

WMACCA Government Contractors Forum

IS THE SKY REALLY FALLING?

Best Practices for Government Contractors on Handling
Internal Investigations and Making Disclosures Under the
Mandatory Disclosure Rule

October 9, 2014



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Best Practices for Government Contractors on Handling Internal Investigations and Making Disclosures Under the Mandatory Disclosure Rule

Moderator:

Scott Hommer

Co-Chair, Government Contracts Practice Group, Venable LLP

Panelists:

Lauren McGinley

Vice President, General Counsel & Secretary, Noblis, Inc.

Rebecca Pearson

Partner, Government Contracts Practice Group, Venable LLP

Seth Rosenthal

Investigations and White Collar Defense Practice Group, Venable LLP



Biographies

J. Scott Hommer, III, Venable LLP - Moderator



Scott Hommer serves as a partner in the Tysons Corner office of Venable LLP. He concentrates his practice in business counseling and litigation, with an emphasis on technology companies and government contractors. He represents clients locally, nationally, and internationally on issues including negotiating contracts, doing acquisitions, protecting intellectual property rights, and litigating successfully. Mr. Hommer also has significant experience

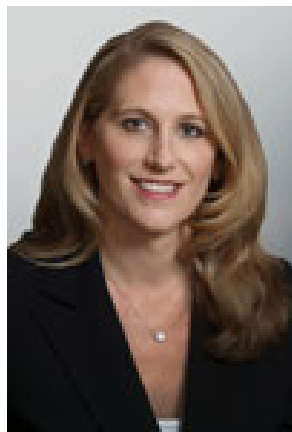
counseling clients who do business with the federal, state, and local governments and has represented clients on contract administration matters, contract claims and disputes, bid protests, contract terminations, teaming agreements, conflicts of interest issues, intellectual property rights issues, government socio-economic programs, and small business matters.

Mr. Hommer is committed to developing relationships with his clients that go beyond the usual role of legal advisor. He works closely with his clients on a proactive basis, developing strategic plans and managing legal issues that may arise, and, more importantly, identifying potential problems before they develop. This approach is not only smart; it is efficient and cost-effective and significantly enhances opportunities for success.



Panelist Biographies

Lauren McGinley, Vice President, General Counsel & Secretary, Noblis, Inc.



As general counsel and secretary, Mrs. McGinley is responsible for all legal matters and corporate secretary duties within Noblis. This includes corporate governance, corporate transactions, tax compliance, intellectual property, litigation management, employment issues, and real estate.

Mrs. McGinley joined Noblis in 2012 as deputy general counsel and deputy compliance officer. In this role, she also helped manage and oversee the Noblis ethics and compliance programs including conducting training and investigations.

Prior to working at Noblis, Mrs. McGinley was associate general counsel for the U.S. operations of one of the world's largest aerospace and defense contractors, where she was responsible for all U.S. mergers and acquisitions activity in addition to managing legal issues related to employment and employee benefits, real estate, and government and commercial contracting. Mrs. McGinley worked for several national and international law firms in the private practice of corporate law prior to going in-house.

Mrs. McGinley received her J.D. from the University of Virginia School of Law and graduated magna cum laude from the Honors College of the University of South Carolina with a degree in international studies and economics. She is a member of the Virginia and District of Columbia Bars.



Panelist Biographies

Rebecca E. Pearson, Venable LLP



Rebecca Pearson focuses on government contracts law. She assists clients in government contract litigation; contract award protests before the Government Accountability Office and federal courts; administrative claims before agency boards of contract appeals; representation before the Department of Justice and federal courts on civil matters involving government contractors; and civil litigation in federal courts involving government prime contractors and subcontractors. Ms. Pearson counsels clients on matters involving contracts including defective pricing and cost allowance questions, teaming agreements, legal and regulatory compliance and ethics, and small business issues. She has significant experience with due diligence in connection with the merger and acquisition of government contractors, as well as post-transaction matters such as novation.

Ms. Pearson's extensive experience as an Air Force attorney in federal litigation and client counseling, and in interfacing with other federal agencies, provides her with an invaluable "insider's" perspective and proven skills to render timely and effective assistance to clients in a wide variety of government contracts matters.



