



Presentation to Association of Corporate Counsel

# Ethical Considerations in Internal Investigations

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# Overview of Presentation

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Introduction to Internal Investigations

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Key Parts of Investigation and Applicable Rules

- Identification of Client
- Documentary Evidence
- Witness Interviews
- Reports to Management/Board
- Disclosure to Government

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# Introduction to Internal Investigations

- Reactive vs. proactive investigations
  - Responding to subpoena/complaint
  - Investigating potential misconduct identified by company
- Investigations arise for many reasons
  - Routine compliance monitoring
  - Complaints – internal, external
  - Subpoena
  - Government investigation
  - Lawsuit – demand letter

# Introduction to Internal Investigations

- Potential Exposure
  - Criminal or civil liability to Federal or State governments
  - Private lawsuits
  - Administrative actions
  - Media attention/reputational harm
  - Employee liability

# Key Parts of Investigation

- Identification of Client



- Documentary Evidence



- Witness interviews



- Reports to management/board



- Disclosure to government authorities



# Identify the Client: Representing the Company

- Theoretically straight forward, practically can be difficult
- Model Rule 1.13: A lawyer employed or retained by an organization represents the organization acting through its duly authorized **constituents**.
- Comment 3: ...when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary **in the best interest of the organization**.
  - Considerations in establishing points of contact and reporting results of investigation
  - Considerations when investigation uncovers illegal conduct by constituents

# Identify the Client: Representing an Employee

- Often during investigations employees may need legal counsel
- A lawyer may be hired by the corporation and paid by the corporation to represent the constituent elements (employees) of the corporation.
  - Paid by corporation but represents only the employee
    - Measures to ensure attorney's representation of employee is not compromised
  - Represent both corporation and employee
    - Must deal with conflicts and potential conflicts

# Identify the Client: Representing an Employee

## Rule 1.7:

- (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.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each **affected client gives informed consent, confirmed in writing.**



# Identify the Client: Representing an Employee

- *United States v. Nicholas*, 6060 F.Supp.2d 1109 (C.Dist. Cal. 2009)
  - Court referred lawyers to State Bar for disciplinary proceedings for multiple ethical violations
  - Defendant Ruehle was chief financial officer of company
  - His company was simultaneously investigated by the United States and sued in derivative litigation for the same alleged conduct.
  - Attorneys represented Ruehle and other company executives in the derivative litigation, but represented only the company in the company's internal investigation.
  - During the internal investigation the attorneys interviewed Ruehle and subsequently shared his inculpatory statements with the company's auditor and the U.S. Government.
  - The Court found that the attorneys never properly disclosed or obtained any waiver for conflict of interest and that the attorney's never clarified who they represented when interviewing Ruehle.
  - Ruehle reasonably believed they were his lawyers and his statements were privileged communications.

# Documentary Evidence

- The first step in many internal investigations is preservation and collection of company records
- Rules implicated
  - Duty of Competence: Rule 1.1
  - Duty to preserve documents: Rule 3.4
  - Collection of email from company and personal accounts: Rule 4.4

# Documentary Evidence

- **Duty of Competence**

- Rule 1.1

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation, reasonably necessary for the representation.
    - Comment 8: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

# Documentary Evidence

## ▪ Duty of Competence

- North Carolina Ethics Opinion applying Comment 8: 2014 Formal Ethics Opinion 5
  - Client's lawyer does not use social media and is unfamiliar with how it works.
  - What is the lawyer's duty to be knowledgeable about social media and to advise the client about the effect of the postings on the client legal matter?
  - "Relevant technology" includes social media.
  - Social media may be subject to substantive law of spoliation in relevant jurisdiction.
  - Counsel has a general duty to be aware of social media and advise client its use in litigation.

# Documentary Evidence

- **Duty to preserve documents**

- Rule 3.4

- A lawyer shall not 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.
- Comment 2: Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, **to obtain evidence through discovery or subpoena is an important procedural right.**

# Documentary Evidence

- Interplay of substantive law and ethics rules
  - When is there a legal duty to preserve documents
    - Litigation
    - Subpoena
    - Inquiry from government
    - If proceeding is pending or can be reasonably foreseen
  - Lawyer's duty when such obligation exists
    - Reasonable inquiry to identify documents
    - Identify custodians
    - Competence with company data systems (Rule 1.1, comment 8)
    - Document hold

# Documentary Evidence

- Records Collection from Employee Emails, Social Media Mining
- Rule 4.4: Transactions with Persons Other Than Clients

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, **or use methods of obtaining evidence that violate the legal rights of such a person.**

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

## Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. **It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons** and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

