

Ethically Handling FCA Investigations, Litigation, and Whistleblowers

*From the Perspective of General Counsel
and Defense Counsel.*

Presented By

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- Given the complex nature of False Claims Act litigation – i.e., that it involves three parties – the ethical issues confronting counsel are unique.
- This paper will focus on the ethical duties and issues facing General Counsel and Defense Counsel.

Ethical Issues Before a *Qui Tam* Complaint is Filed



- **Must be proactive.**
 - Determine who your client is and what your ethical duties are.
 - Establish and maintain attorney-client privilege early.
 - Thoroughly understand what the potential criminal and civil repercussions are.
 - Ascertain the long-term implications for the company.
- **Identify who is implicated.**
- **Employee whistleblower privacy issues.**
 - Employee's reasonable expectation of privacy.
 - Company's policies are critical.
- **Build trusted team (smaller is better).**

- Mixed business and legal functions – e.g., corporate secretaries, officers, board members.
- Emails: Forwarding/Reply All
- Simply because in-house counsel is on the email does not make it privileged.
- Investigation conducted by in-house counsel may not be privileged if in “ordinary course of business.”

- Determine who the client is for the investigation.
- Document that the purpose is to provide legal advice.
- Advise that investigation initiated and directed by attorneys for the purposes of obtaining legal advice not for a routine business review and regularly remind parties of this point.
- Document that any non-attorneys work at the direction of and report to only specific attorneys.
- Clarify the responsibilities of personnel who hold both legal and non-legal job responsibilities.

- Give Upjohn warnings at all witness interviews.
- Mark all investigation-related documents and communications as attorney client privileged, attorney work product or both as appropriate.
- Clarify which personnel will have access to investigative findings and notices, and carefully restrict access and information distribution to only those parties.
- Understand that rules of privilege and work product protections are different in foreign jurisdictions and become familiar with relevant choice of law issues.

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

- (c) Except as provided in paragraph (d), if
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) 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.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Ethical Issues Arising During the Government's Investigation



- Identify who is implicated
- Officers? Board members? Others?
- Will likely need to exclude those implicated from the investigation.
- Separate outside counsel?
- Critical to manage communications during course of investigation.

- Internally:
 - Consider subcommittee of the Board.
 - Communications kept solely within team.
- Make certain that you:
 - Have the correct lawyers engaged as in-house counsel as well as outside counsel.
 - Discuss with outside counsel whether third party consultants should be retained by them to protect privilege.
 - Determine if internal investigation should be conducted solely by outside counsel to protect privilege.
 - Properly address any conflicts of interest before they arise.
 - You have a thorough understanding of the white collar civil/criminal, regulatory, SEC, FDA/Healthcare issues.

- (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.

Ethical Issues After Unsealing of the Qui Tam Complaint



Make sure that Officers and Board Members:

- Clearly understand who General Counsel and Defense Counsel represent and what their duties are.
- Do not go into panic or reactionary mode.
- Do not start deleting computer records, emails, voicemail messages, documents, etc.
- Do not start selling equity or other interests in the company.
- Do not retaliate against the employee whistleblower.
- Keep communications confidential.

- **Implement protocols to avoid conflicts of interest for legal, governance and operational aspects.**
- **Liability analysis**
 - Continued operations
 - Criminal vs. civil problems
 - Pro-active risk management
- **Legal fees vs. organizational budgetary constraints**
- **Media involvement**
 - Determine whether communications should be through General Counsel's office, in-house PR team, or outside consultants

- Don't panic.
- Officers, Board Members and entire organization will look to General Counsel and legal team. Outside counsel will play a significant in supporting General Counsel.
- Determine who is implicated.
- Build your trusted team (smaller is better).
- Consider special team headed by General Counsel's office to coordinate due diligence, interviews, determine period of non-compliance, and quantify the potential exposure.

- Tightly manage communications internally and externally—single point of contact.
- DO NOT hide or destroy any evidence.
- Be careful to protect privilege at all times.
- Avoid conflicts of interest.