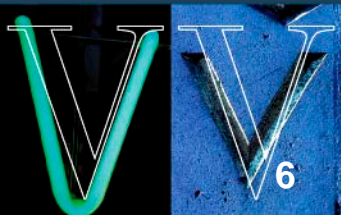
Panelist Biographies

Seth A. Rosenthal, Venable LLP



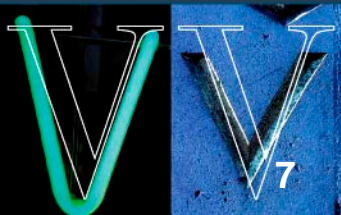
Seth Rosenthal is an experienced trial attorney and former federal prosecutor representing individuals and businesses in criminal matters, investigations by federal and state regulators, and complex commercial and civil rights litigation. He handles a wide range of cases, including procurement fraud, public corruption, partnership and commercial contract disputes and civil rights enforcement. Mr. Rosenthal also directs Venable's *pro bono* program and serves as chair of the firm's *pro bono* committee.

Mr. Rosenthal developed an extensive body of courtroom experience over the span of nearly a decade in the Department of Justice's Civil Rights Division. He conducted grand jury investigations and successfully tried to verdict or obtained guilty pleas in noteworthy cases involving human trafficking, police misconduct and hate crimes, as well as related charges of obstruction of justice, false statements and fraud. He also handled all facets of class-wide civil litigation, including trial, in cases arising under the Fair Housing Act and the Equal Credit Opportunity Act. Early in his career, Mr. Rosenthal litigated death penalty and prison reform cases at the Southern Center for Human Rights.

