



Internal Investigations: The Defense Perspective

Presented To:
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The Misconduct Allegation

- Who should know?
- Who should be contacted?
- Who should assess seriousness?
- How will it be documented?

Why Not Do Nothing?

- Reputation Concerns
- Regulatory Reporting Requirements
 - SEC
 - Sarbanes Oxley
- Civil Liability
- Criminal Exposure

Government Leverage

- Criminal stigmatization – corporate death penalty
- Huge fines under the FCA
- Government contract debarment or federal program exclusion
- Reputational injury
- Collateral civil litigation, S/H or others

Preserve Attorney Client Privilege

- Contacts by law enforcement or regulators – be it a subpoena or an informal inquiry - must be reported *immediately* to in-house counsel.
 - **Insure that questions are fully understood and investigated internally before answers are provided.**
 - **Insure that investigative process is protected by privilege**

Do Something: Conduct an Internal Investigation

- Battle for accurate and timely information, *i.e.*, before the media or government learn of the misconduct allegation
- Obtain the essential information discretely, minimizing internal rumors and morale problems

The Government's “New” Role

- **SWAT mentality**
- **Corporations, or their counsel, as government agents?**
 - **Thompson memo: privilege; indemnification**
 - **Leverage as a substitute for the adversary system (or “good lawyering is a bad thing”)**
 - **But See: KPMG decision out of SDNY**
 - **The McNulty Memo**

Internal Investigation Goals

- Preserve Evidence and Documents
- Determine accuracy of allegations
- Assess regulatory, civil and/or criminal exposures
- Analyze whether/how to deal with civil plaintiffs, regulators and law enforcement
- Remedy systemic failures
- Levy appropriate discipline

Outside Counsel Advantages

- **Specialized legal analysis usually required in any event**
- **Government credence to a more “independent” and “objective” internal investigation.**
- **Better attorney-client and work product protection**
- **Prevent direct government contact with employees. See Rule of Professional Conduct 4.2**

Employee Interviews

- Morale: Investigation does not equal wrongdoing
- Counsel for the provider - not employees
- May be interviewing employees and asking them for documents
- Cooperation and patience is most appreciated

Employee Interviews

- Interviews should begin with a recitation of similar “rules” plus:
 - Honest and full cooperation is required
 - The attorney-client privilege attaching to that interview is the provider’s, not the employees’
 - “Do I need a lawyer?”

Employee Interviews: Attorney-Client Privilege and Cooperation

- Thompson Memorandum makes waiver a factor to consider when deciding to prosecute a corporation
- Employees interview may be provided to the government
- May implicate employees' rights
 - Fifth Amendment concerns
 - 1001 prosecutions

Employee Interviews: Maintaining Attorney-Client Privilege

- Employees involved in the matter being investigated should do their talking about the matter to the organization's counsel - not with each other
 - Avoid privilege waivers
 - Avoid charges of collusion (“getting stories straight”), witness tampering

Encouraging Development:

U.S. v. Stein - - the “KPMG case”

- Thompson Memorandum unconstitutional to the extent it interferes with the employees right to use their resources to defend themselves.
- May also apply to provisions that seem to require waiver of attorney-client privilege
 - Government may still want privileged material
 - You may want to provide privileged material

Document Preservation: “Circuit Breaker”

- Immediate
- Overbroad at the outset
- Documented
- IT Department

Document Preservation: Arthur Anderson case

- For obstruction exposure you DON'T need:
 - Commencement of a criminal or civil fraud investigation
 - Initiation of an administrative audit
 - Service of subpoenas or formal process
 - Informal governmental request for documents

Document Preservation: “Circuit Breaker”

- Employee certifications?
- Notify outside professionals such as lawyers, accountants, auditors, storage vendors
- Counsel to address core individuals re preservation and gathering of records

Document Preservation: Arthur Anderson case

- knowingly and corruptly persuading another person to destroy or conceal documents with the intent to impair availability for use in an official proceeding.
- For purposes of this crime, the proceeding need not be pending at the time of the alleged obstruction

Document Preservation: Control

- Universe of relevant documents should be secured (literally).
- Responsible employees must be directed to find all such documents.
- Employees must be instructed that all such documents are to be preserved, and none are to be altered or created after the fact.

Document Preservation:

SOX: 18 U.S.C. § 1519 (2002)

- “Whoever knowingly alters, destroys... conceals...any...document...with the intent to impede...the investigation or proper **administration of any matter** within the jurisdiction of any department or agency of the United States,...**or in relation to or contemplation of any such matter...**”
 - Reasonable foreseeability?
 - 20 years in jail/\$250k fine
 - (Civil spoliation)

Document Preservation: Educating Your Client

- Destruction not a crime when part of an ongoing, legitimate document retention/destruction policy
- **NEVER** destroy for purpose of having them unavailable for a government inquiry
- **MUST** preserve when reasonable grounds to believe inquiry will be coming OR learn of facts, which if known to government, would reasonably lead to government inquiry

Attorney-Client Privilege: Crime Fraud Exception

- Attorney client privilege will not protect communications where:
 - The client *knowingly* seeks a lawyer's advice
 - In furtherance of an ongoing or future crime
 - Even in cases where the attorney is entirely unaware of the client's criminal intent
 - The client's intent controls

Crime Fraud Exception: Government's Burden

- The government must show that:
 - The client was committing or intending to commit a crime
 - The attorney-client communication was in furtherance of the intended crime.
 - May make *in camera* and *ex parte* presentation to the court in support of motion

Disturbing Development:

In Re Grand Jury Investigation, 445 F.3d 266 (3d Cir. 2006)

- The “in furtherance” requirement has been marginalized
- Third Circuit ruled that the crime fraud exception would apply where the client merely used information provided by a lawyer
- No requirement that the communication be for the purpose of committing a crime

Crime Fraud Exception: Bottom Line

- Prosecutor may attempt to invade the protections afforded under the attorney-client privilege in all instances where the client disregards legal advice
- Even where the communication was not intended by the client to further an ongoing or future crime
- Even when the intent to commit a crime develops after the communication

Take Away Principle I: Transparency

- By definition, organizational conduct will be judged by regulators, agents, prosecutors, judges and juries
 - With (20/20) hindsight
 - Negative inferences drawn
 - You cannot assume that anything is private, e.g., E-mails, board meetings etc.!

Take Away Principle II: Documentation

- If organization's good deeds, training, remediation of problems or decision-making process are undocumented...
 - They "didn't exist."
 - In other words, while "process" counts, it must be documented.

One Size Does Not Fit All

- Resources are limited, and risk management is not a one size fits all proposition. Policy-specific exposures and benefits must be evaluated.

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