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The Ethical Internal Investigator

I. What Is an Internal Investigation?

Let's start with the basics: What is an internal investigation?

Lawyers generally use the term to mean an investigation by counsel concerning his own client, generally concerning possible noncompliance with law or with nonlegal rules, such as corporate policies. Such an investigation can be prompted by a whistleblower complaint, discovery of irregularities, media reports, or asserted claims by a potential adversary party. Whether conducted by in-house counsel or outside counsel, it is "internal" in that the facts are investigated by lawyers whose duties run to the party they are investigating.

An internal investigation is not a new development in the practice of law. Lawyers have investigated facts concerning their own clients' actions for decades, so they can be prepared to either press or defend claims. The witness interview memoranda at issue in the famous 1947 *Hickman v. Taylor* decision were the work product of an internal investigation: a tugboat mysteriously sank in the Delaware River while towing a B&O railroad "car float" across, and the tug owners' lawyer interviewed surviving crew and other witnesses to learn the facts in order to either defend claims from the victims' families or bring claims against the railroad.[1]

In recent decades, however, such investigations have evolved beyond the anticipation of litigation. Corporations, universities, and other collective entities have commissioned internal investigations to evaluate potential violations of institutional policy as well as law, and sometimes to consider much less well-defined issues. In 2020, for instance, the University of Iowa hired a law firm to investigate the racial culture of its football program, and the resultant report concluded that "the program's rules perpetuated racial or cultural biases and diminished the value of cultural diversity" and caused "heightened anxiety."[2]

There is no shortage of articles by lawyers on how to do a proper internal investigation, but that is not the focus here. This article considers some of the issues of legal ethics that arise in internal investigations and offers thoughts on how competent counsel can also take care to be ethical counsel.

II. New Lawyers or Old Lawyers?

One of the first issues raised in an internal investigation is whether to bring in new counsel, who can look at a matter with a fresh set of eyes, or turn to long-time counsel, who can get up to speed faster because they already know the organization and its people.

But are incumbent lawyers conflicted? The American Bar Association's Model Rules of Professional Conduct (Model Rules) provide that a "concurrent conflict of interest" exists when "there is a significant risk that the representation of one or more clients will be materially limited … by a personal interest of a lawyer."[3] The comments help flesh out how that should inform the initial selection of counsel. "Loyalty and independent

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judgment are essential elements in the lawyer's relationship to a client."[4] The comments go on to provide a relevant example of how a lawyer's own interests can give rise to a conflict that impairs the lawyer's ability to provide truly independent judgment: "For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."[5]

So a lawyer approached to do an internal investigation for a long-time client should early on consider whether her firm's past work creates a conflict. Does the issue involve a matter she has advised on in the past? Is the issue one that she, arguably, should have spotted during that past work for the client? In such cases, she may not be able to offer truly independent judgment when doing so calls for second-guessing her own work. Does the issue to be investigated implicate a decision-maker at the client who has selected the lawyer for past matters and would likely do so in future ones? This might pit the lawyer's own pecuniary interests against those of her client, who may count on the lawyer to provide an unflinching account of the decision-maker's actions.

Such concerns are far from hypothetical. In 2001, Enron turned to its long-time outside counsel to conduct a limited investigation of whistleblower allegations concerning Enron's accounting for related-party transactions. The firm's "preliminary investigation" concluded that no further investigation by independent counsel and auditors was needed.[6] But those allegations eventually led to several criminal convictions and the collapse of both Enron and Arthur Andersen in one of the largest accounting fraud cases in American history. The law firm was accused of malpractice and aiding and abetting the breach of fiduciary duty by Enron's officers for advising on some of the relevant transactions and then investigating the allegations about those same transactions.[7] The firm reportedly paid $30 million to settle Enron-related claims against it.[8]

III. Purpose and Scope

But let's say a lawyer is investigating an issue that the lawyer and his firm had nothing to do with, and the individuals thought to be involved have nothing to do with the lawyer's prospects for future work. Can the lawyer lay ethics concerns aside for a while as he plans the investigation? No, he cannot.

