



Dinsmôre

Credits @môre
2021

CONTINUING LEGAL EDUCATION SEMINAR

The logo for Dinsmore, featuring the name in white serif font on a blue square background.

Dinsm^ôre

What's Going on Behind Your Closed Doors?

Ethical Issues and Best Practices in
Conducting Internal Investigations and
Dealing with Government Agencies

The logo for Credits & more 2021, featuring the text in blue with a stylized ampersand and a hat over the 'o' in 'more'.

Credits & m^ôre
2021



Today's Presenters



Moderator: **Sarah Cameron**



Robert Duncan



Lindsay Gerdes



Michael Stuart



Laurie Witek

Today's Agenda

Analysis Through Hypothetical and Discussion

- Best Practices in Conducting Internal Investigations
- General Advice in Dealing with Various Government Agencies

Rule 1.1: Competence

Client-Lawyer Relationship

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3: Diligence

Client-Lawyer Relationship

A lawyer shall act with reasonable diligence and promptness in representing a client.

Hypothetical Fact Pattern

- A bank learns that at one of its branches, employees were being offered financial incentives to open bank accounts, and that there were rogue employees there, led by the branch manager, encouraging customers to open business accounts for the sole purpose of taking out bogus PPP loans using fictitious information.

Hypothetical Fact Pattern

- For example, one unemployed bank customer, with the help of the bank employees, submitted a PPP application claiming to have a real estate business with two dozen employees when, in reality, he drove a taxicab and worked alone. He spent the \$100,000 on his personal housing expenses, a new car and a couple of vacations, and gave the rest in kickbacks to the bank employees and the accountant they set him up with to doctor the fake tax returns for the employees.

Company Driven Investigation v. Government Driven Investigation



Internal Investigation Commences

- Whistle Blower
- Internal Audit
- Anonymous Letter
- Vendor Complaint
- Derivative Demand
- External Circumstances

Commencement of Government Action

- Grand Jury Subpoena
- Search Warrant
- Call from Regulator
- Letter from Government Agency
- Civil Investigative Demand
- Request for Information
- Request for an Interview

Factors for Determining Investigation Strategy

- Government investigation v. no government investigation
- Potential exposure v. no exposure

Special circumstances involved with *qui tam* complaint

- If a whistleblower files a *qui tam* complaint, the company is going to be dealing with a government investigation, but should also be conducting its own internal investigation in parallel with the government's investigation

Dinsmôre

Risks of Cooperating With Government Agencies

DOJ's Latest Policies: a “get tough” approach to white collar crime

- On October 28, 2021, Deputy AG Lisa Monaco in giving the keynote address at the American Bar Association's annual white collar crime conference announced revised corporate enforcement policies including rollbacks of certain DOJ polices softened under the Trump Administration. She also issued a memo the same day announcing the creation of a Corporate Crime Advisory Group and making revisions to Corporate Criminal Enforcement Policies.

Standards for Whether a Company Gets Charged by the Feds?

- Justice Manual sets forth a number of factors to consider in determining whether to charge a company

Dinsmore

Biden Administration's tough on corporate crime stance affecting FCA litigation?



Attorney-Client Privilege and Work Product Doctrine Considerations in Internal Investigations

Attorney-Client Privilege and Work Product Doctrine Considerations in Internal Investigations

- Decide who will lead inquiry
 - *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 393 (S.D.N.Y. 2015): distinguished the extension of privilege where the investigation was led by an attorney with the purpose of providing legal advice, from an internal investigation led by a compliance officer without intent to provide legal advice. In the latter scenario, privilege did not extend to communications made during the investigation

What is considered privileged information by the government and regulators?

Privilege Implications Concerning Individuals in Internal Investigations?

When are Joint Defense or Common Interest Agreements appropriate?

Complications of Multiple Investigations by Different Government Agencies

Conflict Issues Developing During Internal Investigations?

Rule 1.7: Conflict of Interest: Current Clients

Client-Lawyer Relationship

(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.

Rule 1.9: Duties to Former Clients

Client-Lawyer Relationship

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.11:

Dinsmore

Special Conflicts of Interest for Former & Current Government Officers & Employees

Rule 1.7: Conflict of Interest: Current Clients

Client-Lawyer Relationship

(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.

Questions?



Moderator: **Sarah Cameron**



Robert Duncan



Lindsay Gerdes



Michael Stuart



Laurie Witek

Accomplish **môre**.SM

DINSMORE & SHOHL LLP / LEGAL COUNSEL

© 2021. ALL RIGHTS RESERVED.