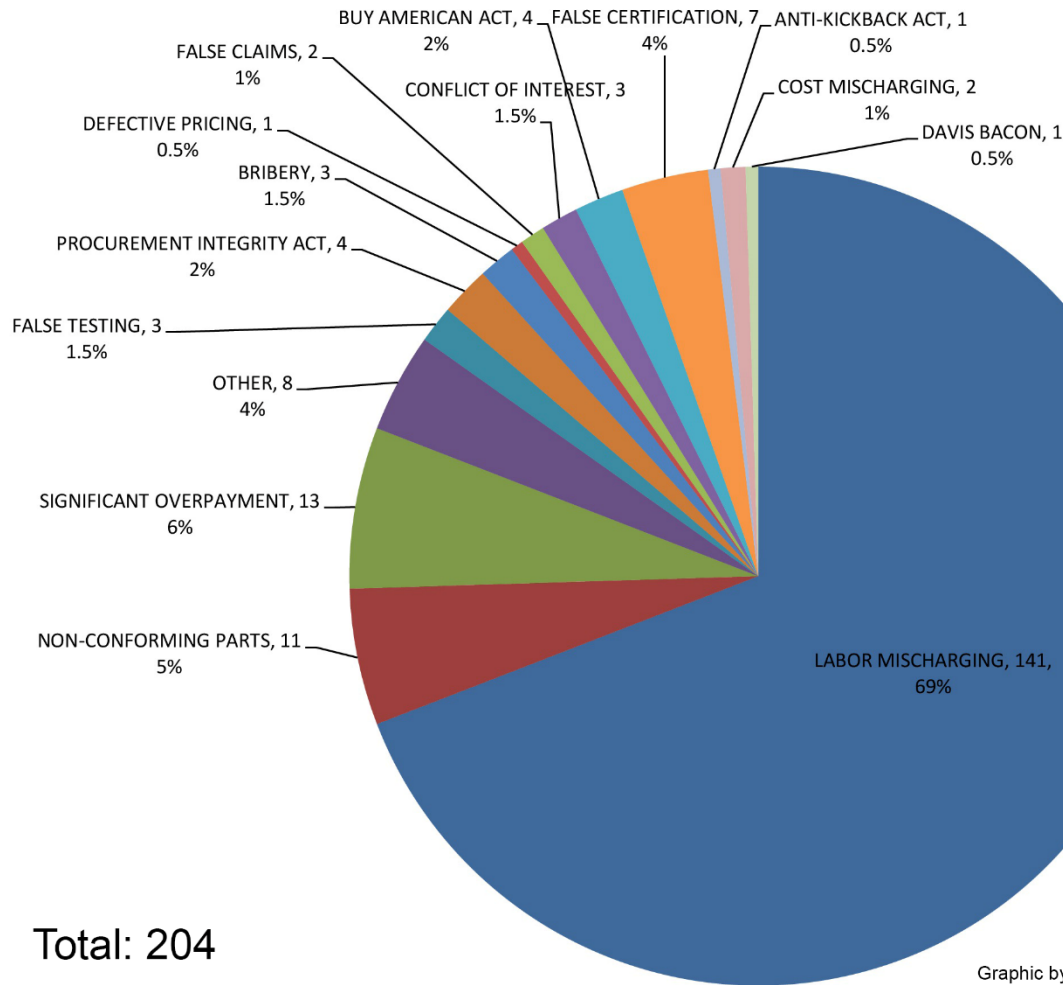


Agenda

- In-House Counsel Perspective
 - Case Study: NOAA Investigation and Disclosure
 - Practical Tips and Lessons Learned
- Outside Counsel Perspective
 - The Mandatory Disclosure Rule
 - Best Practices for Conducting Internal Investigations
 - Update on the Attorney-Client Privilege



CONTRACTOR DISCLOSURE RECEIVED BY TYPE – FY 2014 10/01/2013 – 08/26/2014



Graphic by the Department of Defense's Office of Inspector General

Source: Dietrich Knauth, *DOD Doesn't Want Exemption for Small Fraud Disclosures*, LAW360 (Sept. 29, 2014).



Recent Guidance from the DoD OIG¹

- **There is no “de minimis exception”** to the Mandatory Disclosure Rule.
 - “Our philosophy has always been disclose and let us decide whether the government has been damaged and to what extent.” - Randy Stone, DoD Deputy Inspector General for Policy and Oversight
- **Different OIGs handle disclosures differently** – “For example, while the DOD refers all disclosures to suspension and debarment officials, the General Services, which also receives relatively large numbers of disclosures, does not.”
- **Provide the disclosure to the agency most affected, or all affected agencies** – “Contractors should provide the disclosure to the agency with the largest dollar amount identified in the contract.... [but m]ost contractors provide copies to all agencies involved.”

Source: Dietrich Knauth, *DOD Doesn't Want Exemption for Small Fraud Disclosures*, LAW360 (Sept. 29, 2014).



In-House Counsel Perspective: Lessons Learned & Best Practices

Lauren McGinley

Vice President, General Counsel & Secretary, Noblis, Inc.



Case Study: NOAA Disclosure

Overview

- In July of 2013, an anonymous whistleblower submitted a complaint to the OIG regarding the National Oceanic and Atmospheric Administration (NOAA) management for the Geostationary Orbiting Environmental Satellite-R Series (GOES-R) program
- 21 government and contractor employees attended a “teambuilding” event involving a group lunch and a matinee viewing of the latest Star Trek movie



¹Source: *Review of Improper Expenditure for GOES-R Ground Segment Team Activity*, National Oceanic and Administration, U.S. Dep't of Commerce (Sept. 2014).

Case Study: NOAA Disclosure

The Allegations

- The whistleblower alleged that the majority of the attendees failed to appropriately record their time for the event.
- The OIG initiated an investigative report on the incident.
- Concern that “the event created the appearance of disregard for tax dollars and questioned whether the employees’ time and attendance entries for the event were accurate and whether such an event could be a contributing factor in GOES-R schedule delays.”
- The OIG report determined that, as a result, “the government paid \$3,487.31 in taxpayer-funded wages for employees to attend” the event.

¹Source: *Review of Improper Expenditure for GOES-R Ground Segment Team Activity*, National Oceanic and Administration, U.S. Dep’t of Commerce (Sept. 2014).



Case Study: NOAA Disclosure

The Response

- 5 of the 21 attendees at the event were Noblis employees
- Noblis conducted its own internal investigation of the event, and made a subsequent disclosure to the OIG of the results:
 - “Four of the five Noblis employees initially charged all or part of their time spent attending the team building exercise direct to the GOES-R Support effort. However, in September 2013, these employees subsequently transferred two (2) hours of their time charged that day to the GOES-R Support effort to a Noblis overhead charge code and Noblis then credited the GOES-R Support effort.”

¹Source: *Review of Improper Expenditure for GOES-R Ground Segment Team Activity*, National Oceanic and Administration, U.S. Dep’t of Commerce (Sept. 2014).



Lessons Learned: Preparation and Conduct of the Investigation

- Collect documents and establish facts early
- Issue spot for facts that may require a mandatory disclosure
- Determine the objectives and strategy of the investigation
- Assess qui tam risks
- Assume your investigation may be subject to scrutiny by the OIG
- Take action based on findings



Lessons Learned from Making a Mandatory Disclosure

- No materiality threshold
- Identify and train you principals regularly
- Review policies and procedures
- Fully cooperate with OIG investigations including making employees and information available



OUTSIDE COUNSEL PERSPECTIVE: The Mandatory Disclosure Rule

Rebecca Pearson



What is the Mandatory Disclosure Rule?