# Documentary Evidence

- Collection of personal emails and social media monitoring
  - **Stored Communications Act**, 18 USC 2701: illegal to intentionally access without authorization **a facility** through which an electronic communications service is provided... and thereby obtains, alters, or prevents authorized access to a wire or electronic communications while in **electronic storage** in such system...
  - State privacy laws: many states prohibit employers from requiring disclosure of social media user-names and passwords.
  - Implications for “Bring Your Own Device Programs” and agreements employees sign to use these programs



# Employee Interviews

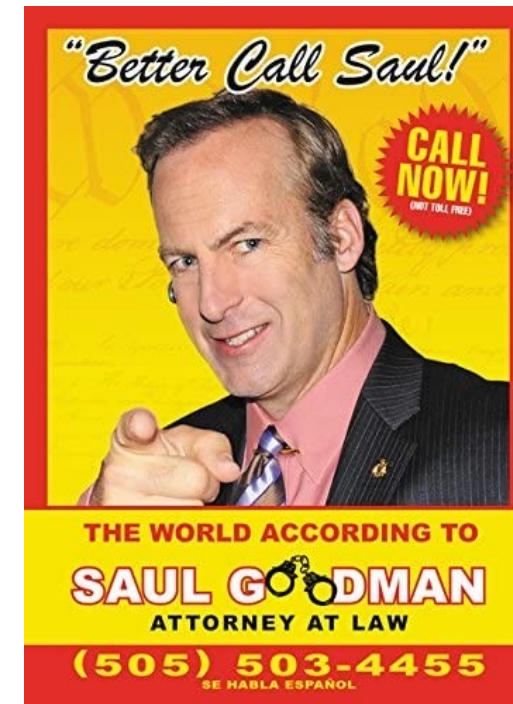
- Key part of any internal investigation is talking to people with knowledge of events
- Type of employee and status in the investigation may drive interview strategy
- Employee interviews are fraught with ethics landmines
  - Rule 4.1: Truthfulness in statements to others
  - Rule 4.2: Communication with person represented by counsel
  - Rule 4.3: Dealing with unrepresented persons

# Employee Interviews

- Rule 4.1 Truthfulness in Statements to Others
  - In the course of representing a client a lawyer shall not knowingly;
    - a) make a false statement of material fact or law to a third person; or
    - b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6
  - Comment 1: Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

# Employee Interviews

- **Application of Rule 4.1:** Pharma company receives complaint that sales representative is paying kickbacks to doctors for prescribing the company's drugs. Compliance requests interview with employee, but employee refuses. GC directs employee supervisor to take employee to lunch and get whatever information he can about the alleged conduct. GC tells supervisor not to tell employee that GC asked him do this and supervisor should deny any knowledge of compliance investigation.



# Employee Interviews

- Rule 4.2 Communications with Person 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 court order.
    - Comment 5: Communications authorized by law may also include investigative activities of lawyers representing government entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.

# Employee Interviews

- **Application:** General counsel has conducted preliminary investigation regarding allegations of embezzlement by company controller. Controller lawyered up during initial discussions, and GC has retained you as external counsel. You wish to interview the controller. Can you ask the HR department to call him and ask that he cooperate with your internal investigation by sitting for an interview?



# Employee Interviews

- Rule 4.3 Dealing with Unrepresented Person
  - 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.
    - See also Rule 1.13(f): In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, **a lawyer shall explain the identity of his 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**.

# Employee Interviews

- Rule 4.3 Dealing with Unrepresented Person

Application: You have been retained by company to investigate allegations of bribery of government officials in a country where the company has a manufacturing facility. You are aware that the executive assistant of the facility's manager keeps the manager's calendar and may have information about meetings the manager attended. You have also been told that the manager would meet foreign officials after hours at the facility to pay bribes. You would like to interview: 1) custodial staff that work after hours at facility to see if they have seen any foreign officials with the manager; 2) the executive assistant that keeps the manager's calendar; and 3) the manager's deputy for general information.

What are counsel's responsibilities with regard to each of the individuals being interviewed?

What should counsel do if any employee refuses to be interviewed?

# Employee Interviews

- Rule 4.3 Dealing with Unrepresented Person
- Don't screw this one up!

“Statements suppressed.  
Attorneys referred to State Bar for appropriate discipline.”