In fact, it is important to sit down with the client's decisionmakers and define the purpose and scope of the investigation early on. The most basic ethical requirement for a lawyer is the first: he "shall provide competent representation to a client."[9] That requires the "preparation reasonably necessary for the representation."[10] "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."[11] And so, the lawyer's early issue spotting is, in fact, a core part of discharging his own ethics responsibility under the rules. Of course, the client gets final say over the scope of a lawyer's investigation, but the lawyer has the duty to advise the client concerning the legal issues raised by the facts or allegations. This may sometimes require the investigating counsel to advise a client against a blinkered (and let's be frank, less costly) investigative approach that fails to consider an important issue or fails to devote the resources reasonably required to address the matter.[12]

Sometimes clients go too far in the other direction, simply throwing the matter to the lawyer with a plea to "investigate and report back." This also implicates Rules 1.1 and 1.2, but it raises an additional ethical peril: failure to adequately communicate.

At the outset of an investigation, the lawyer's obligation to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"[13] cannot be discharged by simply accepting an open-ended invitation to "investigate" without coming to a meeting of the minds concerning what issues are implicated, what questions the client needs answered, and what means (and expense) are justified. To the contrary, an ethical investigation will start with some initial issue spotting, a preliminary assessment of legal issues raised by the initial facts and allegations, and the suggestion of an appropriate objective and scope. The final decision as to the objective of an investigation, however, belongs firmly to the client.[14]

One final topic that should be discussed between lawyer and client at the outset is how the structure and objectives of the engagement will affect the possible protections of the work-product doctrine and attorney-client privilege. Does the client anticipate litigation and hope the internal investigation will help prepare for it? Or does it anticipate using the internal investigation purely to drive changes in the institution? The objectives, and public statements about them, can have significant implications down the road.[15] Sometimes, organizations announce and promise, at the outset, to disclose the results of an "independent" investigation, long before they know what the investigation will turn up and how such disclosure might affect their interests. Again, the obligation to "explain [the] matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" should drive the ethical investigator to discuss these issues with the client early, as she and the client plan the investigation.[16]

Many jurisdictions have not adopted Model Rule 5.7, but in those that have, investigating counsel has an additional ethical reason to focus at the outset on the purpose of the investigation and, in particular, the degree to which the client anticipates litigation. If the investigation is designed and publicly described in a manner that suggests no real connection to a legal, as opposed to a political or social, controversy, the investigating firm may actually be selling a nonlegal service rather than practicing law. The *Wadley* decision, finding no privilege protection because no legal services were rendered in the review of the Iowa football program, implies that the court may have viewed that law firm's work as simply falling outside the practice of law.[17] A law firm agreeing to conduct a nonlegal investigation may have to warn the client that "the services are not legal services and that the protections of the client-lawyer relationship do not exist."[18] Organizational clients cannot be left with the mistaken impression that hiring a law firm, as opposed to, for instance, a human resources consultant or accounting firm, guarantees that the protections of privilege will necessarily apply. This is obviously a discomfiting prospect — all the more reason to address the scope and objectives of the investigation early, thoughtfully, and clearly with the client.

IV. Make Sure Everyone Understands Who the Client Is

Okay, all preliminaries have been attended to, and the investigating lawyer is ready to begin the investigation. Fortunately, the rules give her relatively clear guidance that the organization is her client, but its individual employees, directors, or other "constituents" are not. "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[19] The comments contain

an important observation: "An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents."[20] The comments that follow address some important consequences that flow from this observation, and the ethics rules require the conscientious lawyer to treat different organizational constituents differently, depending on their role.

