

Top 10 Things We Hate to Hear During an Internal Investigation

June 19, 2015

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1. After we heard about the Compliance Hotline Report, we waited a few weeks to call you.

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▶ **Corrective Action**

- Stop the misconduct (and potential damages)
- Implement corrective action

▶ **Ticking clocks**

- 31 U.S.C. § 3729(2)(A) (False Claims Act) (Reduced damages). “If the court finds that the person committing the violation of this subsection furnished . . . the United States . . . with all information known to such person about the violation within **30 days after the date** on which the defendant first obtained the information...the court may assess not less than 2 times the amount of damages which the Government sustains...

▶ **Civil False Claims Act (31 U.S.C. § 3729, *et. seq.*)**

▶ **Government’s Primary Civil Prosecution Tool**

▶ **Authorizes Significant Penalties**

- \$11,000 per “claim”
- Treble damages
- Attorneys Fees

▶ **Maybe Brought by Private Whistleblower (“Relator”)**

▶ **Warning: Company Doing Investigation May Not Know Who the Whistleblower Is (cases filed under seal)**

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2. Human Resources began our investigation and wrote up really good interview memos.

Investigative Issues

- ▶ Privilege Issues
- ▶ Documentation of investigation
 - ◆ Oral Report
 - ◆ Written Report
 - ◆ Interview Notes / Memos
- ▶ Which types of internal investigations should HR handle?
- ▶ Criteria for determining when to involve legal counsel (Investigative Protocols)

In re General Motors LLC Ignition Switch Litigation

- ▶ Commissioned outside law firm to conduct a thorough internal investigation into the defect and delays in recalling the affected vehicles.
- ▶ Internal investigation involved review of over 41 million documents and over 350 interviews.
- ▶ Investigative report provided to Board of Directors and to various government agencies, at least one of which made the report publicly available.
- ▶ *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 JMF, 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015)

In re General Motors LLC Ignition Switch Litigation

- ▶ Report provided to plaintiffs in the subsequent products liability case, who then sought to compel production of any notes or transcripts of the interviews underlying the report.
- ▶ GM sought to protect from disclosure, as privileged: interview notes, summaries and formal memoranda prepared by investigative counsel.

In re General Motors LLC Ignition Switch Litigation

- ▶ The Court found that the materials at issue, to the extent they reflected the various witnesses communications, were conducted as part of the company's request for legal advice in light of the potential government investigations and civil suits facing GM.
- ▶ The Court found that although the Report prepared by counsel had been distributed to various government agencies, the underlying communications (interviews) had not been disclosed.
- ▶ The fact that outside counsel had conducted the interviews and prepared the material made the argument for privilege stronger than in *Upjohn* itself.

In re Kellogg Brown & Root, Inc.

- ▶ A former employee of Kellogg Brown & Root, Inc. (KBR), Barko, alleged that KBR and other defense contractors had violated the False Claims Act by inflating the costs of construction services on military bases in Iraq and accepting kickbacks.
- ▶ KBR had conducted an internal investigation in accordance with its Code of Business Conduct and as required by government procurement regulations.
- ▶ During discovery, Plaintiff sought documents related to the internal investigation, and filed Motion to Compel discovery.
- ▶ KBR objected on grounds of attorney-client privilege and work product doctrine.

In re Kellogg Brown & Root, Inc. (District Court)

- ▶ **District Court held** investigation the documents were not privileged because the investigation had not been conducted for the primary purpose of seeking legal advice but instead was a *routine compliance investigation* pursuant to regulatory law and corporate policy.
- ▶ In-house attorneys had conducted the investigation without consultation with outside lawyers;
- ▶ Many of the interviews during the investigation had been conducted by non-attorneys
- ▶ The employees interviewed were not advised that the purpose of the interview was to assist the company in obtaining legal advice.

In re Kellogg Brown & Root, Inc. (D.C. Circuit)

- ▶ Defendants sought mandamus to the DC Circuit, which held that the fact that internal investigation was conducted by in-house counsel (not outside lawyers) did not undermine KBR's assertion of privilege;
- ▶ The attorney-client privilege still applied to interviews conducted by non-attorneys because in-house counsel directed them;
- ▶ The company's failure to use "magic words" to advise its employees about obtaining legal advice did not eviscerate the privilege: employees "knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected."
- ▶ Court held privilege will apply "if **one** of the significant purposes of the internal investigation was to obtain or provide legal advice"
- ▶ Remand to District Court to address other arguments supporting discovery

In re Kellogg Brown & Root, Inc. (Remand)

- ▶ “[District Court] concludes that the reports drafted by KBR investigators, to the extent they do not reveal confidential employee communications, are not attorney-client privileged.” *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-1276, 2014 WL 7212881, at *6 (D.D.C. Dec. 17, 2014).
- ▶ Court concludes that: 1) witness statements gathered by investigators remain privileged, but 2) substantial portions of the reports constitute fact work product, and 3) that Barko has made an adequate showing of “substantial need” to overcome the work product protection. *Id* at * 10.
- ▶ *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) cert. denied sub nom. *U.S. ex rel. Barko v. Kellogg Brown & Root, Inc.*, 135 S. Ct. 1163 (2015).

