



Ethical Considerations Raised by Internal Investigations



Internal Investigations



The Compliance Function and Regulatory Expectations

- Entities are expected to self-police.
- Self-policing begins with compliance, which includes:
 - Plans, policies, controls and procedures
 - Distribution of policies and training
 - Compliance audits
 - Assessment, monitoring and follow-up
 - Investigate reported/apparent misconduct

Sources

Need for investigation commonly arises from:

- Exit interviews
- Competitor allegations
- Whistleblower / Hotline complaints
- Lawsuits
- Law enforcement or regulatory inquiries

Benefits of Internal Investigations

- Rapid, privileged fact-finding
- Avoid/Minimize regulatory, private, and criminal liability
 - Deferred or non-prosecution
 - Reduction in fines
 - Reduction in defense costs
 - Prevent reputational harm
- Enable proactive strategies
 - Self-reporting
 - Confidential settlements
 - Preemptive remediation (e.g., strengthening controls)

Benefits of Internal Investigations (cont.)

- Avoid “dropped balls”
 - Loan defaults
 - Violating reporting requirements (SEC, CFTC, FINRA, etc.)
 - “Buying an indictment” in the M&A context:
 - DOJ and SEC: “[L]ook to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts.”
(A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition)
 - The DOJ and SEC also recognize “the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity.” Id.

Opportunity for Immediate Mitigation

- Define the issue(s).
- If an issue is ongoing, immediate steps should be considered to mitigate associated risks.

Example in the Healthcare Space:

- Is the issue systemic?
- Does the issue impact billing and/or reimbursement?
 - Directly – *i.e.*, systemic issue impacting coding?
 - Indirectly – *i.e.*, impacting meaningful use incentives?
- If the issue is ongoing or if it is uncertain, consider putting a short-term billing hold in place until the issue can be corrected or confirmed not ongoing
- Document hold

Who Should Conduct the Investigation?

Advantages to In-House Counsel:

- Familiar with company, executive team, underlying subject matter;
- Faster access to information;
- More cost advantageous.

Advantages to Outside Counsel:

- Viewed as independent;
- Greater resources and specialized knowledge;
- Stronger privilege protections;
- Conflict avoidance.

The Big Question: Investigation Scope

- How much is enough?
- Prevent the “runaway” investigation with a short leash.
 - Consider requiring a written work plan with a clearly defined scope.
 - Scope of work should be revisited on a periodic basis or upon reaching specified milestones.
 - Be wary of investigations that evolve into enterprise risk assessments.

Stay Informed

California Rules of Professional Conduct Rule 1.4(a)(3)

A lawyer shall ... keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

- A lawyer will not be subject to discipline ... for failing to communicate insignificant or irrelevant information. ... Whether a particular development is significant will generally depend on the surrounding facts and circumstances.
- A lawyer may comply ... by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

Common Ethical Pitfalls in Internal Investigations

- Unintentionally creating an attorney-client relationship with employee-witnesses;
- Inadvertent waiver of the attorney-client privilege through sloppy reporting (nuances of wording matters);
- Representing conflicted parties prior to uncovering all the relevant facts;
- Creating the appearance of witness tampering and/or retaliation.

Who is the Client?

California Rules of Professional Conduct Rule 1.13(a)

A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

Protecting the Privilege During An Investigation

“Primary Purpose”

- This test is satisfied when “one of the significant purposes” of the investigation communication was to obtain legal advice. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir., June 27, 2014).

Define Role

- When in-house counsel conducts an internal investigation, he/she must use care not to intertwine legal and business role.
- Clarity of role may be difficult to prove in hindsight.

Label Appropriately

- Vigilantly protect the evidence and process.
- Mark all investigation-related documents as “attorney-client” or “work product” privileged (or both), as appropriate.
- Also, have employees gathering data label communications with: “Prepared at the direction of counsel.”

The Elements of the “Upjohn Warning”

- Counsel represents the company and not any individual employee or witness;
- Interview conducted for purpose of providing advice to the company;
- Attorney-client privilege belongs solely to the company and can be waived at its discretion;
- If the company decides to waive the privilege, it may disclose the substance of the interview;
- **But** – the employee must preserve the privilege by keeping the interview confidential.

California's "Upjohn"

California Rules of Professional Conduct Rule 1.13(f)

In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

Avoiding Representation of Adverse Interests

California Rules of Professional Conduct Rule 1.7

- Pursuant to Rule 1.7:
 - (a) A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
 - (b) A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

Is An Upjohn Warning Sufficient?

- Not uncommon, even after an Upjohn Warning, for employees to:
 - Ask about their personal exposure;
 - Seek personal legal advice;
 - Question whether they need separate counsel;
 - Ask questions about indemnification;
 - Inquire about their rights to decline to participate as employees.
- Questions may be posed immediately after the Upjohn Warning or much later in the interview process.

Self-Reporting, Whistleblowers, and the Inherent Conflict

- To be eligible for cooperation credit, corporations are expected to identify culpable individuals to Federal regulators (SEC, DOJ, CFTC), including any senior executives and directors.
- Corporations seeking to avoid criminal and civil sanctions are thus explicitly incentivized to “put the blame” to individuals.
- Notably, individual employees are already incentivized (leniency, immunity and monetary whistleblower awards) to inculcate “up the chain of command.”
 - SEC Office of the Whistleblower received 24,980 whistleblower tips in 2024.
 - The SEC has awarded more than \$2.2 billion to more than 440 whistleblowers since the program’s inception in 2011.

Implications for Investigators

- Enhanced “Upjohn Warnings” may need to be expanded to ensure interviewees understand the risks presented by corporate interest in naming individuals;
- Practical implications of explicit warnings:
 - Individuals may be less willing to cooperate;
 - Separate, independent counsel may be required more often, adding significant time and expense to the investigation;
 - Separate counsel may (1) not cooperate, impeding the ability of the company to gather all necessary facts, (2) unilaterally report additional or contradictory information to regulators, (3) encourage whistleblowing or private litigation (employment/qui tam claims).

Handling Requests for Separate Counsel

- Indemnification and advancement obligations:
 - Bylaws;
 - Employment Agreement;
 - California Labor Code § 2802 & Corporations Code § 317; Delaware Corporations Code § 145 (recently amended to narrow the definition of an eligible “officer”).
- Pool counsel
- Employee still has a duty of cooperation with the company

Post Investigation Consideration

- Final Work Product?
 - Written report
 - Summary presentation format
 - Oral report – generally preferable
- Who maintains the file?
- M&A issues:
 - Who owns the privilege during diligence?
 - After the transaction is closed?

Enforcement Under Trump Administration

- Key decisions centralized in DC
- Focus on “Main Street” or retail investor protections
- Ponzi schemes and financial fraud
- Less use of sweeps for technical violations, novel legal theories and record keeping violations
- Pullback on corporate penalties
- A hands-off approach to cryptocurrency and ESG
 - New Cyber and Emerging Technologies Unit (replaces Crypto Assets and Cyber Unit)
- Pause on FCPA and public corruption prosecutions
- Freezing of Civil Rights Division and prosecution of corporate DEI programs
- Likely no non-violent/non-injury environmental prosecutions, and reduced enforcement of federal gun control laws

Questions?



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