



ETHICS: ETHICAL ISSUES IN INTERNAL INVESTIGATIONS

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Ethical Issues in Internal Investigations

Considerations and Implications for In-House and Outside Counsel

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What We'll Explore

- Who is the Client?
- Should In-House or Outside Counsel conduct the Investigation?
- Joint Representations.
- Interviewing Corporate Employees.
- Should I Self-Report to the Government?

Who is the Client?

ABA Model Rule 1.13(a):

“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

Duty to Snitch?

ABA Model Rule 1.13(b) – You must inform a higher authority in the Corporation if you learn of conduct by an employee that:

- Violates the law or an obligation to the Corporation
- Could cause “substantial Injury” to the Corporation

Who Should Investigate?

Concerns for In-House Counsel

The client, your employer, will be the one completing your performance review

- “The economic fate of in-house attorneys is tied directly to a single employer, at whose sufferance they serve.” *General Dynamics v. Superior Court*, 876 P.2d 487 (Cal. 1994)

Office Politics Could Cloud Your Judgment

Who Should Investigate?

Concerns for In-House Counsel (con't)

In-House Counsel Often Wears Two Hats

- May serve in business capacity
 - Often the most valuable role to the Corporation
- Can Create Tricky Privilege Issues
 - More complicated to apply privilege rules to communications from in-house counsel because that are more likely to mix business and legal functions
 - A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.
 - Business Advice is Not Privileged

Who Should Investigate?

Concerns for In-House Counsel (con't)

Courts More Closely Scrutinize Privilege Claims by In-House Attorneys

- N.Y. Court of Appeals held that the need to apply the attorney-client privilege cautiously and narrowly is “heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.” *Rossi v. Blue Cross & Blue Shield*, 73 N.Y. 2d 588, 593 (1989)
- S.D.N.Y. conducted an email by email review of communications between in-house lawyers.
 - *TVT Records v. Island Def Jam Music Group*, 214 F.R.D 143 (S.D.N.Y. 2003)

Who Should Investigate?

Hiring Outside Counsel

Reminder: Corporation's Regular Outside Counsel
May Lack (or be perceived to lack) Independence

- Enron's regular outside counsel was hired to investigate allegations by a whistleblower, and later settled the civil suit for failure to uncover red flags during the investigation for \$30 million.
- Global Crossing hired its regular outside counsel to conduct an internal investigation concerning accounting improprieties. The firm was later alleged to have conducted an inadequate investigation possibly influenced by conflicts related to its other work for the client, and settled for \$19.5 million.

Joint Representations

You May Represent both the Corporation and an
Individual Corporate Employee

- ABA Model Rule 1.13(g)

BUT . . .

Joint Representation

BEWARE OF CONFLICTS

Prohibited Representation: ABA Model Rule 1.7(a)

- Actual conflict/directly adverse, or
- “Significant Risk” that representation of the Corporation will limit ability to represent the individual

Exception – ABA Model Rule 1.7(b)

- Layer “reasonably believes” he can represent both
- Case does not involve claim by one client against the other
- Written informed consent from both the Corporation and the individual

Conflicts During Joint Representation

Majority View: The Hot Potato Rule – Drop Both Clients

- “A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.”
 - *Picker Int'l Inc. v. Varian Assocs.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (6th Cir. 1989)
 - See also ABA Model Rule 1.9

Minority View: The Accommodation Rule

- “If adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the ‘accommodation’ client understood and impliedly consented to the lawyer’s continuing to represent the regular client in the matter”
 - *Restatement (Third) of the Law Governing Lawyers* § 132 cmt (i)
 - See also *In Re Rite Aid Sec. Litig.*, F. Supp. 2d 649 (E.D. Pa. 2001)

Joint Representation

Can I share privileged information between jointly represented parties?