- Applies to all contracts over \$5M with a period of performance (“POP”) longer than 120 days
 - Flowdown requirement to subcontracts, including commercial item subcontracts.
- Requires the Mandatory Disclosure of:
 - Criminal violations involving fraud, conflicts of interest, bribery or gratuities under Title 18 U.S.C.;
 - Civil False Claims Act violations; and
 - Significant overpayments.
- Revised Contractor Code of Business Ethics and Conduct requirement (FAR 52.203-13(b)) requiring contractors to have a written Code of Ethics and develop internal procedures to detect, process, investigate and assess potential violations to determine whether there is credible evidence triggering a reporting obligation.
- Established requirement for a Business Ethics Awareness and Compliance Program and Internal Control System (FAR 52.203-13(c)) to be in place within 90 days of contract award.



What Would Cause a Contractor to be Suspended or Debarred?

- A contractor may be suspended or debarred for a knowing failure by a **principal**, to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, **credible evidence** of:
 - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - Violation of the civil False Claims Act; or
 - **Significant overpayment(s)** on the contract, other than overpayments resulting from contract financing payments.
- **Principal** means an officer, director, owner, partner or a person having primary management or supervisory responsibilities within a business entity. This definition should be interpreted broadly, and could include compliance officers or directors of internal audit, as well as other positions of responsibility. (FAR 2.101)
- **Credible evidence** standard permits some period of internal investigation before timely disclosure.
- **Significant Overpayment** is not defined. Intent is for the overpayments that the contractor knows will result in unjust enrichment and yet fails to disclose it.



When Should We Disclose? Can we conduct an internal investigation before we disclose?

- The Mandatory Disclosure Rule allows contractors the opportunity to do some preliminary examination of the evidence to determine its credibility before deciding whether to disclose to the Government.
- No set time frame defines “timely.”
- “Timely” requirement should be read in context of the “credible evidence” standard, which provides for a period of internal investigation to determine whether evidence is credible before it is disclosed.
 - Contractor should take reasonable steps to determine evidence is credible, not launch a complex investigation.
 - No time frame for what constitutes a “reasonable investigation.”
 - Measured from contract award date or discovery of credible evidence, whichever is later.
 - Disclosure requirements under the clause apply prospectively from Dec. 12, 2008; however, past conduct on contracts open to exposure is still required.



What is “credible evidence”?

- No bright-line standard
- Threshold may vary somewhat by agency/OIG
- Warning: Once your company makes a disclosure, OIG will likely deem that disclosure a determination that credible evidence exists.



What Must We Do?

- **Must fully cooperate with all Government agencies responsible for audits, investigations or corrective actions.**
 - Includes disclosure to the Government of information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct.
 - Includes providing timely and complete responses to the Government auditors' and investigators' requests for documents and access to employees with information.
 - If an overpayment is involved – a description of the overpayment, including the circumstances of the overpayment, affected contract number and delivery order number, affected line or sub line item, and contractor point of contact.

- **Rule does not require:**
 - Contractor to waive its attorney-client privilege or attorney work product protections. (But see recent *KBR* line of cases.)
 - An officer, director, or employee to waive his or her attorney-client privilege or Fifth Amendment rights.
 - A Contractor to refrain from conducting an internal investigation or defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.



Other Contractual Obligations Required – A Code, Compliance Programs and Internal Controls

Code of Business Ethics and Conduct (FAR 52.203-13(b))

- Required to have a written Code.
- Make available to each employee engaged in performance of the contract (electronic access included).
- Exercise due diligence to prevent and detect criminal conduct.
- Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.



Other Contractual Obligations Required – A Code, Compliance Programs and Internal Controls

Compliance Program & Internal Control System (FAR 52.203-13(c))

- Within 90 days after being awarded a covered contract, ongoing business ethics awareness and compliance program must be in place.
- Required to have steps in place to communicate periodically and in a practical manner the aspects of the compliance program and internal control system, by conducting effective training programs and otherwise disseminating information.
- Establish standards/procedures to facilitate timely discovery of improper conduct in connection with government contracts (e.g., hotline).
- Ensure corrective measures are promptly instituted and carried out.
- Assign high level of responsibility to individual for compliance with adequate resources.
- Periodic audits and review of business practices and internal controls.
- Disciplinary action for improper conduct or failing to take reasonable steps to prevent or detect improper conduct.
- Reasonable efforts not to employ individuals as principals who have engaged in conduct that conflicts with the Code of Ethics and Conduct.
- Timely disclosure, in writing, to agency OIG (copy CO) re credible evidence of wrongdoing under Mandatory Disclosure Rule.
- Does not apply if the Contractor is a small business concern, or if contract is for the acquisition of a commercial item.