The organization will typically have a leadership team that makes basic decisions for the client, such as the decision to commission the investigation, agreement on its scope, and receipt and consideration of its results. The comments refer to this group when they caution the lawyer that "when constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful."[21] Precedent from privilege rather than ethics cases has named this group of decisionmakers the "control group."[22]

There are points of commonality and points of difference between the control group and the other constituents of the organizational client. One thing that is relatively clear is that the attorney's duty of confidentiality generally applies to communications with *all* the client's constituents, not just the control group. This applies expressly in the context of an internal investigation:

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.[23]

But the fact that the attorney's duty of confidentiality applies more or less uniformly to what the constituents tell him in the course of the engagement, no matter their rank, does not mean the attorney's communications to those constituents should be indiscriminate:

> This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.[24]

Understandably, nonlawyer constituents might be confused about whether a lawyer represents them, the organization, or both. Interestingly, the *text* of the rule expressly requires the lawyer to clear up such confusion only when she recognizes adversity between the interests of her organizational client and the individual constituent with whom she is dealing: "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."[25] Early in an investigation, investigating counsel may not know whether the corporate client's interests are adverse to or entirely consistent with those of an employee she is interviewing, and she may even contemplate later representing the organization and the individual in litigation arising from the matter, as she can if their interests are aligned.[26] Under these circumstances, she may be tempted to downplay the distinction between the individual interviewee and her corporate client, fearing that too much candor on this topic by counsel might chill the interviewee's own candor. After all, at this stage, she represents the organization, not the interviewee personally, and her duty of zealous advocacy runs to it, not him.

But downplaying the distinction between the individual and the organization is generally a mistake. In fact, the comments offer better guidance on this point than does the text of the rule itself:

> There are times when the organization's interest *may* be or become adverse to those of one or more of its constituents. In such circumstances the lawyer *should* advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or *potential* conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.[27]

Thus, while the text of Rule 1.13 can be read to only require counsel to clarify that she represents the organization, and not the individual, when adversity has arisen and become clear, the relevant comment goes beyond that to require clarification when adversity *may* exist. Moreover, the comment goes beyond the requirement to merely clarify the identity of her client, requiring the lawyer to expressly warn that she cannot represent the individual, that the individual may wish to obtain other counsel, and that discussions between them may not be privileged.

The reader may react to this contrast between the text of the rule itself and that of the Comment by assuming it is safer to follow the rule. After all, the rules' preamble explains that "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[28] But Rule 4.3 (Dealing with Unrepresented Person) should put the matter to rest. That rule provides:

> In dealing on behalf of a client 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.[29]

It also prohibits a lawyer from giving advice to a nonclient, "other than the advice to secure counsel, if the lawyer 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."[30] Because the investigating counsel does not represent the individual constituents personally, they are unrepresented par-

ties despite their roles as constituents of his organizational client. Rule 1.13, Comment 10 can thus be understood as reconciling rules 1.13 and 4.3.

Careful investigators have therefore, for years, given so-called *Upjohn* warnings that advise employee-interviewees of an organizational client that the lawyer represents the organization and not the individual, that any privilege belongs to the organization and not to the individual, etc. If the *Upjohn* warning is old hat to lawyers who have been conducting internal investigations for 25 years, they might be surprised to learn that the rules do not uniformly require the warning. "Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case."[31]

But the wise investigation counsel provides the warning — liberally and thoroughly — because the potential damage caused by omitting it clearly outweighs the potential damage from giving it even when the constituent clearly understands the facts of the representation and its implications for her personal interests. Cases with absent or arguably "watered-down" *Upjohn* warnings have caused grief when organizational counsel's conduct has been second-guessed by courts.[32] The trial court in *United States v. Nichols* severely criticized a well-known, well-respected firm for disclosing to the government, at the direction of the firm's corporate client, information it obtained in the interview of the corporation's CFO.[33] The trial court appeared to doubt testimony from the investigating counsel that the lawyers had provided an *Upjohn* warning, in part because they did not memorialize doing so, and found that the CFO reasonably believed that the lawyers represented him, personally, as well as the company.[34] The court of appeals overturned the trial court's ruling that the statements had to be suppressed because their disclosure and use violated the CFO's attorney-client privilege, but it did not expressly disturb the trial court's apparent finding that no *Upjohn* warning was actually given nor the referral to the state bar for investigation of possible ethics violations.[35]

The Fourth Circuit has expressly warned of the risk of watering down the *Upjohn* warning:

> We note, however, that our opinion should not be read as an implicit acceptance of the watered-down "*Upjohn* warnings" the investigating attorneys gave the appellants. It is a potential legal and ethical mine field. Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees. However, because we agree with the district court that the appellants never entered into an attorney-client relationship with the investigating attorneys, they averted these troubling issues.[36]

This particular warning sheds light on a related issue: should investigating counsel offer, at the outset, to represent a constituent and the organization jointly in any resultant prosecution or litigation?[37] As the Fourth Circuit opinion warns, the answer, at least before an investigation has been concluded, is generally no.