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3. Well, when the agents came to my house, we were eating dinner and they said “we just have a few questions,” so we talked for “just a little while.”

Investigative Procedures

- ▶ Inform Employees of Rights and Responsibilities
 - Right to Talk to Government
 - Right to Not Talk to Government
 - Right to Counsel
 - Contact Point for Company
 - Comfort Level
- ▶ Single Company Contact with Government
- ▶ “Messaging” to Employees, Government
- ▶ Employee “Advisory Memo”

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4. Our system auto deletes our e-mails after 10 days. And, we forgot how to suspend it.

P.S. Our employees own their cell phones, so we didn't look at their text messages.

Preservation of Potential Evidence

- ▶ *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 218 (S.D.N.Y. 2003). “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”
- ▶ “Spoliation is defined as the intentional destruction of evidence.” *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004) (citing Arkansas law).
- ▶ Litigation Hold Procedures
- ▶ Duty to Preserve Potential Evidence
Obstruction 18 U.S.C. § 1512(b) “Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to-
 - (1) influence, delay, or prevent the testimony of any person in an official proceeding;
 - (2) cause or induce any person to-
 - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; and
 - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding.- shall be fined under this title or imprisoned not more than 20 years, or both.”

5. We had our accountants do a good report adding up all the false claims.

Privilege Issues

- ▶ Potential Admission
- ▶ Best Practices for Expert Opinions/Analyses
 - In-House Expertise/Third Party Consultant
- ▶ Accountant as Agent of Counsel
 - *In Re Bieter* 16 F.3d 929, 937 (8th Cir. 1994)
 - ▶ Extends the “client representative” privilege to communications between a non-employee contractor or consultant and a party's lawyer. An independent consultant may be a representative of the client for purposes of applying the attorney-client privilege and work product doctrine.

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6. We had a couple of internal meetings to discuss the investigation and give everyone a “heads up.”

And we ordered everyone not to talk to the government.

Investigative Issues

- ▶ Communications among witnesses regarding subject matter of investigation
 - Perception Issue
 - Practical Issues (water cooler talk)
 - Legal Issue (witness tampering)
 - ▶ 18 U.S.C. § 1512(b)(2)(A). “Whoever knowingly...corruptly persuades another person...with intent to...cause or induce any person to...withhold testimony...in an official proceeding...shall be fined under this title or imprisoned not more than ten years, or both.”
- ▶ Communications Best Practices
 - Employee Advisory Memo
 - Communications with Corporate Counsel

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7. We have a Compliance Program, but I'm not sure where it is.
And don't remember what it says.

Compliance Program

- ▶ Compliance Program sets standards for corporate conduct, promotes “organizational culture” of ethical conduct and legal compliance
- ▶ “Effective” Program affects government’s view of corporation, and is an important tool for counsel in an investigation (criminal prosecution, FCA intervention, exclusion, penalty amounts)

False Claims Act Statistics

- ▶ Government Intervention Decision In FCA Cases
 - (31 USC § 3730)
- ▶ Critical to Outcome of FCA Case
 - Of \$2.9 billion recovered in 2014, only 1% obtained when government did not intervene
 - Of \$30 billion recovered between 1987-2014, 97% obtained in cases where government intervened
 - Over 95% of intervened cases resulted in significant settlements or judgment for the government
 - Where government declines intervention, more than 90% dismissed with no recovery to Relator
- ▶ Effective Compliance Program: Factor in Government’s Intervention Decision.

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8. Before the subpoena arrived, one of our employees was seen meeting with a government agent.

Investigative Issues

- ▶ In conducting internal investigations, must assume a current employee may be a whistleblower
- ▶ Everything he / she hears will be reported to the government
- ▶ Address “Complaint”
 - Implement Corrective Action, if necessary
- ▶ Avoid Company Conduct that Could be Viewed as Obstructive
- ▶ Whistleblower rewards
 - SEC (Dodd-Frank) (10 to 30% of recoveries over \$1 million)
 - False Claims Act (15 to 25% of total recovery)
 - IRS Whistleblower Program

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9. The complaining employee reported us to the government, so we let her go.

Retaliation Issues

▶ FCA – Retaliation Provision

- Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee . . . is *discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against* in the terms and conditions of employment because of lawful acts done by the employee...in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter. 31 U.S.C. § 3730(h).

▶ Witness tampering 18 U.S.C. § 1512(b)(2)(A).

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10. Since our lawyer helped write our Policy, we thought we'd save some money by having him/her represent all the employees.

► Counsel – Multiple Representation

– Represent Company Employees

Rule 1.7. Conflict of Interest: Current Clients.

- (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.

Rule 1.7. Conflict of Interest: Current Clients.

(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.

▶ Government View (e.g., SEC)

▶ Privilege Issue (Advice of Counsel)

11. Who is this Qui Tam Guy?

Concluding an Investigation

- ▶ Identify potential violations
- ▶ Document conclusions
- ▶ Decision on reporting obligations / voluntary disclosure
- ▶ Corrective action

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