Logistics—How to Make a Disclosure

- Varies by agency
- Many OIGs have online portals to facilitate disclosures
- For example, DoD Contractor Disclosure Program:
 - “Afford contractors a means of reporting certain violations of criminal law and violations of the civil False Claims Act and suspected counterfeit/non-conforming parts discovered during self-policing activities;
 - Provide a framework for government verification of the matters disclosed; and
 - Provide an additional means for a coordinated evaluation of administrative, civil, and criminal actions appropriate to the situation.”¹

¹Source: *Contractor Disclosure Program*, U.S. Department of Defense Office of Inspector General, <http://www.dodig.mil/programs/CD/index.html>.



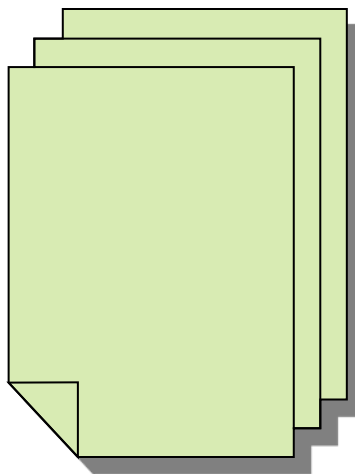
OUTSIDE COUNSEL PERSPECTIVE: Best Practices for Conducting Internal Investigations

Seth Rosenthal



First Steps

- Contact IT to preserve all evidence
 - Pull back-up tapes
 - Suspend document retention/auto-deletion policy
- Take steps necessary to stop underlying conduct in question



First Steps (cont.)

- Overview Meetings
 - Identify key players
 - Identify the existence and location of evidence, i.e., e-mails, e-docs, hard copy files
 - Identify organizational policies that may impact the investigation process, e.g., collective bargaining agreements



Sources of Potentially Relevant Information:

- E-mail servers
- Shared drives
- USB/Thumb drives
- Backup tapes
- External storage facilities
- Hosted archive systems
- Legacy systems
- Employee devices, including smart phones/tablets, Blackberries, laptops, etc., whether company-owned or personal
- CDs
- DVDs
- More...



First Steps (cont.)

- In-house, Outside or Special Counsel?
 - Nature and size of the investigation
 - Potential involvement of senior management
 - Special expertise
 - ✓ Duty to act competently for clients (ABA Rule 1.1)
 - ✓ Must know when and how to seek help dealing in highly-regulated fields, including procurement
 - Conflicts of Interest (ABA Rule 1.7)
 - ✓ Will outside counsel's prior representation of the organization materially interfere with its judgment?
 - Ability to defend the investigation to the government and auditors
 - Privilege considerations, including the attorney-client privilege



First Steps (cont.)



- “Who is the client?”
 - ABA Model Rule 1.13 (“Organization as Client”)
- Possibilities:
 - The Organization/Company
 - Board of Directors
 - Audit Committee of the Board of Directors
 - Special Committee of the Board of Directors



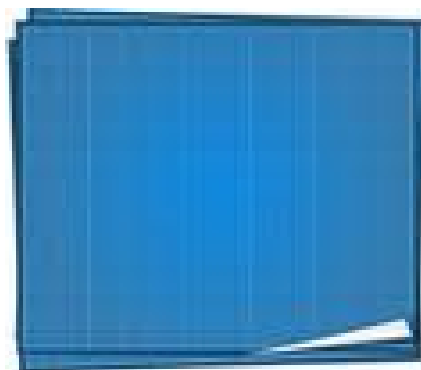
Develop a Plan or Blueprint for the Investigation

- What documents, e-mails, and other information will you collect? From whom?
- Benefits of in-house versus outside collection
 - Independence/possible witness?
- Compose a list of search terms
- Create a list of employees to interview (likely the same as your collection list)



Develop a Plan or Blueprint for the Investigation (cont.)

