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SPECIAL FEATURE

Ethical perspective on internal, gov't investigations

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What to do when the government comes calling is a topic of frequent discussion among both in-house and outside counsel.

The need to respond appropriately to a government inquiry has taken on heightened significance given the recent prosecution of a GlaxoSmithKline lawyer in the U.S. District Court in Baltimore based upon actions taken during the course of an investigation by the Food and Drug Administration into alleged off-label marketing of the drug Wellbutrin.

While the court ultimately directed a verdict in the lawyer's favor, the indictment in *United States v. Stevens* has grabbed the attention of in-house lawyers who now fear that a misstep in responding to a government inquiry may lead to personal criminal liability.

In recent years, internal investigations have assumed an increasingly prominent role in government investigations, either by

triggering a government investigation when the results of the internal investigation are voluntarily disclosed or by serving as a critical component of a corporation's cooperation once management becomes aware of an existing government investigation.

Both internal and government investigations implicate a number of ethical and legal obligations.

Internal investigation benefits

Over the past decade, the U.S. Department of Justice has stressed the importance of corporate compliance programs and internal investigations in determining whether to prosecute a corporation. See United States Attorneys Manual, §9-28.720 (discussing the role of cooperation in determining whether to prosecute a business entity).

Often, sufficient cooperation on the part of a corporation can result in the government deciding not to prosecute or, alternatively, to enter into a deferred prosecution agreement with a corporation. See United States Attorneys Manual, §9-22.000 et seq. (describing pretrial diversion program).

Even if a corporation is successfully prosecuted, cooperation is relevant to the severity of the sanction imposed following conviction. See United States Sentencing Guidelines §8C2.5(g) (providing for a two level reduction in the base offense level used to determine an appropriate sanction where a corporation "fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct").

Given the above, the potential benefit to a corporation of having conducted a thorough internal investigation of allegedly wrongful activity is significant. While it is generally recommended that internal investigations be conducted by outside counsel in order to

maximize the protections afforded by the attorney client privilege, cost considerations frequently result in the initial (and sometimes the entire) investigation being conducted by in-house. In conducting such an investigation, in-house counsel must pay close attention to applicable ethical obligations.

Internal investigations

Rule 1.13(a) of the American Bar Association Model Rules of Professional Conduct sets the stage, providing that a lawyer retained by an organization "represents the organization acting through its duly authorized constituents."

Subsection (f) provides that "in dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

Rule 1.13 is supplemented by Rule 4.3, which addresses the lawyer's obligations in dealing with a person who is not represented by counsel:

"A lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyers knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

Thus, in the context of an internal investigation, a lawyer's duties under the Model

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Rules are dependent upon whether the employee's interests are adverse to the corporate employer and whether the employee is confused about the lawyer's role in the investigation.

As a practical matter, at the outset of an internal investigation, it is often impossible for counsel to determine whether or not an employee's interests diverge from those of the corporate employer. Moreover, the possibility that an employee might be confused as to in-house counsel's role in an internal investigation is very real.

In-house counsel often have day-to-day contact with corporate employees and engage in discussions of both a personal and professional nature. While it is not good practice, and usually occurs without either party giving it much thought, employees sometimes consult with in-house counsel on an informal basis with respect to a variety of legal matters having nothing to do with the corporation's business affairs.

Accordingly, when an employee is interviewed as part of an internal investigation, unless informed otherwise, the employee may well believe that in-house counsel is acting on the employee's behalf.

Under certain circumstances, such interactions can create an attorney-client relationship between in-house counsel and the employee. See, e.g., *International Strategies Group, Ltd. v. Greenberg Traurig, LLP*, 482 F.3d 1, 7 (1st Cir. 2007), citing *DeVaux v. Am. Home Assurance Co.*, 387 Mass. 814 (1983) (implied attorney-client relationship exists when (i) a person seeks advice from an attorney, (ii) the advice sought pertains to matters within the attorney's professional competence, and (iii) the attorney expressly or impliedly agrees to give or actually gives the advice).

If an attorney-client relationship is formed, a conflict of interest may be created under Model Rule 1.7 that would prohibit in-house counsel from acting in a manner potentially adverse to the employee's interests, including conducting an internal investigation.

Given these realities, the only safe course of action is for in-house counsel to give the employee what have generally become known as "corporate Miranda warnings."

The warnings are straightforward: an employee should be advised that (i) in-house counsel represents only the corporate employer and not the employee, (ii) while the communications between the employee and in-house counsel are subject to the attorney-client privilege, the privilege belongs to the corporation alone, and (iii) the corporation may elect to waive the attorney-client privilege at any time without the employee's consent.

While not strictly required, it is the better practice for in-house counsel also to inform the employee that the employee has the right to consult with his or her own counsel prior to deciding whether to be interviewed.

If applicable, counsel should also consider advising the employee of any potential adverse employment action that may be taken should the employee refuse to cooperate in the investigation.

It is often the case that the corporate employer will pay for independent counsel to advise the employee in connection with an internal investigation. While this practice is not prohibited, the corporation must have no influence on the advice given by independent counsel or any right to obtain information passing between independent counsel and the employee. The employee must also consent to the arrangement after disclosure of all material facts. See Model Rule 1.8(f).

Government investigations

The ethical rules and legal obligations relating to government investigations are straightforward and, hopefully, obvious. They boil down to one cardinal rule: be honest in your dealings with the government. Model Rule 4.1 provides:

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Model Rule 8.4 provides, in relevant part, that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects...."

In the case against the GlaxoSmithKline lawyer, this is precisely what the government alleged took place.

The government claimed that, in the context of an FDA investigation, in-house counsel obstructed the investigation by making false statements to, and withholding documents from, the FDA in violation of 18 U.S.C. §1512, submitted false, falsified and altered documents to, and concealed other evidence from, the FDA in violation of 18 U.S.C. §1519, and made numerous false statements to government agents in violation of 18 U.S.C. §1001. All of these crimes are felonies punishable by both fine and incarceration.

The lawyer claimed, among other things, that she relied on advice provided by outside counsel.

On May 10, 2011, the 10th day of trial, the court directed a verdict in favor of the GlaxoSmithKline lawyer on all counts after the government completed the presentation of its case-in-chief. However, as is the case in most white-collar prosecutions, the damage to the lawyer's reputation had already been done.

The lesson to be taken away from the government's prosecution of in-house counsel for actions taken in responding to a government investigation is that the ethical and legal obligations of in-house counsel discussed above must be taken very seriously. Even if one ultimately prevails in a federal criminal prosecution, vindication usually comes at a great financial and emotional cost.

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