The upshot of all this should be relatively clear for investigating counsel: give *Upjohn* warnings, make them clear, and make some contemporaneous record of having done so.

V. Counsel Must Understand Whose Client He Is Speaking To

Sometimes, an investigating counsel can be tripped up by a counterintuitive issue: if he learns that one of his client's constituents is personally represented in the matter, the organization's counsel cannot speak with the individual about the matter without the individual lawyer's consent. This strikes some lawyers as strange. Incredulous in-house colleagues have made comments like this: "What do you mean I can't talk to the CFO? I represent the company, and I can only talk to my client through its people. Of course I can talk to her!"

That outcome, if frustrating for the organization's counsel, is pretty clearly called for in the rules. As explained above, individual constituents of an organization do not cease being individuals, with their own individual interests, which may conflict with those of the organization. The rules and precedent discussed in the preceding section reflect that dual reality. And the black letter of Rule 4.2 clearly covers the situation: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[38] The "no contact" rule applies even if the individual employee consents, or even volunteers, to talk.[39] If the organization's lawyer innocently begins to speak to an employee and learns mid-interview that the employee is represented, the lawyer "must immediately terminate" the discussion.[40]

Precedent applying Rule 4.2 in the context of an internal investigation is sparse, but the Utah Bar's Advisory Opinion Committee considered an analogous issue in a 2013 Opinion. That matter addressed in-house counsel at a government agency wishing to send a litigation hold notice and questions about the locations of relevant documents to all relevant employees, including one who was personally represented and adverse in the matter. Even though "presumably little substantive information" would be "requested or exchanged," the Committee opined that Utah's Rule 4.2 prohibited that.[41]

VI. Careful What You Say!

The lawyer's obligation to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" should be kept in mind throughout the investigation, right through to its conclusion.[42]

In cases where a public controversy has already arisen, the client may want to give the public or a particular outside audience some account of the investigation's results or findings. This may be understandable: the imprimatur of a well-respected law firm can give credence to claims that the issues have been thoroughly investigated and remedied. But, to ensure the discharge

of his own obligation under Rule 1.4(b), diligent counsel should discuss with the client the risks that public disclosure might cause, particularly the very real threat to the protection of the work-product doctrine and the attorney-client privilege. When Baylor University publicly released summary findings, recommendations, and selective details about its outside counsel's investigation of a sexual assault scandal at the school, it waived the attorney-client privilege over "the entire scope of the investigation, and all materials, communications, and information provided to [outside counsel] as part of the investigation."[43]

If the client asks the investigating lawyer herself to make public statements or disclosures about the investigation, doing so may also implicate the lawyer's obligation under Model Rule 1.6 to maintain the confidentiality of "information relating to the representation of a client." Aside from certain specified exceptions, the attorney can disclose such information only with the client's consent or authorization.[44] Notably, there is no shortage of decisions rejecting lawyers' arguments that the existence of client facts in public records, or the client's own prior disclosures, relieve the lawyer's duty to maintain confidentiality.[45]

VII. Conclusion

Internal investigations can be some of the best work of a lawyer's career. They can be intellectually stimulating, strategically and tactically challenging, and they often involve spending time interviewing an array of interesting people. They require both legal acumen and interpersonal skills. But, as with everything a lawyer does, they also require attention to the Rules of Professional Conduct, and a consideration of how the lawyer's own conduct may be judged, down the road, by motivated adversaries, based on how she performs her job.

Notes

1. Hickman v. Taylor, 329 U.S. 495, 498 (1947).

2. Mot. to Compel Produc., Ex. 4 at 25, Wadley v. Univ. of Iowa, No. 4:20-cv-00366 (S.D. Iowa, Jan. 28, 2022), available at https://presnellonprivileges.com/wpcontent/uploads/2022/07/HB-Report.pdf.