- Send out a litigation hold notice to employees likely to have relevant information
 - Consider:
 - Spoliation
 - Data privacy



Document Collection and Review

- Keep it manageable...
 - Search Terms
 - “Data Mining”
 - Predictive Coding
- Cull hot documents



Employee Interviews

- Once you have assembled a list of employees to interview, gather/review documents available to prepare
- Ideally, two people, at least one an attorney, should conduct every interview
- Before every interview, give Upjohn, a.k.a. “Corporate Miranda,” warning
 - Upjohn v. U.S., 449 U.S. 383, 391-92 (1981)
 - Purpose is to clarify that the organization’s counsel represents the organization—not the employee—and to explain the contours of the organizational attorney-client privilege to the employee
 - ABA Model Rule 1.13(d) (when employee’s interests are or may become adverse)



Employee Interviews (cont.)

I represent the Company. I represent only the Company, and I do not represent you or any employee of the Company. I am conducting this interview to gather facts to provide legal advice to the Company. This interview is part of an investigation to determine the facts and circumstances relating to _____ in order to advise the Company how best to proceed.

Our meeting is protected by the attorney-client privilege. But, the privilege belongs solely to the Company, and not to you or any individual employee. That means that the Company alone may elect to waive the privilege and reveal our discussion to third parties. The Company alone may decide to waive the privilege and disclose this discussion, including to federal or state agencies. Disclosure may occur at the Company's sole discretion and without notification to you.

In order for this discussion to be subject to the privilege, it must be kept in confidence. With the exception of your own counsel, if you have one, you may not disclose the substance of this interview to anyone, including other employees or anyone outside of the Company.

Do you have any questions?



“Do I need a lawyer?”

- How do you respond to this question?
 - Does the obligation (duty of loyalty) to the client/organization prevent you from answering?
 - What do you tell individuals/employees if you suspect they are about to incriminate themselves?
- Can you fire an employee who refuses to cooperate for fear of self-incrimination?



Interview Memoranda

- Insert the Upjohn / “Corporate Miranda” warning
- Explain what the interview was about
- Not a verbatim recitation of what was said during the interview
- Inter-weave your thoughts and impressions
 - Attorney work-product doctrine



Dealing with Experts

- Forensics, accounting, other...
- Maintaining the attorney-client privilege
- Supervision of experts



Reporting

- Verbal or in writing?
- Imperative to maintain an ongoing dialogue:
 - What are we doing?
 - Why are we doing it?
- Constantly be thinking about how to maintain the attorney-client privilege



The Attorney-Client Privilege and Internal Investigations

- March 2014 – decision by D.C. District Court severely limited the applicability of the attorney-client privilege in internal investigations. *United States ex rel. Harry Barko v. Halliburton Co.*, 2014 WL 1016784 (D.D.C. Mar. 6, 2014).
 - Found that documents created during an internal investigation were not protected by the privilege because the investigation was “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.”
- On appeal, the D.C. Circuit granted a writ of mandamus, reversed, and clarified the standard as the “significant purpose” test: ***“Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?”*** *In re Kellogg Brown & Root, Inc.*, 2014 WL 2895939 (D.C. Cir. 2014).



Best Practices for Preserving the Attorney-Client Privilege in Internal Investigations

- 1) Remember that merely copying an attorney on an email or including them in a meeting or phone conference is not enough to protect the privilege. A **significant purpose** of the communication must be legal advice.
- 2) Inform interviewed employees of the legal nature of the investigation and that any disclosed information will be protected by the privilege (give an **Upjohn warning**); instruct them not to discuss interviews without prior authorization from counsel.
- 3) Carefully and consistently **label all documents** prepared by legal counsel as “attorney work product” and subject to the “attorney-client privilege.”
- 4) Be wary of the applicability (or lack thereof) of the attorney-client privilege if your company hires a **3rd party** (e.g., an accounting or auditing firm) to assist in an internal investigation.



Practical Reality of Privilege Preservation

- Culture of Waiver
- DOJ Policy – Filip Letter (2008) in USAM
 - **Focus:** Disclosure of relevant facts, not waiver
 - Cannot ask for non-factual attorney-client privileged communications and work product
 - Exceptions: Crime-fraud and advice of counsel defense
 - Cannot consider advancement of attorneys' fees
 - Cannot consider joint defense arguments
 - Cannot consider sanctioning or terminating employees
- SDO Practice



Cooperation Best Practices

- Waiver is NOT automatic
- Indemnification policy
 - State law
 - Written, clear policy
 - Consistent application



Resource

http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3390.



Questions and Comments

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