

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### **ABA Model Rule 3.4**

#### **Fairness to Opposing Party & Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

## Preservation Rules – Other

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- Federal and state procedural rules
  - Sanctions
- Criminal statutes
  - Federal
  - State
- Civil torts
- Company records retention policies



## Preservation – Issues To Consider

- Chats
- Apps
  - Turning off any auto-delete function
- Employee Cell Phones
- Preservation and Production Complications:
  - European Privacy Law
  - HIPAA concerns
- Timing
- Use of Vendors / Forensic Collection



## Not-So-Hypothetical: Ephemeral Messages

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- Company principal directed company's employees to use two messaging applications for the purpose of discussing important company business. One of those applications has automated deletion functionality; the other was an encrypted messaging service.
- FTC later sued the company and its principals.
- FTC filed a motion for sanctions pursuant to Fed. R. Civ. P. 37(e)(2), arguing that defendants intentionally spoliated documents when they moved company communications to ephemeral messaging because there was evidence the principal knew about the FTC investigation in advance of the change. Defendants argued that the introduction of ephemeral and encrypted messaging was due to security concerns.
- **Was the use of ephemeral messaging application with auto-delete spoliation?**



## **Part IV: Employee Involvement in Investigation**

## Unrepresented Employees

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### What Rules Guide Interactions Between Company Counsel and Employees?

- ABA Model Rule 1.13(f)
- Virginia Rule of Professional Conduct 1.13(d)
- ABA Model Rule 4.3
- Virginia Rule of Professional Conduct 4.3
- *Upjohn*

## ABA Model Rule 1.13(f)

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- (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.

## Virginia Rule of Professional Conduct 1.13(d)

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- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

## ABA Model Rule 4.3: Dealing With Unrepresented Person

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- 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.**

Also: ABA Model Rule 4.1 (Truthfulness in Statements to Others)

## Virginia Rule of Professional Conduct 4.3: Dealing with Unrepresented Persons

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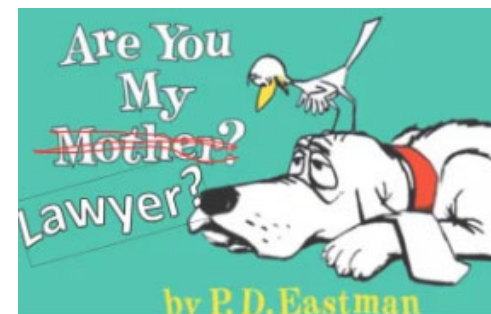
- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make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

Also: Virginia Rule of Professional Conduct 4.1: Truthfulness in Statements to Others

## Interviewing Unrepresented Employees: *Upjohn* Warnings

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- When to give an *Upjohn* warning
- Key Elements of an *Upjohn* warning
  1. Representation is of the company, not of the individual
  2. Because of employment status, conversation is privileged
  3. Privilege belongs to the company, which can decide whether to hold or waive it
  4. Ask that employee keep conversation confidential to protect the privilege
- Document giving *Upjohn* warning
- Responding to employee questions



## Not-So-Hypothetical: Unrepresented Employee

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- In anticipation of an SEC inquiry about alleged stock backdating accounting practices, company engages outside counsel to do an internal review. As part of that investigation, Company CFO was interviewed and consulted with company counsel.
- In a subsequent grand jury investigation, company chose to permit the U.S. Attorney's office to interview company counsel, which included disclosure of communications with CFO in the course of the investigation.
- Company counsel claimed they had administered *Upjohn* warnings, but CFO claimed to believe company counsel was representing him because of their work in a related civil case. CFO moved to suppress statements in criminal case.
- **Were CFO's statements protected by the CFO's attorney-client privilege?**



## Joint Representation

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- Can a company lawyer also represent an employee?
- Key Rules and Concepts
  - ABA Model Rule 1.7
  - Virginia Rule of Professional Conduct 1.7
  - ABA Model Rule 1.13(g)
  - Virginia Rule of Professional Conduct 1.13(e)



## ABA Model Rule 1.7 & Virginia Rule 1.7

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- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) **there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client**, a former client or a third person or by a personal interest of the lawyer.