*United States v. Nicholas*, 606 F.Supp. 2d 1109 (C.D. Cal. 2009)

- In *Nicholas* district court suppressed statements of company CFO in criminal prosecution by U.S. Government, and referred attorneys to State Bar. Suppression subsequently overruled by 9<sup>th</sup> Circuit.
- 4<sup>th</sup> Circuit applies a reasonable subjective belief test on part of the interviewee
  - *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4<sup>th</sup> Cir. 2005)



# Employee Interviews

- Contents of Employee Advisement or “UpJohn Warning”
  - Counsel represents the company
  - Counsel does not represent the employee
  - The employee is being interviewed to develop facts counsel will use to provide legal advice to the company
  - The information provided by the employee will be shared with the company
  - Communications in the interview are confidential and should not be disclosed to others
  - The communications are privileged, but the privilege is held by the company
    - That means the employee cannot share the information, but the company can
  - If the company chooses to waive the privilege (share the information) it can do it without notifying you
  - The company may decide to waive the privilege and share information you provide to others including regulatory agencies, and law enforcement

# Application of Rules to Case

- You are external counsel asked to represent large media and entertainment conglomerate (“MegaMedia”) in an internal investigation. MegaMedia has received a whistleblower complaint that employees of its cruise line sexually exploited entertainers aboard company cruise ships. The whistleblower alleges that senior company personnel participated in this behavior and multiple personnel within the company covered up the abuse and paid witnesses to stay quiet. The whistleblower said they also reported these concerns to law enforcement.
- Company CEO and other C-Suite executives have all retained personal counsel with regard to the case.
- At the outset of the investigation the company CEO seeks to speak with you personally about the investigation. He also states that his son-in-law currently manages the cruise line division of the company and he would like you to represent him as well.

**What Rules of Professional Conduct should you consider in responding to this request?**

# Application of Rules to Case

- You are retained by the company. You declined the CEO's offer to discuss the case directly with you because he is represented by counsel – Rule 4.2
- You declined to represent the CEO's son in law as it is apparent from the circumstances that the interests of the corporation may adversely affect his interests as head of the cruise line division – Rule 1.7
- Your first step in the investigation is to gather documents relevant to the investigation. What are your duties with regard to relevant documents within the company.
  - You interview relevant employees to understand where relevant documents would be located – both physical and electronic
  - You issue document a preservation notice to all parts of company that may have relevant documents

# Application of Rules to Case

- While you are researching location of documents you are told that certain employees routinely correspond about company business on personal email accounts using their company issued cell phones and computers.
- The company has a policy clearly stating that all information on company equipment is subject to search.
- What are your next steps?
  - Research substantive law of jurisdiction to determine what rights employees have in personal email accounts that they have accessed from company equipment.
  - Take action consistent with substantive law of the jurisdiction to obtain this information.

# Application of Rules to Case

- After collecting and reviewing relevant documents you begin the interview process. What Rules should you have in mind as you schedule interviews?
  - Corporate officers have retained individual counsel – must contact their counsel to arrange interview – Rule 4.2
  - Unrepresented individuals can be contacted directly but counsel should immediately identify herself as counsel for the company. It is reasonable for counsel to state that the company expects personnel to cooperate with the investigation. Rule 4.3
    - Can you tell the employees that company policy requires cooperation?

# Application of Rules to Case

- You interview head of cruise line division who is not represented by counsel. He enters the room and says, “I am so glad to talk to a lawyer. Can I get a few things of my chest?”
  - Tell him to stop talking.
  - Provide fulsome UpJohn warning. Advise that they can get their own counsel.
  - Obtain written confirmation of UpJohn warning if he is willing to go through with interview
  
- He asks if you think he needs a lawyer.
  - You explain that as counsel for the company you cannot give legal advice and reiterate that he has the right to go speak to his own lawyer.

# Application of Rules to Case

- During the interview he explains that at the behest of to the CEO, he has been in charge of destroying documents related to this inquiry. He explains there is an offsite location where document destruction is in progress. After you advise him to immediately stop destroying documents, he explains that he is afraid of the CEO and will not stop.
  - Take these concerns to authority in organization above CEO – Board of Directors – Rule 1.13(b)

# Application of Rules to Case

- You arrange an emergency meeting of the board of directors to disclose this information and request that they take action to stop the illegal conduct. The CEO who is also chairman of the board attends. Board members, some of whom are family members of the CEO, are afraid to take any action against CEO or management and question the veracity of the employee's report. What are your options?
  - Report to shareholders?
  - Resign?



# Conclusions and Practice Pointers

- When confronted with need for internal investigation don't wing it
- Procedures in investigation matter
- Remember you are a lawyer, not a law enforcement agent
- Know and remember who is your client
- Be aware of substantive law of your jurisdiction that may inform your ethical conduct
- Special care in dealing with unrepresented individuals

# QUESTIONS AND DISCUSSION