- Traditional view is that there are no confidences between jointly represented parties
- Some states prohibit sharing information between joint clients without consent
 - D.C. Ethics Opinion 296
 - N.Y. State Bar Opinion 555
 - Illinois Adv. Opinion 98007

Interviewing Corporate Employees

Always give an *Upjohn* warning before the interview:

1. You represent the Corporation, not the individual
2. Purpose of the interview
3. Your communications with the individual are privileged, but the Corporation holds the privilege
4. Keep conversation in confidence
5. The Corporation can elect to waive the privilege without any input from the individual
6. Ensure individual is willing to proceed

What if You Don't *Upjohn*?

1. Your client, the Corporation, may not be able to disclose or the Government may not be able to use improper disclosures

AND

2. You may get referred for discipline

U.S. v. Nicholas, **(C.D. Cal. 2009)**

- Company's outside counsel turned over interview statements by former CFO William Ruehle to the Government
- Ruehle was subsequently indicted and moved to suppress the statements
- Ruehle did not consent to the disclosure
- District Court suppressed for failure to *Upjohn* and referred counsel to the State Bar



Self-Reporting

What's in it for me (and my client)?

- You gain credibility with the Government
- You will be better able to control the investigation
- It may help reduce damages
 - Many federal agencies consider corporate disclosure as a factor in any penalty or enforcement action
- You will be better able to control media coverage and client messaging



Self-Reporting

How could it harm my client?

- Government investigation may expand
- Generally there is no guarantee of an NPA or DPA
- Civil fines may be assessed and/or a monitor put in place
- If you disclose counsel's report, you may have waived any privilege
- Private suit by shareholders may result
- Client's costs may substantially increase

FACULTY BIOGRAPHY



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Habib Nasrullah is a former Assistant United States Attorney who concentrates his practice as trial and national coordinating counsel on mass tort, and complex product liability and commercial litigation. Habib has substantial experience in this role, in both federal and state courts, representing several global corporations and the United States. He is frequently called upon to manage and litigate mass torts involving dockets of several thousand cases, including some recent emerging mass torts involving allegations based in professional negligence against healthcare providers, and nationwide food contamination epidemics.

Since returning to private practice, Habib has also represented various pharmaceutical and healthcare companies in multidistrict product liability litigation involving an array of branded and generic drug products and healthcare services. His role includes development and coordination of litigation strategy, the selection of expert witnesses, creation of Daubert and preemption motions, trial preparation and trial. Habib works with clients and local counsel to conceptualize and implement a coherent and effective litigation plan for litigation that is often pending in multiple jurisdictions. He has been brought in to try cases involving complex expert and evidentiary issues with potentially large losses when trial is imminent.

Habib's background as a federal prosecutor often results in his becoming involved in civil cases where there is a "parallel" criminal investigation. He also conducts internal investigations and counsels individual and corporate clients on a variety of federal and state compliance issues in the healthcare, aviation and financial institution sectors.

Practice Areas

- Insurance
- Personal Injury Defense
- Investigations / Compliance
- Mass Torts
- Commercial
- Product Liability

Legal Memberships, Activities and Honors

- Best Lawyers - Commercial Litigation, 2013-2015; Product Liability Litigation, 2012-2015
- The Legal 500 United States - Litigation: Product Liability and Mass Tort Defense, 2013, 2015
- Colorado Super Lawyers - Business Litigation, 2006, 2010-2015; Top 100, 2013-2015
- Benchmark Litigation - Commercial Litigation - Colorado, 2013-2015; Insurance Litigation - Colorado, 2013 -2015; Product Liability - Colorado, 2013-2015; Personal Injury - Colorado, 2013-2015
- Martindale-Hubbell AV® Peer Review Rated
- Diversity & The Bar - Law Firm Rainmakers, 2011
- American Bar Association - Member, Conference of Minority Partners in Majority Corporate Law Firms
- Lawyer-Pilots Bar Association
- International Bar Association

Education

- Georgetown University Law Center, J.D., 1988
- University of Southern California, B.A., 1984, International Relations, magna cum laude - Phi Beta Kappa