## ABA Model Rule & Virginia Rule 1.7: Comments

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### *Special Considerations in Common Representation*

- [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, **because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained.** Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

## ABA Model Rule 1.13(g)

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- (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.

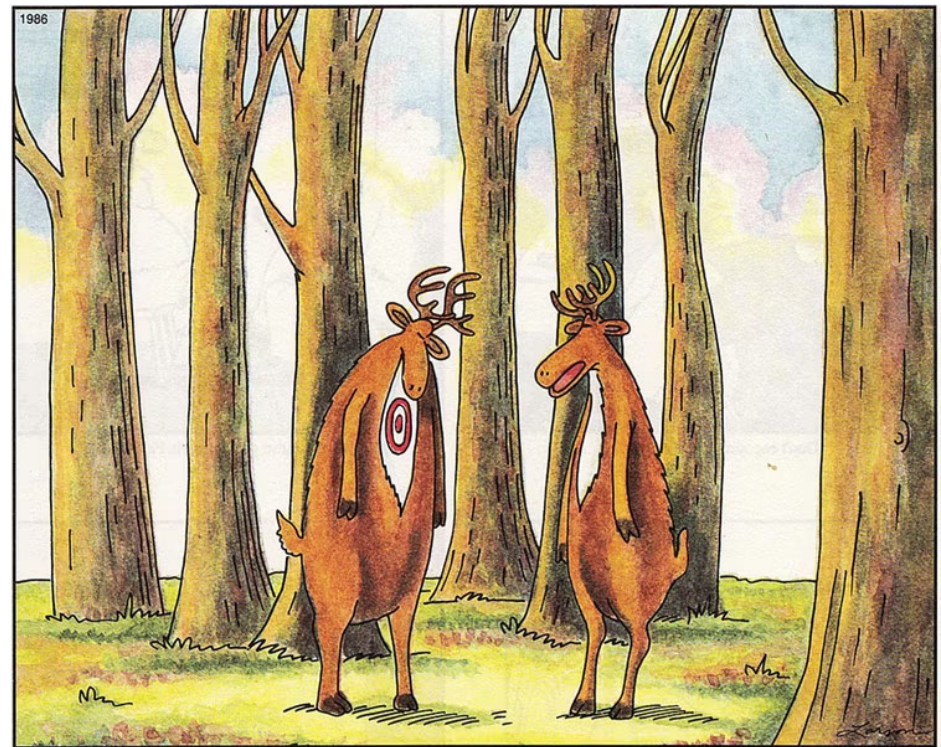
## Virginia Rule of Professional Conduct 1.13(e)

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- (e) 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.

## Important Considerations re: Joint or Individual Representation

- Ethical considerations: Will company's interests and the employee's interests diverge?
  - Do we have reason to believe the employee engaged in wrongdoing?
  - Is there potential individual liability for the employee? (criminal/civil/employment)
  - **Do we / will we have a cooperation obligation that will put this employee in the government's crosshairs?**
- Practical considerations:
  - Control over the privilege
  - Expense
  - Ease of communication



## Not-So-Hypothetical: Joint Representation

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- Company counsel jointly represents Company and Individual in an investigation by the SEC. Company counsel meets with individual to prepare for testimony.
- Joint representation letter gives priority to Company, and permits Company to provide information to government.
- Company counsel withdraws from representation of individual. As part of its cooperation obligations, Company counsel (1) shares information learned in communications with former client employee and (2) advocates for that former client's prosecution.
- Individual, who is later charged, argues that his Indictment should be dismissed or for an evidentiary hearing to address government taint as a result of exposure to privileged information.
- **Was the government improperly exposed to privileged information?**
- **Were Company counsel's actions appropriate?**

## **Nuance: The Represented Employee and In-House Counsel**

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- **What kinds of communications can in-house counsel have with a represented employee?**

### **ABA Model Rule & Virginia Rule 4.2: Communication with Persons 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.



