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CLE RELAY

Navigating Ethical Issues in Complex Investigations and Litigations

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Introduction and Roadmap

- Lifecycle of any case is full of ethical issues and potential pitfalls
- We plan to cover three (interconnected) stages
  - Pre-Investigation
  - Investigation
  - Litigation

STAGE #1:
Pre-Investigation Stage

CLE Poll #1

What is important when deciding whether you need to report misconduct?

a) Common sense and your gut feeling.
b) The laws of jurisdictions in which your company operates.
c) Relevant rules of professional conduct.
d) All of the above.

How and When to Report Misconduct

- SOX Reporting Obligations for In-House Lawyers
  - Section 307, Part 205 of the Sarbanes-Oxley Act of 2002 imposes reporting obligations on in-house attorneys.
    - Compliance is mandatory and failure to comply can result in sanctions.
  - Requires attorneys "**appearing and practicing** before the SEC in the **representation of an issuer"** to report violations.
    - Interpreted very broadly and ***not*** just people involved in mechanical process of making an SEC filing and ***not*** just attorneys in legal department.

How and When to Report Misconduct

- SOX Reporting Obligations for In-House Lawyers
  - **When is the obligation triggered?**
    - Requires attorneys to report evidence of a "material violation" of the securities laws or breach of fiduciary duty or a similar violation of any federal or state law by the company or its agents
  - **What is required of the reporting attorney?**
    - Subordinate attorneys must tell their supervisors and supervisory attorneys and attorneys who work at the direction of the GC are "Reporting attorneys" who must report to GC/CEO under Part 205.3

How and When to Report Misconduct

- Attorneys' obligations under ABA Model Rule 1.13
  - **Step 1:** ABA Model Rule 1.13(b): If a lawyer for an organization knows that an employee of the organization employee intends to act in a manner that could result in a "violation of law that reasonably might be imputed to the organization" and "that is likely to result in substantial injury to the organization", lawyer "*shall proceed as is reasonably necessary in the best interest of the organization*."
  - **Step 2:** "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*."
  - **Step 3:** ABA Model Rule 1.13(c): If higher authority does not address issue, failure to address it is "clearly a violation of law, and "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization", then "*the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.*"

How and When to Report Misconduct

- Attorneys' obligations under ABA Model Rule 1.13
  - Practical Considerations
    - Confer with other in-house attorneys and outside counsel, if necessary, if there is an issue that is troubling you
    - Consulting others will both **(1)** make it more likely you will make right decision; and **(2)** show that steps were taken to make the right decision

Preparing for Scrutiny

How and When to Report Misconduct

- Where Can In-House Counsel Go Wrong?
  - Forget the ultimate client is the corporation (not the executives)
  - Neglect gatekeeper role in the face of business pressures
  - Let everyday “to do list” prevail over more significant issues


STAGE #2:
The Investigation Stage

CLE Poll #2

Which of the following is true regarding multiple party representations?

a) Multiple party representations are bad and generally frowned upon.

b) Nothing can possibly go wrong so long as your aim is to get everybody the benefit of talking to a lawyer.

c) After potential issues are disclosed, there are no issues created by multiple party representations.

d) Multiple party representations create issues that require consideration at the outset and careful monitoring throughout the representation.

Challenges in Multiple Party Representations

- When can attorneys that represent the company also represent an employee of the company?
  - ABA Model 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 ABA Model Rule 1.7."
  - ABA Model 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.*
    - Colloquially, the "daylight test" – Daylight between the interests of the company and employee?

Challenges in Multiple Party Representations

- When can attorneys that represent the company also represent an employee of the company?
  - Exception: ABA Model Rule 1.7(b) – must have, among other things, informed consent *in writing* from both clients.
  - Pros/Cons of multiple representation:
    - **Pros:** retain control over case; plot strategy together
    - **Cons:** risk of potential disqualification down the road based on confidential information provided to counsel
  - **Practice Tips:**
    - **Plan ahead** for potential future conflicts that could arise by addressing this possibility in engagement letters
    - **Make clear in employee engagement letter** that withdrawal from representing employee will not prohibit lawyer from representing corporation

Challenges in Multiple Party Representations

- When must an attorney who represents the company withdraw from representation of an employee based on information learned in the course of an investigation?
  - Concurrent conflicts of interest: not a “one and done” determination; must be evaluated on ongoing basis
  - **Mandatory Withdrawal:** ABA Model Rule 1.16(a): Lawyer “shall withdraw” from the representation of a client if a conflict of interest under the rules arises (including ABA Model Rule 1.7)
  - **Optional Withdrawal:** Several reasons, including if “withdrawal can be accomplished without material adverse effect on the interests of the client”, client “used lawyer’s services to perpetrate a crime or fraud” or if client “insist upon taking action that the lawyer considers repugnant”

