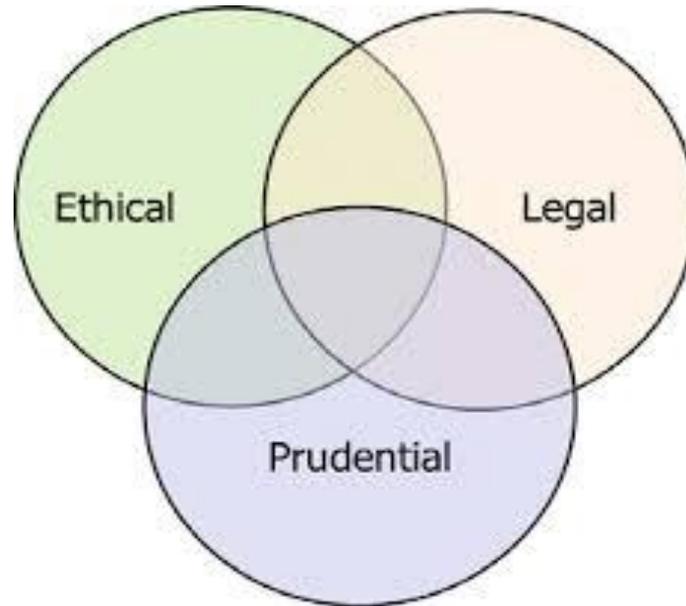




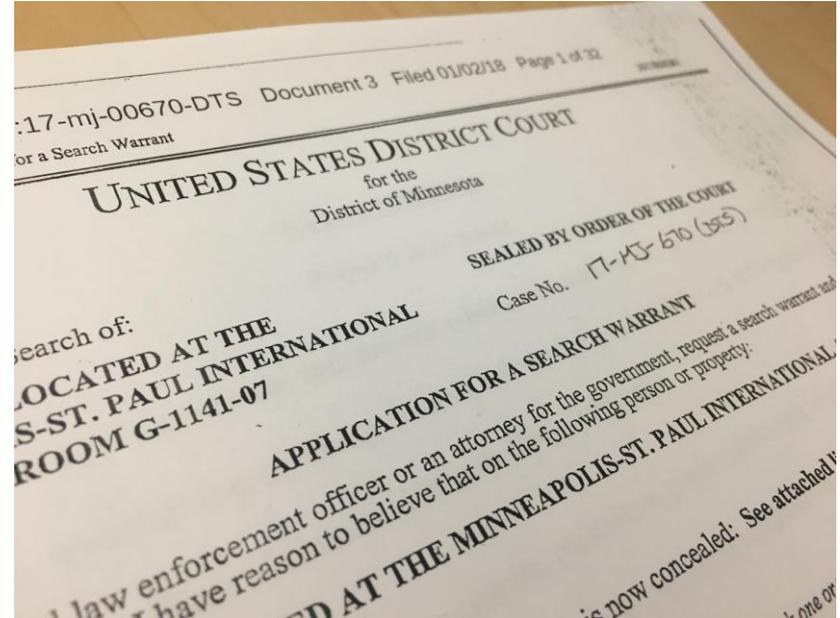
## **Professional Responsibility: Ethical Considerations During A Corporate Crisis**

# Navigating Legal and Business Ethics with Practicality



# Event #1: Investigation of Criminal Conduct

- Execution of a Search Warrant at a subsidiary
- Computers seized
- Employees interviewed
- Potentially privileged communications implicated



# Pressing Considerations

- Triggers the immediate need for legal counsel and an internal investigation;
- Rapid decision points will include:
  - Document preservation;
  - Required/permitted disclosures;
  - Auditor updates;
  - Insurance - notice of claims;
  - Assessment of potential breach of covenants;
  - Need for public relations expertise.



# Organization as the Client



## The State Bar of *California*

### **Rule 1.13 Organization as Client**

**(Rule Approved by the Supreme Court, Effective November 1, 2018)**

- (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.

# Common Ethical Pitfalls During Corporate 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.

# 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 or assists outside counsel in collection of information, he/she must use care not to intertwine legal and business role.
- Clarity of role may be difficult to prove in hindsight.