## Nuance: Former Employees

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- **What special considerations arise when an investigation could or should involve a former employee?**
  - Good hygiene before an investigation
  - Representation issues
  - Privilege issues

## Nuance: HR Investigations

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- Goal: Conducting an investigation while protecting against retaliation.
- Clarity of client
- Who to involve?
- How much information to give an employee?
- Can involvement of counsel for employee help?

## Nuance: Dealing with Union-Represented Employee

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- “Weingarten Rights”: Section 7 of the National Labor Relations Act provides that union-represented employees have the right to have their representation present during an investigatory interview that the employee reasonably believes could lead to the employee’s discipline.
- Not entitled to representation where an employee is being questioned about *another employee’s* conduct, as opposed to their own.

## Takeaways: Employee Issues

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- Start with good investigation hygiene
  - Company policies that encourage cooperation
  - Relationships with departing employees
- Give and document *Upjohn*
  - Warn employees against discussions among themselves
- Err on the side of caution regarding employee representation

## **Part V: Joint Defense / Common Interest Agreements**

## Joint Defense / Common Interest Agreements

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**“The only defense is a joint defense.”**

- Brendan V. Sullivan, Jr.

## Joint Defense / Common Interest Agreements

- Written Agreements
- Cross Examination Rights
- Fiduciary Duties
- Company Counsel and Government Cooperation



## Joint Defense / Common Interest Agreements

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### Justice Manual 9-28.730 - OBSTRUCTING THE INVESTIGATION

Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.



## **Part VI: Reporting About an Investigation**

## Key Considerations

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- What is the purpose/goal of reporting?
- Who is receiving the report?
  - Board
  - Government
  - Auditors
  - Reporter / Employees
- What format should the report take?
  - Oral v. written
- Are there public disclosure implications?

**SPECIAL REPORT**

## DOJ Requires Reporting Facts, Not Read Outs

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### Justice Manual: Section 9-28.720

“Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is timely disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.”

## Federal Rule of Evidence 502

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- a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
- 1) the waiver is intentional;
  - 2) the disclosed and undisclosed communications or information concern the same subject matter; and
  - 3) they ought in fairness to be considered together.

## 502(d) Orders – To Waive or Not To Waive

### ORDER

The Court, upon the United States' Unopposed Motion for a Rule 502(d) Order, and recites the following findings:

NOW, THEREFORE, it is hereby ORDERED that:

1. By producing the Disputed Documents pursuant to this Disclosure and Protective Order and/or permitting testimony or interview statements related to the Disputed Documents or Disputed Communications, ■■■ does not waive any claims of attorney-client privilege and/or work product protection regarding other documents, communications, or information;
2. Should any of the Disputed Documents and/or any testimony or interview statements related to the Disputed Documents or Disputed Communications be found to be subject to the attorney-client privilege and/or work-product protection, ■■■ shall be deemed to have waived the attorney-client privilege and/or work-product protection solely with respect to the documents, communications and information actually disclosed to the United States, and not with respect to any additional documents, communications, or information, and fairness does not require the production of any additional documents, communications, or information;
3. This Disclosure and Protective Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).



## **Part VII: Communications Teams and PR Firms**

## Communications Teams and PR Firms

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- These communications are often not privileged
- Copying lawyers is not enough
- The whole purpose is public disclosure at some point.



## Communications Teams and PR Firms

- *In re Grand Jury Subpoenas*  
Dated March 24, 2003, 265 F.  
Supp. 2d 321 (S.D.N.Y. 2003)
- Factors to consider if  
necessary





## **Part IX: Looking Ahead**

## Trends in Investigations

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- “Sanctions are the new FCPA”
- DEI investigations as an area of interest for SEC
- Money laundering issues in emerging technology
- Focus on ephemeral messaging
- Use of AI in investigations

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