CLE Poll #3

Which of the following could be reasons for a lawyer to withdraw from a multiple representation?

a) A client and former executive of the company would like to cooperate with the government in its investigation of the corporate client
b) A client and executive of the company tells counsel that he plans to be untruthful in an interview with the SEC because “there’s no way they will be able to prove I’m not telling the truth”
c) A client and executive of the company leaves the company on bad terms, including a dispute with the company regarding severance pay
d) All of the above

Dealing with Joint Defense Group Conflicts

- While joint defense groups provide benefits, also create conflicts and require careful attention.
  - Consider limiting the scope of a Joint Defense Agreement to avoid conflicts
  - **Be proactive**: Address possible conflicts that could arise in the joint defense agreement itself
    - Disclaimer of any attorney-client relationship between counsel to one party and other parties
    - Waiver of conflicts of interest / motions to disqualify that could arise out of JDA
    - Consider possible provision allowing use of confidential information if member of joint defense group leaves to become witness for adversary

Preserving Privilege in Internal Investigations

- Practice Tips for Preserving Privilege:
  - Upjohn warnings to employees – essential
  - Ensure all aspects of investigation are attorney-directed
    - *E.g.,* Interviews should ordinarily be conducted by internal or external counsel (not compliance or audit personnel)
    - Memorialize in writing – and communicate to witnesses – that investigation is being conducted for the purpose of providing/obtaining legal advice to company
    - Restrict distribution of investigation materials
  - Copying counsel on emails is not enough

Preserving Privilege in Internal Investigations

- Key Question for Privilege: Is the primary purpose of the internal investigation to obtain / provide legal advice?
  - **Example #1:** Internal investigation of issues relating to accrual where investigation was launched because of auditor refusal to sign company 10-K, not because of SEC enforcement action or anticipated litigation. *Investigation not privileged.* *See SEC v. RPM Int'l*, 1:16-cv-1803, Dkt. No. 81 (D.D.C. Feb. 12, 2020)
  - **Example #2:** Internal counsel carbon copied on email communications about an investigation. *Email not privileged.* *See* Wierciszewski v. Granite City Ill. Hosp. Co., LLC, No. 11-cv-120-GPM-SCW, 2011 WL 5374114, at *1-2 (S.D. Ill. Nov 7, 2011)

Preserving Privilege in Internal Investigations

- When are communications / work product involving third parties during the course of an investigation privileged?
  - **General rule**: Communication with third-party is privileged if the third-party agent is "necessary, or at least highly useful for the effective consultation between the client and the lawyer." *E.g., Cavallaro*, 284 F.3d at 247-48 (citing *Kovel* standard).
  - **Practice Tip**: Where appropriate, retention letter for consultants should make clear that consultant's work is intended to enable counsel to render legal advice and that consultant should treat all communications as confidential

CLE Poll #4

Which of the following is true?

a) Everything created or collected in connection with an internal investigation is privileged.

b) Nothing created or collected in connection with an internal investigation is privileged.

c) Privilege issues will ultimately be decided by a Court, such decisions are hard to predict, and thus no use monitoring the issues.

d) There are steps that attorneys can take to preserve the privilege, but even then, company may decide to waive privilege.

STAGE #3:
The Litigation Stage

Special Litigation Committees

- Common scenario: shareholder demands Board take certain action
  - Most jurisdictions require such a demand before derivative lawsuit or require shareholder to meet high burden of showing demand futility
- Company wants to respond in a way that maintains its control over the process and allows the Company to address/evaluate wrongdoing
- Often, companies establish an independent committee to evaluate/investigate demand (sometimes, though not always, called a "Special Litigation Committee")
- Mechanics of establishing an SLC:
  - Understand how SLCs are treated under law of applicable jurisdiction
  - Ensure committee members are independent
  - Ensure compliance with Company bylaws

Special Litigation Committees: Privilege Implications

- How can the creation of a Special Litigation Committee ("SLC") to conduct an investigation impact privilege?
  - Prudent first step: SLC retains its own legal counsel, and communications with that counsel are generally privileged.
  - If Company already conducted internal investigation, SLC's counsel may ask Company counsel for privileged information. Depending on the jurisdiction, disclosure of privileged information to SLC can result in waiver of privilege.
  - Depending on the jurisdiction, disclosure of SLC's findings to the Company's Board can also waive privilege. *E.g., Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007) (SLC's disclosure of findings of investigation to Board of Directors waived privilege over the investigation)
  - Certain jurisdictions have adopted "fiduciary-exception test", which bars corporation from asserting privilege against its shareholders under certain circumstances. *E.g.*, *NAMA Holdings, LLC v. Greenberg Traurig, LLP*, 133 A.D.3d 46 (N.Y. App. Div. Oct. 8, 2015).