3. Model Rules of Prof'l Conduct R. 1.7(a)(2) (Am. Bar Ass'n 2023) (hereinafter Model Rule).

4. *Id.* cmt. 1.

5. *Id.* cmt. 10.

6. *Vinson & Elkins Report*, Wall St. J. (Jan. 16, 2002), https://www.wsj.com/articles/SB1011142769622726480.

7. Final Report of Neal Batson, Court-Appointed Examiner, at 48–50, In re Enron Corp., No. 01-16034 (Bankr. S.D.N.Y. Nov. 4, 2003).

8. *Ex-Enron Law Firm to Pay $30 Million*, N.Y. Times (June 2, 2006), https://www.nytimes.com/2006/06/02/business/businessspecial3/02enron.html.

9. Model Rule 1.1.

10. *Id.*

11. *Id.* cmt. 2.

12. *See id.* cmt. 5 ("The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.").

13. Model Rule 1.4(b).

14. *See* Model Rule 1.2(a) (requiring lawyer to abide by client's decision as to objectives of a representation and to consult with the client as to means).

15. *See, e.g.*, Order, Wadley v. Univ. of Iowa, No. 4:20-cv-00366 (S.D. Iowa, June 24, 2022), ECF No. 117 (hereinafter *Wadley* Order) (finding that investigation by outside counsel into alleged racial tensions on football team was not prepared in anticipation of litigation and not protected by the attorney-client privilege because the investigation provided no legal advice and, in any case, any privilege claim was waived by its public disclosure).

16. Model Rule 1.4(b).

17. *See Wadley* Order.

18. Model Rule 5.7(a)(2).

19. Model Rule 1.13(a).

20. *Id.* cmt. 1.

21. *Id.* cmt. 3.

22. Upjohn Co. v. United States, 449 U.S. 383 (1981) (holding that the attorney-client privilege extends beyond the control group to protect confidential communications with all relevant employees of a corporate client, where they are made for the purpose of providing legal advice to the corporation).

23. Model Rule 1.13 cmt. 2.

24. *Id.*

25. Model Rule 1.13(f) (emphasis added).

26. *See* Model Rule 1.13(g) (concerning dual representation).

27. *Id.* cmt. 10 (emphasis added).

28. Model Rules, Preamble and Scope, cmt. 14.

29. Model Rule 4.3.

30. *Id.*

31. Model Rule 1.13 cmt. 11.

32. *See, e.g.*, United States v. Nicholas, 606 F. Supp. 2d 1109, 1111 (C.D. Cal. 2009), *rev'd sub nom.* United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

33. *Id.*

34. *Id.* at 1115–16.

35. *See Ruehle,* 583 F.3d at 604 n.3, 613. (The author is familiar with the matter only from the published decisions and disclaims any view on the trial court's suggestions concerning the California Code of Professional Responsibility. In fairness to the lawyers involved, the reader is urged not to assume any noncompliance was actually found.).

36. In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 340 (4th Cir. 2005).

37. *See* Model Rule 1.13(g) (allowing such dual representation if consistent with the conflict-of-interest rule at 1.7, and with appropriate consent by a disinterested organizational decision-maker).

38. Model Rule 4.2.

39. *See id.* cmt. 3.

40. *Id.*

41. Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 13-01 at 1 (2013).

42. Model Rule 1.4(b).

43. Doe 1 v. Baylor Univ., 320 F.R.D. 430, 440 (W.D. Tex. 2017).

44. *Id.*

45. *See, e.g.*, In re Anonymous, 932 N.E.2d 671 (Ind. 2010) (client's prior disclosure provides no defense to Rule 1.6 violation), Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995) (existence of information in public record does not relieve lawyer of confidentiality obligation), ABA Comm. On Ethics & Pro. Resp., Formal Op. 480 (2018) (confidentiality obligation includes information in public record), Cal. Formal Ethics Op. 2016-195 (same).

About the Author

Patrick O'Donnell chairs the litigation and investigations practice at HWG LLP in Washington, D.C. In his 26 years of practice, he has defended white collar cases and complex civil litigation, conducted internal investigations, and defended and counseled other lawyers in legal ethics matters.

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