## Label/CC 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.”

# Defining the Client: A Fulsome “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": Rule 1.13(f)



## The State Bar of California

### Rule 1.13 Organization as Client

(Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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.

# 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.

# Event #2: Grand Jury Subpoena Issued to Parent Company

- Service of a Grand Jury Subpoena
- Seeks documents from parent company
- Custodians include executives, and requires extracting business communications from personal cell phones of those executives
- Some executives request to also be represented by company counsel



# Potential for Dual Representation



## The State Bar of California

### **Rule 1.13 Organization as Client**

**(Rule Approved by the Supreme Court, Effective November 1, 2018)**

- (g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

# Avoiding Representation of Adverse Interests



## The State Bar of California

### **Rule 1.7 Conflict of Interest: Current Clients (Rule Approved by the Supreme Court, Effective November 1, 2018)**

- (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.

# Avoiding Representation of Adverse Interests



## The State Bar of California

- (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
  - (1) the lawyer reasonably believes\* that the lawyer will be able to provide competent and diligent representation to each affected client;

# Duties of Communication



## The State Bar of California

### **Rule 1.4 Communication with Clients (Rule Approved by the Supreme Court, Effective January 1, 2023)**

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent\* is required by these rules or the State Bar Act;
  - (2) reasonably\* consult with the client about the means by which to accomplish the client's objectives in the representation;
  - (3) 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; and
  - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows\* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

# Sample Provision from a Conflicts Waiver

“Both Joint Clients have asked Stradling to represent them in the Special Investigation. This means that Stradling would jointly represent both clients in the same matter. If any actual conflicts arise between the Joint Clients that cannot be resolved by further informed written consent in the future, the Joint Clients have asked that Stradling continue to represent ACME Corp., and seek to withdraw from our representation of John Doe, in the Special Investigation. This means that Stradling could become adverse to John Doe in the Special Investigation.”

# Event #3: Whistleblower Complaint Naming CEO

- Detailed Whistleblower Complaint received that directly implicates CEO
  - Complaint is credible and provided by an employee with knowledge



# Considerations When CEO Has Alleged Involvement

- CEO now needs separate counsel.
  - Do the terms of the engagement letter/conflict waiver permit your current counsel to continue to represent the Company?
- Triggers need to form Special Committee.
  - Interpersonal complications: CEO has relationship with every board member, member of management, the general counsel and often, outside legal counsel.
  - Level of familiarity may put legal counsel in jeopardy of confusing the identity of the client and/or compromising the client's privileged information.
  - CEO may expect a level of access to information that circumstances now do not permit.

# 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
- When is a joint defense or common interest agreement appropriate?

# Event #4: Decision To Voluntarily Present

- 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” on 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 27,000 whistleblower tips in 2025 and awarded more than \$60M, with well over \$2B awarded since 2011.

# The DOJ's Voluntary Self-Reporting Program

- On February 24, 2026, the SDNY formalized an updated Corporate Self-Reporting Program covering securities, commodities or digital asset fraud; false statements to auditors or regulators and certain violations of the Securities Exchange Act of 1934 and the Commodity Exchange Act.
- To qualify, companies must:
  - Timely and voluntarily disclose the illegal activity;
  - Commit to full cooperation, including ongoing reporting of criminal conduct for three years;
  - Remediate the illegal activity, including making restitution payments to victims.
- In return for rapid reporting, the SDNY will attempt to respond to confirm eligibility in 2-3 weeks upon receiving the report.

# Special Considerations Under This Administration

- Decimation of the enforcement apparatus;
  - Should you take advantage of delay or are more lenient results available now?
- Enforcement priorities are evolving in white collar area;
- FCPA; crypto; certain environmental matters are **not** priorities;
- Examples of current priorities include waste, fraud, and abuse (federal health care), evasion of tariffs, elder abuse, securities fraud, complex money laundering (focus on ties to China), bribery hostile to US interests, and FDA violations.
- Keep in mind that the statute of limitations may be longer than the current administration's tenure.



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