Responding to Requests for Internal Investigation Materials

- The best practices for preserving privilege during an investigation strengthen your privilege arguments down the road in litigation
- What other considerations are relevant in responding to requests for internal investigation materials?

Responding to Requests for Internal Investigation Materials

- Defenses based on internal investigation materials waive privilege
  - The attorney-client privilege may be deemed waived as to internal investigation materials when a party puts those materials "at issue" in the litigation.
    - *E.g., Koumoulis v. Indep. Fin. Mktg. Grp.,* 295 F.R.D. 28, 47-48 (E.D.N.Y. 2013), aff'd, 29 F. Supp. 3d 142 (E.D.N.Y. Jan. 21, 2014) (defendant waived privilege over internal investigation by relying on reasonableness of its investigatory policies as a defense);
    - *E.g., Angelone v. Xerox Corp.*, No. 09-CV-6019, 2011 WL 4473534, at *2 (W.D.N.Y. Sept. 26, 2011) ("[T]he clear majority view is that when a Title VII defendant affirmatively invokes a Faragher-Ellerth defense that is premised, in whole in or part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part 150 of and in furtherance of the investigation.")
- **Practice Tip**:
  - Carefully consider the privilege implications of raising a defense based on adequacy of an investigation or reliance on counsel

Responding to Requests for Internal Investigation Materials

- **Selective waiver doctrine**: disclosure of privileged information to government agency waives privilege as to agency, but not third-party litigants.
  - Courts are split on the application of the selective waiver doctrine. *Compare* United States v. Thompson, 562 F.3d 387, 394 (D.C. Cir. 2009) (rejecting doctrine); Westinghouse Electric Corp. v. Republic of Philippines, 951 F.2d 1414, 1424-27 (3d Cir. 1991) (rejecting doctrine); *with* Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc) (accepting doctrine).
  - Some courts only recognize the selective disclosure doctrine when the disclosure was pursuant to a confidentiality agreement. *See, e.g.*, In re Natural Gas Commodity Litigation, No. 03 Civ. 6186VMAJP, 2005 WL 1457666, at *5-6 (S.D.N.Y. June 21, 2005).
- **Practice Tip:**
  - Be aware that disclosure of materials to government regulators creates a significant risk of waiver as to third-party litigants.
  - Disclose all materials to government regulators pursuant to a strict confidentiality agreement, if possible.

E-Discovery of Investigation Materials

- E-discovery in litigation that follows an internal investigation can often be cumbersome, and ethical issues and privilege issues abound
- ESI Protocols can be used to manage the burden of searching ESI in many ways, including the following:
  - Limit the types of data that needs to be preserved or searched
  - Limit the time period of data that needs to be preserved or searched
  - Limit the custodians and search terms that will be used
  - Provide for a method of selecting supplemental search terms
  - Allow for e-mail threading, de-duplication, or technology assisted review to streamline the culling of ESI

E-Discovery of Investigation Materials

- Counsel should consider potential privilege issues in drafting an ESI Protocol
  - Is an in-house attorney who was involved with the investigation a proper custodian for search terms?
  - What if the attorney was sent "hot" documents that are not, on their own, privileged, even if the emails attaching them are privileged?
- Attorneys should also be mindful that courts do not always find all aspects of an internal investigation to be privileged.
  - For example, courts that have found interview memoranda to be privileged have still ordered parties to state the identity of persons interviewed. *See, e.g.*, *In re General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015).

E-Discovery of Investigation Materials

- Negotiation of an ESI Protocol also implicates many of a lawyer's ethical obligations
  - Lawyers have a fundamental obligation to identify and preserve documents and information relevant to litigation.
    - *E.g.*, Model Rule 3.4 ("A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document [with] potential evidentiary value."); *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.").
  - Lawyers also have a duty to provide "competent" representation, including in connection with discussions of ESI (*e.g.*, in a Rule 26(f) conference).
- ESI Protocols can also give rise to ethical issues not explicitly addressed by the ABA Model Rules
  - Example: An attorney knows of bad factual documents from a prior or concurrently-running investigation, but those documents do not fall within the scope of the ESI Protocol.






Any Questions?